

NEW YORK

1285 Avenue of the Americas
New York, NY 10019-6064
+1 212 373 3000

BEIJING

Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86 10 5828 6300

HONG KONG

12th FL, Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852 2846 0300

LONDON

Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44 20 7367 1600

TOKYO

Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81 3 3597 8101

WASHINGTON, D.C.

2001 K Street NW
Washington, DC 20006-1047
+1 202 223 7300

WILMINGTON

500 Delaware Avenue, Suite 200
Post Office Box 32
Wilmington, DE 19899-0032
+1 302 655 4410

May 6, 2010

Client Advisory: *Debra H. v. Janice R.*

On May 4, 2010, the New York Court of Appeals issued an important ruling concerning the rights of same-sex parents in *Debra H. v. Janice R.*, effectively bringing New York State one step closer to recognizing the equality of LGBT families. While reaffirming a line of precedents holding that, absent a second-parent adoption, a non-biological parent does not have standing to seek custody or visitation with the child she helped to raise, the Court of Appeals nevertheless upheld the parental rights of a lesbian, non-biological mother on the ground that the couple had entered into a Vermont civil union and that comity principles required the application of Vermont law which provides that both women are the legal parents of the child.

Factual Background

Respondent Janice R. and petitioner Debra H. met in 2002 and entered into a civil union in Vermont in November 2003, one month before Janice R. gave birth to their son, M.R., who had been conceived through artificial insemination. While Debra H. did not take the step of formally adopting M.R. as a second parent, for much of his life, Janice R. held Debra H. out (both to the world and to M.R.) as M.R.'s mother and the two women raised M.R. together until they separated in the spring of 2006. Indeed, even after they separated, Debra H. continued to act as M.R.'s parent, frequently and consistently seeing him as part of her visitation. In May 2008, however, when M.R. was almost five years old, Janice R. abruptly and unilaterally sought to sever all forms of contact between Debra H. and M.R.

In order to resume contact with her son, Debra H. brought an action in Supreme Court, New York County seeking joint custody and visitation. Janice R., relying primarily on the Court of Appeals' 1991 decision in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), argued that Debra H. lacked standing even to seek custody and visitation because she was not M.R.'s "parent". The trial court disagreed, reasoning, in accordance with several rulings by other courts, that *Alison D.*'s "formulaic approach to defining the word 'parent' . . . may not always effectuate the legislature's express intent of furthering the best interests of the child." The trial court therefore applied principles of equitable estoppel to find that Debra H. was a *de facto* parent to M.R. The Appellate Division, First Department then reversed the Supreme Court and dismissed Debra's petition for lack of standing under *Alison D.* The Court of Appeals granted leave to appeal, with Judge Smith taking the unusual step of granting a motion to stay so that M.R. could continue his relationship with Debra H. while the appeal was pending.

The Court's Decision

All seven of the judges on the Court of Appeals agreed that Debra H. is the legal parent of M.R. and thus is entitled to seek custody and visitation with her son. The Court, however, was quite divided in its analysis, with four separate opinions written in concurrence.

Significantly a majority of the Court, in an opinion written by Judge Read, seemed intent on limiting the case's application, and rejected the argument that *Alison D.* should be overruled because it is outmoded, unworkable and does not take into account the best interests of the child. Indeed, a majority of the judges on the Court of Appeals (Judges Read, Graffeo, Piggot and Jones) expressly reaffirmed the Court's precedent in *Alison D.* on the theory that "*Alison D.*, in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups." (Maj. Op. at 13.) A majority of the Court also agreed that the equitable principles set forth in the Court of Appeals' recent decision in *Shondel J. v. Mark D.*, 7 N.Y.3d 320 (2006), which held that the doctrine of equitable estoppel prohibits a man who had held himself out to be the father of a child from denying paternity for purposes of paying child support, did not apply in cases where a person seeks visitation or custody. (*Id.*)

Given that a majority of the Court refused to overrule *Alison D.*, the Court's decision to affirm the parental rights of Debra H. was premised on an entirely different ground—one that was not heavily briefed by the parties or *amici* in the case. Thus, rather than relying on the more traditional concept of "best interests of the child," the Court of Appeals based its decision on the fact that Janice R. and Debra H. had entered into a civil union in Vermont. As the Court explained, as a result of that civil union, the case presented two issues for it to decide: (1) "whether Debra H. is M.R.'s parent under Vermont law" and (2) "in the event that she is, whether as a matter of comity she is his parent under New York law as well." (*Id.* at 20.) Significantly, the Court then went on to answer both of these questions in the affirmative. In so doing, the Court acknowledged that the potential legal ramifications in New York of entering into a civil union in Vermont were uncertain when Debra H. and Janice R entered into a civil union in 2003, and remain unsettled today, "except to the extent [the Court] resolve[d] the specific issue—*i.e.*, parentage—presented by this case." (*Id.* at 23.)

