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STRATEGIES FOR FAMILY LAW IN ILLINOIS, 2013 EDITION
LEADING LAWYERS ON LEVERAGING ALTERNATIVE DISPUTE RESOLUTION, NEGOTIATING ALIMONY AND CHILD SUPPORT, AND MANAGING CLIENT EXPECTATIONS

DEVELOPING ISSUES IN FAMILY LAW AND STRATEGIES FOR FACING THEM

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Introduction

As an attorney practicing family law, one is faced each day with several challenges. Meeting them often comes down to a balancing act. It is the management of the client's expectations versus what is readily achievable for one's client. If a client has unrealistic expectations, he or she may never be happy, and of course, at the end of the day you want your client to be happy and think you did a great job for them.

When one is facing traditional issues such as temporary support, visitation, and property division, the sophisticated practitioner can generally tell where he or she will end up at the end of the case and can manage the client's expectations accordingly. However, when addressing developing issues and new trends, such as same-sex partnerships and civil unions, the rights of children and parents when the child is born by new reproductive technologies, and how ever-changing cyber technology affects your case, the management of a client's expectations may be extraordinarily difficult. In the coming pages, we will look at these new technologies and trend-setting cases (and some not so new) and offer strategies to address them.

Recent Trends: Parentage, Child Custody, and Same-Sex Marriage Issues

Genetic Testing

Genetic testing (also known as DNA testing) is the analysis of DNA, proteins, and metabolites. Testing laboratories currently offer more than 1,000 genetic tests, which are used to determine parent-child relationships, vulnerability to inherited diseases, genetic disorders, and more.[1]

Present Impact of DNA Testing

Among all DNA-based tests, parentage testing has the biggest impact on family law. The Parentage Act of 1984 provides for courts and hearing officers to advise respondents of the right to use DNA testing to determine the existence of parent-child relationships.[2] However, it does not clearly identify those who have standing to bring a paternity action and request genetic testing. Two recent cases, *In re Paternity of an Unknown Minor* and *Galvez v. Rentas*, clarify this issue.

The Illinois Supreme Court case *In re Paternity of an Unknown Minor* considered whether a putative father (the mother's former paramour) has standing to bring a petition to order DNA testing of a child after the child's presumed father signed a

voluntary acknowledgment of paternity.[3] Here, the putative father brought an action to compel genetic testing of the child. The mother refused to submit the child to DNA testing on the basis that the father-child relationship was conclusively established when the presumptive father (her husband) signed a voluntary acknowledgment of paternity at birth. Note that the mother had already admitted to having a sexual relationship with the putative father. The court decided in favor of the putative father, directing the mother to submit to testing. It explained that a voluntary acknowledgment of paternity merely creates a presumption of paternity. A putative father may bring an action alleging he is the father of the child in an attempt to rebut the presumption, and thereafter the court may order a DNA test to determine the child's real father.

***2** *Galvez v. Rentas* is another recent case that considered whether a presumptive father has standing to bring a petition for DNA testing.[4] This court interpreted Section 11(a) of the Parentage Act of 1984 to provide that the court shall order DNA testing if the parties request it and the paternity matter is unresolved.[5] In contrast to the case cited above, this court held that the paternity issue was inevitably decided after the parties entered a joint parenting agreement in 2006, and the father never brought a petition to vacate it. Entry of the joint parenting agreement meant the presumptive father was in fact the boy's legal father, and the court would not order DNA testing.

Both of the cases above discuss standing to bring a petition requesting DNA testing. The *In re Paternity of an Unknown Minor* case exemplifies the court's willingness to rely on genetic testing to determine paternity, and *Galvez v. Rentas* shows a hesitancy to order DNA testing. Ultimately, these cases show that, although genetic testing provides the ability to determine a parent-child relationship, the court will not always order the test. Judges realize that some children are better off in the home and lifestyle in which they were raised, no matter the identity of their biological father.

These cases demonstrate the difficulty one may have in providing a client with a comprehensive strategy to prove or disprove parentage. Does one advise the client to try to upset a previously established parent-child relationship with another male to the potential detriment of the child? Will a court even consider ordering DNA testing where there is an established long-term parent-child relationship but where circumstantial evidence indicates your client is the father and only genetic testing will prove this?

Is this a moral dilemma or a legal one? As attorneys, we must present all options to our clients, and, with guidance, let a client thoughtfully choose one, even though we may disapprove of the choice.

Preparing for Genetics Testing in the Future

The future of genetic testing is exciting. Scientists are presently developing tests that will reveal a predisposition to contract specific diseases and means to insert artificial genes into human DNA. It is only a matter of time before family law attorneys encounter these issues.

Genetic screening for diseases is likely to become widely available for public consumption in the near future. Family law practitioners might then be in a position to consider the rights of married versus non-married men in requiring mothers to undergo genetic screening for diseases. Advocates argue that genetic screening "involves neither threat nor force, and instead privileges clinical biology, parental choice, and prevention of disease."[6] However, some people have ethical dilemmas with genetic testing, especially when it reveals the likelihood of developing a disease in the future, instead of merely testing for traits in the present.

***3** Additionally, future technology will likely enable humans to insert artificial genes into DNA. For example, genetic manipulation may eventually help us to insert genes that prevent aging, fight acquired diseases, or allow a same-sex couple to produce biological offspring together. Courts may one day be in a position to consider the legality of one parent requiring the other parent to undergo this treatment.[7]

These tests and treatments will have a tremendous effect on family law. They will likely benefit individuals who receive treatment, particularly minors. However, technology that substantially changes DNA might make genetic testing, particularly paternity testing, less effective.

In the context of the "best interest of the child," genetic testing, genetic manipulation, and genetic screening for diseases or sex will greatly affect the practice of family law. Bar groups and others should seriously start considering lobbying their

legislators to enact laws now to address these issues, rather than later, when technology is upon us or perhaps rapidly moving to the next technology.

