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## THE NEW YORK COURT OF APPEALS' EXPANSION OF THE DEFINITION OF THE TERM "PARENT" LEAVES FUTURE QUESTIONS UNANSWERED

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*On August 30, 2016, the New York Court of Appeals in Brooke S.B. v. Elizabeth A.C.C., expanded the definition of the term "parent," overruling the twenty-five-year-old bright line rule that limited standing to seek custody or visitation to traditional parents. In 1991, the New York Court of Appeals decided Alison D. v. Virginia M. where they defined "parent" to include only people who have a biological or adoptive relationship with the child, reasoning that the typical family consisted of a husband and wife. In many cases subsequent to Alison D., the court attempted to alleviate the harsh application this rule had on many parents and their children. Finally, based on the major changes in the law and statistics regarding nontraditional families, the court in Brooke S.B. found this traditional definition became "unworkable." In revisiting the question of what constitutes a parent for custody and visitation purposes, the court held that if a nonbiological, nonadoptive parent, by clear and convincing evidence, can prove a preconception agreement to jointly raise the child, he or she has established standing to seek custody or visitation rights. However, the court did not answer whether a petitioner, in the absence of a preconception agreement, could establish standing for a custody or visitation proceeding. This Note argues that in the absence of a preconception agreement a nonbiological, nonadoptive parent should have the opportunity to establish standing under a functional approach that considers the biological or adoptive parents' consent, the functional*

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*parent's intent when forming a relationship with the child, and the relationship formed between the child and the functional parent.*

## INTRODUCTION

In *Brooke S.B. v. Elizabeth A.C.C.*, the New York Court of Appeals rendered a landmark family law decision that brought New York up to date with the majority of states that recognize parental status of nonbiological, nonadoptive parents.<sup>1</sup> Pursuant to New York Domestic Relations Law § 70, which governs who may petition the court for parental rights, only a “parent” has standing<sup>2</sup> to seek custody or visitation.<sup>3</sup> However, New York’s Legislature has failed to define who qualifies as a “parent” under this vague category, leaving the courts to define and interpret the contours of this vague term.<sup>4</sup> Until recently, New York State had arguably the most conservative laws regarding parental recognition in comparison to other states.<sup>5</sup> In *Brooke S.B.*, the Court of Appeals finally began to more liberally recognize the rights of nontraditional parents. The

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<sup>1</sup> See *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 490 (N.Y. 2016); Alan Feuer, *New York’s Highest Court Expands Definition of Parenthood*, N.Y. TIMES (Aug. 30, 2016), [http://www.nytimes.com/2016/08/31/nyregion/new-york-court-parental-rights.html?\\_r=0](http://www.nytimes.com/2016/08/31/nyregion/new-york-court-parental-rights.html?_r=0); Karen Freifeld, *N.Y. High Court Broadens Definition of Parent in Landmark Ruling*, REUTERS (Aug. 30, 2016), <http://www.reuters.com/article/us-new-york-ruling-parent-idUSKCN1152LM>.

<sup>2</sup> Standing means that an individual is entitled to request this type of relief from the court. In this case, the relief requested would be custody or visitation. Without standing the petition would automatically be dismissed. See *Standing*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/standing> (last visited July 13, 2017) (“Standing . . . is capacity of a party to bring suit in court.”).

<sup>3</sup> N.Y. DOM. REL. LAW § 70 (McKinney 1909).

<sup>4</sup> See *id.*; *Brooke S.B.*, 61 N.E.3d at 493–97; *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29–30 (N.Y. 1991).

<sup>5</sup> See Trudy Ring, *New York State Expands Definition of Parent*, ADVOCATE (Sept. 1, 2016), <http://www.advocate.com/families/2016/9/01/new-york-state-expands-definition>. The New York Court of Appeals was first faced with the critical issue of how to define the term “parent” in *Alison D. v. Virginia M.*, where the court limited parental status to strictly biological parents. See *Alison D.*, 572 N.E.2d at 29. Parental status was expanded somewhat to recognize adoptive parents in *In re Jacob*. See *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995). These precedent cases will be discussed further *infra* Part I.

court expanded parental status to functional parents, recognizing that biology and adoption are no longer determinative of parent-child relationships. Determining that the traditional view of “parent”—which recognized only biological and adoptive parents—was too restrictive for modern family dynamics, the court held that nonbiological, nonadoptive parents could prove parental status by showing a preconception agreement with the child’s traditional parents to raise the child. While the court’s ruling received much acclaim, it left important questions unanswered.

According to the court, “whether a partner without such an agreement can establish standing and, if so, what factors a petitioner must establish to achieve standing based on equitable estoppel are matters left for another day, upon another record.”<sup>6</sup> By leaving this question unanswered, the court acknowledged the inevitability of a functional parent, in the absence of a preconception agreement with the child’s biological or adoptive parent, seeking to establish parental status.<sup>7</sup> Rather than foreclose this argument, the court’s decision essentially invited future petitions regarding the legal status of functional parents.<sup>8</sup>

As an alternative to requiring a formal preconception agreement for recognizing parental status of nonbiological, nonadoptive parents, the New York Court of Appeals should adopt a functional approach to recognizing parental status of these nontraditional parents.<sup>9</sup> By failing to do so, the court’s decision neglects many

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<sup>6</sup> *Brooke S.B.*, 61 N.E.3d at 501.

<sup>7</sup> *See id.*

<sup>8</sup> *See id.* at 500–01; Alton L. Abramowitz, *Evolving Definition of ‘Parent’ in Child Custody and Access; Divorce Law*, N.Y. L. J. (Dec. 1, 2016).

<sup>9</sup> *See* Del. Code Ann. tit. 13, § 8-201(c) (2009); *Bethany v. Jones*, 378 S.W.3d 731, 738 (Ark. 2011); *Middleton v. Johnson*, 633 S.E.2d 162, 172 (S.C. Ct. App. 2006). *See also* Jason C. Beekman, *In Search of Parity: Child Custody/Visitation and Child Support for Lesbian Couples Under “Companion” Cases Debra H. and In Re H.M.*, in CORNELL LAW SCH. GRADUATE STUDENT PAPERS (May, 15, 2011). (“[C]ourts in a growing number of states have applied long standing common law or equitable doctrines, including *in loco parentis*, *de facto* parenthood, psychological parent, or parent by estoppel to conclude that a person who is not [in a] biological or adoptive relationship with a child, but who has functioned as a parent, is entitled to some rights and responsibilities with respect to the child.”).

individuals that this decision was intended protect.<sup>10</sup> Parental figures are necessary for a child's wellbeing, so requiring a bright-line rule recognizing parental status only with a formal preconception agreement is insufficient to protect children from the harsh consequences of losing such an important relationship. Instead, the context in which the parent-child relationship was formed with the nonbiological, nonadoptive parent should be given significance under the law.<sup>11</sup> Without taking context into account, many children will experience the harsh consequences of terminating their relationship with a primary caretaker.<sup>12</sup> On the other hand, under this Note's proposed approach, judges would have discretion to inquire as to the strength of this parent-child bond and determine whether there would be significant effects on the child if standing was not established.<sup>13</sup>

This Note analyzes how the recent New York Court of Appeals holding in *Brooke S.B.* is insufficient to protect many functional parents whose relationship with the child should be given legal significance. This Note further argues that in the absence of a preconception agreement, a nonbiological, nonadoptive parent should be given the opportunity to establish standing to seek custody or visitation rights. Part I outlines the pertinent case law leading towards the expansion of the term parent. This part discusses *Alison D. v. Virginia M.*, the precedent case that barred all functional parents standing to seek custody and visitation, and how courts have, until recently, continuously applied its narrow definition. Part II elaborates on *Brooke S.B.*, the judicial decision that expanded parental status to include nonbiological, nonadoptive parents who had a valid preconception agreement and analyzes the implications of this judicial decision. This part stresses that the New York Court of Appeals' formal requirement of a preconception agreement is insufficient to protect a significant number of children and nonbiological, nonadoptive parents and argues for a more functional approach to recognizing parental status. Part III argues the

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<sup>10</sup> See *Brooke S.B.*, 61 N.E.3d at 500.

