NEW YORK SUPREME COURT
APPELLATE DIVISION — FIRST DEPARTMENT

In the Matter of a Proceeding for
Paternity Under Article 5 of the
Family Court Act and for Visitation of

Ry R.-Y., a minor,

Thomas S., Petitioner-Appellant,

- v. -

Robin Y., Respondent-Appellee.

BRIEF *AMICUS CURIAE* OF THE NATIONAL CENTER FOR LESBIAN RIGHTS; LAMBDA LEGAL DEFENSE AND EDUCATION FUND; GAY AND LESBIAN ADVOCATES AND DEFENDERS; CENTER KIDS; AND GAY AND LESBIAN PARENTS COALITION INTERNATIONAL IN SUPPORT OF RESPONDENT-APPELLEE

Bobbi C. Sternheim
Local Counsel for *Amici*
Rochman, Platzer, Fallick,
Rosmarin & Sternheim
666 Third Avenue
New York, NY 10017
212-697-4090

Nancy D. Polikoff
Professor of Law
American University Law School
4400 Massachusetts Ave. N.W.
Washington, D.C. 20016
202-885-1510

Abby Abinanti
Legal Director
National Center for Lesbian Rights
1663 Mission St. Suite 550
San Francisco, CA 94114
415-621-0674

New York County Family Court Docket No. P3884/91

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INTEREST OF *AMICI CURIAE*

The National Center for Lesbian Rights (NCLR), formerly the Lesbian Rights Project, is a non-profit public interest law firm founded in 1977 and devoted to the legal concerns of women who encounter discrimination on the basis of their sexual orientation. NCLR is particularly well-suited to offer *amicus* assistance to this court, as NCLR attorneys frequently litigate in the area of family law as it applies to lesbians. Most recently, NCLR has participated as an *amicus curiae* in *In re Angel Lace M.*, arguing in favor of lesbian second-parent adoption, before the Wisconsin Supreme Court; *Prescott v. Blume*, arguing in favor of upholding a contract between a biological and a non-biological mother, before the California Court of Appeal; and *Leckie v. Voorhies*, arguing to uphold a trial court's denial of paternity to a semen donor, before the Oregon Court of Appeal.

NCLR attorneys have also written numerous publications on the rights of lesbians to preserve and protect the integrity of their chosen families free from unwarranted intrusions based on bias and stereotypes. These publications include: *Lesbian and Gay Parents: A Legal and Psychological Perspective* (1989); *Lesbian Mother Litigation Manual* (2nd ed. 1990); *Lesbians Choosing Motherhood: Legal Implications of Donor Insemination and Co-Parenting* (1991); *Preserving and Protecting the Families of Lesbians and Gay Men* (1986); *Recognizing Lesbian and Gay Families: Strategies for Extending Employment Benefit Coverage* (2nd ed. 1992); and *Sexual Orientation and the Law* (Clark Boardman, 1985, 1987, 1989).

The Lambda Legal Defense and Education Fund, Inc. (Lambda) is a not-for-profit corporation based in New York which engages in impact litigation in all substantive areas affecting the rights of lesbians and gay men. Founded in 1973, Lambda is the oldest and largest national legal organization devoted to these concerns and has appeared as counsel or *amicus curiae* in hundreds of cases in state and federal courts on behalf of lesbians and gay men who have suffered discrimination because of their sexual orientation. Through its litigation and community education in many states, Lambda has challenged limitations to the concept of "family" which work to exclude or fail to protect the families of lesbians and gay men. Lambda is committed to gaining legal recognition for lesbian and gay couples and families, and eradicating the injustices that result from the lack of such recognition.

Gay and Lesbian Advocates and Defenders (GLAD), a Massachusetts nonprofit, public interest law firm founded in 1978, represents gay men and lesbians, and persons with HIV infection in impact litigation throughout New England. This case raises issues of historic and present interest to GLAD: the rights of both parents and children in fundamental relationships. GLAD is well suited to assist this court by virtue of its participation as counsel or *amicus curiae* in similar cases involving adoption: *Adoption of Tammy*, 416 Mass. 205 (1993); unmarried couples: *Reep v. Department of Employment and Training*, 412 Mass. 845 (1992); foster care: *Babets v. Secretary*, Suffolk County Superior Court, 1986; and child custody *Bezio v. Patenaude*, 381 Mass. 563 (1983).

Center Kids, founded in 1988, is the Family Project of the Lesbian and Gay Community Services Center of New York City, a nonprofit, tax-exempt organization. With more than 1,400 member families in the New York metropolitan area, Center Kids is the largest regional lesbian and gay parenting organization in the United States. Approximately 80 percent of the adult members of Center Kids are lesbians and 20 percent are gay men. The majority of families headed by lesbians have either conceived children through alternative insemination or are in the process of attempting to conceive children through that method. The adult male members include men who have become parents through adoption or foster care placements, as well as men who have been insemination donors. Although there are a significant number of single parents in Center Kids, most families are headed by lesbian or gay life partners who are jointly parenting children. Center Kids sponsors ongoing support groups, monthly discussion groups, and two or three all-day workshops a year on topics that include donor insemination.

Center Kids is frequently consulted by New York City and New York State government officials on numerous family issues, including adoption, foster care, education, and domestic partnership registration. Center Kids has also participated as *amicus curiae* in court cases involving the rights of

lesbian and gay parents and their children, including *Alison D. v. Virginia M.* in the Appellate Division, Second Department and the New York Court of Appeals.

The Gay and Lesbian Parents Coalition International (GLPCI), formerly the Gay Fathers Coalition, was founded in 1979 and is a nonprofit tax-exempt advocacy and support group for gay fathers and lesbian mothers, their partners and children, and prospective parents. GLPCI has over 60 dues-paying member chapters in the United States, Canada, England and Norway, and 2400 individual members, the vast majority of whom live in the United States. GLPCI communicates with more than 235 other lesbian and gay parenting organizations around the world. The membership of GLPCI is equally divided between men and women. Singly and as couples, GLPCI members have become parents through donor insemination, adoption, surrogacy, foster parenting, and through prior heterosexual relationships. GLPCI distributes its newsletter to over 8,000 individuals and organizations, provides a speakers service, helps form local support groups, and holds as annual conference on gay and lesbian parenting.

GLPCI is committed to insuring that lesbian and gay parents and their children are fully protected under the law. GLPCI has participated as *amicus curiae* in court cases, including *In re Adoption of Charles B*, concerning gay adoption, in the Ohio Supreme Court; and *Alison D. v. Virginia M.*, in New York, and *Nancy S. v. Michele G.*, in California, concerning rights of nonbiological mothers.

STATEMENT OF FACTS

This brief relies upon the findings of fact contained in the trial court's Decision and Order, dated April 13, 1993. An edited version is reported at 599 N.Y.S.2d 377 (Fam. Ct. 1993).**

SUMMARY OF ARGUMENT

For more than a decade, lesbians and gay men have been raising children without first bearing those children within the context of a heterosexual relationship. This case concerns the future of Ry R.-Y., a child born into one of the earliest such planned families. Given the recent prevalence of such families, courts will be increasingly called upon to apply common law doctrine to this new family form. *Amici* urge that, in applying the relevant common law principles to Ry's family, this court understand and respect both the context within which her family was created and the family's specific structure.

Amici have consistently advocated that courts should apply certain overriding principles to cases involving planned lesbian and gay families.

** *See also* Nancy D. Polikoff, *The Social Construction of Parenthood in One Planned Lesbian Family*, 22 N.Y.U. REV. OF L. & SOC. CHANGE 203 (1996) —EDS.

Three such principles are: 1) a biological connection is neither a necessary nor a sufficient basis for establishing parenthood; 2) agreements, particularly when coupled with an ongoing course of conduct, establishing the intent of a biological parent either to share parenting with another person or to relinquish parental rights should be upheld; and 3) a child's experience of his or her family, which may include two, less than two, or more than two parents, is critical to any legal analysis. As discussed below, estoppel doctrine allows this case to be decided in a manner consistent with the above principles.

Robin Y. and Sandra R. constructed a planned family with two children, Ry and Cade, born two years apart following insemination with the semen of two different known donors, each of whom agreed that he would not have the rights and responsibilities of parenthood. In the R.-Y. family, as in most planned lesbian and gay families, biology alone does not determine the family relationships. As the trial court found, Ry has two mothers and a sister, even as she knows that neither Sandra R. nor Cade is biologically related to her.

It is common in planned lesbian families for a child to know the biological facts of her origin without ascribing parental status to the semen donor. Especially in the context of an agreement that the donor will be known to the child but will not have the rights and responsibilities of parenthood, and an ensuing course of conduct consistent with that agreement, a child need not consider her biological father a parent. Indeed, after evaluating Thomas S.'s contacts with Ry, her sister, and her mothers within the context of Ry's specific family structure, the court below found that Ry did not ever view Thomas S. as a parent, that "in [Ry's] family, there has been no father." Appellant's brief is fatally flawed because it denies that a child can make such a distinction.

Estoppel doctrine is designed to protect a child from the "lasting trauma" of an order of paternity which would destroy her image of her family. The trial court correctly applied the doctrine when it found that Thomas S. agreed to forego parental rights and engaged in a course of conduct consistent with that agreement, and that Ry thereby developed her identity as a member of a family with two mothers and a sister. Under those circumstances, estoppel appropriately prevents Thomas S. from obtaining an order of paternity that would be contrary to Ry's best interests.

Appellant's brief acknowledges that estoppel is available to defeat a biological father's paternity claim. It attempts to avoid defeat of Thomas S.'s claim, however, by arguing that estoppel could be properly applied only if Ry were the "legitimate" child of her mother and another father. Such a cramped reading of the case law should be rejected, as it would deny all children born into lesbian families, who can never be "legitimate" in the traditional sense of that word, the protection and stability that the estoppel doctrine affords children in heterosexual families.

The presence of "another father" is not a prerequisite for application of estoppel doctrine because estoppel allows a court to preserve a child's experience of her family, and that experience need not include a male parent. The argument that a child must have a father, and that if she does not, no matter what relationships exist, no matter what the child's identity, or the course of conduct of the parties, or the harm to the child, estoppel cannot protect a child from an order of paternity, would render the lives of children intentionally raised outside the two-parent heterosexual model unworthy of legal protection.

The court below found that "a declaration of paternity would be a statement that [Ry's] family is other than what she knows it to be and needs it to be." Although estoppel has not previously been applied when the "family that [the child] knows it to be" is a lesbian family, *amici* urge this court to uphold the trial court's application of the doctrine to protect children in planned lesbian and gay families.

ARGUMENT

I. THE FAMILY CREATED BY SANDRA R. AND ROBIN Y. IS ONE OF AN INCREASING NUMBER OF PLANNED GAY AND LESBIAN FAMILIES, AND THIS CASE MUST BE DECIDED WITHIN THE CONTEXT OF THIS PARTICULAR FAMILY STRUCTURE.

This case concerns the future of a child born into a "planned lesbian family."[1] A planned lesbian family is one in which a lesbian deliberately chooses to raise a child without being married or heterosexually involved. While lesbians and gay men have always raised children born when they were married or in heterosexual relationships, planned lesbian and gay families are a relatively recent, but well-documented, phenomenon. As one psychologist has written:

> [T]he 1980s have witnessed the emergence of an entirely new family structure, unparalleled in human history. For the first time ever in any society we know about, gay people in large numbers are setting out consciously, deliberately, proudly, openly, to bear and adopt children.[2]

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1. This term was coined by psychologist April Martin. April Martin, *Lesbian Parenting: A Personal Odyssey*, *in* GENDER IN TRANSITION 249 (J. Offerman-Zuckerberg ed., 1989). One anthropologist, describing the same phenomenon, uses the term "intentional motherhood." Ellen Lewin, LESBIAN MOTHERS 47-48 (1993).

2. April Martin, The Planned Lesbian and Gay Family: Parenthood and Children 3 (paper delivered to the 1989 Annual Meeting of the American Psychological Association, New Orleans).

