STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. PEN-11-393

ROBERT AND CELIA NOLAN

v.

KRISTEN AND JEFFREY LABREE

On appeal from the
Maine District Court
For Penobscot County, Bangor

BRIEF OF AMICUS CURIAE

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Statement of Amicus Interest

My amicus standing derives from my enduring academic interest in family law, and my particular interest in the legal issues surrounding "test tube babies", i.e. children conceived and born other than as a result of normal intercourse by means of a variety of assisted reproduction techniques (ART).[1] In addition, I have advocated for the adoption of a statute that would have anticipated and resolved the issue of this appeal.[2]

Preface

Because the Law Court's solicitation for amicus briefs requests argument on law only, I have not prepared statements of facts or of procedural history.

Issues Presented for Review

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.

Synopsis

What is difficult about the issue presented in this case is not whether our courts can and should determine and declare parentage for Assisted Reproduction Techniques children. Employing ART is legal, ART children are being born, and the law must serve the public's need. In the absence of something better from the legislature, our Declaratory Judgments Act offers an

adequately elastic procedure to enable the District Court to issue such decisions. The only substantive requirement is to acknowledge this evolution of human reproduction in our common law. The Law Court has engaged in such an accommodation several times, whenever there is good reason to do so and no reason not to.

The difficulty in this field is identifying which of the various contributors to the birth of such a child must be party to such a declaratory judgment action. The chart in the Appendix attached directly to this brief answers this question.

In this case the District Court had full authority to declare the intended father and mother the child's parents, and to declare the gestational mother and her husband not his parents. The District Court should have declared Celia Nolan the child's mother without concern for her *de facto* status. Given the court's focus on parental rights and responsibilities, it should expressly have terminated the child's right to inherit from any person other than the declared parents.

Although the Appellants filed their request for declaratory relief after the child was born rather than before birth or, obviously, before conception, I ignore the issue of their timing in the belief that the Law Court's decision need not be delimited by that qualification.

1. Definitions

The following are definitions for terms used in this brief.

Gamete: an egg or a sperm cell.

Zygote: a fertilized egg before attachment to the uterine wall.

Embryo: a zygote after attachment to the uterine wall; once a zygote becomes an embryo, the woman to whose uterus the embryo is attached is deemed pregnant.

Surrogate mother: a woman who becomes pregnant with an embryo that is the product of one of her own eggs. She is genetically related to the embryo. She has agreed to bear the child on behalf of another person, and not to claim parental rights to the child. For purposes of this brief the method by which she became pregnant makes no difference.

Gestational carrier: a woman who becomes pregnant with an embryo that is the product of another woman's egg. She is genetically unrelated to the embryo. Like a surrogate, she has agreed to bear the child on behalf of another person and not to claim parental rights.

Legal parent: a person with full parental rights and responsibilities as to a child by unambiguous operation of statute or by court decree.

2. The Fundamental Right to Parent

The constitutional ground for actions to determine the parents of ART children is solid: The right to produce and raise children is fundamental. Traditionally, this right was associated with marriage: "Marriage and

procreation are fundamental to the very existence and survival of the race."[3] But the importance of marriage to family has waned, so the Supreme Court has culled the issue of marriage from the fundamental right of parentage: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[4]

3. District Court Jurisdiction over Parentage Issues

Maine's District Courts have jurisdiction:

a. "Over an action to determine parentage"[5];

b. To issue declaratory judgments, and thereby to "declare rights, status and other legal relations."[6] This includes the authority to issue a judgment that "will remove an uncertainty"[7]—such as which of a variety candidates will be the parents;

c. To issue declaratory judgments about parental status: "A determination of parental status as a basis for asserting possible rights to custody or visitation is a proper subject for declaratory judgment."[8]

4. Why Not Simply Adopt?

The problem with adoption is four-fold.

a. The jurisdictional problem is one of timing and delay: The only Maine court empowered to grant adoptions is the Probate Court, which has

jurisdiction over alive persons and the estates of persons who have died, but not over persons-to-be.[9] Prospective ART parents who choose adoption as the method to determine their parental rights and responsibilities must wait until birth to file their petition for adoption,[10] which means that a new-born ART child may not have any legal parents until the adoption hearing has occurred and the petition granted. As the Appellants must have learned in this case, such hiatus is undesirable.

