FAMILY LAW SCHOLARSHIP GOES TO COURT: FUNCTIONAL PARENTHOOD AND THE CASE OF *DEBRA H. v. JANICE R.*

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Family law literature, while diverse in its exploration of contemporary families, also offers important threads of consensus. These strong points of coherence, when brought together with relevant case law, can be a useful means of advancing the academic conversation as well as engaging directly with courts to shape the law's development.

In a field as complex as family law, myriad academic viewpoints on any given issue often make it difficult to imagine scholarly discussion having utility for courts. As we aim to show here, however, amicus briefs can be important vehicles for synthesizing the literature, highlighting basic points of consensus and connecting family law scholarship to ongoing cases.[1]

The Family Law Academics Amicus Brief

[1] For perspectives on the role of effective amicus briefs generally see Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603 (1984); Ed R. Haden & Kelly Fitzgerald Pate, *The Role of Amicus Briefs*, ALA. LAW., March 2009, at 114; Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POL. 33 (2004); Reagan Wm. Simpson, *How to Be a Good Friend to the Court: Strategic Use of Amicus Briefs*, 28 THE BRIEF 3, at 38 (1999); Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs Revisited*, 33 STETSON L. REV. 171 (2003). *But see* Julie Gannon Shoop, *Too Many 'Friends': Appeals Judge Urges Limits on Amicus Briefs*, TRIAL, Dec. 1997, at 18.

In assessing whether amicus briefs "count" as scholarship, Professor Chemerinsky has mused: "I think that perhaps it is best to avoid focusing on form and instead look at quality . . . Scholarship is, in a sense, an act of faith that writing can make a difference." Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 892–93 (2009). For other amicus briefs reproduced in academic journals, *see, e.g.*, Symposium, *Who Gets the Children? Parental Rights after* Troxel v. Granville, 32 RUTGERS L. J. 693 app. at 873 (2001) (reproducing Center for Children's Policy Practice & Research at the University of Pennsylvania amicus brief in *Troxel v. Granville*); Suzanne B. Goldberg, Sarah Hinger & Keren Zwick, *Equality Opportunity: Marriage Litigation and Iowa's Equal Protection*, 12 J. GENDER RACE & JUST. 107 (2008); Suzanne B. Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249 (2006) (reproducing brief of professors of history and family law as *amici curiae*).

The amicus brief reproduced here ("the Brief") makes the connection between family law theory and jurisprudence by synthesizing the scholarly literature on "functional parenthood" and *literally* bringing it to court. The central issue addressed is how the law should recognize the parental rights of an individual who *functions* as a parent despite having neither biological nor adoptive ties to the child. Legal recognition of functional parenthood, the Brief argues, is intended both to counteract the harm inflicted upon children by separating them from a loving parent[2] and to vindicate the rights of functional parents.

The Brief was submitted in the 2010 New York Court of Appeals case, *Debra H. v. Janice R.*,[3] in support of petitioner Debra H. The petitioner had brought the suit two years earlier in an effort to retain contact with the child she had been raising with her former partner since the child's birth. At that time, functional parents like Debra did not have standing in New York to petition for visitation or custody as a result of the 1991 state high court ruling in *Alison D. v. Virginia M.*,[4] in which the court

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[2] *See* Brief of Proposed Amici Curiae National Association of Social Workers, et al., in Support of Petitioner Debra H.'s Motion for Permission to Appeal, No. 106569/08, *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010), *cert. denied*, 131 S.Ct. 980 (2011) [hereinafter NASW Brief] (citing Frank J. Dyer, *Termination of Parental Rights in Light of Attachment Theory: The Case of Kaylee,* 10 PSYCHOL. PUB. POL'Y & L. 5, 11 (2004)); *see also Shondel J. v. Mark D.*, 7 N.Y.3d 320, 330 (2006) ("The potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated."). The children of same-sex couples equally feel the traumatic effects of separation. *See* NASW Brief, *supra* (noting that parent-child relationships and the detrimental effects of the loss of such a relationship are the same for children of same-sex or different-sex parents).

[3] *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010), *cert. denied,* U.S. 131 S.Ct. 908 (Jan. 10, 2011).

[4] 77 N.Y.2d 651 (1991).

declared adults in Debra's position to be "legal stranger[s]" to their children.[5]

Strikingly, forty-five family law professors from law schools across New York State came together to sign the Brief. By collectively endorsing one set of principles for judicial recognition of functional parents,[6] they made a strong statement to the court regarding the importance of functional parent-child relationships and the viability of according those relationships legal recognition.

The amici presented this analysis in part to neutralize the biological parent's attempt to exploit the complex and sophisticated state of family law literature. That parent, Janice R., had urged the court not to wade into the intricacies of adopting a functional approach to defining legal parenthood,[7] but rather to leave any change in the law to the legislature. Janice R. criticized what she perceived to be "Debra H.'s inability to consistently propound one standard" for granting standing to functional parents.[8] She emphasized the divergent approaches of legislatures on a range of factors, including the amount of time required before one can qualify as a functional parent, statutes of limitations for bringing a petition, and distinctions between petitions for visitation and custody.[9] She argued the issue of functional parenthood was so complex—as evidenced by the fact

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[5] While second-parent adoption has been available in New York since 1995, *see In re Matter of Jacob*, 86 N.Y.2d 651 (1995), not all couples complete these adoptions when raising children together. Among the reasons a couple might not proceed with a second-parent adoption are one or both partners' reliance on the stability of the relationship and financial obstacles, because retention of a lawyer, the required home study, and the legal proceeding can be costly. *See* Brief *infra* n.44; Brief for Citizens' Comm. for Children, Lawyers for Children and Children's Law as Amici Curiae Supporting Appellant, *Debra H. v. Janice R.*, 930 N.E.2d 184 (2010) at 28–30.

Some of the amici who endorsed the brief teach family law; others direct child advocacy clinics or programs in family law.

[7] *See* Respondent's Opp. to Mot. for Leave to Appeal, *Debra H v. Janice R.*, No. 106569/08 (N.Y. July 21, 2009).

[8] *Id.* at 2–3.

Id. at 56–58.

that "the standards defining who can assert such standing varies widely from state to state"[10]—that any changes to New York's standard needed to be addressed by the state legislature. The family law academics countered those arguments by reinforcing that points of agreement exist in the literature and the case law upon which courts can and should rely in making functional parenthood determinations.

The Key Features of Functional Parenthood

To demonstrate the consensus around functional parenthood, the Brief draws on the academic literature, the American Law Institute's *Principles of Family Dissolution*,[11] and practices and jurisprudence in other states. It presents ways that courts can—and already have—looked to function rather than form when defining legal parenthood at the point of family dissolution. More specifically, the Brief focuses the court's attention on three factors consistently endorsed in the academic literature: 1) legal parent's consent; 2) functional parent's intent; and, 3) formation of a parent-child bond.

With respect to consent, the Brief argues that it is essential that the legal parent have fostered a functional parent-child relationship. Evidence of the legal parent's having fostered the

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[10] *Id.* at 57.

