**Jody Ollyver DeSmidt, Esq.**
**Walling, Berg & Debele, P.A.**
**121 South Eighth Street, Suite 1100**
**Minneapolis, MN 55402**
**612.335.4284**
**jody.desmidt@wbdlaw.com**

# USING DECLARATORY JUDGMENT ACTIONS TO ESTABLISH PARENTAGE IN SITUATIONS INVOLVING ASSISTED REPRODUCTIVE TECHNOLOGY

## A. Increasing Numbers of Children are Being Born as a Result of Assisted Reproductive Technology, Yet Our Statutes Have not Adequately Addressed the Needs of These Children and Families.

The creation or expansion of families through assisted reproductive technology (hereinafter ART) is becoming increasingly common in Minnesota and throughout the United States. The Centers for Disease Control and Prevention (hereinafter CDC) defines ART in general as procedures involving: "surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman. They do NOT include treatments in which only sperm are handled or procedures in which a woman takes drugs to stimulate egg production without the intention of having eggs surgically retrieved." 2012 Assisted Reproductive Technology Fertility Clinic Success Rates Report. P.3 ¶ 2. (emphasis in original). According to statistics published by the CDC, there were 65,160 live born infants in 2012 resulting from ART. See CDC 2012 ART Fertility Clinic Success Rates Report. Today, over one percent of all infants born in the United States every year are the result of ART. Id.

Although efforts have been made to update Minnesota laws to clarify the establishment of parentage when ART is used as a means to add to a family, such efforts have failed. In general, Minnesota law does not regulate, or address, the use of ART, other than some well-established or basic provisions concerning the use of artificial insemination. Nonetheless,

several Minnesota clinics are using ART to assist individuals in their desire to become parents. Under the Fertility Clinic Success Rate and Certification Act of 1992, Congress mandated the collection of certain fertility clinic data by the CDC. 42 U.S.C. § 263a[i]. There are currently five Minnesota clinics that report their statistics to the CDC regarding ART. See CDC 2012 ART Fertility Clinic Success Rates Report, pp 274-278.

While some of the ART procedures result in an intended female parent giving birth to the child she intends to parent, other procedures require the assistance of a third party to accomplish pregnancy and/or birth. In such circumstances, a gestational carrier assists the family to have a child. The child who results may be the genetic child of the intended parents, or of known or unknown donors, yet is physically born to a carrier (and often, she is married). Therefore, for the sake of the child, parents, donors, carriers, and spouses, parentage of the child needs to be legally established. There is debate among those who practice in this area as to the use of declaratory judgment actions to establish parentage pre-birth and the author recognizes that there are differing opinions in the community on these issues. That said, in Minnesota currently, how parentage of the resulting child is established depends on the county of venue and often on the judge assigned to the case. Some courts allow for a pre-birth declaration of parentage; others do not. Some counties have a policy that disallows the final determination of parentage until after the child's birth. If requested, a pre-birth order granting certain relief to the intended parents will be granted by some courts. Such requests often seek a directive to the medical facility where the child will be born, to hold the issuance of the birth certificate data, required by statute to be done within five days of birth[ii], until a reasonable time after birth so that a certificate identifying the gestational carrier and her husband as the parents of the child is not issued.

Courts that require an after-birth determination of parentage do so based on an interpretation of Minn. Stat. § 257.57, subd. 5, which states that if a paternity action is commenced pre-birth, the proceedings are stayed until after birth except for service of process and depositions. Id. While such cases might more accurately be labelled as "maternity" cases, the lack of clear statutory guidance leads some courts to apply this paternity statute in this fashion. However, in other counties, declaratory judgment actions pursuant to Minn. Stat. § 555 have been used successfully to establish parentage pre-birth when all parties agree to the establishment and medical evidence supports such a conclusion. Such a declaration benefits all parties involved and the child, whose legal parentage is clear at birth without the need for delay or subsequent proceedings.

