Exploring more paths to legal fatherhood

Father's Day may be celebrated very differently next year. Both Illinois legislators and judges are now considering new avenues for legal fatherhood with accompanying parental rights and obligations and for expanded stepparent child care opportunities.

Legal fatherhood is evolving because of two major changes.

One involves human reproductive technologies that permit human birth without sex as well as more accurate natural parent determinations.

The other involves social changes, including the increasing numbers of non-marital children born without legal fathers. Natural fathers of non-marital children are not automatically recognized as are birth mothers and husbands of women who bear children.

Unwed fathers need to act affirmatively in some parental-like way, usually by being named on birth certificates or providing pregnancy support. In the United States, about 1.8 million children are born annually to unwed mothers, with about one-third having no fathers on their birth certificates.

While husbands are the presumed legal fathers of children born to their wives, they, their wives, their children or the state can now more easily rebut the marital presumption sometime after birth by using the new technologies.

Until now, without a paternity case, fatherless children could gain a legal father after birth only through a formal adoption. Such an adoption proceeds under state supervision.

But across the country, there are increasing avenues for informal adoptions in which a second parent is recognized for a child with a single parent, and there is little, if any, state supervision. These avenues go by varying names, including de facto and presumed parenthood. Once recognized, second parents are on equal footing with the single parents they join.

Illinois legislators have been debating whether to recognize new informal adoptions. A rewrite of the Illinois Marriage and Dissolution of Marriage Act, introduced last year as HB 1452, defined an “equitable parent” as “a person who, though not a legal parent of a child … lived with the child since the child's birth or for at least 2 years” while holding himself out as the child's parent and “accepting parental responsibilities, under an agreement with the child's legal parent … provided that a court finds that recognition of the person as a parent is in the child's best interests.” HB 1452 was amended in May to exclude this proposal, but it could reappear.

The initial rewrite of the Illinois Parentage Act, introduced last year as HB 1243, recognized a man as a “presumed” parent of a child if “for the first two years of the child's life, he resided in a household with the child and openly held out the child as his own.” HB 1243 no longer contains this presumption. It could also reappear.

As the pending bills are debated, there are related judicial initiatives.

The Illinois Supreme Court decided DeHart about when HB 1452 and 1243 were introduced.

In that case, the court recognized that an “equitable adoption” of a child by a decedent without a will could prompt the child to recover from the decedent's estate where the decedent had an “intent to adopt and form a close and enduring familial relationship.” The high court then asked two different appellate courts to consider whether this same concept could support a child care order favoring a former boyfriend or a husband of a single mother over her objection.

Where the unwed father had helped raise an adopted child from birth, two justices in May, in Scarlett Z.D., said the man might prevail in his “declaration of parenthood” complaint. A third justice thought the mother may be estopped from denying parenthood.

The Scarlett Z.D. court disagreed with another appeals court resolving a child care plea from a former husband who had raised his wife's adopted child from birth.

In May, in Mancine, two justices rejected equitable adoption and estoppel. A third justice opined, however, that “courts should be able to make custody determinations in a wide variety of contexts beyond those involving biological or adoptive parents when in furtherance of a child's best interests.”

Even without parenthood, some men, such as the stepfather in Mancine, may soon have greater access to child care over maternal objection.

Under a proposed provision in HB 1452 added in May, child visitation opportunities would be expanded for stepparents who are married to a child's parent or who were married to a child's parent who died. Presently, a stepparent can only seek child care if the child is at least 12 and the parent is unable to child care.