MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO.: PEN-11-393

In re:

ROBERT NOLAN AND CELIA NOLAN,

Appellants

v.

KRISTEN LABREE AND JEFFREY LABREE,

Appellees

ON APPEAL FROM
THE PENOBSCOT COUNTY SUPERIOR COURT

AMICUS BRIEF OF APPELLANTS

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STATEMENT OF INTEREST OF THE AMICI[1]

Amicus Curiae American Society for Reproductive Medicine (ASRM) is the nation's leading multidisciplinary organization dedicated to the advancement of the art, science and practice of reproductive medicine. Founded by a group of fertility experts in 1944, members of ASRM were the first physicians to perform many of the standard procedures used by fertility specialists today, including donor insemination and in vitro fertilization. ASRM members include obstetrician/gynecologists, urologists, reproductive endocrinologists, embryologists, mental health professionals, internists, nurses, pediatricians and research scientists. The ASRM Practice Committee issues guidelines, minimum standards, and technical and educational bulletins on important and emerging diagnostic and therapeutic topics in the field of reproductive medicine. Since 1950, ASRM has published *Fertility and Sterility*, a leading peer-reviewed medical journal in obstetrics and gynecology. ASRM also provides a range of patient information booklets designed to help patients understand reproductive treatments and technologies. When fertility treatments involve a third party, such as an egg donor or a gestational surrogate or both, ASRM believes that the best interests of the children are served if the law recognizes the non-genetic parent who endeavored to bring a child into the world as surely as a genetic parent.

Amicus Curiae American Academy of Assisted Reproductive Technology Attorneys (AAARTA) is a specialty division of the American Academy of

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[1] This Amici Curiae Brief is filed with the written consent of the parties.

Adoption Attorneys, a non-profit professional organization of over 330 attorneys, law professors and judges from throughout the United States and Canada, which created AAARTA in recognition of the growing use of assisted reproductive technology. AAARTA is a credentialed professional organization, with a binding Code of Ethics, dedicated to the best legal practices in the area of assisted reproduction and to the advancement and protection of the interests of all parties, including children, involved in assisted reproductive technology. AAARTA attorneys are committed to ensuring that the gestational carrier is fully aware of her rights and responsibilities and helping the intended parents secure a legal relationship with the children born as a result of these arrangements.

Amicus Curiae RESOLVE: The National Infertility Association, established in 1974, is a non-profit organization of patient advocates who work to provide legal protections for infertile persons and increase access to all family building options including medical care, while also providing information, on-line support communities and a nation-wide professional resources directory for individuals and couples seeking to build a family. RESOLVE is the only organization with a nationwide network mandated to promote reproductive health and to ensure equal access to all family building options for men and women experiencing infertility or other reproductive disorders. RESOLVE's constituents and professional members reside in every state, including Maine, and we have served persons from every state over many years. RESOLVE supports gestational carrier agreements in which the parties enter into a legal

agreement to protect the rights of the children to be raised by their intended parents.

Founded in 1999, *Amicus Curiae* the American Fertility Association ("The AFA") is a national non-profit organization that provides information about infertility causes and treatments, and reproductive and sexual health. The AFA assists people in building families, including through adoption and third party solutions, serving as a resource to hopeful parents as well as to health care professionals and public officials. This information is made available online at www.theafa.org and at leading-edge outreach education events across the country. Services are free of charge to consumers, and feature a daily blog, an extensive online library with articles updated weekly, high-definition videos, fact sheets, and a fertility and adoption directory. A professional network listing physicians, attorneys, psychologists, and complimentary care practitioners is also available online. All materials are fully vetted by The AFA's Medical Advisory Council. When individuals or couples create families with children, The AFA believes that the law needs to protect that child by ensuring those who planned to and will raise them are determined to be their parents, ideally before their birth.

Amicus Curiae New England Fertility Society (NEFS) is a non-profit organization of infertility professionals providing information, support and continuing education for all members and others with a special interest in the field of infertility. Members must demonstrate high ethical principles in their medical profession, be invested in the field of infertility, reproductive medicine,

reproductive biology, and adhere to the bylaws of the NEFS. The NEFS provides a forum for presentation of new data and research, encourages exchange of ideas, data and information, and identifies the needs of providers and patients in the field of assisted reproductive technologies in the New England area. As individuals and couples bring children into their lives with these technologies, Amicus NEFS supports the legal system's recognition of a child's parent or parents based on the intent and actions to bring that child into their family.

Amicus Curiae Reproductive Science Center of New England (RSC New England) was founded in 1988 and is one of the largest IVF centers in New England and the nation. With clinics in Massachusetts, New Hampshire, and Rhode Island, RSC New England's highly skilled fertility specialist physicians and embryology scientists have helped to conceive over 30,000 babies. RSC New England prioritizes quality clinical and personal care. RSC New England believes that when a couple endeavors to bring a child into the world, the child's interests are best served when the law recognizes the intended parents regardless of any genetic or biological tie to the child.

Amicus Curiae Boston IVF is a leading fertility center providing reproductive technologies and exceptional patient care that has helped individuals and couples bear 30,000 babies since 1986. We have worked with Maine residents for over ten years, and have multiple offices in Massachusetts, as well as in New Hampshire and a new, full-service IVF center in South Portland, Maine. Boston IVF believes that parenthood is a gift everyone has

the right to experience, and now many can who could not before, even if one or both parents have no genetic connection to the child. We urge that the courts determine the parentage of all children, including those born through gestational carrier agreements, in accord with the parties' intent and conduct -- and regardless of a genetic connection to the child.

Amicus Curia Society for Assisted Reproductive Technology (SART) is the primary organization of professionals dedicated to the practice of assisted reproductive technologies (ART) in the United States. An affiliated society of ASRM, SART includes more than 393 member practices, representing more than 85 percent of the ART clinics in the United States. SART's mission is to set and help maintain standards for ART in an effort to better serve its members and their patients. To this end, SART has been actively involved in the collection of outcomes data from its member programs since 1985 and works with the CDC to implement the reporting requirements of the Fertility Clinic Success Rate and Certification Act. SART's Practice Committee collaborates with the ASRM Practice Committee in producing guidance for the field of ART. SART takes an active role in quality assurance, providing voluntary consultation services for member practices in a collegial spirit to improve the quality of patient care. SART believes that people who require the assistance of a gestational carrier or the contribution of a gamete donor to build their families deserve to have their agreements upheld and that it is in the best interest of resulting children that their parentage is recognized.

