


NO ORAL ARGUMENT REQUESTED

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State of New York  
Court of Appeals



DEBRA H.,

*Plaintiff-Appellant,*

-against-

JANICE R.,

*Defendant-Respondent.*

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**BRIEF OF AMICUS CURIAE FAMILY WATCH  
INTERNATIONAL IN SUPPORT OF  
DEFENDANTS**

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## INTRODUCTION

In this brief, *amicus* Family Watch International will provide a concise account of the important governmental interests served by retaining the rule articulated by this Court in *Matter of Alison D. v. Virginia M.* (77 NY2d 651 [1991]) and which was recognized as controlling by the court below. Briefly, deferring to the legislative decision not to provide standing to seek child custody and visitation to unrelated adults advances the State's interests in preserving the principle of separation of powers, in ensuring certainty in parentage, in preventing child custody arrangements not in the best interests of children and in preventing incursions on the rights of fit parents to direct the upbringing of their children.

## ARGUMENT

**I. This Court should continue to defer to the legislature on the fundamental question of standing to seek child custody.**

As this Court has noted, the question of whether unrelated adults should have standing to seek custody or visitation over the objection of a fit parent is one for the Legislature to address.

As the court below noted, “[t]his matter is governed by the Court of Appeals

decision in *Matter of Alison D. v. Virginia M.* (77 NY2d 651 [1991]), which provides that a party who is neither the biological nor the adoptive parent of a child lacks standing to seek custody or visitation rights under Domestic Relations Law §70, even though that party may have developed a longstanding, loving and

For instance, the District of Columbia Council enacted a law in 2007 that allows a “de facto” parent to seek custody of a child on breakup of a relationship between the legal parent and the “de facto” parent. D.C. Code §16-831.01. A “de facto” parent is defined as someone who has met one of two sets of criteria. In one, the prospective “de facto” parent must have “lived with the child in the same household at the time of the child’s birth or adoption”; have “taken on full and

examples from other jurisdictions of how to do so.

though it has obviously had the time and opportunity to do so. It has even had not acted to amend section 70 in a way that would compel any different result This controlling decision was issued in 1991. Since then, the Legislature has fit parent to allow them” visitation or custody. *Id.*

Legislature did not in section 70 give such nonparent the opportunity to compel a continue visitation with the child.” *Allison D.* at 657. This Court found that “the child or who have had prior relationships with a child’s parents and who wish to 70 to include categories of nonparents who have developed a relationship with a visitation” but this Court declined the invitation “to read the term parent in section deemed it appropriate, it gave other categories of persons standing to seek In the controlling case, this Court noted that “[w]here the Legislature the biological parent.” *Debra H. v. Janice R.*, 61 AD3d 460, 461[2009].

nurturing relationship with the child and was involved in a prior relationship with

More to the point is the example of Delaware. There, the supreme court ruled that the partner of a child's adoptive mother did not have standing to seek custody or visitation with the child in February 2009. *Smith v. Gordon*, 968 A.2d 1 [Del. 2009]. The Legislature, in July 2009, responded directly to this ruling and enacted a law creating an entirely new legal status of "de facto parent" defined as a person who has (1) "had the support and consent of the child's parent or parents who fostered formation and establishment of a parent-like relationship between the child and the de facto parent;" (2) "exercised parental responsibility for the child;" and (3) "acted in a parental role for a length of time sufficient to have established a

both parents." *Id.*

child's parent with the agreement of the child's parent, or if there are 2 parents, responsibilities as the child's parent;" and "held himself or herself out as the relationship form between the child and the third party"; took "full and permanent with the encouragement and intent of the child's parent that a parent-child months" before seeking custody; "formed a strong emotional bond with the child show he or she "lived with the child in the same household for at least 10 of the 12 parents, both parents." *Id.* The second set of criteria would require the person to out as the child's parent with the agreement of the child's parent or, if there are 2 permanent responsibilities as the child's parent"; and have "held himself or herself

bonded and dependent with the child that is parental in nature.” 77 Del. Laws c.

97; 13 Del. Code §8-201.

It seems eminently fair to assume that the New York Legislature would have acted to amend section 70 at some point in the last eighteen years if it wanted a different result than obtained in cases like that of *Allison D.* and the instance action.

**II. The Legislature's failure to grant standing to seek visitation and custody to unrelated adults protects the interests of children and parents.**

The Legislature's decision to retain the rule enunciated in *Allison D.* is amply justified by the important societal interests that rule serves.

