July 2014 Vol. 58, No. 1

ILLINOIS STATE BAR ASSOCIATION

FAMILY LAW

The newsletter of the Illinois State Bar Association's Section on Family Law

In re Marriage of Mancine v. Gansner, In re the Parentage of Scarlett Z.-D. and the status of "equitable parents" and "equitable adoption" in Illinois

By Heather M. Hurst

Two new cases have recently been issued from the Illinois Appellate Courts addressing the doctrines of "Equitable Parents" and "Equitable Adoption."

The Equitable Parent Doctrine and The Equitable Adoption Doctrine

The doctrine of an "Equitable Parent" involves the right of a non-biological, or non-adoptive parent, to file an action for custody or parenting time with a child based upon the ties or relationship of the "equitable parent" to the child. Illinois Courts have unequivocally asserted that Illinois does not recognize the "Equitable Parent" doctrine. Accordingly, these claims have historically been dismissed by Illinois Courts, holding that the non-biological, or non-adoptive parent, lacks standing to even bring a claim. Absent legislation creating an exception to the current statute, it appears clear, that a claim as an equitable parent is unlikely to be recognized in Illinois courts.[1]

Under the doctrine of "Equitable Adoption," a child may be treated as a legally adopted child if there is evidence of the parent's intent to adopt the child, and the parent treats the child as their own. While the existence of an "equitable adoption" is ultimately a question of fact, it is not enough to simply prove a familial relationship existed; but rather, the non-parent must have held himself (or herself) out to the child and the community at large as the natural or adopted parent of the child.

Although Illinois has recently recognized an equitable adoption with respect to a case involving a contested will in an estate/probate matter (*DeHart v. DeHart, 2013 IL 114137*), no Illinois court has recognized equitable adoption in the context of a child custody action. Therefore, after its recent decision in *DeHart,* the Illinois Supreme Court issued a supervisory order directing the First District Appellate Court to reconsider *In re Mancine v. Gansner, 2014 IL App (1st) 111138-B* and the Second District Appellate Court to reconsider *In re the Parentage of Scarlett Z.-D., 2014 IL App (2d) 120266-B,* both of which originally rejected the doctrines of "Equitable Parent" and "Equitable Adoption" in their initial child custody opinions.

Factual Backgrounds of *In re Mancine and In re Scarlett*

Mancine

In *Mancine,* the Husband sought custody of a minor child, William. William had been adopted by the Wife and was not the biological child of either party. The parties began dating in the Spring of 2008, and at that time, the Wife was in the process of adopting William. Wife already had an adopted daughter from a previous marriage.

Around June or July 2008, the parties decided to marry, with their formal engagement occurring that December. However, because Wife had already begun the process of adopting William as a single parent, the parties were advised by the adoption agency to finish the process of Wife's adoption, and then for Husband to adopt William as a stepparent after the marriage.
William was born in August, 2008 and his birth certificate gave his name as "William Michael Gansner," the last name of the Husband.

After the child's birth and before the mandatory six-month statutory waiting period to finalize the adoption had run, the adoption agency visited the parties to update the home study due to the fact that Husband had moved in with Wife and was co-parenting William. In November, 2008, William was baptized, and church records listed both parties as his parents. The adoption agency's February 2009, report noted Wife had designated Husband as the sole guardian of William and any future children she may have and named her parents as alternate guardians. It was uncontested Husband helped care for William by providing all customary parenting functions for the child.

Williams' adoption was finalized in March 2009, and the adoption records identified him as "William Michael Gansner," again listing the last name of the Husband on the document. The parties married in May. Both parties intended that Husband would formally adopt William after the marriage. Wife contacted the adoption agency and arranged for them to visit with the parties immediately following the wedding to start the Husband's adoption process. In June, after screening the Husband, the adoption agency reported they intended to support Husband's

stepparent adoption petition. In August, 2010, the agency informed Husband that he was free to file his step-parent adoption petition.

