Chicago-Kent Law Review

Volume 92
Issue 1 *Changing American State and Federal Childcare Laws*

Article 2

7-25-2017

Introduction

Jeffrey A. Parness
Northern Illinois University College of Law

CHANGING AMERICAN STATE AND FEDERAL CHILDCARE LAWS

JEFFREY A. PARNESS
Symposium Editor

EVOLVING PARENTAL CHILDCARE PARENT LAWS: SYMPOSIUM PAPER REVIEW

JEFFREY A. PARNESS,* SYMPOSIUM EDITOR

Many children in the United States face challenges today that their parents, as children, never faced. Frequently, children today cannot easily identify their parents under law. As well, children today are often significantly or exclusively reared by nonparents who then have no, and may never have, legal recognition as child caretakers or parents. What has happened in a single generation to prompt these uncertainties and these new forms of childcare? Answers lie chiefly in technology and human conduct changes.

There have been two major technology changes. One involves the availability of more reliable, less costly, and less intrusive testing to determine male biological parentage. Better testing has prompted more accurate establishments of paternity for unwed biological fathers, as well as more paternity disestablishments by men once presumed to be legal fathers due to their marriages to birth mothers.

The other change involves the availability of more reliable, less costly, and more accessible processes for assisted human reproduction. Increasingly, medical personnel are unnecessary so that parentage for both opposite and same sex couples, as well as for singles, can be pursued in total privacy without sex. Births employing surrogates are now planned where one or neither of the intended parents contribute no genetic material. Birth mothers intending to parent can bear children resulting from donated ova, sperm, and/or fertilized eggs.

As to changes in human conduct, there has been a significant increase in births arising from sex with unwed mothers who thereafter choose, or are compelled, to raise their children alone, with new intimate partners, or with family members. Some of these mothers bear children who have no biological fathers listed on their birth certificates, with many of these fathers never attaining parental childcare opportunities and never being assessed child support responsibilities (especially if their children never receive public

* Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College; J.D., The University of Chicago.

aid). There is also increasing fluidity in the households where children are raised. With the increasing number of single birth parents (and of single parent adoptions), there are more opportunities for the intimate partners or the family members of single childcare parents to develop parental-like bonds, and perhaps morph into second parents. As Justice Stevens observed in *Troxel v. Granville* in 2000, there is an "almost infinite variety of family relationships that pervade our ever-changing society."[1]

Despite the changes in technology and human conduct, many American state laws on childcare parentage have not been adapted to reflect the new realities of childcare within fluid family relationships. New childcare laws are said to be needed for both new forms of parentage, like de facto and equitable adoption parents, and for new forms of nonparental childcare (especially by stepparents and grandparents).[2] While some new laws have emerged, further legal initiatives are much needed. The symposium authors explore how new parentage laws could respect the superior parental rights of natural and formal adoptive parents while serving the best interests of children and their new caretakers.

In the first paper, "Parents, Babies and More Parents,"[3] Professors June Carbone and Naomi Cahn explore "the difficult questions on how to manage the status of each parent" within a "three parent family" for purposes of allocating parental childcare responsibilities. These questions have arisen, and will increasingly arise, because "the law has embraced functional parenting to a much greater degree," which prompts "a collision course" with the traditional "insistence on parental equality," that is, the goal of according all parents "equal standing" when it "comes to raising a child." While the authors believe "recognition of three parents can provide stability and continuity for a child's relationship with relevant adults, "they say it must be accompanied by judicial determinations that sometimes accord "primary parenting to one adult rather than granting shared decision-making rights to multiple adults." They conclude the "multiple parent model is a good idea only so long as it is applied to recognize. . . the need to accord differing, and unequal, rights to those deemed to be 'parents.'"

In the second symposium paper, "*Obergefell's* Ambiguous Impact on Legal Parentage,"[4] Professor Leslie Joan Harris examines how the same

1. 530 U.S. 57, 90 (2000) (Stevens, J., dissenting).

2. The Uniform Law Commissioners are now considering both a revised version of their 2002 Uniform Parentage Act and a new Non-Parental Child Custody and Visitation Act. Developments are found at www.uniformlaws.org.

3. 92 Chicago-Kent Law Review 9 (2017) [hereinafter Carbone and Cahn].

4. 92 Chicago-Kent Law Review 55 (2017) [hereinafter Harris].

sex marriage equality precedent affects the balance within each American state between claims to legal parentage founded on "biology, function and marriage." She finds the "affect" from the ruling in *Obergefell,* and earlier U.S. Supreme Court cases, is "currently ambiguous." High court precedents "on one hand" endorse, at times, "the claim that children whose parents are married are better off socially and legally than nonmarital children," meaning lawmakers should prefer "legal rules that encourage or prefer childrearing within marriage." "On the other hand," the precedents also support the "unspoken premise" that adults who are not biologically related to children can still be "in fact parents" under law when they "function as parents."