There is documentation of planned lesbian families as far back as the early 1970s. *See, e.g.*, Julia Perez, *To Beverly*, *in* WE ARE EVERYWHERE 13 (Harriet Alpert ed., 1987) (describing the decision that the author made with her then-lover, in 1971, to raise a child together). Two children born to lesbians through donor insemination in the late 1970s were

The planned lesbian or gay family does not have one fixed structure.[3] A lesbian or a gay man may be a single parent; a lesbian or gay couple may decide to raise a child jointly; or a single lesbian or gay man may choose to co-parent with one or more people. A planned lesbian or gay family may be formed in a number of ways, including public, private, or international adoption; birth to a lesbian following donor insemination from a sperm bank, an unknown sperm donor, or a known sperm donor; or birth to a surrogate mother who relinquishes the child to the gay biological father.[4] Lesbians and gay men also serve as foster parents.[5]

This case concerns one common type of planned lesbian family—a lesbian couple in a long-term committed relationship, who choose to be equal parents to children born as a result of insemination with semen from known donors. Contrary to the assertion contained in the brief *amicus curiae* filed by two San Francisco area gay parenting groups, choosing a known donor must not be equated with choosing an additional parent or a "legal noncustodial father" for the child.[6] An anthropological study of lesbian and gay families in the San Francisco area found that ". . . a donor's continued involvement in a child's future was never assumed. Whether an individual donor would identify as a parent or participate in childrearing had to be determined on a case-by-case basis."[7] The anthropologist found that

> most [lesbians and gay men] did not consider a sperm donor to be intrinsically a parent, much less a partner, in relationship to a

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the subject of litigation in the mid 1980s. *Loftin v. Flournoy*, No. 569,630-7 (Cal. Super. Ct., Alameda Cty., Jan. 2, 1985); *In re Pearlman*, No. 87-24,926 DA (Fla. Cir. Ct., Broward Cty., Mar. 31, 1989) reprinted in part, 15 FAM. L. REP. (BNA) 1355 (May 30, 1989). The first law review article addressing some of the legal issues that can arise when a lesbian bears a child through donor insemination was published in 1980, and referred to a "self-help" packet available to assist lesbians wishing to conceive in this manner. Sutton, *The Lesbian Family: Rights in Conflict Under the California Uniform Parentage Act*, 10 GOLDEN GATE L. REV. 1007, 1007-10 (1980). The first major newspaper article mentioning lesbians conceiving children through donor insemination was published in 1980 and estimated that 150 lesbians had been inseminated that year. Anne Taylor Fleming, *New Frontiers in Conception*, NEW YORK TIMES MAGAZINE, July 20, 1980, at 14. The phenomenon known colloquially as the "lesbian baby boom," however, is widely regarded to have begun during the 1980s.

3. One anthropologist, in an introduction to her study of lesbian and gay families, writes, "Nowhere in these pages will readers find an analysis of 'the gay family'. No such standardized creation exists . . ." Kath Weston, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 3 (1991).

4. The range of choices, along with the stories of men and women who have selected among the various options, is set out in April Martin, THE LESBIAN AND GAY PARENTING HANDBOOK (1993). See generally William Henry, *Gay Parents: Under Fire and on the Rise*, TIME, Sept. 20, 1993, at 66.

5. *See* Wendell Ricketts, LESBIANS AND GAY MEN AS FOSTER PARENTS (1992).

6. See Brief *Amicus Curiae* of the Lesbian and Gay Parenting Group and Gay Fathers Group in Support of Petitioner Appellant, at 6-7 [later withdrawn by *amici* —EDS.].

7. Weston, *supra* note 3, at 170.

child conceived through alternative insemination; unless the donor shared parenting responsibilities,[8] his semen tended to be spoken of simply as a catalyst that facilitates conception.[9]

As *amici* document below, section I.B., *infra*, many lesbians create families in which a child knows the semen donor who is her genetic father but does not consider that donor to be a parent. This distinction is possible specifically because children in lesbian families are often raised to consider biology neither a necessary nor a sufficient determinant of family relationships. Certainly that was true in this family. Ry has two mothers and a sister, even though she knows that neither Sandra R. nor Cade is biologically related to her.

The fatal flaw in appellant's brief is its failure to acknowledge that a family, including the children, can make such a distinction. Appellant repeatedly characterizes his relationship with Ry as that of a "noncustodial parent" without placing his contacts with Ry and Cade and their mothers in the context within which Ry experienced them. *Amici* urge this court, in deciding this case, to understand Ry's family and to recognize that a known donor is not always a child's parent.

A. The prevalence of planned lesbian and gay families has been extensively documented, and courts must adapt existing legal principles to serve the best interests of children in such families.

To adapt existing legal principles to serve the best interests of children in planned lesbian and gay families, this court, and all courts, must understand the extent and nature of such families. Although few such families existed when Robin Y. and Sandra R. bore their children, the increasing prevalence such families has been amply documented in recent years.

In 1990, the director of the National Center for Lesbian Rights estimated that five to ten thousand lesbians had borne children into lesbian families.[10] In 1989, the first children's book whose central character is a child born of donor insemination to a lesbian couple[11] sold out of its initial printing of 4000 copies before it was even published.[12] The first book designed exclusively to assist lesbians in making the decision whether and

8. Even Appellant's version of the facts does not demonstrate that he ever shared parenting responsibilities for Ry.

9. *Id.* at 189.

10. Seligman, *Variations on a Theme*, NEWSWEEK, Special Ed., Winter/Spring 1990, at 39.

11. Lesléa Newman, HEATHER HAS TWO MOMMIES (1989).

12. Donna Minkowitz, *No Book Can Change a Child's Sexuality* (Interview with author Lesléa Newman), NEWSDAY, Nov. 30, 1992, at 55.

how to become parents, published in 1985, is now in its fourth printing.[13] A 1985 study of nearly 2000 lesbians reported that approximately one-third wanted to "become mothers either through adoption or artificial insemination."[14] Pacific Reproductive Services, a San Francisco sperm bank, reported last year that more than 100 lesbians use their services each month.[15] And on March 1, 1993, a pediatric clinic specializing in serving children of lesbian and gay parents opened at the University of California at San Francisco.[16]

Although few resources existed for lesbians wanting to raise children at the time that Sandra R. and Robin Y. conceived Cade and Ry, many resources now advise lesbians in similar situations. Two videos were produced in the mid 1980s.[17] A number of books have been written since 1985, including those addressing the decisions that lesbian parents and prospective parents face[18] and those containing personal narratives by lesbians who have chosen to be parents.[19] *Amicus* National Center for Lesbian Rights has written a manual of legal information, which it distributes.[20]

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13. Cheri Pies, CONSIDERING PARENTHOOD (1985). *See* Sue Anne Pressley and Nancy Andrews, *For Gay Couples, the Nursery Becomes the New Frontier*, WASHINGTON POST, Dec. 20, 1992, at A22.

14. O'Connor, *Lesbian Urges Therapists to Find 'New Voices'*, WASHINGTON BLADE, Aug. 19, 1988, at 9 (reporting on the National Lesbian Health Care Survey results released at the International Lesbian and Gay Health Conference, Boston, MA., in July, 1988).

15. William Henry, TIME, *supra* note 4, at 68. Other statistics are found in local coverage of lesbians having children conceived through donor insemination. In 1991, a West Hollywood health care center reported that over 100 women identifying themselves as lesbians had used their donor insemination services; over 200 lesbians had used the services of Sperm Bank of California, in Oakland. Scott Harris, *Two Moms or Two Dads—and a Baby*, LOS ANGELES TIMES, Oct. 20, 1991, at A1. A 1992 *Chicago Tribune* article noted that the city's first seminar on lesbian parenting, held that summer, was filled to capacity, and that 70% of the women using the donor insemination services of the Women's Health Center in Chicago were lesbians. Jean Latz Griffin, *The Gay Baby Boom: Homosexual Couples Challenge Traditions as They Create New Families*, CHICAGO TRIBUNE, Sept. 3, 1992, at C1. A 1992 *Washington Post* article noted that 300 lesbians had attended donor insemination workshops at the city's Whitman-Walker clinic. Sue Anne Pressley and Nancy Andrews, *supra* note 13.

16. *Clinic for Gay/Lesbian Families Opens at UCSF*, SAN FRANCISCO BAY TIMES, March 25, 1993, at 1.

17. *Alternative Conceptions*, by Christina Sunley and Vicky Funari, 1985, and *Choosing Children*, by Debra Chasnoff and Kim Klausner, 1984, listed in Martin, *supra* note 4, at 348. *Choosing Children* was reviewed in *The New York Times*. Vincent Canby, *Two Documentaries, "Children" and "Silence,"* NEW YORK TIMES, Nov. 13, 1985, at C20.

18. Cheri Pies, *supra* note 13; Joy Schulenberg, GAY PARENTING: A COMPLETE GUIDE FOR GAY MEN AND LESBIANS WITH CHILDREN (1985); Martin, *supra* note 4. A 1987 book on donor insemination refers specifically to lesbians bearing children. Elizabeth Noble, HAVING YOUR CHILD THROUGH DONOR INSEMINATION 189-90 (1987).

19. *See, e.g.*, POLITICS OF THE HEART: A LESBIAN PARENTING ANTHOLOGY (Sandra Pollack and Jean Vaughn eds., 1987); Alpert, *supra* note 2.

20. LESBIANS CHOOSING MOTHERHOOD: LEGAL IMPLICATIONS OF DONOR INSEMINATION AND CO-PARENTING (Maria Gil de Lamadrid ed., 1991).

Conferences and other programs, either sponsored by ad hoc groups or by ongoing projects of lesbian and gay health centers,[21] have been and regularly continue to be held in many cities. *Amicus* Center Kids, a project of the New York Lesbian and Gay Community Services Center, has 1400 member families, making it the largest regional gay and lesbian parenting organization in the country. Center Kids holds conferences, workshops, and support groups, and provides information and advocacy for and on behalf of lesbian and gay parents and their children.

In recent years, support groups for lesbian and gay families have developed all over the country, even in isolated areas. *Amicus* Gay and Lesbian Parents Coalition International (GLPCI) has over 60 member chapters and 2400 individual members, and it corresponds with 235 other groups of lesbian and gay parents and their children. GLPCI's annual convention features a children's conference, for children 6 to 12 years old, and a teen conference hosted by Children of Lesbians and Gays Everywhere (COLAGE), a group of teenagers and adults raised by lesbian or gay parents.

The *New York Times* first mentioned donor insemination of lesbians in 1980.[22] In 1984, it covered one of the first lawsuits ever to raise a question about the parental status of two lesbians raising a child together.[23] In 1988, it addressed adoption by lesbians and gay men.[24] Its first detailed description of planned lesbian families in which children were born through donor insemination appeared in 1989.[25] The next year a front page article detailed the issues that arise when the adults in such a family separate,[26] and the first such case in New York was reported by the *Times* in 1991.[27] In 1992, the opinions page of *The New York Times* twice brought two mother

21. *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, 461n.2 (1990) (describing conferences attended by thousands of lesbians in the 1980s).

22. Fleming, *supra* note 2.

23. *Lesbian's Custody Fight on Coast Raises Novel Issues in Family Law*, NEW YORK TIMES, Sept. 9, 1984, at A44; *Woman Wins Right to Visits To Child of Lesbian Ex-Lover*, NEW YORK TIMES, Nov. 23, 1984, at A27.

24. Georgia Dullea, *Gay Couples' Wish to Adopt Grows, Along With Increasing Resistance*, NEW YORK TIMES, Feb. 7, 1988, at A26.

25. Gina Kolata, *Lesbian Partners Find the Means to be Parents*, NEW YORK TIMES, Jan. 30, 1989, at A13; Editor's Note, NEW YORK TIMES, Feb. 3, 1989, at A3; Hunter, *Lesbian Parents Prove To Be in No Way Inferior* (Letter to the Editor), NEW YORK TIMES, Feb. 13, 1989, at A20.

