Legally Speaking

NEWSLETTER VOL. 6, NO. 3

Schiller DuCanto & Fleck LLP

CHICAGO
LAKE FOREST
WHEATON

Family Law. Unparalleled.

Hard Cases Make Bad Law

Recent Trends in College Education Decisions

At present, Illinois appellate courts are split on whether or not a child of divorce has "standing" (legal term for the right to be in Court asking for something) to enforce the college education provisions of their parents' divorce decree. What is this in plain English? It is children's claims as third-party beneficiaries to force their parents to do what they say they will do in divorce decrees that require one or both of their parents to pay for college or other post-high school education. A third-party beneficiary claim is simply the claim of someone who is not a party to a contract but whom the contract is supposed to benefit. While the analysis by courts who have allowed children to make third-party beneficiary claims to force their parents to pay for college rest on real legal principles, they raise parenting issues that divorcing parents rarely consider.

Anita M. Ventrelli

Partner

aventrelli@sdflaw.com

It is clear that children of non-divorced parents have no legal right to force their parents to provide them with higher education, at least not yet. Whether or not to fund college is a family financial decision as well as a parenting decision. Not all children appreciate higher education. Some use college as a four year license to live "independently" on their parents' nickel and to postpone their obligation to support themselves. If the courts or the legislature take away the parental prerogative to deny funding for higher education to children who do not apply themselves in school, the courts are stepping into an area that goes beyond allocating the costs for an education that both parents agree upon. Instead, they are substituting their parenting judgment for that of the parent. Why should parents of divorce be the only ones subject to this type of parenting intervention?

Another situation with similar potential for undermining parental prerogatives is the one that arises when one parent is concerned about the other parent's remarriage and wants a Marital Settlement Agreement to include mandatory estate planning provisions benefitting children of the marriage. This can lead to children who lack the maturity to deal with managing wealth thrust upon them. It can also foster an unintended sense of entitlement and lead to the same type of third-party beneficiary claims.

Debates over parenting philosophies can go on indefinitely. The right question is what divorce agreement terms can help preserve parental decision-making prerogatives? While the courts and the legislature may ultimately decide otherwise, parents wanting to try to avoid creating entitlements can include language stating that they do not intend there to be any third party beneficiaries and that there needs to be a parental agreement or a court finding that the child is deserving of the education before parents are ordered to pay. While support for college age children is as modifiable as other child support, stating intentions in a document approved by the Court is better than silence.

Continued on page 2

This article is dedicated to the memory of Joseph N. DuCanto for his insatiable efforts to inspire lawyers everywhere to challenge what all others take for granted and to Donald C. Schiller for keeping Joe's memory alive for us all.

IN THIS ISSUE

Schiller DuCanto & Fleck LLP Welcomes Allison Adams and Brett Buckley As New Associates

Allison B. Adams and Brett M. Buckley have joined Schiller DuCanto & Fleck LLP as new Associates. Both Allison and Brett began their careers at SDF as Law Clerks in 2011. Allison attended Chicago-Kent College of Law and will be located in the Chicago office. Brett attended The John Marshall Law School and will be located in our Lake Forest office.

CHILD SUPPORT-WHICH PARENT RECEIVES IT AND WHEN?

In many divorce cases, the issue of child support used to be straight forward since there is a statute that sets forth guidelines for the setting of child support. Historically, the guidelines were designed to apply to average wage earners in a traditional household where one parent was designated the primary residential parent with whom the children spent the majority of their time and the other parent was designated the non-residential parent with whom the children spent less of their time. The non-residential parent (usually the bread winner) paid child support to the residential parent (often the stay at home or lesser employed parent) in a set amount based on the guidelines.

In recent years, however, the traditional family setting is evolving and what was once considered less traditional alternatives, such as equal or shared parenting time, are now becoming acceptable resolutions. As a result, the issue of child support is becoming less straight forward and the following types of questions are being raised:

Q: If both parents have equal parenting time, should one spouse have to pay child support to the other?

Q: How much more parenting time does one parent need to have over the other parent to either ensure that they will receive child support or protect them from having to pay child support to the other parent?

Q: If the higher earning spouse has more time with the children than the lower earning spouse, could the lower earning spouse be required to pay child support to his or her former spouse?

Changing familial dynamics and a recent Illinois case have caused even seasoned divorce practitioners to rethink the once simple issue of child support.

In the 2013 case of *In re Marriage of Turk*, 2013 IL App (1st) 122486, parents of two young children divorced in 2005 and agreed that the father would pay unallocated maintenance and child support to the mother, who had primary residential custody of both children. Three years later, the father filed an emergency motion for a change in custody and requested a termination of child support. Eventually the father was awarded custody of the parties' two children. Under the new arrangement, the older child saw his mother weekly for dinner and the younger child saw his mother one-half the time.

