

RECOGNIZING GESTATIONAL SURROGACY  
CONTRACTS: “BABY-STEPS” TOWARD MODERN  
PARENTAGE LAW IN MAINE AFTER *NOLAN V.*  
*LABREE*

*Adam Quinlan*

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I. INTRODUCTION

In *Nolan v. LaBree*,<sup>1</sup> a husband and wife filed a complaint seeking a judgment declaring their legal parentage of a newborn child born via gestational surrogacy.<sup>2</sup> All parties surrounding the birth of this child<sup>3</sup> entered into a surrogacy contract and are in agreement that the genetic mother and father bringing this suit should be declared as the legal parents.<sup>4</sup> When the child was born, however, the birth certificate did not reflect the intentions of the contract, listing the parents as the surrogate mother and the surrogate mother’s spouse.<sup>5</sup> The trial court, following an uncontested hearing, declared the requested paternity determination but held there was no statutory authority permitting a similar determination of maternity and, therefore, declined to make such a declaration.<sup>6</sup> The plaintiffs appealed to the Maine Supreme Judicial Court, sitting as the Law Court, contending that the trial court erred in its aforementioned denial of a maternity declaration based on lack of statutory authority.<sup>7</sup>

This case brought an important issue to the Law Court regarding parentage in artificial reproductive technique births. The issue invited the Law Court to determine the judicial remedy with respect to parentage when a child is born via gestational surrogacy, where the legislature has avoided such controversial topics, creating uncertainty for both courts and families in Maine. The Law Court in *Nolan* interprets the sparse statutory language in a way that ultimately provides for a declaration of parentage in the case at hand, but the question becomes: is it enough?

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1. 2012 ME 61, 52 A.3d 923.

2. *Id.* ¶ 1. “Gestational Surrogacy” is defined as “[a] pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child.” BLACK’S LAW DICTIONARY 1582 (9th ed. 2009). Gestational surrogacy differs from traditional surrogacy, which is defined as “[a] pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person.” *Id.*

3. The parties involved in the parentage issue include the gestational carrier, the carrier’s husband, the sperm donor, and the egg donor. *Nolan*, 2012 ME 61, ¶ 1, 52 A.3d 923.

4. *Nolan*, 2012 ME 61, ¶ 1, 52 A.3d 923.

5. *Id.* ¶ 2.

6. *Id.* ¶ 3. While the court did not rule on the maternity, it did declare the genetic mother was the de facto mother of the child and awarded sole parental rights and responsibilities to both of the genetic parents. *Id.*

7. *Id.* ¶ 1.

This Note considers whether the Law Court's rationale and narrow holding, interpreting statutory language as providing power to the courts to determine and declare both paternity and maternity following a birth via surrogacy, is adequate, or whether the legislature should take further action to provide concrete guidance to both families and courts involving surrogacy arrangements where all parties are in accord as to the identity of the intended parents. This Note next reviews the development of surrogacy agreements and private ordering in family law within the jurisdictions that have addressed the issue. It moves on to reveal and contrast the multifarious approaches taken by different states. This Note then discusses the treatment of such agreements in Maine, ultimately revealing the lack of attention given to the area of law surrounding artificial reproductive techniques. This Note recognizes the unwillingness to adopt comprehensive legislation on the topic but suggests that the issues, once deemed controversial, are less controversial today and a course of action must be embarked upon to keep pace with societal changes and scientific developments. The ultimate recommendation proffered by this Note is to take the first step down this path of modernizing Maine law by minimal legislative action permitting courts to validate certain gestational surrogacy agreements, which would in turn have the effect of automatically terminating the parental rights of the surrogate and her husband, if any, upon the child's birth.

## II. DEVELOPMENT OF SURROGACY AGREEMENTS AND PRIVATE ORDERING

### A. *The History of Surrogacy Contract Law and the Proposal of Uniform Acts*

Assisted reproductive techniques (ART) are fertility treatments where both the egg and the sperm are handled.<sup>8</sup> Specifically they involve surgically removing a woman's eggs, fertilizing the removed eggs with sperm in a laboratory, and returning the eggs either to the same woman or to another, known as a gestational surrogate.<sup>9</sup> The use of ART has increased dramatically in recent years, doubling in the past decade.<sup>10</sup> The Centers for Disease Control (CDC) notes that currently, "over 1% of all infants born in the United States every year are conceived using ART."<sup>11</sup> These techniques are most commonly used by heterosexual couples who are considered infertile, making natural reproduction an impossibility, but the techniques are also used by gay couples and by individual women.<sup>12</sup> Furthermore, the ability to have a child possessing the same genetic makeup as one, or both, of

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8. *Assisted Reproductive Technology (ART)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/art/> (last visited Dec. 5, 2012).

9. *Id.*

10. NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., 2009 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES—NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 65 (2011), available at [http://www.cdc.gov/art/ART2009/PDF/ART\\_2009\\_Full.pdf](http://www.cdc.gov/art/ART2009/PDF/ART_2009_Full.pdf) ("The number of ART cycles performed in the United States has increased, from 99,629 cycles in 2000 to 146,244 in 2009. . . . The number of infants born who were conceived using ART also increased between 2000 and 2009. In 2009, 60,190 infants were born, which was nearly two times higher than the 35,025 born in 2000.")

11. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 9.

12. Christine A. Bjorkman, Note, *Sitting in Limbo: The Absence of Connecticut Regulation of Surrogate Parenting Agreements and Its Effect on Parties to the Agreement*, 21 QUINNIPIAC PROB. L.J. 141, 145 (2008).

the intended parents makes ART an attractive alternative to adoption.<sup>13</sup> It is clear that ART has been, and will most likely continue to be, an increasingly appealing option for Americans when considering having a child.

Surrogacy can be dichotomized into traditional and gestational surrogacy.<sup>14</sup> Traditional surrogacy involves the intended mother being artificially inseminated with the intended father's, or a third party donor's, sperm.<sup>15</sup> The practice of gestational surrogacy differs from traditional surrogacy, as the surrogate mother has no genetic relation to the child but plays a "purely gestational" role, consenting to in vitro fertilization of the embryo and subsequently carrying the fetus to term.<sup>16</sup>

Regardless of the type of surrogacy, parties may choose to enter into a surrogacy agreement providing that the surrogate mother will bear the child for the intentional parents and further give up any rights to the child, if any, upon birth.<sup>17</sup> The legality of such agreements was first confronted by the courts in the 1980s and the issue of whether the agreements are lawful contractual undertakings has been considered, albeit mostly peripherally, by numerous courts since that time.<sup>18</sup> There are numerous legal, medical, and ethical concerns entwined in the analysis of these contracts<sup>19</sup> and consequently, many decisions involving surrogacy agreements are narrow and do not directly address the issue of legality.<sup>20</sup> As discussed in more detail below, approximately one-third of the states across the U.S. have recognized the courts' unwillingness to address such a sensitive issue and have responded by drafting statutes that directly address surrogacy agreements.<sup>21</sup>

Two major cases brought surrogacy issues into the national spotlight and acted as catalysts for lawmakers to encourage legislative regulation of surrogacy agreements.<sup>22</sup> The first and most well-known case, *In re Baby M*,<sup>23</sup> involved a traditional surrogacy agreement where the surrogate mother refused to part with the child upon birth and consequently sought to retain custody of the child in contravention of the surrogacy agreement.<sup>24</sup> The Supreme Court of New Jersey ultimately held custody did not lie with the surrogate mother,<sup>25</sup> but, in its analysis, looked toward the best interests of the child and not the surrogacy agreement.<sup>26</sup> The Court found the surrogacy agreement invalid and unenforceable, as it violated

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13. *Id.*

14. Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 394 (2012); Bjorkman, *supra* note 12, at 145.

15. London, *supra* note 14, at 394.

16. *Id.*

17. BLACK'S LAW DICTIONARY, *supra* note 2, at 1583.

18. 7 RICHARD A. LORD, WILLISTON ON CONTRACTS § 16:22 (4th ed. 2010).

19. See Kelly A. Anderson, *Certainty in an Uncertain World: The Ethics of Drafting Surrogacy Contracts*, 21 GEO. J. LEGAL ETHICS 615 (2008); Robert D. Arenstein, *Is Surrogacy Against Public Policy? The Answer is Yes.*, 18 SETON HALL L. REV. 831 (1988); Paula M. Barbaruolo, *The Public Policy Considerations of Surrogate Motherhood Contracts: An Analysis of Three Jurisdictions*, 3 ALB. L.J. SCI. & TECH. 39 (1993).

20. LORD, *supra* note 18.

21. *Id.*

22. *Id.*

23. 537 A.2d 1227 (N.J. 1988).

24. *Id.* at 1234-37.

25. *Id.* at 1264.

26. *Id.* at 1256.

various laws of the state regarding adoption including: “(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.”<sup>27</sup> The court also held that by predetermining parentage of a child without taking into account the child’s best interests, surrogacy contracts were offensive to public policy of the state.<sup>28</sup> The court ruled this specific agreement invalid but, noting the inevitable ethical and moral issues involved, explicitly left the door open for legislative action to clarify the law surrounding surrogacy contracts.<sup>29</sup>

Conversely, a few years later, the court in *Johnson v. Calvert*<sup>30</sup> held that a gestational surrogacy agreement was not, on its face, against public policy.<sup>31</sup> The court was posed with determining maternity in a scenario in which the birth mother had no genetic relationship and, instead of following the analysis undertaken in *In re Baby M* using the child’s best interests, the court focused largely on the intent of the parents:

[State law] recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother . . . .<sup>32</sup>

The surrogacy agreement, being held not inconsistent with public policy, was used to show the genetic mother’s intent, satisfying the court’s standard to obtain parentage rights.<sup>33</sup>

*Baby M* and *Calvert* illustrate that without explicit legislative direction, courts will be forced to handle these sensitive and difficult issues to the best of their abilities. The cases represent the judicial tip-toeing and inconsistency in analyzing surrogacy agreements, and consequently, the cry to legislatures to clarify surrogate relationships.

In response to the growing use of ART and inevitable complications that accompany it, there have been Uniform Acts proposed to provide guidance to the state legislatures. First, in 1988, the National Conference of Commissioners on Uniform State Laws (NCCUSL) proposed the Uniform Status of Children of Assisted Conception Act (USCACA), which provided two alternatives states could adopt: the first alternative gave effect to gestational surrogacy agreements but only

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27. *Id.* at 1240.

