

IMPOUNDED

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

NORFOLK, ss.

No. SJC-12846

IN THE MATTER OF A MINOR

On Appeal From A Judgment
Of The Probate & Family Court, Norfolk Division

BRIEF OF AMICUS CURIAE
GLBTQ LEGAL ADVOCATES & DEFENDERS ("GLAD")
IN SUPPORT OF THE APPELLANT AND REVERSAL OF THE
DISMISSAL OF THE PROBATE AND FAMILY COURT

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SUPREME JUDICIAL COURT RULE 1:21 CORPORATE DISCLOSURE
STATEMENT ON POSSIBLE CONFLICT OF INTEREST

Pursuant to Supreme Judicial Court Rule 1:21,
Amicus GLBTQ Legal Advocates & Defenders hereby states
that it has no parent corporation and that no publicly
held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

GLBTQ Legal Advocates & Defenders (“GLAD”) is a legal rights organization that seeks equal justice for all persons under the law regardless of their sexual orientation, gender identity, or HIV status. Since 1978, GLAD has worked in New England and nationally through strategic litigation, public policy advocacy, and education. GLAD has an enduring interest in the rights of and protections for LGBTQ parents and their children and has worked on litigation, legislation, and public education throughout New England and nationally on the topic of family protection. See, e.g., Me. Stat. tit. 19-A, §§ 1831-1939; Vt. Stat. Ann. tit. 15C, §§ 101-809; Pavan v. Smith, 137 S. Ct. 2075 (2017); Obergefell v. Hodges, 574 U.S. 1118 (2015); Partanen v. Gallagher, 475 Mass. 632 (2016); Hunter v. Rose, 463 Mass. 488 (2012); Adoption of a Minor, 471 Mass. 373 (2015); Goodridge v. Department of Pub. Health, 440 Mass. 309 (2003); E.N.O. v. L.M.M., 429 Mass. 824 (1999); Adoption of Galen, 425 Mass. 201 (1997).

STATEMENT OF ISSUES

This Court invited amicus participation on the following question:

Whether, under G. L. c. 210, § 1, the Probate and Family Court has jurisdiction over a petition for adoption where the petitioner, who is the child's biological father and is named as the child's parent on her birth certificate, lives outside the United States with the child and his same-sex partner, and the child was born out of wedlock to a gestational carrier who lives in Massachusetts. See G. L. c. 209C, § 10 (b).

STATEMENT OF THE CASE AND FACTS

Amicus adopts and incorporates by reference the Statement of the Case and Facts set forth in Appellant's Brief.

SUMMARY OF ARGUMENT

Amicus joins in the arguments of Appellant's brief, argues that the answer to the question posed by this Court is yes, and urges this Court to reverse the dismissal of the Probate and Family Court.

First, amicus explains that there is clearly jurisdiction over the instant Petition for Adoption pursuant to the plain language of the adoption code's jurisdictional statute, G. L. c. 210, § 1, and where jurisdiction promotes the code's purpose to further a

child's best interests in security and avoids harmful results. (Part I, pp. 3-19)

Second, amicus argues that, in the absence of jurisdiction under the adoption code, this Court's precedents make it plain that equity jurisdiction fills the gap to provide security and clarity in parentage to children born as a result of gestational surrogacy. The Probate and Family Court's equity jurisdiction clearly encompasses the power to establish parentage of this child born through gestational surrogacy, who must enjoy the same protections of other children. (Part II, pp. 19-26)

INTRODUCTION

The amicus, GLBTQ Legal Advocates & Defenders (GLAD), has accepted the Court's invitation to file an amicus brief to respectfully submit to this Court that, whether pursuant to the adoption code or pursuant to its equity powers to establish parentage of children born through gestational surrogacy, it is clear that the Probate and Family Court had the authority to clarify and secure this child's legal parentage and that the dismissal must be reversed.

ARGUMENT

I. THE PROBATE AND FAMILY COURT CLEARLY HAS JURISDICTION OVER THIS PETITION FOR ADOPTION UNDER THE PLAIN LANGUAGE OF G. L. c. 210, § 1, AND ITS DISMISSAL SHOULD BE REVERSED.

