

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE COUNTY

SUPREME JUDICIAL COURT # 09104

T.F.,
Plaintiff-Appellant
v.

B.L.,
Defendant-Appellee

ON REPORT FROM

HAMPSHIRE PROBATE AND FAMILY COURT

BRIEF ON BEHALF OF AMICI
WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS,
CHILD WELFARE LEAGUE OF MASSACHUSETTS,
MASSACHUSETTS CITIZENS FOR CHILDREN,
NATIONAL ASSOCIATION OF SOCIAL WORKERS,
BOSTON PSYCHOANALYTIC SOCIETY AND INSTITUTE, INC.,
PSYCHOANALYTIC INSTITUTE OF NEW ENGLAND,
PSYCHOANALYTIC COUPLE AND FAMILY INSTITUTE OF NEW ENGLAND,
ELLEN C, PERRIN, M.D.,
BARRY S. ZUCKERMAN, M.D.

Paula E. Berg, Esq.
Law Office of Paula E. Berg
One Faneuil Hall Marketplace
Boston, MA 02109
617-723-3033
BBO # 566781

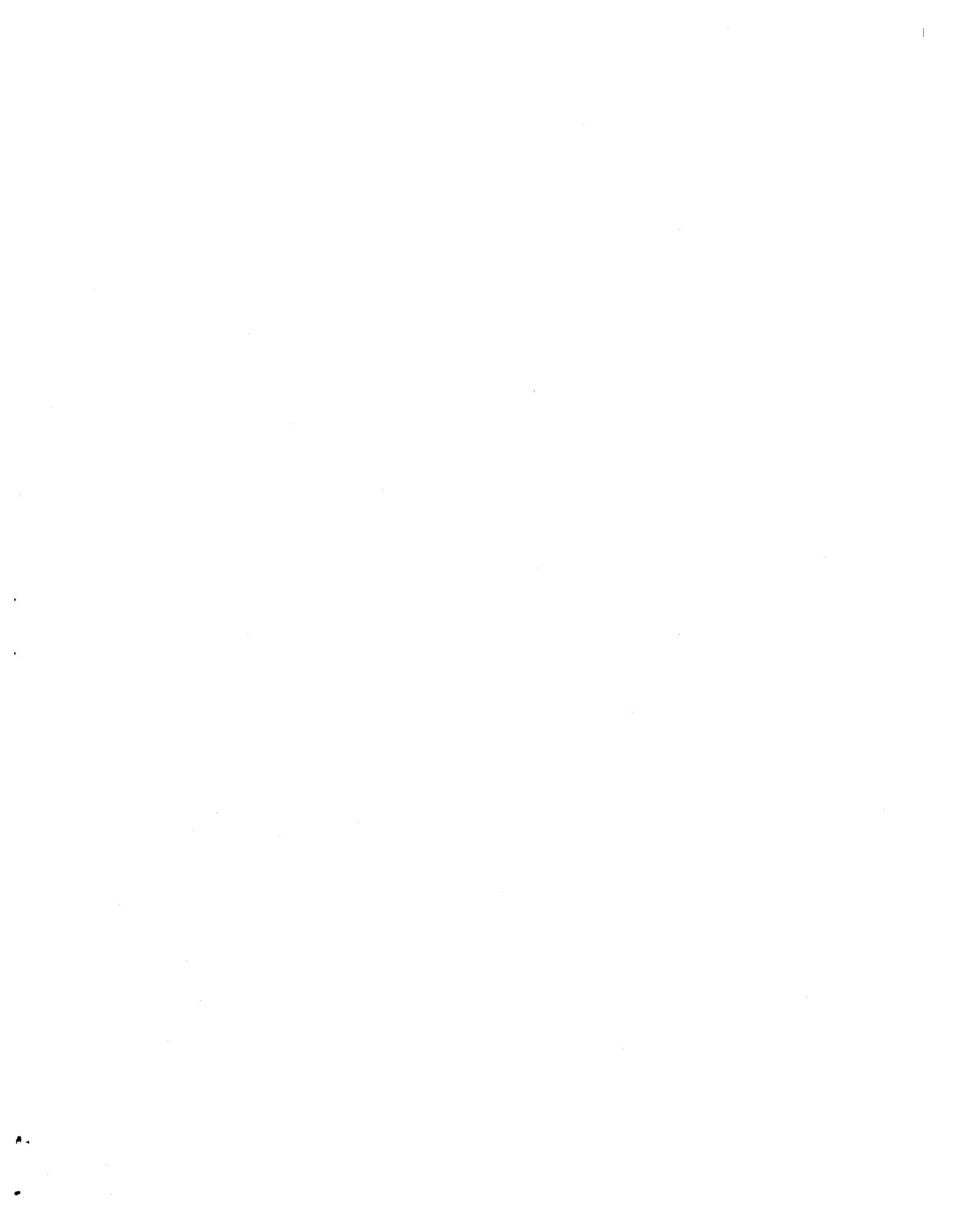


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	i
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE ISSUES	5
STATEMENT OF THE CASE	6
STATEMENT OF FACTS	6
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
I. ALL CHILDREN, REGARDLESS OF THE CIRCUMSTANCES OF THEIR BIRTH OR PARENTAGE, NEED AND ARE ENTITLED TO THE FULL SUPPORT OF THEIR INTENDED PARENTS.	7
A. Child Support Improves The Lives and Well- Being of Children In Single-Parent Homes. .	13
B. Children Are Equally Entitled to Child Support Regardless of the Circumstances Of their Birth and Family Structure.	20
C. The Creation Of The "Intended Parent" Status Ensures That All Those Who Purposefully Bring A Child Into The World With the Intent of Parenting that Child Have An Obligation To Provide Financial Support to That Child.	24
II. A PROMISE TO PARTICIPATE IN THE CONCEPTION, BIRTH, PARENTING, AND SUPPORT OF A CHILD THAT RESULTS IN THE CREATION OF A CHILD CONSTITUTES AN ENFORCEABLE CONTRACT TO SUPPORT THAT CHILD. .	32
CONCLUSION	39



TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Adoption of Tammy</i> , 416 Mass. 205 (1993)	22
<i>Culliton v. Beth Israel Deaconess Medical Center</i> , 435 Mass. 285 (2001)	26
<i>Custody of Vaughn</i> , 422 Mass. 590 (1996)	25
<i>Department of Revenue v. Mason M.</i> , 439 Mass. 665 (2003)	9
<i>Doe v. Roe</i> , 23 Mass. App. Ct. 590 (1987)	21
<i>E.N.O. v. L.M.M.</i> , 429 Mass. 844 (1999)	22, 25
<i>Eccleston v. Bankosky</i> , 438 Mass. 428 (2003)	12, 27
<i>Goodridge v. Department of Public Health</i> , 440 Mass. 309 (2003)	30
<i>Gursky v. Gursky</i> , 39 Misc. 2d 1083 (1963)	34, 35
<i>Karin T. v. Michael T.</i> , 484 N.Y.S.2d 780 (Fam. Ct. 1985)	28, 29, 33, 34
<i>Kendall v. Kendall</i> , 426 Mass. 238 (1997)	25
<i>L.S.K. v. H.A.N.</i> , 813 A.2d 872 (Pa. Super. Ct. 2002)	36, 37
<i>L.W.K. v. E.R.C.</i> , 432 Mass. 438 (2000)	9
<i>Lehr v. Robertson</i> , 463 U.S. 248 (1983)	31
<i>Marriage of Buzzanca</i> , 61 Cal. App. 4 th 1410 (1998)	29, 30

<i>Paternity of Cheryl</i> , 434 Mass. 23 (2001)	11
<i>People v. Sorenson</i> , 68 Cal. 2d. 280 (1968)	29
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944)	24
<i>Woodward v. Commissioner of Social Security</i> , 435 Mass. 536 (2002)	24
<i>Youmans v. Ramos</i> , 429 Mass. 774 (1999)	25

Statutes

M.G.L. c. 46, § 4B	10
M.G.L. c. 119A, § 1	9
M.G.L. c. 208, § 28	10
M.G.L. c. 209C, § 1	10, 21

Other Authorities

ALI Principles of the Law of Family Dissolution: Analysis and Recommendations	27, 33
Paul R. Amato and Joan G. Gilbreth, <i>Nonresident Fathers and Children's Well-Being: A Meta- Analysis</i> , 61 J. Marriage Family 557 (August 1999) .	17
Andrea H. Beller, <i>Child Support and Children's Well- Being</i> , in FAMILY ECONOMICS AND RESOURCE MANAGEMENT BIENNIAL, 25 (1995)	16
Children's Defense Fund, Family Income Division, published on www.childrensdefense.org July 14, 2003	15

Irwin Garfinkel and Sara McLanahan, <i>The Effects of Child Support Reform on Child Well-Being</i> , in CHILD SUPPORT AND WELL-BEING, Ch. 10	20
John W. Graham, Andrea H. Beller, and Pedro M. Hernandez, <i>The Effects of Child Support on Educational Attainment</i> , in CHILD SUPPORT AND CHILD WELL-BEING, Ch. 11, at 323.....	15, 17
Angela Dungee Greene and Kristin Anderson Moore, <i>Nonresident Father Involvement and Child Well-Being Among Young Children in Families on Welfare</i> , in FATHERHOOD: RESEARCH, INTERVENTIONS AND POLICIES 159, 175 (H. Elizabeth Peters and Randal D. Day, eds. 2000)	19
Valerie King, <i>Nonresident Father Involvement and Child Well-Being: Can Dads Make a Difference?</i> , 15 J. Family Issues 78 (March 1994) ...	14, 15, 17, 18
William Marsiglio, <i>Contemporary Scholarship on Fatherhood</i> , 14 J. Family Issues 484 (1993)	15
Massachusetts Child Support Guidelines (effective Jan. 1, 1998)	14
Sara S. McLanahan, Judith A. Seltzer, and Thomas L. Hanson, <i>Child Support Enforcement and Child Well-Being: Greater Security or Greater Conflict?</i> in CHILD SUPPORT AND WELL-BEING, Ch. 8	18
Chadwick L. Menning, <i>Absent Parents Are More Than Money, The Joint Effect of Activities and Financial Support on Youths Educational Attainment</i> , 23 J. Family Issues 648 (July 2002) ..	17
Judith A. Seltzer, <i>Consequences of Marital Dissolution for Children</i> , 20 Ann. Rev. Sociology 235 (1994)	19

Constitutional Provisions

Article 1 of the Declaration of Rights, as amended by
art. 106 of the Amendments to the Massachusetts
Constitution 20

STATEMENT OF INTEREST OF AMICUS CURIAE

This brief is filed on behalf of various amici curiae who are concerned about and involved with issues affecting children.

Amicus Curiae the Women's Bar Association of Massachusetts (WBA) is a professional association of over one thousand attorneys, judges, and policy makers dedicated to advancing and protecting the interests of women and children. The WBA is active in advocating for the elimination of discriminatory practices and beliefs in the legal system and has filed numerous amicus briefs in matters concerning the interests of children in custody and child support matters as well as matters that address the provision of equal protection under the law to all adults and children in the Commonwealth.

Amicus Curiae Child Welfare League of America (CWLA) is an 83-year-old association of more than 1,000 public and private child and family-service agencies throughout the United States that collectively serve more than 3 million abused, neglected, and vulnerable children and youth every year. Founded in 1920, CWLA has long been involved in the development of quality programming, practices and

policies in all areas of child welfare and child well-being. CWLA is particularly concerned about protecting the needs of children who live within the full range of familial configurations. While CWLA supports the rights of gay and lesbian individuals to parent, it also believes that it is in the best interest of their children to enforce the parenting responsibilities and obligations that accompany parental rights. CWLA strives to ensure that every child and young person is protected from harm, injustice, and discrimination and is provided with the best opportunity to achieve his or her full potential.