<sup>11</sup> See Brief of Amici Curiae Family Law Academics In Support of Petitioner-Appellant, Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010) (No. 106569-08) [hereinafter Brief In Support of Petitioner-Appellant, Debra H.].

<sup>12</sup> See *id.*

<sup>13</sup> *Id.*

effectiveness of a functional approach is evident by the numerous states that have adopted a similar method. Part IV proposes a solution for the New York Court of Appeals to adopt a more functional analysis which would allow functional parents to seek custody or visitation rights in the absence of a preconception agreement. Additionally, this Note proposes factors a court should take into account in a parental status determination hearing, including consent of the biological parent, intent of the functional parent, and the bond between the parent and child. This type of case-by-case inquiry as an alternative to requiring a preconception agreement would further the New York Court of Appeals' goal in protecting children and functional parents from the harsh consequences of being forced to sever strong emotional bonds.<sup>14</sup>

#### I. NEW YORK PRECEDENT AFFIRMING A LIMITED DEFINITION OF PARENT

The definition of the term parent continues to cause heated debate because it determines who may petition for parental rights pursuant to New York Domestic Relations Law § 70.<sup>15</sup> Domestic Relations Law § 70 provides that:

The court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.<sup>16</sup>

New York courts have historically interpreted this statute to mean that only a parent has standing to seek custody or visitation,

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<sup>14</sup> See *Brook S.B.*, 61 N.E.3d at 497–98.

<sup>15</sup> N.Y. DOM. REL. LAW § 70 (McKinney 1909); see *id.*; *Debra H. v. Janice R.*, 930 N.E.2d 184, 189 (N.Y. 2010); *Alison D.*, 572 N.E.2d 27, 29 (N.Y. 1991).

<sup>16</sup> N.Y. DOM. REL. LAW § 70 (McKinney 1909).

however, the language of the statute lacks guidance as to who is considered to be a parent.<sup>17</sup> As a result, New York courts are left with significant discretion to determine who falls under this definition.<sup>18</sup> Traditionally, only biological or adoptive parents were considered parents pursuant to Domestic Relations Law § 70.<sup>19</sup>

In 1991, the New York Court of Appeals first interpreted Domestic Relations Law § 70 in *Alison D. v. Virginia M.* with an extremely limited definition of the term parent based on heterosexual views of family relations.<sup>20</sup> Two women, Alison and Virginia, had been in a long-term relationship and made an agreement to conceive a child through artificial insemination.<sup>21</sup> Under this preconception agreement, Virginia would carry the child, however both women would share in all parenting obligations and responsibilities.<sup>22</sup> Throughout the first few years of the child's life, Alison, the nonbiological mother, provided both financial and emotional support for the child, and participated in all major decision-making regarding the child.<sup>23</sup> It was apparent that the child considered both Alison and Virginia to be her mothers, evidenced by the fact that the child called both women "mommy."<sup>24</sup> Additionally, the child used both of the mothers' last names.<sup>25</sup> Despite all the parental responsibilities Alison shared in and the important role she played in the child's life, when the couple ended their relationship, the court held that Alison did not have standing to seek visitation or custody.<sup>26</sup>

The court in *Alison D.* relied on an earlier case it decided, *Ronald FF. v. Cindy GG.*, in which the court held that where a biological or adoptive parent is present, a third party may not interfere with the custody of a child unless a court finds "grievous cause or

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<sup>17</sup> See *id.*; *Brooke S.B.*, 61 N.E.3d at 497–98.

<sup>18</sup> See *Brooke S.B.*, 61 N.E.3d at 490; *Debra H.*, 930 N.E.2d at 188–91; *Alison D.*, 572 N.E.2d at 29.

<sup>19</sup> See *id.*

<sup>20</sup> See *Alison D.*, 572 N.E.2d at 30 (Kaye, J., dissenting).

<sup>21</sup> *Id.* at 28.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See *id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 28–29.

necessity.”<sup>27</sup> Alison was deemed a third party because she was not a biological parent and therefore, in the absence of “grievous cause or necessity,” the court determined it must not displace parental custody from the child’s biological mother.<sup>28</sup> The court also looked at Domestic Relations Law § 71<sup>29</sup> and § 72,<sup>30</sup> which list categories of nonparents who have standing to seek custody or visitation.<sup>31</sup> The court interpreted the failure of New York’s Legislature to include functional parents on the list to mean that they did not intend to give functional parents, like Alison, the right to custody or visitation.<sup>32</sup>

In denying Alison standing for visitation, the New York Court of Appeals determined, based on the traditional understanding of a family structure, that it is only the child’s biological mother and father who have the right to custody or visitation.<sup>33</sup> Although Alison conceded that she was not the child’s biological mother, she argued that she should retain parental status because she took on all of the parenting responsibilities throughout the child’s life.<sup>34</sup> In rejecting this argument, the court ruled that “the word ‘parent’ in Domestic Relations Law § 70 should be interpreted to preclude standing for a de facto parent who, under a theory of equitable estoppel, might otherwise be recognized as the child’s parent for visitation purposes.”<sup>35</sup> This holding proved to be a complete bar on functional parents to establish parental status.<sup>36</sup>

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<sup>27</sup> *Alison D.*, 572 N.E.2d at 29; *Ronald FF. v. Cindy GG.*, 511 N.E.2d 75, 77 (N.Y. 1987).

<sup>28</sup> *See Alison D.*, 572 N.E.2d at 29.

<sup>29</sup> *See generally* N.Y. DOM. REL. LAW § 71 (McKinney 1989) (allowing siblings to petition for visitation).

<sup>30</sup> *See generally* N.Y. DOM. REL. LAW § 72 (McKinney 2004) (allowing grandparents to petition for visitation).

<sup>31</sup> *See id.*; N.Y. DOM. REL. LAW § 71 (McKinney 1989); *Alison D.*, 572 N.E.2d at 29.

<sup>32</sup> *See Alison D.*, 572 N.E.2d at 29 (citing N.Y. DOM. REL. LAW §§ 71 & 72).

<sup>33</sup> *See Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 494 (N.Y. 2016); *see also Alison D.*, 572 N.E.2d at 29 (noting that a child’s biological parents have the right to the “care and custody of their child” unless they are deemed unfit).

<sup>34</sup> *See Alison D.*, 572 N.E.2d at 29 (arguing that she “acted as a “de facto” parent or that she should be viewed as a parent ‘by estoppel’”).

<sup>35</sup> *Brooke S.B.*, 61 N.E.3d at 494.

<sup>36</sup> *Id.*



This outcome was widely condemned for two reasons: it did not account for same-sex couples, and it deprived children of parental figures.<sup>37</sup> One major criticism of the decision was the severe impact it had on same-sex couples.<sup>38</sup> The discriminatory effect of this decision is due to the fact that it is impossible for both same-sex partners to be biologically related to the child, while for heterosexual relationships, both parents can have a biological tie to the child.<sup>39</sup> Furthermore, at the time of this decision, same-sex couples could not marry, nor could a nonmarried partner adopt their partner's biological child. Therefore, at least one partner of a same-sex couple who agreed to raise a child together would always be presumed "a legal stranger in the eyes of the law."<sup>40</sup>

Additionally, the court's decision "f[ell] hardest" on the millions of children raised in nontraditional families.<sup>41</sup> Since Domestic Relations Law § 70 requires custody and visitation proceedings based on the best interest of the child,<sup>42</sup> the court's decision was criticized for straying from the best interest approach and failing to expressly consider the child's welfare in providing a definition of the term parent.<sup>43</sup> Consequently, many lower courts in New York

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<sup>37</sup> See Brief In Support of Petitioner-Appellant, Debra H, *supra* note 11 ("That rule, much-criticized by scholars for its harm to both children and their functional parents, bars legal recognition of a parent-child relationship absent a biological or adoptive tie between the child and adult in question.") *Id.* at 2.