General laws c. 210, § 1, provides the jurisdictional requirements for adoption in Massachusetts. "A person of full age" may petition for the adoption of a person younger than themselves. G. L. c. 210, § 1. The statute expressly permits adoption by a person who is "not an inhabitant of this commonwealth" of a child residing in Massachusetts. G. L. c. 210, § 1. In that instance, a petition for adoption "may be made to the probate court in the county where the child resides." G. L. c. 210, § 1.

In interpreting statutory language, appellate courts first look to the language of the statute. *Adoption of a Minor*, 471 Mass. 373, 374 (2015). When the statute's language is clear, that language is given its "ordinary and natural" meaning. *Adoption of Marlene*, 443 Mass. 494, 497 (2005). Further, "'a statute should be read as a whole to produce an internal consistency.'" *Id.* at 498 (quoting *Telesetsky v. Wight*, 395 Mass. 868, 873 (1985)). By the plain language of G. L. c. 210, § 1, the Probate

and Family Court clearly has jurisdiction over this child's Petition for Adoption.

A. Appellant satisfies all the jurisdictional conditions of the statute.

The Probate and Family Court erred in dismissing this matter for lack of jurisdiction in Massachusetts, R.A. ¹ 31, since there are no jurisdictional barriers to this Petition.² See G. L. c. 210, § 1. Appellant, age 41, is of "full age." R.A. 30. The child, who was born in February 2018, is younger than Appellant. See G. L. c. 210, § 1; A. Br. 8.³ Massachusetts

¹ R.A. refers to the Appellant's Record Appendix.

² There can be no question that Massachusetts has personal jurisdiction over the parties. The carrier resides in Massachusetts, the child was born in Massachusetts, and Appellant resided in Massachusetts and submitted to the jurisdiction of the court.

³ Appellant is unmarried, so there is no requirement of joinder of a spouse. R.A. 24-29; see G. L. c. 210, § 1; see also *Adoption of Tammy*, 416 Mass. 205, 211 (1993) (other than requiring spouse to join, statute does not expressly prohibit or require joinder by any person.) Appellant resides in a country that criminalizes consensual LGBT intercourse, does not allow or recognize marriage equality, and he and his partner are not married. Although his partner enjoys a nonmarital presumption of parentage under G. L. c. 209C, § 6(a)(4), he is not a legal parent without perfecting those rights through a VAP or an adjudication. See, e.g., 209C, § 6(a)(4); *Partanen v. Gallagher*, 475 Mass. 632 (2016); *Smith v. McDonald*, 458 Mass. 540 (2010). Appellant and his partner have determined that it is in the child's best interests for her to have one legal parent given the status of LGBTQ people in Mauritius. See R.A. 24-25.

permits a biological and legal parent to adopt their own child. See, e.g., Petition of Curran, 314 Mass. 91, 94-95 (1943), see generally Adoption of a Minor, 471 Mass. 373 (2015); Adoption of Tammy, 416 Mass. 205 (1993). Finally, Appellant resided in Massachusetts when the adoption was filed.⁴ A. Br. 9.

Even if Appellant had not resided in Massachusetts, G. L. c. 210, § 1, specifically provides for jurisdiction when a petitioner resides outside the Commonwealth and the child resides in the Commonwealth. See G. L. c. 210, § 1. Appellant's home country and current domicile is Mauritius. A. Br. 8-9. His domicile outside the Commonwealth raises no barrier to this adoption petition because Massachusetts law is clear that the Legislature intended to permit non-residents to adopt in Massachusetts. G. L. c. 210, § 1; Krakow v. Dep't of Pub. Welfare, 326 Mass. 452, 454-455 (1950).

Assuming that the Probate and Family Court took issue with the child's residence,⁵ jurisdiction is also

⁴ Appellant resided in Massachusetts for a period of approximately five months spanning from February until June 2018. A. Br. 8-9.