28. *Id.* at 1246 (“The contract’s basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child’s best interests shall determine custody.”).

29. *Id.* at 1264 (“Legislative consideration of surrogacy may . . . provide the opportunity to begin to focus on the overall implications of the new reproductive biotechnology . . . . The problem can be addressed only when society decides what its values and objectives are in this troubling, yet promising, area.”).

30. 851 P.2d 776 (Cal. 1993).

31. *Id.* at 783.

32. *Id.* at 782.

33. *Id.* at 783.

under limited and prescribed circumstances and the second alternative simply held such agreements void.<sup>34</sup> These provisions were limited and failed to fully address parentage rights for children born through ART, and as a result, were ignored by most states.<sup>35</sup>

The USCACA was superseded by the amendments to the Uniform Parentage Act (UPA),<sup>36</sup> which solely adopted the first alternative given in the USCACA upholding and regulating gestational surrogacy agreements.<sup>37</sup> The UPA was originally promulgated in 1973 but dealt only with artificial insemination of a married woman.<sup>38</sup> The purpose of the Act was to grant parenting rights to husbands of the women who were artificially inseminated while protecting the sperm donor against “the legal consequences of paternity.”<sup>39</sup> After the failure of the USCACA, the NCCUSL expanded the UPA to cover technologic advances and redefined social standards of a family since the Act’s inception in 1973.<sup>40</sup>

The current stance of the Uniform Acts among the nation is as follows: four states have adopted the amended UPA (2000); eighteen states still utilize the original UPA (1973), which does not include a surrogacy provision; and only two states have adopted the USCACA.<sup>41</sup> In addition to these states, a number of other states have implemented their own legislation covering surrogacy rights, but there remains a large portion of our country that has no legislative guidance in determining parentage in ART related births whatsoever.<sup>42</sup>

It is apparent that the states have been reluctant to adopt the various proposed uniform provisions concerning surrogacy agreements, thus making the law revolving around surrogacy anything but “uniform.”<sup>43</sup>

### B. Treatment of Surrogacy Agreements by Individual States

Across the United States, only seventeen jurisdictions have laws in place dealing with surrogacy contracts.<sup>44</sup> The legislation among these jurisdictions is by

34. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 5, 9C U.L.A. 373 (2001)

35. Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L.J. 163, 223 (2007).

36. UNIF. PARENTAGE ACT (2000), 9B U.L.A. 295 (2001).

37. Byrn, *supra* note 35, at 169 n.22.

38. UNIF. PARENTAGE ACT (1973), 9B U.L.A. 377 (2001); Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 466 (2006).

39. Shapo, *supra* note 38, at 466-67.

40. *Id.* at 467.

41. *Id.* at 468. “Of the two states that adopted the USCACA, one state adopted the version that voided surrogacy agreements; the other adopted the version that regulated and recognized surrogacy agreements.” *Id.* at 474.

42. *Id.* at 474-75.

43. John G. New, “Aren’t You Lucky You Have Two Mamas?”: *Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change*, 81 CHI.-KENT L. REV. 773, 779 (2006).

44. Chelsea VanWormer, Comment, *Outdated and Ineffective: An Analysis of Michigan’s Gestational Surrogacy Law and the Need for Validation of Surrogate Pregnancy Contracts*, 61 DEPAUL L. REV. 911, 914 (2012). See also *Guide to State Surrogacy Laws*, CENTER FOR AMERICAN PROGRESS, <http://www.americanprogress.org/issues/women/news/2007/12/17/3758/guide-to-state-surrogacy-laws/#PS> (last visited Dec. 5, 2012) (mapping the different treatment of surrogacy contracts across the U.S. as of 2007).

no means uniform, ranging from outright bans to acceptance of the practice.<sup>45</sup> Despite the clear indications of substantial market growth in ART, drawn from the Center for Disease Control's frequent statistical publications, few states have changed their laws to keep pace.<sup>46</sup>

Scholars have divided this disparate patchwork of legislation across the United States into four categories: prohibition, inaction, status regulation, and contractual ordering.<sup>47</sup> States prohibiting surrogacy agreements levy civil and criminal penalties to any parties to such contracts.<sup>48</sup> For example, in the District of Columbia, both traditional and gestational surrogacy agreements are void and unenforceable and punishable by a fine of up to \$10,000, up to a year in jail, or both.<sup>49</sup>

Inaction refers to states in which there are no penalties for entering into surrogacy contracts, but the contracts will be nullified as violative of public policy.<sup>50</sup> While the contracts are not upheld, there may still be statutory guidance in determining maternity and/or paternity. For instance, in Nebraska surrogacy contracts are void and unenforceable, but there are no penalties levied upon parties to such a contract.<sup>51</sup> The statute still gives slight guidance on parentage, stating that the biological father of a child born pursuant to such a contract will carry all of the rights and obligations imposed by law to such child.<sup>52</sup>

States falling in the third category, status regulation, have implemented their own language, or drawn from a Uniform Act, to help clarify the legal status of parties involved in a surrogacy agreement.<sup>53</sup> Specifically, Texas has implemented legislation that holds gestational agreements enforceable provided that certain requirements, creating preordained familial relationships, are met.<sup>54</sup>

The final category is one in which states have held surrogacy agreements valid and essentially dealt with them under existing contract law.<sup>55</sup> For example, Nevada law allows for surrogacy agreements but requires "the respective rights of each party" to be explicitly stated in the contract.<sup>56</sup>

Complicating the legality analysis further, the validity of surrogacy agreements may vary throughout the states depending on a variety of factors including whether

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45. London, *supra* note 14, at 395. *See also* LORD, *supra* note 18, at § 16:22 n.12 (listing the states' various statutes dealing with surrogacy agreements).

