Evolving Illinois parentage laws

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Introduction
American parentage laws have evolved dramatically in the past half century as a result of major changes in reproductive technologies and human conduct. Yet this legal evolution, if not revolution, has not fully kept pace so that today many parentage laws are outdated. The (r)evolution is incomplete in Illinois, leaving both the General Assembly and the Supreme Court with opportunities to update. Both bodies have recently signaled their desire for reforms. Any changes will significantly impact civil litigators, both in and outside of family law matters.

Changing Social Landscape
In the past half century there have been at least two major technology advances prompting the parentage law evolution. One involves the availability of reliable, less costly, and less intrusive DNA testing to determine male parentage. Such testing may even be widely available soon to determine male parentage prebirth. The other involves more reliable, less costly and more generally available processes for assisted human reproduction, including births via artificial inseminations or implanted embryos. New processes now also allow better freezing and storage of genetic materials for later use to prompt healthy human births.

As to changes in human conduct, there has been a significant rise in births from sex to unwed mothers who never marry the biological fathers; in unwed mothers who raise their children alone; in stepparents rearing other people’s biological children; in births from assisted reproduction; and, in newborns who have no fathers listed on their birth certificates. Seemingly, there also have been significant numbers of children born as a result of adultery.

There certainly has been, as well, increasing numbers of nontraditional nuclear families with children, that is, families where there is no married heterosexual couple. In particular, there has been an upsurge in families including same sex couples who plan for, have, and rear children, and in grandparents and other family members who raise or help to raise children where the biological parents are not deceased and where there have been no formal adoptions.

Finally, nuclear families, defined as including at least two adults in an intimate, usually sexual, relationship, more often come and go, so that parents frequently move with their minor children from one nuclear family to another.

Changing Legal Landscape
American state legislators have responded to the changes with many new laws on children born of sex. While DNA testing is not yet generally required before any man can be deemed a father under law at birth, DNA testing has increasingly been allowed to override the traditional statutory paternity presumptions favoring husbands of women.
who bear children during marriage. DNA testing also is increasingly available under law for unwed fathers seeking to establish their own paternity, as well as for unwed mothers seeking to establish paternity in their lovers, often in order to secure child support.

But DNA testing is not available for use in all legal paternity matters. Most significantly, when men sign, with birth mothers, voluntary paternity acknowledgements for children born of sex, both signers are often foreclosed under law from later rescinding via DNA tests. Per federal statute, after ninety days, fraud, duress or material mistake of fact must be shown before negative test results can be employed. The guidelines for fraud and the like vary significantly between the states.

As well, technology and conduct changes have spurred many new parentage laws on births via assisted reproduction. New statutes recognize the parental desires of both unwed and wed opposite sex couples; of unwed and wed same sex couples; and of individual would-be parents, who can be either female (as when artificial insemination is employed) or male (as when a surrogate is employed).

Especially when there is a lag in state statutory responses to the changes in technologies and human conduct, parentage law reforms also occur via common law precedents. Some courts have utilized concepts like de facto parentage; presumed parentage; parentage by estoppel; and equitable adoption. Other courts, while recognizing the new technologies and diversities in nuclear families, have deferred to legislators. Judicial responses within a single state are often not uniform, so that there are sometimes common law initiatives in some, but not all, parentage settings.

Evolving common law developments are sometimes invited by legislators, as when flexible statutory standards are accompanied by (either express or implied) recognitions of broad judicial discretion. At other times, legislators discourage judicial initiative, as when detailed and determinate standards are enacted.

Finally, the National Conference of Commissioners on Uniform State Laws has invited further legal change by endorsing, in August, 2012, the new model Uniform Premarital and Marital Agreements Act provisions involving “custodial responsibility.” Earlier, in the Uniform Premarital Agreement Act, such provisions were not recognized so that only prenups on property and money matters were contemplated. Custodial responsibility pacts in prenups and midnups are now deemed to provide “guidance” for later courts hearing custody and visitation disputes. Effectively, there may soon be widespread parentage by contract – a new kind of informal adoption alongside, e.g., de facto and presumed parentage.