Amicus Curiae Massachusetts Citizens for Children (MCC) is a non-profit statewide child advocacy organization founded in 1959. Its mission is to improve the lives of the state's most vulnerable children through effective advocacy by concerned citizens. MCC effects change by working to improve state services for children, conducting educational programs for the general public and professionals, researching and documenting unmet needs, evaluating existing programs and policies, acting as a catalyst to link individuals and groups around common care,

advocating for needed legislation, and participating in legal action where necessary.

Amicus Curiae National Association of Social Workers (NASW), established in 1955, is the largest social work association in the world, with more than 160,000 members and chapters in every state and internationally. NASW has over 8,200 members. NASW recognizes the increasing number of lesbian, gay, and bisexual people who are making reproductive choices, and it strives to establish legal, medical, and psychological supports for these families through its constituencies.

Amicus Curiae Boston Psychoanalytic Society and Institute, Inc. is a professional society and psychoanalytic training institute, which was founded in 1933. As an organization and through its members, it is concerned with the welfare of children and has provided services to children from all types of backgrounds.

Amicus Curiae Psychoanalytic Institute of New England (PINE) maintains an institute of learning in the field of psychoanalysis, which will advance the teaching, research, and practice of psychoanalysis. PINE also consults with government, educational and

other groups, public and private, for the purpose of improving the understanding of mental health and supporting scientific research.

Amicus Curiae Psychoanalytic Couple and Family Institute of New England (PCFINE) is an educational and scientific organization dedicated to the study and advancement of psychoanalytic work with couples and families. PCFINE also advances teaching and research in the field of psychoanalytic work with couples and families.

Amicus Curiae Ellen C. Perrin, M.D. is Professor of Pediatrics at Tufts University School of Medicine and Medical Director of the Center for Children with Special Needs at the Floating Hospital for Children at Tufts New England Medical Center. She is the author of the book Sexual Orientation in Child and Adolescent Health (2002). Dr. Perrin is the Chair of the Subboard of Developmental-Behavioral Pediatrics of the American Board of Pediatrics and Past President of the Society for Developmental and Behavioral Pediatrics.

Amicus Curiae Barry S. Zuckerman, M.D. is Chief of Pediatrics and Chief of the Division of Developmental and Behavioral Pediatrics at Boston Medical Center. He is Chairman of Pediatrics and The

Joel and Barbara Alpert Professor of Pediatrics at Boston University School of Medicine. Dr. Zuckerman has served on numerous national committees on child welfare, including the President's/Congress's National Commission on Children (1988-1991) and the Future of America's Children Steering Committee of the American Academy of Arts and Sciences (1992-1995). He also has served on the Editorial Boards of several peer-reviewed scientific journals, including the Journal of Pediatrics (1989-1997) and the Journal of Developmental and Behavioral Pediatrics (1994-present).

STATEMENT OF THE ISSUES

1. Should a non-biological parent who participated equally in the decision to bring a child into the world via assistive technology to parent that child have an obligation to provide child support for that child?

2. Under Massachusetts law does a non-biological parent's promise to participate in the conception, birth, parenting, and support of a child conceived through assistive technology constitute an enforceable contract to support that child?

STATEMENT OF THE CASE

The WBA adopts the Statement of the Case of the Plaintiff-Appellant, T.F., to the extent that such Statement concerns the issues addressed in this brief.

STATEMENT OF FACTS

The WBA adopts the Statement of Facts as found and reported by the trial court and of the Plaintiff-Appellant to the extent that such Statement concerns the issues addressed in this brief.

SUMMARY OF THE ARGUMENT

Both the legislature and the courts of the Commonwealth have long recognized the importance of child support for all children. (9-10) This case presents a situation that is not currently addressed under the existing child support scheme. (10-11) This Court has the authority, pursuant to its equity jurisdiction, to remedy this gap. (11-13) The Court should remedy this gap for at least two reasons: (1) children like the one in this case benefit greatly from the financial support of all the people who intended to bring them into the world, (14-21), and

(2) children like the one in this case should not be treated differently simply by virtue of the circumstances of their birth, (21-25). The Court can remedy the gap through the recognition of a status called "intended parent" in the context of child support, as is recommended by leading scholars and has been done in other jurisdictions. (25-32) Furthermore, in cases like this one, where an adult's actions and decisions lead to the birth of a child, the Court should hold that adult to the promise of support that was a necessary precondition to the birth of the child. (32-39) For all these reasons, the non-biological parent in this case should be required to provide child support to the child whom she decided to bring into the world and to parent.

ARGUMENT

I. ALL CHILDREN, REGARDLESS OF THE CIRCUMSTANCES OF THEIR BIRTH OR PARENTAGE, NEED AND ARE ENTITLED TO THE FULL SUPPORT OF THEIR INTENDED PARENTS.

A child born through reproductive technology to unmarried parents needs and is entitled to the support of both parents as much as other children. Indeed, these children are no less in need of and no less entitled to the support of both adults who decided to

bring them into the world than children born to married parents or children of unmarried parents with a biological link to both parents. Yet, those children are entitled under current law to the financial support from both their parents, while children like D. exist in a gap in the law. Current law does not recognize them as either children born to married parents or children born to biologically related parents, and thus there presently is no statutory basis to hold the non-biological parent to a support obligation.

The amici curiae urge this Court to close this gap by adopting the doctrine of "intended parent" in the context of child support. The "intended parent" status will ensure that all children in the Commonwealth, regardless of the circumstances of their birth, receive financial support from all the adults who intended to create and parent them, support from which children such as these would greatly benefit. This Court has the authority pursuant to its equitable powers to adopt such a rule, and in so doing, it can be guided by the evolution of its own jurisprudence to treat all children equally and ensure full support of children by their parents, by the wisdom of the

American Law Institute, and by decisions of courts in other states.