46. Magdalena Gugucheva, *Surrogacy in America* 4, COUNCIL FOR RESPONSIBLE GENETICS (2010), available at <http://www.councilforresponsiblegenetics.org/pageDocuments/KA EVEJ0A1M.pdf>.

47. Emily Gelmann, "I'm Just the Oven, It's Totally Their Bun": *The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN'S RTS. L. REP. 159, 166 (2011) (quoting Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 289 (2009)).

48. *Id.*

49. D.C. CODE §§ 16-401 to -402 (2012).

50. Gelmann, *supra* note 47.

51. NEB. REV. STAT. ANN. § 25-21,200 (West 2012).

52. *Id.*

53. Gelmann, *supra* note 47.

54. TEX. FAM. CODE ANN. § 160.754 (West 2012).

55. Gelmann, *supra* note 47.

56. NEV. REV. STAT. ANN. § 126.045 (West 2012).

the intended parents are married,<sup>57</sup> whether the surrogates are compensated,<sup>58</sup> or whether the surrogacy is traditional or gestational.<sup>59</sup> Some states have no statutory language whatsoever to provide guidance for the courts in parentage issues surrounding surrogacy, and consequently, courts must look to case law and beyond in an attempt to mold a standard.<sup>60</sup>

In short, surrogacy agreements, both traditional and gestational, continue to receive extremely varied treatment across the United States, and there are a myriad of factors that may or may not play a role depending on which jurisdiction is analyzing the controversy.

### C. Surrogacy Agreements in Maine

When issues involving ART-related births and determination of parentage arise in Maine, the courts are left to rummage through the various statutes to find language that may help settle the controversy. One statutory instrument hanging in the judicial tool shed is Maine's version of the Uniform Act on Paternity of 1960 (UAP).<sup>61</sup> However, this is not the ideal tool for the job. The purpose of the UAP was in large part to "establish a simple and effective civil action in a court of record to replace the antiquated 'bastardy' proceeding."<sup>62</sup> Nowhere in the UAP is surrogacy or any type of ART-related procedure mentioned. The first successful recorded modern surrogacy agreement in the United States, laying out the legal rights between the intended parents and a surrogate mother, took place in 1976,<sup>63</sup> and assisted reproductive techniques were not developed until approximately 1981.<sup>64</sup> It is clear the UAP was not, nor could it possibly provide, adequate guidance for a controversy involving surrogacy and parentage. While the act has a useful purpose in some scenarios, it does not seem to be the best tool for ART-related parentage determinations.

Throughout Maine law, the definitions regarding the familial relationship between parent and child are lacking. The terms "mother" and "father," which are

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57. See UTAH CODE ANN. § 78B-15-801 (West 2012) (requiring the intended parents to be married for the existence of a valid and enforceable gestational surrogacy contract).

58. See WASH. REV. CODE ANN. § 26.26.230 (West 2012) ("No person, organization, or agency shall enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract, written or unwritten, for compensation.").

59. See 750 ILL. COMP. STAT. ANN. 47/5 (West 2012) ("Establish[ing] consistent standards and procedural safeguards for the protection of all parties involved in a gestational surrogacy contract in [Illinois] and . . . confirm[ing] the legal status of children born as a result of these contracts.").

60. See *supra* text accompanying note 42.

61. UNIF. ACT ON PATERNITY (1960), 9C U.L.A. 1 (2001). Maine's version of the UPA is codified at 19-A M.R.S.A. §§ 1551-1570 (2012).

62. UNIF. ACT ON PATERNITY (1960), 9C U.L.A. 1 (2001).

63. *History of Surrogacy*, INFORMATION ON SURROGACY, <http://www.information-on-surrogacy.com/history-of-surrogacy.html> (last visited Dec. 5, 2012). Surrogacy has been in existence for a very long time, one of the first recorded instances seen in the bible when an Egyptian handmaiden carried a child, Ishmael, for Abraham and Sarah. (Genesis 16:1-16). These instances of "old fashioned" surrogacies were rarely spoken about and often not recorded. *History of Surrogacy*, INFORMATION ON SURROGACY, <http://www.information-on-surrogacy.com/history-of-surrogacy.html> (last visited Dec. 5, 2012).

64. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 9.



used throughout Maine's UAP, are not defined in any way.<sup>65</sup> Looking to the definitions contained in Maine's probate code does not provide much more insight.<sup>66</sup> The unexplained assumptions revealed by the explicit language contained throughout Maine law—that the child has only two parents, and that those parents are of opposite sex—are evidence of the void in statutory guidance on the topic.<sup>67</sup>

The absence of statutory guidance in this arena has not gone unnoticed. In December of 2002, the Uniform Parentage Act,<sup>68</sup> comprehensively addressing the issue of parentage in ART-related births, was presented to Maine's legislature for consideration.<sup>69</sup> The lengthy and complex bill did not come to fruition and has not been reconsidered since its initial presentation.<sup>70</sup>

In sum, Maine falls into the category of states with no laws dealing directly with surrogacy or ART. If posed with a controversy, the courts are left with no statutory direction to fashion an equitable result and establish an appropriate precedent. The courts may choose to look to other jurisdictions or to uniform laws that have not yet been adopted by Maine. As mentioned previously, however, the law across the country is far from settled in this arena and, consequently, the resulting treatment of these parentage issues dwells in the unknown.

### III. THE *NOLAN* DECISION

#### A. *Factual Background and Procedural History*

In *Nolan v. LaBree*,<sup>71</sup> Robert and Celia Nolan brought an action requesting a declaratory judgment by the court affirming their legal parentage of a newborn baby, Desmond, born through the ART method known as gestational surrogacy.<sup>72</sup> The defendants, Kristen and Jeffery Labree, were the listed parents on the birth certificate filed with the Department of Health and Human Services, but had no genetic relation to Desmond.<sup>73</sup> Kristen was the physical birth mother but was acting as a gestational surrogate,<sup>74</sup> carrying Celia's egg that had been fertilized via

65. John C. Sheldon, *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 ME. L. REV. 523, 525 n.9 (2001).

66. 18-A M.R.S.A. § 1-201(3) (2012) (“‘Child’ includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant.”); *id.* § 1-201(28) (“‘Parent’ includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this Code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.”).

67. Sheldon, *supra* note 65.

68. UNIF. PARENTAGE ACT (2000) (amended 2002), 9B U.L.A. 4 (Supp. 2012).

69. John Sheldon, *The Good News, and Some Bad News, About the Uniform Parentage Act of 2002*, 18 ME. B.J. 94, 94 (2003).

70. John C. Sheldon, *Test Tube Babies Meet Stone Age Statutes*, 27 ME. B.J. 140, 140 n.1 (2012).

71. 2012 ME 61, 52 A.3d 923.

72. Brief of Appellants at 1, *Nolan v. LaBree*, 2012 ME 61, 52 A.3d 923 (No. Pen-11-393) [hereinafter Brief of Appellants]. The case was first brought to a Case Management Conference where the presiding Magistrate, determining he lacked authority to grant such declaratory relief, scheduled the case to be heard by a District Court Judge. *Id.*

73. *Nolan*, 2012 ME 61, ¶ 2, 52 A.3d 923.

74. *See supra* note 2 (defining gestational surrogacy).

in vitro fertilization<sup>75</sup> with sperm from Celia's husband, Robert.<sup>76</sup> From the outset, all parties were in agreement that the Nolans should be declared the legal parents as evidenced by the gestational carrier agreement,<sup>77</sup> the Labrees' answer to the original complaint,<sup>78</sup> and the arguments presented in the appellate briefs.<sup>79</sup> The District Court determined the paternity of Desmond, declaring Robert Nolan as the father, but found that no statutory authority existed in Maine permitting a court's determination of maternity and, consequently, the court refused to declare Celia Nolan as the mother.<sup>80</sup>

The court did, however, declare Celia the de facto mother of the child and "awarded sole parental rights and responsibilities to the Nolans."<sup>81</sup> A de facto parent defined in Black's Law Dictionary is "[a]n adult who . . . is not the child's legal parent . . . [and] [b]ecause the status of de facto parent is subordinate to that of legal parent, a person who expects to be afforded the status of parent should, if possible, adopt the child."<sup>82</sup> Rather than being left to adopt the child that was genetically theirs,<sup>83</sup> the Nolans appealed to the Law Court, which found the requisite statutory authority to declare maternity within the UAP and accordingly vacated the judgment of the District Court,<sup>84</sup> remanding "for a judgment that Celia Nolan is the mother . . . and that the Labrees are not the parents of [Desmond]."<sup>85</sup>

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75. In vitro fertilization is defined by the American Pregnancy Association as the "process of fertilization by manually combining an egg and sperm in a laboratory dish." *In Vitro Fertilization: IVF*, AMERICAN PREGNANCY ASSOCIATION, <http://www.americanpregnancy.org/infertility/ivf.html> (last visited Dec. 5, 2012). The embryo is then transferred to a carrier that provides an environment for growth and eventual birth of the child. *Id.*

76. *Nolan*, 2012 ME 61, ¶ 2, 52 A.3d 923.

77. Brief of Appellants, *supra* note 72, at 3 ("In the Contract, Kristen Labree and Jeffery Labree stated that they had no intention of parenting the child and did not want to parent the child."); Brief of Appellees at 2, *Nolan v. LaBree*, 2012 ME 61, 52 A.3d 923 (No. Pen-11-393) [hereinafter Brief of Appellees] (adopting the same statement from the brief of Appellants).

78. Brief of Appellants, *supra* note 72, (explaining that on the same day the original complaint was filed, the Labrees issued an answer agreeing with the Nolans' requested relief).