<sup>38</sup> See *Brooke S.B.*, 61 N.E.3d at 497–98; *Alison D.*, 572 N.E.2d at 30–31 (1991) (Kaye, J., dissenting); Feuer, *supra* note 1.

<sup>39</sup> *Brooke S.B.*, 61 N.E.3d at 498; Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L. J. 17, 22–23 (1999); RT News, *New York Expands Definition of Parent to Fit Non-Traditional Families*, RT AM. (Sept. 1, 2016), <http://www.rt.com/usa/357708-nys-parenthood-definition-updated/>.

<sup>40</sup> Brief In Support of Petitioner-Appellant, Debra H, *supra* note 11; John Leland, *Parenthood Denied by the Law: After a Same-Sex Couple's Breakup, a Custody Battle*, N.Y. TIMES (Sept. 12, 2014), [http://www.nytimes.com/2014/09/14/nyregion/after-a-same-sex-couples-breakup-a-custody-battle.html?\\_r=0](http://www.nytimes.com/2014/09/14/nyregion/after-a-same-sex-couples-breakup-a-custody-battle.html?_r=0).

<sup>41</sup> *Brooke S.B.*, 61 N.E.3d at 494 (quoting *Alison D.*, 572 N.E.2d at 30 (Kaye, J., dissenting)).

<sup>42</sup> N.Y. DOM. REL. LAW § 70 (McKinney 1909).

<sup>43</sup> *Brooke S.B.*, 61 N.E.3d at 494–95 (citing *Alison D.*, 572 N.E.2d at 30–33 (Kaye, J., dissenting)).

were bound under *Alison D.* to sever bonds between children and primary authority figures in the years following the decision.<sup>44</sup> Columbia Law School Professor Suzanne B. Goldberg, an "expert in sexuality and gender law,"<sup>45</sup> strongly criticized the decision, insisting that New York family law "has not caught up with the way families live their lives, or the rest of New York law. And that gap is causing tremendous damage."<sup>46</sup>

Recognizing the damaging effects of its *Alison D.* decision, the New York Court of Appeals subsequently attempted to counteract the harsh consequences of this extremely narrow definition of "parent," while at the same time refusing to overrule it for 25 years.<sup>47</sup> In 1995, the court held *In re Jacob* that a biological parent's partner who participates in parenthood responsibilities may legalize their relationship with the child through adoption, which was traditionally prohibited.<sup>48</sup> The court reasoned that "from the children's perspective, permitting the adoptions allows the children to achieve a measure of permanency with both parent figures and avoids the sort of disruptive visitation battle we faced in *Matter of Alison D. v. Virginia M.*"<sup>49</sup> Adoption thus became the first option for a nonbiological, same-sex partner to gain standing to seek visitation and custody under the limited definition of *Alison D.*<sup>50</sup>

Subsequently in 2006, on the basis of the child's best interest, the court held in the *Matter of Shondel J. v. Mark D.* that where a nonbiological father mistakenly asserts paternity, he is estopped from denying his obligation to pay child support.<sup>51</sup> The court's goal

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<sup>44</sup> See *Anonymous v. Anonymous*, 20 A.D.3d 333, 333 (N.Y. 2005); *Multari v. Sorell*, 287 A.D.2d 764, 766–67 (3rd Dep't 2001).

<sup>45</sup> *About: Suzanne Goldberg*, OFFICE OF UNIVERSITY LIFE: COLUM. UNIV., <http://universitylife.columbia.edu/about/staff/suzanne-goldberg> (last visited July 13, 2017).

<sup>46</sup> Leland, *supra* note 40.

<sup>47</sup> See *Brooke S.B.*, 61 N.E.3d at 496; *Shondel J. v. Mark D.*, 853 N.E.2d 610, 611 (N.Y. 2006); *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995); Zack Ford, *New York Court Expands Definition of 'Parent' to Recognize Same-Sex Couples*, THINK PROGRESS (Aug. 30, 2016), <https://thinkprogress.org/new-york-same-sex-parenting-decision-2cf5352d8d20#4qsj967nd>.

<sup>48</sup> *In re Jacob*, 660 N.E.2d at 398.

<sup>49</sup> *Id.* at 399.

<sup>50</sup> *Id.* at 398; *Brooke S.B.*, 61 N.E.3d at 495.

<sup>51</sup> *Shondel J.*, 853 N.E.2d at 611.

here was to alleviate the financial consequence on a child raised by only one parent.<sup>52</sup> Under this holding, a nonbiological, nonadoptive parent may be obligated to pay child support,<sup>53</sup> yet has no standing to seek custody or visitation.<sup>54</sup> *Shondel* created a major inconsistency with *Alison D.* because functional parents could be burdened with the obligations of parenthood, but not receive any of the benefits.<sup>55</sup> Despite this major inconsistency, however, when presented with similar facts in *Debra H. v. Janice R.*, the New York Court of Appeals reaffirmed the *Alison D.* definition,<sup>56</sup> but reached a different holding based on the facts.<sup>57</sup> In recognizing the parental status of Debra, a nonbiological parent, the court relied on the common law doctrine of comity to respect the parental status she was granted under Vermont law.<sup>58</sup> The court rejected the argument to overrule *Alison D.* because the majority favored a bright-line rule, insisting that it promoted certainty and uniformity in the event of a breakup.<sup>59</sup>

The New York Court of Appeals continued to oppose arguments advocating for functional parents' rights until the legalization of same-sex marriage, which required a revision of the law to reflect the reality of nontraditional families raising children in New York State.<sup>60</sup> In recognizing the harm inflicted by *Alison D.*'s narrow definition, in *Brooke S.B.* the New York Court of Appeals expanded

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<sup>52</sup> *See id.*

<sup>53</sup> *See id.* at 611–13.

<sup>54</sup> *Brooke S.B.*, 61 N.E.3d at 498.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 496; *Debra H. v. Janice R.*, 930 N.E.2d 184, 186–97 (N.Y. 2010).

<sup>57</sup> *See generally Debra H.*, 930 N.E.2d at 196–97 (giving considerable weight to the fact that the couple entered into a civil union in Vermont prior to the child's birth, the New York Court of Appeals respected the recognition of her parental rights under Vermont law and determined New York law would not impede on these rights).

<sup>58</sup> *Id.* at 196 (citing *Ehrlich-Bober & Co. v. Univ. of Houston*, 404 N.E.2d 726, 730 (N.Y. 1980)) (“The doctrine of comity ‘does not of its own force compel a particular course of action. Rather, it is an expression of one State’s entirely voluntary decision to defer to the policy of another.’”).

<sup>59</sup> *Debra H.*, 930 N.E.2d at 191–92.

