MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Court 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 DISTRICT COURT

BRIEF OF *AMICUS CURIAE* MAINE ATTORNEY GENERAL

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Attorney General is a constitutional officer with the discretion, "in the absence of some express legislative restriction to the contrary, [to] exercise all such power and authority as public interests may, from time to time require, and [to] institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights." *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 558 (Me. 1973) (emphasis omitted). The Court has invited the Attorney General to file a brief as *amicus curiae* on the following issue:

> Whether following a surrogacy arrangement, the District Court has power to declare the parentage of both genetic parents to the exclusion of the gestational carrier and her spouse.

SUMMARY OF ARGUMENT

A District Court has the power, pursuant to Maine's Declaratory Judgments Act, to declare the rights, status, and legal relations of individuals, provided that the court has jurisdiction over the subject matter. As District Courts have jurisdiction over matters of parentage, and Maine law does not otherwise prohibit parentage actions following surrogacy, a District Court may issue a judgment declaring the genetic parents' parentage to the exclusion of the gestational carrier and her spouse.

Moreover, the absence of the Department of Health and Human Services' Office of Data, Research, and Vital Statistics (the "Office") from a proceeding seeking a declaration of parentage does not deprive the District Court of the power to act. The Office's role in relation to adjudications of parentage is purely a ministerial one, confined to conforming a birth record to the Court's judgment, and thus the Court need not join the Office as a party.

ARGUMENT

I. The Declaratory Judgments Act Authorizes the District Court to Declare Parentage Following a Surrogacy Arrangement.

The appellants here seek a declaration of parentage: a judicial determination of the legal status of and relations between appellants, their genetic child, and the gestational surrogate and her husband. It is undisputed that Maine law provides no express procedural vehicle for obtaining such a declaration following a birth by surrogacy. The absence of relief specifically

tailored to appellants' circumstances does not, however, bar the declaration they seek in the District Court. As this Court held under similar circumstances in *Johannesen v. Pfeiffer*, 387 A.2d 1113 (Me. 1978), Maine courts enjoy broad power under the Declaratory Judgments Act to declare the status and relations of parties in cases where, as here, other provisions of the law do not afford a means to do so. The District Court thus erred as a matter of law in concluding that it lacked the power to grant appellants' requested relief.

The Declaratory Judgments Act grants "[c]ourts of record within their respective jurisdictions" the "power to declare rights, status and other legal relations whether or not further relief is or could be claimed."[1] 14 M.R.S. § 5953. The basic goal of the Act is to provide "a more adequate and flexible remedy" for matters within a court's jurisdiction. *Colquhoun v. Webber*, 684 A.2d 405, 411 (Me. 1996). As this Court has explained, the Act "is remedial in nature and should be liberally construed to provide a simple and effective means by which parties may secure a binding judicial determination of their legal rights, status or relations under statutes and written instruments where a justiciable controversy has arisen." *Hodgdon v. Campbell*, 411 A.2d 667, 669 (Me. 1980).

Two requisites must be satisfied in any suit for declaratory judgment. First, a plaintiff seeking declaratory relief must establish that the court has

[1] Note that the Act authorizes declarations "either affirmative or negative in form and effect." 14 M.R.S. § 5953. In the present case, appellants seek a declaration *both* affirmative and negative in effect, i.e., that they are the parents of their genetic child and that the surrogate and her husband are not.

jurisdiction over the matter and demonstrate the existence of a "justiciable controversy." *Hodgdon*, 411 A.2d at 670. Second, the declaratory judgment action must either "serve some useful purpose" or "present[] an issue of public importance." *Perry v. Hartford Accident & Indem. Co.*, 481 A.2d 133, 136 (Me. 1984).

These requirements are met in an action for a declaration of parentage by genetic parents following surrogacy. Maine law contains broad provisions for paternity actions, *see* 19-A M.R.S. § 1551 et seq., and provides for determinations of maternity in certain circumstances, *see* 22 M.R.S. § 2761(3-A) (allowing determination of maternity "by a court of competent jurisdiction prior to the filing of the birth certificate"). By statute, moreover, the District Court has jurisdiction over actions to determine parentage.[2] 19-A M.R.S. § 1556. Conversely, there is nothing in Maine law foreclosing judicial adjudications of parentage following surrogacy. *See Kendrick v. Everheart*, 390 So.2d 53, 57-58 (Fla. 1980) (noting, in the course of holding that a putative father could bring a declaratory judgment action to adjudicate paternity, that the existing paternity statute did not explicitly preclude such an action).

