Dutchess County Index No. 000692-88 Oral Argument Not Requested

COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Application of

Alison D.,

Petitioner-Appellant

For a Writ of Habeas Corpus to determine visitation rights to A.D.M., a child now held by Virginia M.

Respondent-Appellee

BRIEF OF AMICI CURIAE NOW LEGAL DEFENSE AND EDUCATION FUND AND NATIONAL ORGANIZATION FOR WOMEN OF NEW YORK STATE

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The NOW Legal Defense and Education Fund [NOW LDEF] is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women, a membership organization of over 200,000 women and men in approximately 800 chapters throughout the United States.

Family law, and in particular the rights of women in the family sphere, are a major focus of NOW LDEF's work. NOW LDEF has participated as counsel or amicus curiae in numerous cases involving child custody and visitation in state and federal courts, including cases challenging discrimination against a lesbian or gay parent. NOW LDEF is committed to eliminating discrimination against lesbians in all areas of law, including family law, and to securing legal recognition of the rights of lesbian family members.

The National Organization for Women of New York State [NOW-NYS] represents over 30,000 members and has 36 chapters in New York State. NOW-NYS is particularly concerned with the laws of New York as they affect women with respect to the family. Securing full rights for lesbians is a high priority for NOW-NYS.

ARGUMENT

I. ALISON D. HAS STANDING TO SEEK VISITATION UNDER DOMESTIC RELATIONS LAW § 70 PURSUANT TO A FUNCTIONAL DEFINITION OF PARENTHOOD.

Family relationships occupy a position of unique importance for citizens of our society. The U.S. Supreme Court has long recognized and protected the rights of individuals to form families and to participate fully in the lives of other members of their families. See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father's parental rights). In particular, the rights of parents to enjoy the continued companionship of their minor children and to influence their upbringing, although by no means absolute, are highly prized values in our culture and in the law. Stanley v. Illinois, supra; Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

Individuals in all types of families continue to cherish the family as a unique institution. Regardless of their exact structure, families are the basic unit of social organization and provide for the emotional, financial and social needs of their members. Thus, despite changes in the forms that families take, the legal rights arising from family membership remain at least as significant as they ever were.

As family structures in the United States have evolved and proliferated, the law has adapted by broadening its recognition

of families beyond the traditional nuclear grouping. See, e.g., Moore v. East Cleveland, 431 U.S. 494 (1977) (striking down single-family zoning ordinance because of unduly narrow definition of "family"). In White Plains v. Ferraioli, 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756 (1974), this Court held that a group home for abandoned and neglected children met the requirements of a single-family zoning ordinance.

> Whether a family be organized along ties of blood or formal adoptions, or be a similarly structured group sponsored by the State, as is the group home, should not be consequential in meeting the test of the zoning ordinance. So long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance.

34 N.Y.2d at 305-06 (citation omitted). The Court stated that "the city has a proper purpose in largely limiting the uses in a zone to single-family units. But if it goes beyond to require that the relationships in the family unit be those of blood or adoption, then its definition of family might be too restrictive." 34 N.Y.2d at 305 (citations omitted). See also Baer v. Town of Brookhaven, 73 N.Y.2d 942, 540 N.Y.S.2d 234, 537 N.E.2d 619 (1989) (zoning ordinance that fails to include unrelated individuals who live together as a "functionally equivalent family" within its definition of "family" violates State Constitution Due Process Clause); McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 498 N.Y.S.2d 128, 488 N.E.2d 1240 (1985) (same); Group House v. Board of Zoning and Appeals, 45 N.Y.2d 266, 408 N.Y.S.2d 377, 380 N.E.2d 207 (1978) (group home that is "functional and factual equivalent of natural family" meets one-

family dwelling requirement under town zoning ordinances).[1]