STATEMENT OF ISSUES

Amici accept the issues presented by the Appellants.

STATEMENT OF FACTS

Amici accept the description of the Appellants, and supplement as follows.

Desmond Nolan was born at Eastern Maine Medical Center on December 9, 2010. R.A. 26. Robert and Celia Nolan, a married couple, were acknowledged as the parents by the medical staff. R.A. 27. Mrs. Nolan stayed in the room with Desmond and breastfed him. *Id.* The couple took Desmond home with them a few days later. *Id.*

On January 11, 2011, the Nolans filed a pro se complaint in the District Court captioned "Declaratory Complaint for Paternity & To Establish Parental Rights and Responsibilities" to clarify Desmond's parentage given that the woman who actually gave birth to Desmond was Kristin LaBree, a gestational carrier. R.A. 1, 10-11.

The Nolans have twice worked with gestational carrier surrogates to bring a child into their family. R.A. 23, 24. They turned to gestational surrogacy because Celia is a "DES daughter" whose uterus has been compromised by her own mother's use of diethylstilbestrol while pregnant with Celia. R.A. 23-24.

Kristin LaBree and her husband Jeffrey LaBree have three children, and Kristin is employed at Eastern Maine Medical Center. R.A. 32-33. In addition to carrying Desmond, Mrs. LaBree has thrice carried pregnancies for other

women through gestational surrogacy. R.A. 33, 43-44. She has been sensitive to these issues ever since a high school friend was unable to carry a pregnancy, and finds helping families in this way to be a "wonderful" experience. R.A. 33.

Celia Nolan and Kristin LaBree met and "hit it off." R.A. 25. Both women wanted "to do another surrogacy journey." R.A. 25. With counsel representing the LaBrees, R.A. 34, the four parties entered into a contract to pay Kristin's medical expenses, R.A. 25, and "protect all the parties and make sure everything was done legally." R.A. 34.

The parties worked together with Dr. Samuel Pang of the Reproductive Science Center in Lexington, Massachusetts. R.A. 26. According to the Affidavit of Dr. Pang, the treating IVF physician, he retrieved ova from Celia Nolan, which were fertilized with Robert Nolan's sperm, and the resulting embryo was transferred into Mrs. LaBree's uterus on March 27, 2010. R.A. 12 ¶ 8. The embryo transfer was successful and Mrs. LaBree became pregnant with the embryo created by the Nolans. R.A. 13 ¶ 9. As a preventative measure, Dr. Pang also administered medications to Mrs. LaBree to prevent ovulation, such that "there is absolutely no medical possibility that the child …carried by Kristin LaBree could have resulted from an egg which she ovulated spontaneously on her own." Id. ¶ 10. Dr. Pang believes "[i]t is a medical certainty" that the child being carried by Kristin LaBree "could only have resulted from the embryo created with ova retrieved from Celia Nolan and fertilized with Robert Nolan's sperm which were transferred into her uterus on March 27, 2010." Id. ¶ 11.

The District Court Complaint filed pro se by the Nolans sought to rebut the existing parentage presumptions and establish and declare their own parenthood of Desmond. R.A. 10-11. It alleged the facts related to the gestational carrier agreement between the Nolans and LaBrees and that Kristin would carry the embryo created by the Nolans with a physician's assistance. *Id.* It requested that the Court issue an order that each of the Nolans is the "biological father" and "biological mother" of the child, with all parental rights and responsibilities awarded to the Nolans, with no child support order to issue, and for whatever other relief the Court deemed just and proper. *Id.*

The case was initially referred to a Case Management Officer. However, since the Nolans sought declaratory relief, the case was also scheduled for an evidentiary hearing before a District Court Judge. R.A. 6.

At that June 15, 2001 hearing, the District Court candidly acknowledged that this was "the first case of this kind that I've dealt with" and the Judge repeatedly sought to clarify the Court's authority to grant the requested relief. R.A. 16, 18, 40, 41. Counsel for the Nolans referred the judge to: the Uniform Act on Paternity, R.A. 17 ("the paternity statute" and "19A 1564, Section 2" (sic)); the Declaratory Judgments Act, R. A. 21, 50; equity, R.A. 51 ("equitable powers"), R.A. 21 ("just and equitable relief"); equal protection principles, R.A. 20, 51; and the birth registration provisions of Title 22. R.A. 21, 44-47.

The LaBrees and Celia Nolan also testified to the parties' agreement that Kristin LaBree would carry a child for the Nolans. R.A. 25 (Celia Nolan), R.A. 34-36 (Kristin LaBree), R.A. 44 (Jeffrey LaBree). Celia Nolan testified to the

medical procedure in which eggs were extracted from her, combined with her husband's sperm, and the placement of pre-embryos created from the Nolans' sperm and eggs into the uterus of Kristin Labree. R. A. 25. Kristin LaBree acknowledged she did not contribute genetic material, R.A. 34, and that the child was the Nolans. R.A. 35.

Jeffrey LaBree also testified that he had a vasectomy thirteen years ago, R.A. 44, and his wife answered "No," when asked if there was "any way that this child, Desmond, could be genetically related to you or your husband." R.A. 35. Mr. LaBree also asked that the court determine that he is not the father of Desmond and remove him from the birth certificate as Desmond's parent. R.A. 37. Kristin LaBree testified that it was "very upsetting" to be on the child's birth certificate because "Desmond is not our child," R.A. 36, and she and her husband wish no parental rights or responsibilities for Desmond. R.A. 35. Both Kristin and Jeffrey LaBree testified that they wish to be divested of any presumptions of parentage that arise from the fact of giving birth and marriage, and that the Nolans should be declared Desmond's parents. R.A. 37, 44.