<sup>60</sup> *See Brooke S.B.*, 61 N.E.3d at 503–04; Alex Silverman, *New York Court Expands Definition of Parenthood*, CBS N.Y. (Aug. 30, 2016), <http://newyork.cbslocal.com/2016/08/30/new-york-parent-ruling/>.

parental status of functional parents in limited situations,<sup>61</sup> but failed to acknowledge that there are alternative options that would be sufficient to establish standing to seek custody or visitation.<sup>62</sup> By failing to acknowledge alternatives to establish standing, many functional parents and their children are left unprotected by the law.<sup>63</sup>

## II. NEW YORK COURT OF APPEALS EXPANDS PARENTAL RECOGNITION TO RESPECT MARRIAGE EQUALITY AND PROMOTE THE BEST INTEREST OF THE CHILD

In 2016, the New York Court of Appeals was provided the opportunity to revise the precedent rule that limited parental status to biological and adoptive parents when presented with *Brooke S.B. v. Elizabeth A.C.C.*<sup>64</sup> The court expanded the definition of a parent to include functional parents who are able to prove a preconception agreement, between the functional and biological parent, to raise the child by clear and convincing evidence.<sup>65</sup> However, the court declined to use this case to consider alternative ways nonbiological, nonadoptive parents could establish standing.<sup>66</sup>

In *Brooke S.B.*, Brooke and Elizabeth agreed to conceive a child together, although at the time of this agreement they were unable to legally marry as a same-sex couple.<sup>67</sup> Elizabeth became pregnant through artificial insemination, while Brooke took the role of the child’s functional parent, sharing in all parenthood responsibilities.<sup>68</sup> Throughout Elizabeth’s pregnancy, Brooke regularly attended doctor appointments and cut the umbilical cord at birth.<sup>69</sup> The child took Brooke’s last name and referred to her as

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<sup>61</sup> Abramowitz, *supra* note 8.

<sup>62</sup> See *Brooke S.B.*, 61 N.E.3d at 500–01.

<sup>63</sup> See discussion *infra* pp. 21–22.

<sup>64</sup> See *Brooke S.B.*, 61 N.E.3d at 497.

<sup>65</sup> *Id.* at 501.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 490–91.

<sup>68</sup> *Id.* at 491.

<sup>69</sup> *Id.*

“Mama B.”<sup>70</sup> The year following the child’s birth, Elizabeth returned to work, while Brooke stayed home to care for the child.<sup>71</sup>

Four years after the birth of the child, the women’s relationship deteriorated and Elizabeth terminated contact between the child and Brooke.<sup>72</sup> Brooke commenced an action in family court requesting joint custody and visitation.<sup>73</sup> An attorney was appointed for the child, who determined it was in the child’s best interest to grant Brooke visitation based on his interactions with the child and his knowledge of the circumstances.<sup>74</sup> Elizabeth moved to dismiss on the basis that Brooke lacked standing to seek custody and visitation because she did not fall within the definition of a parent under *Alison D.*<sup>75</sup>

Both the child’s attorney and Brooke opposed the motion, insisting that *Alison D.* should be overruled to reflect the changes in the law legalizing same-sex marriage and the best interest of the parties’ child.<sup>76</sup> Susan Sommer, Lambda Legal’s Director of Constitutional Litigation, on Brooke’s behalf contended that:

the prevailing New York legal precedents do not account for the myriad ways that people make families, including same-sex couples, and that to consider non-biological parents “legal strangers” to the children they have cared for since birth is not in the best interest of these children. New York’s passage of the Marriage Equality Act and the U.S. Supreme Court’s 2015 marriage ruling in *Obergefell v. Hodges* call for greater respect for the families formed by same-sex couples and their recognition as full-fledged parents of their children.<sup>77</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See id.*

<sup>77</sup> *Brooke S.B. v. Elizabeth C.C., Summary*, LAMBDA LEGAL, [http://www.lambdalegal.org/in-court/cases/ny\\_brooke-sb\\_v\\_elizabeth-cc](http://www.lambdalegal.org/in-court/cases/ny_brooke-sb_v_elizabeth-cc) (last visited July 13, 2017).

Despite these arguments, both lower courts denied Brooke’s motion seeking custody and visitation, reasoning that she was neither related to the child biologically or through adoption, nor did she marry the child’s biological parent,<sup>78</sup> and therefore they were bound by *Alison D.*<sup>79</sup>

After analyzing the definition rendered in *Alison D.* in terms of recent legal foundations regarding same-sex families,<sup>80</sup> the New York Court of Appeals held that a functional parent could establish standing to seek custody or visitation pursuant to Domestic Relations Law § 70 by proving through clear and convincing evidence a preconception agreement to jointly raise the child.<sup>81</sup> Once a court establishes that the petitioner meets this evidentiary burden, the court would then proceed with a typical custody or visitation proceeding as if between two biological or adoptive parents.<sup>82</sup>

The court relied on two main reasons in its decision to overrule *Alison D.* in favor of a more practical approach.<sup>83</sup> The court looked at both the discriminatory application the prior rule had on same-sex couples and the harm it inflicted on the millions of children raised in families with same-sex parents.<sup>84</sup> With respect to the prior holding’s discriminatory application to same-sex parents, the court found it problematic in light of recently enacted laws governing marriage equality.<sup>85</sup> The court reasoned that because of the legalization of same-sex marriage, both in New York<sup>86</sup> and nationwide,<sup>87</sup> the heterosexual concepts underlying the traditional determination of parental rights in New York were no longer dispositive.<sup>88</sup>

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<sup>78</sup> *Brooke S.B.*, 61 N.E.3d at 491.

<sup>79</sup> *Id.*

<sup>80</sup> *See id.* at 497–500.

<sup>81</sup> *Brooke S.B.*, 61 N.E.3d at 490.

<sup>82</sup> *See id.* at 501.

<sup>83</sup> *Id.* at 497–500.

<sup>84</sup> *See id.*

<sup>85</sup> *Id.* at 498.

<sup>86</sup> N.Y. DOM. REL. LAW § 10-a (McKinney 2011).

<sup>87</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2599–605 (2015).

<sup>88</sup> *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 498 (N.Y. 2016) (“*Alison D.*’s foundational premise of heterosexual parenting and nonrecognition of same-

In 2011, New York legalized same-sex marriage under the Marriage Equality Act.<sup>89</sup> The New York Legislature's intent in enacting this statute was to ensure equal treatment of same-sex couples under the law.<sup>90</sup> Therefore, the statute also mandates that the state government give equal treatment to same-sex and opposite-sex marriages regarding legal status, privileges, benefits, and responsibilities.<sup>91</sup> The New York legislature recognized that stable family dynamics help strengthen society, and concluded the legalization of same-sex marriage would be beneficial in New York State.<sup>92</sup>

Four years later, in *Obergefell v. Hodges*, the Supreme Court of the United States ruled that the fundamental constitutional right to marry should be interpreted to include the right to marry another

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sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court's holding in *Obergefell v. Hodges*, which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples.") (citation omitted).

<sup>89</sup> N.Y. DOM. REL. LAW § 10-a (McKinney 2011) ("A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.").

<sup>90</sup> *Id.* ("It is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law. The omission from this act of changes to other provisions of law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage. The legislature intends that all provisions of law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act.").

<sup>91</sup> *Id.* ("No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex."). For example, in *Wendy G-M. v. Erin G-M.*, where a dispute arose between a birth mother and her wife, a New York Supreme Court held that the common law presumption of consent to conceive a child through artificial insemination by an anonymous donor must be applied equally to same-sex couples as it is to heterosexual couples based on the Marriage Equality Act. *Wendy G-M v. Erin G-M.*, 985 N.Y.S.2d 845, 860–61 (N.Y. Sup. Ct. 2014).

<sup>92</sup> N.Y. DOM. REL. LAW § 10-a(2) (2011) (describing the legislative intent).

individual of the same sex.<sup>93</sup> The Court expressed that prohibiting same-sex marriage deprived a child raised by a same-sex couple of a safeguard of having married parents<sup>94</sup> and attested to the harm and humiliation banning same-sex marriages had on the “hundreds of thousands of children [who] are presently being raised by [same-sex] couples.”<sup>95</sup> Based on the legalization of same-sex marriage, the New York Court of Appeals agreed that the holding in *Alison D.* lacked continued vitality because of the discriminatory effect it had on same-sex couples.<sup>96</sup>

The second reason influencing the New York Court of Appeals to overrule *Alison D.* was that the *Alison D.* definition completely failed to consider the child’s best interest, which is inconsistent with New York’s family law jurisprudence.<sup>97</sup> In an amicus brief for the American Civil Liberties Union, attorney William Rubenstein argued that “a restrictive reading of parent which denies petitioner standing, burdens the constitutional rights of the child by establishing an irrebuttable presumption that visitation by a co-

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<sup>93</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2604–05 (2015); NORTHERN TRUST, *OBERGEFELL V. HODGES IMPACT ON SAME-SEX RELATIONSHIP RECOGNITION* 1 (2015), <https://www.northerntrust.com/documents/articles/wealth-management/insights-lgbt-financial-planning.pdf>. According to Justice Kennedy, the plaintiffs requested “equal dignity in the eyes of the law. The constitution grants them that right.” *Obergefell*, 135 S.Ct. at 2608.

