M.D. et al. v. L.L. et al.
[Indexed as: D. (M.) v. L. (L.)]

90 O.R. (3d) 127
Ontario Superior Court of Justice,
Nelson J.
March 10, 2008

Family law -- Children -- Court having jurisdiction under s. 4 of Children's Law Reform Act to issue declaration that genetic parents of child who was born to surrogate mother were child's parents -- Court having jurisdiction under s. 97 of Courts of Justice Act to issue declaration that husband of surrogate mother was not child's father -- Surrogate mother being child's "mother" under Vital Statistics Act -- Court nevertheless having jurisdiction under s. 97 of Courts of Justice Act and pursuant to its parens patriae jurisdiction to issue declaration that surrogate mother was not child's mother where to do so was in child's best interests -- Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 4-- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 97 -- Vital Statistics Act, R.S.O. 1990, c. V.4.

M and J entered into an agreement with L and I in which L agreed to act as a gestational carrier for M's ova, which had been fertilized with J's sperm. When the child was born, L's name had to be placed on the Statement of Live Birth as the "mother", despite the fact that M and J were the child's genetic parents. M and J brought an application for an order declaring them to be the mother and father of the child, an order declaring L and I not to be the mother and father of the child and related relief. L and I consented to the application.

Held, the application should be granted.

The court had jurisdiction under s. 4 of the Children's Law Reform Act to issue a declaration that M and J were the child's parents, and it was in the child's best interests for this declaration to be made. The court had jurisdiction under s. 97 of the Courts of Justice Act to declare I (L's husband) not to be the child's father. The situation was more complicated regarding L. Under the Vital Statistics Act ("VSA"), "birth" is defined as "the complete expulsion or extraction from its mother of a fetus . . .". Thus, while the term "mother" is not defined in the Act, it is clear that the "mother" of a child is the woman who gave birth to it. L was the child's "mother" under the VSA. Nevertheless, it is possible for the court to declare a person not to be the mother of a child when she is, in fact, the mother of that child under a statute. There is a gap in the Vital Statistics Act that does not operate in the child's best interests, insofar as the inferential definition of "mother" impedes the court's jurisdiction to declare a person not to be the mother of a child. A declaration of non- maternity would clarify the status of the interested parties in a manner that was worthy of judicial determination. A declaration of non-maternity was available in the circumstances of this case pursuant to the court's jurisdiction to issue declarations and its inherent parens patriae jurisdiction. It was in the best interests of the child to remove any ambiguity about who the child's mother was by issuing a declaration that L, who was without genetic link to the child, was not the child's mother. The applicants were granted an order under s. 9(7) of the Vital Statistics Act directing the Registrar to amend the registration of birth to show M and J to be the child's parents.

APPLICATION for declarations of maternity, paternity, non- maternity and non-paternity and for related relief.

Cases referred to C. (J.) v. Manitoba, [2000] M.J. No. 482, 2000 MBQB 173 (CanLII), 151 Man. R. (2d) 268, 12 R.F.L. (5th) 274, 100 A.C.W.S. (3d) 1019; R. (J.) v. H. (L.), 2002 CanLII 76705 (ON SC), [2002] O.J. No. 3998, [2002] O.T.C. 764, 117 A.C.W.S. (3d) 276 (S.C.J.); Rypkema v. British Columbia, [2003] B.C.J. No. 2721, 2003 BCSC 1784 (CanLII), 233 D.L.R. (4th) 760, [2004] 3 W.W.R. 712, 22 B.C.L.R. (4th) 233, 47 R.F.L. (5th) 398, 127 A.C.W.S. (3d) 300, consd Other cases referred to A.A. v. B.B. (2007), 83 O.R. (3d) 561, [2007] O.J. No. 2, 2007 ONCA 2 (CanLII), 278 D.L.R. (4th) 519, 220