⁵ After a delay of eleven months from when the petition was first filed, the trial court provided no basis for its sua sponte dismissal, with prejudice, of

proper because the child's residence is Massachusetts for the purpose of the adoption code. Reside is a term of "flexible meaning" in Massachusetts. Krakow, 326 Mass. at 454. This child satisfies the residence requirement whether the term denotes legal domicile or a more temporary residence in the Commonwealth.

This child's legal domicile is Massachusetts.⁶ The child was born via assisted reproductive technology ("ART") in Massachusetts to her intended, biological father, the Appellant, and to the person serving as a gestational carrier, and they are not married. See R.A. 24-25. As such, under current Massachusetts parentage statutes, the child is a nonmarital child whose parentage status is governed by Chapter 209C.⁷

the adoption petition other than "Massachusetts does not have jurisdiction over this matter." R.A. 21. The time standards require action on an uncontested adoption within 30 days of filing. Standing Order 1-06: Case Management and Time Standards for Cases Filed in the Probate and Family Court Department (2006) ("If a Petition is filed as uncontested, due to the filing of necessary surrenders or termination decrees, and notice is not required, a hearing shall be scheduled within thirty (30) days of the filing of the Petition").

⁶ Neither the old nor the new Petition for Adoption form requests the address of the child. R.A. 15-16, 20-22.

⁷ If this matter is not governed by G. L. c. 209C, then equity must operate to fill the gap to provide

By virtue of the child's birth to the gestational carrier and in the absence of a pre-birth order of parentage, the carrier is reflected as her mother on her birth certificate. R.A. 30; see G. L. c. 46, § 1. For a nonmarital child born in Massachusetts, the child's sole legal parent and sole legal and physical custodian is her birth parent. G. L. c. 209C, § 10(b); Smith v. McDonald, 458 Mass. 540, 545 (2010). As such, the domicile of the birth parent determines the domicile of the child. See Gil v. Servizio, 375 Mass 186, 189 (1978) (domicile of the child "being the same as the domicil of their parent who has lawful custody of them"). Since the gestational carrier is the birth parent and resides in Massachusetts, the child's legal domicile is Massachusetts. R.A. 10, 15, 20.

Appellant's execution of a Voluntary Acknowledgment of Parentage ("VAP") did not change the child's legal domicile.⁸ By proper execution of the

protection and security to this child. See G. L. c. 215, § 6; Section II.

⁸ A Voluntary Acknowledgment of Parentage is an administrative route to parentage that can be signed in the hospital and that establishes legal parentage of nonmarital children. See G. L. c. 209C, § 11. Further, this is not a proceeding to ratify a VAP. See G. L. c. 209C, § 11. Rather, this is an adoption

VAP, her intended and biological father became her legal parent. See G. L. c. 209C, § 11. For a nonmarital child with a legal mother and a legal father, current Massachusetts law provides that the legal mother continues to have sole legal and physical custody of the child in the absence of any court custody order to the contrary. See G. L. c. 209C, § 10(b) (“In the absence of an order or judgment of a probate and family court relative to custody, the mother shall continue to have custody of a child after an adjudication of paternity or voluntary acknowledgment of parentage.”).⁹ Because there was no court order regarding custody following Appellant’s execution of the VAP, the carrier maintained legal and physical custody of the child, and the child’s legal domicile remained Massachusetts. See G. L. c. 209C, § 10(b).

proceeding to terminate the legal parental rights of the gestational carrier and to clarify the sole legal parentage of Appellant.

⁹ Current Massachusetts law does not put nonmarital parents on equal footing, G. L. c. 209C, § 10(b), as it does for marital parents, G. L. c. 208, § 31. This differential treatment of children based on the marital status of their parents and outmoded stereotypes is arguably unconstitutional. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

Nor did the carrier's execution of the adoption surrender change the child's legal domicile. An adoption surrender, while extremely important, has a specific and limited purpose. A surrender consents to adoption, relinquishes custody, and waives the right to notice of further court proceedings involving the child. See G. L. c. 210, § 2; *Adoption of Marlene*, 443 Mass. at 499. Only a decree of adoption, however, fully severs the legal parent-child relationship and effects a change in the child's domicile. See G. L. c. 210, § 6; *Adoption of Marlene*, 443 Mass. at 500 (decree of adoption severs parent-child relationship); *Commonwealth v. Davis*, 284 Mass 41, 49(1933) (domicile of origin not lost until a new domicile is acquired).