Virtual Visitation

Another trend in family law is awarding "virtual visitation" in child custody cases to foster a relationship between the custodial and noncustodial parent through use of the Internet and other technological services, such as e-mail, webcams, instant messaging, and even Facebook.[8] In 2010, Illinois became one of the few states to pass legislation allowing the courts to award virtual visitation in child custody cases.[9] Under the Illinois Marriage and Dissolution of Marriage Act, "a parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would seriously endanger the child's physical, mental, moral, or emotional health."[10] Visitation is defined as "in-person time spent between a child and the child's parent. In appropriate circumstances, it may include electronic communication under conditions and at times determined by the court."[11] Electronic communication is:

Time that a parent spends with his or her child during which the child is not in the parent's actual physical custody, but which is facilitated by the use of communication tools such as the telephone, electronic mail, instant messaging, video conferencing, or other wired or wireless technologies via the Internet, or another medium of communication.[12]

Thus, under the act, a court has complete discretion to order a party to allow the noncustodial parent to visit with the child via electronic communication.

One benefit to virtual visitation is that it allows noncustodial parents to communicate with their children more often than before. One father has even called his virtual visitation order "a godsend" because it allows him to communicate in person with his daughter on a weekly basis, in addition to his normal visitation schedule.[13]

***4** Virtual visitation may even battle visitation abuse. While a parent may be too lazy or irresponsible to show up for a scheduled visitation (and disappoint the child), the parent may find it easy to log on and Skype his child. On the other hand, a child will also benefit. It may be far more beneficial to a child to Skype with his or her parent before a little league game than visit and perhaps cause the child to miss his or her game altogether. Clearly, it is a win-win for the parent and child.

Unfortunately, child custody cases can become very contentious and, when this occurs, some parents willfully interfere with the noncustodial parent's visitation rights.[14] In Illinois, Section 607.1 of the Marriage and Dissolution of Marriage Act attempts to alleviate these visitation problems by providing expedited procedures for enforcing visitation orders in cases of visitation abuse.[15] The act defines visitation abuse as occurring "when a party has willfully and without justification: (1) denied another party visitation as set forth by the court."[16] When the custodial parent interferes with the noncustodial parent's visitation schedule, all the noncustodial parent needs to do to connect with their child is send an e-mail or text message. Although the custodial parent may still interfere with these methods of communication as well, today children have more access to the Internet outside of the home, and thus, interfering with electronic communications would be more difficult for the custodial parent. Therefore, although virtual visitation in no way eradicates visitation abuse, it does provide a simple outlet for children to connect with their parents.

Unintended Consequences: Relocation

Removal of children from Illinois is governed by Section 609 of the Illinois Marriage and Dissolution of Marriage Act, which provides in part:

The court may grant leave, before or after judgment, to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children. The burden of proving that such removal is in the best interests of such child or children is on the party seeking the removal. When such removal is permitted, the court may require the party removing such child or children from Illinois to give reasonable security guaranteeing the return of such children.[17]

The statute was recently amended to include a provision for virtual visitation: "The court may not use the availability of electronic communication as a factor in support of a removal of a child by the custodial parent from Illinois."[18] To establish a case for removal, the circuit court should consider:

First ... 'the proposed move in terms of likelihood for enhancing the general quality of life for both the custodial parent and

the children.' Second ... "the motives of the custodial parent in seeking the move to determine whether the removal is merely a ruse intended to defeat or frustrate visitation.' Third ... 'the motives of the noncustodial parent in resisting the removal.' In addition ... the visitation rights of the noncustodial parent [and] 'whether, in a given case, a realistic and reasonable visitation schedule can be reached if the move is allowed.'[19]

***5** Despite statutory dictates to the contrary, Illinois courts have been influenced by the potential use of virtual visitation in relocation cases.

In *In re Marriage of Dorfman*, the mother petitioned under Section 609 of the act to remove her children to Georgia.[20] The father opposed the petition because he wanted his children to remain in Illinois where he had access to in-person visitation with them.[21] The trial court granted the mother's petition for removal.[22] The father appealed, claiming that the trial court improperly considered the availability of electronic communications in allowing removal.[23] The court held that, because the trial court stated that it must provide an in-person visitation schedule in allowing removal, the court did not violate Section 609(c) of the act when considering the availability of electronic communications in addition to in-person visitation.[24]

Similarly, in *In re Marriage of Coulter*, the court considered the availability of electronic communications in allowing the mother to remove her children to Washington, D.C.[25] The court provided that "while we acknowledge that a court may not *rely* on electronic communication as a factor supporting removal, there is nothing prohibiting a court from *considering* it if it is relevant to the particular case."[26] Thus, although the court is not supposed to rely on the availability of virtual visitation in allowing removal under the act, it seems that the availability of virtual visitation is certainly becoming a factor in deciding removal in favor of the custodial parent.

Religious Freedom Protection and Civil Union Act

On June 1, 2011, the Illinois Religious Freedom Protection and Civil Union Act went into effect, which allows both same-sex couples and heterosexual couples to register for a civil union.[27] The stated purpose of the act is to provide same-sex couples and heterosexual couples alike with the same ""obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses."[28] Thus, the act allegedly provides same-sex couples with an alternative to marriage that bestows all the same benefits and protections of a marriage.[29] However, Illinois still has its own version of the Defense of Marriage Act, which denies same-sex couples the right to legally marry.[30] Therefore, same-sex couples can enter into a civil union, but they cannot legally marry in Illinois. Furthermore, if a same-sex couple gets legally married in another state, Illinois will view that marriage as a civil union.[31]