b. The constitutional problem is that, even if the Probate Court had the statutory authority to consider pre-birth adoption, its authority would nevertheless be confined to considering the best interests of the child, the only statutory basis the court has for approving adoptions.[11] This means that the judge would have to evaluate the prospective parents not only before birth but also, in many cases, before conception. Theoretically, the judge could deny the petition simply because he or she disapproved of the prospective parents—thereby barring them from becoming parents. Such judicial interference with the right to parent is at least unconscionable and, if it amounts to "unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," at most unconstitutional.[12]

c. Cost and Delay. Adoption proceedings require rigmarole—and substantial additional expense—that are inappropriate in ART parentage cases. For example, the adoption statute requires the Probate Court to "direct the [D.H.H.S.] or licensed child-placing agency" to investigate "whether the

proposed home is suitable for the child," to "request a background check for each prospective adoptive parent who is not the biological parent of the child," which check includes "a record of Maine conviction data," and to obtain the prospective parents' fingerprints.[13] None of this information has a bearing on whom to declare as an ART child's parents before the child is born—any more than it would if the intended mother bore the child herself.

4. Judicial policy. "The District Court is the forum where sensitive family matters should ordinarily be resolved."[14]

The issue of the private, inter-se exchange of the parenthood of children after birth, as against the child-protective policy of adoption proceedings, is discusses further in Section 8 of this brief below.

5. May Declaratory Judgment Actions Request Prospective Relief?

The answer is Yes because declaratory judgment actions are "necessarily anticipatory in character."[15] Furthermore, courts that issue declaratory judgments are authorized to grant "further relief based on a declaratory judgment whenever necessary or proper."[16] This means that they may direct the delivering hospital to declare the petitioners the parents on their birth registration documents. This interpretation of the Declaratory Judgment Act dovetails with our traditional statutory scheme: Paternity may be "raised in an action commenced during the pregnancy of the mother."[17]

6. How Prospective is "Prospective?"

But what about *before* pregnancy? Traditionally, conception has been an invisible mystery—some would say a spiritual process—and pregnancy has been fraught with uncertainty for the mother and child. Nowadays, however, the multitude of techniques that permits medical technicians to cause conception, and that protects both mother and child through the birthing process, renders pregnancy more an inevitable than a fantastical phenomenon and birth more a technological achievement.

This means that the traditional approach to parenthood—*don't worry about crossing the bridge until you're standing on it*—need not apply. Certainly, we could continue to await birth before declaring parental responsibilities, but there is no good reason to do so. Furthermore, getting the necessaries out of the way early avoids that difficult hiatus between birth and the court assignation of parental responsibilities. Given the paramount importance of providing children with parents, it is sensible to accelerate assigning parents to children.

It is also permissible to do so, because our Declaratory Judgment Act is elastic. Parties expressing the firm intent to produce a child through ART are requesting the court to "remove an uncertainty" that exists for the reason that there is no statutory guidance on the parentage of ART children. Removing that uncertainty benefits such children, who need to have parents to depend on not only from the moment of birth, but also pending the pregnancy, to address medical issues that may occur.

Nor is there any contravening provision in other Maine statutes. The Uniform Act on Paternity indicates that the "issue of paternity" may be "raised in an action commenced during the pregnancy of the mother."[18] Albeit that the UAP predates the era when pre-pregnancy conception and other ART complications became commonplace,[19] it implicitly recognizes the importance of determining parentage as early as possible.

Moreover, our birth records statute establishes *paternal* rights and responsibilities before birth: "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 [birth] certificate as the father of the child . . . ."[20]

The foregoing arguments ask the Court to infer modernity from obsolete—or at least incomplete—statutes. It is unfortunate that the legislature has failed to bring its statutes up to date. But that need not deter the Law Court from adapting our statutory schema to the public need.

Expecting Maine courts to intervene to modernize family law, as against the legislature's failure to amend outmoded statutes, has solid precedent. In *Beal v. Beal*[21] the Law Court addressed the fact that Maine's alimony statute rendered men ineligible for alimony. The Court ruled that, notwithstanding that the statute expressly extended alimony only women, the Equal Protection clause of Maine's Constitution implicitly extended that right to men: Sex discrimination may not "be justified by outdated sexual stereotypes concerning the respective roles of men and women."[22]

Likewise, in *Adoption of M.A.*,[23] the court expanded the Probate Court's statutory authority to grant adoptions to "a husband and wife jointly or to an unmarried person" by holding that the term "an unmarried person" implicitly includes "an unmarried couple."

