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Article

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NOT THE MAMA? ASSISTED REPRODUCTION AND THE ILLINOIS PARENTAGE ACT OF 2015

Human technological advances often far outstep advances in the law. The invention of computers, and in fact, the evolution of computers, happened faster than laws about privacy, eavesdropping, and theft could catch up. The same is true for the growth of the internet in comparison to changes in the laws relating to it. Technological advances in medical care and treatment have far outpaced the law, particularly in the area of genetics and assisted reproduction. Even as the law tries to keep pace, at times, in the rush to bring currency to the law, the law leaves loopholes. Same-sex marriage laws and presumptions of parentage to children conceived during marriage still face challenges. For unmarried couples in Illinois, there remains a sizeable loophole between who *is* a parent and who *might be* a parent.

The Illinois Parentage Act of 2015 (Act), attempts to answer the question of who *is* a parent. Pursuant to the Act, a parent-child relationship between a woman and child is established by one of the following:

1. Giving birth to the child.

2. An adjudication of the woman's parentage.

3. Adoption of the child by the woman.

4. A valid gestational surrogacy arrangement that complies with the Gestational Surrogacy Act or other law.

5. An unrebutted presumption of the woman's parentage of the child under Section 204 of this Act.[1]

Further, pursuant to the Act, a parent-child relationship between a man and child is established by one of the following:

1. An unrebutted presumption of the man's parentage of the child under Section 204 of this Act.

2. An effective voluntary acknowledgment of paternity by the man under Article 3 of this Act, unless the acknowledgment has been rescinded or successfully challenged.

3. An adjudication of the man's parentage.

4. Adoption of the child by the man.

5. A valid gestational surrogacy arrangement that complies with the Gestational Surrogacy Act or other law.[2]

Finally, pursuant to the Act, a person is the presumed parent if one of the following is met:

1. The parties are married or civilly united at the time of the child's birth.

2. The child was born within 300 days of the dissolution of the parties' marriage or civil union.

3. The parties married after the child's birth and, with written consent, the other person was added to the child's birth certificate.[3]

All that language makes it clearly unclear. For a same-sex male partnership or marriage, the law is rather easy to discern. Men cannot give birth biologically, and as such, they will require a surrogate. Provided a male couple complies with the Illinois Gestational Surrogacy Act,[4] the child would be the child of both men, regardless of whether they are married. The Illinois Gestational Surrogacy Act does not require the intended parents to be married. In a same-sex female partnership or marriage, only one person is going to give birth to the child. The ***21** statute leaves silent, but quietly open, the issue of using genetic relationships to establish parentage. If the first woman gives birth, but the second woman provided the egg for creation of the embryo, it would seem that the second woman could seek an adjudication of parentage based upon genetic maternity. However, what if the second woman provided no genetic material for the creation of this child? To further complicate the question, what if the women never got married?

The first determination involves looking at Article VII of the Illinois Parentage Act of 2015, entitled "Child of Assisted Reproduction." Any individual who is an intended parent as defined by this Act is the legal parent of any resulting child.[5] The intended parent is a person who enters into an assisted reproductive technology arrangement, including a gestational surrogacy arrangement, under which he or she will be the legal parent of the resulting child.[6]

What happens when no written agreements or contracts exist? Even the current, recently-updated statute does not provide for an "oral contract for parentage." The logical implications of allowing such an argument would create staggering litigation in our parentage courtrooms. Any time a party would agree to love and support another person's child, as long as the other person claims reliance on that agreement, would create a system of numerous possible parents. However, past case law does speak to

this issue, and it has not been abrogated by statute. The Illinois Appellate Court rejected a lesbian mother's theory that she had standing, either in loco parentis or as a de facto parent, to seek visitation with the biological children of her former domestic partner.[7] Further, the Illinois Appellate Court affirmed the circuit court's dismissal of the petition for visitation of a woman who, along with her ex-partner, had planned for and raised the biological child of the ex-partner for 1 1/2 years. Acknowledging that she lacked standing under section 607 of the IMDMA, the petitioner contended that she had standing as a common law "de facto" parent or an individual in loco parentis. The court determined that section 607 specifically categorized those who may petition for visitation and what requirements they must meet and thus superseded ***22** the common law. While affirming the dismissal based on lack of standing, the court stated in dicta that this issue demands a comprehensive legislative solution, given that evolving social structures have created non-traditional relationships.[8] In fact, the Illinois Supreme Court has specifically held that a child has no liberty interest in maintaining a relationship with respect to a child's psychological attachment to a non-biological parent.[9] Despite these facts, the Illinois courts have spoken out, albeit in dissent, that something must be done. Judge James Knecht specifically stated in his dissent, in a contentious custody dispute between biological parents and the adoptive parents, "[b]ecause parenthood is a social, psychological, and intentional status as much as it is a biological one, courts should have a flexible interpretation of standing to permit those who have social and psychological ties to a child and who have chosen to accept the responsibility of parenting, and actively intend to meet that responsibility, to participate in court proceedings to determine custody."[10]

In returning to the issue of assisted reproduction parentage, cases involving assisted reproduction must be decided based on the particular circumstances presented.[11] Illinois' public policy recognizes the right of every child to the physical, mental, emotional, and monetary support of his or her parents.[12] In assessing Illinois public policy with respect to children born from assisted reproduction, the supreme court has opined that there is a duty, in an action where the interests of a minor are at stake, to ensure that the rights of the child are adequately protected and that Illinois has a "strong interest in protecting and promoting the welfare of its children."[13] There seems to be a direct contravention here of what the Illinois Supreme Court held in the *Kirchner* case, but the court leaves that conflict unaddressed.

