ROCKLAND COUNTY FAMILY COURT CLERK'S INDEX NO. U-110-07

Court of Appeals

STATE OF NEW YORK

H.M. (ANONYMOUS),

Petitioner-Appellant,

- against -

E.T. (ANONYMOUS),

Respondent-Respondent.

BRIEF OF *AMICUS CURIAE* NEW YORK CITY BAR ASSOCIATION IN SUPPORT OF PETITIONER-APPELLANT

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INTRODUCTION

Two cases come before the Court this term raising related questions about the best interests of children in safeguarding their rights to support, whether financial or emotional, from their second intended parents. These cases, the instant appeal and *Debra H. v. Janice R.*, No. 106569/08, present flip sides of the same coin — the need for courts to enforce the rights of children born through assisted reproductive technologies to the support of intended parents unrelated to them by biology or adoption. Because of the importance of this principle to many children and families, the New York City Bar Association ("NYCBA") has submitted *amicus* briefs in both cases.[1]

At the heart of these appeals are children born to female same-sex couples using anonymous donor sperm, where only one partner is biologically related to the child. The petitioners in both cases, in whose support the NYCBA appears, allege that the couple agreed from before conception that the second, non-biologically related, partner would be a parent to the child, with all the obligations of a parent to provide financial as well as emotional sustenance. In *Debra H.*, the biological mother is alleged to have fostered profound bonds of parent-child attachment between the

[1] The *amicus* brief of the NYCBA *et al.* in *Debra H.*, dated October 29, 2009, has already been filed with the Court.

second parent and child, only to claim now that she unilaterally may breach her promise to honor the rights of her child and his second parent to maintain their parent-child relationship. The non-biologically related petitioner parent in *Debra H.* seeks to protect her relationship with her son and willingly asks to be legally obligated for his financial support. In contrast, in this appeal, the second intended parent, Respondent E.T., abandoned her son, "Baby R.," and disclaims any obligation to provide him with child support. She has left H.M. to shoulder alone the burden of supporting the child they together brought into existence.

These cases demonstrate why the courts' doors must be open to ensure that, where two people deliberately cause a child to be brought into the world in reliance on mutual agreements that both will parent the child, they both are then legally obligated to live up to these promises and their responsibilities to the resulting child. The happenstance of which parent is biologically related to the child and which is not, the sex of the parents, or whether the parents are married or in some other legally recognized relationship, should have no bearing on the binding commitments made by the adults that their child will have two parents on whom to depend for nurture and support.

Nor should the courts turn their backs on children in non-traditional families based on arguments that only when the legislature enacts specific provisions precisely envisioning such families can a forum and remedy be found to enforce the best interests of the children. The courts in many similar contexts apply longstanding canons of statutory construction and common law and equitable powers to further New York public policy and safeguard the best interests of children even if the legislature has not precisely provided for the needs of specific children.

Significantly, both the Appellate Division majority below and Respondent E.T. acknowledge that the State Supreme Court has jurisdiction to entertain equitable claims for child support from intended parents unrelated by biology or adoption. *See H.M. v. E.T.*, 65 A.D.3d 119, 128 (2d Dep't 2009); Br. of Respondent, at 35, 58, 63 n.28. That aspect of the Appellate Division's ruling should be affirmed, and, for the reasons argued in this and Appellant's brief, the jurisdiction of the Family Court to hear this claim under the Uniform Interstate Family Support Act ("UIFSA") also should be acknowledged.

As this brief discusses, other jurisdictions, as well as New York, have recognized the importance to the growing number of children conceived with assisted reproductive technologies of enforcing their rights to financial

support from the adults who committed to parent them and caused them to be brought into the world. The majority below applied an unduly restrictive, archaic reading of the Family Court Act by conditioning statutory support rights on the manner of a child's conception and the sex of his second parent. Moreover, the facts alleged in this case, as in *Debra H.*, provide particularly strong grounds for application of the courts' longstanding equitable powers to provide relief to Baby R. and Appellant H.M., which here may be exercised in either Family Court or Supreme Court.

INTEREST OF *AMICUS CURIAE*

One of the oldest and largest legal professional organizations in the country, the NYCBA was founded in 1870 to improve the administration of justice, promote the rule of law and elevate the legal profession's standards of integrity, honor and courtesy. The NYCBA has over 23,000 members who serve hundreds of thousands of clients, and who have a vital interest in ensuring that New York grants equal rights to people regardless of sexual orientation and sex. Many of the NYCBA's members practice in the area of family law. These and other members represent clients whose very access to the courts may be affected by resolution of this case. With respect to the particular issues raised here, the NYCBA has long taken an active interest in

protecting the legal rights of the diverse types of families that compose modern American society.

The NYCBA submits this brief to emphasize the need for the courts to guarantee that all children have the right to child support from both of their intended parents, regardless of the means by which those children were conceived or the composition of their families. As the NYCBA advocated in its *amicus brief* submitted in *Debra H.*, the best interests of children are served by protecting their legal rights to receive both the emotional and financial support of those individuals who planned as parents for their birth and brought them into the world.[2]

ARGUMENT

I. Children Conceived With Assisted Reproductive Technology Should Be Ensured A Legal Forum And Remedy To Secure Support From Their Intended Second Parents.

Beyond the impact on Baby R. and the parties, the issues presented in this case have profound implications for many same-sex couples and their children. Demographic and social changes over the past decades have produced a marked increase in the number of same-sex couples forming families together. *See* Adam P. Romero et al., Williams Institute, *Census*

[2] This brief, submitted on behalf of the NYCBA as a whole, was independently reviewed and is strongly supported by the following NYCBA committees: the Committee on Children and the Law, the Council on Children, the Family Court and Family Law Committee, the Committee on Lesbian, Gay, Bisexual & Transgender Rights, the Sex & Law Committee, and the Civil Rights Committee.

Snapshot: New York 1 (2008), http://www.law.ucla.edu/williamsinstitute/publications/NewYorkCensusSnapshot.pdf (using census data to estimate that approximately 50,854 same-sex couples resided in New York as of 2005). There has also been a dramatic rise in the number of children raised in non-traditional family settings. As of 2005, in New York alone, over 18,000 children lived in households headed by same-sex couples. *See id.* at 2. A significant number of same-sex couples, including the parties in this case, have turned to assisted reproductive technology ("ART") in order to conceive children.[3]

Children conceived through ART, just like those conceived through traditional means, are born in need of support. Respondent E.T. presents the Court with data regarding children conceived by so-called "promiscuous fathers." *See* Br. of Respondent, at 9-14. She suggests that the larger number of such children somehow justifies a legal regime in which the needs of other children, conceived through ART to unmarried parents, may be ignored by the courts. But this growing body of children, and the

[3] *See* Victoria C. Wright et al., Assisted Reproductive Technology Surveillance — United States 2005, 57 CDC MMWR Surveillance Summaries 1, 1 (2008), http://www.cdc.gov/mmwr/PDF/ss/ss5705.pdf (noting that New York reported the second-highest number of ART procedures among the states); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 Harv. L. Rev. 835, 846 (2000) (noting "great[] expan[sion in] the number of would-be parents who seek" donor insemination "for reasons unrelated to infertility," including many women who "have no male partner").

individual child before the Court in this case, deserve the same protections offered under New York statutory, common law and equitable doctrines that have long applied to all other children. Respondent cannot evade her own legal, not to mention moral, responsibility to this child with resort to irrelevant discussion of others who may also have behaved irresponsibly towards the children they caused to be born.