When counsel requested the Court to direct an order to the Office of Data, Research and Vital Statistics to change Desmond's birth certificate to accurately record his parentage, the Judge stated "it may just be that these transactions should take place in states that authorize it, as opposed to in states that don't." R.A. 52.

On June 23, 2011, the Judge issued Findings. R.A. 6-7. The Court found it had jurisdiction to address paternity, and that "[e]vidence of parentage was submitted through the testimony of the parties and an affidavit of Samuel Pang, MD" who "oversaw the *in vitro* fertilization of an egg from Mrs. Nolan by sperm from Mr. Nolan and implanted it in Mrs. Labree (sic), creating the pregnancy which resulted in Desmond." *Id.* ¶ 3. On this basis, the Judge found that Robert Nolan "has produced clear and convincing evidence that he is Desmond's father, § 1562." R.A. 6.

As to maternity, the Court found that Kristin LaBree is Desmond's mother. R.A. 6. The Judge reasoned that "Maine has not adopted a surrogacy law, and motherhood is and has been determined by who actually gives birth, 22 MRSA § 2761 (3-A). In this case, Kristin Labree gave birth to Desmond." R.A. 6. As to Celia Nolan, relying on *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004), the Court found that the "evidence supports a declaration that Celia Nolan is Desmond's *de facto* mother. This motherhood is equivalent to birth motherhood in terms of awarding parental rights and responsibilities." R.A. 6. *See also* R.A. 9 (Celia Nolan is [Desmond's] *de facto* mother").

The Court declared that "Robert Nolan is Desmond's father and Celia Nolan is his *de facto* mother." R.A. 9. It did not declare the non-parentage of the LaBrees, but stated that the Nolans' parental rights and responsibilities are "to the exclusion of rights and responsibilities for Defendants Kristen and Jeffrey Labree." *Id.*

Further, the Judge: denied any request to "order revision of the birth certificate" by the Office of Data, Research and Vital Statistics since the Department of Health and Human Services was not named as a party; noted "Legitimation has not been attempted under 22 MRSA §2765" R.A. 7; and denied the Nolans' "other requests for relief" in the Amended Parental Rights and Responsibilities Order. R.A. 9.

Upon a request for reconsideration, the Court issued, on July 25, 2011, an "Amended Parental Rights and Responsibilities Order" as discussed above. R.A. 9. This appeal followed.

ARGUMENT

This case is about securing and protecting a child by clarifying the legal relationships of that child to both of the adults who sought to bring him into this world through gestational surrogacy.

As this Court anticipated over a decade ago, "[w]ith the recent advances in biotechnology and human genetics, family law is undergoing further evolution." *Stitham v. Henderson*, 2001 ME 52, ¶ 21, 768 A.2d 598, 604 (Saufley, C.J., concurring). Amici describe below some of the Assisted Reproductive Technologies to which this Court referred in *Stitham*. *See* I. A., *infra*.

In addition, Amici demonstrate that gestational surrogacy is a part of that "evolution" that existing Maine law can address even without an express "surrogacy" statute, as have other states. The District Court's authority to determine parentage, as set forth in the Uniform Act on Paternity, and as

supplemented by the District Court's related equitable powers and its ability to issue declaratory judgments as to status, are more than adequate to support a ruling that Robert and Celia Nolan are Desmond's sole parents, and that the LaBrees are not his parents.

The children brought into the world through these "advances in biotechnology," *Stitham*, 2001 ME at ¶ 21, like all other children, should enjoy the security of legal parent-child relationships with both of their parents, rather than being penalized because of the circumstances of their birth. *See e.g. C.E.W. v. D.E.W.*, 2004 ME 43, ¶¶ 15-16, 845 A.2d 1146, 1152 (Me. 2004) (holding that lesbian partner of child conceived through artificial insemination was de facto parent of child where she acted as child's parent since birth and child considered her to be the mother). It was error for the District Court to fail to exclude Jeffrey LaBree as Desmond's father, and to find maternity in Kristin LaBree and deny it to Celia Nolan, and to refuse to order a change in Desmond's birth registration. In any event, those simple declarations of parentage and non-parentage would also provide a basis for the Office of Data, Research and Vital Statistics to correct its records and issue a new birth certificate confirming the identity of Desmond's parents and reflecting the reality of his family.

I. THIS COURT SHOULD REJECT THE DISTRICT COURT'S RULINGS TO THE EXTENT THEY DO NOT CONFIRM EXCLUSIVE PARENTAGE IN THE NOLANS AS THAT RULING HARMS THIS CHILD AND COULD HARM A WIDE RANGE OF FAMILIES.

A. Background on Assisted Reproductive Technology.

Infertility among opposite-sex couples is well documented.[2] Like the Plaintiffs Robert Nolan and Celia Nolan ("the Nolans"), many families who cannot become parents on their own have brought children into the world through Assisted Reproductive Technology ("ART") involving third parties.[3]

1. Intended Parents May Be Genetic Parents.

This situation involves gestational surrogacy[4] in which an intended female parent can produce viable eggs, but is unable to carry a child, most often due to a diseased or absent uterus. As used by different-sex couples with

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[2] Data from 2002 show that approximately 7 million women and 4 million men suffer from infertility. Michael L. Eisenberg M.D., James F. Smith M.D., M.S., Susan G. Millstein Ph.D., Robert D. Nachtigall M.D., Nancy E. Adler Ph.D., Lauri A. Pasch Ph.D., Patricia P. Katz Ph.D. and Infertility Outcomes Program Project Group, *Predictors of not pursuing infertility treatment after an infertility diagnosis: examination of a prospective U.S. cohort*, 94(6), Fertility and Sterility 2369, 2369 (2010).

[3] Generally speaking, ART is different from procedures in which only sperm is handled, *e.g.* artificial insemination, or procedures in which a woman takes medication to stimulate egg production without having the eggs removed. *See Culliton v. Beth Israel Deaconess Medical Ctr.*, 756 N.E.2d 1133, 1140 n. 10 (Mass. 2001).