<sup>94</sup> *Obergefell*, 135 S.Ct. at 2600–01.

<sup>95</sup> *Id.* at 2600.

<sup>96</sup> See *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 495–500 (N.Y. 2016).

<sup>97</sup> See *id.* at 498–500; Brief In Support of Petitioner-Appellant, Debra H, *supra* note 11. See generally *New York Custody and Visitation Schedules*, CUSTODY CHANGE, <https://www.custodyxchange.com/new-york/visitation-schedule.php> (last visited July 13, 2017) (describing how judges take into consideration the best interest of a child in any matter involving that child). Under the Uniform Marriage and Divorce Act (“UMDA”), a court is to consider a list of factors in determining the best interest of the child such as, the desires of the child’s parents; the desire of the child; the encounter and development of the relationship between the child and parent, as well as a relationship the child creates with a sibling or others that would affect the child; the child’s ability to adjust to the community, including the school and home; and the health of all parties involved. UNIF. MARRIAGE AND DIVORCE ACT §402 (amended 1973).



parent is never in the child's best interest."<sup>98</sup> Acknowledging that the precedent definition did not give any weight to the best interest of the child, the court wrote, "in *Alison D.*, we narrowly defined the term 'parent,' thereby foreclosing 'all inquiry into the child's best interest' in custody and visitation cases involving parental figures who lacked biological or adoptive ties to the child."<sup>99</sup>

The New York Court of Appeals found that, in light of the statistics illustrating that there are a significant number of same-sex partners raising children in New York,<sup>100</sup> as well as the social science revealing the harsh impact separating children from parental figures has on the child,<sup>101</sup> the *Alison D.* definition was no longer workable on the basis that such a restrictive definition completely disregarded the welfare of the child.<sup>102</sup> First, census data show a significant number of same-sex partners raising children in New York.<sup>103</sup> Based on this finding, scholars have argued that the increase in diverse family relationships transforms the concept of the average family dynamic, insisting biology should no longer be a determinative factor of a parent-child relationship.<sup>104</sup> Even when

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<sup>98</sup> Brief for The American Civil Liberties Union as Amici Curiae Supporting Petitioner, *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991).

<sup>99</sup> *Brooke S.B.*, 61 N.E.3d at 498.

<sup>100</sup> *Id.* at 499 (citing GARY J. GATES & ABIGAIL M. COOKE, WILLIAMS INST., NEW YORK CENSUS SNAPSHOT: 2010 1 (2010), [http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot\\_New-York\\_v2.pdf](http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_New-York_v2.pdf)).

<sup>101</sup> See Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL'Y 1, 6–7 (2009); Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D v. Virginia M.*, 17 COLUM. J. GENDER & L. 307, 330–31 (2008); Amanda Barfield, Note, *The Intersection of Same-Sex and Stepparent Visitation*, 23 J.L. & POL'Y 257, 259–60 (2014); Mary Ellen Gill, Note, *Third Party Visitation in New York: Why the Current Standing Statute Is Failing Our Families*, 56 SYRACUSE L. REV. 481, 488–89 (2006). See also Joseph G. Arsenault, Comment, "Family" but Not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals, 58 ALB. L. REV. 813, 834–36 (1995).

<sup>102</sup> *Brooke S.B.*, 61 N.E.3d at 495–97.

<sup>103</sup> See *supra* note 100.

<sup>104</sup> See *id.* at 499–500 (citing *Troxel v. Granville*, 530 U.S. 57, 63–64 (2000)); Roy L. Reardon & William T. Russel Jr., *Overturning Precedent on Meaning of Parenting: New York Court of Appeals Roundup*, 256 N.Y. L. J. 3, 3 (2016).

*Alison D.* was decided, statistics showed that over eight million children throughout the United States were raised by same-sex parents.<sup>105</sup> Furthermore, over fifteen million children at that time were raised by two parents, where at least one parent was not biologically related to the child.<sup>106</sup> Over the years these numbers increased drastically, especially in New York, as a result of the changes in the law and society welcoming same-sex couples.<sup>107</sup>

The court also referenced social science reports to support its finding that the narrow precedent definition of the term parent was contrary to the best interest of countless children of nonbiological, nonadoptive parents residing in New York State. These reports revealed the harm inflicted on these children as a result of the bright-line rule that denied all functional parents the right to have contact with the child.<sup>108</sup> The consensus among family law academics and child psychologists is that children benefit from forming meaningful relationships with two primary parent figures.<sup>109</sup> Additionally, forensic psychologists have testified in custody and visitation proceedings that prohibiting the child from having a relationship

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<sup>105</sup> *Brooke S.B.*, 61 N.E.3d at 499 (citing *Alison D. v. Virginia M.*, 572 N.E.2d 27, 30 (1991) (Kaye, J., Dissenting)).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (citing GATES & COOKE, *supra* note 103, at 1); Reardon & Russel Jr., *supra* note 104, at 3.

<sup>108</sup> *Id.* (citing Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL’Y 1, 7 (2009)); Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D v. Virginia M.*, 17 COLUM. J. GENDER & L. 307 (2008); Amanda Barfield, Note, *The Intersection of Same-Sex and Stepparent Visitation*, 23 J.L. & POL’Y 257, 259–60 (2014); Mary Ellen Gill, Note, *Third Party Visitation in New York: Why the Current Standing Statute Is Failing Our Families*, 56 SYRACUSE L. REV. 481, 488–89 (2006); Joseph G. Arsenaault, Comment, “Family” but not “Parent”: The Same-Sex Coupling Jurisprudence of the New York Court of Appeals, 58 ALB. L. REV. 813, 834–36 (1995)).

<sup>109</sup> *Chatterjee v. King*, 280 P.3d 283, 292 (N.M. 2012); Brian Alexander, *Family Income- Not Married Parents-More Apt to Impact Kids’ Well Being*, NBC NEWS (Feb. 27, 2015), <http://www.nbcnews.com/health/health-news/family-income-not-married-parents-more-apt-impact-kids-well-n313486>. For years, scholars insisted that, “children benefit from continued contact with functional parents, and that the law must recognize the importance of these relationships in adjudicating familial disputes.” Brief In Support of Petitioner-Appellant, Debra H, *supra* note 11, at 6.

with the functional parent is detrimental to the child's well-being.<sup>110</sup> Consequently, the New York Court of Appeals provided one option—entering into a preconception agreement—for functional parents to establish parental status in the eyes of the law.<sup>111</sup>

Although the *Brooke S.B.* holding was a significant step in achieving fairer parenting laws by giving functional parents the opportunity to establish parental status under certain circumstances,<sup>112</sup> the New York Court of Appeals declined to consider other situations in which a nonbiological, nonadoptive parent would be able to establish standing to seek custody or visitation.<sup>113</sup> The court provided that,

Because we necessarily decided these cases based on the facts presented to us, it would be premature for us to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody.<sup>114</sup>

Had the court wanted to find that a functional parent was prohibited from establishing standing for parental rights in a situation where the biological parent consented to the parent-child relationship after conception of the child, they likely would have done so. However, the court did not preclude this argument nor did the court provide any rationale as to why the adoption of a functional approach would be anything but beneficial.<sup>115</sup>

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<sup>110</sup> See generally Stephen P. Herman, *I Have Two Mommies*, AAPL NEWSLETTER (Jan. 2014), <http://www.aapl.org/docs/newsletter/January%202014.pdf> (recalling his experience in a visitation proceeding, forensic psychologist Stephen P. Herman writes, "I testified that the child was equally attached to both of her mommies and it would be detrimental to cut off all contact with her non-biological mother.").