The requirements concerning justiciability and the usefulness or importance of the case are also easily satisfied. These requirements largely converge upon an inquiry into whether the controversy at issue is "real," i.e., whether "the plaintiffs 'set forth a claim of right or obligation buttressed by a sufficiently substantial interest to warrant judicial protection.'" *Help-U-Sell,*

[2] It is also beyond dispute that a District Court may grant declaratory relief in appropriate cases. *See Randlett v. Randlett*, 401 A.2d 1008, 1010 (Me. 1979).

Inc. v. Me. Real Estate Comm'n, 611 A.2d 981, 983 (Me. 1992) (quoting *Allstate Ins. Co. v. Lyons*, 400 A.2d 349, 351 (Me. 1979)). An action for a declaration of parentage implicates numerous rights and obligations underpinned by the sort of interests that regularly and without examination are found to warrant judicial protection, not only in paternity actions under existing law but also in a multitude of other provisions of Maine's statutes and regulations. Some of these rights and obligations are satisfactorily addressed by a declaration of de facto parentage, as was entered in this case, but not all are[3] – nor does de facto parentage do anything to clarify the rights and obligations of the surrogate and her spouse.[4] There can thus be little question that a parentage action under these circumstances presents a justiciable controversy and serves the useful purpose of clarifying the legal status of the parties. Moreover, actions such as this one unquestionably present issues of public importance. As one court has noted, "no one can deny that assisted reproductive technology implicates an essential matter of public policy – it is a basic expectation that our legal system should enable each of us to identify our legal parents with reasonable promptness and certainty." *Raftopol v. Ramey*, 12 A.3d 783, 785 (Conn. 2011).

The suitability of the Declaratory Judgments Act as a vehicle for determining parentage is further confirmed by the Court's decision in

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[3] To cite one example, there is no clear right of inheritance between a child and a de facto parent.

[4] Absent removal from the birth certificate following a conclusive determination of the genetic parents' parentage, the surrogate and her husband would face considerable uncertainty. Among other things, they could be pursued and held liable in child support actions, *see* 19-A M.R.S. § 2101 et seq., and the child would be entitled to inheritance should they die intestate, *see* 18-A M.R.S. § 2-101 et seq.

Johannesen, a case more than passingly similar to the one at bar. There, the putative father of a child born out of wedlock filed an action seeking adjudication of paternity to obtain, among other things, custody of and visitation rights with his child. *Johannesen*, 387 A.2d at 1113. The Superior Court dismissed his action, apparently on the ground that the Paternity Act, as it existed at the time, only allowed for paternity actions by a child, the child's mother, or the public agency chargeable with support of the child. *Id.* at 1114. In other words, as here, the lower court had jurisdiction over the subject matter but perceived no power to act absent explicit statutory authorization. The Law Court disagreed, holding that the father's action could proceed under the Declaratory Judgments Act because he had "at least one right which would be enhanced by a declaration of paternity."[5] *Id.*

In allowing a parentage action to proceed under the Declaratory Judgments Act, *Johannesen* is not an outlier. Indeed, as changes in society have outpaced legislative revision of family law statutes, the courts of numerous states have allowed individuals to pursue a declaration of parental status under declaratory judgment statutes of general application. *See, e.g.*, *T.V. v. N.Y. State Dept. of Health*, 929 N.Y.S.2d 139 (N.Y. App. Div. 2011) (genetic parents seeking declaration of parentage following birth by surrogacy); *Shineovich v. Kemp*, 214 P.3d 29 (Or. Ct. App. 2009) (former same-sex partner seeking declaration of parentage); *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005)

[5] The specific right to which the Court referred was the right to inherit from the child, but determinations of parentage plainly implicate many additional rights, such as the rights to custody and to participation in decisions concerning the child's upbringing and welfare.