Traditional bright-line tests, such as marriage and biological parenthood, no longer dictate the presence or absence of a legally cognizable family. For example, marriage is no longer a prerequisite to enjoying certain rights arising from family relationships. New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (welfare provision discriminating between married and unmarried households violates Equal Protection Clause); Stanley v. Illinois, supra; Levy v. Louisiana, 391 U.S. 68 (1968) (discrimination based on illegitimacy in wrongful death statute violates Equal Protection Clause). Similarly, biological parenthood is not necessarily determinative. Lehr v. Robertson, 463 U.S. 248, 261-62 (1983) (biological link, in absence of other ties to child, insufficient to create constitutionally-protected parental rights); Quilloin v. Walcott, 434 U.S. 246, reh'g denied, 435 U.S. 918 (1978) (upholding termination of biological father's rights in order to permit adoption by stepfather). In place of such bright-line tests, courts have looked instead at the actual emotional, physical and financial connections among individuals to determine the existence and scope of legally protected family relationships. Lehr v. Robertson, supra; Quilloin v. Walcott, 434 U.S. at 255 (terminating biological father's rights serves to

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[1] The New York State Constitution may offer broader protections in this respect than the U.S. Constitution. See Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding zoning ordinance barring occupancy of single dwelling unit by more than two unrelated individuals).

"give full recognition to a family already in existence," consisting of biological mother and stepfather); Stanley v. Illinois, supra.

The increasing variety and complexity of American family life requires realistic definitions of terms such as "family" and "parenthood" -- definitions recognizing that an intimate group of two or more individuals who fully function as a family deserve to be treated as a family in appropriate respects under the law. The legal rights accorded to families are not exclusively limited to groups of individuals related by marriage, blood or adoption. Smith v. Organization of Foster Families, 431 U.S. 816, 844-45 (1977). Family ties therefore should be defined under the law according to a functional test, not according to a mechanical reliance on marital, biological or adoptive status.

This Court recently adopted this exact approach in its exemplary opinion in Braschi v. Stahl Associates Co., 74 N.Y.2d 201, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989). That case involved an interpretation of New York City Rent and Eviction Regulations which contained no definition of the central word "family" (much as Domestic Relations Law § 70(a) contains no definition of the word "parent"). In order to determine the legislature's intent in using the word "family", this Court held that the term

> should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection...should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.

74 N.Y.2d at 211. The Court held that a realistic and valid view of the term "family" would include two adult gay partners. "This view comports both with our society's traditional concepts of 'family' and with the expectations of individuals who live in such nuclear units." Id. (citation omitted).

Under the functional test adopted in Braschi, determining whether a given group of two or more individuals meets the definition of the word family necessitates an objective examination of the specific facts of each case. 74 N.Y.2d at 212-13. While the Braschi opinion sets out some factors that may be helpful in making this determination, id., the opinion stresses that none of the factors is dispositive and that each case must be decided based on the "totality of the relationship." 74 N.Y.2d at 213.

The present case presents a particularly compelling example of the need to apply a functional test to recognize the existence of family relationships. Alison D. and Virginia M. and their two children unquestionably functioned as a family unit, and Alison D. unquestionably functioned as A.D.M.'s parent.

As set out in Petitioner-Appellant's Brief herein, Alison D. and Virginia M. were living together and had been in a loving and committed relationship for nearly three years when they decided to have a child together by insemination of Virginia M. The couple agreed before A.D.M. was born to share equally in all the rights and responsibilities of parenthood. For over two years after the child's birth, during which time another child was born

to the couple through insemination of Alison D., the two women and their children continued to live together as a family. During this time, Alison D. actively performed a myriad of daily caretaking tasks for A.D.M. and functioned as a parent on an equal basis with Virginia M. After the couple moved apart in 1983, Virginia M. agreed that Alison D. would have substantial visitation with A.D.M., which Alison D. in fact exercised until 1986, when Virginia M. began to limit their visits. Alison D. also continued to provide financial support. Soon after Virginia M. terminated contact between Alison D. and A.D.M. in July 1987, Alison D. began this action.

On these facts, applying the "totality of the relationship" test applied in Braschi, Alison D. clearly falls within the meaning of the term "parent" and therefore enjoys standing to bring an action under Domestic Relations Law § 70(a). Under the reasoning of Braschi, this Court need not establish fixed criteria to apply in future cases of individuals seeking standing under Domestic Relations Law § 70(a); this Court may simply decide the present case based on the totality of its facts.

If, however, this Court wishes to adopt a specific definition of functional parenthood to govern this and future cases, amici curiae propose that standing to bring an action under Domestic Relations Law § 70(a) be available to an adult who meets the following criteria: (1) the adult has lived with the child for a substantial period of time; (2) the adult has personally performed the caretaking duties of a parent on a

significant basis and for a significant period of time; and (3) the biological or adoptive parent having custody of the child has expressly consented to the establishment of a parent-child relationship giving rise to legal rights. Application of this test is discussed further in Section III below.