<sup>111</sup> See *Brooke S.B.*, 61 N.E.3d at 501.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* at 500.

<sup>114</sup> *Id.* at 500–01.

<sup>115</sup> See *id.* at 501.

Given the myriad ways to create families today that rely on parent-child relationships in multiple aspects of everyday life,<sup>116</sup> the bright-line rules requiring biology, adoption, marriage, or a preconception agreement<sup>117</sup> do not adequately protect the interests of the child and functional parent. "The reality of contemporary society is that family life today takes many different forms and as part of that development, ideas about the meaning of parentage are changing."<sup>118</sup> Under the current law there will be instances where nonbiological, nonadoptive parents who play a pertinent role in the child's life are prohibited from seeking custody or visitation because either they are unable to prove a preconception agreement by clear and convincing evidence or a preconception agreement never occurred.<sup>119</sup> New York law should recognize that a functional approach as an alternative is required in order to protect all families, including ones formed in diverse ways that function equivalently to traditional families. Without an alternative method for functional parents to establish parental status, a significant amount of parent-child relationships will be unprotected by the law.

One major reason why significant amounts of children and functional parents will be unprotected by the *Brooke S.B.* holding is because a preconception agreement is not the strongest indicator of a parent-child relationship. Despite the fact that the functional parent could be the child's primary caregiver, and it would be in the child's best interest to maintain this relationship, he or she could be stripped of all legal rights as the child's parent absent a preconception agreement.<sup>120</sup> For example, suppose a biological parent and a nonbiological parent jointly raise a child but made no agreement to do so before the child was conceived. Instead, the two parents agreed

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<sup>116</sup> See *K.E.M. v. P.C.S.*, 38 A.3d 798, 808 (Pa. 2012) (quoting *Commonwealth ex rel. Gonzalez v. Andreas*, 369 A.2d 416, 419 (Pa. Super. Ct. 1976)) (allowing parent by estoppel due to the fact that "relying upon the representation of the parental relationship, a child naturally and normally extends his love and affection to the putative parent"); Brief for Family Law Academics as Amici Curiae Supporting Appellant, Debra H., *supra* note 11.

<sup>117</sup> *Debra H. v. Janice R.*, 930 N.E.2d 184, 202 (N.Y. 2010).

<sup>118</sup> Charles P. Kindregan, Jr., *Collaborative Reproduction and Rethinking Parentage*, 21 J. AM. ACAD. MATRIM. L. 43, 44 (2008).

<sup>119</sup> See *Brooke S.B.*, 61 N.E.3d at 501.

<sup>120</sup> See *id.*

post-conception to raise the child. Under the current law, that formality would be enough to sever the parent-child relationship.<sup>121</sup> Continuing with the hypothetical, after the child was born the biological parent went back to work, while the nonbiological parent quit her career to stay home and care for the child. Upon the termination of their relationship when the child is five, the biological parent seeks to terminate the relationship between the child and nonbiological parent. However, due to her time-consuming career and long hours, the biological parent wants to hire a twenty-four-hour live-in babysitter to care for the child outside school hours. Although the biological parent acknowledges it would be in the child's best interest to maintain a relationship with the nonbiological parent rather than a babysitter, she refuses to allow the relationship to continue out of spite. Under the current law, the nonbiological parent and the child would be forced to sever their relationship.<sup>122</sup> As the hypothetical illustrates, the current law under *Brooke S.B.* fails to provide protection for the functional parent and the child because the context of the parent-child relationship is neglected in the inquiry of whether the functional parent established standing.<sup>123</sup>

Additionally, a functional approach should be adopted as an alternative to requiring a preconception agreement because under the current law there will be instances where the parties participate in a preconception agreement, but the functional parent is unable to prove the agreement existed by clear and convincing evidence.<sup>124</sup> While a functional parent can enter into a preconception agreement in writing to easily satisfy this condition, however, the ordinary individual involved in a case of this nature is unlikely to be aware that this is the law and is unlikely to seek advice of a lawyer at the high point in the couple's relationship when they agree to conceive a child. This creates an unfair disadvantage to individuals unfamiliar with the law. Furthermore, without an agreement that is reduced to writing, a standing hearing will consist of a "he said/she said" problem.<sup>125</sup> An alternative functional approach should be adopted

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<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

under New York law to avoid these issues and to better protect diverse family forms. This is especially so when comparing New York's approach to other states which have adopted more functional approaches to recognizing parental status and have recognized *de facto* parental relationships.

### III. EFFECTIVENESS OF A FUNCTIONAL APPROACH

New York law should recognize that there are alternative ways for functional parents to establish sufficient evidence to infer a parental relationship with the child. As an alternative to requiring a preconception agreement, the New York Court of Appeals should adopt a flexible approach that considers the specific dynamic of each family. Academic scholars have argued that courts should give weight to whether the parents, the child, and others have carried on in a parent-child relationship or recognized the relationship between a parent and child.<sup>126</sup> Likewise, states that have adopted this type of approach give considerable weight to a variation of three important elements, including consent of the biological or adoptive parent, intent of the functional parent to form a parent-child bond, and the development of the relationship between the child and the functional parent.<sup>127</sup>

The effectiveness of this type of functional approach is evident by the numerous states that have adopted similar methods.<sup>128</sup>

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<sup>126</sup> See Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INFO 1, 5 (2000); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 UNIV. COLO. L. REV. 269, 270 (1991) (insisting that a parent-child relationship should be recognized where the parent and child "share affection and resources, think of one another as family members, and present themselves as such"); Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family"*, 26 GONZ. L. REV. 91, 99 (1990); Dana C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J. L. & PUB. POL'Y 1, 42 (2015–2016).

<sup>127</sup> Brief for Family Law Academics as Amici Curiae Supporting Appellant, Debra H., *supra* note 11, at 4.

<sup>128</sup> See *id.* ("Courts around the country have likewise embraced these criteria as they have abandoned the formalistic conception of the family reflected in *Alison D.* Importantly, these courts have exercised their well-established equitable powers to adopt these criteria, recognizing functional parent-child relationships

Statutory law in Connecticut, Delaware, Texas, and the District of Columbia, among others, expanded parental recognition to functional parents.<sup>129</sup> For example, under the District of Columbia Code, a petitioner establishes status as a *de facto* parent where the biological or adoptive parent agreed to allow the functional parent to take on parental responsibilities, he or she formed an emotional bond with the child, and resided with the child for at least ten months of the year preceding the commencement of the action.<sup>130</sup> Likewise, Delaware law recognizes a functional parent as someone who took on parental obligations and privileges, with the consent of the biological or adoptive parent, for a sufficient amount of time to form an intimate parent-child relationship.<sup>131</sup>

Many other states have expanded parental recognition of nonbiological, nonadoptive parents through case law.<sup>132</sup> The first state to expand parental rights in such a way was Pennsylvania,<sup>133</sup> where the Pennsylvania Supreme Court ruled that “a person may put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption.”<sup>134</sup> Soon after, the Supreme Court of Wisconsin held that a petitioner must meet four

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that best serve the interests of legal parents and fairly addressing the interests of functional parents.”).

<sup>129</sup> NAT’L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES 6 (2016), [http://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Reognition\\_of\\_LGBT\\_Families.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Reognition_of_LGBT_Families.pdf) (acknowledging that many states [] have enacted statutes to expand parental recognition of functional parents, such as “Arizona, Colorado, Connecticut, Delaware, Indiana, Kentucky, Maine, Minnesota, Montana, Nevada, Oregon, South Carolina, Texas, and the District of Columbia”) [hereinafter NCLR, LEGAL RECOGNITION OF LGBT FAMILIES].