[4] Data collected from reporting fertility clinics by the Society for Assisted Reproductive Technology, an affiliate of ASRM, indicates the following numbers of children in the United States born through gestational surrogacy: in 2004 – 738, in 2005 – 1,012, in 2006 – 1,059, and in 2007 – 1,034. *See* American Society for Reproductive Medicine, *Third Party Reproduction*, 3-4 (2006), at http://www.asrm.org/Patients/patientbooklets/thirdparty.pdf (hereinafter "*Third Party Reproduction*").

viable genetic sperm and eggs, this form of ART involves the intended female parent's eggs being fertilized by the intended male parent's sperm and the embryos created being implanted into the uterus of a third woman, the gestational carrier, who then carries the child for the intended parents. The children created by non-donor gestational surrogacy are genetically related to both intended parents, but the children are born to a third party—the gestational carrier.[5]

This is the precise set of procedures used by the Nolans and Labrees, as explained in the Affidavit of Dr. Samuel Pang, R.A. 12-13, which the District Court accepted without objection, and on which the District Court relied for its Findings. R.A. 25-26, 6-7. These facts were also confirmed by the parties' testimony. R.A. 32-38 (Kristin LaBree); R.A. 43-45 (Jeffrey LaBree); and R.A. 22-32 (Celia Nolan).

Notably, gestational surrogacy arrangements differ from traditional surrogacy in that they *do not* involve the genetic material of the surrogate. *See, e.g. Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1137 (2001) (a traditional surrogate "is both the genetic mother of the child and the mother who carries the child through pregnancy and delivery.").

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[5] Couples in Maine have been using this form of ART for many years. To the knowledge of Amici, the District Courts have routinely made parentage determinations in gestational carrier cases and the Office of Data, Research and Vital Statistics has placed the names of the intended parents on the child's birth certificate without objection. *See* Brief of Appellants at 13 n. 6.

2. Gestational Surrogacy With Egg or Sperm Donation.

The other type of gestational surrogacy involves a donation of genetic material from a third party or parties: an egg donor, a sperm donor, or both. Egg donor gestational surrogacy is used by individuals as well as same-sex and different-sex couples. In one scenario, egg donation is a procedure that allows a woman who cannot produce fertile eggs, but who can carry an embryo to term, to have children. In this procedure an egg donor donates eggs, which are then fertilized and the resulting embryos are implanted into the uterus of an intended female parent. Children born to intended parents using egg donation are not genetically related to the intended female parent, even though she carries them to term. Egg donation may also be used when an intended male parent has available sperm, but the couple has neither viable eggs nor a healthy uterus in which to carry a child. In that instance, the couple then finds two separate women, one who donates an egg (an "egg donor") and the other who carries the embryo(s) created from the donor egg and an intended parent's sperm in her uterus (a "gestational carrier"). The children born are genetically related to only one of the intended parents and born to a third party, *i.e.* the gestational carrier, who has no genetic relation to the children. *See, e.g., Raftopol v. Ramey*, 12 A.3d 783, 793 (Conn. 2011) (in a gestational surrogacy matter, finding subject matter jurisdiction for a judicial declaration of parentage of the genetic father's male partner).

Similarly, sperm donor gestational surrogacy involves donated sperm, combined with the egg of one woman, with the resulting embryo carried by

another woman. One woman or both may be the intended parents. In some circumstances, both egg and sperm are donated with an individual or couple as the intended parent or parents. *See, e.g. S.N. v. M.B.*, 935 N.E.2d 463, 471-472 ¶¶ 33-34 (Oh. App. 2010) (enforcing surrogacy agreement between intended parent who used egg and sperm donors and gestational carrier).[6]

Children, however brought into the world, have a paramount interest in the security and integrity of their families. Amici encourage this court to craft a ruling that protects all children born of gestational surrogacy, not just those of the genetic intended parents, but also those intended parents in which a gamete is provided by either a donor egg or donor sperm.

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[6] The predominant approach for determining parentage in gestational carrier cases turns on the intent and conduct of the parties as expressed in a gestational carrier agreement. *Johnson v. Calvert,* 851 P.2d 776, 782 (Cal. 1993) pioneered intent as the critical determinant for parentage in a dispute between a gestational carrier and the intended parents. In determining parentage, *In re Marriage of Buzzanca,* 72 Cal. Rptr. 2d 280, 282 (1998), found intent dispositive where the child was procreated because a medical procedure was initiated and consented to by the intended parents. In *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d at 1138, the Massachusetts Supreme Judicial Court looked to whether the intended parents and gestational carrier agreed with the orders sought as the basis for a court protocol for pre-birth parentage determinations in gestational surrogacy cases. The intent of the gestational carrier not to be a parent, as expressed in a gestational carrier agreement, was a basis for the Maryland Court of Appeals to rule that the gestational carrier not be listed on the child's birth certificate. *In re Roberto d.B.*, 923 A.2d 115, 272 (detailing the agreement), 278-79 & 294-95 (court may order birth certificate with no mother listed). (Md. 2007). The clearly stated intent and agreement of the parties as to their roles and as to parentage was also conclusive in favor of the intended parent in *S.N. v. M.B.*, 935 N.E.2d 463, 471 ¶ 33 (Oh. App. 2010). In *Raftapol*, 12 A.3d at 793, the Connecticut Supreme Court held that a man who was the domestic partner of the genetic father/intended parent and who was also a party to a gestational carrier agreement could be declared a parent without adopting the children.

B. Existing Maine Law Empowers the District Court to Determine Parentage in Gestational Surrogacy Cases and in the Present Case to Find Exclusive Parentage in the Nolans.

The Uniform Act on Paternity ("the paternity statute"), 19-A M.R.S. § 1551 et seq., accords the District Court "jurisdiction over an action to determine parentage." 19-A M.R.S. § 1556. The Nolans' claim requests such a determination, and also invokes the District Court's power to issue declaratory relief as to who Desmond's parents are and are not. *See* 14 M.R.S. § 5953 ("Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations…."); 14 M.R.S. § 5957 (enumerations in Act do "not limit or restrict the exercise of the general powers conferred in section 5953 in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty"). Finally, if this Court decides that the paternity statute is an inadequate or inappropriate vehicle for resolving parentage determinations for children born with the assistance of a gestational carrier, then the District Court's equitable powers in matters related to "determin[ing] parentage" provide the authority for the requested orders and relief. *Cf. Stitham v. Henderson*, 2001 ME at ¶ 16 & n. 5, 768 A.2d at 603 (District Court is court in which "sensitive family law matters should ordinarily be resolved").