The care and protection of children is sacrosanct in the Commonwealth. In this regard, "it is the public policy of the commonwealth that dependent children shall be maintained, as completely as possible, from the resources of their parents, thereby relieving or avoiding, at least in part, the burden borne by the citizens of the commonwealth." M.G.L. ch. 119A, § 1. See also *L.W.K. v. E.R.C.*, 432 Mass. 438, 444 (2000) ("For decades extending back into the Nineteenth Century, the Legislature has mandated and this court has recognized that parents have an obligation to support their minor children.") This Court has recently re-emphasized the two important public policies furthered by the Massachusetts child support scheme: providing for the best interests of children and ensuring that the taxpayers are secondary to the parents in meeting the financial needs of children. *Department of Revenue v. Mason M.*, 439 Mass. 665, 674-675 (2003).

The Commonwealth's statutory framework reflects these strong social policies and increasingly, but not entirely, addresses the variety of family compositions

and modes of conception that now exist in our society so that most children are covered by current child support laws. Specifically, children born to married parents are entitled to child support when their parents divorce pursuant to Massachusetts General Law Chapter 208, section 28. Where the parents are unmarried but both bear a biological relationship to the child, the child is entitled to support under Massachusetts General Law Chapter 209C, section 1. As to children conceived through assistive technology, the legislature has set forth the legal rights attendant to the parents of children born of artificial insemination within a marriage. See M.G.L. c. 46, § 4B ("Any child born to a married woman as a result of artificial insemination with the consent of her husband shall be considered the legitimate child of the mother and such husband.") That is, children born of assistive technology within a marriage are provided support upon a divorce, without reference to the mode of conception.

The issue in this case addresses the fact that no provision is made for the support of children born via technology to unmarried parents. This unintended gap leaves nonmarital children of artificial insemination

and other assistive technologies unsupported, a result which the legislature surely did not intend and which contravenes public policy.

Requiring that parents support children born of this legislatively accepted modality is a step well within this Court's equitable powers. This Court has on various occasions used its equity powers to remedy gaps in the legislative scheme to ensure the support of children. Recently, for example, the Court addressed the situation where an adult is not biologically related to the child but has developed a parent-child relationship with the child may be obligated to pay child support despite the lack of genetic link. *Paternity of Cheryl*, 434 Mass. 23 (2001). In so holding, this Court realized that although it could not protect the child against the harm that would ensue from the adult's decision to challenge his paternity, it could, using its equitable powers, "protect her financial security and other legal rights" flowing from the parental relationship she had with the putative father. *Id.* at 36. Likewise, in an earlier case this Court used its equity jurisdiction to find a support obligation in another unintended gap in the child support laws in

ordering a father to provide post-minority support to his disabled child. *Eccleston v. Bankosky*, 438 Mass. 428 (2003) (finding support obligation even in the absence of direct and specific legislative mandate).

In so holding, this Court explained:

We have previously recognized that the general equity jurisdiction of the Probate and Family Court, conferred by statute, may be invoked to order a divorced, financially able non-custodial parent to contribute to the support of a mentally or physically incapacitated adult child. ... In conferring general equity jurisdiction on the Probate and Family Court, the Legislature intended to "assure that the interests of justice are served," ... in such circumstances as ... are present here. Rather than a "dangerous" act of superlegislation, ... resort to equity is both explicitly authorized by the Legislature and appropriate as the narrowest ground on which relief can be afforded to [the child].

Id. at 437-438.

As in *Paternity of Cheryl* and *Eccleston*, the fact that existing child support statutes do not expressly address the situation in the case at bar does not mean that the legislature meant to prohibit the possibility of an order requiring the payment of support from an adult who intended to bring the child into the world and parent that child. The principles of equity, and the evolution of statutory and common law with regard

to the protection and support of children, must be the Court's guiding principles as it takes the next logical step in the protection of all our children. This Court should again resort to the equity jurisdiction authorized by the legislature to ensure that the children of assistive technology, regardless of the marital status of their parents, enjoy the financial support of both people who set out to create and raise them.

A. Child Support Improves The Lives and Well-Being of Children In Single-Parent Homes.

Through the creation of the "intended parent" status, this Court should recognize that the support obligation of a person whose actions create a child whom she intends to parent do not end when that person later opts out of child-raising. All children, including children like D., are better off with the financial support of both adults who intended to bring them into the world and raise them. Indeed, the purpose of child support includes the lessening of the "economic impact on the child of family breakup" and ensuring the "child's survival needs and to provide the standard of living the child would have enjoyed had the family been intact." Massachusetts Child

Support Guidelines (effective Jan. 1, 1998). The extensive psychosocial literature in this area addresses the ways in which children's lives and opportunities are enhanced by the receipt of child support from noncustodial parents.¹

For some families, the payment of even a small amount of child support can mean the difference between living below or above the poverty line. Valerie King, *Nonresident Father Involvement and Child Well-Being: Can Dads Make a Difference?*, 15 J. Family Issues 78, 80 (March 1994). "When poor children do receive support, it adds an average of \$2,000 a year to their family's budget, increasing their total income by 26 percent. The poverty rate for families who receive all the child support they are owed is 15.2 percent, compared with the 35.7 percent poverty rate for families that do not receive any of the child support they are due." Children's Defense Fund,

¹ Although this literature focuses on situations involving non-custodial, biological fathers of children being raised by single mothers, since that is the predominant demographic in single-parent households, nothing in the literature suggests that the findings are based on either the gender or the biological connection of the non-custodial parent, or, notably, whether they were involved in the child's life prior to leaving the child's home, and, therefore, the basic principles found in these studies are fully applicable to different family configurations, including the one at issue in this case, i.e. a non-biologically related mother who was in a same-sex relationship with the biologically related mother.

