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# COMMENT

## ALISON D. v. VIRGINIA M.:\* NEGLECTING THE BEST INTERESTS OF THE CHILD IN A NONTRADITIONAL FAMILY

### INTRODUCTION

In our changing society, fewer and fewer children are living in traditional family structures comprised of a biological mother, a biological father and full-blood siblings.<sup>1</sup> Many courts are struggling to accommodate the needs of children to maintain the new and nontraditional relationships in which they grow up.

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\* 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991).

<sup>1</sup> A recent report of the United States Department of Labor Bureau of Labor Statistics concluded that "there is no such thing as a 'typical' family." James R. Wetzel, *American Families: 75 Years of Change*, 113 MONTHLY LAB. REV. 4 (1990). The report found that increasingly fewer families are living in "married-couple families" due in large part to high divorce rates and a growth in what the author terms "nonfamily households—those not consisting of persons related by blood, marriage, adoption, or other legal arrangement." *Id.* at 11. "[I]n a particularly dramatic shift away from traditional nuclear family living, families maintained by never-married women increased tenfold over the past two decades, rising from 248,000 in 1970 to 2.7 million in 1988." *Id.* at 5. The report found family arrangements to be less stable and more heterogenous structures than in the past. *Id.* at 4.

In 1982 25% of children did not live with both of their biological parents. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 880-81 (1984). Estimates indicate that by 1990 this will have risen to 40%.

The reasons for this phenomenon are familiar. More and more parents obtain divorces, resulting in single parent families or, as divorced parents remarry, step-families. An increasing number of parents never marry. Some parents abandon their children; others give their children to temporary caretakers; and still others are judged unfit to raise their children, who are then placed in foster homes.

Bartlett, *supra*, at 881 (citations omitted).

Estimates further suggest that as many as 10 million children have a lesbian mother or gay father. See 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, 461 n.2 (1990).

These efforts, however, do not always achieve a rational or sensitive balance that can accommodate both the rights of parents and the rights and needs of children to maintain these relationships. Unfortunately, courts often sever these very important relationships.

A difficult situation that courts are only now confronting is created when two women make the decision to conceive a child through artificial insemination and subsequently terminate their relationship. After a break-up in the women's relationship, as with heterosexual relationships, a battle for custody and visitation with the child often ensues.<sup>2</sup> The New York Court of Appeals recently addressed this issue in *Alison D. v. Virginia M.*<sup>3</sup> and refused a nonbiological lesbian mother standing to sue for visitation with the child that she had parented for six years because she was not a "parent" within the meaning of the New York Domestic Relations Law.

The result is tragic in *Alison D.*, particularly for the child who is prohibited from maintaining a relationship that he had depended on from birth. This result, however, was not necessarily dictated by existing law, despite the court's avowal that it was powerless to achieve a different outcome.

This Comment examines the procedural history and decision in *Alison D.* and discusses the decision in light of other cases decided by the New York Court of Appeals on related issues. This Comment argues that *Alison D. v. Virginia M.* was wrongly decided for several reasons. First, the court failed to consider whether visitation would be in the best interests of the

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<sup>2</sup> While few of these visitation cases have reached the courts, the general pattern has been that the woman who was not artificially inseminated is denied any opportunity to see the child and the child is denied any right to see her. See *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Cal. App. 1 Dist. 1991) (interpreting the Uniform Parentage Act's definition of parent as the natural or adoptive parent, the court rejected non-biological mother's arguments that she stood *in loco parentis* to the child, that she was the *de facto* parent of the child, that she was a parent by estoppel, or that she was the functional parent of the child); *Sporleder v. Hermes*, 471 N.W.2d 202 (Wis. 1991) (live-in companion of the biological mother did not meet statutory burden of proving that visitation between her and the child would not interfere with the relationship between the custodial parent and the child); *Kulla v. McNulty*, 472 N.W.2d 175 (Minn. Ct. App. 1991) (non-biological mother held not to have standing to petition because the existence of a parent-like relationship is insufficient to constitute a "compelling" circumstance, the co-parenting agreement between the two women was unenforceable and the doctrine of equitable estoppel could not be used to create rights).

<sup>3</sup> 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991).

child, ignoring the most fundamental precept of family law that custody and visitation decisions will be made on the basis of what is in the child's best interests.

Second, the court refused to address the substance of Alison D.'s contention that she stood in a parental relationship to the child, and was thus eligible for standing as a parent under Domestic Relations Law section 70.<sup>4</sup> Instead, the court summarily decided her petition on the procedural issue of lack of standing. This approach is not only inconsistent with the court's recent decisions involving statutory interpretation,<sup>5</sup> but is also at odds with decisions in other jurisdictions. Other jurisdictions have conferred parental status on those who have assumed the duties and responsibilities of raising a child with the intention of acting as a parent, with the full knowledge and consent of the biological or legal parent.<sup>6</sup> The court inappropriately narrowed its focus

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<sup>4</sup> Section 70 of the New York Domestic Relations Law provides for habeas corpus proceedings to obtain custody of a child. While the text of the statute explicitly provides only for custody proceedings, it is frequently used for visitation proceedings as well. Scheinkman, Practice Commentaries, N.Y. DOM. REL. LAW § 70 (McKinney 1988 & Supp. 1993). The statute refers only to parents but does not define the term. The statute states in pertinent part that

either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent 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.

N.Y. DOM. REL. LAW § 70 (emphasis added).

<sup>5</sup> See *infra* notes 69-92 and accompanying text. *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989), see *infra* notes 74-81 and accompanying text, is a prime example of the power of the court of appeals to effectuate the policy and intent of the legislature in interpreting a statute where a significant term remains undefined. The *Braschi* court interpreted the term "family" to include a gay life partner to protect the surviving partner from eviction under New York City housing regulations. *Emanuel S. v. Joseph E.*, 78 N.Y.2d 178, 577 N.E.2d 27, 573 N.Y.S.2d 36 (1991), see *infra* notes 82-92 and accompanying text, is a liberal application of section 72 of the Domestic Relations Law to grandparents suing for visitation against the wishes of the parents in an intact nuclear family.

<sup>6</sup> *Bryan v. Bryan*, 645 P.2d 1267 (Ariz. Ct. App. 1982) (step-father entitled to hearing on visitation petition on *in loco parentis* doctrine); *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978) (same); *Spells v. Spells*, 378 A.2d 879 (Pa. Super. Ct. 1977) (same). See also *In re Paternity of D.L.H.*, 419 N.W.2d 283 (Wis. Ct. App. 1987) (equitable estoppel could successfully be brought against natural mother to prevent her from contesting alleged

to biology and traditional legal categories to dispose of the issue of whether a parent/child relationship existed for the purpose of the Domestic Relations Law. The court's approach, elevating parental rights and prerogatives over the child's interest in maintaining a particular relationship, is difficult to reconcile with the court's power. Moreover, this balancing of interests in *Alison D.* conflicts with the court's recent holding in another visitation case where grandparents were accorded standing to petition for visitation against the wishes of the parents in an intact nuclear family.<sup>7</sup>

Third, the decision was short-sighted. The court did not consider the ramifications its holding would have for a variety of other relationships, including step-parents, step-grandparents and common-law partners.<sup>8</sup> This Comment suggests that the effort of the court to establish standing for visitation rights before any consideration of the best interests of the child ill-serves the court's role of protecting a child under the state's *parens patriae* power.<sup>9</sup> This Comment recommends that the court determine the best interests of a child and standing for visitation by

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father's paternity); *Atkinson v. Atkinson*, 408 N.W.2d 516 (Mich. Ct. App. 1987) (non-biological father may acquire rights and responsibilities of natural father under the equitable parent theory); *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982) (psychological parent theory could be used to confer parental status on non-adoptive parent).

None of these theories have yet been used to confer parental status on a nonbiological lesbian mother. Rather, they have been used most often in cases involving step-parents. But there is no theoretical barrier to applying them to a non-biological lesbian mother. In fact, there is a stronger case to be made for conferring such status on a lesbian mother because she was instrumental in the conception and birth of the child in a way a step-parent was not. Polikoff, *supra* note 1, at 511 n.283.

For a discussion of each of these theories, see *infra* notes 110-39 and accompanying text.

<sup>7</sup> See *Emanuel S. v. Joseph E.*, 78 N.Y.2d 178, 577 N.E.2d 27, 573 N.Y.S.2d 36 (1991). In *Emanuel S.* the court of appeals unanimously reversed the denial of standing and remanded for a finding of whether "circumstances existed such that equity would see fit to intervene," 78 N.Y.2d at 181, 577 N.E.2d at 29, 573 N.Y.S.2d at 38, thus ordering a finding of whether such visitation would be in the best interests of the child.

This Comment examines the decision in *Emanuel S.*, see *infra* notes 82-92 and accompanying text, insofar as it highlights the court's willingness to construe the grandparent visitation statute broadly to enable it to consider the best interests of a child in an intact nuclear family. This Comment suggests that the decisions in *Emanuel S.* and *Alison D.* are fundamentally inconsistent with each other.

<sup>8</sup> See *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 657, 572 N.E.2d 27, 30, 569 N.Y.S.2d 586, 589 (1991) (Kaye, J., dissenting).

<sup>9</sup> For a brief explanation of the *parens patriae* role of the court, see *supra* notes 58-59 and accompanying text.

analyzing the nature of the relationship between the petitioner and the child. The nature of this relationship will define whether it is in the child's best interests to maintain such a relationship and whether the petitioner has sufficient standing as a parent to sue for visitation.

## I. BACKGROUND

### A. *Facts*

Petitioner Alison D. and respondent Virginia M. entered into a relationship in September, 1977 and began to live together in March, 1978.<sup>10</sup> Two years later the two women decided to have a child and agreed that respondent would be artificially inseminated.<sup>11</sup> All arrangements for the conception and birth of the child were made jointly, and the two women agreed to share equally in the financial, psychological and emotional rights and responsibilities of parenting the child.<sup>12</sup> In July, 1981 respondent gave birth to a baby boy. The boy, A.D.M., was given petitioner's last name as his middle name and respondent's last name as his last name.<sup>13</sup> Childbirth and household expenses, both before and after his birth, were shared by the two women, including the maintenance of their jointly owned home.<sup>14</sup> After A.D.M.'s birth, respondent and petitioner jointly cared for him and made decisions concerning his welfare.<sup>15</sup>

In November, 1983 the relationship between petitioner and respondent ended.<sup>16</sup> A.D.M. was almost two-and-a-half years old at the time. By this time, he referred to both Alison D. and Virginia M. as "Mommy."<sup>17</sup> Petitioner moved out of their home but

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<sup>10</sup> *Alison D.*, 77 N.Y.2d at 655, 572 N.E.2d at 29, 569 N.Y.S.2d at 537.

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

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Another child was conceived by the two women through artificial insemination when A.D.M. was two years old, with Alison D. as the biological mother. See Brief for Petitioner at 5 n.4, *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991) (2 No. 61) [hereinafter *Petitioner's Brief*]. While this child was not part of the litigation, it is startling that there was no discussion of the fact that this sibling-type relationship was also being severed as a result of the court's decision.

<sup>14</sup> *Alison D.*, 77 N.Y.2d at 655, 572 N.E.2d at 29, 569 N.Y.S.2d at 537.

<sup>15</sup> *Id.* Such shared responsibilities and decisions included decisions on medical care, selection of nursery school and administering of discipline. *Petitioner's Brief* at 7, *Alison D.* (2 No. 61).

<sup>16</sup> *Alison D.*, 77 N.Y.2d at 655, 572 N.E.2d at 29, 569 N.Y.S.2d at 537.

<sup>17</sup> *Id.*

continued to see A.D.M. several times a week under a joint, oral visitation schedule.<sup>18</sup> Petitioner also agreed to continue to pay one-half of the household expenses, including the mortgage on the home. Alison D. believed that these financial contributions were a form of child support.<sup>19</sup> This mutually agreed upon visitation arrangement continued until 1986 when respondent began to restrict petitioner's visitation with A.D.M.<sup>20</sup>

In 1987 petitioner moved to Ireland but continued her efforts to maintain her relationship with A.D.M., sending him both letters and gifts. Respondent terminated all of petitioner's contact with A.D.M., returning all of her letters and gifts to A.D.M.<sup>21</sup> The relationship between petitioner and the child was acknowledged by both the appellate division and the court of appeals to be close and loving.<sup>22</sup>

### B. *Procedural History*

Under section 70 of the Domestic Relations Law, petitioner Alison D. commenced a proceeding to obtain visitation with A.D.M.<sup>23</sup> She petitioned on the theory that visitation should not be limited solely to biological parents and that she was "in loco parentis" to him,<sup>24</sup> and thus had standing to demand a hearing on whether such visitation would be in his best interests.<sup>25</sup> She further alleged that respondent Virginia M. should be equitably estopped<sup>26</sup> from denying visitation between the infant and Alison D. since Virginia M. had encouraged the development of the relationship between Alison D. and A.D.M. and Alison D. had

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<sup>18</sup> *Id.*

<sup>19</sup> Petitioner's Brief at 7, *Alison D.* (2 No. 61).