ART declaratory judgment actions ask courts to do the same thing: to protect the Plaintiffs' fundamental right to parent notwithstanding the legislature's failure to amend its outdated statutes regarding parentage.

7. The Error Below

According to the Appellant's brief in this case, the District Court denied the intended mother the status of unqualified motherhood because Maine lacks a statute to determine maternity. The Court erred both procedurally and substantively.

Procedurally, it missed the point of declaratory judgments: The presence or absence of another statutory mechanism—here, adoption—to declare parenthood does not deprive the court of the authority to do so under the Declaratory Judgment Act. *See Berry v. Daigle*[24]: "A proceeding for declaratory judgment may be maintained even though an alternative remedy is available." Conversely, even if Maine has no statute by which to determine maternity, all that is required for a court to grant the Appellants the relief they sought in this case is that its "judgment or decree [would] . . . remove an uncertainty."[25]

The District Court also erred in its apparent belief that statutes are the sole repository of legal principles upon which courts may base their decisions.

Sometimes, all one needs are public policy and common sense. An example is the now-famous decision in *In re Marriage of Buzzanca.*[26] John and Luanne Buzzanca had contracted for a child with what I take to have been a gestational carrier. The embryo with which the carrier became pregnant was unrelated to either of the Buzzancas. After the child was born, they split up and John claimed he couldn't be saddled with responsibility for the child because he wasn't genetically related to her.

After struggling with inadequate statutes,[27] the court concluded:

> [T]he Legislature has already made it perfectly clear that public policy (and, we might add, common sense) favors, whenever possible, the establishment of legal parenthood with the concomitant responsibility. . . . [F]or all practical purposes John caused Jaycee's conception every bit as much as if things had been done the old-fashioned way.[28]

The public policies that favor actions like the Appellants' are both numerous and elementary. Those policies include:

1. the constitutionally protected freedom for people to raise families;

2. establishing parenthood early;

3. enabling persons to unburden themselves of their disabilities—in this case, persons with reproductive disabilities—by any legitimate means;

4. advancing the child's best interest by placing him or her with adults who are committed to raising the child as against those who would prefer not to;

5. not directing what adult women—here, the gestational carrier—may and may not do with their bodies;

6. providing people with equal legal protections and opportunities—in this case, providing a prospective mother with the same access to parenthood that the prospective father enjoys;

7. accommodating social changes when there's no reason not to.

These principles are so fundamental that the District Court should have inferred its authority to declare Celia Nolan the unconditional mother of Desmond. To be sure, such an inference involves an incremental expansion of common law and thus requires a degree of judicial activism. A minute degree: It takes only a small step to acknowledge a familial evolution that is already upon us and that deserves accommodation in our common law. The Law Court has previously provided a model for doing just that by acknowledging: men's right to alimony[29]; unmarried couples' right to adopt[30]; and *de facto* parents' right to legal parenthood.[31] The District Court could have followed the Law Court's lead. But trial judges are uncomfortable when they feel like pioneers, so we must rely on the Law Court once again to enlarge the law—for the benefit of many, at the expense of no one.

8. Child Swapping?

Maine's adoption statute reflects the public policy of protecting children by providing an elaborate mechanism for vetting prospective parents.[32] Declaratory judgment parentage actions such as the Appellants', brought without recourse to the adoption statute's precautionary modus operandi, arguably violate that public policy.

What negates that argument is another public policy: the abhorrence of eugenics. The government may not choose who may reproduce and who may not, or with whom. Absent extraordinary circumstances[33] an agreement between two consenting adults to reproduce is beyond the government's regulatory authority. The same is true of an agreement between three consenting adults—the essence of this case. So long as the parties have engaged in an arrangement concerning *reproduction*, the government may not intervene.[34]

In ART declaratory judgment actions, it is the sworn presentation of the parties that satisfies the court that their objective is reproduction and, therefore, that the provisions of the adoption statute do not apply.[35]

9. Who Are Necessary Parties?

The most difficult aspect of ART declaratory judgment actions is not their propriety. What is difficult is to determine who among a platoon of candidates needs to participate in the cases. For example: Would-be parents obtain sperm and eggs from anonymous donor sources, have a lab produce an embryo, and hire a doctor to implant the embryo in the womb of a gestational carrier—a woman who did not produce the egg and is genetically unrelated to the child-to-be. Here are the permutations:

1. The prospective parents have no genetic or physiological relationship to the child, so under our traditional family law statutes they have no standing to bring a suit for parentage except

through adoption, but there's no good reason why they shouldn't be parents. Consider the *Buzzanca* decision discussed above.[36]

2. The gestational carrier will be the birth mother and therefore, by statute, the female parent.

3. If she is married our statute presumes her husband to be the father.

4. The gamete donors are biologically responsible for the child so they have an identifiable interest in him or her, but probably don't want to exercise it and maybe can't even be identified for service of process.