Further, an adoption surrender cannot change domicile of a child without frustrating the purposes of the adoption statute and rendering the language permitting adoption by non-residents ineffective. A surrender may be made to an agency or to a person. G. L. c. 210, § 2. A surrender can be signed as early as four days after birth, but the adoption statutes require, unless waived, that a child reside "in the home of the petitioner" for six months before a decree of adoption can enter. See G. L. c. 210, § 5A. If an

adoption surrender to a person changes a child's domicile, then an out-of-state petitioner receiving custody of a child pursuant to that surrender who has a child reside with them for the requisite six months would never be able to complete an adoption of a child born in Massachusetts. Such a result would contravene the language of G. L. c. 210, § 1, and would undermine the purpose of the adoption code. See *Adoption of Marlene*, 443 Mass. at 498. The Legislature could not have intended such an inconsistent and inharmonious result. See *Krakow*, 326 Mass. at 454-455.

Krakow v. Department of Public Welfare is instructive. In that case, petitioners were residents of New York and filed a petition for adoption in Massachusetts of a child born in Massachusetts because they were precluded by law from adopting in New York. *Krakow*, 326 Mass. at 453. "[W]ithin a few weeks of his birth" in Massachusetts, the child was taken by the petitioners to reside with them in their New York home. *Id.* at 453. The child had a legal domicile of Massachusetts due to either his abandonment by his legal father or because he was a nonmarital child. *Id.* at 454. This Court reasoned that the term residence in G. L. c. 210, § 1, signifies domicile.

Id. at 454. And the SJC concluded that “the temporary abode of the minor with the petitioners, pending the determination of the petition for adoption, did not change his residence.” Id. at 454. The Court reasoned that the legislature could not have contemplated any change of residence by reason of a child living with adoptive parents because of the statutory requirement of six months of residence in the home of petitioners prior to the issuance of a decree of adoption. See G.L. c. 210, § 5A.

“Compliance with the residential requirement, if held to effect a change in the child’s domicil, would bar all petitions by nonresident petitioners. That result could not have been intended by the Legislature.”

Krakow, 326 Mass. at 454-455.

There is no indication in Krakow of whether there was a termination or a surrender to a Massachusetts agency, but that is of no matter since the same rationale applies here. Since the surrender statute expressly permits surrender to an agency or to a person, the Krakow holding remains on point.

Considered together, the adoption statutes must be interpreted harmoniously and to produce a consistent result and to accomplish the purpose of the code. See

Adoption of Marlene, 443 Mass. at 498. Further, a “basic tenet of statutory construction requires that a statute be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous.” Id. at 500 (internal citations omitted). In Krakow, the Massachusetts Probate and Family Court retained jurisdiction over the adoption even though the petitioners resided out of state and the child resided with them pending the adoption decree. Krakow provides a clear precedent for jurisdiction over this Petition.

The Probate and Family Court also had jurisdiction under G. L. c. 210, § 1, by virtue of the child’s birth in this state. In Stearns, a child was born and physically present in Massachusetts, but her legal father was domiciled in Scotland. Stearns v. Allen, 183 Mass. 404, 406 (1903). This Court concluded that Massachusetts had jurisdiction over the adoption because, “[b]y virtue of her birth in Massachusetts” she “was a citizen of the United States and of Massachusetts” regardless of the legal domicile of her father. Stearns, 183 Mass. at 409. Given that this child was born in Massachusetts, R.A. 10, the

Massachusetts court has jurisdiction over her adoption regardless of the domicile of her legal father.