<sup>20</sup> 77 N.Y.2d at 655, 572 N.E.2d at 29, 569 N.Y.S.2d at 587.

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

<sup>22</sup> *Alison D.*, 155 A.D.2d 11, 16, 552 N.Y.S.2d 321, 324 (2d Dep't 1990); *Alison D.*, 77 N.Y.2d at 655, 572 N.E.2d at 29, 569 N.Y.S.2d at 587.

<sup>23</sup> For the text of the statute, see *supra* note 4. Significantly, the text of the statute does not define the term "parent," thereby leaving open the central question of whether the relationship between Alison D. and A.D.M. was a parent-child relationship and thus, deserving of protection.

<sup>24</sup> For a discussion of the *in loco parentis* doctrine, see *infra* notes 113-19 and accompanying text.

<sup>25</sup> Petitioner's Brief at 17, 10, 25, 47, *Alison D.* (2 No. 61). See also *Alison D.*, 155 A.D.2d 11, 12, 552 N.Y.S.2d 321, 322 (2d Dep't 1990); *Alison D.*, 77 N.Y.2d at 656, 572 N.E.2d at 29, 569 N.Y.S.2d at 588.

<sup>26</sup> For a discussion of the doctrine of equitable estoppel and its application in visitation cases, see *infra* notes 120-33 and accompanying text.

relied to her detriment on Virginia M.'s assurances that the relationship would be continued.<sup>27</sup> The supreme court dismissed the petition, holding that the petitioner did not have standing to petition for visitation because she was not a parent within the meaning of the Domestic Relations Law.<sup>28</sup> The court refused to "adopt the definition of a parent as someone standing in loco parentis." Instead, it held that, for the purposes of the statute, "the biological parent of a child is the parent."<sup>29</sup>

## 1. The Appellate Division Decision

### a. *The Majority*

The appellate division affirmed the decision of the supreme court, with one justice dissenting.<sup>30</sup> The majority noted that the best interests of the child are only considered once standing has been conferred on a petitioner. Accordingly, the court held that petitioner did not have standing because, while section 70 does not explicitly define "parent," petitioner was not a parent within the meaning of the statute.<sup>31</sup> First, the majority relied heavily on *Ronald FF. v. Cindy GG.*,<sup>32</sup> where the court of appeals held that the "extraordinary circumstances"<sup>33</sup> rule could not be applied to

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<sup>27</sup> Petitioner's Brief at 47-55, *Alison D.* (2 No. 61).

<sup>28</sup> *Alison D.*, 155 A.D.2d at 12-13, 552 N.Y.S.2d at 322.

<sup>29</sup> *Id.* at 13, 552 N.Y.S.2d at 322.

<sup>30</sup> 155 A.D.2d at 11, 552 N.Y.S.2d at 321 (per curiam)(Koooper, J., dissenting).

<sup>31</sup> *Id.* at 13, 552 N.Y.S.2d at 322.

<sup>32</sup> 70 N.Y.2d 141, 511 N.E.2d 75, 517 N.Y.S.2d 932 (1987).

<sup>33</sup> The "extraordinary circumstances" rule was established in *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976). In *Bennett* the court stated that intervention by the State in the right and responsibility of a natural parent to custody of her or his child is warranted if there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child. *Id.* at 549, 356 N.E.2d at 283, 387 N.Y.S.2d at 827.

The *Bennett* court was confronted with a proceeding by a natural mother seeking custody of her daughter from an unrelated woman into whose care her parents had entrusted the child nearly eight years before. The natural mother, at the time of the daughter's birth, was 15 years-old and unwed. At the time of her petition for custody the natural mother had almost completed college and was sufficiently established that she believed she could care for the child. Moreover, the natural mother's parents no longer had any objections to her regaining her daughter's custody. The caretaker had intended to, but had not yet initiated, adoption proceedings.

The family court specifically found that the mother, through her actions, had not abandoned, surrendered, or persistently neglected the child, but still denied her petition,



a dispute over visitation.<sup>34</sup> The court found that there was no material difference between the petitioner's unsuccessful argument in *Ronald FF.* that extraordinary circumstances warranted an award of visitation and Alison D.'s argument that she stood *in loco parentis* to A.D.M.<sup>35</sup> Second, the majority rejected the

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determining that the child's best interests would be served by remaining in the care of her present custodian. 51 A.D.2d 544, 545, 378 N.Y.S.2d 420, 421 (2d Dep't 1976). The appellate division reversed and awarded custody to the natural mother, holding that absent a finding of abandonment, surrender or neglect, the mother's right to custody of the child was paramount. *Id.*

The court of appeals reversed and remanded, stating that "[a]bsent extraordinary circumstances, narrowly categorized, it is not within the power of a court . . . to make significant decisions concerning the custody of children, merely because it could make a better decision or disposition." *Bennett*, 40 N.Y.2d at 545, 356 N.E.2d at 281, 387 N.Y.S.2d at 824. In applying the articulated rule, the court determined that the prolonged separation of the child and mother constituted extraordinary circumstances, that an examination of the best interest of the child was warranted and that a new hearing be held to inquire into what would be in the child's best interest. *Id.* at 550, 356 N.E.2d at 284, 387 N.Y.S.2d at 827-28.

<sup>34</sup> In *Ronald FF.* petitioner was adjudged by the court of appeals to be a biological stranger to the child with whom visitation was sought. In *Ronald FF.* petitioner and respondent resumed an earlier relationship, at which time respondent, the mother of the child, informed petitioner that she was approximately four months pregnant and that he might be the father. They moved in together, petitioner assisted respondent in the pregnancy, was present at the delivery and was listed as the father on the child's birth certificate. Petitioner was held out as the father of the child and over the following year petitioner continued to see the child regularly, even during periods of estrangement with the mother. The mother commenced a support proceeding against petitioner. Upon learning that the mother intended to move from New York to Texas, petitioner commenced a proceeding to obtain a temporary restraining order to prevent respondent mother from moving, at which time a hearing was commenced to determine the paternity of the child. It was determined that petitioner was not the biological father of the child, but the appellate division found that the circumstances were sufficiently "extraordinary" that the best interests of the child should be considered to determine whether visitation should be ordered. 117 A.D.2d 332, 334, 502 N.Y.S.2d 823, 825 (3d Dep't 1986).

The court relied heavily on the *Bennett* "extraordinary circumstances" doctrine. The court of appeals reversed, however, holding that absent a compelling state interest that would further the best interests of the child, the mother's right to choose with whom her child would associate may not be interfered with by the state. 70 N.Y.2d at 144-45, 511 N.E.2d at 77, 517 N.Y.S.2d at 934. Petitioner's application was denied because no such purpose was shown, the fitness of the mother was not questioned and visitation, not custody, was sought.

For a more extensive discussion of *Ronald FF.*, see Polikoff, *supra* note 1, at 518-20.

<sup>35</sup> *Alison D.*, 155 A.D.2d at 15, 552 N.Y.S.2d at 324. In fact, one could argue that there is a significant difference between the two arguments for relief. The petitioner in *Ronald FF.* was applying as a third party against the wishes of the custodial parent. In *Alison D.*, on the other hand, petitioner was applying as a non-custodial parent. Thus, the issue that both the appellate division and the court of appeals focused on was Alison D.'s standing to sue as a parent, not as a third party challenging the wishes of the custodial parent.

dissent's reliance on *Braschi v. Stahl Associates*.<sup>36</sup> In *Braschi* the New York Court of Appeals interpreted the term "family" to include a long-term homosexual relationship for the purposes of rent control and eviction laws. The appellate division majority concluded the *Alison D.* decision by stating that it did not "by virtue of [its] determination on this issue, minimize, in any way, the close and loving relationship that the petitioner has apparently developed with the child"<sup>37</sup> and that "had the petitioner come within the meaning of the term 'parent' contained in Domestic Relations Law section 70, her claim for visitation would have been worthy of serious consideration."<sup>38</sup>

### b. *The Dissent*

In her dissent, Justice Kooper found that the petitioner had standing to sue for visitation and criticized the majority for refusing to consider the best interests of the child in the absence of legal or biological parentage.<sup>39</sup> She claimed that the majority

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Yet, the arguments made by the petitioners in *Alison D.* and in *Ronald FF.* are analogous in that each argued that the biological mother should be equitably estopped from denying the petitioner a continuing role in the subject child's life, solely on the grounds of a lack of biological tie. The outcome in both cases may have ill-served the child's best interests, because in both cases an important relationship upon which the child depended was abruptly and permanently terminated. However, the court of appeals' decisions effectively terminated any discussion of what would and would not be in either child's best interests.

<sup>36</sup> The court additionally stated that in the *Braschi* decision "the Court of Appeals merely held that *Braschi* could be considered a member of the deceased tenant's 'family', and thereby seek protection from eviction under New York City Rent and Eviction Regulations." 155 A.D.2d at 15, 552 N.Y.S.2d at 324 (emphasis added). Given the attention received by that decision, it is disingenuous to refer to it in such a casual manner. For a discussion of the *Braschi* decision, see *infra* notes 74-81 and accompanying text.

<sup>37</sup> *Alison D.*, 55 A.D.2d at 16, 552 N.Y.S.2d at 324.

<sup>38</sup> *Id.* By this statement, the court presumably meant that if petitioner's application were dealt with on the merits, visitation between petitioner and A.D.M. may well have been found to be in the best interests of the child. This attitude is similarly, though not as explicitly, reflected in the opinion of the court of appeals. See *Alison D.*, 77 N.Y.2d 651, 655, 572 N.E.2d 27, 29, 569 N.Y.S.2d 586, 587 (1991) (referring to her "close and loving" relationship with A.D.M.).

This Comment criticizes this approach and suggests that standing to sue should not act as a barrier to courts in visitation and custody cases. The *Alison D.* decision demonstrates poignantly the impact of procedure on substance: the court's holding that *Alison D.* had no standing effectively precluded her from having any substantive rights *vis-a-vis* A.D.M. The decision also shows that the best interests of the child are not served when a court claims itself to be helpless to go beyond the most restrictive and traditional definition of "parent," regardless of the special circumstances of the child.

<sup>39</sup> *Alison D.*, 155 A.D.2d at 17, 552 N.Y.S.2d at 325 (Kooper, J., dissenting). The

failed to appraise realistically "the term 'parent' within the context of the circumstances presented."<sup>40</sup> The dissent relied on *Braschi v. Stahl Associates*<sup>41</sup> as testimony to the court of appeals' willingness to: (1) eschew "fictitious legal distinctions or genetic history" as dispositive in examining the term "family"; (2) base its holding on "the reality of family life"; and (3) examine the commitment and interdependence that was deliberately created between two people.<sup>42</sup> She reasoned that the proper inquiry in determining whether standing to sue for visitation should be granted should not be the presence or absence of a legal or biological relationship, but "the underlying nature of the relationship between the child and the individual seeking visitation."<sup>43</sup> She further argued that to label the petitioner in the case a "stranger" to the child neither accorded with the reality of the circumstances nor furthered the best interests of the child.<sup>44</sup>

## 2. The Court of Appeals Decision

### a. *The Majority*

The court of appeals, with a strong dissent, affirmed the order of the appellate division.<sup>45</sup> The court framed the issue before

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dissent reminded the court that "in family matters concerning relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided" and "[t]he governing criterion, as always, is the best interests of the child." *Id.*

<sup>40</sup> *Id.* at 16, 552 N.Y.S.2d at 324.

<sup>41</sup> 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

<sup>42</sup> *Alison D.*, 155 A.D.2d at 17-18, 552 N.Y.S.2d at 325 (citing *Braschi v. Stahl Assocs.*, 74 N.Y.2d at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789) (Kooper, J., dissenting). Justice Kooper found that the policy considerations which "necessitated a re-examination of so traditional and sacrosanct a concept as the American family" were even more compelling in the case at bar because of the substantial authority in other jurisdictions for the award of visitation to individuals who, while not biologically or legally related to the child, stood *in loco parentis* to the child. *Alison D.*, 155 A.D.2d at 18, 552 N.Y.S.2d at 326 (Kooper, J., dissenting).

<sup>43</sup> 155 A.D.2d at 20, 552 N.Y.S.2d at 327.

<sup>44</sup> *Id.* This point highlights the way that both the court of appeals and the appellate division framed the issue so as to make the outcome seem to flow logically and inevitably from the fact that Alison D. was neither the biological nor adoptive parent of A.D.M. It does not seem nearly so unreasonable to deny standing to a "biological stranger," as petitioner is referred to by both courts, as it would seem if she were defined in terms that captured the lengthy and loving relationship that admittedly existed between her and the child.