The above definition reflects the reality of family life as experienced by thousands of lesbian and gay couples and the children they are raising. See Section II, infra. It also reflects the widespread recognition among psychologists, psychiatrists and experts in child development that children form child-parent attachments to those adults who function as their parents, regardless of the adults' gender, sexual orientation, or the presence or absence of biological or adoptive ties. J. Goldstein, A. Freud, A. Solnit, Beyond the Best Interests of the Child (1973).

As discussed further below, this test is workable in practice and would not burden either litigants or the courts. See Section III, infra. Moreover, expanding the privileges of custody and/or visitation to adults other than biological and adoptive parents is not a novel concept under New York law. Grandparents may seek visitation under Domestic Relations Law § 72. The rights enjoyed by parents have been extended to adults found to be functioning in loco parentis. E.g., In re Jamal B., 119 Misc. 2d 808, 465 N.Y.S.2d 115 (Fam. Ct. Queens Cty. 1983). Standing to seek custody is also available under the "extraordinary circumstances" doctrine of Bennett v. Jeffreys, 40

N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976).** See, e.g., Mark V. v. Gale P., 143 Misc. 2d 487, 540 N.Y.S.2d 966 (Fam. Ct. Schenectady Cty. 1989).

As in New York, courts in other states have recognized the right of adults who have functioned as parents, but who are not related to the child by blood or adoption, to seek custody and/or visitation. Out-of-state courts have applied a variety of labels to the relationship between functional parents and children, including in loco parentis, equitable parenthood, de facto parenthood, and the doctrine of estoppel. E.g., Carter v. Brodrick, 644 P.2d 850 (Alaska 1982) (stepparent who has assumed in loco parentis status through "psychological parentage" entitled to proceed under statute authorizing custody and visitation of "child of the marriage" upon separation or divorce); Atkinson v. Atkinson, 160 Mich. App. 601, 408 N.W.2d 516 (1987) (non-biological parent married to child's biological mother found to be "equitable parent" entitled to seek custody or visitation); Tubwon v. Weisberg, 394 N.W.2d 601 (Minn. Ct. App.

** The present case is not controlled by the holding in Ronald FF. v. Cindy GG., 70 N.Y.2d 141, 517 N.Y.S.2d 932, 511 N.E.2d 75 (1987). Alison D. is not premising her claim on the "extraordinary circumstances" doctrine, which was the subject of the Ronald FF. decision. Rather, her claim to standing should be upheld based on a functional definition of parenthood, as described in the text above. Moreover, Ronald FF. is distinguishable on its facts, since there is no indication that the petitioner in that case alleged, as did Alison D., that the child was conceived as a result of an agreement between himself and the child's biological parent to share parenting equally, or that he actually performed the caretaking duties of a parent, in a capacity equal to the biological parent, for a significant period of time.

1986) (affirming award of custody to biologically unrelated man who served as "de facto parent" since child's birth where biological mother held man out as child's father); Klipstein v. Zalewski, 230 N.J. Super. 567, 553 A.2d 1384 (Ch. Div. 1988) (equitable estoppel can create right of visitation when stepparent stands in loco parentis); Seger v. Seger, 377 Pa. Super. 391, 547 A.2d 424 (1988) (husband of biological mother entitled to partial custody and visitation based on doctrine of in loco parentis); Gribble v. Gribble, 583 P.2d 64 (Utah 1978) (stepfather standing in loco parentis treated as parent for purposes of visitation statute); In re Custody of D.M.M., 137 Wis. 2d 375, 404 N.W.2d 530 (1987) (great-aunt who stands in loco parentis could come within ambit of term "parent" in visitation statute; dicta).