The Illinois Religious Freedom Protection and Civil Union Act is new, groundbreaking legislation in Illinois. Thus, there is virtually no case law regarding the act, which leaves many questions unanswered, at least for now. Nevertheless, there are ways attorneys can prepare for the inevitable. Section 45 of the act provides that "the provisions of Sections 401 through 413 of the Illinois Marriage and Dissolution of Marriage Act shall apply to a dissolution of a civil union. The provisions of Sections 301 through 306 of the Illinois Marriage and Dissolution of Marriage Act shall apply to the declaration of invalidity of a civil union." Thus, if a same-sex couple wishes to either dissolve or invalidate their civil union, the same rules apply as if the couple were married. Similarly, Section 50 states that "the provisions of the Civil Practice Law shall apply to all proceedings under this act, except as otherwise provided in this act."[32]

***6** Furthermore, the act makes it very clear how a same-sex couple must register for a civil union. First, the same-sex couple must fill out an application provided by the Director of Public Health.[33] The application must include:

1. Name, sex, occupation, address, social security number, and date and place of birth of each party to the civil union

2. Name and address of the parents or guardian of each party

3. Whether the parties are related to each other and, if so, their relationship

4. In the event either party was previously married or entered into a civil union or a substantially similar legal relationship, provide the name, date, place, and court in which the marriage or civil union or substantially similar legal relationship was dissolved or declared invalid or the date and place of death of the former spouse or of the party to the civil union or substantially similar legal relationship[34]

Then the couple must present their application before the county clerk and prove that their civil union is not prohibited under Section 25 of the act.[35] A civil union is prohibited if it is entered:
1. Before both parties turn eighteen years old

2. Before dissolution of another civil union or marriage or similar legal relationship of one of the parties

3. Between an ancestor and descendent or siblings, whether half or whole

4. Between aunts and uncles and nieces and nephews

5. Between first cousins[36]

Once the couple proves that their civil union is not prohibited, the clerk will issue a license and certificate of a civil union as long as all applicable fees have been paid.[37] This certificate must be completed and returned to the county clerk within ten days of the civil union.[38] A civil union must be certified by a judge, by a county clerk, by a public official who has the power to solemnize marriages, or in accordance with any religious ceremony.[39]

Although the act provides clear instructions for how to register for a civil union and how to dissolve a civil union, it is unclear if the act truly provides all benefits of a marriage as it alleges.[40] Section 20 states that "a party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law."[41] However, note that Section 20 does not provide that same-sex couples in a civil union will receive the same *federal* benefits afforded to married couples. This is because the federal Defense of Marriage Act deprives same-sex couples of federal benefits.[42]

***7** A recent development regarding Illinois civil unions is illustrative of this problem. On December 8, 2011, the Illinois Department of Revenue stated that it would provide tax benefits to couples entered into a civil union by allowing couples entered into a civil union to jointly file their state income tax returns.[43] However, the department's instruction specifically states that "a same-sex civil union couple may not file a federal return using a married filing status" because of the federal Defense of Marriage Act.[44] The department provides a solution to this problem: if you and your same-sex partner choose to file a joint Illinois return, you must complete a federal "as-if-married-filing-jointly" return, for Illinois purposes only.[45] Thus, to receive state benefits, a same-sex couple must file a mock federal tax return with their joint Illinois tax return. The department's new policy allows same-sex couples entered into a civil union to jointly file their taxes for the 2011 tax year.[46]

Several questions are still left unanswered. Because the Civil Union Act incorporates specifically some but not all provisions of the Illinois Marriage and Dissolution of Marriage Act (specifically §§ 401-413 and 301-306), did the legislature intend that these omitted sections *not* apply to civil unions? It seems Section 20 eliminates this controversy. But it certainly is confusing. For example, by not specifically incorporating Section 504 of the act, did the legislature intend that maintenance not be available? Probably not. Nevertheless, this argument doubtlessly lends to future litigation in this area.

Key Decisions in the Last Year

Retroactively Awarding College Expenses

While generally there are few family law cases coming from the Illinois Supreme Court, this year offered two cases regarding the issue of college education expenses. In *In re Marriage of Petersen*, the Supreme Court considered whether post-secondary education expenses are a form of child support for purposes of the child support modification statute.[47] The petitioner and respondent in this case were parties to a judgment of dissolution entered in 1999.[48] Section 6 of the divorce decree included language that the court "expressly reserves the issue of each party's obligation to contribute to the college and other expenses of the parties' children pursuant to Section 513."[49] In May 2007, the former wife filed a post-decree petition against her former husband to allocate their three children's college expenses.[50] At this point, one son had graduated one year before she filed the petition, the second son was still in college, and the third son graduated from high school the

month she filed the petition.[51] The court completed a *de novo* review and ruled that "actions taken pursuant to reservations clauses to be modifications under 510 subject to the prohibition of retroactive support."[52] For this reason, spouses may not wait indefinitely to act pursuant to a reservation clause.[53] The former wife was only able to recover college expenses incurred *after* filing her post-decree petition.[54]

***8** A mere month later, the Supreme Court considered *In re Marriage of Spircoff*.[55] In this case, the circuit court posed a certified question of whether *Petersen* bars retroactive relief for college expenses incurred before a third-party beneficiary brings a petition to enforce a provision of his parents' marital settlement agreement to contribute to his college education fund.[56] The court held that, unlike in *Petersen*, the obligation of the parties for educational expenses was "clearly and affirmatively stated and was not expressly reserved," even though the actual allocation of the expenses was not made at the time the judgment of dissolution was entered.[57] Further, this was an action by a third-party beneficiary "seeking enforcement of the provisions of a marital settlement agreement," which is a breach of contract and not an action to modify a Section 513 order.[58]

The Illinois practitioner should therefore include in the drafting of a marital settlement agreement either a specific allocation of college education expenses or the standard language that both parties be required to contribute to the children's college education expenses pursuant to Section 513 of the Illinois Marriage and Dissolution of Marriage Act.