1. The District Court Correctly Determined that Robert Nolan is Desmond's Father But Erred in Failing to Exclude Jeffrey LaBree as Desmond's Father.

Desmond's birth by a married woman triggered a legal presumption that Kristin's husband Jeffrey is his father. MRE 302.[7] *See also* 19-A M.R.S. §1552 (obligations of father to child born during extant marriage).[8] This presumption is rebuttable, and "paternity may be determined" on the complaint of the alleged father, or of the mother[9], among others. *Id.* § 1553. Claims for parentage are cognizable even when the woman who gave birth, as here, is married to a different man than the alleged father. *Stitham v. Henderson*, 2001 ME 52, ¶11, 768 A.2d 598, 602. *See also Denbow v. Harris*, 583 A.2d at 207 ("The Uniform Act on Paternity allows a paternity action even when the child is born to a mother who is married.").

Not only is the paternity presumption rebuttable, but critically for this case, the paternity statute allows parents to acknowledge their children voluntarily. 19-A M.R.S. § 1616. Even apart from genetic facts then, the

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[7] *See e.g. Denbow v. Harris*, 583 A.2d 205, 206-7 (Me. 1990) (distinguishing presumptions of paternity and Maine Rule of Evidence 302).

[8] The presumption of legitimacy in R 302 is not applicable where reliable blood or tissue tests establish that the presumed father is not the bio parent. *Stitham*, ¶ 14, 602.

[9] In the unusual situation in which a Gestational Carrier believes she is carrying her own genetic child, she would thus be able to file a complaint to establish parentage.

existing statute allows a person who intends to and consents to raise a child to be treated in law as the natural parent. [10]

The Judge ruled that the paternity statute applied, at least in part, and correctly concluded that Robert Nolan had "produced clear and convincing evidence that he is Desmond's father, [19-A M.R.S.] § 1562." R.A. 6.

Rather than compel a blood or tissue test, or "DNA testing" R.A. 46, the Court prudently relied on other admissible "evidence relating to paternity" apart from such tests. *Id.* § 1563.[11] This evidence included an affidavit from the treating IVF physician as to the genetic contributors and medical procedure leading to conception of the embryo and implantation of the embryo in Mrs. LaBree, as well as the "medical certainty" that Desmond was the child of Celia

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[10] After 60 days, that acknowledgement is final, and may be challenged only on the basis of "fraud, duress or material mistake of fact with the burden of proof on the challenger." 19-A M.R.S. § 1616. At least one court has analogized the voluntary acknowledgement procedure in a paternity statute to a gestational carrier agreement in which an intended mother who used an egg donor carrier expressed her clear intent to cause the birth of a child and raise it as her own. *S.N. v. M.B.*, 935 N.E.2d 463, 470 ¶ 28 (Oh. App. 2010).

[11] Pursuant to 19-A M.R.S. § 1563, this other evidence includes, "but is not limited to:

A. An expert's opinion concerning the timing of conception;
B. Evidence of sexual intercourse between the mother and alleged father at a possible time of conception;
C. Medical, scientific or genetic evidence relating to the alleged father's paternity of the child based upon tests performed by experts; or
D. The statistical probability of the alleged father's paternity based upon the blood or tissue tests."

Id. § 1563 (1) (A-D).

and Robert Nolan. R.A. 13. The testifying parties agreed with rather than disputed these facts. *See supra* Statement of Facts; R.A. 6-7.[12]

The Judge erred, however, in failing to apply the same clear and convincing evidence to declare Jeffrey Labree's non-paternity. Rather than exclude Jeffrey LaBree as Desmond's father, 19-A M.R.S. § 1564 (exclusion of putative father), the Court's Orders continue to include Jeffrey LaBree as though he is someone legally connected to Desmond. *See, e.g.*, R.A. 9 (Amended Parental Rights and Responsibilities Order). Given the "clear and convincing evidence" of Robert Nolan's paternity, the Court should have expressly excluded Jeffrey LaBree as a father so that there is no doubt that Robert Nolan exclusively occupies that role in Desmond's life.

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[12] Amici cannot strongly enough urge this Court to clarify that 22 M.R.S. § 2761 (3-A) and/or the District Court's power to "determine parentage" and/or the excerise of the District Court's equity jurisdiction, *see infra*, allows parentage determinations to be made before the birth of the child. In the ordinary case involving a gestational carrier agreement, the affidavit testimony of the treating physician should be adequate for determining the genetic contributions of the intended parents or any sperm or egg donors prior to birth. *Compare Culliton*, 756 N.E.2d at 1139-1141 (establishing protocol). If this Court determines that paternity determinations can be made only after birth, then Amici urge the Court to permit the parentage determination to be made prior to the child's birth and to become effective immediately upon the child's birth.

2. The District Court Erred by Determining that Kristin LaBree, Rather than Celia Nolan, is Desmond's Mother.

a. The Birth Registration Statutes Do Not Establish an Irrebuttable Presumption of Maternity in the Birth Mother.

The Court below found that a statute governing birth registration vests legal maternity in the woman who gives birth to a child. R.A. 6. That statute provides:

> For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise determined by a court of competent jurisdiction prior to the filing of the birth certificate. If the mother was married at the time of either conception or birth, or between conception and birth, the name of the husband must be entered on the certificate as the father of the child, unless paternity has been determined otherwise by a court of competent jurisdiction.