<sup>45</sup> *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586

it as "whether petitioner, a biological stranger to a child who is properly in the custody of his biological mother, has standing to seek visitation with the child under Domestic Relations Law section 70."<sup>46</sup> Despite the admittedly close and loving relationship between Alison D. and A.D.M., the court found that she was not a parent within the meaning of the Domestic Relations Law and affirmed the denial of her petition for visitation. The court defined "parent" as a biological parent or "a legal parent by virtue of an adoption."<sup>47</sup> Without addressing the substance of her claims of parental status *vis-a-vis* A.D.M., the court held that these claims were insufficient for the purposes of section 70, stating that "[t]raditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child."<sup>48</sup>

Thus, the majority addressed petitioner's application as that of a third party nonparent, finding that because she did not contest respondent's fitness as a parent, she had no right to visitation "absent grievous cause or necessity."<sup>49</sup> According to the

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(1991)(per curiam)(Kaye, J., dissenting).

<sup>46</sup> *Alison D.*, 77 N.Y.2d at 654-55, 572 N.E.2d at 28, 569 N.Y.S.2d at 587.

<sup>47</sup> *Id.* at 656, 572 N.E.2d at 29, 569 N.Y.S.2d at 588.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* The court makes a point of noting that visitation is a limited form of custody to emphasize the degree of interference that would result from a grant of visitation where a concededly fit parent has determined that it would not be in the best interests of the child to have such visitation. The court states that petitioner "has no right to petition the court to displace the choice made by this fit parent in deciding what is in the child's best interests." *Id.* at 657, 572 N.E.2d at 29, 569 N.Y.S.2d at 588. It seems a fairly large assumption that respondent's refusal to allow petitioner contact with the child arose out of concern for the child's best interests. Valid arguments were made by both Alison D. and Virginia M. for whether such visitation would be in the best interests of A.D.M. However, the court refused to consider the merits of Alison D.'s arguments and instead chose to adopt Virginia M.'s conclusions as its own.

Visitation implicates a parent's right to choose with whom the child may associate—a parental right that should only be burdened if the child needs to maintain a particular relationship. *Id.* at 661, 572 N.E.2d at 32, 569 N.Y.S.2d at 591 (Kaye, J., dissenting) (citing *Weiss v. Weiss*, 52 N.Y.2d 170, 174-75, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981) (custodial parent prevented from moving out of the state because of potential interference with the visitation rights of the non-custodial parent)). As the dissent correctly points out, however, the court's opinion is fundamentally inconsistent because "[i]t cannot be that visitation is the same as custody—a limited form of custody—and yet at the same time different from custody in that the 'extraordinary circumstances' doctrine is inapplicable." 77 N.Y.2d at 660 n.2, 572 N.E.2d at 32 n.2, 569 N.Y.S.2d at 591 n.2 (Kaye, J., dissenting). The court's opinion gave Virginia M. the benefit of the similarity of visitation to custody while denying Alison D. the protection under the "extraordinary circumstances" doctrine, which should have logically flowed

majority, a grant of visitation would impair the biological parent's control and custody of the child.<sup>50</sup> Yet, Alison D.'s contention was that she was a parent to A.D.M. and not merely an unrelated third party who had developed a relationship with A.D.M. The majority refused to interpret the term "parent" to include "categories of nonparents who have developed a relationship with a child."<sup>51</sup> The court buttressed its position by noting that the legislature had given courts, in the cases of siblings and grandparents, explicit statutory authority to "determine whether an award of visitation would be in the child's best interests."<sup>52</sup>

### b. *The Dissent*

Judge Kaye, in a well-reasoned and thoughtful dissent, had three major criticisms of the court's handling of petitioner's ap-

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from the court's analogy.

<sup>50</sup> The court here clearly is favoring the parental rights and prerogative of control of the child over what may be in the best interests of the child. The court makes its position quite clear when it stated "[w]hile one may dispute in an individual case whether it would be beneficial to a child to have continued contact with a nonparent, the Legislature did not in section 70 give such nonparent the opportunity to compel a fit parent to allow them to do so." 77 N.Y.2d at 657, 572 N.E.2d at 30, 569 N.Y.S.2d at 588. The difficulty with the court's point is that the premise of Alison D.'s arguments, which the court rejected, was that she was a parent, not a nonparent.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* This is irrelevant to Alison D.'s arguments, however, because the provisions for grandparents and siblings were intended to broaden standing for third parties and did not address petitioners applying as parents. Had the New York legislature intended those sections to preclude others from having standing as parents, it could easily have expressed that intention in the statute by explicitly barring all except those listed in the statute.

The court also cited *Nancy S. v. Michele G.*, 228 Cal. Rptr 212 (Cal. App. 1 Dist., 1991), where the California court, under similar circumstances, denied a non-biological lesbian mother standing to sue for visitation, finding that she was not a parent within the meaning of the applicable statute. As the dissent aptly pointed out, however, the California court was bound by the specific definition of "parent" contained in the statute. *See Alison D.*, 77 N.Y.2d at 659, 572 N.E.2d at 30-31, 569 N.Y.S.2d at 589-90 (Kaye, J., dissenting). California's Uniform Parentage Act defined a parent as an individual who is an adoptive or natural parent of a child. CAL. CIV. CODE § 7001 (West 1983 & Supp. 1992); *see Nancy S.*, 228 Cal. Rptr. at 212. Thus, the California court could not, without completely disregarding the statutory definition, recognize the petitioner in that case as a parent. The court of appeals in *Alison D.*, however, was not so bound because the Domestic Relations Law provides no definition of "parent" and the court was indeed free to interpret the term to include petitioner.

For a limited discussion of statutory interpretation as it applies to *Alison D.*, see *infra* notes 74-110 and accompanying text.

plication. First, the court imposed upon itself an "unnecessarily restrictive definition of 'parent.'" <sup>53</sup> Second, the court abdicated its duty to promote the welfare and best interests of the child. <sup>54</sup> Third, the court overlooked the "significant distinction between visitation and custody proceedings." <sup>55</sup> The dissent expressed regret that the majority failed to exercise its broad equitable powers so as to effectuate the best interests of the child, particularly because the avowed objective of the visitation statute is to promote the welfare and happiness of the child. <sup>56</sup> The court's holding, the dissent noted, "firmly closes the door on all consideration of the child's best interest in visitation proceedings . . . unless petitioner is a biological parent." <sup>57</sup>

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<sup>53</sup> 77 N.Y.2d at 660, 572 N.E.2d at 31, 569 N.Y.S.2d at 590. The dissent's discussion in favor of a more expansive definition of the term "parent" relied on cases from New York in which statutory purpose is effectuated by defining undefined terms. It also relied on cases from other jurisdictions dealing with tests for parental status for the purposes of visitation decisions. Cases that are instructive on this point are: *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989); *People v. Eulo*, 63 N.Y.2d 341, 472 N.E.2d 286, 482 N.Y.S.2d 436 (1984). For a discussion of the *Braschi* decision, see *infra* notes 74-81 and accompanying text. In *Eulo* the New York Court of Appeals, in the absence of a statutory definition for the term "death," determined that the term "may be construed to embrace a determination, made according to accepted medical standards, that a person has suffered an irreversible cessation of breathing and heartbeat or, when these functions are artificially maintained, an irreversible cessation of the functioning of the entire brain, including the brain stem" to impose criminal liability on a defendant for homicide. 63 N.Y.2d at 346, 472 N.E.2d at 289, 482 N.Y.S.2d at 439. Thus, the court's rationale in *Eulo* that "[f]ew words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension" should logically have extended to Alison D.'s plea for an interpretation of "parent" capable of accommodating the relationship between A.D.M. and her. *Id.* at 354, 472 N.E.2d at 294, 482 N.Y.S.2d at 444 (quoting *Surace v. Danna*, 248 N.Y. 18, 21, 161 N.E. 315, 316 (1928)).

The dissent attempted to allay concerns that a more expansive definition would give everyone in a caretaker relationship with a child standing to sue for visitation. Judge Kaye discussed factors that could be used by courts in determining whether parental or *in loco parentis* status exists, including how the relationship arose, the duration of the relationship and the nature of the responsibilities assumed by the party claiming *in loco parentis* status exists. 77 N.Y.2d at 662, 572 N.E.2d at 32, 569 N.Y.S.2d at 591.

<sup>54</sup> *Id.* at 660, 572 N.E.2d at 31, 569 N.Y.S.2d at 590.

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

<sup>56</sup> *Id.* at 659, 572 N.E.2d at 31, 569 N.Y.S.2d at 590; see N.Y. DOM. REL. LAW § 70 (McKinney 1980 & Supp. 1993). The legislature makes clear in section 70 that the avowed purpose of the statute is that "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." The dissent also noted that the court's opinion diverged from the principle that the best interests of the child take precedence over the right of parental custody. 77 N.Y.2d at 660, 572 N.E.2d at 31, 569 N.Y.S.2d at 590 (quoting *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976)).

<sup>57</sup> 77 N.Y.2d at 661, 572 N.E.2d at 32, 569 N.Y.S.2d at 591.

## II. THE COURT'S FAILURE TO CONSIDER THE BEST INTERESTS OF THE CHILD: HOW POWERLESS WAS THE NEW YORK COURT OF APPEALS?

It is well established in New York that when a court entertains a visitation or custody proceeding, the court acts in the state's role as *parens patriae* and, thus, has the duty and the power to make determinations on the basis of the best interests of the child.<sup>58</sup> A court's power is equitable in nature, and it accordingly has very broad discretion to effectuate a child's best interests.<sup>59</sup> However, courts generally presume that a child's best interests are served through care by the natural or adoptive parent(s) and recognize a near irrebuttable presumption that the right of parents to raise their children is fundamental and ought not be interfered with absent grievous cause or necessity.<sup>60</sup>

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<sup>58</sup> See, e.g., *Bachman v. Mejias*, 1 N.Y.2d 575, 136 N.E.2d 866, 154 N.Y.S.2d 903 (1956) (New York court has duty to decide custody on the basis of a child's welfare); *Kropp v. Shepsky*, 305 N.Y. 465, 468, 113 N.E. 801, 803 (1953) ("a child's welfare is the first concern of the court upon a habeas corpus proceeding, where the judge acts 'as *parens patriae* to do what is best for the interest of the child'"); *Finlay v. Finlay*, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925) (The chancellor "acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent,' and make provision for the child accordingly.").

<sup>59</sup> The practice commentaries to section 70 of the Domestic Relations Law make this point clearly. They state that "the Supreme Court has broad, inherent power as a court of equity and those powers are not limited by statutes concerning the habeas corpus remedy. The inherent power of the Courts is broad enough to allow them to permit nonparents to apply for habeas corpus writs." N.Y. DOM. REL. LAW § 70, *prac. cmt.* (McKinney 1988 & Supp. 1993). However, the commentaries conclude that such power should rarely be used to allow a non-parent to petition. Other courts have recognized the need for this judicial discretion.

It seems to us that if an adequate record can be made demonstrating that it is in the child's best interest that such visitation be authorized the trial judge's discretion in the matter is sufficiently broad to allow him to authorize visitation with a non-parent. Certainly this type of visitation, contrary to the wishes of the custodial parent, should be awarded with great circumspection. But if the welfare of the child is promoted by such visitation and there is no other substantial interest affected the trial judge should be allowed that latitude.

*Wills v. Wills*, 399 So.2d 1130, 1131 (Fla. Dist. Ct. App. 1981); see also *Weichman v. Weichman*, 184 N.W.2d 882, 884 (Wis. 1971) ("The question is not one of the power of the court but of judgment or of judicial discretion. The underlying principle or guideline for the granting of visitation privileges, as it is for granting custody, is what is for the best interest and welfare of the child.").

<sup>60</sup> For cases articulating the right of parents to determine the manner in which their children will be raised, see *Prince v. Massachusetts*, 321 U.S. 158 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither

This parental right or prerogative is not absolute, even though it is the primary focus of most courts. There are some cases which recognize that a "parent's right to a child is not a property right in the general sense, but is more in the nature of a trust which is subject to regulation by and control of the state."<sup>61</sup> Visitation, as a limited form of custody, necessarily impairs the custodial parent's control of the child<sup>62</sup> and is most often granted because it is in the best interests of the child.<sup>63</sup> Yet, cases that treat the rights of the child on a parity with those of the parents are not common, and courts generally regard the purpose of visitation through the perspective of the custodial and noncustodial parents' rights.<sup>64</sup> But given the ex-

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supply nor hinder."); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding unconstitutional a requirement that children attend public schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (concerning the right to teach languages other than English in school); *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976); *Bachman v. Mejias* 1 N.Y.2d 575, 582, 136 N.E.2d 866, 869, 154 N.Y.S.2d 903, 908 (1956).

As one commentator noted:

Parenthood, with few exceptions, is an exclusive status. The law recognizes only one set of parents for a child at any one time, and these parents are autonomous, possessing comprehensive privileges and duties that they share with no one else.