[11] The *Principles* have culled the work of academics into coherent standards, identifying important features of functional parenthood that can help to guide jurisprudence in the area of family dissolution. *See E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891(Mass. 1999) (citing *Principles* when describing qualities of a de facto parent); *In re Parentage of L.B.*, 122 P.3d 161, 176 n.24 (Wash. 2005) (noting that *Principles* "support[] the modern common law trend of recognizing the status of *de facto* parents); *Rubano v. DiCenzo*, 759 A.2d 959, 974–75 (R.I. 2000) (noting, in decision giving recognition to a functional parent, that such position is "in harmony with" the *Principles*). The *Principles*, however, have not been without detractors. *See, e.g.*, Penelope Eileen Bryan, *Vacant Promises?: The ALI Principles of the Law of Family Dissolution and the Post-Divorce Circumstances of Women*, 8 DUKE J. OF GENDER L. & POL'Y 167, 167–68 (2001) (asserting that the *Principles* "do little to alleviate the post-divorce financial distress experienced by women and their dependent children"); Gregory A. Loken, *The New "Extended Family"—"De Facto Parenthood and Standing Under Chapter 2*, 2001 B.Y.U. L. REV. 1045, 1073 (2001) (arguing that the *Principles*, while well-intentioned, present a "substantial conundrum" in allowing potentially abusive litigation by "[i]ndividuals whose only connection to the child is rooted in a now failed love for the child's parent").

other adult's parental relationship with the child in effect confirms the legal parent's consent that to the other adult also becoming the child's parent.[12] In addition, the requirement protects the legal parent's interests by ruling out claims from people who have not actually functioned as parents. Consent can be manifested in a number of ways; as the Brief shows, a legal parent can: incorporate the functional parent's family name into the child's name; encourage joint decision-making with respect to the child's healthcare, education and other needs; and support the development of relationships between the functional parent's immediate family or other relatives and the child.[13]

In addition to requiring the legal parent's consent, the amici maintain that the functional parent must have intended to become a parent to the child, either from conception or by becoming part of an existing family unit. A functional parent can demonstrate this intent by assuming parental responsibility for the child. This qualitative analysis would consider, for example, the functional parent's sharing in the daily emotional and financial care of the child, participation in religious activities

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[12] *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, 471 (1990) (noting that parental status should flow from proof that a parent-child relationship was developed with the cooperation and consent of the legal parent).

[13] *See id.* at 499 (offering examples of the development of a parent-child relationship that should allow the functional parent to seek parental status, including: treating a child as part of both mothers' extended families; giving a child the last name of both mothers; and agreeing (orally or in writing) to jointly raise the child); *see also* Paula L. Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513, 551 (1993) (discussing indicia of consent, including: oral or written agreements; the family name of both women included in the child's name; the assumption of joint decision-making; and the child's relationships with each woman's family members). In addition, when one partner consents to the insemination of the other, that consent has been treated as the basis for establishing the parentage of that partner with the child born as a result of the insemination. *See* Nancy Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. OF C.R. & C.L. 201, 233 (2010) (discussing statutes providing that a person's consent to the artificial insemination of a partner establishes that person as a parent of the child).

with the child and taking a parent-like role ing in family outings.[14]

The development of a parent-child bond may also provide a supplemental indication that a functional parent-child relationship has developed and should be recognized by law. Indeed, a number of courts have noted this feature in discussing functional parenthood.[15] It may be difficult, however, to prove the existence of a parent-child bond when a child is very young. When all other features of parenthood are in place, the amici argue that such a difficulty should not preclude a functional parent from having standing to petition for custody of or visitation with the child he or she intended to raise with the legal parent's consent.

A Partial Victory

The decision in *Debra H. v. Janice R.* came down on May 4, 2010, two years after Debra initially sought the aid of the courts to secure her rights as a parent. The New York Court of Appeals held that Debra has standing as a legal parent to petition for visitation and custody rights with respect to her child. The majority did so, however, on the basis of the couple's Vermont civil union, not on grounds supported by the ideas of functional parenthood.[16]

Consequently, although Debra won an important victory in the context of her own relationship with the child she had been

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[14] *See*, *e.g.*, Ettelbrick, *supra* note 12, at 552 (discussing criteria for functional parenthood, including the functional parent's participation in the daily emotional and financial care of the child).

[15] *See, e.g.*, *V.C. v. M.J.B.*, 748 A.2d 539, 553 (N.J. 2000); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995).

[16] *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010). More specifically, the majority relied on principles of comity to grant parental rights to Debra, based on Vermont civil union law. Under that law, parties to a civil union are deemed to have the same rights with respect to a child born to either party during the civil union. *Id.* at 195. Because the child in this case was born after the parties entered into a civil union in Vermont, the court, drawing on Vermont case law interpreting its civil union statute, held that Debra has standing to seek visitation and custody of the child. *Id.* at 196–97.

raising, the decision leaves most functional parents without legal recognition in New York. In fact, the court specifically affirmed its holding in *Alison D.* that "parentage under New York law derives from biology or adoption,"[17] and expressed the view that those factors provide a needed bright-line rule for establishing parental rights.[18] It declared its conviction that "the predictability of parental identity fostered by *Alison D.* benefits children and the adults in their lives,"[19] and that the type of rule urged by Debra H. "threatens to trap single biological and adoptive parents and their children in a limbo of doubt."[20] Any change in the meaning of the term "parent," it wrote, should be made by the legislature rather than by the courts.[21]

Still, despite the majority's failure to embrace the amici's argument, one concurring judge offered clear support for the functional parenthood doctrine, establishing a potential path for future decision-making on this issue: She found *Alison D.* to be both "outmoded and unworkable," as urged by the amici.[22] Yet while her opinion stands as at least one appellate voice of support in New York for the adoption of a functional approach to parenthood,[23] the court's majority left parents in Debra's position who do not have a civil union or marriage with their former partner in the same situation as before the case was decided—as "legal strangers" to the children they are raising.

The Road Ahead

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[17] *Id.* at 191.

[18] *Id.*

[19] *Id.* at 192.

[20] *Id.* at 193.

[21] *Id.* at 194.

[22] *Id.* at 201 (Ciparick, J., concurring).

[23] In the court's original *Alison D.* decision, Judge Judith Kaye also embraced a functional approach to defining parenthood as the lone dissenter. *See Alison D. v. Virginia M.*, 77 N.Y.2d 651, 657–662 (1991) (Kaye, J., dissenting).

Debra H. won a personal victory in May, 2010, in that she won the right to ask a court for visitation with and custody of her child. However, the law in New York remains substantially unchanged: non-biological parents who have not adopted the children they are raising with a partner, or who were not married to or in a civil union with that partner prior to the child's birth, do not have standing to seek visitation or custody.