Family Income Division, published on www.childrensdefense.org July 14, 2003. See also William Marsiglio, *Contemporary Scholarship on Fatherhood*, 14 J. Family Issues 484, 493 (1993) (noting that non-custodial parents' financial contributions affect a child's standard of living, especially in low-income, female-headed households).

Child support is not just a poverty issue. Even for families surviving above poverty level, payment of child support can ease some of the economic hardship for women and their children and raise the resources available to the family. King, *supra* at 91. The support allows the child to receive better health care, live in a better neighborhood, and have increased access to educational activities and materials. *Id.* at 91. "Child support increases the recipient family's income and allows for a greater purchase of education-related market goods, including perhaps a residence in a community with better schools." John W. Graham, Andrea H. Beller, and Pedro M. Hernandez, *The Effects of Child Support on Educational Attainment*, in CHILD SUPPORT AND CHILD WELL-BEING, Ch. 11, at 323.

Numerous studies have found a positive correlation between receipt of child support and various measures of child well-being, such as behavior, grades, graduation from high school, and entry into college. Children in single-parent homes receiving child support from their non-custodial parent are more likely to graduate from high school, more likely to enter college, and more likely to have increased aptitude socially, cognitively, and behaviorally than their nonsupported counterparts.

Finding that child support is "strongly positively associated" with children's well-being, one researcher noted that child support is associated not only with an increase in family income and higher wage earnings among custodial mothers, but also higher educational attainment among children. Andrea H. Beller, *Child Support and Children's Well-Being*, in *FAMILY ECONOMICS AND RESOURCE MANAGEMENT BIENNIAL*, 25, 31 (1995). Educational attainment as measured by graduation from high school and entry into college is frequently used to determine the effects of family structure on children, both because it is easily quantifiable and is "vital in determining life chances such as future job prospects and earning potential."

Chadwick L. Menning, *Absent Parents Are More Than Money, The Joint Effect of Activities and Financial Support on Youths Educational Attainment*, 23 J. Family Issues 648, 655 (July 2002) (citations omitted). For example, "[f]athers' financial contributions provide wholesome food, adequate shelter in safe neighborhoods, commodities (such as books, computers and private lessons) that facilitate children's academic success and support for college attendance." Paul R. Amato and Joan G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. Marriage Family 557, 559 (August 1999). Overall, nonresidential fathers' contributions are seen as a key resource for children's educational development. An analysis of sixty-three studies on nonresident parents of both genders showed that "children's academic success was positively related to fathers' payment of child support." King, *supra* at 90.

Notably, child support's positive effect on years of school completed is measured as three to seven times as large as the effect of other income. Graham, Beller, and Hernandez, *supra* at 343. Additionally, the more child support received, the higher the grades and the fewer the school problems of the children.

Indeed, child support dollars have a much larger effect on child well-being than ordinary dollars, as measured by the comparative effects of child support on grade point averages and school problems. Sara S. McLanahan, Judith A. Seltzer, and Thomas L. Hanson, *Child Support Enforcement and Child Well-Being: Greater Security or Greater Conflict?* in CHILD SUPPORT AND WELL-BEING, Ch. 8, at 249-50.

Where a non-custodial parent contributes child support, the child is likely to attribute family commitment to the paying parent or to interpret the receipt of support as having symbolic value. *Id.* at 250. The child then has the understanding that he has not been rejected and is in fact valued by the noncustodial parent, leading to a greater sense of well-being.

There are other non-economic benefits to the payment of child support. In particular, it enhances the well-being of the custodial parent by reducing her economic concerns, sets an example of the importance of assuming responsibility, and has other psychological benefits for the child. King, *supra* at 91. Their better behavior in school and higher educational attainment can be explained by the fact

that the receipt of support translates into an increased likelihood of staying rooted in the same community and school district. Judith A. Seltzer, *Consequences of Marital Dissolution for Children*, 20 *Ann. Rev. Sociology* 235, 252 (1994).

One study measured preschool-age children in predominantly African-American single-mother families that receive welfare and found that the receipt of formal or informal support translated into fewer behavioral problems and higher levels of social and emotional adjustment as measured by such factors as whether the child fights, is creative, is loving and affectionate, has a strong temper and other factors on a "personal maturity scale." Angela Dungee Greene and Kristin Anderson Moore, *Nonresident Father Involvement and Child Well-Being Among Young Children in Families on Welfare*, in *FATHERHOOD: RESEARCH, INTERVENTIONS AND POLICIES* 159, 175 (H. Elizabeth Peters and Randal D. Day, eds. 2000).

Interestingly, studies have found a complementary relationship such that parents who pay child support are also more likely to be involved in the children's lives. Irwin Garfinkel and Sara McLanahan, *The Effects of Child Support Reform on Child Well-Being*,

in CHILD SUPPORT AND WELL-BEING, Ch. 10, at 225 (1994)
(citations omitted).

The psychosocial literature indicates the beneficial effect of support on many important measures of child well-being. Children of diverse family structures should not be deprived these benefits.

B. Children Are Equally Entitled to Child Support Regardless of the Circumstances Of their Birth and Family Structure.

The Massachusetts Constitution provides that "[a]ll people are born free and equal and have certain natural, essential and unalienable rights ... Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Article 1 of the Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution. This provision, even prior to its amendment, guaranteed to all people in the Commonwealth equality under the law. Consistent with the guarantees and policies enshrined in this provision, this Court should ensure that children like D. are not treated differently from other children for purposes of receiving child support simply because of

the gender of their parents or the circumstances of their birth.