Finally, there is jurisdiction because this child resided in Massachusetts when the action was filed. She was born on February 17, 2018, and she resided in Massachusetts until June 2018. A. Br. at 8-9. The uncontested Petition for Adoption was filed on April 25, 2018, during her residence in the Commonwealth and when she was an infant who had never lived in any other jurisdiction. Given this, the Probate and Family Court had jurisdiction. See G. L. c. 209B, § 2.

The jurisdictional requirements of G. L. c. 210, § 1, have been amply satisfied. The Probate and Family Court erred in dismissing this adoption for lack of jurisdiction and should be reversed.

B. Jurisdiction in this case advances the core purpose of the adoption statute and avoids harmful results.

The purpose of the adoption code is the "advancement of the best interests of the subject child." See *Adoption of Tammy*, 416 Mass. at 210. Securing a child's legal parental relationship promotes their best interests and well-being. See

Culliton v. Beth Isr. Deaconess Med Ctr., 435 Mass. 285, 292 (2001). Many rights and responsibilities flow from the parent-child relationship, including the right to support, care, decision making, inheritance, public benefits and beyond. See, e.g., Adoption of Marlene, 498; Culliton, 435 Mass. at 292. Access to these benefits provide children with stability and security. As such, establishing and protecting children's parent-child relationships as soon after birth as possible is critical to promoting their best interests. Culliton, 435 Mass. at 292.

The LGBTQ community faces unique challenges in securing their parent-child relationships due to bias and outdated statutes. See, e.g., G. L. c. 46, § 4B; Am. Bar Ass'n House of Delegates, Resolution 113, 6 (2019), <https://www.americanbar.org/content/dam/aba/images/news/2019mymhodres/113.pdf> [hereinafter ABA Resolution 113]. In the United States, despite the constitutional mandate of equality for LGBTQ couples and families articulated in Obergefell v. Hodges, 574 U.S. 1118 (2015), and Pavan v. Smith, 137 S. Ct. 2075 (2017), "state-sanctioned discrimination against LGBT individuals who wish to raise children has dramatically increased in recent years." ABA

Resolution 113 at 6. In Mauritius, where Appellant resides, consensual "sodomy" is criminalized. See Criminal Code (Amendment) Act, 1998 (Act No. 13/1998) (Mauritius). LGBTQ people cannot marry. See Civil Code (Amendment) Act, 1981 (Act No. 22/1981) (Mauritius). They cannot jointly adopt. See Civil Code (Amendment) Act, 1980 (Act No. 37/1980) (Mauritius). Further, Mauritius does not allow people to adopt their own legal children.¹⁰ See Civil Code (Amendment) Act, 1980 (Act No. 37/1980) (Mauritius).

Another challenge facing LGBTQ families and their children are outdated parentage statutes. In Massachusetts, the law of parentage has been outpaced by science and the ways people are now able to form families with children. See, e.g. G. L. c. 46, § 4B; Culliton, 435 Mass. at 293. As a result of the lack of legal protections for LGBTQ parents in Mauritius and the lack of statutory clarity for children born

¹⁰ Mauritius is signatory to Hague convention and will recognize this U.S. decree of adoption. Hague Conference on Private International Law, Status Table: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (March 6, 2019), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>.

through gestational surrogacy in Massachusetts, adoption in Massachusetts remains the best route available to secure and clarify the parentage of this child and to avoid harmful unintended results.

An adoption for this child will be beneficial and serve her best interests. With an adoption, Appellant will be able to secure and clarify the child's parentage through a decree that he is the child's sole legal parent and that terminates the legal parental rights of the gestational carrier. A decree of adoption will be recognized in all jurisdictions. See, e.g., Hague Conference on Private International Law, Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption art. 23, May 29, 1993, 1870 U.N.T.S 182, S. Treaty Doc. No. 105-51 (1998); V.L. v. E.L., 136 S. Ct. 701 (2015). And, a decree will ensure that the child's birth certificate is amended to reflect her accurate legal parentage. See G. L. c. 46, § 13(g).¹¹ Without a