5. The technician who introduced the sperm to the egg directly caused the conception and produced the zygote, but will prefer not to be considered a parent.

6. The physician or technician who inserted the zygote thereby caused the pregnancy, but will prefer not to be considered a parent.

7. And the delivering hospital, which is supposed to identify the parents upon birth, is caught in the middle.

To address these details I have prepared a chart identifying necessary parties. The chart is attached directly to this brief as the Appendix.

Certain persons or organizations may be excluded *ab initio*:

a. The chart reflects the fact that the delivering hospital need not be named as a party. Our Birth Records statute (22 M.R.S.A. § 2761) requires

hospital authorities to identify as the parents of the newborn(s) those persons identified as such by the order of "a court of competent jurisdiction prior to the filing of the birth certificate." The hospital's responsibility is unambiguous and compliance is mandatory, so there is nothing for the hospital to litigate.

b. The chart also reflects the fact that anonymous sperm and egg donors need not be named as parties. The holding in *Guardianship of I. H.*[37] applies just as well to ART parentage cases as it does to guardianships: "Our two reasons for this holding are the improbability of actually notifying an anonymous sperm donor of a guardianship petition and the fact that anonymous sperm donors wish to remain anonymous." The same reasoning extends to egg donors. See *Beal v. Beal*[38]: Sex discrimination may not "be justified by outdated sexual stereotypes concerning the respective roles of men and women."

c. For the same reason that anonymous donors wish to remain anonymous, physicians and technicians who perform ART procedures may be excluded for the reason that they have no imaginable interest in being named parties in such proceedings.

10. Explaining the Chart

There is a twofold purpose for commencing declaratory judgments to determine parentage: to identify who are the parents, and to exclude all who might raise a claim to, or be assigned, such status. Current Maine statutes employ a variety of terms to refer to mothers, fathers and parents. Until the

legislature clarifies who has claim to parentage and who does not, I propose litigating the interest of any person who could conceivably qualify as a parent under any existing Maine statute that purports to identify parents. Doubt is resolved by inclusion as a necessary party.

a. Intended parents are always parties.

b. Gestational carriers and surrogates are always parties, because they are "mothers" under our current statutes. *See, e.g.*, our statute on the recording of live births, 22 M.R.S.A. § 2761 (3-A): "the mother is deemed to be the woman who gives birth to the child." Likewise, the Probate Code's adoption provisions refer to "the biological mother of a child,"[39] a term that goes undefined in the Probate Code but that undoubtedly refers to a woman giving birth.

c. The husbands of gestational carriers and surrogates are always parties by dint of the birth records statute: "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 [birth] certificate as the father of the child, unless paternity has been determined otherwise by a court of competent jurisdiction."[40] "Conception" is not defined, so it could include *in vitro* fertilization. Thus any person who was the husband of a gestational carrier or surrogate at the *time of fertilization* must be named as a party, even if he and she divorced before the birth. Doubt about a carrier's or

surrogate's marital status at the time of "conception" must be resolved by inclusion of the man as a party.

d. Known egg donors and sperm donors must be included as parties because they qualify as "biological mothers" and "biological fathers" under a broad interpretation of the Probate Code.[41]

e. The husband of a woman who is a known egg donor but does not gestate need not be included as a party because (1) the woman does not give birth to the child so the birth records statute does not apply, and (2) he is not a biological father by any definition.

f. The wife of a man who is a known sperm donor need not be included as a party because no existing statute gives her a claim to the child even if he is deemed a "biological father."

11. The Issue of Inheritance

There is reason to doubt that the declaratory judgment in this case disposed of the child's right to inherit from the gestational carrier and her husband. This uncertainty arises by dint of this provision in our Child Protection statute: "An order terminating parental rights divests the parent and child of all legal rights, powers, privileges, immunities, duties and obligations to each other as parent and child, except the inheritance rights between the child and his parent."[42]

12. Applying the Foregoing Rules in *Nolan v. Labree*

The District Court had the authority to declare that the Nolans are the exclusive parents of the child, and to exclude the gestational carrier and her husband as parents.[43]

The court should not have awarded Mrs. Nolan *de facto* parental status. It should have declared her simply Desmond's mother.