New York's law recognizes that the obligation of support properly rests upon a child's parents, the individuals responsible for bringing the child into the world. *See* N.Y. Fam. Ct. Act ("FCA") § 413(1)(a) ("the parents of a child under the age of twenty-one years are chargeable with the support of such child"); § 513 ("each parent of a child born out of wedlock is chargeable with the support of such child"). As this Court observed in *Spencer v. Spencer*, New York has a "strong policy interest in assuring that both parents fulfill their support obligations throughout their children's first 21 years of life." 10 N.Y.3d 60, 68-69 (2008). This policy derives from the State's dual interests in protecting the welfare of children and ensuring that children are adequately supported so they do not become public charges. *L. Pamela P. v. Frank S.*, 59 N.Y.2d 1, 5 (1983). The responsibility to support a child is enduring; it cannot be treated by a person who has undertaken parenthood as a fleeting obligation subject to termination at will.

Children conceived with anonymous donor sperm may face additional challenges in securing needed support. By its very nature, this manner of conception results in children being born with only one of the two adults to whom they are genetically related legally obligated for their support. *See In re Sebastian*, 25 Misc. 3d 567, 582 n.44 (Sur. Ct. N.Y. County 2009) ("Men who anonymously donate sperm and sign waivers of parental rights are both protected from claims of support and barred from establishing legal paternity."); *In re Adoption of Michael*, 166 Misc. 2d 973, 974-75 (Sur. Ct. Bronx County 1996) (holding that an anonymous sperm donor forfeits parental rights regardless of marital status of the mother).

Yet, as asserted both in this case and in *Debra H.*, the children involved were brought into the world with second parents who, albeit not genetically related to them, nonetheless committed to support them as parents. A genetic relationship is not the determinative factor in whether an individual is obligated to furnish support for a child he or she caused to be brought into the world. As the Appellate Division has observed, "[i]n recognition of current reproductive technology, the term 'genetic stranger' alone can no longer be enough to end a discussion of . . . who is, or may be, a 'parent.'" *Perry-Rogers v. Fasano*, 276 A.D.2d 67, 72 (1st Dep't 2000).

A. Courts In Other Jurisdictions, Considering Similar Asserted Facts, Have Recognized That Children Conceived Through ART Are Entitled To Support From Their Second Intended Parents.

In recent years, courts throughout the country have appreciated their responsibility to respond to the needs of children in the face of evolving family demographics and advances in reproductive technology. *See Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality opinion) ("The demographic changes of the past century make it difficult to speak of an average American family."); *In re Parentage of L.B.*, 122 P.3d 161, 165 (Wash. 2005) ("In the face of advancing technologies and evolving notions of what comprises a family unit, this case [involving same-sex parents] causes us to confront the manner in which our state, through its statutory scheme and common law principles, defines the terms 'parents' and 'families.'"). In particular, courts in a number of states have recognized that individuals who act to bring children into the world through ART must be liable for the children's support, notwithstanding the lack of any genetic relationship.[4]

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[4] *See, e.g.*, *Elisa B. v. Super. Ct. of El Dorado County*, 117 P.3d 660, 669-70 (Cal. 2005); *In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003); *Levin v. Levin*, 645 N.E.2d 601, 604-05 (Ind. 1994); *In re Baby Doe*, 353 S.E.2d 877, 878-89 (S.C. 1987); *People v. Sorenson*, 437 P.2d 495, 498-99 (Cal. 1968); *Brown v. Brown*, 125 S.W.3d 840, 843-44 (Ark. Ct. App. 2003); *L.S.K. v. H.A.N.*, 813 A.2d 872, 877-78 (Pa. Super. Ct. 2002); *Jackson v. Jackson*, 739 N.E.2d 1203, 1210-13 (Ohio Ct. App. 2000); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (Cal. Ct. App. 1998); *R.S. v. R.S.*, 670 P.2d 923, 927-28 (Kan. Ct. App. 1983); *Chambers v. Chambers*, No. CN00-09493, 2002 Del. Fam. Ct. LEXIS 39, at *13-15, *38 (Del. Fam. Ct. Feb. 5, 2002); *K.S. v. G.S.*, 440 A.2d 64, 66-

The decision of the Illinois Supreme Court in *In re Parentage of M.J.* is particularly relevant. In that case a mother sought child support from her ex-partner for the couple's twin sons conceived through anonymous donor insemination. 787 N.E.2d at 145. The mother conceded that the man, to whom she was not married, was not the biological father. Instead, she alleged that he agreed they should use anonymous donor sperm to have children together, promised to support financially any children that might be born as a result, and acknowledged the resulting twins as his own. *Id.* at 146. Looking first to the Illinois Parentage Act, the court found inapplicable the statutory remedy providing that "[a]ny child born as a result of artificial insemination is considered the legitimate child of the husband and wife consenting to the use of the technique," because the man had failed to provide the necessary written consent. *Id.* at 148-49.[5]

The court nonetheless held that the mother could maintain her suit for support as a "common law action[] to establish parental responsibility." *Id.* at 151. Citing public policy to prevent children from becoming public charges, the court determined "that the best interests of children and society

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69 (N.J. Super. Ct. Ch. Div. 1981). Notably, many of these decisions are based on facts closely analogous to those presented in this case, where a lesbian couple, with the intention of forming a family together, turns to ART in order to conceive a child. *See, e.g.*, *Elisa B.*, 117 P.3d at 663; *L.S.K.*, 813 A.2d at 874; *Chambers*, 2002 Del. Fam. Ct. LEXIS 39, at *2-3.

[5] In light of its holding that the required written consent was lacking, the court did not reach whether the statute should apply to an unmarried couple. *Id.* at 150.

are served by recognizing that parental responsibility may be imposed based on conduct evidencing actual consent to the artificial insemination procedure." *Id.* at 152. In a particularly germane passage, the Illinois Supreme Court observed:

> [I]f an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law. Regardless of the method of conception, a child is born in need of support.

Id.