¹¹ A birth certificate is document that stays with a child throughout life and is widely used to enroll in school, access benefits and prove identity. Birth Certificates, Am. Bar Ass'n (Nov. 20, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/birth-certificates/. It is critical to ensure that a birth certificate accurately reflects legal parentage.

decree of adoption and the accompanying amendment of the child's birth certificate, this child's father will not be her sole legal parent, and instead her legal parentage will be shared with a gestational carrier who has no interest in being her parent and no relationship with her. This leaves the child vulnerable. Adoption is not available in Mauritius, so without access to adoption in Massachusetts, the gestational carrier will remain a legal parent of the child. The security and clarity of adoption will certainly serve this child's best interests.

Adoption also provides critical protections for the person who served as the gestational carrier. The carrier never intended to serve as a legal parent for the child beyond a short period of time to enable the child to have an original birth certificate listing a woman as a parent. See R.A. 24-25. The carrier has no intent or desire to be a legal parent. See R.A. 24-25. She is not biologically related to the child. R.A. 24-25. Most importantly, she has no relationship with the child and has never provided her with any care. See R.A. 24-25. Continuing as the child's legal parent means that that the carrier has all of the weighty rights and responsibilities of parentage.

Culliton, 435 Mass. at 292; *Adoption of Tammy*, 416 Mass. at 215. Given that these parental rights are unwanted and unintended, it is imperative that the carrier, a Massachusetts resident, have access to the courts to terminate those rights.

Where it is uncontested that the intent of the parties is establishing Appellant as the child's sole legal parent and where the interests of the child will be best served by terminating the legal parental rights of the gestational carrier, jurisdiction for a Petition for Adoption serves the code's core purpose. Many times, this Court has interpreted the adoption code to protect children born to LGBTQ parents. See generally, e.g., *Adoption of a Minor*, 471 Mass. 373 (2015); *Adoption of Galen*, 425 Mass. 201 (1997); *Adoption of Tammy*, 416 Mass. 205 (1993). This child, who needs the security of a decree protecting her legal relationship to her intended, biological father and terminating any legal rights of the gestational carrier, merits similar protection.

II. IF THIS COURT DETERMINES THERE IS NO JURISDICTION UNDER THE ADOPTION CODE, THERE MUST BE JURISDICTION IN EQUITY TO PROTECT THIS CHILD THROUGH A POST-BIRTH JUDGMENT OF PARENTAGE.

The Probate and Family Court enjoys broad jurisdiction in equity. General Laws c. 215, § 6, provides that the Probate and Family Court is a court of "general equity jurisdiction." This Court recently addressed the broad scope of a Probate Court's equitable jurisdiction to fashion remedies:

"A court with equity jurisdiction has broad and flexible powers to fashion remedies.' Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 1), 424 Mass. 430, 463, 677 N.E.2d 127 (1997). 'These powers are broad and flexible, and extend to actions necessary to afford any relief in the best interests of a person under their jurisdiction.' Matter of Moe, 385 Mass. 555, 561, 432 N.E.2d 712 (1982)."

Recinos v. Escobar, 473 Mass. 734, 740-741

(2016) (concluding that the Probate and Family Court has jurisdiction over children over 18 to determine special immigrant juvenile status).

Specifically, the Probate and Family Court enjoys broad equitable jurisdiction over matters involving parentage, which are central to this matter. See G. L. c. 215, § 6; Hodas v. Morin, 442 Mass. 544, 547

(2004). In E.N.O. v. L.M.M., this Court concluded that the Probate and Family Court enjoyed the equitable jurisdiction to protect the relationship between a child and her de facto parent. 429 Mass. 824, 828, 833-834 (1999). "The court's duty as *parens patriae* necessitates that its equitable powers extend to protecting the best interests of children in actions before the court, even if the Legislature has not determined what the best interests require in a particular situation." E.N.O., 442 Mass. at 827-828.