79. *Id.* at 4 ("The intention of the parties is, and always has been, that the Intended Parents are established as the legal parents of Desmond and that Kristen Labree and Jeffery Labree have no legal rights or responsibilities whatsoever regarding this child.")

80. *Nolan*, 2012 ME 61, ¶ 3, 52 A.3d 923.

81. *Id.*

82. BLACK'S LAW DICTIONARY, *supra* note 2, at 1222. There are a few Maine cases that provide guidance but do not provide a strict definition of 'de facto parents.' See *C.E.W. v. D.E.W.*, 2004 ME 43, 845 A.2d 1146; *Rideout v. Riendeau*, 2000 ME 198, 761 A.2d 291.

83. There are additional reasons why adoption in gestational surrogacy cases is a less desirable route for intended parents to embark upon. John C. Sheldon's Amicus Brief views the problem with adoption as "four-fold" containing jurisdictional problems, constitutional issues, increased cost and delay, and judicial policy complications. Brief of Amicus Curiae John C. Sheldon at 7-9, *Nolan v. LaBree*, 2012 ME 61, 52 A.3d 923 (No. Pen-11-393) [hereinafter Brief of Amicus Curiae John C. Sheldon]. Also, it should be noted that "the rights of the de facto parent (Celia Nolan under the District Court's ruling) can be impacted or limited by the right of the "true" parent (Kristen Labree under said ruling)." Brief of Appellees, *supra* note 77, at 3.

84. *Nolan*, 2012 ME 61, ¶ 1, 52 A.3d 923.

85. *Id.* ¶ 7.

*B. Arguments of the Parties*

On appeal, the Nolans argued that the courts are permitted to utilize equitable powers pursuant to declaratory judgments to determine maternity.<sup>86</sup> The Nolans further contended that “[b]y stating that Robert Nolan is the legal father, but not allowing Celia Nolan to be declared the legal mother, the District Court’s refusal to acknowledge its inherent power could violate the equal protection clause of the United States and Maine Constitutions by treating similar situated persons differently.”<sup>87</sup>

The Nolans recognized that, under the statute regarding registration of live births,<sup>88</sup> the legal mother is the woman who physically births the child, but highlighted an exception that allows for a court of competent jurisdiction to declare otherwise.<sup>89</sup> They argued that the court has the ability, and should indeed exercise said ability, to interpret the statutory language in a “gender neutral fashion” so as to avoid issues of constitutionality.<sup>90</sup>

The Appellees, the Labrees, joined the Nolans in all of their arguments, reiterating that Maine Law explicitly allows for gender neutral interpretation of statutory language in instances such as these.<sup>91</sup> The Labrees noted the advancements taking place in reproductive technology and urged the court to adapt by allowing for maternity determinations where the parties are similarly situated.<sup>92</sup> Furthermore, the Labrees articulated that the district court’s declaration that Celia Nolan is the de facto mother simply was not adequate, explaining that “the rights of the de facto parent (Celia Nolan under the district court’s ruling) can be impacted or limited by the right of the “true” parent (Kristen Labree under said ruling.)”<sup>93</sup>

*C. Decisions of the Court*

In a concise opinion, the Court points out that there exists statutory authority for courts to declare parentage and further finds that even though the language granting such authority lies within the “Uniform Act on Paternity,” a presumption is drawn that the legislature’s use of the gender-neutral word ‘parentage’ was intentional and, therefore, requisite authority exists for courts to determine not only paternity, but maternity as well.<sup>94</sup>

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86. Brief of Appellants, *supra* note 72, at 4.

87. *Id.* at 5.

88. 22 M.R.S.A. § 2761 (2004 & Supp. 2012).

89. *Id.* See Brief of Appellants, *supra* note 72, at 9-10.

90. Brief of Appellants, *supra* note 71, at 18. See also 1 M.R.S.A. § 71(7-A)(B) (1989 & Supp. 2012) (recognizing that “the Revisor of Statutes shall be authorized to change any masculine or feminine gender word to a gender-neutral word when it is clear that the statute is not exclusively applicable to members of one sex”); *Danforth v. Emmons*, 124 Me. 156, 126 A. 821, 823 (1924) (finding authority to construe masculine language, ‘his heirs,’ as including both genders for the purposes of the Death-Liability Act of 1891).

91. Brief of Appellees, *supra* note 77, at 3.

92. *Id.* at 4.

93. *Id.* at 3.

94. *Nolan v. LaBree*, 2012 ME 61, ¶ 4, 52 A.3d 923. The court explained how 19-A M.R.S. § 1556 provides the requisite statutory basis for both paternity and maternity declarations. *Id.*

Before the opinion was issued, the Law Court invited amici briefs on the issue<sup>95</sup> and received several in response, all of which argued for a declaration of parentage for the genetic parents to the exclusion of the gestational carrier and her spouse.<sup>96</sup> The brevity of the opinion reflects the caution with which the court approached the issue, ultimately providing an equitable outcome for the parties, but crafting the decision in a narrow manner, seemingly to avoid delving into a complicated and controversial issue involving surrogacy rights in Maine.

#### IV. ANALYSIS AND RECOMMENDATIONS

##### A. *The Need for Change*

*Nolan* illustrates but one problem involving ART-related births and determining parentage. While the outcome of *Nolan* is proper, and steps are being taken in the right direction, the opinion and consequently the precedent it sets, is extremely narrow. The legislature has avoided promulgating laws regarding parentage in ART cases, but this case signals that it is time further action be taken to bring Maine's parentage statutes into the twenty-first century.