26. David Margolick, *Lesbian Child-Custody Cases Test Frontiers of Family Law*, NEW YORK TIMES, July 4, 1990, at A1.

27. Kevin Sack, *Lesbian Loses a Ruling on Parent's Rights*, NEW YORK TIMES, May 3, 1991, at B1. That year the paper also featured another front page story on children raised by gay and lesbian parents. Jane Gross, *New Challenge of Youth: Growing up in a Gay Home*, NEW YORK TIMES, Feb. 11, 1991, at A1.

lesbian families to the attention of its readers,[28] and in 1993 it featured an editorial condemning the use of a parent's sexual orientation as a factor justifying denial of custody.[29] Also in 1993, the *Times* reported on cases raising novel questions of law in planned lesbian families,[30] and reviewed, in a front page story, the increased visibility of gay and lesbian parents.[31]

Within the last five years, both television and other mainstream print media have documented life in planned lesbian families. One extensive article included a reference to the R.-Y. family. The reporter wrote that

> In the New York City neighborhood of Greenwich village, Sandra Russo and Robin Young are rearing Cade, 13, and Ry, 11, their respective biological daughters via artificial insemination. The children's nurturing home life and studied imperviousness to teasing have turned around their peers. Says Ry: "After a while they get it. Some kids are a little slow."[32]

In addition to lengthy coverage in *Time*, *supra*, *Newsweek*,[33] and *The New York Times*, *supra*, articles on planned lesbian and gay families have appeared in *USA Today*,[34] *The Boston Globe*,[35] *The San Francisco Examiner*,[36] *The San Francisco Chronicle*,[37] *The Los Angeles Times*,[38] *The Atlanta Constitution*,[39] *The Washington Post*,[40] *Newsday*,[41] *The Chicago Tribune*,[42] *The Arizona Republic*,[43] *The San Diego Union-Tribune*,[44] *The*

28. Anna Quindlen, *Evan's Two Moms*, NEW YORK TIMES, Feb. 5, 1992, at A23; Cindy Rizzo, *A Family Life Just like Yours*, NEW YORK TIMES, Aug. 26, 1992, at A21.

29. *Gay Parents: Living in Fear*, NEW YORK TIMES, Oct. 4, 1993, at A16.

30. *Two Adoption Cases Go To Appeals Courts*, NEW YORK TIMES, April 18, 1993, at A25; Joseph Sullivan, *Court Backs Lesbian's Right to Adopt Partner's Child*, NEW YORK TIMES, Aug. 11, 1993, at B5.

31. Susan Chira, *Gay and Lesbian Parents Grow More Visible*, NEW YORK TIMES, Sept. 30, 1993, at A1.

32. TIME, *supra* note 4, at 68.

33. Seligman, *supra* note 10. *Newsweek* also included lesbians raising children born as a result of donor insemination in its lengthy cover story on lesbians which appeared in 1993. *The Power and the Pride* and Barbara Kantrowitz and Danzy Senna, *A Town Like No Other*, NEWSWEEK, June 21, 1993, at 54, 56.

34. *Same Sex Couples Taking Big Step*, USA TODAY, Nov. 10, 1993, at 12A.

35. Adams, *Gay Couples Begin a Baby Boom*, BOSTON GLOBE, Feb. 6, 1989, at 2.

36. *Creating New Families* and *Two Moms*, SAN FRANCISCO EXAMINER, June 12, 1989, at A17, 18.

37. David Tuller, *Gays and Lesbians Try Co-Parenting*, SAN FRANCISCO CHRONICLE, Feb. 4, 1993, at A1.

38. Scott Harris, *For This Family Call It Mothers' Day*, LOS ANGELES TIMES, May 9, 1993, at B1; Scott Harris, Oct. 20, 1991, *supra* note 15.

39. Elizabeth Coady, *Two Same-Sex Parents Say Gender Doesn't Matter*, ATLANTA CONSTITUTION, Aug. 19, 1992, at B1.

40. Pressley and Andrews, *supra* note 13; Patrice Gaines-Carter, *How Am I Going To Deal With Father's Day*, WASHINGTON POST, Dec. 21, 1990, at C1.

41. Mandell, *The Lesbian Baby Boom*, NEWSDAY, July 13, 1989, at 8; Liz Willen, *Motherhood Sans Dad*, NEWSDAY, Aug. 5, 1993, at 15.

42. Jean Latz Griffin, *supra* note 15; Jean Latz Griffin, *Law Begins to Address Rise in Gay Families*, CHICAGO TRIBUNE, Sept. 4, 1992, at C1.

(New Orleans) Times-Picayune,[45] *The Houston Chronicle*[46] and *The Wall Street Journal*.[47] Television programs featuring planned lesbian and gay families have included 20/20,[48] Phil Donahue Show,[49] Oprah Winfrey Show,[50] and Cable News Network News.[51] And in a "Dear Abby" column in 1992, Abigail Van Buren expressed to a skeptical letter writer her unqualified support for two-mother lesbian families.[52]

In 1993, Random House published *Family Values: Two Moms and Their Son*,[53] the first full-length book issued by a major publishing company detailing life in a family with two lesbian mothers and a child born as a result of donor insemination. Reviews of the book were carried in several major newspapers.[54]

In recent years, a body of children's literature has featured children with lesbian and gay parents.[55] Two such books, *Heather Has Two Mommies*[56] and *Daddy's Roommate*[57] were recommended to teachers in the

43. Frank Bruni, *Gay Couples Plant Family Trees*, THE ARIZONA REPUBLIC, May 9, 1993, at H3.

44. Angela Lau, *Lesbian Couples Opt for Babies*, SAN DIEGO UNION-TRIBUNE, Nov. 18, 1993, at B1.

45. David Tuller, *Gay Co-Parenting Challenges Law on U.S. Family*, THE TIMES-PICAYUNE (New Orleans), Feb. 10, 1993, at F10. This paper also announced a forum on the medical, practical and legal issues involved in lesbians and gay men having children. *Forum: Gays as Parents*, July 14, 1993, at B4.

46. R.A. Dyer, *Out of Love and Luck*, HOUSTON CHRONICLE, May 31, 1992, at C1.

47. Hagedorn & Marcus, *Case in California Could Expand Legal Definition of Parenthood*, WALL STREET JOURNAL, Sept. 8, 1989, at B10.

48. ABC television broadcast, *20/20: I Have Two Moms*, May 6, 1989; *20/20: Women Who Love Women*, Oct. 23, 1992.

49. *Phil Donahue Show* (CBS television broadcast, Sept. 19, 1989).

50. *Oprah Winfrey Show* (ABC television broadcast, Aug. 9, 1990).

51. Richard Roth, *Gay Have New Opportunities to Have Children*, Cable News Network News, June 5, 1992, Transcript #44-1.

52. Abigail Van Buren, *Lesbian Moms Leave Co-Worker in a Tizzy*, CHICAGO TRIBUNE, May 26, 1992, at C9.

53. Phyllis Burke, FAMILY VALUES: TWO MOMS AND THEIR SON (1993).

54. Diane Cole, *The Forms Families Take*, CHICAGO TRIBUNE, Aug. 8, 1993, at C4; Suzanne Curley, *Mothers Courage*, NEWSDAY, June 27, 1993, at 39; Renee Graham, *A Lesbian Parent's Political Awakening*, BOSTON GLOBE, June 4, 1993, at 51; Sherry Stripling, *Lesbian Mother's Book Seeks Acceptance for Gay Families*, SEATTLE TIMES, June 2, 1993, at E2; Lillian Faderman, *Two Moms are Better than One*, LOS ANGELES TIMES BOOK REVIEW, May 9, 1993, at 2; Patricia Holt, *A Lesbian Parent's Legal Odyssey*, SAN FRANCISCO CHRONICLE (Sunday Review), May 9, 1993, at 1.

55. *See, Books Open Doors for Gay Parents*, ATLANTA CONSTITUTION, Jan. 14, 1991, at C1 (describing Alyson Wonderland, a publisher of books containing characters who are gay and lesbian parents); William Davis, *Books for Kids of Gay Couples*, BOSTON GLOBE, Nov. 17, 1990, (Living Section) at 12.

56. *Supra* note 11.

57. Michael Willhoite, DADDY'S ROOMMATE (1990).

proposed Children of the Rainbow curriculum for the New York City Public Schools.[58] *Heather Has Two Mommies* was also the subject of contention in some libraries around the country.[59] Children with two mothers or two fathers are prominently featured in two collections of fairy tales, *The Duke Who Outlawed Jelly Beans* and *The Day They Put a Tax on Rainbows*,[60] and the imprint Alyson Wonderland plans to introduce "board books" for toddler-age children with lesbian or gay parents during 1994.[61]

Scholarly literature in both law and mental health demonstrates substantial interest in the novel questions raised by the proliferation of planned lesbian and gay families. Dozens of articles have appeared in law journals since 1980 examining such legal issues as access to unknown donor insemination, rights of known donors and nonbiological mothers, availability of joint or second-parent adoptions, and the status of a legally unrecognized parent upon the death of the biological mother.[62] A few studies of the psychological development of children born into planned lesbian families have been published,[63] and a large longitudinal study of such families began in the mid 1980s.[64]

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58. For coverage of the controversy this provoked, *see, e.g.*, Liz Willen, *Gays, Too, Value Family*, NEWSDAY, Sept. 9, 1992, at 23; Barbara Kantrowitz, *The Ages of Innocence*, NEWSWEEK, December 28, 1992, at 64.

59. *See, Heather's Two Moms, Three Censors*, ATLANTA CONSTITUTION, June 27, 1993, at H4 (editorial in support of the availability of the book in libraries in the Gainesville, Florida-area Chestatee Regional Library System after two state legislators urged removal).

60. Johnny Valentine, THE DUKE WHO OUTLAWED JELLY BEANS (1991); Johnny Valentine, THE DAY THEY PUT A TAX ON RAINBOWS (1992).

61. Remarks by publisher Sasha Alyson at workshop, San Francisco Book Festival, November 6, 1993.

62. *See, e.g.*, Polikoff, *supra* note 21, and articles cited therein; Ettlebrick, *Who is a Parent? The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L.S.J. HUMAN RIGHTS 513 (1993); Cullum, *Co-Parent Adoptions: Lesbian and Gay Parenting*, TRIAL, June 1993, at 28; Committee on Sex and Law, *Second-Parent Adoption in New York State: Furthering the Best Interests of Our Children*, 47 RECORD BAR ASSOC. N.Y. 983 (1992); Cox, *Love Makes a Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 J.L. & POL. 5 (1991).

63. B. McCandlish, *Against All Odds: Lesbian Mother Family Dynamics*, *in* GAY AND LESBIAN PARENTS 23 (Frederick Bozett ed., 1987); Alisa Steckel, *Psychosocial Development of Children of Lesbian Mothers in* GAY AND LESBIAN PARENTS, *supra* note at 75; Charlotte Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex-Role Identity*, *in* CONTEMPORARY PERSPECTIVES ON GAY AND LESBIAN PSYCHOLOGY: THEORY, RESEARCH AND APPLICATION (Beverly Greene and Gregory Herek eds., 1994).

64. *See*, Polikoff, *supra* note 21, at 563 n.568. While study of the psychological well-being of children in planned lesbian families is relatively recent, there have been many studies of the psychological well-being of children born of heterosexual relationships who are raised by their lesbian mothers after divorce. The most complete review and analysis of this literature is contained in Charlotte Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992). Dr. Patterson concludes that "there is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents." *Id.* at 1036.

Sandra R. and Robin Y. began their family before much written or documentary material was available to lesbians and gay men about planning families. Indeed, they were among the first wave of women deliberately conceiving children through donor insemination to raise together as equal parents. As the considerable media interest in the last five years substantiates, this family form is increasing, and proper application of common law principles requires that courts understand such families without reference to the assumption that every child has one mother and one father.

B. The family structure resulting when semen donors are known to children but do not function as parents is common among planned lesbian families.

Robin Y. and Sandra R. chose to construct a planned family with two children born following insemination with the semen of two different donors. Those donors agreed that they would not have parental rights and responsibilities towards the children, although they would be known to them. The burgeoning literature and press treatment illustrate that planned lesbian and gay families are frequently structured in such a fashion, with a known donor who is not one of the child's parents.

Dr. April Martin's comprehensive treatment of gay and lesbian parenting demonstrates that lesbians commonly choose known donors without expecting those men to thereby become parents to their children.[65] She distinguishes between "donor" and "father." The term "donor" encompasses a man who is known as the biological father but does not participate in raising the child. By contrast, the term "father" refers to a true parent—someone involved in the child's care and in decision making.[66] As she describes, a lesbian couple may want the donor to be known to the child but still not want him to have "a parental involvement. That is, they intend that he will never be in a position to make decisions for their child, to contribute money to the child's upbringing, or to actually do the work of care-giving."[67]

Dr. Martin further addresses the concerns of men who may be interested in being known donors. She asks such men to consider in advance whether they will be able to follow through on their intentions to be known to the child without having control over the child's life.[68] For those who feel uncomfortable with having no decision making authority over the

65. Martin, *supra* note 4, at 79-84.
66. *Id.* at 79-80.
67. *Id.* at 80-81.
68. She states,
If you are intending to have some nonparental connection to the child, think carefully about the fact that you will have no control over the child's upbringing. What if you disagree with the way the mothers want to raise 'your' child? How painful might it be to have to keep your feelings to your self? What about the fact that the

child, she suggests that they choose to be fathers, not donors, and that they make a coparenting arrangement which would provide a full share in the child's upbringing.[69]

A lesbian couple planning a family often balances their belief that knowledge of and some contact with the donor is in the best interests of their child[70] against the fear that a known donor might try to gain parental rights in court. Thus, the literature describes the careful search that lesbians undertake, as did Robin Y. and Sandra R., for men with common values whom they can trust.[71]

The relationships between children and known donors, as described in personal narratives and newspaper accounts, make clear that the distinction between biological fatherhood and parenthood is common. One man spends every Friday afternoon with his child. "He describes himself as a

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mothers will expect to make all the decisions about when and how often you see the child?