Although the court reduced the father's support obligation, it did not abate child support, notwithstanding that the father now had custody of the children. The court found the following factors significant: the mother still had substantial parenting time with the younger child and hopefully her time with the older child would increase; there was a large disparity between the parties' respective incomes and standard of living; both parents have a duty to support the children; and the non-custodial parent incurs regular, necessary and reasonable expenses for the children during his or her parenting time. Nowhere in the child support statute is there a statement that the non-custodial parent is the payor of support and can never be the recipient. However, the situations where this can occur are very limited: the primary breadwinner is the primary residential parent and the other spouse, even after any maintenance rights, is still in need of financial assistance to provide for the children while they are in his or her care.

Perhaps now the answers to the questions enumerated above should be:

A: Maybe.

A: Who knows?

A: Maybe.

Some judges are skeptical to a request for shared parenting, suspecting the request is motivated by the potential to diminish a support obligation or increase a chance to receive support.

Andrea K. Muchin

Partner
amuchin@sdflaw.com

When a client who has not traditionally stayed at home tells me that he or she wants equal parenting time, I ask many questions to evaluate their historical parenting practices. I tend to investigate whether something has recently changed in their spouse's life such that their spouse's traditional parenting role should now come into question (i.e., substance abuse or mental illness). In my experience, every case is unique and it is incumbent on divorce lawyers to determine what their client actually wants and to advocate for what is best for the family.

Time will determine whether the situation in *Turk* was isolated to the particular facts of that case or if its holding becomes widespread. However, these concerns certainly should be making both people going through a divorce, and their lawyers, rethink the issues surrounding child support and recognize that this is no longer a clear cut issue.

HARD CASES MAKE BAD LAW *(Continued from cover)*

Parents should be careful about eliminating requirements that they be found to have the ability to pay for an education before being ordered to do so. The unpredictable financial events of recent years have made what was once unthinkable prospect a stark reality, namely that parents who had every intention of paying for college could not afford the expense. There is often pressure on parent(s) with financial means at the time of divorce to remove the "ability to pay" condition. Once removed, the "ability to pay" condition can't provide the intended safety net for the parent who suffers an unexpected financial reverse.

To protect against a parent becoming a guarantor for college, specify the type of the institution a child may attend and whether the contribution is limited to the cost of an in-state education or whether it may include private school or out-of-state tuition. Parents are always free to do more than what a court order requires, but once an obligation is ordered, they must show unforeseeable and/or changed circumstances to change the obligation.

Parents with young children might be better off agreeing that if they have the wherewithal to pay, they will allow the court to make a determination in accord with the statutory factors. This will help avoid having a commitment they can't pay for or an undeserving child.

THE ILLINOIS SUPREME COURT RESOLVES A SPLIT IN THE APPELLATE COURT REGARDING VISITATION AFTER A DETERMINATION OF PARENTAGE

In *In re Parentage of J.W.*, 2013 IL 114817, the Illinois Supreme Court recently clarified the proper standard to be applied when a biological father seeks to have visitation with his child after a determination of parentage.

In that case, the mother, Amy, began an intimate relationship with Jason Wills in the summer of 2001. During that same summer, Amy had a one-time sexual encounter with Steve Taylor. J.W. was born in April of 2002, and it was assumed that Jason was the child's father. Jason signed a voluntary acknowledgement of paternity and was listed on J.W.'s birth certificate as her father. When Amy and Jason divorced, the parties agreed Amy would have sole custody of J.W. and that Jason would have visitation.

Steve – while seeking out old acquaintances – saw a picture of J.W. on Amy's social media site and noted a resemblance. He contacted Amy and eventually a DNA test established that he was J.W.'s biological father. Jason was informed that he was not J.W.'s biological father, and J.W. was introduced to Steve and his extended family. Steve sought visitation with J.W.

Michele M. Jochner

Partner

mjochner@sdflaw.com

The trial court determined that Steve had the burden of proving that visitation would be in J.W.'s best interests by a preponderance of the evidence and applied the "best interests" factors set forth in the Illinois Marriage and Dissolution of Marriage Act. The trial court held that, at that time, J.W.'s best interests were not served by having visitation with Steve, as the child had difficulty understanding who her father was.

On appeal to the Illinois Appellate Court, Steve argued that the trial court erred in holding that he had the burden of proof to establish that visitation was in J.W.'s best interests. Steve contended that as a biological parent, he enjoyed a presumption entitling him to visitation absent evidence of serious endangerment to the child. The appellate court agreed with Steve and concluded that the rebuttable presumption for reasonable visitation applied and that the evidence did not support a finding of serious endangerment. Accordingly, the appellate court reversed the trial court and sent the case back to the trial court to determine a visitation plan.

The Supreme Court reversed the appellate court and affirmed the trial court, making it clear that under the Parentage Act, the noncustodial parent has the initial burden to show that visitation is in the child's best interests.

What should you take away from this case? As an initial matter, parents and their attorneys can always attempt to seek a resolution out of court and agree upon a visitation schedule. However, if the parents are unable to agree to a visitation schedule, it will be necessary to seek assistance from the court.