In contrast to his colleagues, Judge Smith, the author of the Court's opinion in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006) denying a right to same-sex marriage in New York, endorsed a far different approach, explaining in his own concurrence that he would depart from *Alison D.* both for purposes of visitation and child support. (Smith, J., concurring at 2.) Judge Smith echoed the majority in calling for a need for predictability and certainty in cases concerning parental rights, but argued that he would instead adopt a different "bright-line rule"—one that includes lesbian mothers and others similarly situated in the definition of "parent." (*Id.* at 3-4.) Recognizing that a rote adherence to *Alison D.* "disappoints the expectations of the adults involved [and] much worse . . . leaves each child with only one parent," Judge Smith stated that he "would hold that where a child is conceived through [artificial donor insemination] by one member of a same sex couple living together, with the knowledge and consent of the other, the child is as a matter of law—at least in the absence of extraordinary circumstances—the child of both." (*Id.* at 4-5.)

Finally, in a separate concurrence authored by Judge Ciparick and joined by Chief Judge Lippman, Judge Ciparick argued that *Alison D.* should be overruled as outmoded in favor of a test that properly takes into account the best interests of the child. (Ciparick, J., concurring at 1.) As Judge Ciparick noted, since *Alison D.* was decided, lower courts have been forced either to

permanently sever strongly formed bonds between children and adults with whom they have parental relationships, or engage in “deft legal maneuvering to explain away the apparent applicability of *Alison D.*” (*Id.*) Judge Ciparick thus proposed an alternate rule whereby, in addition to biological and adopting parents, an individual would have standing to seek visitation or custody if she can show that: (1) the biological or adoptive parent consented to and encouraged the formation of a parental relationship; and (2) the petitioner intended to and actually did assume the typical obligations and roles associated with parenting the child. (*Id.* at 5.)

Observations

Although obviously a positive result for the mother and son in *Debra H.*, the Court of Appeals’ decision may close the door to maintaining relationships with both parents in households headed by a same-sex couple for whom adoption may not be a practical option for any number of reasons, including the fact that second-parent adoption is, at best, a time-consuming, expensive and intrusive process. As then soon-to-be Chief Judge Judith S. Kaye warned in her dissent in *Alison D.*—and as Judges Ciparick echoed in her concurrence in *Debra H.*—it is upon these children that the Court’s decision “falls hardest” in “limiting their opportunity to maintain bonds that may be crucial to their development.” *Alison D.*, 77 N.Y.2d at 658 (Kaye, J., dissenting).

At the same time, however, the Court of Appeals’ decision may have opened a much wider door to same-sex couples in New York State. This is so because underlying the Court’s decision is the conclusion that valid out-of-state civil unions (or marriages), and the attendant rights and responsibilities of such civil unions (or marriages), are entitled to legal recognition in New York. Although the Court recently refused to resolve a similar “recognition” issue in the recent cases of *Godfrey v. Spano* and *Lewis v. Department of Civil Service*, 13 N.Y.3d 358 (2009), here, the logic of the Court’s decision means that valid out-of-state marriages between same-sex couples are in fact entitled to a significant degree of recognition in New York under principles of comity. Indeed, while Judge Read, writing for the majority, explicitly attempted to limit the Court’s holding by stating that the Court’s decision provides “only that New York will recognize parentage created by a civil union in Vermont” (Maj. Opinion at 26), it is hard to conceive of a principled way for the Court to distinguish between a Vermont civil union and a Connecticut or Massachusetts marriage or to distinguish a child custody determination from a host of other important rights that come with marriage. The holding in *Debra H.* could thus apply not only to protect the familial relationship for children in families with same-sex parents, but could also effectively grant same-sex couples who live in New York, but who marry in neighboring states the many other legal rights and responsibilities that come with marriage.

It is, of course, impossible at this early stage to determine with certainty how much of an impact *Debra H.* will have in future cases. Although it eliminates the applicability of equitable estoppel principles to provide parental status to “de facto” parents, it also arguably presents a significant opening for greater legal recognition of out-of-state same-sex marriages in New York.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions or wish to discuss your particular situation, please call Roberta A. Kaplan (212-373-3086).