Id. at 85.

69. *Id.*

70. The brief *amicus curiae* of the Council for Equal Rights in Adoption is curiously misplaced in this case. The views contained in the brief are widely disputed in adoption circles. *See* Elizabeth Bartholet, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993). Regardless of whether those views have merit, however, Sandra R. and Robin Y. acted consistently with the position enunciated in the brief. They selected donors who would agree to be known to their children, and they facilitated contact between the children and the donors. Even when the dispute about the extent of Thomas S.'s contact with the children developed, they continued to allow him to visit, *see* Tr. Steel, May 5, 1992, at 155, and they did not terminate his contact until after he initiated this litigation. Ry knows the biological realities, as does Cade. Should either child want greater contact with these men at some later date, that option will be available. Council for Equal Rights in Adoption seems not to recognize that if this court awards parental rights to Thomas S. it will effectively eliminate the option of lesbians choosing known donors unless the lesbian mother is willing to fully share parental rights. Although some of the material cited by the Council for Equal Rights in Adoption argues that the practice of unknown donor insemination should be eliminated, this view has no support in existing statutory schemes, including those of this state, and the practice is certain to continue. Thus, one would expect *amicus* to support a result in this case that would encourage women to select known, rather than unknown, donors. The only result that will have such impact is one that clarifies that there are factual situations in which known donors are not entitled to parental rights.

71. An anthropologist studying lesbian and gay families noted that lesbians recognize the danger that a known donor could change his mind and ask for custody. Weston, *supra* note 3, at 170. The *amicus curiae* brief of two San Francisco-based parenting groups [later withdrawn by *Amici* —EDS.] suggests that Sandra R. and Robin Y. should not prevail in this case because they did not follow the statutory procedure available in California for ensuring that a known donor will not have parental rights, namely use of semen provided to a physician. The parties were unaware of the potentially applicable statutes at the time of the insemination, *Thomas S. v. Robin Y.*, 599 N.Y.S.2d 377, 378 (Fam. Ct. New York Cty. 1993); the case that clarified the status of California law on this subject, *Jhordan C. v. Mary K.*, 170 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986), was not decided until five years after Ry was born; and most of the inseminations took place in New York, where there was and is no relevant statute. The trial judge correctly stated that, in the absence of a controlling statute, the common law principle of estoppel applies to the question of whether a biological father will obtain an order granting him parental rights.

father, but not a parent."[72] Another plays a "godfather or uncle type of role" towards the child.[73] An Oakland, California mother of a nine-year-old describes a situation similar to the present case; she did not want the donor to be a parent to the child but she did want to preserve the possibility of future contact. Her child occasionally spends time with the biological father.[74] A *Chicago Tribune* article describes two families with known donors who do not function as parents. In one, the child knows that the man is her biological father, that "he helped make her," and although he visits her he is not involved in raising her.[75] In the other, the donor agreed that he would have no parenting rights or responsibilities, but would have contact with the child.[76] In a family in which a gay male couple is raising two children born following insemination of two different biological mothers with the semen of one of the men, the biological mothers exchange cards and pictures with the family and visit once a year.[77] In a San Diego-area family, the donor agreed to waive his legal rights, but will be, along with other men, a male role model for the child.[78] In an Oregon family, a semen donor waived his parental rights but had limited visits of short duration throughout the five-year-old child's life. His subsequent petition for paternity and court-ordered visitation was denied by a court.[79]

When there are two children in a family, the use of two different sperm donors, as was chosen by Robin Y. and Sandra R., supports the family model that differentiates biology and parenthood. One lesbian mother describes the dynamics as follows:

> Susan and I felt strongly that we did not want our two children to have the same donor. We were concerned that if our children have the same sperm donor, he might become a great deal more psychologically important in our lives than we intended. The children would be biologically related to each other through the sperm donor, deriving from the donor a link that we could never give them. It felt more comfortable, then, to have different donors, and let our children's primary ties to each other be based on our love for them and their love for each other.[80]

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72. Nancy Zook and Rachel Hallenback, *Lesbian Coparenting: Creating Connections, in* POLITICS OF THE HEART, *supra* note 19, at 89, 91.

73. David Tuller, SAN FRANCISCO CHRONICLE, *supra* note 37.

74. *Id.*

75. Griffin, CHICAGO TRIBUNE, Sept. 4, 1992, *supra* note 42.

76. *Id.*

77. *Id.* A fuller description of this family is found in Pressley and Andrews, WASHINGTON POST, *supra* note 13.

78. Angela Lau, SAN DIEGO TRIBUNE, *supra* note 44.

79. *Leckie v. Voorhies*, Order and Judgment of Dismissal and for Costs (Case no. 60-92-06326, Cir.Ct., Lane Cty., Ore., Apr. 19, 1993) [*aff'd* 875 P.2d 521 (Or. Ct. App. 1994). *See also*, Polikoff, *The Social Construction of Parenthood in one Planned Lesbian Family*, 22 N.Y.U. REV. L. & SOC. CHANGE 203, 205 n.13 (1996) —EDS.] This case is discussed more fully, *infra* section II.A.

80. Martin, *supra* note 4, at 94.

C. *This court should apply existing legal principles within the context of this specific planned lesbian family; to do otherwise would invalidate this family and destabilize the lives of children in all similar families.*

Amici urge this court to interpret legal principles to protect both the integrity of planned lesbian and gay families and the best interests of children within such families. To do this, the court must appreciate the context within which the particular family was created and must understand what the family looks like from the inside, including specifically from the perspective of the children. In this case, as demonstrated in Section III, *infra*, established legal doctrine supports *amici*'s position.

Several overriding principles should be applied in cases involving planned lesbian and gay families. Three of the relevant principles *amici* advocate are: 1) a biological connection is neither a necessary nor a sufficient basis for establishing parenthood; 2) agreements, particularly when coupled with an ongoing course of conduct, establishing the intent of a biological parent either to share parenting with another person or to relinquish parental rights should be upheld; and 3) a child's experience of his or her family, which may include two, less than two, or more than two parents, is critical to any legal analysis. *Amici* and numerous groups of lesbian and gay parents have consistently argued that biology alone does not determine parenthood and that parenting agreements made in the context of planned lesbian and gay families should be encouraged.

Appellant's brief takes a different approach. It asserts that the trial court was "distracted" by the intent of the parties at the time of the insemination and by the nontraditional family structure involved in this case. Brief of Petitioner-Appellant at 28. *Amici* believe, to the contrary, that it was proper for the court to credit the parties' intent at the time of insemination, in addition to their subsequent, consistent course of conduct, and then to apply the governing legal principles, namely estoppel doctrine, in the context of Ry's specific, nontraditional, family structure. In arguing that these two critical facts—the intent of the parties and the nature of a planned lesbian family—are mere "distractions," appellant violates Ry's reality and risks obliterating the reality of the thousands of children being raised in planned lesbian families.

In attempting to persuade this court that Thomas S.'s relationship with Ry was parental in nature, Appellant's brief recites his various contacts with her. It fails, however, to place those contacts in the context of Ry's family structure. This has the effect of aggrandizing Appellant's relationship with Ry and concomitantly obscuring the planned family structure into which Ry, with Thomas S.'s full consent and agreement, was born.

For the first three years of Ry's life, when she was developing her identity as a member of a family with two mothers and a sister, she did not

know that Thomas S. existed. In examining the development of Ry's family, those three years cannot be ignored. When Ry and Cade then met Thomas S., a relationship developed among Thomas S., Sandra R., Robin Y., and the girls, *together.* Sandra R., Robin Y., and the girls, *together,* also developed a relationship, with Jack Kolb, Cade's biological father. Sandra R. and Robin Y. reiterated to Thomas S. the importance of him treating both girls equally, and he agreed to do so. Thomas S. never had an independent relationship with Ry, yet that is what he seeks in this litigation.

The fact that this litigation is about Ry alone, not Ry and Cade together, does violence to the family structure that Robin Y. and Sandra R. created and that Thomas S. agreed to honor. In this family, Ry and Cade are sisters. They have two parents who are both mothers. They have extended family on both sides who treat them as sisters. They do not consider themselves step-sisters or half-sisters, with certain relatives who are part of the family of one but not the other; they consider themselves full sisters. Thomas S. had a relationship with Ry and Cade together, as sisters, as did all people who came in contact with this family, including Jack Kolb.

Ry was raised from birth in a planned family, a family in which relationships were not determined by biology. As *amici* have demonstrated, this type of family, in which a semen donor is identified as the child's biological father but never considered a parent, is common. It is within the context of this type of family, and specifically the two-mother, two-child family in which Ry has lived for her entire life, that *amici* urge this court to decide this case.

II. NO SEMEN DONOR WHO AGREED TO FOREGO THE RIGHTS AND RESPONSIBILITIES OF PARENTHOOD AND WHOSE COURSE OF CONDUCT WAS CONSISTENT WITH THAT AGREEMENT HAS EVER BEEN GRANTED AN ORDER OF PATERNITY.

While no New York case has considered the rights of known semen donors in contested paternity actions, the cases that have been decided in other jurisdictions support the decision of the trial court below. Those cases stand for the principle that a known semen donor is entitled to a hearing to determine the intent of the parties at the time of the insemination and the course of conduct of the parties after conception.[81] Thomas S.

81. Appellant's brief twice misstates the holdings of the semen donor cases.

First the brief states that, "every jurisdiction which has considered the issue has held that a known donor of a child conceived by an unmarried woman as a result of artificial insemination is the legal father of the child so conceived, and that as such he is entitled to an order of filiation and substantial visitation." Brief for Petitioner-Appellant at 28. This is not the case. The cases hold that a known semen donor is entitled to a hearing on the intent of the parties at the time of the insemination. In those cases in which the trial court failed to hold such a hearing, the appellate courts reversed so that the appropriate hearings could be held, but they did not issue either orders of paternity or visitation. *See infra* pp. 236-37. As

received such a hearing. Given the factual findings of the trial court, Thomas S. would not have been entitled to an order of paternity under any of the existing cases.

In the cases in which the donor was successful in obtaining parental rights, two factors were significant. First, the donor asserted parental rights when the child was an infant. It is conceded that did not occur in the instant case. Second, the donor alleged an agreement with the mother to function as a father to the child and/or a course of conduct consistent with such agreement; the mother in each of the cases disputed the existence of such an agreement and disputed the course of conduct. The donor prevailed only when, after a hearing, his version of the facts was accepted.

A. *A semen donor who is known to the child can be denied an order of paternity.*

In an Oregon case with factual similarity to the case at bar, the donor was denied a paternity order. *Leckie v. Voorhies*, Case No. 60-92-06326 (Cir. Ct., Lane Cty. 1993) [*aff'd* 875 P.2d 521 (Or. Ct. App. 1994) —EDS.]. The court applied legal doctrine consisting of a statute stating that semen donors have no parental rights[82] and an earlier appellate decision holding that such a statute would be unconstitutional if it barred parental rights in a donor who had an agreement with the recipient to assume the rights and responsibilities of parenthood.[83]

Mr. Leckie had agreed to relinquish all parental rights. The agreement afforded him limited visitation with the child born of the insemination, at the convenience of the mother and her partner, and he agreed to an equal amount of visitation with Ms. Voorhies's four-year-old child who was not biologically related to him. The mother and her partner stated in the agreement that they were happy to have the donor in their lives "not as a

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this section demonstrates, no known semen donor has been successful when a court has found that the donor agreed not to be a parent to the child.