Maintenance

The First District heard *In re Marriage of Doermer*, a case concerning the issue of "whether a petition for an extension of maintenance should be dismissed when the parties previously agreed to a date that the maintenance would terminate, the maintenance was received in the form of unallocated support, and the child for whom the unallocated support was being received is emancipated."[59] The court held that the non-modification clause in the settlement agreement was enforceable.[60]

Failure to Disclose Assets

In *In re Marriage of Goldsmith*, the appellate court considered whether a former wife was entitled to vacate her marriage dissolution judgment after learning that her former husband had concealed assets valued at approximately $2 million during the original divorce proceeding.[61] The court noted that pursuant to 735 ILCS 5/2-1401, "the purpose of a petition for relief from judgment is to alert the circuit court to facts which, if they had been known at the time, would have precluded entry of the judgment." However, the purpose of the proceeding is not to give the litigant a new opportunity to correct mistakes or negligence that occurred in an earlier proceeding.[62] The court held that the absence of evidence during litigation that an asset was comingled does not entitle the wife to relief from judgment, even when the trial court acknowledged that the parties had engaged in limited discovery. This was not a case of "fraudulent concealment of assets," it was a case of a failure to sufficiently investigate.

***9** While not a departure from current law, practitioners should be certain to do discovery. The *Goldsmith* result seems harsh, but it is nothing new that failure to exercise due diligence in discovery will prevent that party from seeking vacature of a judgment, except perhaps in the case of fraud. If your client does not want to do thorough discovery, be sure to obtain an exculpatory letter from your client explicitly stating that limited discovery is not in their interest and they understand the potential consequences of their inaction.

Privilege

In *Johnston v. Weil*, the Illinois Supreme Court held that a psychiatrist's report on interviews in child custody matters is not privileged under the confidentiality statute when the mental health professional is acting as an independent Section 604(b) professional, whose sole function is to make an evaluation for the circuit court to consider.[63] The court reasoned that the exception in the Mental Health and Developmental Disabilities Confidentiality Act to the therapist-patient privilege, "relating to discretionary disclosure in civil proceeding of communications made to or by therapist in course of examination ordered by court, does not apply to the mandatory disclosure to opposing party and counsel of the contents of a report from a professional appointed to advise court in a child custody proceeding."[64]

This case resolves the issue once and for all that a confidential doctor/patient privilege does not apply to a court-ordered 604(b) custody evaluation. Accordingly, no privilege is violated by neutral evaluation disclosure to the parties, the court, and counsel. Nevertheless, whether this information may be re-disclosed by said individuals to the third parties remains unanswered. Yet, the court's dicta seems to indicate that the information may *not* be re-disclosed to others after the initial disclosure to the court, counsel, and parties.

Parents and Children

Parentage

Parentage cases are generally brought pursuant to the Illinois Parentage Act of 1984[65] or the Illinois Parentage Act.[66] The former legislation is used to define parent-child relationships and allocate support. The latter is applied in artificial insemination cases.

Changes to Legal Standards and Rules

In recent years, both the acts themselves and case law interpreting the legislation have remained relatively constant. The only notable amendment is the standardization of genetic testing under Sections 11(b) and (f) of the 1984 Parentage Act (effective January 1, 2011). The additions provide in part that ""genetic testing must be of a type reasonably relied upon by experts" and the percent probability must reveal at least a 99.9 percent chance that the alleged father is presumed to be the father. Courts should have been relying on DNA tests this accurate before the laws went into effect. Yet, the science of these tests is rarely the most challenging aspect of paternity cases.

Approach of Recent Cases

***10** In ruling on parentage cases, courts use the purpose and public policy of the parentage acts to guide and justify their decisions. The public policy section of the Parentage Act of 1984 recognizes "the right of every child to the physical, mental, emotional, and monetary support of his or her parents."[67] The purpose of the Illinois Parentage Act is to ensure a child born through artificial insemination is treated "the same as naturally conceived legitimate child of husband and wife."[68] As will be seen later in this chapter, applying the purpose and public policy is difficult in certain situations.

Challenging Parentage Cases

Generally, the family history and unique fact patterns make these cases difficult. The following issues continue to present special challenges to family law practitioners: the father is neither identified nor present and/or does not want to be present, or the mother gave birth after artificial insemination.

Parentage Act of 1984

The issue of a previously unidentified father wanting to define a parent-child relationship comes within the Illinois Parentage Act of 1984. This situation arose in a case five years ago, which went up to the Illinois Supreme Court. In *JSA v. MH*, two married attorneys had an extramarital affair, and the woman got pregnant.[69] Nine months later, the woman gave birth and listed her husband as the child's father on the birth certificate.[70] Three years later, the putative father and mother performed a DNA test on the child.[71] The results revealed that the male attorney, not the mother's husband, was the father of the child.[72] The putative father then filed an action to establish parentage, and six weeks later, the mother and her husband filed a petition to adopt the child.[73]

The parties extensively litigated under the Adoption Act and the Parentage Act of 1984. To resolve the issue, the Supreme Court first determined which statute applied by looking at the first party to file and then how parental rights should be

adjudicated under that statute.[74] The putative father was the first to file when he brought a petition to establish a father-child relationship under the Parentage Act.[75] Moreover, the factual situation at bar did not trigger the Adoption Act because the child was not subject to an adoption proceeding, nor was he expected to be when the putative father filed his parentage action.[76] Then the court went on to discuss the application of the Paternity Act. The court looked to the purpose of the statute and explained that the legislators established this statute as a mechanism to legally establish parent and child relationships, and the purpose of the act is to further the public policy to recognize that children need the support of their parents, regardless of marital status.[77] A putative father has up to twenty years to establish parental rights after the child is born, unless the child is going to be adopted.[78] Ultimately, the court indicated that the putative father had every right to establish a father-child relationship.

***11** If you step outside of the laws and look at the reality of the case, you have to wonder if the child's interests are best served by this decision. The minor will probably have a tough time coming to terms with the legal battles in his name and the relationships between the mother, the biological dad (the mother's paramour), and the presumptive father (the mother's husband). Should the court have focused less on the public policy behind the Parentage Act and more on the best interests of the child?