(same); *Everheart*, 390 So.2d 53 (putative father seeking declaration of paternity); *Pritz v. Chesnul*, 436 N.E.2d 631, 635 (Ill. Ct. App. 1982) (same); *Slawek v. Stroh*, 215 N.W.2d 9 (Wis. 1974) (same); *A. B. v. C. D.*, 277 N.E.2d 599 (Ind. Ct. App. 1971) (same).[6]

For all of the above reasons, the Declaratory Judgments Act grants a District Court the authority necessary to make a declaration of parentage following a birth by surrogacy.[7]

II. The District Court's Power to Declare Parentage Does Not Require Joinder of the Office of Data, Research, and Vital Statistics.

In its findings below, the District Court suggested that it could not grant the requested relief absent joinder of the Department of Health and Human Services' Office of Data, Research, and Vital Statistics, which is the State entity responsible for creating, maintaining, and amending birth records. The District Court was mistaken; the law does not require joinder of the Office in order to declare parentage and effect a change in a birth record.

Rule 19 of the Maine Rules of Civil Procedure requires the joinder of all parties in whose absence "complete relief cannot be accorded among those

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[6] In considering the application of Maine's Declaratory Judgments Act, it is particularly appropriate to take into account authority from other states given the Act's intent to "make uniform" the law of the various states (as well as federal law) relating to declaratory judgments. *See* 14 M.R.S. § 5951.

[7] As the parties have argued, Maine's paternity statute, 19-A M.R.S. §§ 1551 et seq., may provide an additional basis for a District Court to act upon a complaint for determination of maternity. Though the statute is framed in terms of paternity, the parties suggest that it must be read in gender-neutral terms, pursuant to 1 M.R.S. § 71(7-A), to avoid constitutional shoals. However well-grounded this argument may be, the Court need not reach it, for the appeal may be resolved on non-constitutional grounds. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (applying prudential principle requiring avoidance of constitutional issues "if there is some other ground upon which to dispose of the case").

already parties." M.R. Civ. P.19(a). Manifestly, complete relief may be accorded in a parentage action without the participation of the Office. The Office's rules require that it accept court orders as evidence supporting an application for amendment of a birth certificate, 10-146 C.M.R. ch. 2, § 5(C)(4)(e), and, in cases of judicial determinations of paternity, the rules mandate entry or deletion of a father's name on the birth certificate in accordance with the court's determination, *id.* § 9. In either case, the Office's role is non-discretionary: it simply conforms the birth record to the court's order. Where an individual or entity has a solely ministerial role to play in the requested relief, joinder is not required. *See Gimbrone v. Stevenson*, 778 N.Y.S.2d 799, 801 (N.Y. App. Div. 2004). Were such not the case, anomalous consequences would follow; among other things, courts would be required to join the appropriate county register of deeds in every single property dispute. Such a result was surely not intended by the Advisory Committee when it drafted Rule 19.

Accordingly, the District Court's power to declare the parentage of the parties and cause the birth record to be amended was not contingent on the joinder of the Office of Data, Research, and Vital Statistics.

CONCLUSION

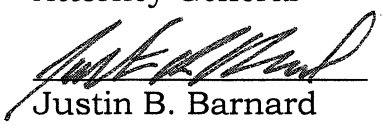
The Declaratory Judgments Act affords a District Court the authority to issue a judgment declaring the genetic parents' parentage to the exclusion of the gestational carrier and her spouse, and it need not join the Office of Data,

Research, and Vital Statistics to do so. Accordingly, it is the position of the Attorney General as *amicus curiae that* the District Court erred in concluding that it lacked the power to issue the requested declaratory judgment.

March 23, 2012

Respectfully submitted,

WILLIAM J. SCHNEIDER
Attorney General



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CERTIFICATE OF SERVICE

I, Justin B. Barnard, Assistant Attorney General, hereby certify that I have caused two copies of the foregoing brief of the Maine Attorney General to be served upon the attorneys listed below, by depositing those copies this date in the United States Mail, first-class postage prepaid, addressed for delivery as follows:

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