Second, the brief states that, "when a recipient of artificial insemination fails to comply with available statutory procedures to terminate the donor's parental rights, *or* if she subsequently allows the father and child to develop a relationship, she may not later challenge his claim to paternity." *Id.* at 28-29 (emphasis in original). No authority follows this sentence in appellant's brief, and its contentions are inaccurate. First, failure to comply with an available statutory procedure means only that the statute does not dispose of the controversy; it does not deprive a mother of the opportunity to challenge a claim to paternity on other grounds, such as estoppel and family autonomy. *See infra* pp. 234-35. Further, in the only case decided in which the child was beyond infancy, the court denied paternity to a known semen donor who had some relationship with the child. The donor in that case had agreed to forego parental rights and responsibilities and to have limited visitation at the convenience of the mother. *Leckie v. Voorhies*, Case No. 60-92-06326 (Cir. Ct., Lane Cty. 1993) [*aff'd* 875 P.2d 521 (Or. Ct. App. 1994). *See also*, Polikoff, *The Social Construction of Parenthood in one Planned Lesbian Family*, 22 N.Y.U. REV. L. & SOC. CHANGE 203, 205 n.13 (1996)—EDS.]. For a complete discussion of this case, *see* section II.A., *infra*.

82. Or. Rev. Stat. 109.239.

83. *McIntyre v. Crouch*, 98 Or. App. 462. 780 P.2d 239, *rev. den.*, 308 Or. 593 (1989), *cert. den.*, 495 U.S. 905 (1990).

father, but as a good male role model for both their children." When the child was three years old, the donor reconfirmed his intentions by signing an amended agreement which again stated that he was relinquishing all parental rights, but which clarified six hours a month of visitation. As a result of the donor's behavior during a visit in March, 1992, the mother discontinued his visitation, and the donor filed a paternity action.

The mother filed a motion for summary judgment based upon the Oregon statute and *McIntyre*, alleging that the donor was absolutely barred by statute and that such bar was constitutional unless the donor could establish that he and the mother agreed that he would have the rights and responsibilities of parenthood. The court granted the motion.

The donor was subsequently denied visitation under a separate Oregon statute[84] because he failed to show that court-ordered visitation would be in the best interests of the child. The donor alleged, among other things, that the child knew he was her father, that he had spent much time with both children, that both children called him "dad," that both children thought of his mother as their grandmother, and that he had made substantial financial contributions to the children. The court, after finding the mother to be an extremely credible witness, found that

> [the donor's] relationship with the children was similar to those the children had with several adults. There was no substantial difference in how the children related to [the donor], as opposed to other adults familiar to the children, except that they had known him longer and so perhaps were slightly more familiar. Decision at 3-4.

The court further found that

> [the donor's] status in these children's lives, taken in best light, raises him only to the level of a secondary attachment. His own description of his relationship does not rise beyond that of a child care provider, even an excellent child care provider. It is not essential for the best interests of children to maintain contact with his or her biological parent. Decision at 4.

Leckie is instructive in the case at bar because the semen donor was known to the four-year-old child and had some contact with her. The fact that the donor was known to the child, and that she knew him to be her biological father, was not sufficient to confer upon him the rights and responsibilities of parenthood, in the absence of an agreement that the semen donor would retain parental rights and responsibilities, and in the absence of a relationship which was parental in nature between the donor and the child.

84. Or. Rev. Stat. 109.119.

B. Thomas S. received a hearing to determine the intent and subsequent course of conduct of the parties; nothing more is required under the law of any jurisdiction.

All of the cases that have disposed of paternity actions brought by known semen donors, in various jurisdictions and under a variety of statutory and common law schemes, are consistent with two of the principles enunciated by *amici*, specifically that biology is not a sufficient basis for establishing parenthood and that agreements to forego parental rights should be upheld.[85] *See* p. 230, *supra*. Under the case law, a semen donor's biological connection entitles him to a hearing to determine the intent of the parties and, where relevant, the course of conduct. No court has based a finding of paternity on biological connection alone.[86] Each court has considered the intent of the parties. Where there has been a course of conduct, it, too, has been considered. Thomas S. received a hearing at which both intent and course of conduct were considered. Having found that Thomas S. agreed to forego the rights and responsibilities of parenthood and engaged in a ten-year course of conduct consistent with that agreement, the trial court's denial of his paternity petition is consistent with existing case law.

The first case that addressed the parental rights of a known semen donor is also the least pertinent, as it did not involve the deliberate creation of an alternative family structure. *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (1977). The parties were in a "dating" relationship and were contemplating marriage at the time of the insemination, and the court relied in part on this in reaching its decision. The mother testified that she intended the sperm donor to be only a visitor in her home, while the sperm donor testified that he assumed he would act as a father. The court found that the sperm donor fully intended to assume the responsibilities of parenthood and that the evidence did not support the mother's contention that the sperm donor had waived his parental rights.[87]

In the case at bar, the court found that Thomas S. was a semen donor who agreed to forego both the rights and the responsibilities of parenthood and that he acted consistently with that agreement over a ten year period.

85. The third principle, that a child's experience of her family is important, has not been specifically addressed in any of the semen donor cases. This principle, however, is amply served by the estoppel doctrine that New York courts apply in paternity determinations. *See* section III, *infra*.

86. Indeed to do so would wreak havoc with the states' schemes for regulating donor insemination. Those schemes all provide some mechanism for insuring that biology alone will not make a semen donor a parent.

87. There was no statute governing parental rights of sperm donors in effect in New Jersey when *C.M. v. C.C.* was decided. Subsequent to *C.M. v. C.C.*, the New Jersey legislature enacted a statute providing that, when a licensed physician is involved, a semen donor to a someone other than his wife has no parental rights unless the donor and the woman enter into a written contract to the contrary. N.J. Rev. Stat. 9:17-44(b)(1988).

C.M. v. C.C. does not stand for the proposition that under such circumstances a donor must be awarded an order of paternity.

In *Jhordan C. v. Mary K.*, a semen donor successfully sued for paternity of a child who was nine months old when the action was commenced. 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986). The statute extinguishing parental rights when a semen donation occurs through a licensed physician was not applicable because the parties had conducted the insemination without a doctor. The court then examined the intent and conduct of the parties.

In *Jhordan C.*, the court found "no clear understanding" that the donor would have no parental relationship with the child. *Id.* at 536. Indeed, the court found that "the parties' conduct indicates otherwise." *Id.* That conduct consisted of the social relationship that developed between the mother and the donor; the mother's failure to object to the donor's collection of baby equipment or to his creation of a trust fund for the child; and the monthly visits the mother permitted between the donor and the child. *Id.* The semen donor alleged that the mother agreed he would care for the child as often as two or three times a week, although the mother denied such an agreement. 224 Cal. Rptr. at 532.

The court in *Jhordan C.* further dismissed the argument that a paternity order would infringe upon the family autonomy of the mother, her coparent and the child by finding that the donor "was not excluded as a member of [the child's] family, either by anonymity, by agreement, or by the parties' conduct." *Id.* Affirmance of the trial court's ruling that the donor was the child's legal father was based upon both statutory interpretation and the factual finding that "the parties by all other conduct preserved [the donor's] status as a member of [the child's] family." *Id.* at 537-8.

In a subsequent California case, *Steven W. v. Martha Andra N.*, 3 Civ CO12456 (Cal. Ct. App., 3rd Dist., May 6, 1993), a semen donor filed for paternity of an infant child, and the court, as in *Jhordan C.*, ruled that the failure to use a licensed physician rendered the statute inapplicable. The court then addressed the other arguments made by the mother and her life partner.

The women specifically argued that the donor should be estopped from asserting paternity. They maintained that they had selected him as a donor because he respected their relationship; that they informed him he would have no financial or emotional responsibilities for the child; that he never stated that he wanted involvement or visitation rights with the child; and that they would not have selected him as a donor if they had known he wanted parental rights. The donor testified to a radically different set of facts, indicating his consistent expression of interest in being involved as the child's father. The court found that the mother had not met her burden of proving estoppel, that the women did not clearly communicate that the donor would be relinquishing all parental rights, and that the women had

failed to ascertain what the donor meant when he informed them that he wished to be involved in the child's life.[88]

Taken together, these two cases support the proposition that, in the absence of a controlling statute, both estoppel and preservation of family autonomy are arguments that may defeat a semen donor's paternity application in California. Under *Jhordan C.*, in determining who constitutes a child's family, a known semen donor may, by agreement or conduct, be excluded. The arguments opposing a paternity determination failed in the above cases because they were not supported by the facts as found by the trial courts. In the instant case, however, the trial court found both that the elements of estoppel had been proven and that Ry's family consisted of her two mothers, Robin Y. and Sandra R., and her sister, Cade. Given these factual findings, denial of Thomas S.'s petition for an order of paternity is consistent with the two California cases.

In *In re R.C.*, the Colorado Supreme Court ruled that a statute extinguishing the parental rights of semen donors was not applicable to known donors and recipients who agreed that the donor would retain parental rights. 775 P.2d 27 (Colo. 1989). As a result of the court's interpretation of the statute, the case was remanded for a hearing on the intent of the parties at the time of the insemination. In that case the semen donor filed a paternity action when the child was 10 months old, alleging both an agreement that he would function as a father to the child and a course of conduct consistent with that agreement. The mother disputed all of the allegations. Here, Thomas S. received a hearing and the court found both that he agreed at the time of the insemination not to assert parental rights and that the course of conduct for the ensuing decade was consistent with that agreement.

Similarly, under Oregon law, a semen donor is not precluded by statute from asserting parental rights if he and the recipient agree that he will be a parent. *McIntyre v. Crouch*, *supra* note 83. Thus, the intent of the parties governs. The *McIntyre* action was filed when the child was two months old,[89] and the impact of the appellate decision was to require a hearing on the disputed facts concerning the parties' intent.[90] As previously discussed, *see* section II.A., *supra*, in a subsequent Oregon case applying both the statute and the principles established in *McIntyre*, a semen donor was denied an order of paternity to a four-year-old child. *Leckie v.*

88. Given the facts found by the trial court, the appellate court explicitly declined to rule on the question of whether a California statute stating that an agreement does not bar a paternity action, Cal. Civil Code Section 7006(e), would preclude application of estoppel doctrine to a donor's paternity action. Decision at 20.

89. This fact, and a detailed description of the factual dispute between the parties is found in the Brief in Opposition to the Petition for A Writ of Certiorari to the Supreme Court of Oregon, *Crouch v. McIntyre*, No. 89-1424, filed March 29, 1990.

90. The court clarified that

> There is no constitutional requirement that, because the donor is known to the unmarried woman when he gives his semen, he must have a claim to be a father.

Voorhies, supra. In the instant case, Thomas S. received a full hearing, and the court found that he did not intend by his semen donation to have the rights and responsibilities of parenthood.

III. EQUITABLE ESTOPPEL IS AN APPROPRIATE DEFENSE TO THOMAS S.'S PATERNITY ACTION.

The biological father of a child born to a woman who is not his wife is not automatically entitled to an order of paternity. "Case law recognizes that the results of blood tests can be rendered irrelevant by the defense of equitable estoppel." *Terrence M. v. Gale C.*, 193 A.D.2d 437, 597 N.Y.S.2d 333 (1st Dept. 1993), *motion for leave to appeal den'd*, 1993 N.Y. LEXIS 4313 (Nov. 22, 1993). Courts have liberally applied estoppel doctrine to preserve the child's experience of his or her family,[91] even when that experience is inconsistent with biology. As one court applying estoppel to defeat the claim of a biological father stated, "we would be remiss if we failed to note that the inevitable effect of destroying the child's image of her family would be catastrophic and fraught with lasting trauma." *Ettore I. v. Angela D.*, 127 A.D.2d 6, 513 N.Y.S.2d 733, 739 (2nd Dept. 1987).

In other words, in New York, biology is not destiny. For no one is this a more salient principle that for the growing number of lesbian and gay families, for whom "family planning" necessarily signifies creation of a family by plan and agreement rather than via biology alone.

The case law does not support appellant's interpretation that application of the estoppel doctrine is limited to cases in which a finding of paternity would brand a child "illegitimate." Such a cramped reading of the case law would preclude many children from benefitting from the security the estoppel doctrine affords, and would preclude all lesbian mothers from invoking estoppel to protect the integrity of their families. A child born into a lesbian family, whether consisting of a single lesbian mother or two lesbian mothers, can never be "legitimate" in the traditional sense of that word. If appellant's argument were to prevail, every lesbian mother who conceived through use of semen from a known donor would be vulnerable to a paternity challenge. This would be true regardless of the agreement and course of conduct of the parties or the emotional impact on the child of eradicating her sense of security in her family.