Upon reviewing how children now live in the United States and current American state parentage laws founded on function, marriage, and voluntary acknowledgments, Professor Harris opines that because *Obergefell* has produced only "uneven" development of "legal principles that protect functional parent-child relationships more broadly," new state statutes are needed "to protect functional parent-child relationships." Such statutes "should create simple, inexpensive procedures for legal parents and their partners who are or will become functional parents to register the partners as legal parents."

In the third symposium paper, "Assisted Reproduction Inequality and Marriage Equality,"[5] Professor Seema Mohapatra considers the import of the same sex marriage equality precedent on access to assisted reproduction, with and without surrogacy, for same sex couples. She focuses on how the precedent affects the laws on human infertility, with some focus on the need for expanded insurance coverage for assisted reproduction.

Beyond marriage equality dictates, Professor Mohapatra urges new efforts aimed at expanding assisted reproductive services for all. She concludes that only when there is general "access to biological parenthood" regardless of financial resources will there be "reproductive justice."In the fourth symposium paper, "Romantic Discrimination and Children,"[6] Professor Solangel Maldonado explores "how racial preferences in the dating market potentially affect the children of middle-class African-American mothers who lack or reject opportunities to intermarry." Initially, she reviews the evidence on racial preferences in the dating and marriage market, concluding that it demonstrates two groups are "least preferred by online daters African-American women and Asian-American men," with these groups having "the lowest rates of intermarriage." Professor Maldonado

5. 92 Chicago-Kent Law Review 87 (2017) [hereinafter Mohapatra].
6. 92 Chicago-Kent Law Review 105 (2017) [hereinafter Maldonado].

then focuses on the continuing disadvantages faced by nonmarital children, especially those raised solely by "middle class African-American women," and how new laws can help diminish them. She urges "that the state should support all families regardless of family form." One form of support would be for the federal government to replace its "Healthy Marriage Initiative," that funds projects encouraging marriage before childbearing, with a "Healthy Families Initiative," that would fund "campaigns on the value of healthy families and parent-child relationships." She concludes that governments should fund "programs that support parents regardless of their family structure."

In the fifth symposium paper, "Quacking Like a Duck? Functional Parenthood Doctrine and Same Sex Parents,"[7] Professor Katherine Baker "argues that a functional approach to determining legal parenthood is inherently problematic, especially for those concerned with expanding legal recognition of non-traditional family forms," including "advocates for gay and lesbian rights." Problems arise when courts "embrace a functional approach without clear indication of intent to co-parent . . . because the judges find the parties [usually a single parent and her/sometimes his mate] functioned as a family." One major problem is that "in letting function trump or supplant intent, courts pay short shrift to the constitutional parental autonomy rights of the extant parent and discount an individual's right to create a legal family that does not mimic the traditional heteronormative ideal." To alleviate this problem, Professor Baker urges "an opt-in system" for parenthood independent of marriage and formal adoption wherein those [often same sex couples] wishing to co-parent could employ "a simple, intent-based registration system" by which they "mutually opt-in to co-parentage." She recommends that the system originate in governmental expansion of the processes now employed for voluntary acknowledgments of paternity by unwed biological fathers and unwed birth mothers of their children born of consensual sex.

In the sixth symposium paper, "Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity,"[8] Professor Jeffrey A. Parness and David A. Saxe explore American state laws implementing the federal Social Security Act's requirements on voluntary paternity acknowledgments (VAPs), which are tied to state participation in federal welfare subsidy programs. In particular, they focus on the varying state laws on contesting VAPs more than 60 days after signing via challenges based on

7. 92 Chicago-Kent Law Review 135 (2017) [hereinafter Baker].
8. 92 Chicago-Kent Law Review 177 (2017) [hereinafter Parness and Saxe].

"fraud, duress or material mistake of fact." They demonstrate how state laws differ regarding who may challenge; what constitutes fraud, duress or material mistake of fact; the time limits for presenting challenges; and how timely challengers may otherwise be barred from contesting VAPs. The authors review the negative consequences flowing from these interstate legal variations, including the difficult choice of law issues, which at times are resolved without any recognition of the differing state laws on de facto (or presumed or equitable) parenthood, as well as the problematic use of norms driven by federal welfare reimbursement policies in parentage cases that do not involve welfare, especially where the best interests of children are disserved.

Reforms are suggested for VAP challenge processes at both the federal and state levels. At the federal level, clarity is particularly needed on what constitutes fraud and mistake and on who is eligible to challenge VAPs. At the state level, differentiation is needed between paternity acknowledgments tied to the federal Social Security Act compliance, and parentage acknowledgments (by both men and women) lying outside of welfare policy, wherein both same sex and different sex couples may acknowledge and wherein childcare opportunities and children's best interests are paramount.