The Supreme Court of California similarly concluded that a lesbian who "actively consented to, and participated in, the artificial insemination of her partner with the understanding that the resulting child or children would be raised by [the couple] as coparents" should be presumed the child's legal parent. *Elisa B.*, 117 P.3d at 669. The *Elisa B.* court noted that a contrary conclusion would leave the children at the center of the litigation "with only one parent and would deprive them of the support of their second parent." *Id.* Of particular concern to the court was the prospect that "the financial burden of supporting [the children] would be borne by the county." *Id.*

The public policies underlying the decisions in *In re Parentage of M.J.* and *Elisa B.* — the need to act in the best interests of children and to prevent shifting to the state the financial burden of caring for minors — apply universally, in New York and elsewhere, as well as in Illinois and California. *See L. Pamela P.*, 59 N.Y.2d at 5; *Schaschlo v. Taishoff*, 2 N.Y.2d 408, 411 (1957).[6] Accordingly, this Court should confirm, as other states' courts have, that an intended second parent who engages in a "deliberate course of conduct with the precise goal of causing the birth of . . . children," *In re Parentage of M.J.*, 787 N.E.2d at 152, is obligated to furnish support to provide for the children's care, regardless of a biological or genetic connection. *See also Sorenson*, 437 P.2d at 499 ("One who consents to the production of a child cannot create a temporary relation to be

[6] Although Baby R. was conceived and born in New York, where E.T. continues to reside, he and H.M. now live in Canada. The UIFSA, enacted pursuant to the requirements of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, § 321, 110 Stat. 2105, 2221, furthers the universally-recognized imperative of holding accountable those financially responsible for a child, regardless of the jurisdiction in which the child and parties now reside. *See Kansas v. United States*, 214 F.3d 1196, 1199 n.4 (10th Cir. 2000) (noting that in passing the PRWORA, "Congress made clear that non-payment of child support, particularly in interstate cases, is a widespread problem which has significant deleterious effects on children, particularly those in low-income families."). It also furthers New York's interest in ensuring reciprocity from other jurisdictions in enforcement of child support orders for the benefit of New York children. *See Spencer*, 10 N.Y.3d at 65 ("The legislative history indicates that the requirement to adopt UIFSA supported the congressional goal to 'achieve uniformity in interstate cases, and also to recognize other States' uncontested child support orders.'" (citing H.R. Rep. No. 104-651, at 1324 (1996))); *Dep't of Revenue v. Sloan*, 743 So. 2d 1131, 1133 (Fla. Dist. Ct. App. 1999) ("The purpose of reciprocal acts such as the UIFSA . . . is to improve and extend by reciprocal legislation the enforcement of duties of support.").

assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible.").

B. Existing New York Law Premised On The Same Public Policy Concerns Recognizes The Need To Protect Children Conceived Through ART.

The majority below rightly confirmed that equitable relief to secure child support for a child like Baby R. may be obtained in New York (though, as discussed *infra*, the majority's conclusion that jurisdiction lies only in Supreme and not Family Court was unduly restrictive). *See H.M.*, 65 A.D.3d at 128. As the majority noted, equitable remedies apply to hold accountable a person who has caused a child to be born with promises to support and parent that child.

Statutory and common law already recognizes that children conceived by means of ART are entitled to support from their intended second parents, even absent a biological tie. Indeed, prior to any statutory enactment expressly addressing the parentage of children born using ART, the courts held the partner of the child's biological mother responsible for child support.

For example, *Anonymous v. Anonymous* held that a husband's consent to his wife's insemination by anonymous donor sperm "implied a promise

on his part to furnish support for any offspring resulting from the insemination." 41 Misc. 2d 886, 888 (Sup. Ct. Suffolk County 1964). *Gursky v. Gursky* similarly held that a spouse was obligated to support a child conceived by means of donor insemination and born to his wife, even though the child was held not to be the "legitimate issue of the husband." 39 Misc. 2d 1083 (Sup. Ct. Kings County 1963). The courts in such cases ensured that a couple's use of ART did not create a loophole for non-biologically-related intended second parents to disclaim obligations of support for the children they caused to be born every bit as much as if they were genetic parents.

In 1974 the New York legislature partially codified this principle in enacting Domestic Relations Law ("DRL") § 73, which provides that a child conceived through anonymous donor insemination and born to a married couple is deemed the "legitimate" child of both spouses "for all purposes," where both parties executed a written consent and the procedure was performed by medical personnel. *See* 1974 N.Y. Laws ch. 303, § 1.[7] Given the statutory requirements of a marriage, written consent and medical supervision, the express language of DRL § 73 does not specifically cover a

[7] As more recently amended, DRL § 73 provides that "[a]ny child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes."

significant number of New York children conceived through ART. *See In re Sebastian*, 25 Misc. 3d at 568 (noting that New York has "an out-dated statutory scheme which fails to anticipate the relations created by" ART). However, even when the requirements of DRL § 73 are not strictly met, courts have looked to the public policy underlying the rule and pre-existing common law doctrines to hold intended second parents liable for support for the children whose conceptions and births they planned.

For example, in *Laura WW. v. Peter WW.*, the Third Department held that DRL § 73's presumption of parentage did not apply to a child conceived with anonymous donor sperm and born to a married couple because the husband had failed to consent in writing to the procedure. 51 A.D.3d 211, 214 (3d Dep't 2008). Nevertheless, the court concluded that "[n]either the language nor legislative history of [DRL] § 73 suggests that it was intended to be the exclusive means to establish paternity of a child born through the [anonymous donor insemination] procedure." *Id.* at 214-15. Instead, the court turned to the common law and held that "*equity and reason require a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed the legal parent of the resulting child.*" *Id.* at 215 (emphasis added). Finding that the husband had "consented to the child's creation," the Third

Department affirmed the Supreme Court's conclusion that the man was the child's legal parent and, thus, liable for support. *Id.* at 217-18.

Other decisions from courts in this State, both before and after the enactment of DRL § 73, have held that intended second parents cannot disclaim obligations of support for children conceived though ART and brought into the world with that adult's consent. *See Karin T. v. Michael T.*, 127 Misc. 2d 14, 19 (Fam. Ct. Monroe County 1985) (holding that transgender man was liable for support of children conceived through donor insemination and born to spouse); *Anonymous*, 41 Misc. 2d at 888; *Gursky*, 39 Misc. 2d at 1088-89.

As the Third Department noted, while DRL § 73 may "cover[] one specific situation," other "situations will arise where not all of [the] statutory conditions are present." *Laura WW.*, 51 A.D.3d at 215. To limit application of the public policy and equitable principles underlying DRL § 73 to only one sub-class of children conceived as a result of ART would run counter to this State's policy of "promot[ing] the best interests of children." *Shondel J. v. Mark D.*, 7 N.Y.3d 320, 329 (2006).