While political controversy has hindered many courts across the nation from adopting legislation on the topic it is apparent that assisted reproductive techniques are growing in both use and acceptance. Allowing for the possibility of parenthood that otherwise would not be available for a variety of people has proved to be an extremely attractive benefit of the procedures, increasing the use and popularity of the techniques exponentially since their foundations. The growth, as evidenced by the statistics surrounding use<sup>97</sup> as well as the drastic increase in facilities and businesses providing ART-related services,<sup>98</sup> is undeniable. With the benefits and increase in usage, surrogacy has received much publicity and is almost considered commonplace.<sup>99</sup>

With this movement, there is a mutation of social norms and what constitutes a family unit. Defining the modern family has become an intricate task with the use of surrogacy, as evidenced by *Nolan*, where there were arguably four parents of the child upon birth: the gestational carrier, the carrier's husband, and the two who provided the genetic material for the baby. As our society changes and affords new opportunities for parenthood, it is important that the governing law keeps pace and

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95. Matthew Pollack, *Maine Supreme Judicial Court Sitting as the Law Court Public Notice*, STATE OF MAINE JUDICIAL BRANCH: LATEST NEWS & ANNOUNCEMENTS (Feb. 29, 2012), [http://www.courts.state.me.us/news\\_reference/news/current/amicus\\_surrogacy\\_022912.html](http://www.courts.state.me.us/news_reference/news/current/amicus_surrogacy_022912.html).

96. Amicus Brief of Appellants, American Society for Reproductive Medicine, et al. at 33, *Nolan v. LaBree*, 2012 ME 61, 52 A.3d 923 (No. Pen-11-393) [hereinafter Amicus Brief of Appellants]; Amici Brief of Concerned Maine Attorneys, at 17, *Nolan v. LaBree*, 2012 ME 61, 52 A.3d 923 (No. Pen-11-393) [hereinafter Amici Brief of Concerned Maine Attorneys]; Brief of Amicus Curiae John C. Sheldon, *supra* note 83, at 21; Brief of Amicus Curiae Maine Attorney General, at 8-9, *Nolan v. LaBree*, 2012 ME 61, 52 A.3d 923 (No. Pen-11-393) [hereinafter Brief of Amicus Curiae Maine Attorney General].

97. *See supra* notes 10-11 and accompanying text.

98. Mark Hansen, . . . and *Baby makes Litigation: As Surrogacy Becomes More Popular, Legal Problems Proliferate*, 97 A.B.A. J. 52, 54 (2011) (describing the sharp increase of new businesses in the field such as fertility clinics, surrogacy agencies, and online brokers).

99. *Id.* (noting that many famous names have utilized the technique and openly endorse its benefits, including Elton John, Sarah Jessica Parker, and Nicole Kidman).

that we “match familial complexity with statutory sophistication.”<sup>100</sup>

Furthermore, the disparate treatment across the United States, where surrogacy agreements may be criminalized in one state but valid in a neighboring state, leads to a great deal of forum shopping.<sup>101</sup> While this may drive a parent’s decision to seek a surrogacy contract in another jurisdiction, it could lead to a throng of legal complications unforeseen by the unwary.<sup>102</sup> Even if the parties agree as to the choice of state law, there are circumstances in which the court will not be bound by such a stipulation.<sup>103</sup> In Maine, where the law is silent on gestational agreements, parties may be enticed to engage in such forum shopping, which may yield beneficial results, but can get tricky and should be handled with the utmost care.<sup>104</sup> This recommended caution involved with proceeding in this manner undoubtedly will be a greater burden on the potential parent(s), in the form of legal fees, risk, and even increased prices for surrogacy services.

### B. Effecting Change In Maine

Keeping our law up to date and relevant to the society in which we live can be accomplished by implementing legislation or through common law. As we have seen, legislation has been avoided in this area and the court in *Nolan* was forced to step in. However, common law should not be the first choice for the vehicle in which we modernize our parentage laws in Maine. The Supreme Court reminds us that “legislatures are ultimate guardians of the liberties and welfare of the people”<sup>105</sup> and that “the power to make rules to establish, protect, and strengthen family life . . . is committed . . . to the legislature of that State.”<sup>106</sup> Important issues that involve such a personal matter as surrogate parenting are therefore best left in the hands of the legislature and the public. The task of adjusting Maine law to the technological advancements in reproduction should not be solely imposed on a handful of judges.

Furthermore, it takes time for the common law surrounding a specific topic to develop; precedent will be set as controversies arise. There is no preemptive decision-making and, consequently, law will not be fashioned until problems occur. This leaves little guidance for individuals who wish to benefit from ART, effectively creating additional encumbrances in the form of increased legal and

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100. Sheldon, *supra* note 69.

101. Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 522 (2010).

102. See Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399, 399 (1990) (discussing the complications that may arise when residents of a state that does not recognize surrogacy agreements attempt to conduct all or part of the surrogacy transaction in a state that permits such agreements by using hypothetical situations of a couple residing in a state where surrogacy agreements are not recognized).