That he is known does not mean that he has asserted any rights or assumed any responsibilities of fatherhood other than the donation itself. 780 P.2d at 245 n.5.

91. Appellant's argument that it is Robin Y., not he, to whom estoppel should be applied, *see* Brief of Petitioner-Appellant at 35-36, relies upon cases containing numerous factual findings not present in the trial court's decision in this case. The facts contained in the trial court's decision concerning the creation of the R.-Y. family, the subsequent course of conduct of the parties, and the nature of Ry's family relationships, including the finding that "in [Ry's] family there has been no father," *Thomas S.*, 599 N.Y.S.2d at 380, distinguish this case from those in which estoppel has been applied to prevent the destruction of a flourishing father-child relationship or to prevent a mother who had obtained court-ordered child support from subsequently disavowing a father's paternity.

Appellant's brief contains the assertion that the trial court's denial of his paternity petition amounts to a "lesbian exception" to domestic relations law. Brief of Petitioner-Appellant at 70. It is appellant, however, who seeks to create a "lesbian exception." Appellant's brief acknowledges, as it must, that estoppel is available to defeat a paternity claim made by a biological father. By arguing that this doctrine should only be used when a child's "legitimacy" is at stake, appellant would make estoppel unavailable to children raised in lesbian families. *Amici* believe that legal doctrine designed to protect the stability of children in conventionally structured families must be made available to protect the stability of children in lesbian families, and that no "lesbian exception" to the applicability of estoppel doctrine should be created by this court.

A. *Estoppel is properly applied to preserve a child's experience of her family and is not limited to situations in which a child's "legitimacy" is at stake.*

Contrary to the interpretation contained in appellant's brief, in the many cases in this state concerning paternity, it is the child's family experience, not the child's "legitimacy," that the courts have sought to protect when applying the estoppel doctrine. When those two factors converge, some opinions have addressed both, but no case supports the proposition that preserving a child's "legitimacy" is an element of equitable estoppel.

Indeed, in the most recent Appellate Division opinion estopping an alleged biological father from asserting paternity, which came from this Department, the court affirmed a trial court decision that explicitly rejected the argument that estoppel can be used only to preserve a child's "legitimacy." *Terrence M. v. Gale C., supra, aff'g Board v. Plank*, 150 Misc. 2d 743, 570 N.Y.S.2d 270 (Fam. Ct., New York Cty. 1991). The court applied the doctrine to defeat the paternity claim concerning a 17-year-old, born out of wedlock, who had known another man (since deceased) as her father. In affirming, the appellate court noted the adverse emotional impact that a paternity determination would have upon the child, and found that the trial court "properly invoked the doctrine of equitable estoppel to preserve existing ties in the face of an outsider's threatened intrusion." 597 N.Y.S.2d at 334.

In cases in which a child's "legitimacy" has been preserved by application of estoppel, the fact of preserving the child's "legitimacy" has not been necessary to the result. When biological fathers have been estopped from obtaining paternity orders for children born to married women, estoppel has turned upon the course of conduct of the parties, especially the man seeking the paternity order, and the resulting relationships established with the child.[92] Specifically, when a man who has reason to know that he is the

92. Appellant's brief, at pp. 42-47, misconstrues the law that applies to estoppel claims in paternity cases. It relies on cases from the non-family law arena, ignoring a long history

biological father of a child permits a child to develop family relationships which would be disrupted by an order of paternity, then he can be estopped from obtaining such an order.

Thus, in *Purificati v. Paricos*, 154 A.D.2d 360, 545 N.Y.S.2d 837 (2nd Dept. 1989), the biological father of a three-year-old was living at the time of the action with the child's mother. He was equitably estopped from claiming paternity because he had waited more than three years before filing a paternity action. During that time, the child developed a parent-child relationship with the mother's husband, and, even after the mother and her husband divorced, the former husband had regular visitation with the child and paid child support. The child considered the former husband's mother to be his grandmother and had a sibling relationship with a child who was indisputably the child of his mother and her former husband. Although the court made reference to the concept of "branding the child illegitimate," this was neither an element of estoppel nor necessary to the court's result. Rather, the estoppel was based upon the biological father's "lengthy acquiescence" in the development of a parent-child relationship between the child and the mother's husband. 545 N.Y.S.2d at 839.

While *Ettore I. v. Angela D.*, 127 App. Div. 6, 513 N.Y.S.2d 733 (2nd Dept. 1987) also referenced the notion of "illegitimacy," the critical facts in that case were the lapse of time before the petitioner filed a paternity action and the existing parent-child relationship between the child and her mother's former husband. From the child's birth, the biological father had wanted to be acknowledged as the child's father, but he had been denied visitation by the mother. He filed a paternity action only when the child was almost three years old, and after the mother and her husband had separated. He was estopped because he did not promptly pursue his legal rights and therefore the child's "image of her family" would be destroyed by a paternity order, an occurrence the court found would be "catastrophic and fraught with lasting trauma." 513 N.Y.S.2d at 739.

In other cases in which a child's "legitimacy" has been preserved by application of estoppel, it has been the conduct of the parties and the existing parent-child relationships, not the status of "legitimacy," that have been determinative. In *Boyles v. Boyles*, 95 A.D.2d 95, 466 N.Y.S.2d 762 (3rd Dept. 1983), a mother was estopped from denying her former husband's paternity. The couple had lived together, as parents of the child, until the child was two-and-a-half-years old. The child had the husband's last name and the husband was listed as father on the child's birth certificate. The husband's parents were called the child's "Grandma" and "Grandpa." 466 N.Y.S.2d at 765. The court further found that the husband justifiably relied on the mother's conduct as a basis for believing that

of cases in which claims of paternity or non-paternity have been settled through application of equitable estoppel.

she would not enforce any superior right to custody of the child by asserting that he was not the child's father. *Id.* Only *after* finding estoppel based on the factual circumstances did the court mention that, "moreover," the mother should be precluded from "bastardizing" the child. *Id.*

In *Sharon GG v. Duane HH*, 95 App. Div 2d, 467 N.Y.S.2d 941 (3rd Dept. 1983), *aff'd mem.*, 63 N.Y.2d 859, 482 N.Y.S.2d 270, 472 N.E.2d 46 (1984), the mother had also expressed no doubt about her husband's paternity for two and a half years after the child's birth. Throughout that period she held the child out as her husband's son, put his name on the birth and baptismal certificates, accepted support while living together and apart, and permitted a strong parent-child bond to be formed between the husband and child. "These facts are sufficient, under the case law, to establish prima facie a defense for the husband on the basis of equitable estoppel." 467 N.Y.S.2d at 943. Subsequent to establishing the prima facie case for estoppel, the court discussed the benefits of preserving the child's legitimacy, but that factor was not an element of the estoppel itself.

In *Michel DeL. v. Martha P.*, 173 A.D.2d, 570 N.Y.S.2d 279 (1st Dept. 1991), the mother and her current husband, who claimed to be the child's biological father, were estopped from challenging the paternity of the mother's former husband, when the child was conceived during the mother's first marriage. The decision makes no reference to, and therefore does not rely upon, preserving the child's "legitimacy." Rather, it relies upon the fact that, for more than two years, the mother and the alleged biological father had encouraged a "paternal, emotional and financial" relationship between the child and the former husband, who had had summer and holiday visitation with the child and paid large amounts of child support. The court found that the traditional elements of estoppel had been proven. *Accord, Biserka B. v. Zdenko R.*, 133 A.D.2d 728, 520 N.Y.S.2d 17 (2nd Dept. 1987) ("[Mother] created an opportunity for the development of a father-son relationship between the respondent and the child. Having concealed for eight years the purported 'true' paternity of the child, the appellant is now estopped from contesting the husband's paternity." 520 N.Y.S.2d at 18.); *Vito L. v. Filomena L.*, 172 A.D.2d 648, 568 N.Y.S.2d 449 (2nd Dept. 1991) (Although the court noted that no purpose would be served by "branding the child illegitimate," estoppel of husband was based upon "having accepted his status as the father of the child without objection for nearly eight years.").

When the ability to preserve a child's "legitimacy" and the ability to preserve a child's experience of her family diverge, the courts use estoppel to preserve the child's family experience, not the child's "legitimacy." Thus, in *Vilma J. v. William L.*, 151 A.D.2d 758, 542 N.Y.S.2d 783 (2nd Dept. 1989), the court applied estoppel to preserve a 12-year-old child's understanding that a man who was not her mother's husband was her father, even though this rendered her "illegitimate." In *Willy G. v. Debra B.*,

181 A.D.2d 858, 582 N.Y.S.2d 204 (2nd Dept. 1992), a paternity petition was granted where the child considered the petitioner to be her father and considered her mother's former husband to be her "stepfather." The court did not mention the fact that granting the petition rendered the child "illegitimate."

When children are born out of wedlock, their "legitimacy" cannot be at issue, yet in numerous cases courts have applied estoppel doctrine to preserve a child's real family. *Anton W. v. Nadine V.*, 597 N.Y.S.2d 865, 868 (Fam. Ct., Bronx Cty. 1993) (mother equitably estopped from denying the paternity of a man who was not the out-of-wedlock child's biological father, because "preserving the child's legitimacy [is not] essential to the application of the doctrine of equitable estoppel"); *June B. v. Edward L.*, 69 A.D.2d 612, 419 N.Y.S.2d 514 (1st Dept. 1979) (mother estopped from denying the paternity of her out-of-wedlock child after she had obtained a consent order of paternity against a man who had readily accepted the responsibilities of parenthood); *Barbara A.M. v. Gerard J.M.*, 178 A.D.2d 412, 577 N.Y.S.2d 110 (2nd Dept. 1991) ("father" estopped from contesting his paternity, after he had consented to a paternity order and developed a father-son relationship with the child for almost 10 years).

That the question of a child's "legitimacy" is separate from the question of whether the elements of estoppel have been met is supported by the fact that a man claiming paternity of a child born to a married woman will be successful if he asserts his status immediately, even though a finding of paternity will render the child "illegitimate." *Swann v. Schoenfeld*, 163 A.D.2d 850, 559 N.Y.S.2d 408, 410 (4th Dept. 1990) (equitable estoppel wrongly applied by trial court where, among other things, the petitioning father made "timely attempts to establish paternity.") *See also Crane v. Battle*, 62 Misc. 2d 137, 407 N.Y.S.2d 355 (Fam. Ct., New York Cty. 1970) (petitioner entitled to order of paternity of a one-and-a-half-year-old child, where mother had not been living with her husband, the presumption of legitimacy having been overcome.)

All of the above cases demonstrate that preserving a child's "legitimacy" is not an element of estoppel in the context of an action concerning a child's paternity. Thomas S.'s attempt to limit the application of estoppel doctrine in such a fashion should be rejected by this court.

B. Estoppel is properly applied when the trial court finds that a child does not consider a semen donor to be a parental figure even though she knows the biological facts of her origin.

The arguments that appellant cannot be estopped from asserting paternity because Ry had no other father and because Ry knew he was her

"father"[93] eviscerate the reality of children's lives in lesbian families and should be rejected by this court. A healthy family does not require parents of a particular gender, nor does the absence of another male parent insulate a biological father from estoppel principles.

The first argument, that having "another father" is a prerequisite to the application of estoppel is similar to the assertion that estoppel can only be applied to prevent a child from becoming "illegitimate." It suggests that a child must have a father, and that if she does not, no matter what relationships exist, no matter what the child's identity as a member of a family, or the course of conduct of the parties, or the harm to the child, estoppel cannot be applied to protect a child from an order of paternity. This argument ignores not only Ry's actual life experience but the life experience of all children born into families consciously and intentionally created outside the two-parent heterosexual model. Equitable estoppel has been applied consistently to make determinations that preserve a child's experience of his or her family. The presence of "another father" is not a prerequisite for application of estoppel doctrine because a child's experience of his or her family need not include a male parent.