<sup>130</sup> D.C. CODE § 16-831.01(B)(2016).

<sup>131</sup> DEL. CODE ANN. tit. 13, § 8-201(C) (2017).

<sup>132</sup> NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 129. These states “include: Alaska, Arkansas, Arizona, Colorado, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Washington, West Virginia, and Wisconsin.” *Id.* at 5.

<sup>133</sup> Nancy D. 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, 502 (1990).

<sup>134</sup> *Id.* (quoting *Spells v. Spells*, 378 A.2d 879, 881 (Pa. Super. Ct. 1977)).

elements in order to establish status as a *de facto* parent.<sup>135</sup> This four-part test considers the consent of the biological or adoptive parent, intent of the functional parent regarding parental responsibilities, whether the functional parent and the child resided together, and whether a parent-child relationship was formed.<sup>136</sup> This test was adopted by many other state courts, including New Jersey, Massachusetts, Maine, and Washington.<sup>137</sup> Similarly, a North Carolina decision held that a nonbiological, nonadoptive parent established standing where the petitioner proved intent to form a parent-child relationship, the parties jointly made decisions on behalf of the child, and the parent and child formed an intimate relationship.<sup>138</sup> Only a few states now have a complete bar on awards of custody and visitation for functional parents who equally participate in parenthood responsibilities.<sup>139</sup>

The American Law Institute ("ALI") also supports giving nonbiological, nonadoptive parents the opportunity to establish standing to seek custody or visitation based on a functional approach.<sup>140</sup> Recognizing that a nonbiological, nonadoptive parental figure may be essential to the welfare of the child, the ALI Principles provide two different options, including *parent by estoppel* and *de facto* parent, to establish parental status as a functional parent.<sup>141</sup> *Parent by estoppel* can be established where the petitioner is ordered to pay child support on behalf of the child, where the petitioner

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<sup>135</sup> *In re H.S.H.-K.*, 533 N.W.2d 419 (Wisc. 1995).

<sup>136</sup> *Id.* at 421.

<sup>137</sup> Beekman, *supra* note 9 at 25–6. *See also* NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 129, at 5 ("Some states, including Indiana, Maine, Nebraska, Pennsylvania, and Washington, have case law recognizing that a non-biological and non-adoptive parent can have all of the rights and responsibilities of parentage based on the following factors: her acceptance of the responsibilities of parentage, living with the child, the legal parent's fostering a parent-child relationship between the child and the non-biological and non-adoptive parent, and the existence of a bonded parent-child relationship.").

<sup>138</sup> *Mason v. Dwinnell*, 660 S.E.2d 58, 220–21 (N.C. Ct. App. 2008).

<sup>139</sup> NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 129, at 5.

<sup>140</sup> *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.03 (AM. LAW INST. 2002); Barbara Bennett Woodhouse, *Horton Looks at the ALI Principles*, 4 J.L. & FAM. STUD. 151, 154–55 (2002).

<sup>141</sup> *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.03 (AM. LAW INST. 2002).



cohabitated with the child for at least two years and had a reasonable belief, based on the representation of the other parent, that he or she was a co-parent, or where the petitioner resided with the child for at least two years and participated in parental responsibilities, pursuant to the consent of the legal parent.<sup>142</sup> A functional parent can establish *de facto* parental status where the petitioner is “an adult who lived with the child and who regularly performed at least half of the caretaking functions with respect to the child, with the consent of at least one of the child’s parents and without expectation of financial compensation.”<sup>143</sup> Thus, it is clear that the drafters of the ALI Principles support the “widespread consensus” for law reform to recognize functional parents.<sup>144</sup>

A functional approach under New York law, similar to those mentioned above, would be beneficial because it is consistent with the court’s broadened definition of a parent, and also mitigates the court’s concern about infringing on the legal parent’s fundamental rights.<sup>145</sup> In *Brooke S.B.*, the New York Court of Appeals emphasized that they expanded the definition of parent to promote the best interest of the child and protect the rights of functional, same-sex parents.<sup>146</sup> Adopting a functional approach as an alternative to a formal preconception agreement will further these goals.<sup>147</sup> It would “meet the needs of contemporary families by ensuring that family realities are reflected in law, particularly given that many children are no longer raised by two married parents.”<sup>148</sup> Given contemporary society, there will be many situations in which

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* See also Beekman, *supra* note 9 (suggesting that functional parents should be given the opportunity to establish standing to seek custody or visitation); Herbie DiFonzo, *Toward a Unified Theory of Family: The American Law Institute’s Principles of the Law of Family Dissolution*, 2001 B.Y.U. L. REV. 923, 936–38 (2001) (arguing in favor of uniform adoption of the ALI Principles because it treats the best interest of the child as a priority).

<sup>145</sup> See Brief for Family Law Academics as Amici Curiae Supporting Appellant, Debra H., *supra* note 11, at 7.

<sup>146</sup> See *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 498–501 (N.Y. 2016).

<sup>147</sup> See Brief for Family Law Academics as Amici Curiae Supporting Appellant, Debra H., *supra* note 11, at 6–7.

<sup>148</sup> *Id.* at 7.

a functional parent takes on all parental responsibilities, but did not make a preconception agreement to raise the child.<sup>149</sup> Without creating an alternative way for functional parents to establish parental status, both children and functional parents will suffer.<sup>150</sup> Therefore, a functional approach would best-serve the New York Court of Appeals' consideration of the functional parent's equality and the best interest of the child.<sup>151</sup>

One might argue that giving nonbiological, nonadoptive parents status under the law infringes on the biological or adoptive parent's fundamental right to control and care for their child.<sup>152</sup> However, a functional approach mitigates this risk by requiring the legal parent's consent when determining whether to expand parental rights to functional parents.<sup>153</sup> There is a consensus around the country that a legal parent retains a fundamental right to raise the child in the way he or she chooses.<sup>154</sup> Therefore, "the fundamental nature of those rights mandates caution in expanding the definition of that term [parent] and makes the element of consent of the biological or adoptive parent critical."<sup>155</sup> Indeed, there are alternative ways to ensure that the biological or adoptive parent consented to the functional parent's relationship with the child

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<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> See *id.*; Paula L. Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y. L. SCH. J. HUM. RTS. 513, 516 (1993); Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L. Q. 23, 46–48 (2006); Martin Guggenheim, *Rediscovering Third Party Visitation Under the Common Law in New York: Some Uncommon Answers*, 33 N.Y.U. REV. L. & SOC. CHANGE 153, 153–54 (2009); Polikoff, *supra* note 133, at 463–64.

<sup>152</sup> See *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 494, 499 (N.Y. 2016).

<sup>153</sup> See generally Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 385–390 (1994) (illustrating how a functional approach takes into account concerns about consent from the biological parent when expanding parental rights to functional parents).

<sup>154</sup> *Troxel v. Granville*, 530 U.S. 57, 63–66 (2000); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

<sup>155</sup> See *Brooke S.B.*, 61 N.E.3d at 499.

absent a formal preconception agreement.<sup>156</sup> For example, under Wisconsin law, which was adopted by many other states,<sup>157</sup> consent of the biological or adoptive parent is an element the petitioner must prove.<sup>158</sup> Similarly, under the ALI Principles, *de facto* parenthood can be established by residing with the child for two years and having an arrangement with the biological or adoptive parent to provide parental support.<sup>159</sup> Each of these approaches address the concern regarding consent of the legal parent to avoid infringing on that parent's fundamental right.<sup>160</sup>

From surveying other states' approaches to recognizing functional parents, there are numerous solutions to the New York Court of Appeals' unanswered question of whether there are alternative ways for a functional parent to establish parental status in the absence of a preconception agreement.<sup>161</sup> By adopting a functional approach as an alternative to requiring a preconception agreement, the court "can bring New York's family law into step with the general trend, identified and endorsed by family law academics throughout the State and country."<sup>162</sup> Similar to other states, a case-specific inquiry considering family dynamics and parent-child interest should govern the court's analysis.