A fundamental premise of the law of exclusive parenthood is that parents raise their own children in nuclear families. The nuclear family, which is the preferred social unit in our society, is itself an exclusive unit, its membership reserved to a married couple and their dependant children.

Bartlett, *supra* note 1, at 879 (citation omitted).

<sup>61</sup> *Looper v. McManus*, 581 P.2d 487, 489 (Okla. Ct. App. 1978). *Cf.*, *Curry v. Ashby*, 129 A.D.2d 310, 517 N.Y.S.2d 990 (1st Dep't 1987), where the court, in applying the "extraordinary circumstances" test, *see supra* note 33, referred to "the abiding principle that the child's rights . . . are 'paramount' and are not subordinated to the right of parental custody, as important as that right is." *Id.* at 316, 517 N.Y.S.2d at 993. *See also* *Spells v. Spells*, 378 A.2d 879, 882 (Pa. Super. Ct. 1977) ("The guiding star for the court in coming to a conclusion . . . is the welfare of the child. To this the rights of the parents and all other considerations are subordinate.").

<sup>62</sup> *Alison D.*, 77 N.Y.2d at 656-57, 572 N.E.2d at 29, 569 N.Y.S.2d at 587.

<sup>63</sup> *Simpson v. Simpson*, 586 S.W.2d 33, 35 (Ky. 1979) (step-mother had right to have court consider whether visitation would be in the best interests of the child even though it would be a limitation on the custody of the natural father); *Looper v. McManus*, 581 P.2d 487, 488 (Okla. Ct. App. 1978) ("Visitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well-being by permitting partial continuation of an earlier established close relationship."); *Weiss v. Weiss*, 52 N.Y.2d 170, 175, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981) ("Visitation is a joint right of the non-custodial parent and of the child.").

<sup>64</sup> For a discussion of the parental rights doctrine, see HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 821-25 (2d ed. 1988).



PLICIT statutory mandate that courts focus on the best interests, welfare and happiness of a child, the parental rights approach is not the best one to use in making visitation determinations.

The problems with the current New York approach are obvious. The *Alison D.* majority, in denying Alison D. standing to petition for visitation between herself and A.D.M., foreclosed all consideration of A.D.M.'s best interests. A.D.M.'s need to maintain his relationship with one of his primary caretakers since birth was entirely disregarded. The court made no mention of the trauma A.D.M. may experience at the abrupt termination of this important relationship.<sup>65</sup> The majority framed its opinion solely in terms of Virginia M.'s right as the biological mother to exclusive control and custody of A.D.M. and Alison D.'s lack of right to interfere with Virginia M.'s choice of with whom A.D.M. would associate.<sup>66</sup> That A.D.M.'s best interests were completely unaccounted for is evident. Even the appellate division alluded to the fact that visitation would have been in A.D.M.'s best interests and that Alison D. may well have succeeded on the merits.<sup>67</sup> Similarly, the court of appeals referred to the "close and loving relationship" between A.D.M. and Alison D.<sup>68</sup>

### III. THE COURT'S NARROW CONSTRUCTION OF "PARENT"

The failure to consider A.D.M.'s best interests was an abdication of the court's duty under the Domestic Relations Law to protect the child and further his or her best interests when a

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<sup>65</sup> See Bartlett, *supra* note 1, at 902-11 (discussing the need of children for continuity in their relationships). Professor Bartlett states that "[n]ear consensus does exist, however, for the principle that a child's healthy growth depends in large part upon the continuity of his personal relationships." *Id.* at 902.

<sup>66</sup> *Alison D.*, 77 N.Y.2d at 657, 572 N.E.2d at 30, 569 N.Y.S.2d at 590.

<sup>67</sup> The appellate division stated that it did not

by virtue of [its] determination on this issue, minimize, in any way, the close and loving relationship that the petitioner has apparently developed with the child. Indeed, had the petitioner come within the meaning of the term 'parent' contained in Domestic Relations Law § 70, her claim for visitation would have been worthy of serious consideration.

155 A.D.2d at 16, 552 N.Y.S.2d at 324. The court failed to follow the common-sense approach recommended by at least one commentator that "[s]omeone must be hurt by the ultimate decision, but it should not be the child." Peggy Blotner, *Third Party Custody and Visitation: How Many Ways Should We Slice the Pie?*, 1 DET. C.L. REV. 163, 175 (1989).

<sup>68</sup> *Alison D.*, 77 N.Y.2d at 655, 572 N.E.2d at 29, 569 N.Y.S.2d at 587.

parent petitions for visitation.<sup>69</sup> The court adopted a narrow definition of "parent." This interpretation of the statute was flawed.<sup>70</sup> First, the court did not observe recognized methods of statutory interpretation, such as that employed in *Braschi v. Stahl Associates*<sup>71</sup> and *Emanuel S. v. Joseph E.*<sup>72</sup> Second, the

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<sup>69</sup> See N.Y. DOM. REL. LAW § 70 (McKinney 1988 & Supp. 1993); see *supra* note 4.

<sup>70</sup> A variety of approaches to statutory construction were available to the court of appeals. For a discussion of the main schools of interpretative thought, see Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Internal Burdens, and a Misleading Version of Democracy*, 22 U. Tol. L. Rev. 583, 589-608 (1991). The available theories range from a strict, facial analysis (textualism) through approaches that seek to implement the underlying purpose of a statute (purposivism) or implement the intention of the statute's drafters "as transformed through the crucible of intervening legal developments in order to render a meaning as consistent as possible with text and original intent but one that will fit well with other statutes, current case law, and public norms," (dynamism) and to a functional approach which blends the above approaches (eclectic pragmatism). *Id.* at 596. Stempel argues that the eclectic pragmatist approach is the most widely used and that it is characterized by efforts to "render acceptably wise and fair decisionmaking consistent with the prevailing political construct" in a more functional manner that "attempts to appreciate the practical consequences of the interpretation for future litigation under the statute being construed." *Id.* at 598.

If Alison D. had petitioned as a third party and not as a parent, the court's arguments on her lack of standing might have had some validity because section 70, on its face, applies only to parents and she would clearly not fall within section 71 (siblings) or section 72 (grandparents). This Comment is not arguing that Alison D. should have had standing as a third party but, as she argued, that she had parental standing under section 70 to at least be heard on the merits of her claim. For a discussion of the parent/third party distinction, see Polikoff, *supra* note 1, at 473. Polikoff distinguishes her theory of redefining parenthood from Professor Bartlett's theory. Polikoff believes Bartlett's approach dilutes "the legal significance of parenthood so that nonparents can obtain legal protection for at least some of their claims with respect to children with whom they have significant relationships." *Id.* An approach, such as the one Bartlett advocates, could present problems in terms of the court exceeding its statutory grant of power under section 70, which on its face applies only to parents and not third parties.

However, no such problem is presented here because Alison D.'s petition was based on her status as a parent by virtue of her *in loco parentis* relationship with A.D.M. Under any of the above methods of statutory interpretation, with the possible exception of textualism, Alison D.'s petition as a parent merited a discussion of whether the statute could be interpreted to include her relationship with A.D.M. The court, however, adopted an essentially strict textualist approach that is at significant odds with the eclectically pragmatic or dynamic approach adopted by the same court in *Braschi*. The difficulty in this particular case is that the term at issue, "parent," no longer has the same limited meaning as it may have had when the statute was first enacted. Thus, the sole use of the textualist approach renders the court's inquiry incomplete. The intent of the drafters—that the child's best interests be furthered—remains constant and should be the guiding standard for the court where, as here, a key term has become ambiguous due to social changes.

<sup>71</sup> 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

<sup>72</sup> 78 N.Y.2d 178, 577 N.E.2d 27, 573 N.Y.S.2d 36 (1991).

court failed to consider the variety of other theories used both in New York and other jurisdictions that could have accommodated Alison D.'s claim for parental status.<sup>73</sup> Third, the court ignored a philosophy espoused by the United States Supreme Court that recognizes a much broader view of the family.

### A. *Statutory Interpretation*

#### 1. *Braschi v. Stahl Associates*

In *Braschi* the court held that under the New York Rent and Eviction Regulations a gay life partner constituted a family member and thus could not be evicted.<sup>74</sup> In reaching this conclusion, the court enunciated several rules of statutory construction. First, the *Braschi* court stated that "[i]t is fundamental that in construing the words of a statute the legislative intent is the great and controlling principle."<sup>75</sup> Thus, the *Braschi* court was guided by the legislative purpose in the rent-control regulations—to protect tenants.<sup>76</sup> Had the court utilized the *Braschi* approach in analyzing Alison D.'s claim, it would have been guided by the statute's goal of considering the best interests of A.D.M.<sup>77</sup> The *Braschi* court also stated that statutes should be "interpreted so as to avoid objectionable consequences and to prevent hardship or injustice."<sup>78</sup> The *Alison D.* court was not influenced by any such considerations of fairness and justice, which is all the more grievous in light of its equitable powers and *parens patriae* role.

In both *Braschi* and *Alison D.* legislators failed to define the statutory terms relating to a legally protected family relationship. In *Braschi* the term "family" was interpreted broadly to

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<sup>73</sup> See *infra* notes 110-39 and accompanying text.

<sup>74</sup> *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989). In *Braschi* the court was required to construe the term "family" in the context of the New York Rent Control Law, which provides that upon the death of a tenant in a rent control apartment, the landlord cannot evict "some other member of the deceased tenant's family who has been living with the tenant." N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d) (1990).

<sup>75</sup> *Braschi*, 74 N.Y.2d at 207, 543 N.E.2d at 51, 544 N.Y.S.2d at 786 (citations omitted).

<sup>76</sup> *Id.* at 208-09, 543 N.E.2d at 52, 544 N.Y.S.2d at 787. For the court's discussion of the legislative purpose underlying the rent control code, see *id.* at 208-12, 543 N.E.2d at 52-54, 544 N.Y.S.2d at 787-89.

<sup>77</sup> See N.Y. DOM. REL. LAW § 70, *supra* note 4.

<sup>78</sup> *Braschi*, 74 N.Y.2d at 208, 543 N.E.2d at 52, 544 N.Y.S.2d at 786.

effectuate the legislative policy of protecting tenants. In *Alison D.* the dissent reasoned that the term "parent" should similarly be interpreted broadly to effectuate the legislative mandate that courts further the best interests of children in adjudicating custody and visitation cases. Yet, the court of appeals summarily rejected Alison D.'s arguments for a more functional definition of parent. It stated that she was not a parent to A.D.M. because she was neither his biological nor adoptive parent.<sup>79</sup> This statutory interpretation is antithetical to *Braschi* where the same court rejected arguments that the term "family member" be interpreted in accord with the state's intestacy laws, thereby limiting the protection afforded to those related by blood, consanguinity or adoption. Instead, the *Braschi* court adopted a far more functional definition of the term "family."<sup>80</sup> Yet, the arguments for a more limited approach to statutory interpretation that were eloquently rejected in *Braschi* were adopted by the same court in *Alison D.* without even a passing reference to *Braschi*.<sup>81</sup>

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<sup>79</sup> See *Alison D.*, 77 N.Y.2d 651, 656-57, 572 N.E.2d 27, 29-30, 569 N.Y.S.2d 536, 588-89 (1991).

<sup>80</sup> *Braschi*, 74 N.Y.2d at 209, 543 N.E.2d at 52, 544 N.Y.S.2d at 787. The court was unpersuaded by the arguments that protection should not be afforded because the legislature had not accorded protection through legal recognition of the relationship between the appellant and the deceased. The court determined that the term "family member" was subject to ambiguity and thus "the consequences that may result from the different interpretations should be considered." *Id.* at 208, 543 N.E.2d at 52, 544 N.Y.S.2d at 787. The court concluded that "since rent-control laws are remedial in nature and designed to promote the public good, their provisions should be interpreted broadly to effectuate their purposes." *Id.* Had this same approach been adopted in *Alison D.* the outcome surely would have been different. The court offered no valid reason for why it did not and, in fact, did not discuss the applicability of the *Braschi* decision to Alison D.'s petition at all.

<sup>81</sup> There were no changes in membership on the court of appeals between its *Braschi* and *Alison D.* decisions. Hence, it is difficult to explain the disparate treatment given the two cases, particularly the abandonment of the approach to statutory construction that the court applied in *Braschi* and ignored in *Alison D.* The *Braschi* court's analysis should have been instructive in *Alison D.* The *Braschi* court stated that

the term family, as used in NYCRR 2204.6(d), 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 against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of

## 2. *Emanuel S. v. Joseph E.*

The outcome in *Alison D.* is even odder in light of a case decided only two months later by the New York Court of Appeals. In *Emanuel S. v. Joseph E.*<sup>82</sup> the court determined that section 72 of the Domestic Relations Law grants standing to grandparents who seek visitation with grandchildren of an intact family against the wishes of the parents.<sup>83</sup> The grandparents in this case had visited with the infant for the first three months after his birth, but this agreed upon visitation was terminated when the relationship between the grandparents and parents deteriorated.<sup>84</sup> The grandparents instituted the proceeding when the child was one-year-old.<sup>85</sup> The *Emanuel S.* court adopted a broad view of the statute's provision for grandparent standing, disagreeing with the appellate division's more limited approach.<sup>86</sup> Whether one agrees with this outcome, it is analyti-

"family" and with the expectations of individuals who live in such nuclear units.