22 M.R.S. § 2761 (3-A).

The District Court erred. The charge of the State Registrar of the Office of Data, Research and Vital Statistics is to prepare birth records that accurately reflect the facts of a child's parentage. 22 M.R.S. § 2761. Contrary to the District Court's understanding, the birth certificate statute cited does not establish a legal presumption of maternity. *See, e.g. Raftopol*, 12 A.3d at 789 n. 17; *Culliton*, 756 N.E.2d at 1138 n. 9. Instead, it captures, records and reflects the information provided to it by hospitals, other providers, or by court orders.

Even as a factual presumption, the stated presumption is rebuttable. The cited statute expressly acknowledges that someone other than the birth mother can be designated as the mother "prior to the filing of the birth

certificate" via a court order. Moreover, since vital records are a recording of facts, they "may be altered or amended" in accord with department regulations even after the initial filing with the Office of Data, Research and Vital Statistics. 22 M.R.S. § 2705. The Department's regulations specifically authorize correction as to the "names of parents" on birth certificates.[13] 10-146 CMR ch. 2, § 5 (C)(1). Just like *before* the initial registration, a "court order" provides the documentation required *after* registration to substantiate a correction on a birth certificate when the order "references the specific record to be amended and the specific changes to be made." 10-146 CMR ch. 2, § 5 (C)(4)(e). S*ee also* 10-146 CMR Ch. 2, § 2 (A) (4). ("State Registrar shall evaluate all applications and evidence submitted in support of any alteration, correction, completion or other amendment and shall approve the requested change when supported by appropriate evidence.")[14]

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[13] An "amendment" is a change "at any time after registration" of "any item" on a birth record. 10-146 CMR ch. 2, §1 (C) and a "correction" is "the striking out of any errors" and "substitution of the correct information." *Id.* §1 (G). The parents themselves can apply to correct the birth certificate—including as to the "[n]ames of [p]arents" *Id.* § 5(c)(1)(a). The Registrar approves changes "supported by appropriate evidence." *Id.* § 2(A)(4).

The regulations also devote an entire section to adding or deleting a father's name on the birth certificate based on either a court determination of or voluntary acknowledgement of paternity. *See* 10-146 CMR ch. 2, § 9.

[14] The Judge noted that the birth registration statute refers to the maternity determination being made "prior to the filing of the birth certificate." R.A. 45. The timing of the Nolans' request should not block relief where both parentage, and thus birth records, are subject to change by judicial order. The birth registration statute implicitly allows judicial determinations not only before birth registration, but before the birth of the child. These provisions simply underscore the District Court's power to "determine parentage" at any number of times. In addition, no attempt at "legitimation" was required, nor would it have been effective, where the intended and genetic parents are

When counsel requested the Court to issue an order to the Office of Data, Research and Vital Statistics directing changes in Desmond's birth certificate, the Court responded, *inter alia*, "The Legislature should act before I do." R.A. 47. But the Legislature has acted. It has already authorized the Registrar to make changes to the identity of a child's parents in order to maintain accurate records. In addition, the legislature has empowered the District Court to "determine parentage," and to determine both maternity and paternity "for purposes of birth registration." 22 M.R.S. § 2761 (3-A). If the Court had used its statutory or equitable power to declare parentage in accord with the gestational carrier agreement and uncontradicted evidence of intent and conduct of the parties, then either the Judge could have directed an order to the Office of Data, Research and Vital Statistics designating a change in Desmond's parentage or the parties could have taken their orders of parentage and non-parentage to the Office of Data, Research and Vital Statistics for correction of the birth in accord with department procedures.

In short, this statute provides no guidance as to who the legal "mother" (or parents) is in a gestational surrogacy case. As this Court observed in *Stitham v. Henderson*, "historically, the concept of a 'maternity test' was rarely discussed because the biological mother was, by definition, present at the birth of the child. Given advances in genetics, that assumption will not always hold." *Id.*, 2001 ME 52 ¶ 25 n. 14, 605 n. 14 (Saufley, J., concurring). This is such a case.

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already married to one another. *Compare* R.A. 7.

b. The District Court's Power to Determine Maternity.

The District Court's erroneous interpretation of the birth registration statute clearly constrained its otherwise applicable power to "determine parentage," including maternity. If the District Court had properly understood its power, it could only have concluded that Celia Nolan is Desmond's mother and not Kristin LaBree. The same evidence that conclusively rebutted Jeffrey LaBree's presumed paternity, as well as the contractual agreement and the parties course of conduct in reliance on that agreement, would similarly rebut Mrs. LaBree's maternity and establish Mrs. Nolan as Desmond's mother.

One way of understanding the District Court's power, as appellants set forth below and in this Court, is that the Judge could have construed the paternity statute in a gender neutral fashion in order to avoid any constitutional infirmity flowing from a legal system in which men may prove (and disprove) paternity but which allows women no opportunity to prove (or disprove) maternity.[15] *See* Appellants Br. at 17-19. This Court has previously construed the paternity statute to avoid constitutional problems of a different sort. *Johannesen v. Pfeiffer*, 387 A.2d 1113, 1114-1115 (Me. 1978). *See also In re Stubbs*, 141 Me. 143, 147, 39 A.2d 853, 854-55 (Me. 1944) (where statute susceptible to two interpretations, court should adopt interpretation which would sustain its constitutionality). In the gestational surrogacy context, courts have begun addressing the limitations of the gendered language in paternity statutes by construing them to allow claims for maternity or to prove non-

[15] The statute speaks in terms of "paternity" except for clarifying the District Court's jurisdiction "to determine parentage."

maternity. *See, e.g., In re Roberto d.B.*, 923 A.2d 115, 124-125 (Md. 2007)(state sex discrimination prohibition requires paternity statute to be "construed to apply equally to both males and females"); *T.V. v. New York State Dep't of Health*, 929 N.Y.S.2d 139, 147 (Sup. Ct., App. Div. 2d Dept., 2011) (gendered terms in paternity statute should be construed to include claims for maternity). *But see cf. In the Matter of the Parentage of a Child by T.J.S and A.L.S.*, 16 A.3d 386, 392-393 (N.J. Super. Ct., App. Div.) (allowing parentage order when both of the intended parents are genetic parents, but no equal protection violation where parentage statute recognizes parental status for infertile husband (involving use of donor sperm) but not infertile wife (involving use of donor eggs)), *rev. granted* 23 A.3d 935 (N.J. 2011).