Following the New York high court's ruling, Janice R. appealed for review in the United States Supreme Court, but the Court denied her petition.[24] This denial, as well as the recent denial of review in a similar case[25] provide a strong indication that the Court intends to leave determinations of functional parenthood to the states.[26]

With this ongoing state-based control over family recognition, functional parents around the country may continue to face challenges from their former partners like those Debra faced. While some states, notably California,[27] have adopted the principles of functional parenthood, others, such as New York, Utah, Illinois and Tennessee, continue to leave functional parents in limbo.[28] Academics can thus continue to play an important role in providing information and analysis that may be critical for securing functional parents' legal rights in New York and in

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[24] *Janice R. v. Debra H.*, 131 S.Ct. 908 (2011).

[25] *Charisma R. v. Kristina S.*, 96 Cal.Rptr.3d 26 (Cal. Ct. App. 2009), *cert. denied*, 2010 WL 596568 (Feb. 22, 2010). Unlike *Debra H.*, however, *Charisma R.* did not address the manner in which an out-of-state civil union factors into recognizing parental rights.

[26] Subject, of course, to the constitutional limitations the Court described in *Troxel v. Granville*, 530 U.S. 57 (2000) (pertaining to the fundamental rights of biological parents).

[27] California originally established its functional parent doctrine in *Elisa B. v. Superior Court*, 37 Cal.4th 108 (Cal. 2005). For further detail on other states' approaches to functional parenthood, see Part II of the Brief.

[28] For other decisions in which state courts have considered the issue and denied same-sex partners standing to petition for custody or visitation of their non-biological or non-adoptive children, *see, e.g.*, *Jones v. Barlow*, 154 P.3d 808 (Utah 2007); *In re Visitation with C.B.L. v. H.L.*, 723 N.E.2d 316 (Ill. App. Ct. 1999); *Thompson v. Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999).

other jurisdictions as states assess, and re-assess, their approach to functional parenthood.

INTEREST OF AMICI CURIAE

Amici curiae are forty-five professors who teach and write about family law on the faculties of every law school in New York State. Their names, titles and institutional affiliations are listed individually in an Attachment to this brief.

Amici have extensive expertise related to trends in family law in New York and throughout the country. Through their academic research, clinical work and teaching, amici have particular insight into the harmful consequences to parents and children caused by formalistic conceptions of family.

In addition, based on their expertise, amici are able to address developments in both legal scholarship and the law more generally regarding the increasingly widespread recognition and adoption of a functional approach to families and parenting. They do so to supplement rather than duplicate the arguments presented by the parties.

SUMMARY OF ARGUMENT

Family law academics overwhelmingly endorse an approach to family law that recognizes and protects functional parent-child relationships. This approach, which accords recognition to individuals who have functioned as parents with the legal parent's consent, rejects the formalistic rule of *Alison D. v. Virginia M.*[29] That rule, much-criticized by scholars for its harm to both children and their functional parents, bars legal recognition of a parent-child relationship absent a biological or adoptive tie between the child and adult in question.[30] By contrast, the functional approach discussed here and endorsed by both scholars and numerous courts reflects the reality of family life today, and in doing so promotes the best interests of children in New York State.

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[29] 77 N.Y.2d 651 (1991).

[30] *Id.* at 656.

In particular, family law scholars have identified the legal parent's consent, the functional parent's intent and the formation of a parent-child bond as defining features of functional parenthood. These features are similarly endorsed by the American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).

Courts around the country have likewise embraced these criteria as they have abandoned the formalistic conception of the family reflected in *Alison D*. Importantly, these courts have exercised their well-established equitable powers to adopt these criteria, recognizing functional parent-child relationships that best serve the interests of children while simultaneously protecting the interests of legal parents and fairly addressing the interests of functional parents.

The time is ripe for this Court, too, to shift away from *Alison D.* toward a jurisprudence that more closely corresponds to the reality of family life. In light of its established equitable powers and past exercise of those powers to recognize functional parents in certain contexts, this Court is well within its authority to grant standing to functional parents and to protect important functional parent-child relationships that will further the child's best interests.

ARGUMENT

This Court can bring New York's family law into step with the general trend, identified and endorsed by family law academics throughout the State and country, toward adopting a functional approach to defining legal parenthood at the point of family dissolution. This functional approach best serves the interests of New York's children, consistent with New York's family law jurisprudence and this Court's equitable authority. In doing so, a functional approach corrects the widely condemned and harmful formalistic rule set out by *Alison D. v. Virginia M.*,[31] which held that a woman who had functioned in all respects as a parent to her child was nonetheless a legal stranger to that child,

[31] 77 N.Y.2d 651.

because she was not the biological or adoptive mother of the child.[32]

I. Family Law Academics Overwhelmingly Endorse a Functional Approach to Recognizing the Legal Family.

Family law academics from every law school in New York State endorse an approach that recognizes functional families and the functional parent-child relationships within those families. Families, as respected scholars have long argued, are not only groups of people who meet a formal definition of family as created by adoption or marriage, but also those groups that function as a family, presenting themselves and being recognized by others as such.[33]

Academic scholarship uses a variety of terms to describe non-biological and non-legal parents (here amici use the term "functional parent"), but at their core, all terms stem from the same essential commitment—that adults who develop parent-child relationships with the children they are raising are parents in every respect.

A. Family Law Academics Reject the Formalistic Rule of Alison D. as Inconsistent with Family Realities and Embrace a Functional Family Approach to Defining Legal Parenthood.

In formulating a functional approach to the legal family, family law academics have resoundingly rejected the approach of *Alison D. v. Virginia M.*,[34] which held that a woman who did not have biological or adoptive ties to her child could not be a parent within the meaning of New York's Domestic Relations

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[32] *Id.* at 657.

[33] *See, e.g.*, Martha Minow, *Redefining Families: Who's In and Who's Out*?, 62 U. COLO. L. REV. 269, 270 (1991) (describing a functional family as one that will "share affection and resources, think of one another as family members, and present themselves as such"); *see also* Paula L. Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513, 516-17 (1993) (discussing how a lesbian couple, through intent, planning, and sharing of responsibilities, functions as a family unit).

[34] 77 N.Y.2d 651 (1991).

Law § 70.[35] As one analyst pointed out, the Court's decision in *Alison D.* demonstrated "a glaring lack of concern for the important interests of children living in nontraditional families."[36]

Moreover, there is consensus among academics that children benefit from continued contact with functional parents and that the law must recognize the importance of these relationships in adjudicating familial disputes.[37] This consensus demonstrates that a rule granting exclusive parental authority only to legal parents and not to other adults with parent-child relationships is inadequate to address the needs of today's

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[35] *Id.* at 656-57.

[36] *Recent Case: Family Law—Visitation Rights—New York Court of Appeals Refuses to Adopt A Functional Analysis in Defining Family Relationships*—Alison D. v. Virginia M., *572 N.E.2d 27 (1991)*, 105 HARV. L. REV. 941, 945 (1992); *see also* Andrew Schepard, *Revisiting "*Alison D.": *Child Visitation Rights for Domestic Partners*, 6/27/2002 N.Y.L.J. 3, [col.1] at 3 (discussing how *Alison D.* prevents courts from making an individualized assessment and visitation plan based on a child's needs). For additional discussion, see, e.g., Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation*, 17 COLUM. J. GENDER & L. 307 (2008) (discussing impact of *Alison D. v. Virginia M.*); Martin Guggenheim, *Revisiting Third Party Visitation Under the Common Law in New York: Some Uncommon Answers*, 33 N.Y.U. REV. L. & SOC. CHANGE 153, 183 (2009) (observing that many commentators have criticized *Alison D.* and instead endorsed Judge Kaye's dissenting opinion in that case); Joseph G. Arsenault, *"Family" But Not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 ALB. L. REV. 813 (1995) (criticizing the formalistic approach taken by the Court in *Alison D.*).