**B. Declaratory Judgment Actions.**

The Minnesota Legislature enacted the Uniform Declaratory Judgment Act in 1933. Found at Minnesota Statutues section 555 et. seq., the statute reads, in part:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Minn. Stat. § 555.01. The statute is remedial in nature and is intended to afford relief from uncertainty and is to be liberally construed. *See* Minn. Stat. § 555.12 (emphasis added); Hoeft v. Hennepin County, 754 N.W.2d 717, 722 (Minn. App. 2008); rev. denied (2008). The federal district court for the District of Minnesota has stated that: "[t]he essential distinction between a declaratory judgment action and an action seeking other relief is that in the former **no actual wrong need have been committed or loss have occurred in order to sustain the action."**

Spine Imaging MRI, L.L.C. v. Liberty Mutual Ins. Co., 818 F. Supp. 2d 1133 (D. Minn. 2011) (emphasis in original) (citing Cnty. of Mille Lacs v. Benjamin, 361 F. 3d 460, 464 (8th Cir. 2004)).

Interpretations of the act have made it clear that the court is empowered to adjudicate disputed legal rights whether or not further relief could be claimed. *See* Cincinnati Ins. Co. v. Franck, 621 N.W. 2d 270, 273 (Minn. App. 2001); Hoeft v. Hennepin County, 754 N.W. 2d 717, 722 (Minn. App. 2008) rev. denied (Nov. 2008). However, the Uniform Declaratory Judgment Act cannot create a cause of action where one does not exist. Id. citing Alliance for Metro Stability v. Metro. Council, 671 N.W. 2d 905, 916 (Minn. App. 2003). Declaratory judgment is an alternative remedy that a party can pursue. See Connor v. Township of Chanhassen, 249 Minn. 205, 209 81 N.W. 2d 789, (1957) 793-94. As early as one year after Minnesota's enactment of the statute, it was believed that declaratory actions should be encouraged because they avoid drastic remedies and enable clarification and stabilization of unsettled legal relations. The statute does not contain exclusions or prohibit certain actions from being addressed thereunder; there is no legal question which cannot become the subject of a declaration according to interpretation of the act. *See* Edwin M. Borchard, The Uniform Declaratory Judgments Act, 249 Minn. L. Rev. 1934. According to Professor Borchard, "it is manifest that, even before the enactment of a general statute authorizing declarations, courts in western countries made declarations of fact, such as declarations of death, paternity, legitimacy, and sanity." Id. at 252. In his article, Professor Borchard also indicated that the "purpose of declaratory judgments may be said to be removing uncertainty and insecurity from legal relations, and thus to clarify, quiet and stabilize them before irretrievable acts have been undertaken or to enable an issue of

questions, status, or facts on which a whole complex of rights may depend to be expeditiously determined." Id.

A district court has original jurisdiction to hear all civil cases. Minn. Const. art. VI, § 3. See Anderson v. County of Lyon, 784 N.W. 2d 77, 80 (Minn. App. 2010); Mertins v. Comm'r of Natural Resources, 755 N.W. 2d 329 (Minn. App. 2008). "[C]ases involving family law fall within the district court's original jurisdiction." Holmberg v. Holmberg, 588 N.W. 2d 720, 724 (Minn. 1999). "[A] district court has broad jurisdiction to determine justiciable controversies regarding claims of statutory or common-law rights." Anderson v. County of Lyon, 784 N.W. 2d 77, 80 (2010).

District courts have equitable jurisdiction in family matters and should be able to determine parentage of a child, if necessary, under their equitable powers. The question for these families and their counsel becomes, is the court's power to do so under the Declaratory Judgment Act of Minn. Stat. § 555.01, limited to what is stated under the parentage statute found at Minn. Stat. § 257.57, subd. 5?[iii] This portion of the "Declaration of Parentage" statute states: "If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after the birth, except service of process and the taking of depositions to perpetuate testimony." Id. This statute pre-dated the use of ART, and prevents pregnant women from being forced to undergo invasive DNA testing on their fetuses. Should this statute now be construed to limit a court's equitable authority to issue an order declaring parentage, when existing medical evidence already establishes the identity of the child's genetic parents, and all involved parties involved agree upon the identity of the intended parents? The Minnesota Court of Appeals, in an unpublished case involving ARTS, has stated:

> "Because there is no Minnesota legislative or judicial pronouncement that prohibits such agreements we conclude that GSAs [Gestational Surrogacy

> Agreements] do not violate any articulated public policy of this state.... By this opinion, however, we neither condemn nor condone gestational surrogacy. That is not our function. But a child has been born in this state as the result of the procedure, and the judiciary has been asked to determine the child's parentage and custody. That is our function."