Alternatively, the District Court could have resorted to its well-established equitable powers to determine parentage – both paternity and maternity. Amici recognize that the District Court is not a court of general equity jurisdiction. 4 M.R.S. § 152; *Boyer v. Boyer*, 736 A.2d 273, 277 (Me. 1999). Yet, the District Court possesses equitable jurisdiction to address issues otherwise within its jurisdiction but for which there is no adequate remedy at law. For example, the District Court's "authority to act in equity regarding parental interests" and establish de facto parenthood is expressed in, but not confined to, those statutes addressing parental rights and responsibilities, *C.E.W. v. D.E.W.*, 2004 ME 43, ¶ 11, 845 A.2d. 1146, 1151 (2004) (equitable authority for de facto parenthood tied to 19-A M.R.S. §1653). In the same vein, the statutory power to "determine parentage" implies a

correlative equitable power to determine parentage when the literal terms of the paternity statute do not apply. *See also Roussel v. State*, 274 A.2d 909, 921-22 (Me. 1971) (equity petition is proper basis for court to adjudicate legal right to custody of a child).

The existence of a comprehensive statutory scheme for "parentage" and "paternity" does not vitiate the court's equitable powers to act in the child's best interests in appropriate cases. In *Harmon v. Emerson*, 425 A.2d 978 (Me. 1981), a divorce case, this Court made clear that even in areas in which courts rely solely on statutory authorization for their jurisdiction over matters, "[t]he trial judge who is asked to act as a wise, affectionate, and careful parent to do what is best for the interest of the child must be held to be invested with broad discretion." *Id.* at 983 (internal quotation omitted). This Court elaborated, "Once the Legislature has generally delegated to the judiciary the performance of the dispute-resolution function in the area of domestic relations, it is the responsibility of the judiciary to determine how that function may best be carried out within the intent of the legislative mandate." *Id.* at 983-84.

Assuming for the sake of argument that the Uniform Parentage Act is inadequate to address maternity (or paternity) claims, then the parties here have no adequate remedy at law because no statute addresses their situation, *i.e.*, that of establishing who is and is not a mother (or father) in a case of gestational surrogacy, and the District Court may exercise its equity jurisdiction as circumstances require.

The Court clearly understood that it had equitable jurisdiction insofar as it denominated Celia Nolan a "de facto mother," an equitable appellation. While the Nolans did not assert equity in their original pro se complaint, their counsel raised equity repeatedly at the evidentiary hearing. *See* Statement of Facts, *supra*. When exercising its equity jurisdiction, the District Court can determine parentage in a gestational surrogacy matter.[16] *See Littlefield v. Adler*, 676 A.2d 940, 942 (Me. 1996) (citations omitted) ("The power of equity is broad and flexible. Equitable remedies may be fashioned to meet the needs of the parties in a particular case."). *See also* Robert Treat Whitehouse, *Equity Jurisdiction Pleading and Practice in Maine* § 544 (1900) ("[O]ne of the most characteristic … features … of equity [is] that it may vary its decrees indefinitely and adapt them to all the requirements of any particular case."); *Levasseur v. Dubuc*, 229 A.2d 201, 204 (Me. 1967) (quoting 27 Am. Jur. 2d, *Equity* § 103) ("'The power of equity is said to be coextensive with the right to relief; it is as broad as equity and justice require.'"); *Robinson v. Clark*, 76 Me. 493, 495 (1884) (quoting Pomeroy, Equity Jurisprudence § 109) ("'There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all parties.'").

In addition to invoking the District Court's equitable power, the Nolans' Complaint specifically included a request for a declaratory judgment that only

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[16] Other states have utilized this same approach. *See, e.g. Culliton*, 756 N.E.2d at 1139 (Mass. 2001) (using equity to establish parentage and "furnish[] a measure of stability and protection to children born through such gestational surrogacy arrangements.").

the Nolans are Desmond's parents. All of the parties consented to and supported the Nolans' request. These declarations fall squarely within the District Court's power under the Maine Declaratory Judgments Act, *i.e.* declarations regarding the "rights, status and other legal relations" between the parties pursuant to the law and their agreement and course of conduct in reliance on that agreement. 14 M.R.S. §5953. *See also Hodgdon v. Campbell*, 411 A.2d 667, 669 (Me. 1980) (citations and quotations omitted) (the Maine Declaratory Judgment Act is remedial in nature and should be liberally construed to effectuate its purpose); Horton and McGehee, *Maine Civil Remedies* § 3-2(a) (4th ed. 2004) ("Provided the prerequisites of a controversy are present and provided declaratory would serve a purpose by resolving the controversy or uncertainty, a declaratory judgment may be rendered on almost any subject.").

c. Nothing Bars The Use of Equity for the Requested Declarations of Parentage and Existing Policy Supports the Nolans' Request.

There is no bar to the exercise of equity or to the issuance of declaratory relief in these circumstances. *See State v. Dyer*, 371 A.2d 1079, 1083 (Me. 1977) ("Proper judicial discretion is that which is guided and controlled, in the light of the facts and circumstances of each particular case, by the law and justice of the case, subject only to such rules of public policy as may have been established for the common good.")

While the District Court suggested that the parties should go to states that "authorize" these types of arrangements, R.A. 52, the fact that there is no

Maine statute on reproductive technology is no basis for inferring a public policy against gestational surrogacy. *See Roberts v. Stevens*, 24 A. 873, 876 (Me. 1892) (absence of statute or decision is not basis to infer violation of public policy). *Compare J.F. v. D.B.*, 879 N.E.2d 740, 741-742 (Ohio 2007) (no public policy violated by entering surrogacy contract).[17] The question for the court is whether existing Maine law – statutory and equitable - is capacious enough to address these circumstances. As demonstrated above, it is.