At the same time as the adoption of William became final; the parties had already commenced the adoption of another child, Henry, and were in the process of moving to Chicago. Henry was born in September, 2009 and was adopted by both parties. Husband alleged that he was the primary caretaker of all 3 of the children after the move. Husband further maintained that even after he secured full time employment as an Assistant Attorney General for the State of Illinois, he remained the children's primary caretaker.

Wife's Petition for Dissolution of Marriage filed in September, 2010, claimed the parties had only one child together, Henry, and Husband was a fit and proper person to share joint custody of the child. In his Response and Counter-Claim, Husband sought sole custody of both William and Henry. Wife moved to dismiss Husband's claim for custody of William alleging Husband lacked standing because he never became his *legal* parent through a formal adoption. The trial court granted Wife's Motion to Dismiss, and Husband appealed.

On appeal, Husband argued the trial court was in error and should apply an "equitable parent" approach to the case. Because Illinois had rejected the "Equitable Parent" Doctrine, however, the Appellate court refused, holding that under the Illinois Marriage and Dissolution of Marriage Act only the Wife had properly established a parent-child relationship through the adoption of William, something Husband failed to do, and therefore only she had standing to seek custody. The Appellate Court went on to state there is, at present, a statutory scheme for non-parents to seek custody; however, it was not applicable to the Husband in this case. Specifically, Section 601 (b)(2) of the Illinois Marriage and Dissolution of Marriage Act provides that "a custody proceeding may be commenced by a non-parent by filing a petition for custody of the child in the county in which he is permanently resident or found, *but only if he is not in the physical custody of one of his parents." (Emphasis added).* The Court noted that the Illinois Supreme Court interpreted this section as a standing requirement for nonparents, which, in the custody context refers to a "statutory requirement the non-parent must meet before the trial court proceeds to the merits of the petition for custody." *In re Custody of M.C.C.*, 383 Ill.App.3d 913, 917 (2008) (citing *In re R.L.S.*, 218 Ill.2d 436). Since, William was in the custody of Wife, his only legal parent, Husband had no standing to seek custody of William.

Husband further argued on appeal that an "equitable adoption" applied because he had fully intended to adopt William, had held William out as his own child, and the filing of the petition for adoption was merely a ministerial act. The Court rejected this argument stating the act of filing a Petition is not merely a ministerial act, but rather is the process by which a non-biological parent-child relationship is created. Moreover, Husband's sole reliance on his intent to

adopt was insufficient when he never followed through with his Petition to formally adopt William.

As noted above, the Illinois Supreme Court directed the appellate court to reconsider *Mancine* in light of its decision in *De- Hart,* where a parent-child relationship was established by equitable adoption for purposes of taking under a will. However, upon reconsideration, the Appellate Court in *Mancine* found *DeHart* did not apply because *De- Hart* was a common-law will contest in which the concept of equitable adoption could be applied; conversely, the *Mancine* proceedings were statutory rather than equitable proceedings. As such, the *Mancine* Appellate Court once again upheld the trial court's decision to grant the Wife's motion to dismiss. A Petition for Leave to Appeal to the Supreme Court was filed and subsequently denied on June 10, 2014.

Scarlett

In *Scarlett*, the Father sought a determination of parentage, custody, and parenting time with Scarlett, the adopted daughter of his former fiancée. The parties began living together in 1999 and became engaged by 2001. In 2003, during a trip to the Mother's birthplace of Slovakia, Mother met Scarlett and decided to adopt her. The parties discussed adopting Scarlett together, and Father supported the adoption financially and otherwise. Slovakian adoption laws required Mother to stay in Slovakia during the adoption process, and to complete the adoption as a single parent because the parties were not married and Father was not of Slovakian descent. During the year in which the adoption process took place, Father traveled to Slovakia approximately five times and upon Mother's return to the United States, the parties and Scarlett lived as a family, although the Parties never married, and Father never formally adopted the child.