Illinois Parentage Act

Artificial insemination cases are also challenging for family law practitioners. Difficulties arise because the applicable law, the Illinois Parentage Act,[79] advocates outdated social opinions and is therefore hard to apply to modern fact patterns. The need for amendments became apparent in the 2003 Illinois Supreme Court case *In re parentage of MJ.* Here, a woman and her boyfriend dated for ten years, but never married.[80] They wanted to have a child and mutually decided the boyfriend would provide financial assistance for artificial insemination by an anonymous donor.[81] The woman gave birth, and then the couple broke up.[82] Eventually, the woman brought a paternity and support action against her former boyfriend.[83] The case became problematic when the parties realized the boyfriend never signed the written consent to insemination required by the Illinois Parentage Act.

The Illinois Supreme Court decided that the "failure to obtain written consent of putative father to insemination precluded claim for paternity under Parentage Act," but the "Parentage Act did not prohibit mother's action based on common law theories of oral contract or promissory estoppel" for child support.[84] Therefore, under the unique circumstances of this case, the unmarried man was required to support the child.[85] Additionally, the court relied on the purpose of the statute to ensure that a "child is considered the legitimate child of the husband and wife requesting and consenting to the artificial technique."[86] The court then noted that the fact that the parties were not husband and wife did not matter because "a state may not discriminate against a child based on the marital status of the parties at the time of the child's birth."[87]

The Supreme Court's opinion is interesting for several reasons. First, it encourages the use of promissory estoppel to get around the statutory requirement of written consent to artificial insemination. Second, the court should look to the purpose of the statute to ensure the "legitimacy" of children born through artificial insemination. However, "legitimacy" generally concerns the status of a child born to married parties, and the parties in this case were never married. Two years later, in *In re Marriage of Simmons*, the appellate court held that a transsexual male who was born female could not be considered the father of his child when he was actually a party to an invalid same-sex marriage.[88] Therefore, the child was illegitimate and the Illinois Parentage Act did not apply.[89] Would the result be the same after enactment of the Illinois Religious Freedom Protection and Civil Union Act?

***12** In sum, Illinois laws surrounding parentage are outdated and far too narrow. The amendments made to the Illinois Parentage Act of 1984 this year, which simply standardize DNA testing, are essentially superficial and insufficient. They do not reach the substantive challenges of these cases and therefore do not provide sufficient assistance to attorneys and judges. Both parentage acts need to be expanded to ensure decisions sufficiently consider children's best interests, as well as modern issues of children born by the use of new reproductive technologies.

Adoption and Termination of Parental Rights

The supreme and appellate courts have issued few opinions recently where adoption is the central issue. The majority of these

cases are brought under the Juvenile Court Act. Practicing in this area requires the attorney to recognize a critical distinction between these two statutory schemes. Specifically the goal of the Illinois Adoption Act is the severance of rights between children and their biological parents, while the goal of the Juvenile Court Act is in reality family reunification in many circumstances.

In re Marriage of Mancine concerns a divorce proceeding in which a husband sought custody of a child adopted by his wife before the marriage, even though he never filed a petition for adoption.[90] The appellate court dismissed the case on grounds that the husband lacked standing.[91] "Standing in Illinois requires some injury in fact to a legally cognizable interest."[92] The husband was aware at all times during the marriage that he was not the biological father and needed to adopt the child.[93] Ultimately, the court provided that the husband had not established a legal relationship with the child. The harsh reality was that "no liberty interest exists with respect to a child's psychological attachment to a non-biological parent."[94] Thus, the appellate court affirmed that the husband lacked standing to seek custody of the child.[95]

The husband did not contest that he failed to adopt the child and is not a legal parent.[96] Instead, he brought several creative equitable arguments that he should have standing to seek custody, including:
1. Illinois should adopt the "equitable parent" concept.

2. His wife represented that he was the child's father.

3. He should be recognized as the father despite his failure to file the adoption petition.

4. The court should apply a *parens patriae* power to award custody.

5. The child should not be left fatherless.[97]

The appellate court responded:
1. Illinois has not adopted the "equitable parent" doctrine and the husband does not have standing to seek custody under any Illinois statutes. (Nonparents have standing to bring a custody case in Illinois only when the child is "not in the physical custody of one of his parents.")

***13** 2. Equitable estoppel does not apply.

3. Illinois does not recognize the concept of "equitable adoption."

4. *Parens patriae* cannot be applied.

5. Illinois does not require that every child have a father.[98]

In re Mancine indicates that the court is not currently willing to read new concepts into the Adoption Act. It is well-settled law that a court is not willing to make exceptions for parents who fail to follow the legal requirements to adopt a child.

Lawyers should familiarize themselves with the entire adoption process before accepting an adoption case. A valid adoption depends on valid consent from both adoptive parents and a termination of the biological parent's rights.[99] The result of an attorney's failure to file the proper adoption forms and petitions is a void adoption.