The court correctly excluded both the gestational carrier and her husband from parental rights and responsibilities as to Desmond but it should have gone further and excluded them as Desmond's parents.

Because the court failed to do that, it should have excluded the child from any inheritance rights from the estates of the gestational carrier and her husband.

13. Issuing an Order to Change the Birth Certificate

The District Court refused to order a change in the birth certificate. This issue is admittedly beyond the scope of the Law Court's request for amicus briefs, but I step beyond the metaphorical border to offer this: The District Court should have exercised its power to grant "[f]urther relief based on [its] declaratory judgment" because doing so was "necessary or proper" to a judgment that "remove[d] an uncertainty" as to parentage.[44]

14. The Broader Issue

I urge the Law Court not to limit its decision in this case to the description of the issue in its Notice for Briefs (whether the District Court may "declare the parentage of both genetic parents"). Doing so will limit the benefit of the decision to opposite-sex couples who can generate gametes. This will leave an uncertainty about the decision's applicability to (1) opposite-sex couples who use gametes from someone other than themselves, and (2) same-sex couples. There is no good reason to provoke more appeals.

Respectfully submitted,

Date: March 23, 2012

John C. Sheldon
Maine Bar No. 88

Endnotes

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[1] My publications in this field include: *Anticipating the American Law Institute's Principles of the Law of Family Dissolution*, 14 M.B.J. 18 (1999); *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 Me.L.Rev. 523 (2002).

I am grateful to Attorneys Michael J. Levey and Peter L. Murray for helping me with this brief.

This brief is a revision of an article I began to prepare for publication after the Legislature failed, several years ago, to adopt legislation that would have helped our courts identify the parents of ART children. The issue proved too politically hot to handle and died in committee. That prompted me to write the article because ART and ART babies weren't going away, and I believed that Declaratory Judgment was both an available and appropriate remedy. My project waned as I turned my attention to other issues, and I never submitted the article for publication.

I had been mulling over the use of declaratory judgment actions in cases such as this since an experience I'd had in the Bridgton District Court several years earlier.

The Department of Health and Human Services had brought a child protection action against the parents of two children. From the start of the action the children had been in foster care. The case lingered for two years as the parents reluctantly participated in the Department's reunification plan. Finally the Department gave up waiting for the parents to come around and brought an action to terminate their parental rights and responsibilities (hereafter PRR).

I heard the evidence, which included testimony by the foster parents who, by this time, had decided to adopt the children. Impressed both by the parents' intransigence (that they had jeopardized the children was not contested) and the foster parents' qualities I ordered the parents' PRR terminated.

And there the case stopped. The Department dutifully opened an adoption proceeding in the Cumberland County Probate Court and, several months later, a Probate Judge permitted the same foster parents to adopt the children. I wasn't there, but I believe that that judge heard exactly the same evidence I had.

In any case involving children's placement, such a delay is unjustifiable, and it bothered me enough that I started contemplating the joinder, on my own motion, of just such a termination case with a declaratory judgment action. My research about declaratory judgments

led me to believe that they were appropriate for ART parentage cases as well.

[2] John C. Sheldon, *Some Good News, and Some Bad News, about the Uniform Parentage Act of 2002*, 18 M.B.J. 94 (2003).

[3] *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

[4] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

[5] 19-A M.R.S.A. § 1556.

[6] 14 M.R.S.A. § 5953.

[7] 14 M.R.S.A. § 5957.

[8] *Johannesen v. Pfeiffer*, 387 A.2d 1113, 1115 (Me. 1978).

[9] The adoption provisions of the Probate Code contemplate only the adoption of a "child," which is defined as "a person who is under 18 years of age." 18-A M.R.S.A. § 9-102 (d). See also 18-A M.R.S.A. § 9-201 (a), addressing "a child born out of wedlock."

[10] No adoption petition may be filed until there is a "minor child." 18-A M.R.S.A. § 9-304 (a-1): "Upon the filing of a petition for adoption of a minor child . . . ." Likewise, a petition for adoption must involve a "person," which term is defined as "an individual, a corporation, an organization or other legal entity." *Id.* §§ 9-301, 1-201 (29).