Moreover, to limit application of DRL § 73's presumption of parentage for children conceived through ART only to children born to a

married couple would be unconstitutional.[8] *See Gomez v. Perez*, 409 U.S. 535, 538 (1973) ("[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."); *see also In re Adoption of Michael*, 166 Misc. 2d at 975 (noting that "[i]t might very well be unconstitutional for the law to try to make . . . a distinction . . . based upon marital status . . . with regard to a woman's right to be artificially inseminated").

Furthermore, because same-sex couples cannot marry in New York, *see Hernandez v. Robles*, 7 N.Y.3d 338 (2006), restricting the presumption of parentage contained in DRL § 73 to married couples would amount to discrimination on the basis of sexual orientation, as well as sex, in violation of constitutional equal protection guarantees. The Court of Appeals of Oregon recently held as much in *Shineovich v. Kemp*, 214 P.3d 29 (Or. Ct. App. 2009).[9] In that case, the court considered a constitutional challenge by a lesbian mother, not biologically related to her child, to an Oregon statute granting legal parentage "to the husband of a woman who gives birth to a child conceived by artificial insemination, without regard to the biological

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[8] The constitutional implications raised in the present case are further discussed in Point III.B *infra*.

[9] On December 9, 2009 the Oregon Supreme Court denied a petition for review in *Shineovich v. Kemp* (S057775) (A138013). *See* Or. Sup. Ct., Media Release 2 (Dec. 9, 2009), *available at* http://www.ojd.state.or.us/sca/WebMediaRel.nsf/Files/12-09-09_Supreme_Court_Conference_Results_Media_Release.pdf/$File/12-09-09_Supreme_Court_Conference_Results_Media_Release.pdf.

relationship of the husband and the child, as long as the husband consented to the artificial insemination." *Id.* at 39. The court reasoned that because same-sex couples cannot enter into civil marriage in Oregon, the privilege of presumed parenthood granted by the statute "is not available to the same-sex domestic partner of a woman who gives birth to a child conceived by artificial insemination, where the partner consented to the procedure with the intent of being the child's second parent." *Id.* at 40. Finding "no justification for denying [the privilege of legal parenthood] on the basis of sexual orientation," the court found the limitation unconstitutional. *Id.*

II. The Doctrine Of Equitable Estoppel Applies To Preclude A Person Who Caused A Child To Be Born With Promises Of Support From Disclaiming Financial Obligations To The Child.

As this Court has underscored, "New York courts have long applied the doctrine of estoppel in paternity and support proceedings" in order to protect the best interests of children. *Shondel*, 7 N.Y.3d at 326. Equitable estoppel is grounded in notions of fairness. "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted." *Id.*; *see also Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175, 184 (1982).

The doctrine of equitable estoppel has been repeatedly held available in this State — in proceedings in both Family Court and Supreme Court — to prevent an individual from disclaiming parentage and obligations of support.[10] The Court expressly noted in *Shondel* that although "paternity by estoppel is now secured by statute," the doctrine "*originated* in case law." *Shondel*, 7 N.Y.3d at 326 (emphasis added). Indeed, New York courts repeatedly invoked the doctrine prior to its codification by the legislature in the 1990s.[11]

This Court has emphasized that "the child is the party in whose favor estoppel is being applied." *Shondel*, 7 N.Y.3d at 330; *see also In re Baby Boy C.*, 84 N.Y.2d 91, 102 n.* (1994); *Ettore I.*, 127 A.D.2d at 13. Focusing on the best interests of the child involved, courts have equitably estopped

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[10] *See, e.g.*, *Shondel*, 7 N.Y.3d at 326 (appeal from action originating in Family Court); *Westchester County Dep't of Soc. Servs. ex rel. Melissa B. v. Robert W.R.*, 25 A.D.3d 62, 71 (2d Dep't 2005) (asserting, in appeal from Family Court, that "[t]he doctrine of equitable estoppel may be invoked to preclude a father . . . from denying paternity to avoid support obligations where the invocation of the doctrine is in the best interests of the child"); *Charles v. Charles*, 296 A.D.2d 547, 549 (2d Dep't 2002) (asserting, in appeal from Family Court, that "[e]quitable estoppel is commonly invoked in matters of paternity, child custody, visitation and support. . . . It can be used to estop a father from denying paternity to avoid support obligations.").

[11] *See, e.g.*, *Ettore I. v. Angela D.*, 127 A.D.2d 6, 13 (2d Dep't 1987); *Sharon GG.v. Duane HH.*, 95 A.D.2d 466, 468-69 (3d Dep't 1983), *aff'd on op. below*, 63 N.Y.2d 859 (1984); *Montelone v. Antia*, 60 A.D.2d 603, 603 (2d Dep't 1977); *see also* 1990 N.Y. Laws ch. 818, § 12; 1997 N.Y. Laws ch. 398, § 80.

those who have acted as a child's second parent from later disclaiming parentage based on lack of a genetic connection to the child.[12]

Significantly, the doctrine is not limited to situations in which there was at least the possibility of a biological connection — such as in the case of a former sexual partner who operated under the mistaken impression that he might have been the child's father. *See, e.g.*, *Shondel*, 7 N.Y.3d at 324-25. Rather, courts have invoked the doctrine when it was clear from the outset that the intended second parent could never have been biologically related to the child. For instance, equitable estoppel has been applied to prevent a man from disclaiming his obligation to support a child informally adopted by his wife after he voluntarily brought the child into his home. *See Wener*, 35 A.D.2d at 52-53. Notably, "[t]he implied promise-equitable estoppel approach has been followed by New York courts in fixing

[12] *See, e.g.*, *Shondel*, 7 N.Y.3d at 328; *Laura WW.*, 51 A.D.3d at 218; *Vernon J. v. Sandra M.*, 36 A.D.3d 912, 913 (2d Dep't 2007); *Griffin v. Marshall*, 294 A.D.2d 438, 438-39 (2d Dep't 2002); *Hammack v. Hammack*, 291 A.D.2d 718, 720 (3d Dep't 2002); *Ocasio v. Ocasio*, 276 A.D.2d 680, 680 (2d Dep't 2000); *Brian B. v. Dionne B.*, 267 A.D.2d 188, 188 (2d Dep't 1999); *Richard B. v. Sandra B.B.*, 209 A.D.2d 139, 142-43 (1st Dep't 1995); *Mancinelli v. Mancinelli*, 203 A.D.2d 634, 635 (3d Dep't 1994); *Vito L. v. Filomena L.*, 172 A.D.2d 648, 650-51 (2d Dep't 1991); *Campbell v. Campbell*, 149 A.D.2d 866, 867 (3d Dep't 1989); *Montelone*, 60 A.D.2d at 603; *Wener v. Wener*, 35 A.D.2d 50, 52-53 (2d Dep't 1970); *Karin T.*, 127 Misc. 2d at 16-19; *Gursky*, 39 Misc. 2d at 1088-89.