Several cases have specifically held that gays and lesbians who have shared in the upbringing of their partners' biological children are entitled to seek custody or visitation. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Geo. L. J. 459, 527-42 (1990) (citing, inter alia, In re Guardianship of Batey, No. 134-752 (Juv. Div. Cal. Super. Ct., San Diego Cty., Nov. 5, 1987); In re Hatzopoulos, No. D-54498 (Denver Juv. Ct. July 8, 1977); In re Pearlman, No. 87-24,926DA (Fla. Cir. Ct., Broward Cty., Mar. 31, 1989), reprinted in part, 15 Fam. L. Rep. (BNA) 1355 (May 30, 1989); In re Estate of Hamilton, No. 24,951 (Vt. Probate Ct., Washington Cty., July

25, 1989); Loftin v. Flournoy, No. 569,630-7 (Cal. Super. Ct., Alameda Cty., Jan. 2, 1985); Sabol v. Bowling, No. CF27,024 (Cal. Super. Ct., Los Angeles Cty., Jan. 30, 1989).

The basic distinctions between family members and non-family members remain valid and important. However, the legal protections available to families should be available to all families, not merely to those characterized by traditional ties of blood, marriage or adoption. Therefore, amici curiae respectfully urge this Court to grant standing to functional parents under Domestic Relations Law § 70(a).

II. A FUNCTIONAL DEFINITION OF PARENTHOOD IS NECESSARY TO PROTECT THE RIGHTS OF LESBIAN AND GAY FAMILIES.

Lesbian and gay couples raising children together provide a particularly persuasive example of families whose legal status deserves to be evaluated according to a functional test rather than a superficial reliance on their lack of ties by blood, marriage or adoption.

Estimates of the number of children living with at least one lesbian or gay parent range from six million to ten million. Polikoff, supra, 78 Geo. L. J. at 461 n.1 (citations omitted). The number of lesbian couples who are choosing to bear or adopt children together and jointly raise them is growing rapidly. See Kolata, Lesbian Partners Find the Means to Be Parents, N.Y. Times, Jan. 30, 1989, at A13, col. 1; Margolick, Lesbian Child-Custody Cases Test Frontiers of Family Law, N.Y. Times, July 4,

1990, at A1, col. 5.

Lesbian and gay families lack the option of formalizing their ties through traditional legal means. Single-sex marriage is banned in all states. See, e.g., Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed for want of substantial federal question, 409 U.S. 810 (1972); B. v. B., 78 Misc. 2d 112, 355 N.Y.S.2d 712 (Sup. Ct. Kings Cty. 1974). In most states, including New York, a lesbian cannot adopt her partner's biological child without terminating the parental rights of the biological parent. Patt, Second Parent Adoption: When Crossing the Marital Barrier Is in a Child's Best Interests, 3 Berkeley Women's L.J. 96 (1987-88); Polikoff, supra, 78 Geo. L. J. at 522; Zuckerman, Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother, 19 U.C. Davis L. Rev. 729 (1986).

New York and an increasing number of other states have repudiated legal doctrines that discriminate on the basis of sexual orientation in child custody and visitation cases. S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985); Nadler v. Superior Court, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); Bezio v. Patenaude, 381 Mass. 563, 410 N.E.2d 1207 (1980); DiStefano v. DiStefano, 60 A.D.2d 976, 401 N.Y.S.2d 636 (4th Dep't 1978); M.A.B. v. R.B., 134 Misc.2d 317, 510 N.Y.S.2d 960 (Sup. Ct. Suffolk Cty. 1986) (citing cases); Guinan v. Guinan, 102 A.D.2d 963, 477 N.Y.S.2d 830 (3rd Dep't 1984); D.C. Code Ann. §§ 16-

911(a)(5), 16-914(a); Susoeff, Assessing Children's Best Interests When A Parent Is Gay or Lesbian: Toward a Rational Custody Standard, 32 U.C.L.A. L.Rev. 852 (1985).

Contrary to popular myths, being raised in a lesbian or gay family has no demonstrable negative effect on children. F. Bozett, Gay and Lesbian Parents 58 (1987); Achtenberg, Lesbian and Gay Parenting: A Psychological and Legal Perspective 422 in American Bar Association Section of Family Law 1987 Annual Meeting Compendium; Kirkpatrick and Hitchens, "Lesbian Mothers/Gay Fathers" in Emerging Issues in Child Psychiatry and the Law (P. Benedek & D. Schetky eds. 1985); Polikoff, supra, 78 Geo. L. J. at 561-72. Children raised in such families are no more likely than other children to experience confusion about sex roles or to become lesbian or gay themselves. Achtenberg, supra, at 422; Polikoff, supra, 78 Geo. L. J. at 545; Note, Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis, 102 Harv. L. Rev. 617, 634 (1989).