O.A.C. 115, 150 C.R.R. (2d) 110, 35 R.F.L. (6th) 1; Bagaric v. Juric (1984), 1984 CanLII 2133 (ON CA), 44 O.R. (2d) 638, [1984] O.J. No. 3069, 5 D.L.R. (4th) 78, 2 O.A.C. 35, 40 C.P.C. 211, 23 A.C.W.S. (2d) 417 (C.A.); Buzzanca v. Buzzanca, 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280 (Ct. App. 4th 1998); D. (K.G.) v. P. (C.A.), [2004] O.J. No. 3508 (S.C.J.); Dodd v. Cossar, [1998] O.J. No. 335, 54 O.T.C. 129, 16 C.P.C. (4th) 132, 77 A.C.W.S. (3d) 287 (Gen. Div.); Hallstone Products Ltd. v. Canada Customs and Revenue Agency (2006), 2006 CanLII 25617 (ON SC), 82 O.R. (3d) 368, [2006] O.J. No. 3096, 271 D.L.R. (4th) 268, 32 C.P.C. (6th) 115, 150 A.C.W.S. (3d) 349 (S.C.J.); Johnson v. Calvert, 5 Cal. 4th 84, 851 P.2d 776 (1993); Nickerson v. Nickerson (1991), 1991 CanLII 7127 (ON SC), 4 O.R. (3d) 447, [1991] O.J. No. 1188, 34 R.F.L. (3d) 341, 28 A.C.W.S. (3d) 346 (Gen. Div.); O'Driscoll v. McLeod, 1986 CanLII 735 (BC SC), [1986] B.C.J. No. 1355, 10 B.C.L.R. (2d) 108, 2 A.C.W.S. (3d) 344 (S.C.); Phelan (Re), [1999] O.J. No. 2465, 99 O.T.C. 130, 29 E.T.R. (2d) 82, 89 A.C.W.S. (3d) 800 (S.C.J.); Raft v. Shortt (1986), 1986 CanLII 1812 (ON SC), 54 O.R. (2d) 768, [1986] O.J. No. 492, 2 R.F.L. (3d) 243, 37 A.C.W.S. (2d) 367 (H.C.J.); Rutherford v. Ontario (Deputy Registrar General) (2006), 2006 CanLII 19053 (ON SC), 81 O.R. (3d) 81, [2006] O.J. No. 2268, 270 D.L.R. (4th) 90, 141 C.R.R. (2d) 292, 30 R.F.L. (6th) 25, 148 A.C.W.S. (3d) 943 (S.C.J.); Sayer v. Rollin, [1980] O.J. No. 613, 16 R.F.L. (2d) 289, 2 A.C.W.S. (2d) 41 (C.A.); T. (S.) v. Stubbs (1998), 1998 CanLII 14676 (ON SC), 38 O.R. (3d) 788, [1998] O.J. No. 1294, 158 D.L.R. (4th) 555, 56 O.T.C. 110, 24 C.P.C. (4th) 144, 78 A.C.W.S. (3d) 481 (Gen. Div.) Statutes referred to Assisted Human Reproduction Act, S.C. 2004, c. 2, s. 6(1) Children's Law Reform Act, R.S.O. 1990, c. C.12, ss. 4, 8, 12, 13, 21 Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 97 [as am.], 137 Family Law Act, S.A. 2003, c. F-4.5, s. 12(5), (6) [as am.] Family Maintenance Act, C.C.S.M. c. F20 Family Relationships Act 1975 (South Australia), s. 10E Human Fertilisation and Embryology Act 1990 (U.K.), 1990, c. 37, s. 30 Vital Statistics Act, C.C.S.M. c. V.60, s. 1 [as am.] Vital Statistics Act, R.S.O. 1990, c. V.4, ss. 1[as am.], 9(1) [as am.], (7) [as am.], 53 [as am.] Vital Statistics Act, 1948, S.O. 1948, c. 97, s. 1(a) Rules and regulations referred to Family Law Rules, O. Reg 114/99, rules 2.03, 14(10), 14.06 Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 2.03, 14.06 Authorities referred to Ontario Law Reform Commission, Report on Human Artifical Reproduction and Related Matters, Vol. I (Toronto: Ministry of the Attorney General, 1985) Sarna, L., The Law of Declaratory Judgments, 3rd ed. (Toronto: Carswell, 2007)

Christopher M. Murphy, for the applicants.

Endorsement of NELSON J.: -- Introduction

[1] This application came before me by way of a 14B motion. It is about genetic and surrogate parents. It deals with custody orders, declarations of parentage, positive and negative declarations of paternity and maternity, changing birth records and confidentiality.

Nature of the Application

[2] M.D. and J.D. (the applicants) bring a motion pursuant to rule 14(10) of the Family Law Rules, O. Reg. 114/99. The applicants seek an order declaring them to be the mother and father of a child, E.D. They also seek an order declaring two persons, L.L. and I.L. (the respondents), not to be the mother and father of the same child.

[3] If the above order is granted, the applicants further seek an order directing the Deputy Registrar for the Province of Ontario (the "Registrar") to amend E.D.'s birth registration to reflect the fact that M.D. and J.D. are the parents.

Factual Background

[4] M.D. and J.D. are a married couple. M.D. is unable to bear children due to medical reasons. The applicants have a family friend, L.L., who is able to bear children. L.L. was willing to act as a surrogate mother. L.L. is married to I.L.

[5] The applicants entered into a so-called "Gestational Carriage Agreement" with L.L. and I.L. in November 2006. Under the agreement, L.L. agreed to act as a gestational carrier for M.D.'s ova, which had been fertilized with J.D.'s sperm. The applicants would thus be the genetic parents of any child that was born as a result of this procedure.

[6] Happily, in the summer of 2007, L.L. gave birth to a child, E.D. After the child's birth, a "Statement of Live Birth" had to be completed and filed with the Registrar. That statement required that L.L. place her name on the form as the "mother" of E.D., notwithstanding the agreement and the fact that the applicants are E.D.'s genetic parents.

[7] After making inquiries with the Registrar, counsel for the applicants was informed that an application had to be made to the court in order to declare them to be the parents of E.D.

The Sample Order

[8] The Registrar provided the following sample order to counsel for the applicants, following counsel's inquiries:

> Under the Children's Law Reform Act,
> (a) an order awarding custody of the child [insert name] born [insert date] (hereinafter "the child") to the applicants, [insert name] and [insert name] (hereinafter the "applicants")
> (b) a declaration that the applicant, [insert name] is the mother of the child and the applicant [insert name] is the father of the child and that they will be recognized in law to be the mother and father
>
> Under the Children's Law Reform Act and the Courts of Justice Act,
> (c) a declaration that the respondent [insert name] is not the father of the child
> (d) a declaration that the respondent [insert name] is not the mother of the child
>
> Under the Vital Statistics Act,
> (e) an order directing the Deputy Registrar for the Province of Ontario to register the birth of the child in such a fashion as to show the applicant [insert name] as the mother of the child and the applicant [insert name] as the father of the child
> (f) further and alternatively to (e) hereof, an order, if necessary, directing the Deputy Registrar General for the Province of Ontario to amend the registration of birth (if the Registrar General has completed, certified and registered a statement) in such a fashion so as to show the applicants as the sole parents of the child
>
> Under the Courts of Justice Act,
> (g) a direction to the Registrar to seal and treat as confidential all documents filed in this proceeding
> (h) a direction to the Deputy Registrar General for the Province of Ontario to deal and treat as confidential the Notice of Live Birth and all other records in its possession in connection with this matter, including this order, save and except for Form 2 [the Statement of Live Birth] and the birth certificate
> (i) an order that the title of proceedings be changed for all purposes, except for subparagraph (e) or (f) above, to reflect the following [See Note

> 1 below] and the Registrar of the Ontario Superior Court of Justice be directed to amend the records accordingly.

[9] The order that the applicants seek is similar to the above sample order.

[10] Rule 14(10) of the Family Law Rules permits a motion to be brought with respect to "procedural, uncomplicated or unopposed matters". In this case, the respondents I.L. and L.L. consent to the applicants' motion. The Registrar, who has also been given notice, neither consents to nor opposes the motion.

[11] While this motion is brought on consent, consent alone cannot confer jurisdiction upon this court where none otherwise exists: Lazar Sarna, The Law of Declaratory Judgments, 3rd ed. (Toronto: Carswell, 2007), p. 73; see also Rutherford v. Ontario (Deputy Registrar General) (2006), 2006 CanLII 19053 (ON SC), 81 O.R. (3d) 81, [2006] O.J. No. 2268, 30 R.F.L. (6th) 25 (S.C.J.), at para. 65. As issues of jurisdiction to grant the requested order arise in this case, I have chosen to provide written reasons.

Gestational Carriage Agreement

[12] Pursuant to the gestational carriage agreement entered into by the applicants with L.L. and I.L., it was agreed that it would be in the best interests of the child to be placed into the immediate permanent custody of the applicants after birth. The agreement states that the applicants are not only the genetic parents of the child, but also the "social" parents. L.L. and I.L. agree to relinquish any parental rights over the child, while the applicants confirm their intention to assume all parental responsibilities. The agreement also states that the applicants will apply to this court to obtain an order declaring them to be the child's parents, and directing that they be named as such on the child's birth registration.

[13] It should be noted that the agreement in question appears to comply with the requirement under subsection 6(1) of the Assisted Human Reproduction Act, S.C. 2004, c. 2that no consideration pass to the surrogate mother in exchange for her assistance.

[14] That said, I have not been asked to rule on the validity of the various provisions of the gestational carriage agreement, and therefore I have not done so. The agreement's validity is not essential to the findings and conclusion reached in this case.

Statutory Provisions

[15] The Children's Law Reform Act, R.S.O. 1990, c. C.12 ("CLRA") grants this court the jurisdiction to issue declarations of parentage. Section 4 of the CLRA states:

> 4(1) Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.
>
> (2) Where the court finds that a presumption of paternity exists under section 8 and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court shall make a declaratory order confirming that the paternity is recognized in law.
>
> (3) Where the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect.

[16] This court also has jurisdiction to issue declarations pursuant to s. 97 of the Courts of Justice Act, R.S.O. 1990, c. C.43 ("CJA"):

> 97. The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

[17] Regarding custody, s. 21 of the CLRA provides:

> 21. A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.

[18] The Vital Statistics Act, R.S.O. 1990, c. V.4 ("VSA") governs the registration of births in Ontario:

> 9(1) The mother and father, or either of them, in such circumstances as may be prescribed, or such other person as may be prescribed, shall certify the birth in Ontario of a child in the manner, within the time and to the person prescribed by the regulations.

[19] The VSA allows for the certificate of birth to be amended, after a court has made an order under s. 4 of the CLRA declaring a person or persons to be a parent:

> 9(7) On receiving a certified copy of an order under section 4, 5 or 6 of the Children's Law Reform Act respecting a child whose birth is registered in Ontario, the Registrar General shall amend the particulars of the child's parents shown on the registration, in accordance with the order.

[20] The VSA contains no definitions of either "mother" or "father". However, "birth" is defined as follows, pursuant to s. 1:

> "birth" means the complete expulsion or extraction from its mother of a fetus that did at any time after being completely expelled or extracted from the mother breathe or show any other sign of life, whether or not the umbilical cord was cut or the placenta attached[.]

Case Law

[21] There is apparently only one reported Ontario decision similar to this case in terms of the nature of the order sought. That case is R. (J.) v. H. (L.), 2002 CanLII 76705 (ON SC), [2002] O.J. No. 3998, [2002] O.T.C. 764 (S.C.J.).

[22] In R. (J.), a gestational carriage agreement similar to the one in the case at bar was entered into between the "genetic parents" (the applicants) and the surrogate mother (who was the respondent, together with her husband). The applicants obtained DNA test results indicating that there was a 99.99 per cent probability that they were the genetic parents of twins who had been carried by the surrogate mother. Kiteley J. found that the applicants were entitled to be recognized in law as the father and mother of the twins, pursuant to s. 4 of the CLRA (R. (J.), at paras. 10-11).