Guardianship

Effective January 1, 2011, the Illinois Probate Act was amended to safeguard parental rights. "The court may now only appoint a guardian to a minor if the parents have voluntarily relinquished their custody, the parents fail to object after receiving notice of the hearing and petition, or the parents consent to the appointment in notarized writing or by personal appearance in court."[100]

Additionally, a new provision went into effect regarding "revocation of letters" under the Probate Act of 1975. The addition allows the minor's living, adoptive, or adjudicated parent to petition to discharge a minor's guardian and terminate

guardianship and the guardian to challenge that petition. The statute provides that when a minor's living, adopting, or adjudicated parent, whose parental rights have not been terminated, files a petition, the court shall terminate the guardianship if the parent establishes that a "material change in the circumstances of the minor or the parent has occurred" since the guardian was appointed, "unless the guardian establishes, by clear and convincing evidence, that termination of the guardianship would not be in the best interest of the minor."[101] The court shall determine the minor's best interests by considering relevant factors, including the:

1. Relationship between the minor and the parent and members of the parent's household

2. Ability of the parent to provide a safe and nurturing environment

3. Stability of the parties and minor

4. Minor's adjustment to his or her home, school, and community

5. Nature of visitation between the parent and minor and the guardian's ability to facilitate visitation[102]

The *In re TPS* court was one of the first cases to consider guardianship rights under the new statute. This court explained that the Probate Act amendment codified and expanded rules regarding petitions to terminate guardianships.[103] The court and now legislation provides that an appointed guardian has standing to contest the termination of guardianship, but this guardian must still prove by clear and convincing evidence that guardianship is in a child's best interests.[104]

***14** One common issue under this statute, which arose in *In re TPS*, is whether a nonparent has standing to contest a minor's parent's desire to terminate or discharge a minor's guardian. The court had ruled that a nonparent would have standing where the child's parent consented to guardianship or the child does not have a living parent who is willing and able to make day-to-day childcare decisions.[105] However, lawyers may confront challenges showing that a nonparent guardian falls within this rule. Attorneys should consider this issue before accepting a guardianship case.

Visitation

Visitation is defined as the "in-person time" spent between a child and the child's noncustodial parent.[106] In the absence of demonstrating endangerment to a child, visitation is the right of every noncustodial parent.

Visitation can become problematic in child custody cases for many reasons. The following section will discuss four of the most challenging issues facing family law practitioners at the present time: visitation rules involving armed forces personnel, grandparent visitation, removal, and electronic communication.

Armed Forces Personnel

Recognizing the fact that so many Americans, both men and women, are deployed, the Illinois legislature has enacted new visitation rules that apply to members of the Armed Forces. On June 1, 2012, new visitation provisions will go into effect, but the change will only apply to families in which a parent is a member of the US Armed Forces who is deployed or who has orders to be deployed. The statute provides that upon motion of the parties or the court, parties shall be granted an expedited hearing for visitation proceedings.[107] Upon motion of the service member, the court shall allow the parent, who is deployed or has orders to deploy and is unable to appear, to testify by phone or electronic means.[108] With regard to completion of visitation, the court may allow the parent who is a member of the Armed Forces to select a person "known to the child" to exercise substitute visitation, so long as it is in the best interests of the child.[109] Additionally, the court may also temporarily modify visitation, allowing visitation by electronic means, while a parent is deployed to accommodate for his or her absence.[110]

Unsettled Law: Grandparent Visitation

Grandparent visitation issues came into the national spotlight when the US Supreme Court ruled in the historic case of *Troxel*

v. Granville.[111] In that case, the court ruled that a Washington law allowing "any person to petition for visitation rights at any time" was unconstitutional because it violated the "fundamental right of parents to make decisions about their children."[112] The Constitution provides *parents*, not grandparents, with freedom to provide for the custody and care of their children.[113] This decision "caused a ripple effect across the country" and caused many state courts and legislatures to reevaluate their third-party visitation.[114]

***15** Court decisions pertaining to grandparent visitation have been in flux since *Troxel*. Just five months after the US Supreme Court decision, the Illinois Supreme Court heard its own grandparent visitation case. In *Lulay v. Lulay*, a child's grandmother petitioned the court for visitation under the Illinois Grandparent Visitation Statute.[115] The minors' parents were divorced, but both were fit and shared equal custody and objected to the grandparent visitation.[116] The court held that grandparent visitation in this case "did not serve a compelling state interest and therefore unconstitutionally infringed on the parents' fundamental liberty interest in raising their children."[117] Accordingly, the Illinois Supreme Court found the grandparent visitation statute unconstitutional.

Two years later, the Illinois Supreme Court further strengthened the rights of parents. In *Wickham v. Byrne*, the court ruled that the Illinois Grandparent Visitation Statute was unconstitutional because it contradicted the ""traditional presumption that a fit parent's decision to deny or limit visitation with grandparents is in the child's best interests."[118] Moreover, "the statute placed the parent on equal footing with the grandparents" and "allowed the state to infringe on the fundamental right of the parent to make child rearing decisions, thereby violating the parent's due process rights."[119]

The Illinois legislature enacted new rules regarding grandparent visitation in 2005 and amended them in 2007 to eliminate the prior statutes' constitutional infirmities.[120]

Recent cases indicate that most grandparents will be challenged to overcome the presumption that a fit custodial parent has the right to allow or deny grandparent visitation.[121] To this day, the law regarding grandparent visitation remains unsettled. The statute is "constantly being constitutionally attacked, with the main basis being that it impedes on the parent's fundamental right to the care, custody, and control of their children."[122]

Relocation: Still a Case-by-Case Analysis

Removal of a child from Illinois by the custodial parent is another practice area that causes family law practitioners a great deal of consternation. Courts are aware that their opinion has a life-changing effect on parties. In most cases, granting removal will limit the nonresidential parent's ability to see his or her child. Meanwhile, denying removal will allow the parties to maintain the status quo with regard to visitation, but prevent the plaintiff from moving for whatever reason (job, relationship, etc.). Making matters more complicated, each removal case is *sui generis*. Therefore, Illinois courts are left to rely on a few common law factors (the "Eckert" factors) to determine whether removal is appropriate. These factors include the potential to improve quality of life, motives, the effect on visitation rights, and whether a realistic visitation schedule can be reached if removal is granted.[123]

***16** The appellate court recently issued opinions in two interesting removal cases, *In re Marriage of Demart* and *In re Marriage of Dorfman*. Both cases were largely decided on their visitation issues. In the former case, the inability of parents to offer a realistic visitation schedule and the strong potential for removal to hinder visitation rights of the noncustodial parent were a strong basis for denying visitation.[124] In the latter case, even though the father was on house arrest, the court held that it is not required to "provide a visitation schedule before or at the same time it offers a judgment on a petition for removal," but a visitation schedule would have to be set at some point.[125] Visitation is important, and presenting strong reasoning as to why visitation will or will not work may sway the court's opinion in challenging removal cases.