responsibility for support of a child conceived by means of artificial insemination by a third-party donor." *Id.* at 53.[13]

A. The Allegations In H.M.'s Petition Support Application Of Equitable Estoppel In This Case.

H.M. has made out a *prima facie* case for invocation of equitable estoppel.[14] She has alleged that she and E.T. were involved in a committed, monogamous relationship of over five years and that, over the course of their relationship, they discussed raising a family together. *See H.M.*, 65 A.D.3d at 120-21. According to H.M., with E.T.'s assistance and encouragement, H.M. became pregnant through ART and gave birth to a child. *Id.* at 121. The parties shared all expenses related to the conception and birth. *Id.* at 131 (Balkin, J., dissenting). For the first few months of Baby R.'s life, E.T. cared for him as a parent. *Id.* at 121. However, when he was four months old, E.T. ended her relationship with H.M. and the child, presenting H.M. with a check for $1,500. *Id.* at 131 (Balkin, J., dissenting). Without means to support Baby R. herself, H.M. moved with him to Canada to live with her parents. *Id.* H.M. has also alleged that, subsequent to the parties'

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[13] *See, e.g.*, *Karin T.*, 127 Misc. 2d at 19 (invoking equitable estoppel to hold transgender man chargeable for support of children conceived through donor insemination and born to his spouse, even though marriage was deemed void); *Gursky*, 39 Misc. 2d at 1088-89.

[14] At this stage of the proceedings H.M.'s allegations must be accepted as true and viewed in the light most favorable to her claim for relief. *See Sanders v. Winship*, 57 N.Y.2d 391, 394 (1982).

separation, E.T. provided clothes and gifts to the child and visited with him. *Id.*

The allegations here present a strong case for application of equitable estoppel, particularly in light of this Court's holding in *Shondel*. The Court held in that case that a man who had "mistakenly represented himself as a child's father" was precluded from denying his paternity and was required to pay child support. *Shondel*, 7 N.Y.3d at 324. The man had had only a fleeting relationship with the child's mother, who lived in Guyana. *Id.* There was certainly no indication that he intended to bring a child into the world with a promise of lifelong support. After the child was born, the man, operating under the mistaken belief that he was the child's genetic parent, voluntarily stepped into the child's life and provided periodic child support. *Id.* Although he and the child visited one another, they never resided together as a family. *Id.*

Here, on the other hand, according to H.M.'s allegations, E.T. encouraged H.M. to become pregnant through ART (even assisting in the insemination procedure), shared the costs of the ART procedure and birth and brought the child into their home after his birth. If equitable estoppel can hold a man chargeable for support of a child he had no plans to conceive (and in fact did not conceive), surely that doctrine must apply to a woman

who intentionally causes a child to be conceived with a promise to provide lifelong support.

B. Equitable Estoppel Requires A Person To Live Up To A Financial Commitment To A Child Even If That Person Has Forsaken Forming An Emotional Attachment With The Child.

There is no merit to E.T.'s contention that an emotional bond must exist between the intended second parent and the child before the doctrine of equitable estoppel may be invoked. As explained in Appellant's brief (at 49-53), a parent-child attachment is simply not a required element of equitable estoppel in this context. Nor should it be. "[A] child is *born* in need of support." *In re Parentage of M.J.*, 787 N.E.2d at 152 (emphasis added). The obligation to support one's child is not triggered after a certain amount of time, or only once an emotional bond has been formed. That obligation arises when the individual causes the child to be brought into being based on a promise to support the child.

Indeed, it would be supremely poor public policy to condition an obligation to support a child a person caused to be born based on that person's establishment of psychological bonds with the child. An individual who makes a commitment of support could then shirk their obligations simply by walking away before the child is old enough to become emotionally bonded to that adult. As this Court noted in *Shondel*, a person

may not defeat application of the doctrine of equitable estoppel by "severing all ties with the child." 7 N.Y.3d at 331. Instead, numerous cases have applied equitable estoppel to preclude an individual from disclaiming parentage and support obligations when the parent-child relationship was terminated early in the child's life, or without the support parent having established a significant emotional relationship with the child.[15]

E.T. claims that the relief requested by H.M. would be tantamount to forcing a "parent-child relationship" on an "unwilling party," contrary to this Court's holding in *In re Baby Boy C.*, 84 N.Y.2d 91, 101-02 (1994). *See* Br. of Respondent, at 71-72. Not so. H.M. seeks financial support for the couple's child; she does not seek to force E.T. to assume a parent-child relationship E.T. has already rejected. Significantly, although this Court in *In re Baby Boy C.* declined to order a joint adoption after the husband revoked his consent, it specifically observed that the children and prospective adoptive mother still had legal recourse to pursue financial support from him. 84 N.Y.2d at 102-03.

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[15] *See Laura WW.*, 51 A.D.3d at 213 (parties separated prior to the birth of the child); *Vernon J.*, 36 A.D.3d at 913 (support parent incarcerated for majority of child's life and only "exercised occasional visitation"); *Mancinelli*, 203 A.D.2d at 635 (support parent severed relationship with child two years after birth); *Vito L.*, 172 A.D.2d at 648-51 (support parent left country before child was born and later lived with child for only six months); *Wener*, 35 A.D.2d at 51-52 (support parent cut off support slightly over a year after bringing infant into his home).

E.T. should not be rewarded for her failure to provide Baby R. with emotional nurture by being relieved of her obligation to provide him with financial support as well. While the law cannot force a parent to provide love and affection to her child, it can force her to provide for the child's material needs.[16]

III. The Family Court Has Subject Matter Jurisdiction To Adjudicate A Woman Liable For Support Of A Child She Intentionally Caused To Be Brought Into The World.

As explained in Appellant's brief, this Court should construe the provisions of the FCA as granting the Family Court subject matter jurisdiction over support applications brought on behalf of children like Baby R. *See* Br. of Appellant, at 14-44. The unduly restrictive reading of the FCA by the majority below has the potential to invite intended second parents residing in New York whose children now live elsewhere to disclaim their obligations to support the children they planned for, conceived and brought into this world. Moreover, the majority's reading of the FCA to deprive out-of-state children whose second parent is a woman recourse to Family Court, the designated UIFSA tribunal, raises significant

[16] It should be noted that although the formation of parent-child bonds of attachment are not essential to trigger an obligation of child support, they do trigger a child's right to protection for an ongoing relationship with a loving non-biologically related parent, when the child's biological or adoptive parent consented to and fostered those bonds. That is the issue presented in *Debra H.* Together, this case and *Debra H.* call for the Court to protect the best interests of children born to non-traditional families in securing financial, as well as emotional, support from intended second parents.

constitutional concerns which should not be overlooked. Nor is the Family Court constrained from applying the doctrine of equitable estoppel, as it has done in many similar cases, to provide relief to H.M. and her son.