[37] *See, e.g.*, Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 640 (2002) ("For some time now, courts and commentators have developed the concept of functional parenthood as a way to recognize the important relationships children often forge with individuals who function as their parents but who do not have that legal status."); *see also* Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 389-90 (1994) (discussing how an expanded definition of "parent" allows courts to address the best interests of the child).

children and their parents.[38] A functional family approach, by contrast, meets the needs of contemporary families by ensuring that family realities are reflected in law, particularly given that

[38] *See* Madeline Marzano-Lesnevich & Galit Moskowitz, *In the Interest of Children of Same-Sex Couples*, 19 J. AM. ACAD. MATRIM. L. 255, 270 (2005) (describing as problematic the limitation of legal parental status to only the biological mother in a same-sex relationship where the partners collaboratively decided to become parents); Nancy D. Polikoff, *Lesbian and Gay Parenting: The Last Thirty Years*, 66 MONT. L. REV. 51, 53 (2005) (observing in context of gay and lesbian family dissolution that, in absence of adoption or other legal recognition, "countless children have been harmed by losing a relationship with their legally unrecognized parent"). For additional recognition of the failings of the current rule, see Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L.Q. 23, 48 (2006) (recognizing harm that comes from denying important relationships by treating functional parents as legal strangers); Guggenheim, *supra* note 8, at 155 (observing that New York law "denies adults who have served as important parent-like figures the chance to demonstrate that allowing a parent to sever arbitrarily all ties between the child and the former parent-like figure is harmful to the child"); Holmes, *supra* note 9, at 361-62 (describing jurisprudence granting exclusive parental authority to the legal parent as "particularly inadequate when the dispute is between an adult who has both a legal and an actual relationship with the child and an adult who has only an actual relationship with the child"); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 Berkeley Women's L.J. 17, 22-23 (1999) (recognizing disadvantage that functional parents face in the inability to engage in parenting responsibilities such as consenting to medical care or representing a child's interests to government agencies).

many children are no longer raised by two married parents.[39] A functional family approach acknowledges these realities and serves the best interests of children by granting parental rights to functional parents.[40]

B. Family Law Scholarship Recognizes the Legal Parent's Consent, the Functional Parent's Intent, and the Development of a Parent-Child Bond as Defining Features of a Functional Family.

Family law scholarship recognizes that both the legal parent's consent and the functional parent's intent to create or raise a family are of particular importance in defining functional families. The formation of actual bonds of attachment in a parent-child relationship is also relevant in determining who is a functional parent.

1. The Legal Parent's Consent Is Essential to Ensuring that the Legal Parent Intended to Foster the Functional Parent-Child Relationship.

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[39] See Guggenheim, supra note 8, at 153 (observing that it is no longer true that most children are raised by two married parents); see also Charles P. Kindregan, Jr., Collaborative Reproduction and Rethinking Parentage, 21 J. Am. Acad. Matrim. L. 43, 44 (2008) ("[T]he reality of contemporary society is that family life today takes many different forms, and as part of that development, ideas about the meaning of parentage are changing."). For additional discussion of the changing realities of the American family, see Developments in the Law—Changing Realities of Parenthood, 116 Harv. L. Rev. 2052, 2052 (2003) (recognizing the changing reality of the form of American families and that advances in reproductive technology have "challenged law's assumptions about how families come to be"); Marzano-Lesnevich & Moskowitz, supra note 10, at 268 (observing that it "is well known that many same-sex couples are raising families together in the United States"); Nancy D. Polikoff, The Impact of Troxel v. Granville on Lesbian and Gay Parents, 32 Rutgers L.J. 825, 829 (2001) (noting how mainstream family law scholars, practitioners, and courts have recognized that a rigid parent-nonparent analysis does not reflect reality); Julie Shapiro, A Lesbian Centered Critique of "Genetic Parenthood," 9 J. Gender Race & Just. 591 (2006) (discussing changes in the nuclear family and the diminishing importance of genetic links).

[40] *See* Forman, *supra* note 10 at 49 (advocating continued recognition of functional parents to protect the children of same-sex couples).

The legal parent's consent to and encouragement of a functional parent-child relationship is essential to the legal recognition of that relationship.[41] The consent requirement protects the interests of legal parents by ensuring that the legal parent intended to foster the functional parent-child relationship. In particular, the consent requirement serves to protect the legal parent from claims by individuals not functioning as parents.[42]

Legal parents can manifest their consent in various ways. As scholars have recognized, consent may be shown, for example, by a legal parent incorporating a family name of the functional parent into the child's name; making an oral or written agreement with the functional parent to jointly raise the child; engaging in joint decision-making with the functional parent regarding the child's health care, education, and other basic needs; and supporting the development of relationships between the child and the functional parent's parents, siblings, and extended family members.[43]

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[41] *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, 471 (1990) (noting that parental status should flow from proof that a parent-child relationship was developed with the cooperation and consent of the legal parent); *see also* Ettelbrick, *supra* note 5, at 548-50 (discussing requirements for functional parenthood, including agreement of both adults to be co-equal parents).

[42] *See* Holmes, *supra* note 9, at 394-95 (demonstrating how adequately defining the criteria that grants parental status to a functional parent—such as requiring that the functional parent was a participant in the decision to create a family unit—addresses concerns about expanding the category of those who may seek standing to assert parental rights); *see also* Polikoff, *This Child Does Have Two Mothers*, *supra* note 13, at 464 (arguing that parental autonomy and a child's best interests can be served by including in the definition of a parent those who have "maintain[ed] a functional parental relationship with a child" when the legal parent "created that relationship with the intent that the relationship be parental in nature").

[43] *See* Polikoff, *This Child Does Have Two Mothers, supra* note 13, at 499 (offering the following as examples of the development of a parent-child relationship that should allow the functional parent to seek parental status: treating a child as part of both mothers' extended families; giving a child the last name of both mothers; and agreeing (orally or in writing) to jointly raise the child); *see also* Ettelbrick, *supra* note 5, at 551 (discussing indicia of consent, including: oral or written agreements; the family name of both women included in the child's name; the assumption of joint decision-making; and the child's relationships with each woman's family members).

2. The Functional Parent's Intent to Create a Family Is Also Significant in Defining Functional Parenthood.

The functional parent's intent ensures that he or she also planned to become a parent by participating in the decision to create a family, either from conception or by forming a family unit with another adult and child.[44] By assuming parental responsibility for the child, a functional parent demonstrates that he or she has voluntarily and intentionally taken on a parental role.[45] The requirement that the assumption of parenting be voluntary confirms that individuals who have been paid to care for the child or otherwise have not acted as parents do not have standing to assert a claim as functional parents.[46]

Echoing scholars' commitment to evaluating the functional parent's intent to parent, the jurisprudence in this area shows that acts demonstrative of intent to parent include, for example: the functional parent's taking time off of work to care for the child, providing financial support, making decisions about the child's care, participating in religious activities with the child, and going on family outings.[47] These and other similar actions ensure that the functional parent provided care indicative of a parent-child relationship.