This Court has consistently articulated the power of the Probate and Family Court to establish parentage of children born pursuant to a gestational carrier agreement. In Culliton v. Beth Israel Deaconess Medical Center, this Court concluded that the Probate and Family had the power, in equity, to declare parentage of children born as a result of a gestational carrier agreement and to issue an order, pre-birth, to designate the legal parents as parents on the children's birth certificates. 435 Mass. at 291-292. There, a married couple entered into an agreement with a person serving as a gestational carrier in order to have children. Id. at 287. The couple arranged for embryos to be carried by a

gestational carrier who had no biological relationship to the children. Id. at 290.

This Court provided relief in equity where there was no direct legal authority for issuing a pre-birth order of parentage. Id. at 288-289. Where the plaintiffs, rather than the carrier, were the sole biological sources of the children, the carrier agreed with the relief sought, and the petition was uncontested, this Court concluded that the Probate and Family Court had jurisdiction pursuant to its equity powers to issue the requested relief -- declarations of legal parentage and pre-birth orders to reflect that parentage on the children's birth certificates. Id. at 291-292. This conclusion acknowledged "the importance of establishing rights and responsibilities as soon as is practically possible." Id. at 292. The Court further noted that the relief, by establishing parentage accurately, would furnish "a measure of stability and protection to children born through such gestational surrogacy arrangements." Id. at 292. In the end, the SJC ordered entry of a judgment declaring the plaintiffs the lawful parents of the children and ordering the birth certificate to reflect the

plaintiffs as the legal parents of the children. Id. at 295-296.

In Hodas v. Morin, this Court clarified that the Probate and Family Court had jurisdiction to establish the parentage of children born through gestational carrier agreements in Massachusetts where the intended parents and the carrier resided out of state. 442 Mass. at 553. In that case, the intended parents resided in Connecticut, the gestational carrier resided in New York, the ART procedures took place in Connecticut, and the parties' agreement contemplated the birth of the child at a Massachusetts' hospital. Id. at 545-546, 547. The parties chose Massachusetts to facilitate obtaining a pre-birth order of parentage. Id. at 546. This Court concluded that the trial court's jurisdiction over the case was "clear" for two primary reasons. See id. at 547. First, the Probate and Family Court "has subject matter jurisdiction in questions of law and equity concerning parentage." Id. at 547. The Culliton case held that a Probate Court judge has the authority to consider a request for a pre-birth order of parentage when the plaintiffs, rather than the carrier, are the biological parents of the child, the gestational

carrier agrees, no one, including the hospital, contests the petition and there is waiver of any contradictory provisions of the agreement. Culliton, 435 Mass. at 547. Furthermore, the equity statute “poses no residency requirement.” Hodas, 442 Mass. at 547. Second, the Probate Court had personal jurisdiction because the hospital was a Massachusetts corporation and the other parties submitted to jurisdiction. Id. at 548. There were no jurisdictional barriers to a declaration of legal parentage pursuant to a gestational carrier agreement and to the issuance of a pre-birth order directing that parentage to be reflected on the child’s birth certificate. See id. at 548.

In light of these precedents, the Probate and Family Court enjoys jurisdiction in equity to declare Appellant’s sole legal parentage of the child and to issue a post-birth order that his sole parentage be reflected on the child’s birth certificate. Appellant meets the standard articulated in Culliton and Hodas. See Culliton, 435 Mass. at 291-292; Hodas, 442 Mass. at 547. Appellant, rather than the carrier, is the biological parent of this child, having conceived using a donor egg. R.A. 24. The gestational carrier

has no biological link to the child, and she has signed a surrender, thereby clearly communicating her wish to terminate any legal rights she may have as a birth parent and to establish the sole legal parentage of Appellant. See R.A. 23-25. No one contests the Petition, and the hospital has no stake in this matter having already reported the facts of birth to the Department of Public Health ("DPH"). Additionally, DPH's interest, to the extent it has an interest in collecting the facts of the birth parent, has been satisfied as those facts have been collected through the VAP and birth certificate processes. See Culliton, 435 Mass. at 293-295.