In 2008, after the deterioration of the parties' relationship, Mother moved from the parties' residence with Scarlett. Father filed a petition to establish parentage arguing he was an "equitable parent" and Mother moved to dismiss, arguing Father lacked standing. After hearings on the Wife's Motion to Dismiss (which were granted, in part, and denied, in part), the trial court heard 17 days of testimony over a seven-month period. The trial court found the parties had resided together as a family for a significant period of time, held themselves out to others as a family, had intended to adopt Scarlett together and that Father had participated in the entire adoption process, including paying for the adoption. Moreover, the court found that Scarlett called the Father "daddy," looked to him as her father figure, and found Father was a fit and proper person to have custody and parenting time with Scarlett. Mother, however, had intentionally prevented contact between Scarlett and the Father after the move, even though Scarlett expressed a desire to continue to see her Father. There was evidence Mother had alienated Scarlett from Father, and it was not in the best interests of Scarlett to be separated from him. However, the Court noted it was "forced to follow the law as it exists now" and therefore, despite the concerns regarding the best interests of the child, the issue of standing was

determinative. The Court held Mother was the only *legal* parent and Father therefore lacked standing to seek custody or parenting time.

As in *Mancine*, the original opinion of the *Scarlett* court held that Illinois does not recognize the "Equitable Parent" doctrine and therefore could not apply it to the facts of this case.

After the Illinois Supreme Court's advisory order, the Appellate Court reconsidered *Scarlett* in light of *DeHart*. The *Scarlett* Appellate Court after considering *DeHart* was not prepared, as the *Mancine* Court did, to hold as a matter of law that the "equitable adoption" doctrine could never be applied to a custody case, and therefore it remanded the case to the trial court, with the directive to make factual findings in accordance with *DeHart*. This is the first case where an Illinois Court will consider the doctrine of "Equitable Adoption" in a custody case and we await the trial court's opinion on remand.

Conclusion

Depending on the result from the Scarlett trial court on remand, and the likely subsequent appeal if the original opinion is altered, it is possible there will be a conflict between the First and Second District Appellate Courts which may ultimately be addressed by the Supreme Court.

Regardless of the result on remand in *Scarlett*, it is clear that if the situations raised in *Mancine* and *Scarlett* are going to be appropriately addressed, Illinois law needs to be changed. Certainly, there are situations in which it may be in the best interest of a child for a non-parent who has been a significant part of the child's life to be allowed parenting time, or even custody. Preventing a relationship between a non-parent who has lived with a child for a significant period of time and is regarded by the child as their parent, cannot be in the child's best interest. This is especially true considering the emergence of more non-traditional families.

On the flip side, in both *Mancine* and *Scarlett*, the non-parent "fathers" had the ability to formally adopt the children in question but failed to do so. Recognizing such individuals as equitable parents could reward their inaction and undermine the formal adoption process. Further, some fear that sanctioning equitable parenting would interfere with the long-standing constitutional recognition of a parent's fundamental liberty interest to decide the care, custody, and control of his or her own children by allowing a non-parent to impede upon those decisions.

The Supreme Court of Illinois will likely be required to resolve the conflict between the *Mancine* court and the *Scarlett* court, depending, of course, on the *Scarlett* court's decision on remand. Or the legislature may statutorily recognize equitable parents in the interim. One thing is clear: with the growth of non-traditional families on the rise, complex cases requiring a recognition of the realities of their relationships continue to increase in frequency, and the children at the root of

the controversies will be the ones who suffer as years and years of their childhoods are spent litigating their custody. ■

---

1. Author's Note: A previous version of HB1452, a proposed rewrite of the Illinois Marriage and Dissolution of Marriage Act (presently referred to Assignments in the Senate), included a revision to the current Act which would allow for an "equitable parent" to have standing to seek custody and parenting time with a minor child. However, due to considerable criticism of this portion of the rewrite, the section regarding "equitable parents" has been removed from the current version of the bill.