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[44] *See* Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005) (arguing that intent should be used as a means of establishing legal parentage for a functional parent); Shapiro, *A Lesbian-Centered Critique of "Genetic Parenthood,"supra* note 11, at 611 (2006) (identifying intent and function as alternative ways of recognizing parenthood rather than genetics); *see also* Kindregan, *supra* note 11, at 46 (noting that instead of through biology and genetics, parenthood should be determined in part by factors such as the intent of parties who cooperate in using reproductive technology to have a child).

[45] *See*, *e.g.*, Ettelbrick, *supra* note 5, at 552 (discussing criteria for functional parenthood, including the functional parent's participation in the daily emotional and financial care of the child).

[46] *See* Holmes, *supra* note 9, at 393 (discussing operation of voluntary assumption of responsibility as a requirement for an expanded definition of parenthood).

[47] *See, e.g.*, *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421-22 (Wis. 1995); *see also infra* Part II.A.1.

3. The Development of a Parent-Child Relationship Is Also Relevant to the Functional Parent Determination.

The formation of a parent-child relationship is likewise an important feature in evaluating whether an adult has become a functional parent.[48] In addition to being recognized by scholars, a parent-child bond has been deemed relevant by a number of courts.[49] However, when the dissolution of a relationship occurs shortly after the birth or legal parent's adoption of a child, the difficulty of proving a parent-child bond should not preclude a functional parent from asserting a visitation or custody right so long as that individual, with the consent of the legal parent, planned for the child's conception or adoption into the family.

C. The American Law Institute's Principles of the Law of Family Dissolution Confirm that Consent, Intent, and Development of a Parent-Child Bond Are Central to Defining Functional Parents.

The American Law Institute's *Principles of the Law of Family Dissolution* (the "*Principles*"), produced by the nation's leading organization devoted to improving the law through collective contributions of scholars, also reflect and reinforce the value of recognizing functional parents and the criteria by which

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[48] *See, e.g.*, Minow, *supra* note 5, at 270 (observing that a family can be defined in part by the sharing of affection and resources).

[49] *See infra* Part II.A; *see also V.C. v. M.J.B.*, 748 A.2d at 553; *H.S.H.-K.*, 533 N.W.2d at 421.

functional parent claims can be evaluated by courts.[50] In so doing, the *Principles* confirm the widespread consensus around the defining features of a functional parent.

The *Principles*, like the academic scholarship on functional parents, recognize and address the harm that arises when courts do not appropriately respond to family realities. Specifically, they reinforce that a functional parent's "participation in the child's life is critically important to the child's welfare," and that the law should therefore authorize and protect a child's contact with that functional parent.[51]

In addressing the harm to children caused by a formalistic approach, the *Principles* set out two categories of functional parents entitled to legal recognition—de facto parents and

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[50] *See* American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter *Principles*]. For additional scholarly discussion of the *Principles*, see J. Herbie DiFonzo, *Toward a Unified Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 B.Y.U. L. REV. 923, 938 (2001) (describing aim of the *Principles* to resolve the tension between the allocation of full recognition to legal parents and the harm that results from disallowing the maintenance of bonds between children and functional parents); Barbara Bennett Woodhouse, *Horton Looks at the ALI Principles*, 4 J.L. & FAM. STUD. 151, 165 (2002) (affirming that the *Principles* allow for a more flexible and functional definition of family). By formulating a framework for recognizing functional families in the law, the *Principles* aim to ensure that the law remains responsive to the changing realities of family evident in both society and legal institutions. *See Developments in the Law*, *supra* note 11, at 2064 (discussing aims of the *Principles*); Goldberg, *supra* note 8, at 338 (noting that the *Principles* provide "important authority").

[51] *Principles*, *supra* note 22, at ch. 1,1(d) (2002).

parents by estoppel[52]—based on the same features identified in the academic literature discussed above.[53] That is, the *Principles*

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[52] The defining features of the two functional parent categories are largely similar:

> (b) A *parent by estoppel* is an individual who, though not a legal parent, (i) is obligated to pay child support under Chapter 3; or (ii) lived with the child for at least two years and (A) over that period had a reasonable, good-faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and (B) if some time thereafter that belief no longer existed, continued to make reasonable, good-faith efforts to accept responsibilities as the child's father; or (iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.
>
> (c) A *de facto parent* is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

Principles, *supra* note 22, at § 2.03(1).

[53] *Id.* at § 2.03.

look to the legal parent's consent, the functional parent's intent, and the formation of a parent-child relationship.[54]

With respect to the legal parent's consent, the *Principles* track the scholarly recommendations. For example, the legal parent must enter an agreement, oral or written, with the functional parent regarding acceptance of parental responsibilities for that functional parent to be granted status as a parent by estoppel.[55] Similarly, the legal parent must agree to an arrangement whereby a functional parent takes on a parenting role for that person to be considered a de facto parent.[56]

The *Principle*s' requirement of parental intent on the part of the functional parent likewise reflects the views of family law academics. Parents by estoppel must have held themselves out as parents and accepted full parental responsibilities, such as making decisions about and attending to the child's well-being.[57] De facto parents must have performed a majority of, or at least a large a share of, caretaking functions for the child, for reasons other than financial compensation.[58] Caretaking functions include, for example: attending to a child's physical and developmental needs such as nutrition and education, helping the child develop interpersonal relationships, and providing moral and ethical guidance.[59]

Also consistent with scholarly recommendations, the *Principles* recognize the importance of a parent-child bond.

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[54] *See* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1330 (2005) (observing that the *Principles*' categories require agreement of the legal parent, a conclusion that the functional parent has assumed parental obligations, and recognition that according legal parenthood to the functional parent is in the child's best interests).

[55] *Principles*, *supra* note 22, at § 2.03(1)(b), § 2.03 Comment (b)(iii).

[56] *Id.* at § 2.03(1)(c), § 2.03 Comment (c).

[57] *Id.* at § 2.03(1)(b), Comment (b)(iii), illus.9.

[58] *Id.* at § 2.03(1)(c).

[59] *Id*. at § 2.03(5).

While they do not require a separate evaluation of that bond, they explicitly recognize that disregarding the connection a child has with a functional parent at the time of family dissolution "ignores child-parent relationships that may be fundamental to the child's sense of stability."[60]

Affirming the *Principles*' utility, states have looked to the *Principles* in applying a functional approach to the assessment of parent-child relationships. In *E.N.O. v. L.M.M.*, for example, the court relied on the *Principles* in defining a de facto parent and observed that "[t]he recognition of de facto parents is in accord with notions of the modern family."[61] The *Principles* thus reinforce, along with the academic literature, the widespread view of experts that family law can and should recognize functional parent-child relationships by giving consideration to the legal parent's consent, the functional parent's intent and the functional parent-child bond.