In re the Paternity and Custody of Baby Boy A., No. A07-452, 2007 WL4304448 (Minn. Ct. App. Dec. 11, 2007). According to the Minnesota Supreme Court," [a] court of equity has the power to adapt its decree to the exigencies of each particular case so as to accomplish justice. It is traditional and characteristic of equity that it possesses the flexibility and expansiveness to invent new remedies or modify old ones to meet the requirements of every case and to satisfy the needs of a progressive social condition." Beliveau v. Beliveau, 217 Minn. 235, 247 14 N.W. 2d 360, 366 (1944). Minnesota courts continue to have general equity jurisdiction and equity's basic function is to act as a source of supplemental relief. Swogger v. Taylor, 243 Minn. 458, 464-65, 68 N.W. 2d 376, 382 (1955).

### C. It is Reasonable to Rely on the Declaratory Judgment Act to Establish Parentage in ARTS Cases.

A pre-birth declaratory judgment establishes rights and responsibilities, thus clarifying who should be making medical decisions on behalf of a child, who should be parenting the child from birth and to whom the hospital should discharge the child. A pre-birth declaration also makes it clear from birth who is financially responsible for the child and, therefore, whose insurance should cover the child's hospital stay. Such a declaration also clarifies for medical facilities and personnel whose names should be listed on the child's original birth certificate. By establishing parentage pre-birth, an erroneous birth certificate is not issued and the child's intended and/or genetic parents are listed on the original document. Such a request fits well within the purpose and intent of the "Declaratory Judgment Act" as such an order declares rights, status and legal relations, which are not contested by any of the involved parties.

A declaratory judgment action saves time for the parties and for the judicial system. As a result it also saves costs for the parties, in terms of legal fees, and costs for the system in avoiding a two-step process. In cases where both intended parents are the genetic parents of the child, many Minnesota courts have been willing to declare the paternity and maternity of a child pre-birth based upon this provision in the law. Some courts have been willing to do so where one intended parent is not the genetic parent, while other courts in those situations require a subsequent step-parent adoption by the non-genetically related parent. Since Minnesota law is clear that an egg/sperm donor cannot claim an interest in the resulting child, Minn. Stat. § 257.62, subd. 5(c), an adoption should not be necessary or required where a donor has been used and a physician has been involved in the process.

A pre-birth declaration will result in the intended parents being named as parents on the birth certificate. Often, this is extremely important to the intended parents. Without a pre-birth order, or a race to get an order within five days of birth, the gestational carrier will be listed as "mother" on the birth certificate and, if she is married, her husband will be listed as the father. A pre-birth declaration, in contrast, provides clarity regarding who should make all medical/legal decisions on behalf of the child, without having to go through the gestational carrier for such decisions, and the declaration establishes the intended parents' insurance coverage for the child. In short, a declaratory judgment by a court determining parentage of a child prior to birth leads to clarity for *all* involved as to who has what rights, duties, and responsibilities to the child. A pre-birth declaratory judgment determination made as to a child conceived through the process of assisted reproductive technology removes the uncertainty for others as to who has what rights regarding the child, the child's medical care and treatment, the child's insurance coverage, and whose names should be listed on the birth certificate.

A declaratory action is not intended to enable or permit courts to decide abstract or hypothetical questions or academic questions. See Holiday Acres No. 3 v. Midwest Federal Savings and Loan Association of Minneapolis, 271 N.W. 2d 445, 447 (Minn. 1978), rehearing denied (Nov. 27, 1978); Hoeft v. Hennepin County at 722. A declaratory judgment action must present a justiciable controversy or the court does not have jurisdiction to declare rights under the Act. See Onvoy, Inc. v. ALLETE, Inc., 736 N.W. 2d 611, 617 (Minn. 2007). In the cases in which parties are seeking declaratory judgment as to the identity of a particular child's parents pre-birth, they are not asking hypothetical, abstract, or academic questions. Rather, they are asking the court to clarify the rights, duties, and obligations of the parties involved based on known facts. The pre-birth declaration also simplifies an otherwise far lengthier process. It eliminates the need for additional requests of the court, and it allows for a much less expensive process for all individuals involved. As stated in the Act itself, the Act is to be remedial in nature and its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations and it is to be liberally construed and administered. The issues before the court with respect to a declaratory judgment action in an assisted reproductive technology case fit very well into the statutory scheme of the Uniform Declaratory Judgment Act. These types of actions, when brought before the court, clearly establish and settle the uncertainty and insecurity with respect to the rights, status, and other legal relations of the parties involved as they relate to the child to be born.