[23] Kiteley J. also granted a declaration that the husband of the surrogate mother was not the father of the twins. Subsection 8(1) of the CLRA establishes a presumption that the father is the person married to the mother of the child at the time of birth. Kiteley J. found that the presumption had been rebutted. She held that while subsections 4(1) and (2) of the CLRA provided the jurisdiction to make "positive declarations", the court also had the jurisdiction to make "negative declarations", such as a declaration of non-paternity, pursuant to s. 97 of the CJA (R. (J.), at paras. 12-13).

[24] Kiteley J. found the issue with respect to the respondent surrogate mother to be more complicated. Section 1 of the VSA defined "birth" as "the complete expulsion or extraction from its mother of a fetus . . . ". Interpreting the VSA, Kiteley J. held that the surrogate mother was "clearly the birth mother" (R. (J.), at para. 15).

[25] Ultimately, however, Kiteley J. decided to grant the declaration sought that the birth mother was not the mother of the twins. This decision was "facilitated" by the fact that the surrogate mother consented to the relief sought by the applicants. Kiteley J. held that if there had been a conflict between the surrogate mother and the applicants, she would have had to consider whether s. 4 of the CLRA permitted a declaration that a child had more than one mother. Based upon the consent of the respondents, and particularly the consent of the birth mother, Kiteley J. held that it was appropriate to grant the declaration of non-maternity pursuant to s. 97 of the CJA. Kiteley J. also found that it was in the best interests of the twins for the declaration to be made (R. (J.), at paras. 18-20).

[26] The British Columbia Supreme Court dealt with a similar issue in Rypkema v. British Columbia, 2003 BCSC 1784 (CanLII), [2003] B.C.J. No. 2721, 47 R.F.L. (5th) 398 (S.C.). The issue before the court was whether it could and should declare the genetic parents (the applicants) to be the parents of the child born of the surrogate mother for the purposes of the birth registration maintained by the Vital Statistics Agency.

[27] Under the relevant British Columbia statute, "birth" was defined as "the complete expulsion or extraction from its mother, irrespective of the duration of the pregnancy, of a product of conception . . ." (Rypkema, at para. 12). The court did not refer to any provincial legislation equivalent to the CLRA. The court granted the declaration sought by the applicants, relying upon the case of O'Driscoll v. McLeod, 1986 CanLII 735 (BC SC), [1986] B.C.J. No. 1355, 10 B.C.L.R. (2d) 108 (S.C.), in which Huddart L.J.S.C. had held that the court had jurisdiction to make binding declarations of paternity. In addition to O'Driscoll, the court was influenced by the surrogate mother's consent to the application, and the beneficial effects of affirming the parent-child relationship (Rypkema, at paras. 29-32). It should be noted, however, that the applicants in Rypkema did not seek declarations of non-paternity and non- maternity.

[28] Finally, a similar issue arose before the Manitoba Court of Queen's Bench in C. (J.) v. Manitoba, 2000 MBQB 173 (CanLII), [2000] M.J. No. 482, 12 R.F.L. (5th) 274 (Q.B.). In contrast to Rypkema and R. (J.), the applicants (the genetic parents) sought a declaration compelling hospital staff attending at the birth to complete documentation showing the applicants to be the natural and legal parents of the child to be delivered by the surrogate mother. The applicants also sought a declaration that they were to be indicated as the "natural and legal parents" of the child on the birth certificate. The province opposed the application. The surrogate mother and her husband joined with the genetic parents as applicants (C. (J.), at paras. 1-3).

[29] Section 1 of the Manitoba Vital Statistics Act, C.C.S.M. c. V.60 defined birth as "the complete expulsion or extraction from its mother, irrespective of the duration of the pregnancy, of a product of conception . . .". Keyser J. held that while "mother" and "father" were not defined in the Act, it was clear that "mother" was contemplated to be the person who gives birth to the child, regardless of the original source of the genetic material (C. (J.), at para. 4).

[30] Keyser J. referred to the Manitoba Family Maintenance Act, C.C.S.M. c. F20 and held the legislature had made it explicitly clear that a declaration of paternity or non- paternity was available prior to the child's birth. Keyser J. agreed with the respondent that since the legislature had specifically contemplated the issue of pre-birth declaratory orders, and had decided not to make them available with respect to maternity, the application should be dismissed (C. (J.), at paras. 6-7).

Legislation in Other Jurisdictions

[31] At least one province in Canada has addressed the issue before this court through legislation. In Alberta, subsection 12(5) of the Family Law Act, S.A. 2003, c. F-4.5 provides that if a child is a product of the donor's genetic material, and the gestational carrier consents, "the court shall make an order declaring the genetic donor to be the sole mother of the child". Furthermore, pursuant to subsection 12(6) of the same Act, the genetic mother is deemed to be the child's sole mother from the time of birth. Under the statute the gestational carrier must, after the child's birth, consent to the genetic mother being the "sole mother". Consent given prior to birth, as formalized in a gestational carrier agreement, may not be used as evidence of consent post-birth.

[32] In the United States, practice with respect to the status of surrogate mothers varies by state. California appears to be the state most protective of the parental status of the genetic parents. In Johnson v. Calvert, 5 Cal. 4th 84, 851 P.2d 776 (1993), the gestational carrier and the genetic parents had a dispute as to whether the gestational carrier was the "mother" of the child. The California Supreme Court recognized that, practically speaking, the child had two mothers: one genetic mother and one birth mother. The applicable statute, however, allowed for only one mother. The court held that, where a child has a genetic mother and a birth mother, the woman "who intended to bring about the birth of a child that she intended to raise as her own" was the child's "natural mother". Thus, in Johnson v. Calvert, the genetic mother was held to be the child's "natural mother".