As noted earlier, if D.'s parents had been married at the time of his conception, he would have been entitled to child support under the statutory and common law scheme, even if one parent were not a biological parent. Discrimination based upon the marital status of the parents is, however, no longer tolerated. Children born to unmarried parents are "entitled to the same rights and protections of the law as all other children." M.G.L. ch. 209C, § 1. See also *Doe v. Roe*, 23 Mass. App. Ct. 590, 592 (1987) (pre-M.G.L. 209C decision that children born outside of wedlock are due the same support after age eighteen as children of previously married parents based on idea that "[i]t now appears to be well established that discriminatory treatment (at least by statute) of children born out of wedlock ... in matters of support ... usually will result in an unconstitutional denial of equal protection ...").

Similarly, D. would have been entitled to child support had both parents contributed genetic material, regardless of whether they had been married and regardless of whether B.L. had developed a

relationship with the absent parent. Having a biological connection to both parents was, of course, not possible in this case since both of D.'s parents are of the same sex. Massachusetts law has evolved consistent with the principles of equal protection, though, such that same-sex parents are treated equally.² Thus, for example, the Court has permitted same-sex couples to adopt where the child's best interest was served, see *Adoption of Tammy*, 416 Mass. 205 (1993), and has found a lesbian parent to be deemed a *de facto* parent for purposes of visitation when it serves the child's best interest, see *E.N.O. v. L.M.M.*, 429 Mass. 844 (1999). Accordingly, a child born of same-sex parents is not a "stranger" to the protections accorded to children of different sex parents under law and equity. Failing to find a child support obligation in this case would mean that while children born with biological links to both parents (most children of heterosexual couples) are assured of child support despite the absence of an ongoing relationship with one parent, children conceived

² Indeed, a decision holding that B.L. is equally obligated to support D. treats her relationship with T.F. as no different from a heterosexual relationship for purposes of support - while recognizing that conception options for same-sex couples are necessarily different from those of heterosexual couples.

through assistive technology with no biological link to one parent (most children of same-sex couples) would not receive support from the estranged parent.

Lastly, the fact that B.L. terminated the relationship during D.'s infancy should not make a difference under the law given that B.L., perhaps more so than some biological parents who fail to develop relationships with their offspring, participated actively in the decision to bring D. into the world and raise him. To allow B.L. to also terminate her support of D. along with her contact creates a disincentive for other non-biological parents to participate in raising the child after the end of the relationship with the biological parent lest they be forced to contribute to the child's support. This would violate sound public policy in favor of promoting parent-child relationships.

As this Court recently stated so pointedly, no child should be deprived of support due to an "accident of birth." *Woodward v. Commissioner of Social Security*, 435 Mass. 536, 546 (2002) ("Repeatedly, forcefully, and unequivocally, the Legislature has expressed its will that all children be 'entitled to the same rights and protections of the

law' regardless of the accidents of their birth."
(citation omitted)). The fact that D. is linked
biologically to only one of his two parents, and that
the non-biologically linked parent removed herself
from his life so early, should not result in his
unequal access to child support under the law.

**C. The Creation Of The "Intended Parent" Status
Ensures That All Those Who Purposefully
Bring A Child Into The World With The Intent
of Parenting that Child Have An Obligation
To Provide Financial Support to That Child.**

To ensure that children like D. are entitled to
the child support that is so important to their well-
being, and to ensure that children like D. are not
treated differently simply because of the
circumstances of their birth, this Court should
recognize the doctrine of "intended parent."

Courts have historically exercised *parens patriae*
power to further the protection of children's welfare
and advance children's' best interests. See, e.g.,
Prince v. Massachusetts, 321 U.S. 158 (1944) (*parens*
patriae power used to curtail guardian's use of child
labor); *Custody of Vaughn*, 422 Mass. 590
(1996) (requiring entry of findings of fact on effects
of violence on children to ensure that judges weighed
effect of abuse prior to awarding custody, although

the custody statute did not require such findings at the time case was decided); *Kendall v. Kendall*, 426 Mass. 238 (1997) (court may, to protect a child, restrict a parent's unfettered right to practice religion). As technology and changing social mores have changed family structures, the courts have not been afraid to use their equitable power to ensure the best interests of children by recognizing new legal definitions of parenthood. For example, this Court recognized the concept of the *de facto* parent to address its concern that children have continued access to their non-biological caregivers. See *E.N.O.*, 429 Mass. 824; *Youmans v. Ramos*, 429 Mass. 774 (1999). In those cases, the Court recognized that the bonding that occurred between the *de facto* parent and the child was sufficient to impose a child support obligation on the parent. We now ask the court to use its equitable power to carve out another legal status for parents - "intended parent" - a status that will help ensure financial support for the children like D. who currently exist in a legal netherworld.³ Although

³ The amici curiae on these facts do not seek alteration in the Court's treatment of surrogacy issues. Amici are not suggesting that the "intended parent" doctrine be adopted for the purposes of determining the enforceability of a surrogacy contract or custody in situations where different persons are "competing" for

such children may not have had any contact with the intended parent, as the children did in *E.N.O.* or *Youmans*, such children are nevertheless bonded to their "intended parents," not by relationship but by intent - that is, the intended parent is bonded to the child by virtue of his/her decision to bring the child into the world to parent that child.

In fact, in the otherwise distinguishable arena of surrogacy, this Court found that the reference to parent in a statute was broad enough to cover an intended parent even though another person had actually give birth, and thus, a birth certificate naming the intended parent could be issued. See *Culliton v. Beth Israel Deaconess Medical Center*, 435 Mass. 285 (2001) (entering judgment declaring that the intended parents of a child born via a surrogate, not the birth mother, can be listed as the "parents" under M.G.L. c. 46 s. 1, which requires that the parents of the child be listed on the birth certificate, where all parties declared that the intended parents of the

the exclusive status of parent. We ask only that the court adopt the concept of "intended parent" in situations involving issues of child support where a person has actively participated in bringing a child into the world with intent to parent that child or has intended to become a parent in some other fashion (e.g., by participating in an adoption proceeding with another adult).

child, who was born via a gestational surrogate, were the parents).