The amendments to the paternity statute providing for voluntary acknowledgement of paternity and parental responsibilities regardless of genetics cogently express this policy. 19-A M.R.S. § 1616. In addition, this Court has protected children's interests by sanctioning the use of long-standing equitable powers and the *parens patriae* duty to protect children to establish de facto parenthood where existing statutes fail to address the realities of a child's family relationships. *See, e.g.*, *C.E.W. v. D.E.W.*, 2004 ME 43, ¶¶ 11-12, 845 A.2d 1146, 1151 (2004). In a similar vein, this Court has construed the adoption statutes to authorize joint adoptions and thus avoid a result contrary to the public interest of encouraging families to undertake the daunting work of fostering and adopting children. *In re Adoption of M.A.*, 2007 ME 123, ¶¶ 30-31, 930 A.2d 1088, 1098 (Me. 2007).

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[17] Courts in many jurisdictions routinely step in to define the familial relationship between the child and the adults who intend to be and assume legal responsibility for the child they created, even without specific legislation involving gestational carrier agreements. Diane S. Hinson & Maureen McBrien, *Family Advocate*, ABA Section of Family Law, volume 34, No. 2 Fall 2011, pp. 32-36.

The requested relief would serve Desmond's interests. A judicial declaration would benefit Desmond by establishing who his parents are and are not, and allow his parents to obtain an accurate birth certificate. It would ensure his health needs are met through accurate insurance coverage as the legal dependent of the Nolans, and also allow him to obtain identity documents like a social security card and a passport so that he can travel with his parents. Absent a declaration of their respective statuses—parentage in the Nolans and non-parentage in the LaBrees—the parties remain bound in a wide-reaching legal relationship to each other and to Desmond, and their respective legal rights and liabilities will remain unclear and could subject them to responsibilities to each other and for each others' actions. While not anticipated, should circumstances change with either couple, legal actions for parental rights and responsibilities, or for child support, could follow. Should any of the four adults die, there would be questions about intestate succession, access to Social Security child's benefits and any number of other benefits that may, or may not, flow to Desmond, and might affect the LaBrees' own children. While not applicable to Desmond, it is certainly conceivable that a child could be born with medical complications, thereby complicating decision-making and insurance coverage at the most inopportune time. *See also Culliton*, 756 N.E.2d at 1139 (discussing negative consequences for child from absence of parentage orders). A declaratory judgment of status would clarify that no one but the Nolans are responsible for Desmond, and that neither the LaBrees nor Nolans nor anyone acting on their behalf could pursue any right, benefit, or

claim against one another based upon the LaBrees' assistance to the Nolans in having a child. Most importantly, when Desmond is old enough to understand, the declaration would unambiguously tell him who his parents are.

Indeed, without affording the relief requested by the Nolans, they and the LaBrees will be forced to remain in an undesired co-parenting relationship. It cannot serve Desmond's interests or Maine public policy to perpetuate these legal relationships that have no basis in the reality of how these families are living their lives and their involvement or non-involvement with Desmond. *See Von Schack v. Von Schack*, 2006 ME 30, ¶ 25, 893 A.2d 1004, 1011 (2006) (addressing Maine's marriage and divorce laws and stating that Maine has a "unique interest in assuring that its citizens are not compelled to remain in such personal relationships against their wills. . .").

In the same vein, the District Court's refusal to determine parentage in accord with the uncontradicted testimony of the parties' contract, intent and conduct implicates Desmond's constitutional liberty interest in maintaining the integrity of his family and his actual parental relationships. *See generally Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (acknowledging "freedom of personal choice in matters of marriage and family life"). *See also*, *e.g.*, *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987) (child's interest in continued companionship and society of parents is a cognizable liberty interest). While Desmond's family consists of his intended and actual

functioning parents and his sister, he has been thrust into an unwilling legal parent-child relationship with the LaBrees. [18]

Under the District Court's reasoning, children born through gestational carrier arrangements are thus saddled with unwanted and, as detailed above, problematic legal relationships with those carriers (and their spouses) as well as with a compromised legal status and potentially undermined protections vis-à-vis the child's actual parents. Not only is this a unique burden for children born through ART, but it also effectively "dismember[s]" the child's family. *See Stanley v. Illinois*, 405 U.S. 645, 658 (1972). In *Stanley,* the constitution compelled recognition of an extant family relationship that authorities failed to acknowledge. *Id.* at 651-52 (invalidating a state statute that excluded non-marital fathers as their children's custodians after the mother's death).[19] This

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[18] The State must be exceedingly cautious about interfering with the parent-child relationship. *See e.g., Santosky v. Kramer*, 455 U.S. 745, 753-754, 758-759 (1982); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 862-863 (1977); *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 535-536 (1925); and *Meyer v. Nebraska,* 262 U.S. 390, 399-402 (1923).

[19] Amicus AAARTA's position statement in support of a child's right to have his or her genetic and intended parents be declared as the child's legal parents immediately upon his birth is detailed on its website. *See* American Academy of Adoption Attorneys, *AAAA Position on Children's Rights in Adoption*, http://www.adoptionattorneys.org/information/children_rights.htm (last visited Jan. 9, 2012). In particular, the statement notes that "the rights of children in their family relationships are at least as fundamental and compelling as those of their parents," *citing In re Bridget R.*, 49 Cal.Rptr.2d 507, 524 (Cal. App. 1996), *review denied*, Cal. Sup. Ct. (1996), *cert. denied,* 519 U.S. 1060 (1997), *cert. denied*, 520 U.S. 1181 (1997). Children's rights can also be viewed as more compelling than those of the parents because they "comprise more than the emotional and social interests which adults have in family life; children's interests also include the elementary and wholly practical needs of the small and helpless to be protected from harm and to have stable and permanent

Court should interpret the existing statutes and avail itself of its equity power to avoid such a constitutional infirmity in the present case.

CONCLUSION

For all of the above-stated reasons, Amici respectfully request that this Court reverse the errors cited by judicially declaring parentage in the Nolans and non-parentage in the LaBrees, order the Office of Data, Research and Vital Statistics to change Desmond's birth certificate in accord with these orders, and further order the District Court Department to develop a protocol for handling pre-birth orders in gestational surrogacy matters.

Respectfully submitted this 11th day of January, 2012.

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homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring." *Id.*

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