A. The Family Court Act Should Be Read As A Whole, In A Gender-Neutral Manner, To Permit The Family Court To Hold An Intended Second Mother Liable To Support Her Child.

As Appellant asserts in her brief, the UIFSA (*i.e.*, Article 5-B of the FCA), Article 4 of the FCA and Article 5 of the FCA each provide the Family Court with jurisdiction to adjudicate this claim for child support. *See* Br. of Appellant, at 14-44. *Amicus* does not repeat Appellant's thoroughly briefed arguments on the first two of these points, but rather focuses here on Appellant's argument that the majority below erred in failing to construe Article 5 in a gender-neutral manner.

As the Second Department majority properly recognized, the statutory language of the FCA should be broadly construed to protect the best interests of children. *See H.M.*, 65 A.D.3d at 128; *see also Schaschlo*, 2 N.Y.2d at 411 (observing that laws "chiefly concerned with the welfare of . . . child[ren] . . . should be liberally construed). However, the majority failed to apply this canon of construction prioritizing the interests of children, concluding instead that the Family Court lacked jurisdiction to entertain H.M.'s support application because Article 5 of the FCA uses such gender-

specific terms as "paternity" and "father." *See H.M.*, 65 A.D.3d at 124-25 (citing FCA §§ 511, 523, 541, 542(a)). However, as the dissent observed, the majority failed to appreciate the extent to which numerous other provisions of the FCA employ gender-neutral language, including such terms as "parents," *see* FCA §§ 413, 415, 417, 443, 513, 515, 580-302, 580-401; "parentage," *see* FCA §§ 580-201, 580-301(b)(6), 580-701; "party to a child support order," *see* FCA § 413-a; and "person chargeable with . . . support," *see* FCA § 422. *See H.M.*, 65 A.D.3d at 135-36 (Balkin, J., dissenting). The majority also disregarded FCA § 561, providing for "proceedings to compel support by a mother."

The majority's failure to read the statute as a whole was error. As this Court has held, "[s]tatutes which relate to the same subject matter must be construed together unless a contrary legislative intent is expressed." *Dutchess County Dep't of Soc. Servs. ex rel. Day v. Day*, 96 N.Y.2d 149, 153 (2001) (citations omitted); *see also* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 97 ("Not only are different parts of the same act interpreted together, but different acts which are in pari materia are to be construed each in the light of the other."); Statutes § 221(b) ("In accordance with general rules of construction, statutes which are *in pari materia* are to be construed together as though forming part of the same statute."). Indeed,

in interpreting the UIFSA, this Court has looked for guidance to other statutes governing child support obligations. *See Spencer*, 10 N.Y.3d at 65-66 (holding that UIFSA and the Full Faith and Credit for Child Support Orders Act "have complementary policy goals and should be read in tandem").

The majority's rationale for ignoring these gender-neutral statutory provisions — that they "are not part of the statutory scheme embodied in Family Court Act article 5," *H.M.*, 65 A.D.3d at 125 — is inconsistent with a court's "obligation to harmonize the various provisions of related statutes and to construe them in a way that renders them internally compatible." *In re Aaron J.*, 80 N.Y.2d 402, 407 (1992); *see also Comm'r of Soc. Servs. ex rel. Rebecca G. v. Bernard R.*, 87 N.Y.2d 61, 69 (1995) (reading FCA § 514 "in connection with the subsequently enacted [FCA § 545]" and concluding that § 514 is "properly understood" as authorizing a court to impose liability for birth-related expenses on either parent without regard to their sex); *Robert W.R.*, 25 A.D.3d at 70 (reading FCA § 516-a together with other provisions of Article 4 and 5 of the FCA because the provisions were *in pari materia*).

The majority's decision also contravenes other relevant canons of statutory construction, including that statutes be read in a gender-neutral

manner. General Construction Law § 22 provides that whenever "gender indicative words . . . appear in any law, rule or regulation, unless the sense of the sentence indicates otherwise, they shall be deemed to refer to both male or female persons." N.Y. Gen. Constr. Law § 22. Courts are also directed to adopt the construction of a statute "which will produce equal results and avoid unjust discrimination." McKinney's Cons. Laws of N.Y., Book 1, Statutes § 147.

Numerous New York courts have followed these guiding principles to construe various provisions of the FCA gender-neutrally.[17] Construing the provisions of Article 5 of the FCA in a gender-neutral fashion would also comport with the courts' responsibility to interpret the law, particularly where children are involved, so as to respond to changing societal realities. Interpreting "paternity" in the current statutory scheme to exclude the possibility that a child has two mothers perpetuates an anachronistic view of contemporary families and disregards advancements in reproductive

[17] *See, e.g.*, *Rachelle L. v. Bruce M.*, 89 A.D.2d 765, 765 (3d Dep't 1982) (reading former version of FCA § 532 which concerned payment of costs of blood testing in a gender-neutral manner by substituting the phrase "the alleged father" with "the party seeking the test"); *Lisa M. UU. v. Mario D. VV.*, 78 A.D.2d 711, 711 (3d Dep't 1980) (reading FCA § 514 gender-neutrally by "authorizing the court to impose the obligation of paying for the confinement expenses of the mother of the child upon either the mother or father or both as the court, in its discretion, may deem proper"); *Carter v. Carter*, 58 A.D.2d 444, 447 (2d Dep't 1977) (reading FCA §§ 413 and 414 to mean that both parents "are equally responsible for the support of their children and that . . . the Family Court [should] apportion the costs of such support between them . . . without regard to the sex of the parent").

technologies. It also denies Baby R. and other children like him avenues to child support based solely on the sexes and marital status of their parents. Just as courts struck down statutes in the family law context that were premised on "the baggage of sexual stereotypes," *see Califano v. Westcott*, 443 U.S. 76, 89 (1979),[18] so too must parentage statutes evolve to account for non-traditional families, including same-sex couples raising children conceived through ART. *See In re Jacob*, 86 N.Y.2d 651 (1995) (construing New York adoption law to permit second-parent adoptions by same-sex partner of biological parent).

B. The Second Department Majority's Reading Of The Family Court Act Is Constitutionally Infirm.

The majority's conclusion that the Family Court has jurisdiction to order support from a putative father but not a putative mother raises serious constitutional concerns.[19] Denying children the necessary support from an

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[18] *See also, e.g.*, *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (striking down state law requiring child support for boys but not girls over age 18 based on stereotypes about appropriate male and female roles); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643-44 (1975) (striking down law providing survivors' benefits to widows but not widowers based on archaic assumptions that men will be primary family wage-earners and women will assume primary childrearing role).