74 N.Y.2d at 211, 543 N.E.2d at 53-54, 544 N.Y.S.2d at 788-89 (emphasis added).

The court formulated a multi-factor objective examination of the parties' relationship to be used in determining whether protection should be afforded. These factors included "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services." *Id.* at 212-13, 543 N.E.2d at 55, 544 N.Y.S.2d at 790. These factors could easily have been adapted to the situation in *Alison D.* to assess, in an objective manner, the nature and strength of the relationship between Alison D. and A.D.M.

For a brief critique of the *Alison D.* decision, see *Family Law—Visitation Rights—New York Court of Appeals Refuses to Adopt a Functional Analysis in Defining Family Relationships—Alison D. v. Virginia M.*, 105 HARV. L. REV. 941 (1992) (criticizing the court for refusing to adopt the *Braschi* approach and arguing that such an approach would have better served the best interests of the child).

<sup>82</sup> *Emanuel S. v. Joseph E.*, 78 N.Y.2d 178, 577 N.E.2d 27, 573 N.Y.S.2d 36 (1991).

<sup>83</sup> Section 72 provides:

Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court by commencing a special proceeding . . . [and] the court . . . may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.

N.Y. DOM. REL. LAW § 72 (McKinney 1988 & Supp. 1993).

<sup>84</sup> *Emanuel S.*, 78 N.Y.2d at 179, 577 N.E.2d at 28, 573 N.Y.S.2d at 37.

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

<sup>86</sup> The appellate division stated that a petitioner, under section 72, must demonstrate the existence of some circumstance or condition, such as untoward disruption of an established grandparent-grandchild relationship be-

cally and philosophically inconsistent with the outcome in *Alison D.*

The legislative history of section 72 makes clear that the amendment was intended to confer upon certain grandparents an ability to petition for visitation in more situations than just the death of a parent. Before 1975 the only circumstances under which a grandparent had automatic standing was when one of the parents of the child was deceased.<sup>87</sup> In 1975 the New York State Legislature amended section 72 to expand these circumstances to cases "where circumstances show that conditions exist which equity would see fit to intervene."<sup>88</sup> As the appellate division correctly noted, however, this clause, while intended to open up standing in some cases, was not meant to erase all limits on when standing should be granted.<sup>89</sup> Arguably, the amend-

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cause of, e.g., a change in the status of the nuclear family, or interference with a "derivative" right, or some abdication of parental responsibility, before judicial examination of the best interests of the child with its attendant trauma, increased animosity, and financial drain is to be undertaken.

*Emanuel S.*, 161 A.D.2d at 87, 560 N.Y.S.2d at 214 (2d Dep't 1990), *rev'd*, 78 N.Y.2d 178, 577 N.E.2d 27, 573 N.Y.S.2d 36 (1991).

<sup>87</sup> The legislative history of section 72 of the Domestic Relations Law makes this point in explaining the purpose of the amendment: "This [existing] provision can only be worked if either or both of the parents of the child are deceased. This bill broadens the court's jurisdiction." N.Y. DOM. REL. LAW § 72 (McKinney 1988 & Supp. 1993), Bill Jacket L. 1975, c. 431.

<sup>88</sup> N.Y. DOM. REL. LAW § 72 (McKinney 1988 & Supp. 1993).

<sup>89</sup> 161 A.D.2d at 87, 560 N.Y.S.2d at 214. Section 72's legislative history does not lend support to the court's expansive interpretation. The Bill Jacket documents refer to awards of visitation "in appropriate instances." Memorandum Accompanying Comments on Bills Before the Governor for Executive Action, New York State Board of Social Welfare, June 23, 1975. Some of the circumstances listed in the legislative history are where there has been some form of child abuse, child neglect or, most significantly, in the event of separation or divorce of the parents. Senator Leon Giuffreda, who introduced the bill, made this point:

In the context of today's society with a high divorce rate, many disinterested parents do not concern themselves with the welfare of a child who is in the custody of the other parent. Many times the parents of the parent who has "deserted" the infant issue of the marriage may be concerned with the welfare of that child. However, under present law they do not have standing to apply for visitation rights unless one or both parents are deceased.

N.Y. DOM. REL. LAW § 72 (McKinney 1988 & Supp. 1993), Bill Jacket, L. 1975, c. 431.

Further, the New York statute is in the minority in terms of providing for grandparent visitation access not only in the event of divorce or death of one of the parents, but also when circumstances would make it equitable for such visitation to be granted. See Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall*, 25 A.B.A. FAM. L.Q. 59, 75 (1991); Bartlett, *supra* note 1, at 933-39. For a detailed list of the states and their statutes, see Richard S. Victor et al., *Statutory Review of Third-*

ment was intended to provide only a limited expansion on the availability of standing to grandparents. That the *Emanuel S.* court applied section 72 to a grandchild in an intact nuclear family leaves one wondering what circumstances remain where a court, using its equitable powers, would not intervene. The parental rights doctrine that seems to have been so influential in *Alison D.* is noticeably absent from the court's analysis in *Emanuel S.*<sup>90</sup> The *Emanuel S.* court was willing to push the limits of the authorization of the statute by overlooking the substantial interference with the parents' rights to focus on the child's best interests.

The dichotomy between these two cases is particularly insupportable. It is illogical for grandparents who have had limited contact with a child to have a greater entitlement to standing or an award of visitation than a woman who was instrumental in the child's conception and stood *in loco parentis* to the child from birth. There is no rational explanation for the expansive treatment given the grandparents petition in *Emanuel S.* and the restrictive treatment given the nonbiological parent's petition in *Alison D.* Moreover, the court of appeals apparently felt no need to offer one.<sup>91</sup> Even though the Domestic Relations Law does not explicitly address the situation in *Alison D.*, the power of the court was sufficient to permit consistent outcomes in *Emanuel S.* and *Alison D.* The court had no difficulty using its powers to consider the child's best interests when grandparents stood behind the petition, but it proclaimed itself powerless when *Alison D.* voiced her plea.

### 3. Other Jurisdictions

The court's approach to defining the term "parent" in *Alison D.* was also inconsistent with the approach adopted by other jurisdictions. The *Alison D.* court reasoned that because the legislature granted a specific right to petition for visitation to sib-

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*Party Rights Regarding Custody, Visitation, and Support*, 25 A.B.A. FAM. L.Q. 19 (1991). Thus, the New York Court of Appeals broadly interprets a provision that does not have wide national support.

<sup>90</sup> See *supra* notes 58-68 and accompanying text.

<sup>91</sup> While there are possible separation of powers arguments that can be made that it is for the legislature to correct any illogical outcomes, these arguments are rebuttable on the basis of the wide equitable powers courts possess when considering petitions for custody or visitation.

lings and grandparents, the legislature intended that this be an exhaustive list of those who could petition and get the benefit of a child's best interests analysis.<sup>92</sup> However, there is nothing to indicate that the mere enactments of section 72 to protect grandparent petitioners and section 71 for siblings were intended to affect the ability of others to petition for visitation as parents where it would be in the best interests of the child.

Further, this reasoning fails to take account of the broad equitable powers the court possesses. Courts from other jurisdictions have not been so restrictive when confronted with similar, though not identical, problems.<sup>93</sup> Although none of the following cases from other jurisdictions deal specifically with a lesbian couple's visitation battle, the various approaches are equally applicable in this context. Essentially, it is the best interests of the child that are nearly always paramount. Additionally, the mere absence of a specific legislative mention in a visitation statute of a category that includes the petitioner does not deprive courts of the power to grant visitation to a person who has stood *in loco parentis* to a child when it is in a child's best interests.

In *In re Custody of D.M.M.*<sup>94</sup> the Wisconsin Supreme Court determined that the statutes authorizing the award of visitation to parents, grandparents, and great-grandparents did not "abrogate the visitation rights of others when the best interests of the child warrant."<sup>95</sup> Rather, they were intended to ensure that those listed had a uniform right to petition for visitation "recognized by statute that is not subject to developing and changing

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<sup>92</sup> See *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 657, 572 N.E.2d 27, 29, 569 N.Y.S.2d 586, 588 (1991). The majority stated that the legislature, in enacting provisions for siblings and grandparents to bring special proceedings to obtain visitation rights, effectively refused other nonparents the opportunity to do so. See N.Y. DOM. REL. LAW § 71 (McKinney 1989) (special proceedings for infant siblings); N.Y. DOM. REL. LAW § 72 (McKinney 1988) (special proceedings for grandparents).

<sup>93</sup> See *In re Custody of D.M.M.*, 404 N.W.2d 530 (Wis. 1987) (statute that authorized award of visitation to grandparents and great-grandparents did not deprive courts of authority to award visitation to others not listed in statute, including a great-aunt); *Evans v. Evans*, 488 A.2d 157 (Md. 1985) (statutes that authorized award of visitation rights to biological parents, adoptive parents and grandparents constituted policy statement that courts should automatically consider those listed if in the best interests of the child but did not preclude award of visitation to others, here, a non-adoptive step-mother).

<sup>94</sup> 404 N.W.2d 530 (Wis. 1987).

<sup>95</sup> *Id.* at 535.



common law."<sup>96</sup> Thus, the Wisconsin court reversed the dismissal of a great-aunt's claim and remanded the case for a determination of whether visitation with the petitioner great-aunt would be in the best interests of the child.<sup>97</sup>

Similarly, in *Evans v. Evans*<sup>98</sup> the Maryland Court of Appeals held that the purpose of a statute authorizing an award of visitation to grandparents was intended to be a policy statement and to ensure automatic consideration of their petitions. At the same time, the court found that the statute was not intended to deprive others who are able to demonstrate that visitation is in the child's best interests of such an opportunity.<sup>99</sup> The *Evans* court, relying on its equitable powers when deciding issues of custody and visitation, rejected the argument that the court's authority to determine other visitation matters was to be construed narrowly because the state legislature had amended the visitation statute to allow for grandparent visitation.<sup>100</sup> Thus, the nonadoptive step-mother, though not explicitly granted standing in the applicable statute, could have visitation with her step-son if it was in his best interests.<sup>101</sup>

While courts in other jurisdictions are attempting to use their equitable powers in new situations, the New York Court of Appeals offered no valid reason for its renunciation of its inherent equitable powers when considering the petitions of those not enumerated in the statute. The New York State legislature clearly expressed its intention that the best interests of the child should prevail and that the happiness of the child was to be the paramount concern in making custody and visitation determinations.<sup>102</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> The court stated that "[t]he legislature did not intend to supplant the common law that allowed other persons to petition for visitation, but intended that grandparents and great-grandparents be provided with a uniform right to petition in all the courts of the state. The legislature intended that the best interest of the child should control the decision to grant visitation in all these situations, which is the polestar of the statute." *Id.* at 537.

<sup>98</sup> 488 A.2d 157 (Md. 1985).

<sup>99</sup> *Id.* at 160.

<sup>100</sup> *See id.* at 159.

<sup>101</sup> While the *Alison D.* court did not mention step-parents, its logic necessarily applies to their petitions as well. *See supra* note 8 and accompanying text. Thus, step-parents would be treated in the same manner as lesbian nonbiological mothers.

<sup>102</sup> Section 70 of the Domestic Relations Law states that "[i]n all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall

#### 4. The United States Supreme Court View of the Family

State courts are not alone in confronting broader views of family and parenthood. The United States Supreme Court has espoused a vision of what constitutes a family and has articulated some constitutional implications of such family relationships.<sup>103</sup> In *Smith v. Organization of Foster Families*<sup>104</sup> the Supreme Court upheld procedures for removal of children from foster homes but discussed the possibility of a constitutionally protected liberty interest in the relationship of the foster parents and the children. Significantly, the Court noted that "biological relationships are not [the] exclusive determination of the existence of a family"<sup>105</sup> and further stated that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children."<sup>106</sup>

Later, in *Lehr v. Robertson*<sup>107</sup> the Court expanded on the *Smith* language to deny an unwed father's paternity proceeding. The proceeding had been instituted to prevent the child's adoption by the husband of the mother. The unwed father had had virtually no contact with the child. The *Lehr* Court noted that "the rights of the parents are a counterpart of the responsibili-

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determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly." N.Y. DOM. REL. LAW § 70 (McKinney 1988 & Supp. 1993).

<sup>103</sup> It is important to note that this philosophy of what constitutes a family is a distinct issue from the possible constitutional challenges that can be made due to the New York Court of Appeals' failure to recognize Alison D.'s claim. Such constitutional challenges could be based on the Equal Protection Clause of the Fourteenth Amendment and on the theory of protection for the integrity of the established family unit. For a presentation of the constitutional claims made on behalf of A.D.M., see Brief for Amicus Curiae, The American Civil Liberties Union, *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991) (2 No. 61).