The principle of holding adults liable for the support of children they bring into the world is also enunciated in the American Law Institute's (ALI) Principles of the Law of Family Dissolution, a source which this Court has approvingly cited in creating new paths for the continued protection of children in changing times. See, e.g., *Eccleston*, 438 Mass. at 437 (citing ALI Principles of the Law of Family Dissolution: Analysis and Recommendations § 3.04(2) & comment j, § 3.12(2)(a) & comment a, & § 3.24(2) (2002)). Specifically, Section 3 of Principles of the Law of Family Dissolution, the same ALI article cited by this Court in *Eccleston*, provides that a court may "impose a parental support obligation upon a person who may not be the child's parent under state law, but whose prior course of affirmative conduct equitably estops that person from denying a parental support obligation to the child." ALI Principles, § 3.30(1). That section further provides that the protection of children in same-sex couples be recognized under the doctrine of equitable estoppel.

In recognizing the status of "intended parent," the Court can build on the groundwork laid by other states that have found that non-biological intended parents have an obligation to support their intended children. For example, in one case, a New York family court ordered the non-biological intended parent of a same-sex couple to pay child support to the child. *Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (Fam. Ct. 1985). In that case, the non-biological parent, a lesbian, had signed an artificial insemination agreement that resulted in the impregnation of her then-partner, who subsequently gave birth to a child. The non-biological parent argued that only a "parent" is liable for the support of children and that "by reason of the fact that she is female, she biologically could not be the parent of these children nor has she formally adopted them." *Id.* at 781. The court rejected her argument and held that she was a "parent" to whom the responsibility of child support attached:

In Black's Law Dictionary 1003 (5th ed. 1979), "parent" is defined as "one who procreates, begets or brings forth offspring." The actions of this respondent in executing the [artificial insemination] Agreement above referred to certainly brought forth these offspring as if done biologically.

Id. at 19.⁴

Similarly, California, beginning with *People v. Sorenson*, 68 Cal. 2d. 280 (1968), has long held that a biological connection to a child is not necessary for the court to order child support but instead that the agreement and participation in actions resulting in the procreation of a child carry with it the obligation to support, an obligation that can not "disclaimed at will." *Id.* at 285. Indeed, in a more recent case, the California Supreme Court held that is was not necessary for either party to have a biological relationship with the child for the court to order one party to pay child support to the other for the benefit of the child. *Marriage of Buzzanca*, 61 Cal. App. 4th 1410, (1998). In that case, the child was born as the result of donated sperm, egg, and a gestational surrogate. The court based its ruling

⁴ In that case, unlike in this case, the non-biological parent had had an ongoing relationship with the children at issue. That fact was not dispositive, however, as to this point, on which the court focused on the fact that her actions, like those of B.L., brought forth the children.

that the father nevertheless was obligated to pay child support on the critical fact that the child would never had been born if he had not agreed to have a fertilized egg implanted in a surrogate. *Id.* at 1412-13.⁵

To establish a family is a basic right to individual liberty. Moreover, as this Court recently noted, "the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual." *Goodridge v. Department of Public Health*, 440 Mass. 309, 332 (2003). With every right, however, comes a responsibility. When bringing a child into the world, that responsibility includes

⁵ The court in *Buzzanca* did rely to some extent on *Johnson v. Calvert* supra, noting that the same rule enunciated in *People v. Sorenson* "which makes a husband a lawful father of a child born because of his consent to artificial insemination should be applied". *Buzzanca*, *id.* at 1412-1413. However, *Johnson* was distinguishable in that intentions were being looked at to break a "tie" between competing claims to exclusive parenthood, not one in which the intentions of a person trying to evade the responsibility of parenthood. *Id.* at 1425-26. The central holding of the case is that people who intentionally take actions to become a parent or actions that result in the birth of a child must be held to the responsibilities of a parent regardless of their biological connection to the child. This holding can be adopted by this court without the adoption of the "intended parent" rule to determine competing claims to exclusive parenthood in cases of surrogacy. See Footnote 3, supra.

one of financial support. See *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) ("The rights of the parents are a counterpart to the responsibilities they have assumed.").

In the end, just as an unmarried person who causes the creation of a child through natural means is held to be a parent, so should the same accountability attach to an unmarried person whose intentional actions are just as responsible for bringing a child into the world to parent that child, especially since procreation by assistive technology often requires even more premeditation and planning than natural conception.⁶

Massachusetts has been unafraid to raise the national bar for equality. Both the courts and the legislature have responded to the ever increasing diversity of family structures and circumstances of birth. The recognition of the status of "intended parent" is the next logical step, one that is

⁶ Although in this case, the issue of "intended parenthood" arose in the context of a same-sex couple, the creation of a new legal status of "intended parent" would likewise guide parties and courts in cases involving children support obligations to children of heterosexual couples as well. For example, a woman and a cohabitating male who is unable to contribute genetic material due to surgery, sterility, or preclusive genetic concerns but who intends with the woman to parent a child via artificial insemination of the woman would be deemed the "intended parent" of the resultant child with the obligation to support the child.

important to helping ensure that all children are entitled to child support by those whose decisions to parent lead to their birth.

II. A PROMISE TO PARTICIPATE IN THE CONCEPTION, BIRTH, PARENTING, AND SUPPORT OF A CHILD THAT RESULTS IN THE CREATION OF A CHILD CONSTITUTES AN ENFORCEABLE CONTRACT TO SUPPORT THAT CHILD.

Where, as in this case, a couple together set about a purposeful path to conceive and parent a child and a child is, resulting, brought into the world, both adults in the couple should be held financially responsible for the child. That the child is not biologically related to one of the adults should be irrelevant where absent that adult's participation in the decision to bring forth the child and concomitant promise to participate in the parenting and support of the child, the other adult would not have undertaken to conceive and birth the child, as occurred in this case. The amici urge the Court in this case to find, pursuant to the doctrine of estoppel, that where an adult promises to participate in the upbringing of a child and that promise is a necessary precondition to the birth of a child, that adult be found to have an ongoing child support obligation, regardless of later changes in her choices.