The Internet: A New Way to Complete Visitation?

Visitation completed on the Internet might be one new way to resolve visitation dilemmas and other visitation issues, as mentioned at the beginning of this chapter. Although it is probably not the best way to spend time with children, the Illinois visitation statute allows for visitation completed by electronic communication under certain circumstances.[126] Given the visitation statute's new armed forces personnel section, which specifically allows visitation to be completed through

electronic communication, and the importance of e-mail and video chat, visitation completed online might become more widespread. However, the question of whether the purpose of visitation is truly satisfied without physical presence remains to be answered. Given the amount of time children spend twittering and e-mailing, many may prefer this method of visitation. It is likely, however, that many or most noncustodial parents will not.

Conclusion

Technologies in all areas are moving at a rapid pace. Whether it is genetic testing or more advanced computer discovery tools or civil unions, the practitioner is well advised that a "deep breadth" may be beneficial to both the attorney and the client. With the continual amendment to statutes and new statutory enactments to keep pace with new technology and increased acceptance of the GLBT community, the practitioner is well advised to check all resources at your disposal.

Key Takeaways

• Family law practitioners are constantly balancing client expectations and working toward readily achievable results.

• Attorneys should become familiar with the entire adoption process before starting to work on an adoption case. Recent cases indicate that courts will not make exceptions for parents who fail to follow the rules.

• Virtual visitation is a relatively new way for noncustodial parents to spend time with their children. Although it potentially allows noncustodial parents to communicate with their children more often than before, there is something to be said for human contact.

***17** • The Illinois Freedom Protection and Civil Union Act leaves many questions unanswered. Future litigation of maintenance and government benefit issues is likely.

• Stay updated on the various options available to your clients in paternity cases, and make sure your clients understand them. Practitioners should advise clients to submit to DNA testing before signing an acknowledgment of paternity.

Footnotes

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Mr. Toback has represented several high-profile clients in hotly contested cases and has been featured on CNN, local and national television outlets, and has appeared in newspapers throughout the country. He has been recognized as a leading lawyer in Family Law *every year since 2003 and as an Illinois "Super Lawyer" in* Family Law *each year since 2006. In 2000, the* Chicago Sun Times *named him as a top-ten divorce lawyer in Chicago.*
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1 US Department of Energy Genome Programs, *What Is Gene Testing? How Does It Work?*, Human Genome Project Information, www.ornl.gov/sci/techresources/Human_Genome/medicine/genetest.shtml (Mar. 21, 2012).

2 750 Ill. Comp. Stat. Ann. 45/11 (West 2012).

[3] *In re Paternity of an Unknown Minor*, 951 N.E.2d 1220 (Ill. App. Ct. 2011).

[4] *Galvez v. Rentas*, 934 N.E.2d 557 (Ill. App. Ct. 2010).

[5] 750 Ill. Comp. Stat. Ann. 45/11 (West 2012).

[6] Dov Fox, *Prenatal Screening Policy in International Perspective: Lessons from Israel, Cyprus, Taiwan, China, and Singapore*, 9 Yale J. Health Pol'y, L. & Ethics 471, 475 (2009).

[7] David D. Friedman, *Future Imperfect: Technology and Freedom in an Uncertain World*, 8 J. High Tech. L. 1 (2009) (future technology "may offer us the ability to insert artificial genes into our DNA").

[8] 750 Ill. Comp. Stat. Ann.5/607(a)(2) (West 2012); *see* Ofeila Cassillas, *Divorced Parents Get Virtual Visit*, Chicago Tribune, http:// articles.chicagotribune.com/2010-01-23/news/1001220515_1_visitationparents-stress (Jan. 23, 2010) (describing the various technologies noncustodial parents are using to communicate with their children).

[9] *See* 750 Ill. Comp. Stat. Ann. 5/607(a)(1) & (2) (West 2012).

[10] *Id.* at 5/607(a).

[11] *Id.* at 5/607(a)(1).

[12] *Id.* at 5/607(a)(2).

[13] Cassillas, *supra* note 8.

[14] *See In re Marriage of Charous*, 855 N.E.2d 953, 961 (Ill. App. Ct. 2006) (finding that the mother failed to provide overnight visitation to the father despite court order to do so).

[15] 750 Ill. Comp. Stat. Ann. 5/607.1(a) (West 2012).

[16] *Id.*

[17] *Id.* at 5/609(a).

[18] *Id.* at 5/609(c).

[19] *In re Marriage of Collingbourne*, 791 N.E.2d 532, 545 (Ill, 2003) (citing *In re Marriage of Eckert*, 518 N.E.2d 1041 (1988)).

[20] *In re Marriage of Dorfman*, 2011 IL App (3d) 110099 (3d Dist. 2011), *available at* www.state.il.us/court/opinions/appellatecourt/2011/3rddistrict/august/3110099.pdf.

[21] *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 1050-51.

25 *In re Marriage of Coulter,* 2012 IL App (3d) 100973, 5 (3d Dist. 2012), *available at* www.state.il.us/court/opinions/AppellateCourt/2012/3rdDistrict/3100973.pdf.

26 *Id.*

27 750 Ill. Comp. Stat. Ann. 75/1, 5 (West 2012).

28 *Id.* at 75/5.

29 *Id.* at 75/20.

30 *Id.* at 5/212, 5/213.1.

31 *Id.* at 75/60.

32 *Id.* at 75/50.

33 *Id.* at 75/30.

34 *Id.*

35 *Id.*

36 *Id.* at 75/25.

37 *Id.* at 75/30.

38 *Id.*

39 *Id.* at 75/40.