<sup>104</sup> 431 U.S. 816 (1977).

<sup>105</sup> *Id.* at 843. For a discussion of the constitutional inability of a state to stereotype family structures into the model nuclear family, see *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (housing ordinance that limited dwelling occupancy to a minimum number of related individuals held unconstitutional when challenged by grandmother living with her son, grandson and a second grandson who was the cousin of the first grandson).

<sup>106</sup> 431 U.S. at 844.

<sup>107</sup> 463 U.S. 248 (1983).

ties they have assumed.”<sup>108</sup> The Court went on to say that “the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds.”<sup>109</sup>

It seems a logical extension of the court’s reasoning that where the presence of the biological link is not dispositive, as in *Lehr*, neither should the lack of a biological link be dispositive against an individual who has assumed the responsibilities and wishes to receive the benefits of the same relationship. The New York Court of Appeals was not bound by the *dicta* in the Court’s *Smith* and *Lehr* decisions. Yet the philosophy of flexibly defining family could have formed a backdrop for the court of appeals’ statutory interpretation. Armed with such a philosophy, the New York Court of Appeals would have produced a different outcome in *Alison D.*

### B. Other Theories of Parenthood

Another option for the court of appeals in deciding *Alison D.* was to address substantively petitioner’s claim that she stood *in loco parentis* to the child and that respondent, as a result of her promise and actions, should be equitably estopped from denying the relationship that she created and encouraged and from which she benefitted.<sup>110</sup> These theories, along with a number of other theories that could confer parental status on legally unrecognized “third parties,” are unified by the concept that when an individual has assumed the duties and responsibilities of being a parent, usually with the consent of the legally recognized parent, the individual may be found to stand in the legal status of a “parent.”<sup>111</sup> These theories were available to grant Alison D. standing as a parent to sue for visitation. The application of one or more of these theories would have allowed the court to give legal recognition to the relationship between Alison D. and A.D.M. as an emotionally significant one—not merely a relation-

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<sup>108</sup> *Id.* at 257.

<sup>109</sup> *Id.* at 261.

<sup>110</sup> Petitioner’s Brief at 55, *Alison D.* (2 No. 61).

<sup>111</sup> These theories have often been applied in the context of a support proceeding against the third party by the legally recognized parent, although this is not always the case. See generally Polikoff, *supra* note 1, at 492-94. For example, in New York step-parents of children who are in danger of becoming public charges are statutorily liable for their support. N.Y. FAM. CT. ACT § 415 (McKinney 1993).

ship between "biological strangers."<sup>112</sup> While none of these theories has yet been used to allow visitation by a nonbiological lesbian mother against the wishes of the biological mother, there is no barrier to their being so utilized.

### 1. *In Loco Parentis*

The concept of "*in loco parentis*" is well known in the law and has been used in New York and other jurisdictions to confer on a third party the rights and liabilities of a parent/child relationship: "A 'person in loco parentis' is one who has assumed the status and obligations of a parent without formal adoption. Whether or not one assumes this status depends on whether that person *intends* to assume that obligation."<sup>113</sup> Thus, the *in loco parentis* relationship continues only so long as the child and the person seeking the status intend that it should, regardless of the presence or absence of a biological relation.<sup>114</sup> When a court finds that an *in loco parentis* relationship exists, the "rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child."<sup>115</sup> The theory has been used primarily in the context of step-parent/step-child relationships, but the theory ought to be applicable to other relationships as well.<sup>116</sup>

In *In re Jamal B.*,<sup>117</sup> for example, a New York court found

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<sup>112</sup> *Alison D. v. Virginia M.*, 77 N.Y.2d 654, 654-55, 572 N.E.2d 27, 28, 569 N.Y.S.2d 586, 587 (1991).

<sup>113</sup> *Gribble v. Gribble*, 583 P.2d 64, 66 (Utah 1978) (nonadoptive step-father was entitled to hearing on his claim that he stood *in loco parentis* to his step-son) (emphasis in original). The term *in loco parentis* literally means in the place of the parent. The theory underlying the doctrine is stated in *Spells v. Spells* in the context of a petition by a step-father for visitation with his step-child. See *Spells v. Spells*, 378 A.2d 879 (Pa. Super. Ct. 1977). The court viewed the doctrine as embodying two ideas: the assumption of parental status and the discharge of parental duties. *Id.* For a general discussion of the *in loco parentis* doctrine, see CLARK, *supra* note 64, at 820.

<sup>114</sup> See Polikoff, *supra* note 1, at 502. For a detailed discussion of the *in loco parentis* doctrine and its applicability to the lesbian mother, see Polikoff, *supra* note 1, at 502-08.

<sup>115</sup> *Id.* at 502-03 (quoting *Spells v. Spells*, 378 A.2d at 881-82).

<sup>116</sup> See *Bryan v. Bryan*, 645 P.2d 1267, 1272 (Ariz. Ct. App. 1982) (where step-parent petitioned for visitation the court stated that "[t]he ties that cement members of a family into a unit of solidarity [are] not necessarily the result of blood relations, but they arise out of and are formed by an intimate association sharing with each other the joys and sorrows, the fears and hopes, the successes and failures of each and all.").

<sup>117</sup> 119 Misc. 2d 808, 465 N.Y.S.2d 115 (Fam. Ct. Queens County 1983). The issue was whether the grandmother of a profoundly retarded boy had the right to receive no-

that an *in loco parentis* relationship could exist between a grandmother and her grandson. The court described five elements to be considered in determining whether an *in loco parentis* relationship exists:

- (1) whether the party intends to assume all the obligations of parenthood,
- (2) the level of involvement in the child's home, school, recreation and social activities,
- (3) whether or not the party is receiving compensation for his or her services . . . ,
- (4) whether the party means to take the place of the lawful parent not only in providing support but also with respect to educating, instructing and caring for the general welfare of the child, and
- (5) whether the party has a true interest in the well being and general welfare of the child.<sup>118</sup>

Given the circumstances surrounding Alison D.'s petition, there was more than a sufficient basis to warrant a discussion on the merits of her claim that she stood *in loco parentis* to A.D.M. Alison D.'s petition established at least a *prima facie* showing that she: (1) assumed all of the obligations of parenthood; (2) was significantly involved in A.D.M.'s school activities and medical care; (3) was not compensated for her "services"; and (4) was genuinely interested in A.D.M.'s well-being. It is almost incomprehensible that the court of appeals could have failed to address her claim substantively in light of the substantial evidence proffered to demonstrate that Alison D. stood *in loco parentis* to A.D.M.<sup>119</sup>

## 2. Equitable Estoppel

The theory of equitable estoppel has been used by courts to prevent one party from denying the existence of a parental relationship.<sup>120</sup> The two primary postures in which the doctrine of equitable estoppel arises are: estopping an individual from deny-

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tice and be heard in a proceeding brought by a child care agency to terminate parental rights when the grandmother was the listed primary caretaker of the child and had "exhibited a continuing and abiding concern for his health and welfare." *Id.* at 810, 465 N.Y.S.2d at 117.

<sup>118</sup> *Id.* at 811, 465 N.Y.S.2d at 117 (citations omitted).

<sup>119</sup> Petitioner's Brief at 6, *Alison D.* (2 No. 61).

<sup>120</sup> See Polikoff, *supra* note 1, at 491-502 (discussing the doctrine's theory, the cases that espouse it, and its limitations).

ing parentage (usually paternity) and imposing support obligations on that individual;<sup>121</sup> and estopping an individual from denying the parentage (often paternity) of another individual *vis-a-vis* a child in a custody or visitation proceeding.<sup>122</sup> The criteria for a finding of equitable estoppel are: "(1) action or nonaction which induces (2) reliance by another (3) to his [or her] detriment."<sup>123</sup> In her petition, Alison D. alleged substantial action by Virginia M. that led Alison D. to assist in the conception of A.D.M. and to assume traditional parental obligations, including arranging with her partner for A.D.M.'s conception and birth, and providing financial and emotional support to Virginia M. and A.D.M.<sup>124</sup> Alison D.'s reliance on the understanding between the two women that she would always have access to A.D.M. to maintain their relationship was clear, and the detriment suffered by Alison D. by the unilateral severance of the relationship between A.D.M. and Alison D. was equally clear. Thus, the court's failure to address substantively her claim of equitable estoppel

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<sup>121</sup> See, e.g., *Karin T. v. Michael T.*, 127 Misc.2d 14, 19, 484 N.Y.S.2d 780, 784 (Fam. Ct. Monroe County 1985) ("The actions of this respondent in executing the [insemination] agreement . . . certainly brought forth these offspring as if done biologically. The contract and the equitable estoppel which prevail in this case prevent the respondent from asserting her lack of responsibility by reason of lack of parenthood."); *Wener v. Wener*, 35 A.D.2d 50, 312 N.Y.S.2d 875 (2d Dep't 1970) (court held husband who was neither natural nor legal parent liable for child's support on the basis of equitable estoppel and implied contract to support); *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. Kings County 1963) (husband held liable for support of child born to his wife through artificial insemination because of his consent to the insemination and his wife's reliance on his implied promise to support without which she likely would not have undergone insemination); *M.H.B. v. H.T.B.*, 498 A.2d 775 (N.J. 1985) (divorced step-father held liable on the basis of equitable estoppel for the support of his step-children because of his actions in inducing the reliance of his step-daughter). Polikoff argues that these cases, in part, stand for the proposition that "courts will enforce the parental obligation of support if the child would not have entered the family but for the actions of the 'nonparent'." Polikoff, *supra* note 1, at 493.

<sup>122</sup> See *In re Paternity of D.L.H.*, 419 N.W.2d 283 (Wis. 1987); *Boyles v. Boyles*, 95 A.D.2d 95, 466 N.Y.S.2d 762 (3d Dep't 1983) (mother estopped from asserting man's lack of paternity for the purpose of obtaining custody of the child without a consideration of the child's best interests); *In re Adoption of Young*, 364 A.2d 1307 (Pa. 1976) (natural mother equitably estopped from denying former husband's paternity of child born while she was married to former husband and from whom she had accepted support payments following their divorce).

<sup>123</sup> *In re Paternity of D.L.H.*, 419 N.W.2d at 287. The Wisconsin Supreme Court estopped a woman from denying her husband's paternity, despite blood tests that conclusively established that he was not the biological father of the child, where he had acted as father to the child.

<sup>124</sup> Petitioner's Brief at 55, *Alison D.* (2 No. 61).

ignored the facts of the case and provided no guidance as to what kind of showing would be necessary to raise estoppel under these or similar facts successfully.

Such a substantive analysis was undertaken by a California court in *Sabol v. Bowling*.<sup>126</sup> *Sabol* presents a detailed discussion of the application of equitable estoppel to a situation, like *Alison D.*, where two lesbian mothers were involved in a visitation battle over their child conceived through artificial insemination. While the nonbiological parent was unable to adduce sufficient evidence "to show that there was contact of such a nature or duration between parent and child that parental estoppel was established,"<sup>128</sup> the case is significant for its consideration on the merits of the petitioner's claim<sup>127</sup> and for its sensitive recognition of the needs of children and society for a legal redefinition of the term "family."<sup>128</sup> The facts alleged in *Alison D.*'s petition

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<sup>126</sup> *Sabol v. Bowling*, No. CF 27024, slip op. (Cal. Super. Ct., L.A. County, Jan. 30, 1989).

<sup>128</sup> *Id.* at 10. By requiring that evidence be adduced to show that the child "relied on the putative parent's representations and accepted the individual as a psychologically bonded parent," *id.* at 9-10, the court announced a requirement that reciprocal conduct by the petitioner and the child be exhibited such that the child recognizes the petitioner as a parent. *Id.* Further, this mutually acknowledged relationship must achieve clear recognition in the community. *Id.* One problem with this requirement is that it will make it virtually impossible for estoppel to be shown when the subject child is an infant or very young child. However, this would not present any difficulties under the facts of *Alison D.*'s petition because of the substantial showing of this kind of reciprocal conduct. For example, A.D.M. called *Alison D.* "mommy."

<sup>127</sup> The sum total of the appellate division's treatment of *Alison D.*'s claim of equitable estoppel is contained in a single sentence: "The argument raised by petitioner relating to equitable estoppel is without merit." 155 A.D.2d at 16, 552 N.Y.S.2d at 324. The contrast between *Sabol* and *Alison D.* is illustrative of the cursory treatment given to *Alison D.*'s claim by both the appellate division and the court of appeals.

<sup>128</sup> The *Sabol* court stated:

No matter what one's political, social, moral, religious or philosophical bent may be, one may not ignore the fact that children are being born that are the products of homosexual unions. We have always sought to protect our children, to recognize and value the importance of family and to create legislative vehicles to continue these relationships and insure that the best interest of the child are [sic] protected.