[33] The intention-based inquiry created by the court in Johnson v. Calvert has since been extended such that a woman can be declared a child's "natural mother" without a genetic link to the child: Buzzanca v. Buzzanca, 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280 (Ct. App. 4th 1998). In other words, the intention as expressed in the parties' agreement may be conclusive as to "motherhood", even in the absence of genetic ties.

[34] The liberality of the California regime is to be contrasted with the approach taken by the states in Australia. For instance, in the state of South Australia, genetic mothers are prevented by statute from being legally recognized as the mother of a child born from a surrogacy arrangement: Family Relationships Act 1975 (S.A.), s. 10E. The same Act prevents genetic fathers from being declared the father of any children resulting from an artificial insemination procedure. Surrogacy agreements also appear to be illegal in all of the Australian states, except for New South Wales which has no legislation at all covering the matter.

[35] Occupying a more middle ground is the law of England and Wales. Genetic parents can apply for a court declaration (a "parental order") that they are the legal parents of a child born from a surrogacy arrangement: Human Fertilisation and Embryology Act 1990 (U.K.), 1990, c. 37, s. 30. The order must be sought within six months after the birth of the child. As in Canada, no consideration may pass to the surrogate mother.

Analysis

(i) Declaring the genetic parents to be the parents pursuant to the CLRA

[36] There is no issue with respect to this court's jurisdiction to declare the applicants the parents of E.D. pursuant to s. 4 of the CLRA. Even if the applicants were not the genetic parents of E.D., a declaration of parentage under s. 4 would still be available, given that the CLRA does not define parentage solely on the basis of biology: A.A. v. B.B. (2007), 2007 ONCA 2 (CanLII), 83 O.R. (3d) 561, [2007] O.J. No. 2 (C.A.), at para. 32.

[37] The Ontario Court of Appeal recently canvassed the importance of a declaration of parentage from the perspective of both the parent(s) and the child in A.A. Amongst the benefits and ramifications of such a declaration are such things as the fact that a declaration of parentage is a "lifelong immutable declaration of status", the ability to inherit on intestacy, and the ability of the parent to register the child for school and obtain government documents for the child (A.A., at para. 14).

[38] As has been noted above, declarations of parenthood have been issued in very similar circumstances before in this province: R. (J.). The courts of this province have also issued a parental declaration in favour of a single father who used his sperm to fertilize an [ovum] from an anonymous donor, which was then carried to term by a surrogate mother: D. (K.G.) v. P. (C.A.), [2004] O.J. No. 3508 (S.C.J.). In D. (K.G.), the father was declared to be the child's father, and the birth registration was ordered amended so as to show him as the sole parent, i.e., without mention of the surrogate mother.

[39] There is some cautionary case law with respect to declarations of parenthood, namely the Manitoba case of C. (J.). However, C. (J.) can be distinguished on the basis that the applicant genetic parents sought a

declaration that would have compelled hospital staff to record them as the parents of the child prior to the birth. The case was resolved by reference to the Manitoba Family Maintenance Act, which clearly indicated a legislative intention that no declaration as to maternity was available prior to the birth of a child. C. (J.) is thus distinguishable on its facts, and on the specific provisions applicable in Manitoba.

[40] I have no difficulty in holding that, in the circumstances of this case, the applicants should be declared the parents of E.D. Certainly, it would be in the child's best interests for such a declaration to be made in this case.

(ii) Declaring the husband of the surrogate mother not to be the child's father

[41] There is also no real issue with respect to this court's jurisdiction to declare I.L. (the husband of the surrogate mother) to not be E.D.'s father.

[42] The power to issue a declaration of non-paternity was canvassed in Raft v. Shortt (1986), 1986 CanLII 1812 (ON SC), 54 O.R. (2d) 768, [1986] O.J. No. 492, 2 R.F.L. (3d) 243 (H.C.J.). In Raft, the court was asked to make a declaration of non-paternity. Justice Potts held that, as s. 4 of the CLRA only related to positive declarations, the jurisdiction to make an "order in the negative" had to be found elsewhere. Potts J. held that s. 110 of the CJA [now s. 97] provided the jurisdiction to make negative declarations. In the alternative, Potts J. held that this power was part of the court's inherent jurisdiction (Raft, at paras. 6-9). The reasoning in Raft was applied by Kiteley J. in R. (J.), at para. 13.

[43] In my opinion, Kiteley J.'s decision that the court had the jurisdiction to issue a declaration of non-paternity was also supported by the nature of declaratory judgments. As held by Huddart L.J.S.C. in O'Driscoll v. McLeod, supra [at para. 23]: "The Court has the power to grant declarations which determine legal relationships generally." There is no logical reason why a legal relationship can only be subject to a positive, as opposed to a negative, determination.

[44] Huddart L.J.S.C.'s interpretation is supported by Lazar Sarna in The Law of Declaratory Judgments, supra. Mr. Sarna writes at p. 1: "The declaratory judgment is a judicial statement confirming or denying a legal right of the applicant" (emphasis added). An earlier edition of Mr. Sarna's work, specifically a passage containing the preceding quotation, was quoted approvingly by Justice Granger in Nickerson v. Nickerson (1991), 1991 CanLII 7127 (ON SC), 4 O.R. (3d) 447, [1991] O.J. No. 1188 (Gen. Div.), at para. 17. Mr. Sarna states at p. 33, note 39, that negative declarations denying legal rights are "now a common occurrence".