The second argument, that estoppel is inapplicable because Ry knew Thomas S. to be her biological father, is similarly flawed. It ignores the context of Ry's life and the lives of children in thousands of lesbian and gay families. Perhaps the principal characteristic of such families is that neither biology nor legal sanction determine the authenticity of the relationships created nor the child's understanding of those relationships. The issue here, therefore, is not what Ry knew of the biological facts, but how Ry experienced her family and what social and emotional meaning she attached to the biological facts. Especially in the context of an agreement that the semen donor will be known to the child but will not have the rights and responsibilities of parenthood, and an ensuing course of conduct consistent with that agreement, a child can know the biological facts of her origin without considering her biological father a parent.[94]

As *amici* have demonstrated, section I.B., *supra*, it is a common practice for lesbians to use known semen donors, and to permit some contact

93. Appellant's brief says, among other things, "there is not a shred of evidence in the instant case that Ry was ever in any sense misled as to who her father was," Brief of Petitioner-Appellant at 45; "Nothing that Mr. Steel was alleged to have done (or failed to do) could have suggested to Ry that someone else was her father," Brief of Petitioner-Appellant at 45 n.32; "Ms. Young has no husband, and Ry has never believed herself to be the 'legitimate' child of Sandra Russo. Indeed, in the instant case the child has always known the Petitioner is her biological father," Brief of Petitioner-Appellant at 48; "Although Ry has a long-standing relationship with Ms. Russo, she has always known that Ms. Russo is not her father," Brief of Petitioner-Appellant at 50.

94. The increasingly popular practice of open adoption also relies on the premise that a child's knowledge of her biological origins does not make the biological mother or father a parent entitled to legal rights.

between the child and the semen donor. Because of the deliberate construction of family relationships within lesbian families, a child can be raised to know that a man is her biological father without considering him her parent. Whether the child views the semen donor as a parent is a factual determination. Appellant's reasoning that a man who is identified as a child's biological father could never be estopped from asserting paternity would deny children in lesbian families the protection that the estoppel doctrine affords children in heterosexual families—the ability to estop the claim of a biological father when to issue a paternity order would destroy the child's image of her family. The fact that the child knows the semen donor as her biological father should not preclude application of the estoppel doctrine to defeat a paternity claim that would amount to a "rocking of [the child's] cosmos."[95]

Appellant's argument further implies that a child raised in a home with two mothers cannot consider herself firmly established as the daughter of those two parents. It suggests without foundation that the power of biology is so strong that, even if the daily care and decision making involved in parenting is performed by two mothers, a child will still consider her known semen donor to be her parent, unless she knows another man as her father. Appellant's argument denies that children of lesbians and gay men can truly learn to define their family relationships on the basis of their experience rather than on the basis of the conventional, heterosexual norm.

The resolution of this case must not turn on whether Ry knew that Thomas S. contributed the semen that resulted in her conception or on whether she had a warm relationship with him before he commenced this action. It must turn on how she experienced her family even with full knowledge of the biological reality.[96]

95. This was the language used by Dr. Schneider to characterize the adverse psychological effect an order of paternity in favor of Thomas S. would have on Ry. *See* Tr., Dr. Schneider, Sept. 23, 1992, at 19.

96. The outcome of this case should not turn on the significance Thomas S. may have come to attach to biology. He may well have found that the biological reality was more emotionally significant than he originally expected. Although at one time he agreed to treat Ry and Cade equally, he later found that this was difficult, that "he was not able to put biology aside." *Thomas S.* at 379. That biology was such a powerful determinant of Thomas S.'s feelings does not mean that it was equally powerful for Ry or the other members of her family. There was absolutely no evidence, for example, that Robin Y. or Sandra R. ever felt more strongly towards her biological child than her nonbiological child. There is also no doubt that Ry and Cade consider themselves sisters with two mothers, even as they understand the biological reality to the contrary.

1. Given the factual findings of the trial court, estoppel was appropriately applied.

Three New York Appellate Division cases have estopped a petitioning biological father from obtaining a paternity order. *Terrence*, *supra*; *Purificati*, *supra*; *Ettore*, *supra*. *Ettore* set forth generally applicable estoppel principles.

> The doctrine of equitable estoppel may successfully be invoked, in the interest of fairness, to prevent the enforcement of rights which would ultimately work fraud or injustice upon the person against whom enforcement is sought. An estoppel defense may also be invoked where the failure to promptly assert a right has given rise to circumstances rendering it inequitable to permit the exercise of the right after a lapse of time. 513 N.Y.S.2d at 737-38 (citations omitted).

In a paternity proceeding, the foregoing of the rights and responsibilities of parenthood is the first criterion. The second criterion, reliance, is established when the child develops family relationships as a consequence of the biological father's actions or inactions. The third criterion, detriment, is established when the child would be traumatized, *see*, *Ettore*, *supra*; *Purificati*, *supra*; or otherwise adversely emotionally affected, *see*, *Terrence M.*, *supra*, by the requested paternity determination.

The facts as found by the trial court support its determination that the elements of estoppel are present in this case.

a. The trial court found that Thomas S. agreed to and did forego asserting parental rights.

In this case, the court found the first criterion to be established by the agreement Thomas S. made with the two women, coupled with an ensuing, consistent course of conduct.[97] Thomas S. agreed prior to Robin Y.'s insemination with his semen that "a child born of the insemination would be raised by [Sandra R.] and [Robin Y.] as co-parents and as Cade's sister; that [he] would have no parental rights or obligations; and that he would make himself known to the child if the child asked about her biological origins." *Thomas S.*, 599 N.Y.S.2d at 378. He would not have been chosen as a sperm donor if he had not said that he had no interest in exercising parental rights. *Id.* at 382.

The parties' behavior reaffirmed the family they intended to create by their agreement. The court found that Thomas S. knew about Ry's birth

97. Contrary to the characterization contained in appellant's brief, the trial court's application of estoppel did not rest solely upon its finding that the mothers had relied in choosing Thomas S. as a semen donor upon his representation that he would not assert parental rights. Rather, the court examined the course of conduct over the ten years from before Ry's conception until the onset of the litigation.

but had virtually no contact with Ry or her family until February, 1985, when Ry was three years old. *Id.* at 379. When Robin Y. and Sandra R. initiated contact between their family and Thomas S. in 1985, he expressly agreed to honor his agreement to treat the women as co-mothers to both children and to treat Cade as Ry's sister. *Id.* There were several visits between Thomas S. and Sandra R., Robin Y., and the girls between 1985 and 1991; these were "at the complete discretion of [Robin Y.] and [Sandra R.]." *Id.* Thomas S.'s conduct for the decade after the insemination "confirmed his earliest representations." *Id.* at 382.

In each of the reported cases, the court examined the reason for the period between the child's conception or birth and the commencement of the paternity action. In *Terrence*, the biological father offered no reason. In *Purificati*, the court found that the reason was the biological father's (and the mother's) desire for the financial benefit provided by the wealth of the mother's former husband. In *Ettore*, the court found "patently insufficient" the proffered reason that the biological father did not want to disturb existing relationships while the mother was living with her husband. Here the court found that Thomas S. "attempt[ed] to change the ground rules" of Ry's life when she was almost ten years old, because of changes in his own life. 599 N.Y.S.2d at 382.

As the court did here, courts must examine the development of the child's family relationships during the elapsed time.[98] Those relationships develop as a result of the biological father's actions or inactions which can include, as in this case, an agreement to forego parental rights and a course of conduct consistent with that agreement.

b. The element of reliance is established by the court's finding that Thomas S. chose to forego parental rights to Ry, which allowed her to develop her identity as a child in a family with two mothers and a sister.

The court below examined the family relationships that Ry developed as a consequence of living in her planned lesbian family structure. The court found that Ry's family definitions had resulted in reliance upon the concept of family to which the parties had initially agreed and which Thomas S. had reaffirmed in words and by his conduct. The court properly credited the deep significance of the "functional family relationships" which had developed between Ry and Sandra R., as a second mother, and between Ry and Cade as full siblings. *Id.* at 382.

The court found that "Ry, like Cade, was given the last names of R. and Y. to indicate that R. and Y. considered her the equal daughter of each of them. R. and Y. paid all the expenses of Ry's birth, and have jointly supported her all of her life." *Id.* at 378. Further, the court found that "Ry

98. There is no magic age at which the elapsed period of time becomes significant. *Terrence* involved 17 years, while *Ettore* and *Purificati* involved three-year periods.

and Cade regard each other as sisters, and have a very close, warm relationship. Both girls call Robin Y. and Sandra R., 'Mommy.'" *Id.* at 379. Both girls regard Sandra R.'s mother as their grandmother, and she pays for private school tuition for both of them. *Id.* The school treats both women as co-mothers of each child. *Id.* Prior to this litigation, the mothers had believed that Thomas S. "could be trusted not to question their legal status." *Id.*

The findings of the psychiatrist, Dr. Myles Schneider, who evaluated all the parties and other relevant people, support the court's conclusion that this family had formed its bonds without regard to biology. Dr. Schneider testified that

> Ry . . . considers Sandra R. and Robin Y. to be her parents and Cade to be her full sister. She understands the underlying biological relationships, but they are not the reality of her life. The reality of her life is having two mothers, Robin Y. and Sandra R., working together to raise her and her sister. Ry does not now and has never viewed Thomas S. as a functional third parent. . . .
>
> [Ry] knows that she, Cade and her mothers comprise an unusual and unconventional family. She knows that some outside her family have often shown intolerance and insensitivity toward her family. Notwithstanding this intolerance, Ry's own view of her family is that of a warm, loving, supportive environment. *Id.* at 380.

After detailing the psychiatrist's findings, the court concluded that "Ry has been brought up to view Robin Y. and Sandra R. as equal mothers raising two children and to view Thomas S. as an important man in her family's life. In her family, there has been no father." *Id.*

Appellant's argument that the reliance element has not been established ignores these critical findings made by the trial court. Rather, his argument hinges once again on the proposition that estoppel cannot be applied unless a child considers another man to be her father. Specifically, appellant's brief attempts to cut short the inquiry into the family relationships Ry developed during the first nine and a half years of her life by asserting simply that "nothing that Mr. Steel was alleged to have done (or failed to do) could have suggested to Ry that someone else was her father." Brief of Petitioner-Appellant at 45 n.32. Appellant would thereby have this court avoid examination of Ry's experience of her family, even though that experience was shaped in part by appellant's agreement and conduct for ten years, simply because Ry "has always known that Ms. Russo is not her father." Brief of Petitioner-Appellant at 50.

This analysis renders invisible or unworthy of legal protection the lives of children intentionally raised in families without fathers. Lesbians and

some single heterosexual women[99] often deliberately raise children in such families. These families are complete, legitimate, and well-functioning. The children in such families can be as healthy and well-adjusted as children in heterosexual families,[100] and, in this case, the trial court specifically found that both Ry and Cade were well-adjusted children. 599 N.Y.S.2d at 379.

The families that lesbians and gay men form have validity and integrity. Children can and do reliably identify their parents and siblings in such families without reference to a traditional heterosexual model.[101] Lesbians who are successful in creating loving and healthy families and in raising well-adjusted children who do not view their biological fathers as non-custodial parents are entitled to the protection that estoppel doctrine affords. Under the reliance element of this doctrine, a court must evaluate a child's

99. Of the approximately 30,000 children born annually through donor insemination, an unknown, but increasing number, are born to single women. Rhonda Anderson, *Pregnancy Without Partner: Donor Insemination is the Way Some Single Women are Having Children*, NEWSDAY, Aug. 10, 1991, at 17.

100. For research on the psychological well-being of children raised by lesbian mothers, see notes 63-64, *supra*.

101. The history of litigation concerning parental rights in gay and lesbian families includes examples that support this assertion. In those cases, children who had been prevented from seeing a person with whom they previously had a parental relationship were able to clearly articulate their continuing desire for contact with that person.

In *A.C. v. C.D*, a nonbiological mother of a seven-year-old daughter filed a complaint for visitation after the child's biological mother terminated all contact between the two. Case No. 89191039/CE99949 (Circuit Ct. for Baltimore City, Maryland, order dated March 29, 1990). The Complaint alleged, among other things, a joint decision to bear a child through alternative insemination, shared responsibility for care and financial support of the child, joint decision making, a holding out to teachers, child care providers, friends, and others as a two parent family, a designation of the nonbiological mother's parents as grandparents, and a pattern of visitation between the child and A.C. after the two mothers split up which C.D. subsequently unilaterally terminated. The biological mother's motion to dismiss did not deny any of the allegations in the Complaint. At the time of the hearing, the child told the judge that she was upset at not being able to see and talk to A.C. and said she wanted to, in spite of the fact that she had not seen her in 14 months and that during that entire time she had been living with her biological mother. *See* Margolick, *supra* note 26, at 1, 10.

