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By Jeffrey A. Parness

People move in and out of family relationships. These same people also move in and out of American states. When the parental status of one or more of these moving people is important in a civil action, context often is important. That is, the purpose behind a parentage designation must be considered before a determination can be made. A parentage determination can be used, inter alia, in a dispute over child custody/visitation/parental responsibility allocation opportunities, over child support duties, over heirship in probate, or over standing to pursue tort remedies. Parentage under law may vary with context. For example, in Illinois there is parentage via equitable adoption in probate, but not in parental responsibility allocation. Compare DeHart v. DeHart, 2013 IL 114137 (probate) to In re Scarlett Z.-D., 2015 IL 117904 (child custody). Further, parentage law assessments are confusing because for some purposes, parental-like interests are recognized for nonparents. Thus in Illinois, a court can order an “allocation of parental responsibilities” involving a child to be entered on behalf of a nonparent, like a grandparent or stepparent.¹

When movements in and out of family relationships are accompanied by movements in and out of states, legal parentage determinations important to dispute resolutions are even more challenging. Family relationships may have been first established in one state, continued in a second state, and become important under law in a civil action in a third state. An opposite sex unwed couple can get together and conceive a child via sex in one state, the child can be born in a second state to the mother then married to another man, and the mother can thereafter move with the child to a third state where a legal paternity issue first arises. Or, a same sex female couple can reside in one state, prompt a pregnancy for one spouse/partner or for a surrogate in a second state, and then split up with one of the women and the child moving to a third state where parentage under law for the former spouse/partner and/or the surrogate is in dispute. Interstate movements make legal parentage determinations particularly challenging as American state laws vary widely on parentage definitions in a single context, as with disputes over standing for child custody/visitation/parental responsibility allocation purposes or as with the validity of surrogacy contracts (including, at times, differentiations in state laws between genetic and gestational surrogates).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) proposed for enactment in all U.S. states a revised Uniform Parentage Act in 2017 (2017 UPA). This proposal contains some very different approaches to legal parentage (at least for childcare and child support purposes) than were set out in the (original) 1973 UPA and in the 200 UPA, as revised in 2002. The latest proposal, for example, expressly recognizes, for the first time, a voluntary parentage acknowledgment option for a female partner of a birth mother; a de facto parent doctrine (quite different from the “hold out” parent doctrine which continues); and, varied approaches to assisted reproduction contracts involving no surrogate, a genetic surrogate, or a gestational surrogate. At least two states (Washington,
Vermont) have already substantially adopted the 2017 UPA. Many other states, like Illinois, continue chiefly under the 2000 UPA, while a few states remain significantly committed to at least certain provisions in the 1973 UPA.

National uniformity is unlikely to follow soon from U.S. Supreme Court precedents or from new state laws better defining who possesses the federal constitutional parental rights involving the “care, custody, and control” of children, recognized, for example, in Troxel v. Granville, 530 U.S. 57, 65 (2000) (“perhaps the oldest of the liberty interests recognized”) (plurality opinion). The U.S. Supreme Court has chiefly deferred to state lawmakers on who possesses federal constitutional parental childcare rights, though it has nationalized the norms on who holds other federal constitutional rights like free speech, abortion and speedy criminal trial. There has also never been relative uniformity of state laws on legal parentage under either the 1973 UPA or the 2000 UPA. The 2017 UPA shows no signs, to date, of general acceptance by state lawmakers.

Because legal parentage is key in many civil actions, including tort and probate, that are outside of domestic relations disputes and because people move in and out of both family relationships and states, civil litigation lawyers in Illinois must understand the challenges posed by contextual parentage within and between states. The NCCUSL, in both the 2017 and 2000 UPAs, has tried to limit the uncertainties in interstate settings by proposing a simple choice of law norm. This norm, followed in Illinois via 750 ILCS 46/104(b) within the Illinois Parentage Act of 2015, says that adjudications of “the parent-child relationship” do “not depend on ... the place of birth of the child ... or ... the past or present residence of the child.” Thus, the Act declares that the provisions of the Act will apply to a “determination of parentage in this State.”

Unfortunately, this method of choosing between conflicting state parentage laws can run afoul of U.S. Supreme Court precedents on Full Faith and Credit obligations. As well, it can run contrary to the legitimate expectations of the people who move between states and of the out-of-state lawmakers who had regulated the family relationships within their states before the interstate moves.

The problems arising from always employing a forum state’s own parentage laws are well illustrated by the case of Johnson v. Johnson, 617 N.W.2d 97 (N.D. 2000). There, Antonyio and Madonna, living in New Jersey in 1988, took custody in Pennsylvania of Jessica, then 3 months and the natural granddaughter of Madonna. Jessica’s mother—who was married to Madonna’s son who was then in jail—placed Jessica with the Johnsons. Jessica was scheduled to remain with the Johnsons for a month. But 10 years later she was still with the Johnsons. During the decade the Johnsons had resided both in New Jersey and Florida. In 1998, Antonyio moved (via military transfer) to North Dakota where he filed for divorce. Madonna was then living with Jessica in Kentucky. In response to the North Dakota suit, Madonna sought child support on behalf of Jessica from Antonyio. Applying its own common law principles on equitable adoption, the North Dakota court found Antonyio liable as a parent for support, which liability was to be calculated under North Dakota law in this child support context (and certainly in a child custody/visitation/parental responsibility allocation context).

The problems with using forum laws in the Johnson case jump out. No significant acts prompting Antonio’s equitable adoption occurred in North Dakota. The needs of Jessica arose in Kentucky, while Antonyio’s assets were in North Dakota. The interests of Jessica’s biological parents were never considered, and likely could not have been considered given personal jurisdiction constraints. And, there was no consideration of the governmental interests of New Jersey and Florida in Antonyio’s earlier childcare (if not the interests of Pennsylvania in Antonyio’s earlier agreement).

In a case like Johnson, even if forum laws are to be used, it should only come after inquiry into forum choice of law rules. These rules might prompt (or even require, per full faith and credit principles) the employment of some parentage laws from outside of North Dakota. It seems to me far more reasonable to assess Antonyio’s parentage (i.e., equitable adoption) under North Dakota law in a North Dakota probate context prompted by Antonyio’s death in North Dakota than to assess Antonyio’s parentage under North Dakota law in this child support context (and certainly in a child custody/visitation/parental responsibility allocation context).
Legal parentage is important in civil actions in Illinois in varying contexts, including child custody/visitation/parental responsibility allocation; child support; probate; and tort (as in wrongful death). Parentage norms can vary in different contexts even where all relevant conduct occurred in Illinois. Where people and their family relationships move interstate, while context remains important, challenging—and often overlooked—choice of law issues must also be confronted in order to respect the reasonable expectations of moving people and their lawmakers outside of Illinois, if not to abide by Full Faith and Credit obligations.

1. 750 ILCS 5/601.2(b)(4) and (5).


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