[19] There is some dispute as to whether such constitutional arguments, not having been raised below, may be considered by this Court. *See H.M.*, 65 A.D.3d at 127-28. Whether or not the question was raised below, the Court should certainly avoid issuing a ruling that violates constitutional precepts. *See In re Jacob*, 86 N.Y.2d at 668 n.5 (citations omitted). This was precisely the approach taken by this Court in *In re Jacob*, notwithstanding the dissent's observation in that case that the parties had not raised the constitutional argument below. *See id.* at 680 (Bellacosa, J., dissenting). In any event, this Court has held that it may address "a question of statutory interpretation . . . even

intended second parent based on the sex of that parent would run afoul of the equal protection guarantees of the federal and state constitutions. *See generally Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); *see also In re Sebastian*, 25 Misc. 3d at 581 (holding that New York statutory scheme which provides methods for a father, but not a mother, to establish parentage amounted to "a constitutionally prohibited gender-based classification").

As the dissenting justices recognized below, it would be irrational to suggest that the child at the center of this litigation is entitled to support from an absent father but not an absent mother. *H.M.*, 65 A.D.3d at 136 n.7 (Balkin, J., dissenting). After all, money is gender neutral. *Cf. Shondel*, 7 N.Y.3d at 327 ("Equitable estoppel is gender neutral."). Certainly, child support furnished by a mother buys the same amount of food, clothing, and shelter as support furnished by a father. From the perspective of the child, in whose best interests the courts act, it makes no difference whether his financial necessities are being paid for by a woman or a man.

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though it was not presented below." *Richardson v. Fiedler Roofing, Inc.*, 67 N.Y.2d 246, 250 (1986).

The majority's decision in this case is also constitutionally suspect because it draws discriminatory lines on the basis of the sexual orientation and marital status of the parents. In *In re Jacob*, this Court determined that a interpretation of DRL § 117 denying children "the opportunity of having their two de facto parents become their legal parents, based solely on their biological mother's sexual orientation or marital status, would not only be unjust under the circumstances, but also might raise constitutional concerns in light of the adoption statute's historically consistent purpose — the best interests of the child." 86 N.Y.2d at 667. Similarly, to deny a child the right to secure support from his intended second parent because of the parents' sexual orientation or inability to enter into civil union or civil marriage runs contrary to the guarantee of equal protection.[20]

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[20] The Respondent attempts to minimize the commitment she made to H.M. and the child they had together by observing that she and H.M. never entered into a civil union or marriage. *See* Br. of Respondent, at 7, 42-44, 67, 70-71. This argument is specious. While E.T.'s parentage of Baby R. might have been established by a civil union or marriage with H.M., the absence of a civil union or marriage does not relieve E.T. of her obligations to support the child she caused to be brought into the world. Beyond that, during the period of the parties' relationship, neither civil union nor marriage was available to same-sex couples — the two had no opportunity to enter into these legally-recognized relationships. Similarly, E.T. makes much of the fact that she did not legally adopt Baby R. *See* Br. of Respondent, at 44 & n.24. However, as she concedes, Baby R.'s birth predated this Court's 1995 *In re Jacob* ruling permitting second-parent adoptions by same-sex partners. Moreover, E.T. abandoned the child within months of his birth, before any adoption could have been effectuated even if it had been an option available to a same-sex couple at that time. In short, E.T.'s failure to pursue a second-parent adoption of Baby R. does not excuse her obligation to support him. *See In re Baby Boy C.*, 84 N.Y.2d at 101-02 (noting that, despite husband's refusal to follow through on

In *In re Jacob*, this Court underscored that "[w]here the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results." *Id.* (citations omitted); *see also* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 150(c) ("If possible, a statute is required to be construed in favor of its constitutionality, and in such manner as to uphold its constitutionality."). Thus, in order to avoid potential constitutional infirmities, the Court interpreted New York's adoption statutes to permit second-parent adoptions by same-sex partners. *In re Jacob*, 86 N.Y.2d at 667-68.

As this Court explained in *People v. Liberta*, "[w]hen a statute is constitutionally defective because of underinclusion, a court may either strike the statute, and thus make it applicable to nobody, or extend the coverage of the statute to those formerly excluded." 64 N.Y.2d 152, 170 (1984). In making such a determination, a court must "discern what course the Legislature would have chosen to follow if it had foreseen . . . [the] underinclusiveness." *Id.* at 171 (citations omitted).

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planned adoption, the children and wife retained remedies to impose financial obligations on him).

Courts have repeatedly employed this analysis in the family law context to cure gender-based discrimination resulting from disparate treatment between fathers and mothers. For example, in *Califano*, the Supreme Court concluded that a federal statute providing welfare benefits to families where the father, but not the mother, was unemployed was unconstitutional. 443 U.S. at 89. The Court determined that replacing the word "father" in the statute with its "gender-neutral equivalent" was the appropriate remedy, ensuring that benefits would "be paid to families with an unemployed parent on the same terms that benefits have long been paid to families with an unemployed father." *Id.* at 92; *see also Rachelle L.*, 89 A.D.2d at 765; *Lisa M. UU.*, 78 A.D.2d at 711.

Requiring parents to support their children is a fundamental social imperative, making the only appropriate remedy here a construction of Article 5 of the FCA which acknowledges the Family Court's jurisdiction to determine whether women, as well as men, are obligated to support their non-biologically related children.

C. The Majority Below Erred In Concluding That The Family Court Lacks Jurisdiction To Apply The Doctrine Of Equitable Estoppel.

The majority below held that the Family Court lacks authority to invoke the doctrine of equitable estoppel to require E.T. to live up to her

promises of support. According to the majority, such an action would be tantamount to granting equitable relief "not specifically authorized by the Constitution or statute." *H.M.*, 65 A.D.2d at 127. This conclusion was also erroneous.

The majority did recognize that in a number of cases the Family Court has employed the doctrine of equitable estoppel to "preclude[e] a party from 'denying a certain fact.'" *Id.* (citation omitted). Although invocation of the doctrine in this case would have accomplished precisely that result — precluding E.T. from disclaiming her parentage and support obligations — the majority held that the Family Court may invoke equitable estoppel only to grant relief specifically authorized by statute, namely to adjudicate a male a father (but not a female a mother). *Id.* This reasoning shares the same flaw as the majority's conclusion that Article 5 of the FCA may not apply to a petition for support against a woman.

Moreover, equitable estoppel certainly may be used offensively by the Family Court to establish a fact, as has been recognized by New York courts. *See, e.g.*, *Charles*, 296 A.D.2d at 549 (holding that equitable estoppel "can be used offensively to enforce rights created by words or conduct, or defensively to cut off rights," and remanding to Family Court for hearing to determine whether invocation of the doctrine would be in child's

best interest). Indeed, this Court has observed that "the doctrine of equitable estoppel may and has been applied in statutory proceedings by courts of limited jurisdiction," including in a paternity proceeding in Family Court. *In re Baby Boy C.*, 84 N.Y.2d at 100 (citing *Sharon GG. v Duane HH.*, 95 A.D.2d 466, 468 (3d Dep't 1983), *aff'd*, 63 N.Y.2d 859 (1984)).