### D. The Parentage Act Should Not Be Used to Limit Declaratory Judgments of Parentage.

Minn. Stat. § 257.51 through § 257.75 is entitled "Parentage Act." Minnesota's current parentage act is based on the "Uniform Parentage Act (1973)" and was enacted in 1980. This statute permits a parentage action to be initiated pre-birth. Id. at 257.57. However, Minn. Stat. §

257.57, subd. 5 reads as follows: "If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after birth, except service of process and the taking of depositions to perpetuate testimony." Similar language is found at § 611 of the "Uniform Parentage Act (2000)" (hereinafter UPA). Notably, no such language is contained within the Declaratory Judgment statute and the comment to the UPA section reads: "This section recognizes that establishing a parental relationship as quickly as possible may be in the best interest of a child. To facilitate that process, some initial steps may be completed prior to the birth of the child." Id. (emphasis added).[iv]

Clearly it is in a child's best interest to establish parentage of the child as soon as possible. When medical technology enables individuals to become parents who have historically been unable to do so, the court's hands should not be tied by a statute enacted long before such technology was available. Whereas a court cannot order invasive pre-birth DNA testing for a child, it certainly should be able to rely on the testimony/affidavit of the medical professional who created an embryo and completed the embryo transfer to verify the identity of a child's genetic parents. This identity of a child's parents is further substantiated by the ability of the physician who conducted the transfer to verify that the gestational carrier was not pregnant at the time of embryo transfer. When the parties involved entered into a gestational carrier agreement and all parties agree that the intended parents are the parents of the child, to delay the process of identifying a child's parents' benefits no one, including the child, unless the gestational carrier's health insurance will be used for coverage of the baby upon birth.

In these high-tech cases, where there is clear intent about who the child's parents are, well before embryo creation and embryo transfer, it is both inaccurate and inappropriate to rely on a statute that neither contemplated nor considered this type of situation. In these situations,

the child's creation is highly planned in a sophisticated and medically complicated manner. Relying instead upon an outdated statute in a situation where medical technology has removed the guess work is clearly not in the best interests of the child involved. When all parties agree, and the physician clearly identifies the genetic parents of the child, a delay in determining parentage and the risk of an erroneous birth certificate being created does not equate with the best interests of the child.

In situations where there is no reasonable basis to delay a declaration of parentage, it is appropriate to allow parties to move forward under the declaratory judgment act to determine rights, duties and obligations of the respective parties. Declaratory judgments are not prohibited by the "parentage act" and the declaratory judgment act itself clarifies that it is an alternative remedy. As an alternative remedy, when all parties are in agreement as to who are the parents of the child and medical evidence verifies the assertion, there is no useful purpose served by delaying adjudication when requested.

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[i] Notably the CDC's most up-to-date report is from 2012 because outcomes from ART processes are not known for nine months after the procedure. This, 2012 ARTs procedures resulted in children being born into the 3rd quarter of 2013.

[ii] Minn. Stat. § 144.215, subd. 1.

[iii] But see Morey v Peppin, 375N.W. 2d 19, 22 (Minn. 1985) in which the Minnesota Supreme Court indicated that statutes have superseded common law in most aspects of family law. However, medical technology has advanced far beyond what was contemplated nearly thirty years ago when Morey was decided. Interestingly, in the case of State v. Sax, 231 Minn. 1, 6-7, 42 N.W. 2d 680, 684 (Minn. 1950), the Minnesota Supreme Court referred to the paternity statutes as "completely supersed[ing]...the primitive common law rules with reference to illegitimate children and their father." Id. (emphasis added). Looking at today's medical advances, one could look at our current statutes in ARTS cases as being primitive.

[iv] This version of the UPA also had a specific section addressing parentage resulting from ARTS.