[11] *See, e.g.*, 18-A M.R.S.A. § 9-304 (f): "If the judge is satisfied with the identity and relations of the parties, of the ability of the petitioner to bring up and educate the child properly, considering the condition of the child's biological parents, and of the fitness and propriety of the adoption, the judge shall make a decree setting forth the facts and declaring that from that date the child is the child of the petitioner and that the child's name is changed, without requiring public notice of that change."

[12] *Eisenstadt v. Baird*, n. 3 above.

[13] 18-A M.R.S.A. § 9-304.

[14] *Stitham v. Henderson*, 2001 Me. 52, 768 A.2d 598 (Me. 2001) n. 5.

[15] *Shapiro Brothers Shoe Co. v. Lewiston-Auburn S.P.A.*, 320 A.2d 247 (1974). The important limitation—that courts may not issue advisory opinions—doesn't apply because an action to declare parental status involves an "actual controversy, the claimed result of which is not based on fear or anticipation, but is reasonably to be expected." *Cupola Golf Course, Inc., v. Dooley*, 898 A.2d 134 (Vt. 2006). Anticipating that courts might hesitate to declare parenthood before a pregnancy occurs, for fear of issuing a merely advisory opinion, parties would be well advised to provide in their gestation or surrogacy contracts that the contract will not be effective until a court reviews it and issues a declaration of parentage on the basis of its terms.

[16] 14 M.R.S.A. § 5960.

[17] 19-A M.R.S.A. § 1557.

[18] 19-A M.R.S.A. § 1557.

[19] The U.A.P. was enacted into Maine law in 1995.
[20] 22 M.R.S.A. § 2761 (3-A).
[21] 388 A.2d 72 (Me. 1978).
[22] *Id.* at 74.
[23] 2007 ME 123. The court commented that "[a] plain reading of the statute . . . leads to possibly absurd or illogical results . . . [and] elevates form over substance to an illogical degree." That interpretation sidestepped the likelihood that, at the time the statute was submitted to the legislature, the legislators would probably have been horrified at the thought that a same-sex couple should be allowed to adopt. *Adoption of M.A.* stands for the proposition that the Law Court will interpret statutes according to current social standards, not historical ones.
[24] 322 A.2d 320, 325 (1974).
[25] 14 M.R.S.A. § 5957. By declaring Celia Nolan a *de facto* mother the court created as much uncertainty as it removed. What, exactly, was the record of the "factual relationship" between Celia and the child that would justify the conclusion that Celia deserved *de facto* status? *See Stitham v. Henderson*, 2001 ME 52, 768 A.2d 598 (Me. 2001) at ¶ 25 and notes 15 and 16.
[26] 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280 (Cal. App. 1998).
[27] "[C]ourts must construe statutes in factual settings not contemplated by the enacting legislature." 61 Cal.App.4th at 1417, quoting *Johnson v. Calvert*, 5 Cal.4th 84, 89 (Cal.App. 1993).
[28] 61 Cal.App.4th at 1423, 1426.
[29] *Beal v. Beal*, n. 21 above.
[30] *Adoption of M.A.*, n. 23 above.
[31] *Stitham v. Henderson*, n. 25 above.
[32] See text accompanying n. 13 above.
[33] Incarcerated felons may be denied the right to procreate. Under certain circumstances, guardians may "make [a health-care] decision in accordance with the guardian's determination of the ward's best interest." 18-A M.R.S.A. § 5-312 (3). Even in the case of people who have a track record of abusing their children, however, the government may not prevent them from procreating. For example, the D.H.H.S. child protective services may not act unless there is a "child" who is "in immediate risk of serious harm." D.H.H.S. Child and Family Services Policy Sec. IV (F)(3)(b).
[34] Extreme examples are the best test of the quality of a legal tenet. So here is an extreme example: A woman contracts to be a surrogate for intended parents, and to use the sperm of a known donor: her husband. The surrogate and husband engage in intercourse, she becomes pregnant and ultimately produces the child. The intended parents should properly be declared the child's parents; the method of inducing pregnancy is immaterial.

[35] I will address two other complaints about ART in passing.

Harvard Law School Professor Elizabeth Bartholet once told me that surrogacy is prostitution. Professor Bartholet was no anti-feminist. Rather, she was uncomfortable with the complexity that ART forces upon us. What used to be simple—women who are paid for sexual services are prostitutes—isn't simple anymore. Now one must distinguish between commercial reproductive services and commercial sexual gratification. The former bears none of the opprobrium of the latter.