II. Adoption of a Functional Approach to Recognizing Parent-Child Relationships in Jurisdictions Across the Country, Including New York, Confirms the Approach's Viability and Simplicity.

In jurisdictions across the country, including New York, courts have exercised their equitable powers to grant standing to functional parents who seek to maintain parent-child relationships with the children they have been raising. Notably, all of these courts have applied the same defining features, as discussed above, in determining who can assert parental rights and responsibilities at the point of family dissolution. *They examine whether, with the consent of the legal parent, the functional parent intended to and in fact assumed parental*

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[60] *Id.* at ch. 1,1(d).

[61] 711 N.E.2d 886, 891 (Mass. 1999); *see also In re Parentage of L.B.*, 122 P.3d 161, 176 n.24 (Wash. 2005) ("[T]he American Law Institute's recent recommendation supports the modern common law trend of recognizing the status of *de facto* parents."); *Rubano v. DiCenzo*, 759 A.2d 959, 974-75 (R.I. 2000) (observing that the decision to recognize a functional parent-child relationship was "in harmony with the principles recently adopted by the American Law Institute").

responsibility, and formed a parental bond with the child. New York can and should do the same.

A. Numerous Other States Demonstrate the Practical Means by Which This Court Can Apply a Functional Approach.

Over the past two decades, courts across the country have rejected the formalism that characterizes *Alison D. v. Virginia M.*,[62] and instead have embraced a functional approach to recognizing parent-child relationships that amici advocate here.[63]

1. The Basic Features of Consent, Intent, and Parent-Child Bond Have Been Applied Most Simply and Concisely by the Wisconsin Supreme Court in *In re* Custody of H.S.H.-K.

The four-prong test proposed by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*[64] is the leading example of a simple and concise application of the basic features of a functional approach to recognizing parent-child relationships. Other courts agree that the *H.S.H.-K.* test identifies those relationships where an adult actually functions as a parent,

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[62] 77 N.Y.2d 651 (1991).

[63] *See* Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 685 (2005) ("[A] growing number of states have applied longstanding common law doctrines and equitable principles to hold that a person who has functioned as a child's parent may be entitled to seek custody or visitation with the child . . . and may be responsible for child support, even where they have not completed an adoption or are not otherwise the child's legal parent."). For additional discussion, see, e.g., Jacobs, *supra* note 16, at 436 (characterizing as "positive progress" courts' increasing use of "functional parenthood principles and equitable doctrines" to determine parental rights and responsibilities); *Developments in the Law*, *supra* note 11, at 2054 (finding that "parental rights doctrine has moved dramatically" toward recognizing as parents those who would not have been accorded parental rights under traditional law when they function as parents); Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 SANTA CLARA L. REV. 999, 1021 (2008) (observing that courts are more willing than before to consider the rights of a lesbian partner after the termination of a relationship).

[64] 533 N.W.2d 419, 420-21 (Wis. 1995).

precludes standing to persons not functioning as parents, and serves the bests interests of the child.

The *H.S.H.-K.* court required consent from the legal parent in prong one: "[T]he biological or adoptive parent [must] consent[] to, and foster[], the petitioner's formation and establishment of a parent-like relationship with the child."[65] The court identified in the family at issue in *H.S.H.-K.* many of the same manifestations of the legal parent's consent identified by scholars above, including "the parties' agreement about the conception of the child, the dedication ceremony naming both parties as the child's parents, and the child's name," which was hyphenated to include the names of both mothers.[66] As the court recognized, the consent requirement protects the legal parent against claims by individuals not functioning as parents.[67]

Prong two, in requiring "that the petitioner and the child lived together in the same household," provides a helpful indicator of the adults' commitment to raising the child

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[65] *Id.* at 420; *see also V.C.*, 748 A.2d at 552. ("Prong one [of the *H.S.H.-K.* test] is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child.").

[66] *H.S.H.-K.*, 533 N.W.2d at 436 n.40; *see also supra* Part I.B.1.

[67] *See id.* at 436 (noting court's interest in protecting "parental autonomy and constitutional rights by requiring that the parent-like relationship develop only with the consent and assistance of the biological or adoptive parent"); *see also Rubano,* 759 A.2d 959, 974 (R.I. 2000) (affirming *H.S.H.-K.* test's ability to "preclude such potential third-party parents as mere neighbors, caretakers, baby sitters, nannies, au pairs, nonparental relatives, and family friends" from obtaining standing); *In re Parentage of L.B.*, 122 P.3d 161, 179 (Wash. 2005) (internal quotation marks omitted) (applying consent requirement to allay concern that "teachers, nannies, parents of best friends . . . adult siblings, aunts . . . grandparents, and every third-party . . . caregiver" could obtain standing as functional parents).

together.[68] In the third prong, the court required a showing of the functional parent's intent to assume parental responsibilities: "[T]he petitioner [must] assume[] obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation."[69] These requirements ensure that the functional parent *functions* like a parent in the most literal sense.

The court's fourth prong requires formation of a parent-child bond: "[T]he petitioner [must have] been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature."[70] The presence of a parent-child bond helps to confirm that harm to the

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[68] *H.S.H.-K.*, 533 N.W.2d at 421. Because the legal parent's consent to the development of the functional parent-child relationship is critical, *H.S.H.-K.*'s second prong does not "allow a person to seek custody and visitation of a boyfriend or girlfriend's child one day after they moved into the family home," as Respondent claims. Respondent's Opp. to Mot. for Leave to Appeal, *Debra H. v. Janice R.*, No. 106569/08 (N.Y. July 21, 2009) at 3. Instead, as other courts have recognized: "What is crucial here is not the amount of time but the nature of the relationship." *V.C.*, 748 A.2d at 553. A day in the household will not give the hypothetical boyfriend or girlfriend standing; rather, the party seeking standing for purposes of visitation or custody must have received consent to act as a parent, assumed parental responsibilities, and formed a parent-like bond with the child. Similarly, sharing physical space does not qualify one for standing if the other criteria have not been met.

[69] *H.S.H.-K.*, 533 N.W.2d at 421.

[70] *Id.*

child would result if separated from the functional parent.[71] [72] Nevertheless, courts have been attentive to scholars' concerns that legitimate functional parents may face an unfair evidentiary burden in proving a parent-child bond if the child is very young.[73] Thus, courts have observed that the nature of the parent-child bond assessment will vary based on the "period and stage of the child's life and development."[74]

2. Courts in Several Jurisdictions, Exercising Well-Established Equitable Powers, Have Adopted the H.S.H.-K. Functional Parent Test.