Estoppel may arise when (a) there was an explicit or implicit agreement or undertaking by the person to assume a parental support obligation to the child; (b) when the child is born during the marriage or cohabitation of the person and the child's parents; or (c) when the child is conceived pursuant to an agreement between the person and the child's parent that they would share responsibility for the child and each would be a parent to the child. ALI Principles § 3.03 (a)-(c). Promissory estoppel has been applied in other states to hold non-biological intended parents liable for the payment of support. For example, in *Karin T.*, a non-biological lesbian parent was found liable for support of children she intended to parent when living as a man and "married" to the biological mother. *Karin T. v. Michael T.*, 484 N.Y.S.2d 780. The court further found that the children were third party beneficiaries of the artificial insemination agreement signed by the parties and which "must inure to the benefit of these children." *Id.* at 784. In finding a support obligation by the non-biological parent, the court held:

To hold otherwise would allow this respondent to completely abrogate her responsibilities for the support of the children involved and would allow her to benefit from her own fraudulent acts which induced their birth no more so than if she were indeed the natural father of these children. Of course, the respondent was free to engage and live in any lifestyle which she felt appropriate. However, by her course of conduct in this case which brought into the world two innocent children she should not be allowed to benefit from those acts to the detriment of these children and of the public generally.

Id. at 784. Although the *Karin T.* court referred to a document signed by the non-biological parent to conceive the children, the writing is a mere contrivance which may or may not be found as evidence of intent. Course of conduct is equal to or stronger evidence of parties' intent to conceive and parent together.

In its decision, the *Karin T.* court relied on *Gursky v. Gursky*, 39 Misc. 2d 1083 (1963), which involved married parties who conceived a child prior to the enactment of a New York statute declaring children of artificial insemination legitimate. In that case, the husband's declarations and conduct concerning his wife's artificial insemination "implied a promise on his part to furnish support for any

offspring resulting from the insemination. This, in the light of the wife's concurrence and submission ... was sufficient to constitute an implied contract." *Gursky*, 39 Misc. 2d at 1088-89. The Court further stated the principles of equitable estoppel which may guide this Court in the instant case:

There was nothing in the record to indicate that the wife would have undergone artificial insemination in the absence of the husband's consent. Hence it is reasonable to presume that she was induced so to act and thus changed her position to her detriment in reliance upon the husband's expressed wishes. To relieve the husband of any duty of furnishing support for the child resulting from the artificial insemination of the wife, to which she submitted in reliance of her husband's wishes, would cast a financial burden upon the wife which in equity and conscience should be borne by the husband. The circumstances properly call for invocation and application of the doctrine of equitable estoppel so as to cast upon the husband, as between husband and wife, the primary duty of support of the child involved. It has been stated by the Court of Appeals that an estoppel "rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury"; and a party may not, even innocently, mislead another and then claim the benefit of his deception.

Id. at 1088-1089 (citations omitted).

Similarly, a Pennsylvania superior court recently held that equitable principles required enforced a support obligation against a woman who had intentionally parented five children with her former domestic partner. *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. Ct. 2002). In that case, the non-biological parent resisted the support claim, arguing that she had no biological connection to the child and that as a former same-sex partner she had so few parental rights that imposing a support obligation on her would be inequitable. The court disagreed and ordered support, finding that it was necessary to apply equitable rules in the children's best interest. *Id.* at 878.

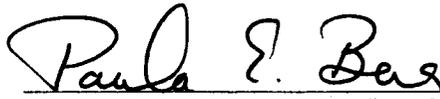
Although in that case the non-biological parent had had an actual relationship with the child, unlike this case and more like *E.N.O.* and *Youmans*, the Pennsylvania court did not rely on that relationship in making its determination that the non-biological parent was obligated to pay child support. Rather, the court relied heavily on the initial joint agreement and arrangement by the parties for L.S.K. to conceive through artificial insemination. *Id.* at 874. The import of the parties' initial decision to

have children via artificial insemination of one of them is also evident in the Pennsylvania courts' discussion of the doctrine of estoppel. The court noted that the doctrine of estoppel applies in the case at bar even more strongly than it might in a step-parent case. "Unlike a stepparent, it is evident that H.A.N. did not enter into a relationship where children already existed. Instead she and [L.S.K.] decided to start a family together." *Id.* at 877. The court then noted the important consequences of this action. "H.A.N committed herself to a course of conduct which involved significant undertakings and commitment by [L.S.K]."
Id. at 877-878. Accordingly, the court held that the non-biological parent's promise to assume responsibility for the children she intended to be born to her partner estopped her from avoiding her child support obligations to her children. *Id.* That case, although it presents an uncommon fact pattern, nevertheless stands for the proposition that when two people intend to conceive and raise children through artificial insemination but only one is biologically connected, the non-biological parent is likewise obligated to provide support for the children based on a contract theory.

For these reasons, and in the best interest of D., amici respectfully request this Court to support the position of the plaintiff/appellant and hold B.L. liable for the payment of child support under prevailing laws for the calculation and duration of child support to minors.

Respectfully Submitted,

The Women's Bar Association of Massachusetts,
Child Welfare League of America,
Massachusetts Citizens for Children,
National Association of Social Workers,
Boston Psychoanalytic Society and Institute,
Inc.,
Psychoanalytic Institute of New England,
Psychoanalytic Couple and Family Institute of
New England,
Ellen C. Perrin, M.D., and
Barry S. Zuckerman, M.D.,



Paula E. Berg (BBO# 565781)
Law Offices of Paula E. Berg
One Faneuil Hall Marketplace
Boston, MA 02109
617-723-3033

Dated: February 24, 2004