103. JOAN ROSS WILDER, 17 WEST’S PA. PRAC., Family Law § 26:8 (7th ed. 2012) (explaining that “[p]arentage may be dependent upon how a jurisdiction views the relationship between two adults raising the child”).

104. *Id.* See generally *J.F. v. D.B.*, 897 A.2d 1261, 1265-66 (Pa. Super. 2006) (illustrating just how complicated a surrogacy agreement can become where the intended parents, the surrogacy broker, the egg-donor, and the gestational surrogate all resided in different states).

105. *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904).

106. *Labine v. Vincent*, 401 U.S. 532, 538 (1971).

financial risk. Even when courts are confronted with a specific issue, the opinion may shy away from crafting in-depth precedent and provide only a narrow holding that does little to elucidate matters for others in the future whose circumstances may differ in the slightest. Conversely, legislation on the issue will provide the optimal amount of clarity. Statutory language directly addressing issues will be the most effective form of guidance for both the courts and individuals who may wish to pursue this method of child birth.

Still, it is not without concern that legislation is recommended. It is acknowledged that this suggestion of legislative action has been proposed to Maine's lawmakers in the past, in the form of the UPA proposal of 2002, and has not been revisited since.<sup>107</sup> Rather than tender a similar proposal, which may not fare well with lawmakers, the ultimate recommendation of this Note is for minimal legislative action, easing our state into the waters of modern familial complexities.

Although surrogacy law throughout our nation is a "crazy quilt of laws,"<sup>108</sup> gestational surrogacy agreements, as opposed to traditional surrogacy agreements, are treated more favorably, as the surrogate has no biological relationship whatsoever to the child.<sup>109</sup> No matter where a child is born in the United States, "[a] woman who gives birth to a child using her own egg is legally presumed to be the child's mother."<sup>110</sup> This presumption can create complications when litigating a determination for parentage and consequently, attorneys are hesitant to get involved in traditional surrogacy arrangements, some turning down representation in such cases all together, no matter the circumstances.<sup>111</sup>

To implement legislation recognizing gestational surrogacy agreements, by explicitly allowing for a judicial decree that validates the contract, seems less of a stretch for Maine's legislature than adopting comprehensive language on ART-related issues such as the UPA. In looking for guidance we can turn to states such as our neighbor, New Hampshire. New Hampshire's applicable statute, which allows for judicial preauthorization of parentage, provides for "the automatic termination of the parental rights of the surrogate and her husband, if any, after the birth of a child born as a result of the arrangement and a vesting of those rights solely in the intended parents."<sup>112</sup>

Of course the legislature must additionally define what will be considered a legitimate gestational surrogacy agreement. New Hampshire dealt with this by implementing certain requirements that need to be met before the order validating the contract can be issued: the parties to the contract must first meet certain eligibility requirements, the contract must be in the best interest of the child, there are no unconscionable terms in the contract, there are certain mandatory provisions in the agreement, and finally, the petitioners must have undergone evaluations and

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107. Sheldon, *supra* note 70.

108. Hansen, *supra* note 98.

109. See Darra L. Hofman, "Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact, 35 WM. MITCHELL L. REV. 449, 453 (2009).

110. Hansen, *supra* note 98, at 56-57 (quoting Chicago attorney Nidhi Desai, who specializes in reproductive technologies).

111. *Id.* at 57 (quoting New York attorney Elizabeth Swire Falker on her attitude toward traditional surrogacy agreements: "I wouldn't touch one with a 10-foot pole").

112. N.H. REV. STAT. ANN. § 168-B:23 (2002).

counseling determining they are fit for parentage.<sup>113</sup> These regulations placed on the surrogacy contract all serve public policy purposes recognized by New Hampshire and its residents and should be considered by Maine's legislature. This Note advocates adopting New Hampshire's structure of a gestational agreement or, in the alternative, using New Hampshire's statute as a starting point for public discussion on what, if any, regulations should be integrated into Maine's definition of a legitimate gestational surrogacy agreement.

#### V. CONCLUSION

Maine should take narrow legislative action permitting courts to recognize and uphold agreements under circumstances where all parties are in agreement and have contractually consented to a gestational surrogacy agreement. This would in turn have the effect of automatically terminating the parental rights of the surrogate and her husband, if any, upon the child's birth. Although *Nolan* dealt with a judicial termination after the birth of the child, whereas the suggested legislation would provide an action for judicial preauthorization, had it been available to the parties before the birth of baby Desmond, it would have undoubtedly solved this parentage problem swiftly and equitably.

Limited legislative action creating a method for judicial preauthorization of parentage where a gestational contract exists and that meets minimal requirements befitting Maine's public policy would be a suitable "baby-step" in ushering in a new era of familial complexity. With the incongruent patchwork of laws surrounding surrogacy in the United States, finding ways to accomplish ART births is far from impossible for any family; creating statutory language that provides guidelines for our state's citizens will benefit all and harm none. It is imperative that we keep pace with technology and society and provide clarity for our citizenry, especially in the field of family law. While perhaps the legislature is not yet ready for a full adaptation of ART-related issues, movement must be made forward and progress taken toward matching Maine's legal with its societal environment.

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113. N.H. REV. STAT. ANN. § 168-B:17, B:23 (2002).