If you are a father whom a court has declared to be the biological father of a child born out of wedlock, you are not guaranteed visitation time with your child. Rather, you must petition the court and demonstrate that it is in the child's best interests to have visitation with you. Specifically, you should include in your petition facts relating to the following "best interest" factors: (1) the wishes of the child's parents; (2) the wishes of the child; (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school and community; (5) the mental and physical health of all individuals involved; (6) the physical violence or threat of violence by the child's potential custodian, whether directed against the child or directed against another person; (7) the occurrence of ongoing or repeated abuse as defined in the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person; (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; (9) whether one of the parents is a sex offender; and (10) the terms of a parent's military family-care plan.

If you are a mother who has had a child out of wedlock, and you do not agree to a visitation schedule, you can demand that the father demonstrate that it is in the child's best interest to have visitation. You also can and should object if the father's petition lacks any allegations relating to the child's best interest. Depending on the facts, pointing out for example that the father never bothered to seek a relationship until child support was sought undermines the inference that the father is interested in fulfilling the role of a parent. However, in the final analysis, if the proper allegations are made, it will likely take extraordinary circumstances to warrant no visitation or contact.

Kimberly A. Cook Ranked Top 40 Under 40

Schiller DuCanto & Fleck LLP is pleased to announce that Associate Kimberly A. Cook has been ranked as a Top 40 Under 40 attorney by the Law Bulletin Publishing Company.

Meighan A. Harmon Named IAML Fellow

Schiller DuCanto & Fleck LLP is pleased to announce that Senior Partner Meighan A. Harmon has been named a fellow to the International Academy of Matrimonial Lawyers.

IN THE NEWS

Michele M. Jochner was named Co-Chair of the Women's Leadership Institute of the Chicago Bar Association's Alliance for Women for the second consecutive year.

Michael R. Galasso was interviewed recently on local Naperville television's "Business Connection."

Karen Pinkert-Lieb was listed among the Top Ten Women Consumer Lawyers in Illinois by the Leading Lawyers Network.

Burton Hochberg was featured in the August 2013 Consumer Edition of Leading Lawyers Magazine.

Anita M. Ventrelli spoke at the Annual Meeting for the Ohio Judicial Conference on September 12, 2013 and at the ABA Section of Family Law 2013 Fall CLE Conference in Deer Valley, Utah on October 19, 2013.

Michele M. Jochner spoke at the National Association of Administrative Law Judge's 2013 Annual Conference on Writing Effective Decisions on September 18, 2013.

Michelle A. Lawless and Shannon R. Burke presented "Divorce Boot Camp: Post-Divorce Representation" hosted by the Illinois Institute of Continuing Legal Education on September 26, 2013.

Meighan A. Harmon presented an Annual Case Law Review at Illinois AAML Columbus Day Seminar on October 14, 2013.

Michelle A. Lawless spoke at an Illinois Continuing Legal Education Webcast for their "Family Law Series: Children's Issues in Dual Income Families" on October 16, 2013. Michelle additionally completed a 40 hour mediation training certification program and is now a certified mediator.

Jason N. Spossep presented "Introduction to Collaborative Divorce - an alternative path to traditional divorce litigation," for the Legal Aid Society in Chicago on October 30, 2013. He will be presenting "De-mystifying the Collaborative Process in Domestic Relations Cases" at The Chicago Bar Association Continuing Legal Education Webcast on November 6, 2013.

Shannon R. Burke presented a webinar through the Illinois Institute of Continuing Legal Education regarding Post-Judgment Motions and Appeals on November 6, 2013.

Donald C. Schiller was invited to present at the American Academy of Matrimonial Lawyers Annual Meeting on November 8, 2013.

Jay P. Dahlin spoke on a panel for the American Society of International Law at Loyola University School of Law on November 12, 2013.

Joshua M. Jackson spoke at Sarah's Light Divorce Workshop on November 14 and 16, 2013.

Race Judicata

Schiller DuCanto & Fleck LLP employees participated in this year's Chicago Volunteer Legal Services' Race Judicata. The 5k run benefits the Chicago Volunteer Legal Services Foundation, which assists in providing legal services and advice to those who do not have access to justice.

This year Leslie Arenson, Nancy Kawakami, Jillian Molz and Amy Neustedter came in second place in the women's group division of the race. Schiller DuCanto & Fleck LLP wishes this group and all the participants congratulations!

Timothy M. Daw, Co-Editor / Shannon R. Burke, Co-Editor / Justine E. Long, Layout/Design

SCHILLER DUCANTO & FLECK LLP

CHICAGO
LAKE FOREST
WHEATON

sdflaw.com

200 North LaSalle Street
30th Floor
Chicago, IL 60601-1089

(312) 641-5560 Phone
(312) 641-6361 Fax

225 East Deerpath Road
Suite 270
Lake Forest, IL 60045-1973

(847) 615-8300 Phone
(847) 615-8284 Fax

310 South County Farm Road
Suite 300
Wheaton, IL 60187-2477

(630) 665-5800 Phone
(630) 665-6082 Fax