Being a sperm donor is not in and of itself enough to make one a parent. Emerging medical technology creates a need to define parenthood in terms of functional realities rather than on biological bases. Our laws must clarify the emerging social questions by redefining a family and determining if a nonbiological partner who intends to be a parent of a child has legal rights to continue custodial responsibilities once the parties have ended their relationship. *Sabol*, No. CF 27024, slip op. at 9 (Cal. Super. Ct., L.A. County, Jan. 30, 1989).

demonstrating the close and loving relationship between her and A.D.M., a relationship that both the court of appeals and the appellate division acknowledged, should have been sufficient to trigger a consideration of both her claim of estoppel and whether visitation was in A.D.M.'s best interests.

In *Karin T. v. Michael T.*<sup>129</sup> a New York family court was confronted with two women who had conceived a child through artificial insemination. The issue was whether the nonbiological mother of the child could be held liable for child support. Relying on a theory of equitable estoppel, the court found that the woman was a parent to the child and that the imposition of a support obligation was appropriate.<sup>130</sup> The court referred to the Black's Law Dictionary definition of parent "as one who procreates, begets or brings forth offspring."<sup>131</sup> The *Karin T.* court concluded that by acquiescing to the artificial insemination of petitioner, the nonbiological mother had "certainly brought forth the [ ] offspring as if done biologically" and thus was estopped from asserting a lack of parentage.<sup>132</sup>

Since courts are willing to impose support obligations on the nonbiological parent of a child conceived through artificial insemination, equity should dictate that the corresponding benefit of parenthood status should exist as well. Given *Karin T.*, there is every reason to believe that had the posture of the *Alison D.* case been reversed, and Virginia M. had initiated a support proceeding against Alison D., the court would have estopped Alison D. from denying a support obligation to A.D.M. This is an incongruous and unfair result.

### 3. Equitable Parent

A related theory upon which courts have relied to find a parental relationship is that of the equitable parent.<sup>133</sup> This theory

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<sup>129</sup> 127 Misc. 2d 14, 484 N.Y.S.2d 780 (Fam. Ct. Monroe County 1985). Respondent had attempted to change her female identity and "live like a man" and had undergone a wedding ceremony with petitioner. There was no judicial finding on whether respondent was, in fact, a transsexual. Petitioner conceived two children through artificial insemination and, for approximately six years, respondent lived with petitioner and contributed to the support of the children. *Id.* at 14-15, 484 N.Y.S.2d at 781-82.

<sup>130</sup> 127 Misc. 2d at 17, 484 N.Y.S.2d at 784.

<sup>131</sup> *Id.* (quoting BLACK'S LAW DICTIONARY 1003 (5th ed. 1979)).

<sup>132</sup> *Karin T.*, 127 Misc. 2d at 17, 484 N.Y.S.2d at 784.

<sup>133</sup> For a discussion of equitable parenthood, see Elizabeth A. Delaney, *Statutory*



was first enunciated by Michigan's highest court in *Atkinson v. Atkinson*.<sup>134</sup> The *Atkinson* court was confronted with a woman who sought to deny the paternity of the man who had acted as father to her child for the four years since the child's birth. The court granted him equitable parent status on the basis of the close father/son relationship that existed despite the lack of a biological tie.<sup>135</sup> As with the other theories of parenthood, the court relied upon a theory of reciprocal rights and obligations and a thorough examination of the nature of the relationship between the subject child and the petitioning individual. That this theory was also not considered by the court of appeals in *Alison D.* is regrettable because the facts of that case strongly indicate a mutually acknowledged relationship between A.D.M. and Alison D., Virginia M.'s acquiescence to that relationship and Alison D.'s demonstrated willingness to assume the obligation of parental support.<sup>136</sup>

#### 4. Psychological Parent

Another more recently developed theory attempts to provide an alternative, child-centered theory of parenthood.<sup>137</sup> The

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*Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177, 201-06 (1991).

<sup>134</sup> 408 N.W.2d 516 (Mich. 1987).

<sup>135</sup> *Id.* The court stated:

a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibilities of paying child support.

*Id.* at 519.

<sup>136</sup> See *supra* notes 10-22 and accompanying text.

<sup>137</sup> This theory is similar, if not identical, to that enunciated in *In re B.G.* under the rubric of "de facto parent." 523 P.2d 244 (Cal. 1974). A *de facto* parent was defined as that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care. . . . We anticipate that juvenile courts will experience little difficulty in determining whether a person is a *de facto* parent for purposes of standing to appear in a juvenile court custody proceeding. The simple fact that a person cares enough to seek and undertake to participate goes far to suggest that the court would profit by hearing his views as to the child's best interests; if the participant lacks a close relationship with the child, that fact will undoubtedly emerge during the proceedings.

*Id.* at 253 n.18.

Alaska Supreme Court utilized this theory, finding that it was based on the *in loco parentis* doctrine without explaining that they were different. The court adopted a definition of psychological parent that embodied an examination of the day-to-day contact between the child and the petitioner and the extent to which the child depended upon that adult for support and affection.<sup>138</sup>

The elements of a supportive, mutual and caring relationship between A.D.M. and Alison D. were alleged by Alison D. and acknowledged by the court. Yet these elements were insufficient to merit the court's consideration under any of the above theories. This is unfortunate because these theories are compatible with the kind of best interests analysis on which the courts should be concentrating. Most important, all of these various theories of alternative parenthood demonstrate that there are many ways to accommodate nontraditional relationships, even without explicit statutory authority. Thus, when the court of appeals stated that "[w]hile one may dispute in an individual case

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<sup>138</sup> The court cited the following description of a "psychological parent":

One who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological need for an adult. This adult becomes an essential focus of the child's life, for he is not only the source of the fulfillment of the child's physical needs, but also the source of his emotional and psychological needs. . . . The wanted child is one who is loved, valued, appreciated, and viewed as an essential person by the adult who cares for him.

It is this relationship, the psychological parent-wanted child relationship, which over and above all others is worthy of protection by the legal system. This relationship may exist between a child and any adult; it depends not upon the category into which the adult falls—biological, adoptive, foster, or common-law—but upon the quality and mutuality of the interaction.

Carter v. Brodrick, 644 P.2d 850, 853 n.2 (Alaska 1982) (citation omitted) (emphasis added) (step-parent who stood *in loco parentis* to step-child can petition for custody and visitation under statute that provides for visitation with "child of the marriage"). It is important to note that the relationship may exist between the child and any adult, not that any adult may petition. Thus, one who stands in a parent/child relationship with the child should be able to petition, unlike a babysitter or nanny who should not necessarily have that ability absent such a deep relationship with the child that recognition is warranted.

Bartlett suggests three criteria for determining whether such a psychological/*de facto* parent status exists: (1) the adult must have had physical custody for at least six months; (2) the adult must demonstrate "mutuality," that is a demonstration that the motive in seeking parental status is genuine care and concern for the child; and (3) the adult must prove that the relationship with the child arose with the consent of the legal parent or under court order. Bartlett, *supra* note 1, at 946-47.

whether it would be beneficial to a child to have continued contact with a nonparent, the Legislature did not in section 70 give such nonparent the opportunity to compel a fit parent to allow them to do so,"<sup>139</sup> the court was ignoring a substantial body of case law and commentary that showed that the court, in fact, had ample authority to give legal recognition to such relationships.

#### IV. RAMIFICATIONS OF THE ALISON D. DECISION

One of the results of this decision is that in New York any caretaker, regardless of a relationship's duration, could be unable to petition for visitation, unless that caretaker is either a biological or adoptive parent.<sup>140</sup> This includes step-parents who have not legally adopted the child in question. This result would be as absurd as it would be tragic since an ever-increasing number of children live in, and depend upon, these potentially legally unrecognized relationships.<sup>141</sup>

The majority's decision was influenced by the fear that granting Alison D. standing to petition as a parent could mean that any caretaker of whatever duration would be able to petition.<sup>142</sup> The court also expressed concern about the potential

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<sup>139</sup> 77 N.Y.2d at 657, 572 N.E.2d at 29, 569 N.Y.S.2d at 588.

<sup>140</sup> Grandparents are protected by section 72 of the Domestic Relations Law. See *supra* notes 82-91 and accompanying text.

<sup>141</sup> As Justice Kooper stated in her appellate division dissent:

The majority's holding could well prove detrimental to the child, since it authorizes the abrupt termination of any and all contact with a person whom the child recognizes as a parent, no matter how compelling the realities favoring continuation of the relationship might be. Clearly, a child's love for, and attachment to, a person who has assumed the role of parent, is no less merely because that person is not biologically related to the child.

*Alison D. v. Virginia M.*, 155 A.D.2d 11, 18, 552 N.Y.S.2d 321, 326 (2d Dep't 1990).

Interestingly, the dissenting opinions in both the appellate division and court of appeals decisions were written by the only women on each of the two courts. In addition, Judge Kooper is a step-mother, which perhaps, in part, explains her sensitivity to the claims at issue in *Alison D.*

<sup>142</sup> This slippery-slope concern has been expressed by one court, in the context of granting a step-parent's petition under the *in loco parentis* theory, as fear that such recognition would "open the door to the butcher, the baker and the candlestick maker." *Bryan v. Bryan*, 645 P.2d 1267, 1273 (Ariz. Ct. App. 1982). The major problem with allowing this concern to guide judicial decisions on visitation and custody is that it weighs concerns about judicial economy and judicial usurpation into the legislative function over and above concerns for a child's welfare. Courts are statutorily obliged to favor the best interests and welfare of children over other concerns. Further, *Alison D.*'s argu-

change in the law such recognition might have brought.<sup>143</sup> These fears led the *Alison D.* court to refuse to acknowledge that there can be multiple persons in a child's life who could claim parental status *vis-a-vis* the child. The result of the court's holding was to terminate the relationship between Alison D. and A.D.M. because it did not fit within recognized patterns and because recognizing this relationship could expose the child to multiple claims.<sup>144</sup>

This reasoning is flawed. Regardless of the actions of courts, childrens' lives with ever greater frequency do not fall into the patterns and arrangements that courts either assume exist or project onto these children.<sup>145</sup> The relationships in which increasing numbers of children find themselves are not those that derive from traditional biological ties. As a result, children are injured by the failure of courts to recognize and allow the main-

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ment was that she was a parent to A.D.M., even though not an adoptive or biological one. Thus, concerns about the ramifications of third party petitions did not need to be resolved against Alison D. because, by her very arguments, the holding would only apply to others similarly situated, i.e., those in a parental relationship who are applying as parents.

<sup>143</sup> The California Court of Appeals expressed this concern in rejecting a lesbian mother's claim under similar circumstances, stating that recognizing the expanded definition of parent would leave the court to "face years of unraveling the complex practical, social and constitutional ramifications of this expansion of the definition of parent." *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Cal. App. 1 Dist. 1991). Judge Kaye in her *Alison D.* dissent recognized this concern, but expressed her belief that such concerns "overlook and misportray the Court's role in defining otherwise undefined statutory terms to effect particular statutory purposes, and to do so narrowly, for these purposes only." *Alison D.*, 77 N.Y.2d at 661, 572 N.E.2d at 32, 569 N.Y.S.2d at 591 (Kaye, J., dissenting).

The majority in *Alison D.* cited *Nancy S.* approvingly for its narrow interpretation of the term "parent." It is significant, if not dispositive, however, that the California court was bound by the definition of "parent" contained in the statute, which limited "parent" to encompass only those who were either the adoptive or natural parents of the child in question. See *Nancy S.*, 279 Cal. Rptr. at 215.

<sup>144</sup> This concern was mirrored by the Wisconsin Supreme Court in *Sporleder v. Hermes*, 471 N.W.2d 202 (Wis. 1991), under similar, although not identical, circumstances. The women in *Sporleder* had one of them adopt the child, since artificial insemination had been unsuccessful. The court stated that "[w]ere we to permit individuals standing *in loco parentis* to obtain custody, as *Sporleder* urges us to do, we would open the doors to multiple parties claiming custody of children by virtue of their *in loco parentis* status. Without limitations as we have discussed today, a child could have multiple 'parents,' and could find himself of herself subject to multiple custody and visitation arrangements." *Id.* at 208 (footnote omitted).

<sup>145</sup> As Polikoff points out, "Courts should design rules to serve children's best interests. By failing to do so, they perpetuate the fiction of family homogeneity at the expense of the children whose reality does not fit this form." Polikoff, *supra* note 1, at 469.

tenance of these relationships.<sup>146</sup> One of the striking ironies of the court of appeals' position is that the sperm donor may very well have a greater entitlement to a hearing on visitation with A.D.M. than did Alison D., who actually made the decision to bring him into the world and helped raise him for the first six years of his life.<sup>147</sup>

There are few means available to two women in the *Alison D.* situation, at the outset of their decision to conceive and raise a child, to protect the child from this result in the event of an acrimonious breakup. One possibility is joint or second-parent adoption by the two women. Another is a co-parenting agreement between the two women, providing for physical placement and legal custody of a child in the event of a break-up. Unfortunately, neither of these two methods at present provides a reliable legally-recognized means for women to ensure that such a relationship will be protected for both the child and the nonbiological mother.