Illinois Parentage Law (R)Evolution
In Illinois there are some newer statutory provisions on parentage for births by surrogacy. There remain older provisions on parentage for births by sex and by other forms of assisted reproduction. The Family Law Study Committee (FLCS), at the directive of the Illinois General Assembly, has proposed statutory reforms on legal parentage for children born of sex and of assisted reproduction. They have been under consideration for a while. The legislature now seems ready to act. But even if it acts, any reforms would not likely answer all the questions raised by the changes in technologies and human conduct.

The FLCS proposals have appeared in two bills, one seeking to amend the Illinois Parentage Act of 1984 and the Illinois Parentage Act (PIPA) and the other seeking to amend the Illinois Marriage and Dissolution of Marriage Act (PIDMDMA). Each bill at one point has extended childrearing interests to those who are neither actual or alleged biological parents nor adoptive parents, but who have acted as parents.

To date, PIPA would not significantly alter Illinois law on the presumed paternity of a husband whose past, present or future wife delivers a child born of sex. For example, if enacted, a man would be a presumed a parent of a child born to his wife only when the child is “born” during the man’s “state-recognized marriage, civil union or domestic
partnership" with the mother, as well as of a child born to his ex-wife within 300 days after a similar state-recognized relationship has been terminated.

PIPA also suggested for some time a comparable parentage presumption for a woman whose state-recognized partner bears a child born of sex, as well as presumed parentage in a child for either a man or a woman who "for the first 2 years after the birth of the child ... resided in a household with the child, openly held out the child" as his or her own "during that time," when the "child had only one parent under law ... and that parent consented" to the "holding out." PIPA has also suggested recognition of assisted reproduction agreements between unmarried couples who do not employ surrogates.

At one point PIMDMA also would have altered Illinois parentage laws. It would have replaced court-ordered child custody and visitation with judicial allocations of "parental responsibilities," which include "significant decision-making responsibilities with respect to the child," and of "parenting time," which do not. Only legal parents, meaning biological or formal adoptive parents, ordinarily would be eligible for allocations of "parental responsibilities." Allocations of "parenting time" could be made to "equitable parents" who provided childcare and who include the child's present or former stepparent; a man or woman who "lived with the child for at least two years" while having "a reasonable, good-faith belief" that "he or she was the child's biological parent" based on "marriage to the child's legal parent or on the actions or representations of the legal parent;" and, one who "lived with the child since the child's birth or for at least two years, and held himself out as the child's parent ... under an agreement with the child's legal parent (or, if there are two legal parents, both parents) to rear the child together."

As the FLCS proposals have been debated, the Illinois courts have also been urged to reconsider parentage via common law rulings. Two intermediate appellate courts have recently rejected calls for de facto parent reforms, in large part, out of separation of powers concerns. But the Supreme Court remanded the cases for reconsideration in light of its 2013 ruling that an intestate's heir can include a child untied biologically to the decedent and never formally adopted by the decedent. One appellate court continued to reject de facto parenthood after remand. Other appellate courts have considered contracts and guardianships as vehicles for parentage for lesbians whose mates bore children via assisted reproduction.

Implications for Civil Litigators
So what does this trend, driven by changes in technology and human conduct, toward legal parentage beyond biological ties and formal adoptions mean for civil litigators? Surely, parenting time and child support guidelines are evolving. But since DeHart v. DeHart, 2013 IL 114137, probate practitioners must account for those "informally" adopted by some decedents.

As well, personal injury practitioners must now reconsider who has standing to pursue, e.g., claims for medical expenses and emotional distress. And rethinking may be needed for those involved in enforcing intra-family domestic violence laws, any remaining immunities involving parent-child relationships, and formal adoption notice requirements.

Thus, evolving parentage laws will alter the practices of many civil litigators, including those who eschew traditional family law cases.