Any distinction between this child's circumstances and those in Culliton and Hodas, namely, Appellant's marital status and the timing of the request, cannot pose barriers to relief. It is a fundamental constitutional and statutory command that children are entitled to equal protection regardless of the marital status of their parents or the circumstances of their birth. See, e.g., G. L. c. 209C, § 1; Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017); Partanen, 475 Mass. at 638 (noting legal equality of nonmarital children); Woodward v. Comm'r

of Social Sec., 435 Mass. 536, 546 (2002)

("Repeatedly, forcefully, and unequivocally, the Legislature has expressed its will that all children be 'entitled to the same rights and protections of the law' regardless of the accidents of their birth"). This child cannot be deprived of the security of legal parentage based on her nonmarital status. Nor should the timing of the action pose a barrier to relief; indeed, now that this child is born, it is even more important for her to have the stability and protection of clear and accurate legal parentage and to have an amended birth certificate to demonstrate that parentage to the world. It was clearly within the jurisdiction and power of the Probate and Family Court to declare the parentage of this child and to issue an order amending her birth certificate to reflect that parentage.

Post-birth decrees of parentage provide critical protections for children born as a result of gestational carrier agreements. In many instances, children born through gestational carrier agreements to intended parents living abroad need an original birth certificate that lists a woman as a birth parent in order to secure citizenship in their intended

parent's country of origin. Caitlin Pyrcce, *Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem*, 23 *Ind. J. Global Legal Stud.* 925 (2016).

For these children, agreements provide that a gestational carrier will be listed as the birth mother on the original birth certificate and that parentage will be clarified post-birth to terminate any legal rights of the birth parent, to clearly establish the sole parentage of the intended parent(s), and to secure an amended birth certificate. Massachusetts is the only New England state that has not clarified a process for obtaining post-birth judgments of parentage in the context of gestational surrogacy, apart from an adoption process. See, e.g., *Conn. Gen. Stat.* § 7-48a; *Me. Stat. tit. 19-A*, § 1934; *N.H. Rev. Stat. Ann.* § 168-B:12; 8 *R.I. Gen. Laws* § 8-2-13(equity jurisdiction); *Vt. Stat. Ann. tit. 15C*, § 804. If, *arguendo*, the adoption statute is not available to this child, then this Court should clarify that equity must allow access to a post-birth judgment securing this child's legal parentage and directing the amendment of the birth certificate reflecting that judgment.

CONCLUSION

The Probate and Family Court erred in dismissing this action with prejudice. Whether under the adoption code or pursuant to its equity jurisdiction, the Probate and Family Court clearly had jurisdiction to determine this child's legal parentage and should have acted. This Court should reverse the dismissal and remand for swift completion of the adoption or, in the alternative, order entry of an equity judgment that Appellant is the child's sole legal parent and an order amending the child's birth certificate to reflect that parentage. Such a judgment is critical and overdue to provide clarity and security for all of the impacted parties - parent, child and carrier.

Respectfully Submitted,



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December 16, 2019

CERTIFICATE OF COMPLIANCE

**Pursuant to Rule 16(k) of the Massachusetts Rules of
Appellate Procedure**

As required by Mass. R. A. P. 16 (k), Counsel certifies that this Brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16 (a) (6); Mass. R. A. P. 16 (e); Mass. R. A. P. 16 (f); Mass. R. A. P. 16 (h); Mass. R.A.P. 18; and Mass. R. A. P. 20.

December 16, 2019



Patience Crozier, Esq.

CERTIFICATE OF SERVICE

IN THE MATTER OF A MINOR

Supreme Judicial Court No. SJC-12846

I, Patience Crozier, hereby certify that on December 16, 2019, I electronically filed the Brief of Amicus Curiae GLBTQ Legal Advocates & Defenders in Support of the Appellant with the Supreme Judicial Court by using the e-file system in accordance with SJC Rule 1:25 (Electronic Filing Rules). I certify that the parties or their counsel of record are registered as e-file Filers and that Kathleen A. DeLisle, Esq., Nichols, DeLisle & Lightholder, P.C., 14 Main Street, Southborough, MA 01772 will be served by the e-file system.

December 16, 2019



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