[45] A declaration of non-paternity is in essence a denial of a legal right. Accordingly, given that the issue of paternity is justiciable (it is not a mere "moral, social or political matter" to which no legal or equitable rights arise: O'Driscoll, at para. 23), a declaration of non-paternity may be made by this court.

[46] It should be noted that in R. (J.), DNA testing was used to establish to a 99.99 per cent probability that the child was the genetic material of the applicants. There has been no genetic testing in the case at bar. However, genetic testing is not a prerequisite to the court exercising its jurisdiction to make a declaration of non-paternity. The gestational carriage agreement in this case contains provisions by which the surrogate mother agreed to abstain from sexual intercourse for a two-week period prior to every embryo transfer, and ending when the first blood test after each embryo transfer had been obtained. The purpose was presumably to ensure that any child born from the process was the genetic child of the applicants. In any case, a CLRA declaration of paternity is available without medical corroboration: Bagaric v. Juric (1984), 1984 CanLII 2133 (ON CA), 44 O.R. (2d) 638, [1984] O.J. No. 3069 (C.A.), at para. 29.

[47] Given the consent of the parties in this case, together with the terms of the gestational carriage agreement, this court should not order genetic testing to determine M.D. and J.D.'s genetic link to E.D. If L.L. and I.L. had not consented to the application, or if there had been some suggestion that the terms of the

agreement had not been adhered to, genetic testing would have been appropriate. In the circumstances in this case, however, I have little difficulty in declaring that I.L. is not E.D.'s father.

(iii) Declaring the surrogate mother not to be the child's mother

[48] Most problematic in terms of this application is the request for this court to declare L.L. (the surrogate mother) not to be E.D.'s mother.

[49] The problem arises from the definitions found within the VSA. As cited above, the VSA defines "birth" as "the complete expulsion or extraction from its mother of a fetus . . .". Thus, while the term "mother" is not defined within the Act, it could be argued that the definition of "mother" relates to the definition of "birth", which would indicate that a "mother" is a woman who gives birth to a child.

[50] This was the interpretation given to the VSA by Kiteley J. in R. (J.). Kiteley J. held that, pursuant to the VSA, the surrogate mother was "clearly the birth mother" for the purposes of that Act. Interpreting similar legislation in Manitoba, Keyser J. came to the same conclusion in C. (J.), at para. 4. These two judicial interpretations are also in accord with that of the Ontario Law Reform Commission (Ontario Law Reform Commission, Report on Human Artificial Reproduction and Related Matters, Vol. I, (Toronto: Ministry of the Attorney General, 1985), p. 72).

[51] The only interpretation that is somewhat contrary, that I am aware of, is that of Justice Rivard in Rutherford v. Ontario (Deputy Registrar General), supra. Rivard J. found that the term "mother" was undefined in the VSA. Rivard J. stated, at para. 59:

> This reference to "mother" [in the definition of "birth"] does not actually define what is meant by mother. The definition provides an exhaustive definition of birth. Clearly, the person giving birth is a mother, but it is an error of logic to thereby conclude that all mothers must give birth. Rivard J. went on to state that the definitional ambiguity meant that the VSA was "neutral" with respect to the meaning of the term "mother". However, Rutherford was concerned with a different issue than the one before this court, namely whether the court could order two lesbian co-mothers to be registered as the parents of a child pursuant to the VSA and the CLRA.

[52] I find the interpretation of "mother" under the VSA advanced by Kiteley J., Keyser J. and the Ontario Law Reform Commission compelling. Based upon an examination of the VSA as a whole, it is clear that "mother" refers to the woman who gave birth to the child.

[53] I conceive of the problems stemming from a declaration of non-maternity somewhat differently than did Kiteley J. Kiteley J. held that the VSA definition of mother, as inferred by an interpretation of that statute, went to the issue of whether the CLRA would permit a declaration that a child had more than one mother (R. (J.), at paras. 18-20). The answer to this has been conclusively determined in A.A., where it was held that a declaration that a child has more than one mother is available.

[54] The issue as restated is, therefore, whether this court can declare a person not to be the mother of a child when she is, in fact, the mother of that child pursuant to a statute. For the following reasons, I answer that question in the affirmative.

[55] A declaration of parentage pursuant to s. 4 of the CLRA is a judgment in rem, recognized for all purposes by the world: Sayer v. Rollin, [1980] O.J. No. 613, 16 R.F.L. (2d) 289 (C.A.), at para. 5. What additional benefit is there in a declaration of non-parentage when combined with a s. 4 declaration? The declaration of non-parentage is, it seems to me, simply a clarification of status for the genetic parents, the surrogate mother and her spouse, vis-à-vis their respective relationships towards the child. Where there are two persons with potential claims to be the child's mother, a declaration that one of them is the child's mother might not preclude the other from also being that child's mother. Thus, a declaration of non-

maternity would clarify the status of the interested parties in a manner that is worthy of judicial determination.

[56] A declaration of non-maternity is available in the specific circumstances before this court pursuant to this court's jurisdiction to issue declarations and its inherent parens patriae jurisdiction.

[57] The Ontario Court of Appeal examined the doctrine of parens patriae concept at some length in A.A. Rosenberg J.A. held that the court's "inherent parens patriae jurisdiction may be applied to rescue a child in danger or to bridge a legislative gap" (A.A., at para. 27).