Joint or second-parent adoption is not a viable option for many couples because the vast majority of states do not expressly recognize such adoption.<sup>148</sup> Under ordinary adoption procedures, adoption requires the relinquishment and termination of the legal rights and obligations of the legally-recognized parent.<sup>149</sup> For this kind of adoption to be successful, a court must be willing to allow the nonbiological mother to adopt without terminating the parental rights of the biological mother.<sup>150</sup> Such

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<sup>146</sup> For a discussion of the needs of children to have stability and continuity in their family relationship, see Bartlett, *supra* note 1, at 902-11.

<sup>147</sup> See *In the Interest of R.C.*, 775 P.2d 27 (Colo. 1989); *McIntyre v. Crouch*, 780 P.2d 239 (Or. Ct. App.), *appeal denied*, 784 P.2d 1100 (1989). In both cases, the courts refused to dismiss the claims of known sperm donors who were trying to establish parental rights to the child conceived as a result of their donation. Each argued for such rights on the basis of alleged agreements between themselves and the biological mother, despite the fact that the statute in each jurisdiction expressly provided that semen donors do not have rights or obligations with respect to children conceived as a result of their sperm donations.

<sup>148</sup> Polikoff, *supra* note 1, at 526. For a discussion of lesbian mother adoption and a survey of the few cases where such adoption has been permitted, see generally *id.* at 522-27. See also Emily C. Pratt, *Second Parent Adoption: When Crossing the Marital Barrier is in a Child's Best Interests*, 3 BERKELEY WOMEN'S L.J. 96, 98 nn.13-14 (1987-88); *Developments in the Law-Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1656 (1989).

<sup>149</sup> See Polikoff, *supra* note 1, at 522.

<sup>150</sup> *Id.* at 522.

recognition is inconsistent with the traditional attitude of family law which recognizes only one mother and one father for each child. A family composed of two legally-recognized mothers is not part of this traditional scheme. Thus, cases in which this kind of adoption has been allowed have required courts to acknowledge "the proffered family forms as acceptable child-rearing models."<sup>151</sup> Such acceptance is not yet sufficiently widespread that women can rely upon it in planning their future families. For Alison D. it was not a realistic option because New York had, at the time, yet to pass on the legality of a second mother adoption, let alone address it in the adoption statute.<sup>152</sup>

In the aftermath of *Alison D.* a New York surrogate has since approved such an adoption. In *In re the Adoption of a Child Whose First Name is Evan*<sup>153</sup> Surrogate Eve Preminger noted that one of the benefits of allowing the adoption was that absent the adoption, in the event that the two mothers separated, the heretofore unrecognized mother "would have no right to visitation even if it were demonstrated that denying visitation would be harmful to Evan."<sup>154</sup> In approving the adoption, Surrogate Preminger stated:

this is not a matter which arises in a vacuum. Social fragmentation and the myriad configurations of modern families have presented us with new problems and complexities that can not be solved by idealizing the past. Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed. Here this Court finds a child who has all of the above benefits and *two* adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities. There is no reason in law, logic or social philosophy to obstruct such a favorable situation.<sup>155</sup>

However, adoption under these circumstances still cannot be relied upon because approval is almost entirely within the discretion and judgment of the surrogate.

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<sup>151</sup> *Id.* at 526.

<sup>152</sup> See *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 657, 572 N.E.2d 27, 29, 569 N.Y.S.2d 586, 588 (1991).

<sup>153</sup> *In re the Adoption of a Child Whose First Name is Evan*, 153 Misc. 2d 844, 583 N.Y.S.2d 997 (Sur. Ct. N.Y. County 1992).

<sup>154</sup> *Id.* at 846, 583 N.Y.S.2d at 999.

<sup>155</sup> *Id.* at 852, 583 N.Y.S.2d at 1002.

The efficacy of a co-parenting agreement is similarly uncertain. In *Sporleder v. Hermes*<sup>156</sup> the Wisconsin Supreme Court rejected a co-parenting agreement entered into between a lesbian couple executed after they had separated. The court held that the contract was unenforceable for several reasons.<sup>157</sup> First, insofar as the agreement attempted to resolve custody and visitation in a manner agreeable to both women, the court found that it was unenforceable because the custody and visitation statute of the state prefers parents over third parties.<sup>158</sup> Second, the court reasoned that custody and visitation are to be determined by statute and case law and cannot be the subject of a contract.<sup>159</sup> Third, the court stated that an adoptive parent cannot bargain or contract away her rights in the adopted child.<sup>160</sup> There is nothing to suggest that a different result would occur were the New York Court of Appeals to pass on the issue under these circumstances. Hence, a co-parenting agreement between two women would not be assured of enforcement.

Thus, the court of appeals decision in *Alison D.* leaves women seeking to establish a nontraditional family in the objectionable position of not being able to protect the children of that relationship from the ill effects of an acrimonious dissolution. The *Alison D.* court assisted the biological mother in unilaterally severing the relationship between A.D.M. and Alison D. with absolutely no regard for the effect this disruption would have on A.D.M. The court's opinion theoretically has even wider impact by leaving unprotected the relationships between step-parents and step-children who have not gone through the formality of an adoption.

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<sup>156</sup> 471 N.W.2d 202 (Wis. 1991).

<sup>157</sup> The court states, in concluding its discussion of the co-parenting agreement, that [b]ecause of the public interest in maintaining a stable relationship between a child and his or her legal parent, the co-parenting agreement, to the extent that it purports to award custody or grant visitation rights to Sporleder, is unenforceable. While we recognize that Sporleder may have had a reasonable expectation that she would have continued contact with Z.J.H. under the agreement, enforcing the agreement would be contrary to legislative intent and the public interest.

*Id.* at 212. Nowhere are the child's interests so much as mentioned. See also Polikoff, *supra* note 1, at 498 (noting that such agreements are not binding upon courts).

<sup>158</sup> 471 N.W.2d at 211.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

## V. RECOMMENDATIONS

A court handling visitation and custody decisions is charged with protecting the children and effectuating their best interests. A new approach is obviously needed for nontraditional cases.<sup>161</sup> If standing really presents the stumbling block to consideration of a child's best interests, as the court of appeals suggested, then revising the law of standing as applied to custody and visitation cases is an appropriate place to start. By dismissing the claim for lack of proper standing, as the court of appeals did, the court prevented itself from answering the question that the proceeding was intended to determine: whether visitation between Alison D. and A.D.M. would have been in A.D.M.'s best interests. In the words of other commentators, it "gives the result as the reason."<sup>162</sup>

A recent New York family court case presents an instructive discussion of standing in the context of petitions for custody. In that case, *Whalen v. Commissioner of the Fulton County Department of Social Services*,<sup>163</sup> the court sought to avert the unpalatable outcome of *Alison D.* by determining that a family court, in entertaining a petition brought under section 651(b) of the Family Court Act,<sup>164</sup> possessed greater jurisdiction than where a petition is brought in the supreme court under the Do-

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<sup>161</sup> One commentator has suggested that judges attempting to resolve custody and visitation decisions might better serve the interests of all the concerned parties by flipping a coin. Alan Ryan, *When It's Rational to be Irrational*, THE N.Y. REVIEW, Oct. 10, 1991, (reviewing JON ELSTER, SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY (1991)). Elster argues that tossing a coin to choose between warring individuals "shortens the process, reduces the damage, and produces as good a result as we can hope for." *Id.*

<sup>162</sup> Michael J. Lewinski, Note, *Visitation Beyond the Traditional Limits*, 60 IND. L.J. 191, 212 (1984). Lewinski goes on to state that "the argument [on standing] does not advance discussion of whether nonparental visitation rights are a good or wise thing." *Id.* (citation omitted).

<sup>163</sup> 152 Misc. 2d 251, 575 N.Y.S.2d 631 (Fam. Ct. Fulton County 1991).

<sup>164</sup> Section 651 (b) states:

When initiated in the family court, the family court has jurisdiction to determine, with the same powers possessed by the supreme court in addition to its own powers, habeas corpus proceedings and proceedings brought by petition and order to show cause, for the determination of the custody or visitation of minors, including applications by a grandparent or grandparents for visitation rights pursuant to section seventy-two or two hundred forty of the domestic relations law.

N.Y. FAM. CT. ACT § 651(b) (McKinney 1983 & Supp. 1993).



mestic Relations Law.<sup>165</sup> The *Whalen* court found that the Family Court Act provided greater standing than the supreme court was allowed under section 70.<sup>166</sup> Thus, the necessary showing to trigger the court's equitable powers is to have the "petitioner show on its face that the remedy asked for will be for the benefit of the child."<sup>167</sup>

The only logical source of the required nexus for standing is the relationship between petitioner and child. If the relationship is of sufficient strength, duration and, where a child is old enough for it to be a factor, mutuality, it is entirely rational to conclude that the maintenance of this relationship could be in a child's best interests. Certainly, the existence of such a relationship should be a sufficient showing to at least warrant an inquiry into the particulars of the situation. The inquiry at this stage of such a proceeding does not go to the merits of the claim. Rather, the inquiry is to whether a petitioner should be given the opportunity to be heard.

Court-imposed labels, such as biological strangers, do not address the nature of the relationship or lack of a relationship between a petitioner and a child and should not be used to bar absolutely any consideration of what would serve a child's best interests.<sup>168</sup> For a court to consider whether visitation in these

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<sup>165</sup> The petitions in *Whalen* were brought by the paternal grandfather, a sibling of the subject child and, significantly, "two persons wholly unrelated to the child, but having a nexus with her through their adopted son who is the brother of the subject child." 152 Misc. 2d at 252, 575 N.Y.S.2d at 631.

<sup>166</sup> In delineating to whom standing is extended, the *Whalen* court stated:

The question of standing does not arise in a vacuum. Rather, the nature of an individual's interest in the outcome of a specific controversy determines whether he or she has the right to request judicial intervention into the resolution of that controversy. In order to satisfy the requirements of standing, a party must have "a sufficient stake [in the outcome of] an otherwise justiciable controversy to obtain judicial resolution of that controversy."

The above discussion of standing was omitted from the N.Y.S.2d reporter, but the opinion was reprinted in full in N.Y. L.J., Sept. 23, 1991 (quoting *Matter of Mavis M*, 110 Misc. 2d 297, 441 N.Y.S.2d 950 (Fam. Ct. Kings County 1981), citing *Sierra Club v. Morton*, 405 U.S. 727 (1972) (alteration in original)).

In *Matter of Mavis M* the court found that foster parents who had voluntarily relinquished their status as foster parents had not demonstrated a sufficient stake in the outcome of the this matter to be invested with standing to bring this matter. 110 Misc. 2d at 308-09, 441 N.Y.S.2d at 957.

<sup>167</sup> *Id.*

<sup>168</sup> As Polikoff states:

Attempting to avoid such litigation on the merits by equating the nonbiological mother's legal status with that of a babysitter or family friend does not demon-

circumstances would serve the child's best interests, legislative changes are not required. Such legislative change would, however, be the simple solution to a complex set of problems facing us in a society with staggering rates of divorce, remarriage and alternative living arrangements, all of which add up to many children who depend upon nontraditional relationships for physical and psychological security.<sup>169</sup> Legislative change would clearly and uniformly resolve the issue and, ideally, prevent disparate outcomes in similar cases. At the same time, courts are not helpless in the absence of legislative change; they need only use existing standing doctrine in keeping with the traditional goal of family law—to serve the best interests of the child. Such an approach is entirely within a court's reach and, in fact, best serves the court's role in adjudicating such proceedings.

## CONCLUSION

Where does *Alison D.* leave us? Even if the decision is adhered to, children will continue to be born into homosexual families. The refusal of courts to acknowledge these relationships as being legally significant and protected will continue to comport neither with the reality of a child's life nor with the court's traditional role of protecting and effectuating the best interests of a child. This refusal is even more objectionable when it is based on improper standing, as it was in *Alison D.* Absent legislative change, a revision of the manner in which courts apply standing doctrine to these cases would better serve the children's interests and the court's role in adjudicating visitation cases.

Kimberly P. Carr

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strate a principled defense of either parental rights or the best interests of children. Rather, the technique is a bad faith assertion of a definition of parenthood that is no longer adequate to recognize contemporary family forms.

Polikoff, *supra* note 1, at 542.

<sup>169</sup> See Delaney, *supra* note 133, at 209. Delaney argues for the addition of a statutory redefinition of the parent-child relationship to "allow a nonbiological, unmarried 'parent' who has satisfied certain conditions to pursue an action to determine parentage even though no biological or adoptive link connects the child to the 'parent'." *Id.*