The prevalence of lesbian and gay families, the fact that they provide a healthy and valid setting for raising children, the unavailability of marriage or adoption to formalize such families' relationships, and the increasing repudiation of discrimination against such families in custody and visitation matters, all argue in favor of extending standing to adult members of such families to seek custody or visitation pursuant to a functional definition of parenthood.

III. A FUNCTIONAL DEFINITION OF PARENTHOOD IS PRACTICAL AND WILL PROMOTE THE INTERESTS OF PARENTS AND CHILDREN.

As described in Section I above, amici curiae urge that an adult who meets the following definition of functional parenthood should be accorded standing as a parent under Domestic Relations Law § 70(a): (1) the adult has lived with the child for a substantial period of time; (2) the adult has personally performed the caretaking duties of a parent on a significant basis and for a significant period of time; and (3) the biological or adoptive parent having custody of the child has expressly consented to the establishment of a parent-child relationship giving rise to legal rights. This test, with the proper procedural and substantive refinements, is eminently well-suited to protecting the various interests of the biological or adoptive parent, the functional parent, the child, and the courts.

At the outset, it should be noted that this is a threshold test, to determine whether an individual has standing. If standing is granted, a request for custody or visitation will then be decided according to the best interests of the child standard established by Domestic Relations Law § 70(a). Thus, even if an individual such as Alison D. is able to prove that she meets the legal definition of a functional parent, she would not necessarily be entitled to custody and/or visitation.

Under the system proposed by amici curiae, a putative functional parent would at least have the opportunity to seek a

day in court to prove her case. Under the decision of the Appellate Division in the present case, the courthouse door is irrevocably closed to all functional parents who are unrelated to a child by blood or adoption, regardless of the equities of the individual case. The result of such a rule is that children are inevitably deprived of contact with their functional parents (who by definition have been deeply and intimately involved in the children's lives), without even an inquiry into the child's best interests.

Allowing functional parents to obtain standing to seek custody or visitation does not mean that they will be treated identically to biological or adoptive parents. Under the system proposed here, the putative functional parent would bear the burden of proving, first, that she is a functional parent and therefore enjoys standing, and second, that granting her visitation or custody would serve the child's best interests. As a result of these burdens of proof, the biological or adoptive parent's rights would properly enjoy greater protection than the rights of the putative functional parent.

When determining the best interests of the child after a functional parent has been granted standing, it would be entirely appropriate for the trial court to apply a rebuttable presumption that the best interests of the child are ordinarily served by granting custody to the biological or adoptive parent. This distinction accurately reflects the different degree of relationship borne to the child by a biological or adoptive

parent as opposed to a functional parent. Nevertheless, depending on the circumstances, a court could find that a functional parent has rebutted this presumption -- for instance, if the biological or adoptive parent is shown to be unfit.

With respect to visitation, an appropriate factor for the court to consider would be the existence of such extreme acrimony between the custodial parent and functional parent that visitation would be contrary to the child's best interests. Numerous studies have demonstrated that children suffer emotional harm if exposed to ongoing conflict between two parents. J. Wallerstein and S. Blakeslee, Second Chances: Men, Women and Children A Decade After Divorce 272-73 (1989); Chambers, Rethinking the Substantive Rules for Custody Disputes in Divorce, 83 Mich. L. Rev. 477, 555-57 (1984). Recognizing these dangers, this Court has held that orders of joint custody are not permitted if the two parents are unable to cooperate in a manner conducive to the child's well-being. Braiman v. Braiman, 44 N.Y.2d 584, 407 N.Y.S.2d 449, 378 N.E.2d 1019 (1978).

The three-prong functional definition presented above is necessarily general. Further refinements to each component of the definition are suggested below.

With respect to the first element of the definition, the question of whether the period of cohabitation between the adult and the child is "substantial" should be evaluated both according to the absolute amount of time involved and according to the significance of that amount of time in relation to the child's

life span. For a very young child, a relatively short period of cohabitation could be deemed very substantial, whereas for a teenager, the length of cohabitation would typically have to be longer to be substantial. See J. Goldstein, A. Freud, A. Solnit, Beyond the Best Interests of the Child 31-52 (describing concepts of time and continuity in context of children's perceptions).