40 *Id.* at 75/20.

41 *Id.*

42 Defense of Marriage Act, 1 U.S.C.A. § 7 & 28 U.S.C.A. § 1738C (West 2012) (stating that one of the purposes of the act is to

preserve government resources, such as marital benefits, which Congress believed would be depleted if same-sex marriages were legalized).

[43] Illinois Department of Revenue, *Same Sex Civil Unions*, *available at* www.revenue.state.il.us/Individuals/Same-Sex-Civil-Unions.htm.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *In re Marriage of Petersen*, 955 N.E.2d 1131 (Ill. 2011).

[48] *Id.* at 1132.

[49] *Id.* at 1133.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 323.

[53] *Id.* at 327.

[54] *Id.*

[55] *Marriage of Spircoff*, 959 N.E.2d 1224 (Ill. App. Ct. 2011).

[56] *Id.* at 1225.

[57] *Id.* at 1230.

[58] *Id.*

[59] *In re Marriage of Doermer*, 955 N.E.2d 1225 (Ill. App. Ct. 2011).

[60] *Id.* at 1232.

[61] *In re Marriage of Goldsmith*, 2011 IL App. (1st) 093448, *available at* www.state.il.us/court/opinions/AppellateCourt/2011/1stDistrict/August/1093448.pdf.

62 *Id.*

63 *Johnston v. Weil*, 946 N.E.2d 329 (Ill. 2011).

64 *Id.* at 341.

65 750 Ill. Comp. Stat. Ann. 45 (West 2012).

66 *Id.* at 40.

67 *Id.* at 45/1.1.

68 *Id.* at 40/2.

69 *JSA v. MH*, 863 N.E.2d 236 Ill. (2007).

70 *Id.* at 239.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 250.

75 *Id.*

76 *Id.*

77 *Id.* at 245-46.

78 *Id.* at 246.

79 750 Ill. Comp. Stat. Ann. 40 (West 2012).

80 *In re parentage of MJ*, 787 N.E.2d 144, 146 (2003).

81 *Id.*

82 *Id.*

[83] *Id.* at 147.

[84] 750 Ill. Comp. Stat. Ann. 40/1 (West 2012); *MJ,* 787 N.E.2d148-49.

[85] *MJ*, 203 Ill.2d at 152.

[86] *Id.* at 148.

[87] *Id.* at 152.

[88] *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005).

[89] *Id.*

[90] *In re Marriage of Mancine*, 965 N.E.2d 592, 595-96 (Ill. App. Ct. 2012).

[91] *Id.*

[92] *Id.*

[93] *Id.* at 598.

[94] *Id.* at 602.

[95] *Id.*

[96] *Id.* at 596.

[97] *Id.*

[98] *Id.* at 597 (quoting 750 Ill. Comp. Stat. Ann. 5/601(b)(2) (West 2012)).

[99] 17 Ill. Prac., Estate Planning & Admin. § 33.1 (4th ed. 2011) ("the problems of adoption in estate planning").

[100] Students of the University of Illinois College of Law, *Illinois Law Update*, 98 Ill. B.J. 508, 509 (2010).

[101] 755 Ill. Comp. Stat. Ann. 5/11-14.1(b) (West 2012).

[102] *Id.* at 5/11-14.1(b)(1-5).

[103] *In re TPS*, 2011 IL App (5th) 100617, ¶ 18, *available at* www.state.il.us/court/opinions/appellatecourt/2011/5thdistrict/june/5100617.pdf.

104 *Id.*

105 *Id.* at ¶14.

106 750 Ill. Comp. Stat. Ann. 607(a)(1) (West 2012).

107 *Id.* at 606(f).

108 *Id.* at 5/606(g).

109 *Id.* at 5/607(h).

110 *Id.* at 5/610(f).

111 *Comment, Grandparent Visitation Statutes in the Aftermath of* Troxel v. Granville, 17 J. Am. Acad. Matrimonial Law. 122 (2001) (citing 120 S.Ct. 2054 (2000)), *available at* www.aaml.org/sites/default/files/grandparent%20visitation%statutes-article.pdf.

112 *Id.*

113 *Id.*

114 Michael K. Goldberg & Serena Nakano, *Survey of Illinois Law: Grandparent Visitation*, 33 S. Ill. U. L.J. 649, 653 (2009).

115 *Lulay v. Lulay*, 739 N.E.2d 521 (Ill. 2000).

116 *Id.* at 524.

117 *Id.* at 534.

118 *Wickham v. Byrne*, 769 N.E.2d 1(Ill. 2002).

119 U.S.C.A. Const. Amend 14; 750 Ill. Comp. Stat. Ann. 5/607(b)(1), (3) (West 2012).

120 *See id.* at 607(a-3), (a-5), (a-7).

121 *See In re Pfalzgraf*, 882 N.E.2d 719 (5th Dist. 2008) (The court held that grandparents failed to prove that a mother's decision not to allow grandparent visitation is harmful to the child's mental, physical, or emotional health); *Flynn v. Henkel*, 880 N.E.2d 166 (Ill. 2007) (The Supreme Court ruled that a child "never knowing a grandparent who loved him and who did not undermine the child's relationship with his mother" is a harm sufficient to overcome the presumption that a fit parent's denial of grandparent visitation is harmful to the child's mental, physical, or emotional health).

122 Goldberg, *supra* note 108, at 665.

123 *In re Marriage of Demaret*, 2012 IL App (1st) 111916, *available at* www.state.il.us/court/Opinions/AppellateCourt/2012/1stDistrict/1111916.pdf.

124 *Id.*

125 *In re Marriage of Dorfman*, 956 N.E.2d 1040, 1050 (Ill. App. Ct. 2011).

126 750 Ill. Comp. Stat. Ann. 5/607(a)(1) (West 2012) (visitation ""may include electronic communication under conditions and at times determined by the court").

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