In *In re Pearlman*, Joan Pearlman and Janine Ratcliffe jointly decided to bear and raise a child whom Pearlman would conceive by alternative insemination. When the child, Kristen, was five years old, her biological mother died of systemic lupus. Joan Pearlman's parents filed for custody. They were successful, and about a year after her biological mother's death, Kristen left Janine's home to live with her grandparents. She continued to see Janine one or two days a month. Subsequently, her grandparents adopted her and terminated her visitation with Janine. Janine successfully moved to set aside the adoption and for custody of Kristen. At the time of the hearing, Kristen was almost ten years old and had not lived with Janine for *three years*. During that time her grandparents had said many negative things to her about Janine. Nevertheless, when the trial judge interviewed Kristen in chambers, on December 22, 1988, she told the judge, "Like, for Christmas I don't really want a present. All I want is to live with Neenie [the child's name for Janine]. That's my Christmas present." A child psychiatrist and the child's court-appointed guardian ad litem both testified that Kristen wanted to live with Janine and that Janine, even three years after their separation, was her "primary parent figure." Case no. 87-24926 DA (Circuit Court for Broward County, Florida. Order dated March 31, 1989).

parental and sibling[102] relationships, based upon the child's experience, without any preconception of what a family must look like. *Amici* urge this court to reject appellant's cramped reading of the inquiry required under existing case law; the extent of the trial court's inquiry was appropriate.

c. Ry would suffer detriment if a paternity order were issued.

The final element of estoppel is detriment. *See Terrence, supra; Purificati, supra*; *Ettore, supra.* Appellant's brief asserts yet again that a paternity determination would cause Ry no harm because "she never believed herself to be the 'legitimate' child of Sandra Russo." Brief of Petitioner-Appellant at 48. *Amici* urge this court to reject this limited view of when an order of paternity will be harmful to a child. The trial judge's opinion demonstrates respect for and appreciation of the experience of a child raised for her entire life in a lesbian family consisting of two mothers and a sister.

The trial court found that Ry would be harmed by an order of paternity. He credited the psychiatrist's testimony that

> Ry . . . views this court proceeding as an attack on and threat to her positive image of herself and her family. Her sense of family security is threatened.[103] She has expressed fear of ongoing court involvement and worries about a confusing and threatening period in her family's life. . . .
>
> Even the prospect of a visit with [Thomas S.] causes Ry much anxiety . . . . Any forced visitation would cause her increased anxiety, and would also do nothing to repair her relationship with Thomas S. 599 N.Y.S.2d at 380.

The trial judge found that

> [t]his attempt [to change the ground rules of Ry's life] has already caused Ry anxiety, nightmares, and psychological harm. Ry views this proceeding as a threat to her sense of family security. For her, a declaration of paternity would be a statement that her family is other than what she knows it to be and needs it to be. To Ry,

102. The court in *Ettore I.* found that the child's relationship with her younger brother would be adversely affected by a paternity order. 513 N.Y.S.2d at 739. The child in *Purificati* also had a sibling relationship that was of concern to the court. 545 N.Y.S.2d at 839. In this case, Ry has a sister, Cade, whose importance the trial court recognized. The court referenced the psychiatrist's findings that Ry would consider a paternity order a statement that Cade was a member of a separate family. Decision at 11. Although appellant's brief largely overlooks this relationship, the trial judge found, and there can be no dispute based on the record, that both children consider themselves the daughters of both mothers as well as full sisters to each other.

103. The court's decision, before editing for publication, also contains the following language at this point: "For Ry, a declaration of paternity would be a statement that she, Robin Y. and Thomas S. constitute one family unit and Cade, Sandra R. and Jack K. form another. This juxtaposition of relationships frightens her." Decision at 11.

> Thomas S. is an outsider attacking her family, refusing to give it respect, and seeking to force her to spend time with him and his biological relatives, who are all complete strangers to her, for his own selfish reasons. A declaration of paternity naming Thomas S. as Ry's father, under these circumstances, at this late time in her life, would not be in her best interests. *Id.* at 382.

Appellant's argument that a paternity order cannot be detrimental when there is no other father because it will only add to, rather than take away from, the child's life is misguided. When a child has never viewed her biological father as a parental figure, as the trial court found in this case, his "addition" as a parent is an intrusion into and a destabilization of the child's family. For example, appellant's assertion that an order of paternity will not undermine the existing family relationships is inaccurate. An order of paternity would accord him full parental rights, including custodial rights to Ry superior to those of Sandra R.[104] Court-ordered visitation, and the potential for endless relitigation of the terms of visitation, would undermine the authority that has always been Robin Y. and Sandra R.'s alone—the authority that all parents have to make the decisions affecting the lives of their children. Further, in the event that Robin Y. and Sandra R. petition the court to become the legally recognized parents of both children,[105] Thomas S. could have the power to block such adoption with respect to Ry, thereby preventing her from obtaining full legal acknowledgment of her relationship with Sandra R. and Cade.[106]

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104. One never wants to anticipate tragedy. Nonetheless, like all children, those born into lesbian families do sometimes experience the loss of a mother. *See*, Obituary of Mary-Helen Mautner, WASHINGTON POST, Aug. 26, 1989, at B4 ("Survivors include her companion of 10 years, Susan Hester, and their daughter, Jessica Hester-Mautner . . ."); Deb Price, *Girl Would Be Orphan If They'd Lost Battle*, STAR TRIBUNE (Minneapolis), Jan. 5, 1994, at E4 (discussing death of Victoria Lane, and its impact on her surviving life partner and their two young children). Some of those children have been subjected to litigation concerning their custody by those claiming legal rights at least equal to those of the surviving mother. *See* cases cited in Polikoff, *supra* note 21, at 527-33. In his testimony, when questioned, Thomas S. responded that if Robin Y. were to die Ry could stay with Sandra R. "with my consent." Tr., Steel, May 8, 1992, at 121-22.

105. This practice is commonly referred to as "second-parent adoption." The first such adoption was granted by a trial court in Alaska in 1985. *See* Polikoff, *supra* note 21, at 522. The first such adoption in New York was granted in 1992. *In the Matter of Adoption of Evan*, 153 Misc. 2d 844, 583 N.Y.S.2d 997 (Sur. Ct. 1992). [This practice has since been expressly approved by the New York Court of Appeals. *In re Jacob*, Nos. 195, 196, 1995 WL 643833 (N.Y. Nov. 2, 1995) *rev'g and remanding In re Dana*, 209 N.Y.S.2d 52 (App. Div. 1995) — EDS.]

106. In *Terrence M., supra*, the man whom the child had always identified as her father was dead. Therefore, an order of paternity in the petitioner would not have detracted from the relationship she had once had with him. Nonetheless, the petitioner was estopped from claiming paternity.

2. The trial court's consideration of Ry's best interests was proper, as was the court's evaluation of Ry's best interests in the context of her specific family structure.

After reviewing the case law applying estoppel in paternity proceedings, the *Ettore I.* court concluded that "as a practical matter, if there is anything that the body of law does suggest it is that the paramount concern in this type of case should be the best interests of the child." 513 N.Y.S.2d at 739. The child's best interests were explicitly deemed an appropriate consideration in *Purificati v. Paricos, supra*; *Barbara A.M. v. Gerard J.M., supra*; *Michel DeL. v. Martha P., supra*; *Anton W. v. Nadine V., supra*; *Sandy M. v. Timothy J.*, 138 Misc. 2d 338, 524 N.Y.S.2d 639 (Fam. Ct., Broome Cty. 1988). *Accord, Willy G. v. Debra B., supra* (The law guardian asserted that the best interests of the child were immaterial in the paternity proceeding. The court stated that "there is no support for this position." 582 N.Y.S.2d at 205).[107]

a. It is not always in a child's best interests to have a known semen donor declared a father.

In arguing that denial of his paternity petition cannot be in Ry's best interests because it "sever[s] her relationship with the only father she has ever known," appellant raises the specter of harm to Ry based upon theories and research concerning children of divorce, children in foster care, and children who have been adopted into a new family. Brief of Petitioner-Appellant at 59. Ry fits none of these categories.[108] She is a child who, from birth, has lived with the same two parents, one her biological mother

107. Once the facts supporting estoppel have been proven, the party being estopped must show why it is in the best interests of the child not to apply estoppel. *Terrence M. v. Gale C., supra*; *Sharon GG v. Duane HH, supra.* The mother in *Sharon GG* asserted that it was in the child's best interests to know the biological father, but this was not sufficient to defeat the estoppel. 467 N.Y.S.2d at 944. The alleged biological father in *Terrence M.* also failed to show why it would be in the child's best interests to legalize his status as her father. 597 N.Y.S.2d at 334.

108. The *amicus* brief of Council for Equal Rights in Adoption is flawed for this reason as well. None of the theories or research set out in that brief address the psychological status of a child raised openly from birth by a lesbian couple, one of whom is her biological mother. One of the books cited speculates about the impact of donor insemination in lesbian families, but the research on offspring of donor insemination contained in that book included none from planned lesbian families and, indeed, none who had been told honestly from birth about his or her biological origins. Annette Baran and Reuben Pannor, LETHAL SECRETS (1989). The book's primary criticisms of the practice of donor insemination are anonymity and secrecy, neither of which is a factor in this case. Furthermore, the authors of that book do not recommend that a semen donor, once known, should be given full rights of parenthood. They say in their recommendations merely that the donor "has a right to request personal contact with his offspring at an appropriate age;" that the child "has a right to meet his donor father if he wishes to have personal contact;" and that the parents "have a responsibility to accept and support their child's desire to meet his genetic father at an appropriate age." *Id.* at 168-70. Therefore, nothing in the Baran and Pannor book supports an award of paternity to Thomas S.

and the other her nonbiological mother, and with her sister. She lives with the parents who have always wanted her and have always raised her.

The trial court found that, in spite of Ry's knowledge of her biological connection to Thomas S., she never considered him a noncustodial parent. Thus, appellant's analogy to the multiple parental relationships a child may have in a step-family situation is misplaced, as is the specter he raises that denial of his paternity petition threatens the rights normally accorded to noncustodial parents.

If appellant's argument is accepted, every court would be compelled to find that it is always in the best interests of a child to grant an order of paternity to a known semen donor. *Amici* urge this court to reject such reasoning. If, within a given family, a child knows the man who is her biological father but does not consider that man a parent, a court must be able to find that it is not in the particular child's best interests to grant an order of paternity.

b. A semen donor's financial assets should not compel a finding that a paternity determination is in the child's best interests.

Appellant also argues that an order of paternity is necessary to Ry's best interests because of the substantial financial resources he could provide her. In making this argument, he relies significantly on the possibility that Sandra R. could walk away from Robin Y. and Ry and leave Ry without adequate support.

This argument should also be rejected. There is nothing in the record to suggest either that Sandra R. will not remain a member of this family or that she would ever stop supporting Ry. Furthermore, she could be compelled to provide financial support for Ry. *See Karen T. v. Michael T.*, 127 Misc. 2d 14, 484 N.Y.S.2d 780 (Fam. Ct., Monroe Cty. 1985). Almost any semen donor can claim that a child's best interests would be served by access to his assets. If the court were to accept this reasoning, it would severely undermine the ability of lesbians to deliberately form families without fathers.

CONCLUSION

A biological father is not automatically entitled to an order of paternity. In this case, concerning the future of a child born following donor insemination into a planned lesbian family, the court below properly credited the parties' intent at the time of insemination that Thomas S. would not have the rights and responsibilities of parenthood, as well as their subsequent, consistent course of conduct. The court evaluated the contacts that Thomas S. had with Ry and Cade and their mothers, Robin Y. and Sandra R., within the context of the specific family structure within which Ry has lived for her entire life. The court found that "in [Ry's] family, there has been no father" and that Ry knew the biological facts of her

origin but never considered Thomas S. a parent. The court further found that "a declaration of paternity would be a statement that [Ry's] family is other than what she knows it to be and needs it to be."

Estoppel doctrine is designed to protect a child from the "lasting trauma" of an order of paternity which would destroy her image of her family. As the court below noted, this doctrine "has been utilized by the courts to decide paternity proceedings for families whose reality is more complex than a one mother, one father biological model." 599 N.Y.S.2d at 382. This doctrine is properly available to protect a child's experience in a planned lesbian or gay family. Given the findings of the court below, Thomas S. was properly estopped from obtaining an order of paternity, and *amici* respectfully requests that the order dismissing the proceeding be affirmed.