[58] In A.A., A.A. and C.C. were lesbian partners who wanted to have a child. They enlisted the assistance of their friend, B.B. It was determined amongst the three that A.A. and C.C. would be the primary caregivers to the child, but that B.B. would remain involved in the child's life. Therefore, three persons had parental relationships with the child: his biological father (B.B.) and mother (C.C.), and his mother's lesbian partner (A.A.). When the child was two years old, A.A. applied for a declaration pursuant to the CLRAthat she, like B.B. and C.C., was a parent of the child (A.A., at paras. 1-2).

[59] At trial, the court found that there was no legislative gap in the CLRA, as that Act intentionally contemplated there being only one mother of a child. On this basis, the court held that parens patriae jurisdiction was unavailable (A.A., at paras. 18, 28). The Court of Appeal overturned Justice Aston on this point. Rosenberg J.A. noted that the CLRA did not define parentage solely on the basis of biology, and held that, even if the CLRA was intended to limit declarations of paternity and maternity to biological parents, this would not answer the question of whether there was a legislative gap (A.A., at paras. 32-33).

[60] Examining the legislative intention behind the CLRA, Rosenberg J.A. held that the original purpose of the statute was to ensure that all children should have legal status, be they born inside or outside a traditional marriage union. The legislature had not contemplated other types of relationships or the advancement of reproductive technology (A.A., at para. 34). Rosenberg J.A. went on to hold that, since the legislature had not turned its mind to modern social conditions and technologies, there was a gap in the legislation that does not operate in the best interests of the child. In the circumstances, Rosenberg J.A. held that the court's parens patriae jurisdiction was rightly employed (A.A., at para. 38).

[61] In my opinion, there is a gap in the current VSA legislation that does not operate in the best interests of the child, insofar as the inferential definition of "mother" under that statute impedes the court's jurisdiction to declare a person not to be the mother of a child.

[62] The definition of "birth" first appears in the Vital Statistics Act, 1948, S.O. 1948, c. 97, s. 1(a):

> "birth" means the complete expulsion or extraction from its mother of a foetus which did at any time after being completely expelled or extracted from the mother breathe or show any other sign of life, whether or not the umbilical cord was cut or the placenta attached[.]

[63] As can be seen, this definition is in essence the same definition of birth that we have today, exactly 60 years later. In 1948, the notion that ova could be fertilized in a laboratory, and then implanted into a surrogate mother to gestate, would have been the stuff of science fiction. The current VSA has not changed with respect to its definition of "birth", and the consequent inference that the "mother" is the person who gave birth to the child. There is no recognition in the VSA that there can be two mothers: the birth mother and the genetic mother.

[64] Clearly, regulatory reasons could exist as to why the government would require the birth mother to record her name on the Statement of Live Birth. In fact, the instructions on the current Statement of Live Birth form state: "The mother on the form must be the woman who gave birth to the child."

[65] The legislative gap that arises in this case is thus distinct from the type of gap that was before the Court of Appeal in A.A. In A.A. there was a direct legislative gap, in that the gap arose out of the statute from which the order was sought. In this case, the order is sought pursuant to the CJA. There is no gap that arises out of the CJA; rather, the gap stems from the effect of the VSA upon the ability of this court to issue a declaration of non-maternity. Therefore, the gap is indirect in nature. That said, it is no less of a gap, and I can think of no principled reason why the court's remedial parens patriae jurisdiction should not be available to rectify the situation by clarifying the legal status and rights of the parties.

[66] This ruling does not affect in any way the legitimacy of the statutory and regulatory scheme of birth registration. This ruling simply pertains to the issue of whether the inferred definition of "mother" under the VSA prevents a declaration that the woman who gave birth to a child is not the mother of that same child after that child's birth has been registered in accordance with the law.

[67] It is in the best interests of the child that this court issue a declaration that the child's surrogate mother, who is without genetic link to the child, is not that child's mother. As noted above, at para. 37, the Ontario Court of Appeal has discussed the benefits and importance of a declaration of parenthood. In my opinion, there is no doubt that it is additionally in the best interests of the child to remove any ambiguity about who the child's mother is, where the circumstances of the child's birth and the operation of a statute combine to produce such ambiguity.

[68] For the reasons above, L.L. is declared not to be the mother of E.D. Further Orders Sought by the Applicants

[69] In addition to the declarations discussed above, the applicants seek custody of E.D. The court's jurisdiction to grant the applicants custody of E.D. is conferred pursuant to s. 21 of the CLRA. Custody of E.D. is hereby ordered in favour of the applicants.

[70] Further, the applicants seek an order directing the Registrar to register, or amend the registration of birth, in a manner showing the applicants to be the parents of E.D. This court has jurisdiction to grant that order pursuant to subsection 9(7) of the VSA, and such an order shall issue.

[71] The applicants seek an order directing the Registrar to treat as confidential the Notice of Live Birth pertaining to E.D., and all other records in its possession in connection with this matter, including this order, except for Form 2 (the Statement of Live Birth), and the birth certificate.

[72] This court possesses the jurisdiction to order that certain documents be treated as confidential pursuant to s. 137 of the Courts of Justice Act, which states:

> 137(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.
>
> (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

[73] A plain reading of subsection 137(2) indicates that a prerequisite for the court to seal a document is that the document must be filed before the court. In this case, I am asked to order documents sealed (the Notice of Live Birth, this order and "all other records" in the Registrar's possession relating to the matter) that have never been filed before this court.