The seminal case on the issue of parentage by estoppel in an assisted reproduction setting is *In re Parentage of M.J.*[14] The Illinois Supreme Court determined that a man who, despite not having signed written consent, participated in the decision and process to bring children into the world through artificial insemination can be required to financially support the children under the common law when he has no biological connection with the children and there is no statutory provision requiring him to do so. The supreme court noted that the respondent engaged in a "course of conduct with the precise goal of causing the birth of these children."[15] The court further reasoned that if an unmarried person who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law."[16] The court concluded that the Illinois Parentage Act does not preclude the mother's claims for parental responsibility based on common law theories of oral contract or promissory estoppel.[17]

As such, if two women plan to create a child through assisted reproduction, but elect not to memorialize same in writing, would parentage by estoppel apply? The Illinois Appellate Court has answered that estoppel would apply. Specifically in a case involving a lesbian couple, the court held that a former partner may assert common law contract and promissory estoppel causes of action seeking custody and visitation with respect to children conceived through artificial insemination and borne by the other partner during the relationship.[18] Finally, the Illinois Appellate Court decided *In re Marriage of Dee J. and Ashlei J.* in April 2018, well after the January 1, 2017 amendments were made.[19] The Second District specifically relied upon the holdings of *M.J.* and *T.P.S. and K.M.S.* in its 2018 ruling and specifically addressed the theories followed in those cases. Illinois' statutory authority did not recognize parental rights where a child was conceived by an unmarried couple through artificial insemination; however, the courts have accepted common-law claims in such cases, particularly because one's participation in

artificial insemination is not some whimsical or trivial act. The court noted specifically that assisted reproduction is planned and carefully organized activity, as opposed to a heat of the moment decision.[20]

***23** Of course, the case law leaves silent what might constitute acts supporting parentage by estoppel. This leaves parents and practitioners to detail and outline specific facts supporting that proposition. This could include: being present at the insemination meetings, selecting the child's name together, being named in baby announcements, selecting a partner's oldest child as godparent, listing the other partner as parents in communications, selecting and participating in a baptismal sacrament, and giving the child the other partner's last name. These all would indicate the seriousness of the plan of two parents to create a life together and raise that child as their own. Again, without a writing, these are merely oral contracts. Fortunately, oral contracts are proved not only by what the parties have said, but by what they have done.[21] For the benefit of a child or child created through assisted reproduction, it is clear that the *M.J.* case provides a safety net for a gap in the law that must be corrected. As technology continues to advance, this gap will only grow larger as the law lags behind.

Footnotes

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1 750 ILCS 46/201 (a).

2 750 ILCS 46/201(b).

3 750 ILCS 46/204.

4 750 ILCS 47/1 *et seq.*

5 750 ILCS 46/703(a).

6 750 ILCS 46/103(m-5).

7 *In re Adoption of A.W., J.W., and M.R., Minors,* 343 Ill. App. 3d 396, 796 N.E.2d 729 (2nd Dist. 2003).

8 *In re the Matter of Visitation with C.B.L.,* 309 Ill. App. 3d 888, 723 N.E.2d 316 (1st Dist. 1999).

9 *In re Petition of Kirchner*, 164 Ill.2d 468, 649 N.E.2d 324 (1995).

10 *In re Parentage of Unborn Child Brumfield,*284 Ill. App. 3d 950, 673 N.E.2d 461 (4th Dist. 1996).

11 *In re Parentage of M.J.*, 203 Ill.2d 526, 540, 787 N.E.2d 144, 152 (2003).

12 *Id.* at 539, 151.

13 *Id.*

14 203 Ill.2d 526, 787 N.E.2d 144 (2003).

15 203 Ill.2d at 541; 787 N.E.2d at 152.

16 *Id.*

17 *Id.*

18 *In re T.P.S. and K.M.S.*, 2012 IL App (5th) 12076, 978 N.E.2d 1070 (2012).

19 2018 Ill. App. (2d) 170532.

20 *Id.*

21 *In re Marriage of Sherrick,* 214 Ill.App.3d 92, 157 Ill.Dec. 917 (4th Dist. 1991) (*citing Feyreisen v. Sanchez*, 70 Ill.App. 105 (1897)).

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