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Heather still has two mommies

The Court of Appeals permits non-biological, non-adoptive 'parents'

In two decisions handed down May 4, the Court of Appeals indicated that former same-sex partners can be "parents" of their former partner's children despite a lack of biologic or adoptive relationship. These decisions could portend a departure from the current bright-line rule for determining parentage to a standard that is more flexible – and contentious.

In Matter of H.M.: Family Court can determine whether an ex-partner is a "parent"

In the first of these cases, *In Matter of H.M. v. E.T.*, 2010 N.Y. Slip Op. 03756, the Court of Appeals was faced with the issue of whether or not the Family Court has jurisdiction to determine if a woman who was not a child's biological parent could be deemed a parent of that child, and therefore responsible for the payment of child support.

In that case, a woman who was the child's biological parent sought child support from her former partner. The parties had been involved in a romantic relationship in New York for six years. During most of this time period, they cohabited together. During the initial year of their relationship, the couple planned to have a child and to raise it together. One of the women became pregnant via artificial insemination and had a son thereafter. The partner was present during the delivery and cut the umbilical cord. The parties shared the expenses associated with the conception and birth of the child. They also both participated in the care of the child subsequent to his birth. Four months after the birth of the child, however, the couple terminated their relationship. The partner continued to provide the biological mother with gifts for the child as well as monetary contributions for his care.

The biological mother ultimately commenced an action against her former partner seeking a declaration of parentage and an order of child support on behalf of her son. The partner opposed the petition, claiming that

she could not be deemed to be a parent of the child. While the Family Court Support Magistrate ruled in favor of the partner, a judge from the Family Court granted the mother's objections and ordered a hearing to determine whether the partner should be equitably estopped from denying parentage and support obligations. The partner appealed. The Appellate Division reversed and dismissed her petition, however, for a lack of subject matter jurisdiction. The case was ultimately heard by the Court of Appeals, which reversed the Appellate Division and determined that the Family Court possesses subject matter jurisdiction to hear the partner's petition.



Russell I. Marnell

In reaching this decision, the Court of Appeals initially considered the fact that Article 4 of the Family Court Act provides that the parents of a child under 21 years of age are chargeable with the support of a child and, if possessed of sufficient means, shall be required to pay for child support a fair and reasonable sum as the court may determine. The Court then ruled that the Family Court indisputably has jurisdiction to determine whether an individual parent, regardless of gender, is responsible for the support of a child; and that the Family Court has ancillary jurisdiction where necessary to carry out its core function of presiding over support proceedings. The Court held that this includes the jurisdiction to decide whether a party before it – in this instance, a non-biologically related female – is in fact a parent. In reaching its ultimate decision, the The Court finally considered the fact that Article 4 of the Family Court Act establishes the public policy of the state in favor of obligating individuals, regardless of gender, to provide support for their children. Thus the majority ruled that because the biological mother asserts that her former partner is the child's parent, and is therefore chargeable with the child's support, the case is within the Family Court's Article 4 jurisdiction. In so ruling, the majority did not



Scott R. Schwartz

make a determination on the merits of the natural mother's claim for support.

The dissent argued that the Family Court is only empowered to resolve the issue of parentage pursuant to Article 5 of the Family Court Act, which is limited to issues of paternity. The dissent went on to conclude that the biological mother was seeking child support from a woman with no biological or other legal connections to the child, and that therefore the Family Court has no legal authority to address her petition under Article 4. For the Family Court to find that support obligations are chargeable to the ex-partner under Article 4, the dissent determined, it would have to grant the mother the type of equitable relief that is beyond its jurisdiction.

Debra H.: Civil Unions and Comity May Make Ex-Partners "Parents" Under New York Law

In *Debra H. v. Janice R.*, 2010 N.Y. Slip Op. 03755, also decided on May 4, 2010, the Court of Appeals held that a non-biological parent, in this instance a woman, was entitled to visitation with her former same-sex partner's child conceived from artificial insemination.

This case also involved a lesbian couple who decided that one of them would have a child and the other would play an active role in raising the child. After the couple terminated their relationship, the mother permitted visitation between the former partner and the child for approximately two years before eventually denying all

access. Her former partner then sought joint legal and physical custody of the child. The Court noted that throughout the couple's relationship, the biological mother had repeatedly rebuffed her partner's efforts to legally adopt the child.

The prevailing factor which was dispositive in the Court of Appeals' determination of this case was the fact that the parties had previously entered into a civil union in Vermont. Before relying on the Vermont civil union, however, the Court initially discussed the biological mother's proposition that the Court's prior decision in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), was controlling on the issue of visitation of a non-biological parent such as her former partner. In the *Alison D.* case, the Court of Appeals ruled that only a biological or adoptive parent has standing to seek visitation against the wishes of a fit custodial parent. The *Alison D.* case was similar to the instant matter in that both cases involved women who participated extensively in the lives of children born to their same-sex partners before the termination of the relationship with the biolog-

ical mothers. At some point thereafter, the biological mothers cut off all communications and contact between the child and their former partners. In deciding the instant case, the majority of the Court initially determined that *Alison D.* was still controlling, and that it would not be overturned as requested by the partner. The majority decision emphatically and unambiguously stated, however, that their reaffirmation of *Alison D.* does not dispose of this case.

The Court of Appeals noted that the vital issues to be determined were whether the former partner is considered to be a parent pursuant to Vermont law due to the parties' civil union in that state; and in the event that she is, whether as a matter of comity she is deemed to be a parent under New York law as well. The Court determined with respect to the initial issue that the parties would both be considered parents of the child based upon an application of Vermont Law as a result of their Civil Union. In light of this determination, the question then became whether New York Courts should accord comity to Vermont and recognize the former partner as the natural parent under New York law as well. The Court considered the fact that:

New York's determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy, and our policy prevails in case of conflict. The Court locates the public policy of the state in the law as expressed in statute and judicial decision and also considers the prevailing attitudes of the community. Even in the case of a conflict, however, New York's public policy may yield in the face of a strong assertion of interest by the other jurisdiction.

Id. at 13 (quoting *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 580 (1980)). Thus, taking public policy into consideration, the Court of Appeals held that "we see no reason to withhold ... recognition where someone is a parent under a sister state's law." *Id.* The Court went on to hold that the availability of second-parent adoption to New Yorkers of the same sex negates any suggestion that recognition of parentage based on a Vermont civil union would conflict with our state's public policy. The majority decision opined that this decision would afford predictability to parents and children alike and was therefore consistent with the public policy of our state.

There were three concurring decisions.

Justice Graffeo stated that *Alison D.* must be reaffirmed; any specialized approach for cases such as this should be fashioned by the legislature. Justice Ciparick advocated overruling *Alison D.* as being outmoded and unworkable in light of the social changes that have occurred in the 19 years since *Alison D.* He proposed a functional, flexible, multi-factored test to determine parentage that takes into account the child's best interests rather than simply relying upon biology or an adoptive relationship. The final concurrence was authored by Justice Smith, who also advocated overruling *Alison D.* but disagreed with Justice Ciparick's proposed flexible approach test. He proposed a bright line rule for determining parentage with respect to lesbian couples. The Courts should apply the common law presumption of legitimacy, such that where a child is conceived through Artificial Donor Insemination by one member of a same-sex couple with the knowledge and consent of the other, then the child is, absent extraordinary circumstances, the child of both as a matter of law.

Russell I. Marnell is lead counsel at the Law Offices of Russell I. Marnell, P.C. in East Meadow and Smithtown. Scott R. Schwartz concentrates in matrimonial and family law.