The same insensitivity induced the Supreme Court of New Jersey to condemn the surrogacy contract in its famous *Baby M* decision:

> The surrogacy contract conflicts with: (1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions. . . . The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents.

In the Matter of Baby M, 537 A.2d 1227, 1240, 1241 (N.J. 1988). The court was correct that the surrogacy contract sought to avoid the adoption process. So, explicitly or implicitly, does all reproduction. The court was unaware that it could, and should, have distinguished pay for reproductive services from pay for possession of living persons. *Baby M's* prospective parents had the right to reproduce free of any governmental approval, including that which adoption necessitates.

In this case, as in *Baby M*, it is the parties' intent that legitimizes the gestational and surrogacy contracts. If that sounds like too fine a line to draw, too fragile a basis for critical legal distinctions, consider how consequential intent is in contract law, tort law and criminal law. Intent can make all the difference between that which we encourage or enforce and that which we condemn. Similarly, it is the parties' intent that provides the critical differentiation that ART requires us to recognize: the moral distinction between reproductive services, on the one hand, and sexual services and human trafficking on the other.

[36] See text accompanying n. 28 above.

[37] *Guardianship of I. H.*, 2003 ME 130 ¶ 16.

[38] 388 A.2d 72, 74 (Me. 1978).

[39] 18-A M.R.S.A. § 9-201 (a).

[40] 22 M.R.S.A. § 2761 (3-A).

[41] 18-A M.R.S.A. § 9-201 (a) refers to "the biological mother"; *id.* (b) refers to "the biological father."

[42] 22 M.R.S.A. § 4056 (1).

[43] The District Court order awarded parental rights and responsibilities to the Nolans. Technically, the court should have *declared* them the parents (14 M.R.S.A. § 5953) and then, if any doubt lingered, granted further relief by *awarding* them such PRR (*id.* § 5960).
[44] 14 M.R.S.A. §§ 5960, 5957.

Certificate of Service

On March 23, 2012, I either mailed (postage pre-paid) or delivered by hand two copies of this Amicus Brief to the following:

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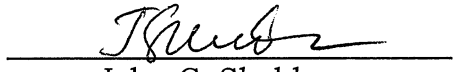

John C. Sheldon
Maine Bar #88

Chart of Necessary Parties for ART Parentage Determinations
Nolan v. Labree: Brief of Amicus Curiae John C. Sheldon: Appendix

Woman Giving Birth	*Egg Source*	*Sperm Source*	*Suit required?*	*Parties*
Intended Parent	Intended Parent	Intended Parent	No	n/a
	Anonymous Donor	Intended Parent	No	n/a
	Intended Parent	Anonymous Donor	No	n/a
	Anonymous Donor	Anonymous Donor	No	n/a
	Known Donor	Intended Parent	Yes	IPs, KD(e)
	Intended Parent	Known Donor	Yes	IPs, KD(s)
	Known Donor	Known Donor	Yes	IPs, KD(e), KD(s)
	Anonymous Donor	Known Donor	Yes	IPs, KD(s)
	Known Donor	Anonymous Donor	Yes	IPs, KD(e)
Gestational Carrier	Intended Parent	Intended Parent	Yes	IPs, GC, GC's husband
	Anonymous Donor	Intended Parent	Yes	IPs, GC, GC's husband
	Intended Parent	Anonymous Donor	Yes	IPs, GC, GC's husband
	Anonymous Donor	Anonymous Donor	Yes	IPs, GC, GC's husband
	Known Donor	Intended Parent	Yes	IPs, GC, GC's husband, KD(e)
	Intended Parent	Known Donor	Yes	IPs, GC, GC's husband, KD(s)
	Known Donor	Known Donor	Yes	IPs, GC, GC's husband, KD(e), KD(s)
	Anonymous Donor	Known Donor	Yes	IPs, GC, GC's husband, KD(s)
	Known Donor	Anonymous Donor	Yes	IPs, GC, GC's husband, KD(e)
Surrogate	Surrogate	Intended Parent	Yes	IPs, S, S's Husband
	Surrogate	Anonymous Donor	Yes	IPs, S, S's Husband
	Surrogate	Known Donor	Yes	IPs, S, S's Husband, KD(s)