In most cases, a putative functional parent should have to prove that the cohabitation with the child, or at least the performance of the tasks described in the second prong of this test, lasted up until the commencement of the litigation or shortly before. Because children's emotional attachments to adults evolve very rapidly, interactions that took place many years earlier between an adult and a young child would normally be irrelevant to proving that the adult is currently a functional parent. Id. Exceptions to this rule should of course be permitted under appropriate circumstances.

With regard to the second prong of the test, the "caretaking duties" referred to could be specified and listed. The West Virginia Supreme Court adopted this helpful approach in order to define the term "primary caretaker" in the leading custody case, Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981). To simplify proof and streamline court proceedings, the caretaking duties to be considered should be concrete and objective. Garska v. McCoy, supra; Neely, The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed, 3 Yale Law & Policy Review 168 (1984).

Mere financial support should not be included among these duties, since the best interests of a child are not served by linking issues of custody and visitation to parents' financial status. Burchard v. Garay, 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (1986).

For purposes of the second element of the definition, the phrase "on a significant basis" should be evaluated in part by comparison to the caretaking duties performed by the biological or adoptive parent. As discussed earlier in connection with the cohabitation requirement, the phrase "for a significant period of time" should be evaluated both according to an objective measure and according to the child's subjective sense of time.

With regard to the third criterion, the putative functional parent must prove that the child's biological or adoptive parent consented to the establishment of a parent-child relationship with legal -- not just emotional or practical -- ramifications. This requirement avoids confusion by clarifying the fact that an individual such as a live-in babysitter who lives with the child, performs caretaking duties, and may even be regarded by the child as a parent, is not entitled to the legal benefits of parenthood (such as the right to seek custody or visitation) if the biological or adoptive parent who has custody of the child has not consented to the creation of such rights. This requirement recognizes and defers to each biological or adoptive parent's right to dictate whether another adult will later be entitled to standing as a functional parent. It places the biological or

adoptive parent in a crucial gate-keeper role, thus ensuring that the legal status of functional parenthood will be used not as a sword by disgruntled cohabitants, but rather as a shield by individuals trying to protect the rights previously granted to them through private ordering.

In order to be sufficient under the test proposed here, the biological or adoptive parent's consent must be explicit, although not necessarily in writing. Such agreements are not rare. In the present case, Alison D. and Virginia M. agreed before A.D.M. was born that they would raise the child jointly and that they would share equally in the rights and responsibilities of parenthood. (R. 9-10, 22). In recent years, several sources have provided lesbian and gay couples with advice on entering into parenting contracts. E.g., D. Clifford & H. Curry, A Legal Guide for Lesbian and Gay Couples (Nolo Press 5th ed. 1988); D. Hitchens, Lesbians Choosing Motherhood: Legal Issues in Donor Insemination (National Center for Lesbian Rights 1984); Sexual Orientation and the Law § 1.04[3] (National Lawyers Guild 1989). Although such agreements are not necessarily binding on the court acting in its role as parens patriae, they would suffice to indicate the biological or adoptive parent's intent to share parental rights with another adult.

Additional procedural steps can be adopted to curtail harassment of biological and adoptive parents and to avoid burdening the courts with frivolous actions. For example, the courts should require that all petitioners seeking to avail

themselves of the status of functional parents under Domestic Relations Law § 70(a) must set forth sufficient facts in their pleadings to establish their ability to meet all three prongs of the test. If it later transpires that such allegations were false, the petitioner could be subject to appropriate sanctions. If the pleadings are adequate on their face to make out the petitioner's status as a functional parent, and the biological or adoptive parent contests the petitioner's standing, a hearing on standing should be held, at which evidence is received on the question of whether the petitioner meets the definition of a functional parent. To maximize judicial economy and fairness to the parties, this hearing would be entirely separate from any best interests inquiry to determine custody and/or visitation, inasmuch as a best interests inquiry will never be reached if the petitioner is denied standing. When applied in this manner, the proposed functional test would be both just and efficient.

CONCLUSION

Amici curiae respectfully request this Court to reverse the judgment of the court below and remand for a determination of Alison D.'s standing as a functional parent. A functional test to define the term parenthood for purposes of Domestic Relations Law § 70(a), as described in this brief, is supported by prior decisions of this and other courts and is mandated by the increasing diversity in American family life.

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