IV. As Held By The Second Department And Conceded By E.T., The Supreme Court Has Concurrent Jurisdiction To Hear Claims For Support Brought Against A Woman.

As discussed in Point III, principles of statutory construction and constitutional considerations call for reading the FCA and UIFSA as establishing jurisdiction in the Family Court to entertain H.M.'s support application. But even if this Court finds otherwise, the Supreme Court still possesses jurisdiction to enter an award of support against E.T. and other recalcitrant parents like her, notwithstanding the UIFSA, as the Second Department majority confirmed and E.T. conceded. The dissenting justices below expressed some doubts about the Supreme Court's concurrent jurisdiction, *see H.M.*, 65 A.D.3d at 138 (Balkin, J., dissenting), which *Amicus* addresses here.

The New York Constitution provides that the Supreme Court "shall have general original jurisdiction in law and equity. . . ." N.Y. Const. art. VI, § 7(a). As a court of general jurisdiction, the Supreme Court "'is

competent to entertain all causes of action unless its jurisdiction has been specifically proscribed.'" *Sohn v. Calderon*, 78 N.Y.2d 755, 766 (1991) (quoting *Thrasher v. U.S. Liability Ins. Co.*, 19 N.Y.2d 159, 166 (1967)). Although the FCA provides that "[t]he family court has exclusive original jurisdiction over proceedings for support or maintenance under this article and in proceedings under" the UIFSA, *see* FCA § 411, it also has been held that there is "concurrent jurisdiction in the Supreme Court with the Family Court to direct support for children in any appropriate action, whenever that issue may arise, and that the constitutional power cannot be diluted by the Legislature in the creation of new proceedings in the Family Court." *Vazquez v. Vazquez*, 26 A.D.2d 701, 702-03 (2d Dep't 1966); *see also Kagen v. Kagen*, 21 N.Y.2d 532, 537-38 (1968).

Thus, despite the statutory grant of "exclusive" jurisdiction to the Family Court over proceedings brought under the UIFSA, the Supreme Court must also be recognized to have jurisdiction over such actions. *See* Merril Sobie, Practice Commentaries, McKinney's Cons. Laws of N.Y., FCA § 580-102 (2009) ("Article 5-B [the UIFSA] should logically apply to the Supreme Court."). For that reason, the majority below correctly held that H.M.'s action could properly be brought in Supreme Court. *See H.M.*, 65 A.D.3d at 128; *see also Doe v. N.Y. City Bd. of Health*, 5 Misc. 3d 424,

427 (Sup. Ct. N.Y. County 2004) (noting that although Family Court could not issue a declaration of maternity, the Supreme Court had the power to do so).

The dissenting justices relied on *Strom v. Lomtevas*, 28 A.D.3d 779 (2d Dep't 2006), for the proposition that the Family Court is the sole UIFSA tribunal, and therefore, even if H.M.'s application for support could be filed in Supreme Court, as the majority suggested, the Supreme Court would be forced to transfer the matter to the Family Court, thereby leaving H.M. and others like her "in limbo." *H.M.*, 65 A.D.3d at 138 (Balkin, J., dissenting). The dissenting justices read *Strom* too broadly.

The issue in *Strom* was whether a provision in a couple's judgment of divorce providing that the Supreme Court, and not the Family Court, would retain jurisdiction as to matters of alimony, custody, support and visitation remained viable following passage of the UIFSA. *Strom*, 28 A.D.3d at 779-80. After the couple's divorce, the mother, who had relocated to Germany, filed a petition to enforce the support provisions in the judgment of divorce. *Id.* at 779. Just as in this case, pursuant to the UIFSA the petition was directed to Family Court, which dismissed based on the provision in the divorce decree vesting jurisdiction in the Supreme Court. *Id.* at 780. The

Second Department reversed, holding that the Family Court is the sole UIFSA tribunal. *Id.*

Because the court in *Strom* concluded that the Family Court *could* entertain the support petition, it had no occasion to answer the question addressed by the Second Department dissent in this case — whether the Supreme Court could entertain a UISFA petition if the Family Court was deemed to *lack* jurisdiction. In fact, *Strom* contained no analysis regarding the Supreme Court's constitutional grant of original jurisdiction. By reading *Strom* to foreclose the Supreme Court's ability to consider H.M.'s support application, the dissenting justices in this case interpreted that decision too expansively. In any event, this Court should not adopt such an exception to the Supreme Court's constitutionally-conferred concurrent jurisdiction.[21]

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[21] If, however, it is determined that the Family Court is the sole tribunal for all claims filed pursuant to the UIFSA, then the Family Court certainly must be held to have statutory jurisdiction under the UIFSA to apply equitable remedies to safeguard out-of-state children like Baby R. The New York legislature provided in FCA § 580-303(1) that the Family Court, the designated UIFSA tribunal, "shall apply the . . . substantive law . . . generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies available in those proceedings. . . ." Thus FCA § 580-303(1) empowers the Family Court to apply the doctrine of equitable estoppel and provide equitable remedies, as the Supreme Court may do in "similar proceedings originating in this state." Such a reading ensures that New York's bifurcated court system, in which the Supreme Court enjoys general original jurisdiction and the Family Court exercises specialized statutorily-granted jurisdiction, does not create a loophole through which recalcitrant New York women can shirk their obligations simply because the children to whom they owe child support live out of state and are funneled through the UIFSA into Family Court. "[T]he focus of UIFSA is on providing out-of-State petitioners with a simplified procedure to present their case." *Child Support Enforcement Unit ex rel. Judith S. v. John M.*, 183 Misc. 2d 468, 473 (Fam. Ct. Monroe County 1999),

It is critical that H.M. and others like her have an adequate forum in which to seek child support from those individuals — whether male or female — who, after causing a child to be brought into the world, attempt to walk away from their parental obligations. Failure to recognize such a forum would leave out-of-state children whose intended second parents continue to reside in New York without an avenue to seek support. Such an outcome would have the perverse effect of rendering New York a haven for parents escaping their support obligations.

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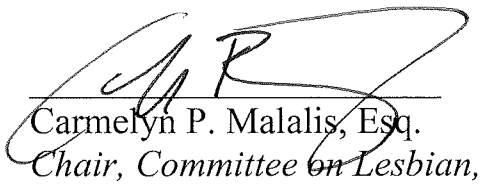
modified on other grounds, 283 A.D.2d 40 (4th Dep't 2001). It is not to deprive out-of-state children substantive rights and remedies available to similarly situated in-state children simply because support claims for these children are processed through the Family Court.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court ensure a forum and remedy to provide for children like Baby R.

Dated: December 22, 2009
New York, New York

Respectfully submitted,



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