Courts in several jurisdictions have adopted the *H.S.H.-K.* test to grant standing to functional parents. These courts have praised the test as "[t]he most thoughtful and inclusive definition of *de facto* parenthood."[75] While *H.S.H.-K.* dealt specifically with visitation, courts have applied its articulation of the key features of functional parenthood to the full panoply of parental

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[71] *See* Forman, *supra* note 10, at 48 (recognizing harm that comes from denying important relationships by treating functional parents as legal strangers); Polikoff, *Lesbian and Gay Parenting*, *supra* note 10, at 53 (lamenting that "countless children have been harmed by losing a relationship with their legally unrecognized parent"); Brief for Citizens' Comm. for Children, Lawyers for Children and Children's Law as Amici Curiae Supporting Appellant, *Debra H. v. Janice R,* 930 N.E.2d 184 (2010) at 4 ("The social science literature is replete with studies finding that children form attached relationships with non-biological non-adoptive parents and that severing such relationships is traumatic and can have long-term negative consequences for a child's development.").

[72] The availability of second-parent adoption does not diminish the inevitable harm caused by separating a child from his or her functional parent when no adoption has taken place. *See* Brief for Citizens' Comm. for Children, Lawyers for Children and Children's Law as Amici Curiae Supporting Appellant, *Debra H. v. Janice R*., 930 N.E.2d 184 (2010) at 28-30.

[73] *See* Part I.B.3 *supra*.

[74] *V.C.*, 748 A.2d at 553.

[75] *V.C.*, 748 A.2d at 551; *see also In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005) (affirming that "[r]eason and common sense support recognizing the existence of *de facto* parents" using *H.S.H.-K.* test); *Rubano*, 759 A.2d at 974 (R.I. 2000) (citing elements of *H.S.H.-K.* test, as articulated in *V.C.*, as "useful criteria"); *Middleton v. Johnson*, 633 S.E.2d 162, 168 (S.C. Ct. App. 2006) (adopting *H.S.H.-K.* as a "good framework" for assessing functional parenthood).

rights.[76] Courts adopting the *H.S.H.-K.* test have done so in the exercise of their equitable powers. Indeed, in *H.S.H.-K* itself, the Wisconsin court invoked its "long standing equitable power to protect the best interest of a child," while recognizing that the state's custody statute did not apply to the functional parent in that case.[77] Other states have followed suit.[78] This Court can benefit from the accumulated wisdom of these courts, which have found the *H.S.H.-K.* test to be a practical formulation with predictable results that protects legal parents, best serves the interests of children, and fairly assesses the interests of functional parents.

3. Other States Have Similarly Recognized Functional Parent-Child Relationships.

Although amici consider the *H.S.H.-K.* test the simplest and clearest articulation of the defining features of functional parenthood, other states' formulations similarly recognize functional parent-child relationships. This holds true across states that apply other functional parent doctrines such as *in loco parentis* and "exceptional circumstances," as well as in states that do not use a fixed term or test to assess functional parenthood.

For example, in *T.B. v. L.R.M.*,[79] Pennsylvania's high court defined the *in loco parentis* doctrine using the features amici endorse throughout this brief. The court required consent from the legal parent: "[T]he third party in this type of relationship . . . can not place himself *in loco parentis* in defiance of the [legal]

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[76] *See, e.g.*, *V.C.*, 748 A.2d at 553 (applying *H.S.H.-K.* to custody and visitation proceedings); *L.B.*, 122 P.3d at 173, 177 (using *H.S.H.-K.* to determine who is in "legal parity with an otherwise legal parent" with respect to "parentage, visitation, child custody, and support").

[77] *H.S.H.-K.*, 533 N.W.2d at 421-23 & n.3, 425.

[78] *See, e.g.*, *In re Parentage of L.B.*, 122 P.3d at 166 ("Washington courts have consistently invoked their equity powers and common law responsibility to respond to the needs of children and families in the face of changing realities. We have often done so in spite of legislative enactments that may have spoken to the area of law, but did so incompletely.").

[79] 786 A.2d 913 (Pa. 2001).

parents' wishes and the parent/child relationship."[80] The court also ensured that the functional parent intend to parent and assume parental responsibility by requiring "the assumption of a parental status, and . . . the discharge of parental duties."[81] The court required parent-child attachment, as well, in the form of "psychological bonds" between the functional parent and child.[82] Notably, the Pennsylvania court affirmed that these defining features of functional parenthood apply uniformly across custody, visitation, and parental support determinations.[83]

Jurisdictions applying an "exceptional circumstances" doctrine have also employed the basic features of a functional approach to guide their inquiry. For example, the South Carolina Court of Appeals applied the *H.S.H.-K.* test to confirm the petitioner in the case was a functional parent, eligible for standing to seek visitation under the state's exceptional circumstances test.[84] The court found the functional parent-child relationship so "compelling" as to require legal recognition of the relationship, even though the biological parent was fit and available.[85]

Similarly, Maryland's high court weighed the same defining features of functional parenthood in describing that state's exceptional circumstances doctrine. The court considered "a finding that one meets the requirements that would give that person *de facto* parent status . . . a strong factor to be considered in assessing whether exceptional circumstances exist."[86] Further

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[80] *Id.* at 917.

[81] *Id.*

[82] *Id.* (quoting *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1319-20 (Pa. Super. Ct. 1996)).

[83] *Id.* at 917 ("The rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child.").

[84] *Middleton*, 633 S.E.2d at 168.

[85] *Id.* at 172.

[86] *Janice M. v. Margaret K.*, 948 A.2d 73, 93 (Md. 2008).

clarifying Maryland's exceptional circumstances test in its remand order to the state Circuit Court, the Maryland Court of Appeals included "the psychological bond between a child and a third party" among the factors to be considered. *Id.*[87]

North Carolina's appellate court also applied the same basic features in *Mason v. Dwinnell*.[88] Although it did not articulate a specific test, the court accorded a functional parent standing to seek custody, looking to (1) the couple's agreement to share in "all major decisions regarding their child"; (2) the functional parent's deliberate assumption of "emotional and financial care and support, guidance and decision-making" to the point of "equal participation"; and (3) the functional parent's "psychological parenting relationship" with the child.[89]

Thus while some states call mothers like Debra H. a de facto or psychological parent, some find that she stands *in loco parentis* or that exceptional circumstances warrant standing, and some prefer not to rely on strict terms or tests. However, one unifying fact about these states' approaches is clear: all grant

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[87] The court articulated these equitable powers despite the limited category of persons allowed to petition for parental rights under Maryland's family law code. MD. CODE ANN., FAM. LAW § 9-102 (1984). Thus even under the most narrow statutory provisions, courts have not relinquished their equitable powers to grant standing to functional parents. This court likewise retains its equitable authority no matter how narrowly DRL § 70 is construed. *See infra* Part II.B.

[88] 660 S.E.2d 58 (N.C. Ct. App. 2008).

[89] *Dwinnell*, 660 S.E.2d at 65, 67.

standing.[90] Amidst minor variations in language, these states confirm the decisive trend toward use of a functional approach to recognizing parent-child relationships.

B. This Court's Decisions, as well as Lower Courts' Decisions, Demonstrate This Court's Authority to Recognize Functional Parent-Child Relationships.