**A. The rule of *Allison D.* promotes certainty in matters of legal parentage.**

The law's traditional presumption, followed by the Legislature as noted in *Allison D.*, that legal parenthood is tied to biological relationships, marriage or adoption promotes certainty in parentage matters. These criteria are objectively verifiable. They also limit the universe of persons who can claim legal access to a child. They thus create bright lines that simultaneously (1) give notice to those who might make choices that could result in the creation of a parental relationship (like engaging in a sexual relationship or marrying or adopting a child) that they are accepting certain responsibilities and (2) assuage concerns that others who do not fit these criteria might be able to interfere with an ongoing parent-child relationship.

involving step-parents, grandparents, and parties in a relationship with a couples and could arise in a myriad of other circumstances, including disputes given standing to seek child visitation and custody “are not limited to same-sex For instance, the kinds of disputes that might arise if unrelated adults are ought not to second-guess the Legislature’s judgment.

implications of doing so may explain why it has not so chosen and why this Court bodies of Delaware and the District of Columbia have done. Some probable Legislature could adopt less objective criteria for parentage as the legislative criteria that could result in less optimal outcomes for children. It is true that the the discretion of individual courts using open ended and potentially nebulous Without this kind of clarity the determination of legal parentage would be at

**B. The rule discourages complicated and potentially harmful child rearing arrangements.**

standing to seek custody or visitation of a child. determinations without abandoning the rule that an unrelated adult does not have There are clearly adequate ways of ensuring clarity in parentage child. *In the Matter of Jacob*, 86 NY2d 651 [1995].

unmarried couples including couples where one of the partners is the parent of the *v. Robles*, 7 NY3d 338 [2006]. New York does, however, allow for adoptions by parentage through biological ties or through marriage are not possible. *Hernandez* Since this case involves a same-sex couple, the possibilities of establishing

significant other.” *Janice M. v. Margaret K.*, 948 A.2d 73, 88 [Md. 2008] (holding that a same-sex partner of a child’s mother did not have standing to seek visitation). Thus, deserting the standard recognized in *Allison D.* could affect the lives of many more children than just those being raised by same-sex couples. In fact, given the prevalence of divorce and remarriage or cohabitation, it would seem these latter scenarios would be much more likely to produce disputes over custody. Nor would these disputes necessarily be confined to only two individuals. The Delaware and D.C. laws described above clearly allow for more than two legal parents. Such scenarios are not unheard of either. A Minnesota case involved a dispute between a sperm donor and a same-sex couple raising a child in which all of these parties were given some parental rights to a child. *LaChapelle v. Mitten*, 607 N.W.2d 151 [Minn. App. 2000] *cert denied* 531 U.S. 1011[2000]. As complicated as disputes between divorcing parents or between two biological parents over child custody can be (i.e. a child being shuttled between two homes or being subjected to competing claims about schooling), this complication can only be increased when the dispute involves three or even more “parents.”

In short, the potential complications that an expansive standing rule might create, amply justify the hesitance of the Legislature to adopt such a rule. At the very least, they underscore the wisdom of this Court’s deference to the Legislature on this matter.

**C. The rule also protects the rights and prerogatives of fit parents.**

As other parties in this proceeding will explain at greater length, the rule of *Allison D.* prevents an unnecessary incursion into the ability of a fit parent to direct the upbringing of his or her child. As this Court noted in that case: “To allow the courts to award visitation—a limited form of custody—to a third person would necessarily impair the parents’ right to custody and control.” *Allison D.* at 656-657. These parental rights are well established in U.S. Supreme Court precedent. See *Meyer v. Nebraska*, 262 U.S. 390 [1923]; *Pierce v. Society of Sisters*, 268 U.S. 510 [1925]; *Troxel v. Granville*, 530 U.S. 57 [2000].

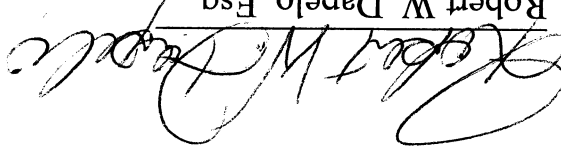
When an unrelated adult is allowed to assert claims adverse to a fit parent’s decisions (i.e. is given standing to contest the parent’s wishes), interference with the parent’s rights (even if only to the degree that the claims require a defense in court) is inevitable.

Avoiding this interference is another valid reason this court should reject the invitation to second-guess the Legislature’s refusal to expand standing for custody and visitation.

**CONCLUSION**

For the foregoing reasons, amicus curiae, Family Watch International, respectfully requests that this Court affirm the decision of the court below.

Respectfully submitted,

  
Robert W. Dapelo, Esq.