[74] Furthermore, a review of the case law where s. 137 has been invoked indicates that the documents that may be sealed are those under the court's control. See, for example, Dodd v. Cossar, [1998] O.J. No. 335, 16 C.P.C. (4th) 132 (Gen. Div.); Phelan (Re), [1999] O.J. No. 2465, 99 O.T.C. 130 (S.C.J.); Hallstone

Products Ltd. v. Canada Customs and Revenue Agency (2006), 2006 CanLII 25617 (ON SC), 82 O.R. (3d) 368, [2006] O.J. No. 3096, 271 D.L.R. (4th) 268 (S.C.J.).

[75] I am not satisfied that this court has the jurisdiction to order that records in the possession of the Registrar be sealed and, therefore, I decline to grant the order sought. In the event that the applicants wish to make further submissions on this issue, they may do so within 30 days.

[76] Despite my refusal to order the Registrar to seal the records, I note that the provisions of the VSA appear to provide strong confidentiality protection to all parties to this application. Specifically, s. 53 of the VSA provides:

> 53(1) No division registrar, sub-registrar, funeral director, person employed in the service of Her Majesty or other prescribed person shall communicate or allow to be communicated to any person not entitled thereto any information obtained under this Act, or allow any such person to inspect or have access to any records containing information obtained under this Act.

[77] Furthermore, the declarations of parentage granted by this court "may" be filed by the applicants with the Registrar pursuant to s. 12 of the CLRA. If the applicants chose to do this, interested parties may apply for disclosure of the declarations under s. 13 of the same Act. Privacy interests are protected by the requirement under s. 13 that the person applying (i) have an interest; (ii) furnish substantially accurate particulars; and (iii) provide a satisfactory reason for requesting the declarations.

[78] Finally, the applicants seek an order pursuant to s. 137 of the Court of Justice Act directing the registrar of the court to seal and treat as confidential all documents filed in this proceeding. Justice Lederman considered the test to obtain a sealing order in Hallstone Products, at para. 27:

> The Canadian judicial system is based on a presumption that all court proceedings must be conducted in an open and public manner so as to maintain confidence in the administration of justice. The party seeking a sealing order must establish that such an order is necessary to protect societal values of superordinate importance in order to rebut the presumption. Hence, the test for granting a sealing order is whether the social value raised by the plaintiffs is one of superordinate importance to the rights of the public to open access.

[79] In this case, the applicants have not provided any material to indicate why they seek a sealing order. Kiteley J. considered this type of application in R. (J.), and held at paras. 27 and 28:

> Simply because in this case the request is unopposed does not mean that an order pursuant to section 137 is a foregone conclusion . . . the court has an important interest in the openness of legal proceedings since transparency is one of the hallmarks of judicial impartiality.
>
> In the absence of any evidence to justify the request, I am not prepared to speculate or infer what factors would be weighed on the part of the applicants. I have only the presumption of openness which I must apply.

[80] Given the high threshold to obtain a sealing order, and the decision not to grant a sealing order in similar circumstances in R. (J.), I am not prepared to order the court registrar to seal the documents filed in this proceeding at this time. However, if the applicants wish, they may make further submissions on this issue within 30 days.

[81] This court possesses the jurisdiction to use initials or pseudonyms to protect the identity of parties pursuant to rule 2.03 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 which enables the court, in the interests of justice, to dispense with the general rule that the names of parties be identified in the title of the proceeding (rule 14.06): T.(S.) v. Stubbs (1998), 1998 CanLII 14676 (ON SC), 38 O.R. (3d) 788, [1998]

O.J. No. 1294 (Gen. Div.). The use of initials to identify the parties was ordered in R. (J.) in the absence of submissions on the point. In this case, the identification of the parties by initials is entirely appropriate, given the privacy interests that the parties and E.D. have in this matter.

[82] Lastly, the applicants request that the title of proceedings be changed "to reflect the following . . .". Thereafter, the names of the applicants and the respondents are set out. I believe that this section of the draft order may reflect an administrative error, as the title of proceedings sought does not reflect any change in the title of proceedings as it stands. Again, if the applicants wish, they may make further submissions on this point within 30 days. In any case, I am ordering that the title of proceedings be altered to identify the parties and E.D. by initial. Conclusion

[83] An order shall issue as follows:
Under the Children's Law Reform Act,
(a) custody of the child, E.D., born June 23, 2007
(hereinafter "the child") is hereby granted to the applicants, M.D. and J.D. (hereinafter the "applicants").
(b) it is hereby declared that the applicant, M.D., is the mother of the child and the applicant, J.D., is the father of the child and that they are recognized in law to be the mother and father. Under the Courts of Justice Act,
(c) a declaration that the respondent I.L. is not the father of the child.
(d) a declaration that the respondent L.L. is not the mother of the child. Under the Vital Statistics Act,
(e) the Deputy Registrar for the Province of Ontario is hereby directed to amend the registration of the birth of the child in such a fashion as to show the applicant, M.D., as the mother of the child and the applicant, J.D., as the father of the child. Under the Rules of Civil Procedure,
(f) the title of these proceedings is ordered amended so as to identify the applicants and the respondents I.L. and L.L. by their respective initials.

Application granted.

Notes

Note 1: "The following refers to the suggested title of the proceedings, omitted from this endorsement.