This Court has repeatedly affirmed its authority to reexamine "rules long settled but not recently revisited . . . if there is some evidence that the policy concerns underlying them are outdated or if they have proved unworkable."[91] In particular, this Court has long observed that courts are justified in rejecting an "archaic and obsolete doctrine which has lost its touch with

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[90] *See, e.g.*, *In re Custody of H.S.H.-K*, 533 N.W.2d 419 (Wis. 1995) (parent-like relationship); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (de facto parent); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005) (same); *V.C.*, 748 A.2d 539 (psychological parent); *In re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004) (same); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001) (*in loco parentis*); *Middleton v. Johnson*, 633 S.E.2d 162 (S.C. Ct. App. 2006) (exceptional circumstances); *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005) (same); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008) (discussed *supra*); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004) (emphasizing that functional parent "must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life"); *Rubano*, 759 A.2d 959 (R.I. 2000) (mixing terminology of de facto parents and psychological parents while applying *H.S.H.-K.*).

Recently, Montana's high court confirmed its state's commitment to a functional approach. *Kulstad v. Maniaci*, 352 Mont. 513 (2009). Delaware also has joined the ranks of states employing a functional approach in a decisive reversal of the state Supreme Court, which had failed to utilize its equitable powers to protect children's best interests vis-à-vis their functional parents. *See* DEL. CODE ANN. tit. 13 § 8-201(c) (2009) (overruling *Smith v. Gordon*, 968 A.2d 1 (Del. 2009), by recognizing de facto parenthood).

[91] *People v. Damiano*, 87 N.Y.2d 477, 489 (1996) (Simons, J., concurring).

reality" despite the doctrine of stare decisis.[92] Based on this authority, this Court has replaced outdated, unworkable rules with new rules in many different instances.[93] For similar reasons, the interpretation of *Alison D.* adopted by some lower courts as precluding their authority to exercise equitable powers warrants reexamination. The consequence of this unduly narrow interpretation—the barring of legal recognition of functional parents—is "at variance with modern-day needs and with concepts of justice."[94]

Numerous lower courts have expressed the same concern about the unworkable rule that results from interpreting *Alison D.* to preclude courts from exercising their equitable powers to

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[92] *People v. Hobson*, 39 N.Y.2d 479, 487-88 (1976); *see also People v. Taylor*, 9 N.Y.3d 129, 149 (2007) ("[A] holding that leads to an unworkable rule, or that creates more questions than it resolves, may ultimately be better served by a new rule."); *People v. Bing*, 76 N.Y.2d 331, 338 (1990) ("Although a court should be slow to overrule its precedents, there is little reason to avoid doing so when persuaded by the 'lessons of experience and the force of better reasoning.'") (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting)); *Simonson v. Cahn*, 27 N.Y.2d 1, 3 (1970) ("The doctrine of *stare decisis* does not enjoin departure from precedent or preclude the overruling of earlier decisions . . . [if] the principles announced prove unworkable or 'out of tune with the life about us, at variance with modern-day needs and with concepts of justice.'") (quoting *Bing v. Thunig*, 2 N.Y.2d 656, 667 (1957)).

[93] *See, e.g.*, *People v. Bing*, 76 N.Y.2d at 347 (overruling *People v. Bartolomeo*, 53 N.Y.2d 225 (1981), as unworkable because the *Bartolomeo* rule, which concerned suspects' waiver of rights absent counsel, was an "unacceptable obstruction to law enforcement"); *Hobson*, 39 N.Y.2d at 486-91 (overruling three earlier cases as unsound deviations from established constitutional right to counsel for criminal defendants); *Babcock v. Jackson*, 12 N.Y.2d 473, 484 (1963) (departing from traditional choice of law rule, which had generated "unjust and anomalous results").

[94] *Thunig*, 2 N.Y.2d at 667; *see also supra* Part I.A

recognize functional parent-child relationships.[95] Indeed, this Court has already exercised its equitable powers to recognize functional parents and promote the best interests of the child on many different occasions. In the recent case of *Shondel J. v. Mark D.*,[96] for example, this Court, based on the principle of equitable estoppel, held that a non-biologically related adult who had functioned as a parent was indeed a parent of the child for paternity and support purposes.[97] Lower courts in the State have similarly exercised their equitable powers to recognize

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[95] *See*, *e.g.*, *Anonymous v. Anonymous*, 20 A.D.3d 333, 333 (1st Dep't 2005) (Sweeny, J., concurring) ("I am compelled to voice my concern that in recognizing the primacy of the rights of the biological parent, the Court of Appeals has defined a rigid construct which concomitantly ignores the reality of the relationships that nurture and develop a child."); *Multari v. Sorrell*, 287 A.D. 2d 764, 771 (3d Dep't 2001) (Peters, J., concurring) ("If in custody and visitation disputes, common sense, reason and an overriding concern for the welfare of a child are to prevail over narrow selfish proclamations of biological primacy, the assertion of equitable estoppel by a nonbiological or nonadoptive parent must be given credence by the courts."); *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 289 (2d Dep't 1998) ("[W]e are of the opinion that the best interests of the child will not be served in this case if . . . *Alison D.* [is] blindly applied."); *Beth R. v. Donna M.*, 19 Misc.3d 724, 733-34 (N.Y. Sup. Ct. 2008) ("If the concern of both the legislature and the Court of Appeals is what is in the child's best interest, a formulaic approach to finding that a 'parent' can only mean a biologic or adoptive parent may not always be appropriate.").

[96] 7 N.Y.3d 320 (2006).

[97] *See also Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976) (exercising common-law authority to permit functional parent to seek custody consistent with the child's best interests); *Finlay v. Finlay*, 240 N.Y. 429, 432 (1925) (recognizing court's "jurisdiction to determine the custody of infants as it exists at law and in equity irrespective of the statute"). Importantly, New York's common law did not historically distinguish the concept of custody from visitation. Indeed, "[o] ne of the core common law principles . . . was the symmetry with which the law treated efforts to secure custody and efforts to secure visitation." Guggenheim, *supra* note 8, at 169.

functional parents in order to promote the best interests of the child.[98]

CONCLUSION

For the foregoing reasons, amici urge the Court to bring New York law into step with the beneficial trend, recognized by scholars and courts throughout the country as well as in this State, toward protecting both children and parents at the point of family dissolution by recognizing functional parent-child relationships.

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Respectfully submitted,

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[98] *See, e.g.*, *Charles v. Charles*, 296 A.D.2d 547, 549 (2d Dep't 2002) (observing that in "cases involving paternity, child custody, visitation and support, the doctrine of equitable estoppel will be applied [] where its use furthers the best interests of the child or children who are the subject of the controversy"); *Gilbert A. v. Laura A.*, 261 A.D.2d 886, 887 (4th Dep't 1999) (granting a custody and visitation hearing to non-biological father for consideration of evidence regarding the biological mother's "alleged role in creating and encouraging a father-child relationship" and a "psychological bond" between the non-biological father and child); *Jean Maby H.*, 246 A.D.2d at 283, 289 (recognizing that the equitable estoppel doctrine can properly be invoked "to preclude the biological parent from cutting off [a functional parent's] custody or visitation with the child" consistent with this Court's decisions treating children's interests "as the determinative or prevailing concern").

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