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<sup>156</sup> See Brief for Family Law Academics as Amici Curiae Supporting Appellant, Debra H., *supra* note 11, at 9–10.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 18–23.

<sup>159</sup> PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.03 (AM. LAW INST. 2002).

<sup>160</sup> See Brief for Family Law Academics as Amici Curiae Supporting Appellant, Debra H., *supra* note 11, at 9; Beekman, *supra* note 9.

<sup>161</sup> See D.C. CODE § 16-831.01 (2016); *In re H.S.H.-K.*, 533 N.W.2d 419, 419 (Wisc. 1995); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.03 (AM. LAW INST. 2002). See also NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 129, at 6 ("Many states have enacted statutes giving *de facto* parents or persons who have assumed a true parental role in a child's life a right to seek visitation or custody.").

<sup>162</sup> Brief for Family Law Academics as Amici Curiae Supporting Appellant, Debra H., *supra* note 11, at 3.

## IV. SOLUTION

As a result of the New York Court of Appeals' unanswered question of recognizing parental status for functional parents in the absence of a preconception agreement, instances will occur where a parent-child relationship is unprotected by the law, negatively impacting both the child and functional parent. To better protect these families, a functional approach should be adopted that is in-line with other states' approaches as an alternative to requiring a formal preconception agreement. Such an approach envisions a three-part test to establish standing. A court would consider: 1) whether the biological or adoptive parent at any time consented to the functional parent's intimate, parent-child relationship with the child; 2) whether the nonbiological, nonadoptive parent intended to take on the privileges, responsibilities, and obligations of parenthood; and 3) whether the functional parent and the child formed a sentimental relationship.

The first factor requires a court to find that the legal parent consented to the parental relationship between his or her partner and the child. "The legal parent's consent to and encouragement of a functional parent-child relationship is essential to the recognition of that relationship."<sup>163</sup> This is to ensure that the biological or adoptive parent's fundamental rights are protected, which was a critical issue that the New York Court of Appeals was concerned with when hesitating to expand parental recognition to functional parents.<sup>164</sup> It is uncontested that consent at some point in time from the biological parent is required, whether the consent be in the form of a preconception agreement, which was the case in *Brooke S.B.*,<sup>165</sup> an agreement after conception, or consent that is implied from the actions and representations of the legal parent.<sup>166</sup>

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<sup>163</sup> *Id.* at 8.

<sup>164</sup> *See id.* at 9; *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 499 (N.Y. 2016); Polikoff, *supra* note 133, at 490.

<sup>165</sup> *Brooke S.B.*, 61 N.E.3d 488 at 500–01.

<sup>166</sup> *See* D.C. CODE § 16-831.01; *In re H.S.H.-K.*, 533 N.W.2d at 421; Dwinell, 660 S.E.2d at 61–62; PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.03 (AM. LAW INST. 2002). *See also* Brief for Family Law Academics as Amici Curiae Supporting Appellant,

Beyond a written or oral agreement, there are numerous ways in which a legal parent can consent to a parent-child relationship. For example, New York courts could find implied consent where the child uses the functional parent's last name or there is joint decision-making between the parties regarding the best interest of the child.<sup>167</sup> Additionally, a court might find consent where the legal parent induced the parent-child relationship, such as requesting that the functional parent treat the child as family and encouraging the functional parent to foster a relationship between the child and his or her extended family. Another relevant factor in establishing consent should be whether the legal parent insisted that the functional parent take on significant financial burdens on behalf of the child that are typically the responsibility of a parent, such as college tuition. Although consent is necessary to protect the fundamental rights of the biological or adoptive parent, there are alternative ways to infer consent other than a preconception agreement.

Second, a court should consider whether the nonbiological, nonadoptive parent intended to take on the role of parenthood. This element is established where the functional parent voluntarily takes on parental responsibilities.<sup>168</sup> This would be a fact-specific inquiry, but facts sufficient to meet this requirement could include whether the functional parent provides financial support on behalf of the child, holds the child out to be his or her own, participates in decision-making, spends sufficient time with the child in the absence of the legal parent, or takes time off of work to engage in parental obligations.<sup>169</sup>

Third, a court should analyze the development of the parent-child relationship. Although no one factor would be dispositive, the court should consider whether the functional parent provided support for the child, either financially, intellectually, or emotionally, as well as whether the functional parent and the child resided together, the duration of the relationship, the daily

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Debra H., *supra* note 11, at 9–10 (elaborating on the importance of consent from the legal parent).

<sup>167</sup> Brief for Family Law Academics as Amici Curiae Supporting Appellant, Debra H., *supra* note 11, at 9–10.

<sup>168</sup> *Id.* at 11.

<sup>169</sup> *Id.*; see also Shapiro, *supra* note 39, at 24–25.

encounters of the functional parent and child, whether the sharing of affection is mutual, and the child's desires.

Under this three-part test, the functional parent seeking to obtain parental status would bear the burden of proving each element upon dissolution of his or her relationship with the child's legal parent. This type of approach gives the judge discretion in determining whether both parents and the child were held out as a family, and whether it would be unfair to deny recognition of this relationship upon dissolution of the parents' relationship. This approach also allows a judge to consider the hardship a child would face from being forced to terminate his or her relationship with a significant adult figure while simultaneously placing the burden on the presumed functional parent to prove that such a relationship should not be terminated.

#### CONCLUSION

After years of harsh consequences resulting from the 25-year-old precedent in *Alison D.*, the New York Court of Appeals in *Brooke S.B.* finally expanded the definition of a parent to include parental rights of functional parents.<sup>170</sup> Albeit limited, the court's holding relaxed the complete bar of parental recognition for same-sex couples, as well as heterosexual couples who form families in nontraditional ways, by providing an option for nonbiological, nonadoptive parents to establish parental status in the form of a preconception agreement. The decision pushed New York family law in the right direction of achieving the fairest outcome in the event of a relationship termination, however there is more work to be done. The court refused to decide whether a functional parent may establish standing to seek custody or visitation in the absence of a preconception agreement, leaving the door open for potential challenges to functional parents seeking a parental status determination.<sup>171</sup>

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<sup>170</sup> *Brooke S.B.*, 61 N.E.3d at 490; see Reardon & Russel, *supra* note 104; Silverman, *supra* note 60.

<sup>171</sup> *Brooke S.B.*, 61 N.E.3d at 500 (reasoning that an expansion of standing to include partners without pre-conception arrangements would be premature).

Consistent with multiple states that have flexible parenting laws,<sup>172</sup> the New York Court of Appeals should adopt a functional approach as an alternative to requiring a formal preconception agreement. In order to promote the welfare of the child and protect the rights of the functional parent, a court should determine whether, based on the facts of each case, the child's legal parents consented to the parent-child relationship, whether the functional parent intended to fulfill parental responsibilities, and whether a parent-child relationship was actually formed. By satisfying each of these prongs, a functional parent would establish standing to petition the court for custody or visitation, which would then result in a custody or visitation proceeding that would be determined in the best interest of the child.

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<sup>172</sup> See, e.g., D.C. CODE § 16-831.10 (2009); DEL. CODE ANN. tit. 13, § 8-201 (2013); *Spells v. Spells*, 378 A.2d 879, 881 (Pa. 1977) (refusing to reject stepparent's visitation privileges because of status as a stepparent); *In re H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wisc. 1995) (holding that the court has equitable powers to grant visitation when a parent-like relationship exists); *Mason v. Dwinnell*, 660 S.E.2d 58, 64-68 (N.C. Ct. App. 2008) (holding that former domestic partner of natural parent had standing to seek custody of a child conceived during a domestic partnership).