

THE ARKANSAS COURT OF APPEALS HOLDS THAT STEP-PARENT  
ADOPTION HAS SAME LEGAL EFFECT AS BIOLOGICAL  
PARENTHOOD FOR PURPOSES OF ILLEGITIMACY AND THIRD-  
PARTY STANDING TO PETITION FOR VISITATION RIGHTS

In *Walchli v. Morris*,<sup>1</sup> the Arkansas Court of Appeals ruled that a paternal grandmother lacked judicial standing to petition the circuit court for visitation rights to her grandson, who was legally adopted by his father's wife after his biological mother terminated her parental rights.<sup>2</sup> In spite of being born out of wedlock, the court found the child "legitimate" for purposes of the visitation-rights statute.<sup>3</sup> Because the child's legal parents were married, the grandparent-visitation rights statute could not benefit the child's grandmother, and even though she had played a slight role in raising the child, the court held that granting an exception to standing on the theory of *in loco parentis* would be incongruous with prior appellate decisions in Arkansas.<sup>4</sup>

On December 31, 2002, A.W. was born to his unmarried-biological mother, RayAnn Williams.<sup>5</sup> A.W.'s biological father, Butch Walchli, was also unmarried at that time, and did not establish paternity until December 29, 2005, when he gained joint custody of and primary custodial guardianship over A.W.<sup>6</sup> Butch then married Elizabeth Walchli in the fall of 2008, shortly before RayAnn terminated her parental rights over A.W.; Elizabeth adopted A.W. as her own legal child that same August.<sup>7</sup>

In April of 2009, A.W.'s paternal grandmother, Tanni Morris, along with her husband, Joe Morris, filed suit in Sebastian County Circuit Court seeking change of custody in her favor, or, alternatively, court-ordered visitation rights,<sup>8</sup> to which Butch responded with an unsuccessful motion to dismiss for lack of standing.<sup>9</sup> Thereafter, the circuit court held a hearing where it concluded that, irrespective of A.W.'s legal adoption in 2008, Ms. Morris was entitled to judicial consideration for grandparent-visitation rights under Arkansas Code Annotated section 9-13-103 because A.W. was still illegiti-

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1. 2011 Ark. App. 170, \_\_\_ S.W.3d \_\_\_.

2. *Id.* at 10, \_\_\_ S.W.3d at \_\_\_.

3. *Id.*, \_\_\_ S.W.3d at \_\_\_.

4. *Id.*, \_\_\_ S.W.3d at \_\_\_.

5. *Id.* at 2, \_\_\_ S.W.3d at \_\_\_.

6. *Id.*, \_\_\_ S.W.3d at \_\_\_.

7. *Walchli*, 2011 Ark. App. 170, at 2, \_\_\_ S.W.3d at \_\_\_.

8. *Id.*, \_\_\_ S.W.3d at \_\_\_.

9. *Id.* at 2-3, \_\_\_ S.W.3d at \_\_\_; *see* ARK. CODE ANN. § 9-13-103(b) (Repl. 2009).

mate for having been born out of wedlock.<sup>10</sup> The circuit court granted the Morrisses one overnight-weekend visitation per month, and ordered both the Walchlis and the Morrisses to pay one-half shares of the \$2,895 in fees requested by the appointed ad litem.<sup>11</sup>

In reversing the circuit court's grant of visitation rights, the court of appeals decided three issues. First, it held that because Elizabeth legally adopted A.W., A.W. was a legitimate child to a legitimate marriage as a matter of law.<sup>12</sup> Second, the court found the nature of the relationships involved in the case to be imperfect for invocation of the doctrine of *in loco parentis*.<sup>13</sup> Third, the court ruled that the circuit court abused its discretion in the manner it assessed and awarded fees to the attorney ad litem.<sup>14</sup>

Under the visitation statute, a grandparent is legally entitled to visitation rights to a grandchild if one of the following scenarios exists:

(1) The marital relationship between the parents of the child has been severed by death, divorce, or legal separation;

(2) The child is illegitimate and the petitioner is a maternal grandparent of the illegitimate child; or

(3) The child is illegitimate, the petitioner is a paternal grandparent of the illegitimate child, and paternity has been established by a court of competent jurisdiction.<sup>15</sup>

As the Morris' were paternal grandparents and paternity was established, illegitimacy under section (b)(3) was the sole provision of the statute in dispute on appeal.<sup>16</sup> Still, the Morrisses also directed the court's attention to Arkansas Code Annotated section 28-9-209, which according to their interpretation, requires the biological mother and putative father of an illegitimate child to, at some point, enter marriage before the child can gain legitimacy.<sup>17</sup>

First, the court found the Morrisses' reliance on section 9-28-209 misplaced, as that provision deals with inheritance rights of children born out of

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10. *Walchli*, 2011 Ark. App. 170, at 3-4, \_\_\_ S.W.3d at \_\_\_.

11. *Id.* at 3, \_\_\_ S.W.3d at \_\_\_.

12. *Id.* at 5, \_\_\_ S.W.3d at \_\_\_ (interpreting ARK. CODE ANN. § 9-9-215(a)(1) (Repl. 2009)).

13. *Walchli*, 2011 Ark. App. 170, at 6-9, \_\_\_ S.W.3d at \_\_\_. According to the Supreme Court of Arkansas, *in loco parentis* means, "in place of a parent; instead of a parent; charged factitiously with a parent's rights, duties, and responsibilities." *Robinson v. Ford-Robinson*, 362 Ark. 232, 239, 208 S.W.3d 140, 144 (2005) (quoting BLACK'S LAW DICTIONARY (5th ed. 1979)).

14. *Walchli*, 2011 Ark. App. 170, at 9-10, \_\_\_ S.W.3d at \_\_\_.

15. ARK. CODE ANN. § 9-13-103(b) (Repl. 2009).

16. *Walchli*, 2011 Ark. App. 170, at 4, \_\_\_ S.W.3d at \_\_\_.

17. *Id.* at 4-5, \_\_\_ S.W.3d at \_\_\_; *see* ARK. CODE ANN. § 28-9-209 (West 2011).

wedlock under the probate code.<sup>18</sup> According to the court, section 9-28-209 did not control the manner in which it could determine legitimacy under section 9-13-103.<sup>19</sup> Next, the court found no considerable logic in fashioning a distinction between parenthood through adoption and parenthood through biological lineage, where, in both instances, the child's mother and father are married and are both the legal parents of the child.<sup>20</sup> Writing for the court, Judge Gruber warned that, if held to the contrary, "A.W. will remain illegitimate forever—in spite of the fact that his legal parents are married and the fact that RayAnn has no legal relationship whatsoever with A.W.—or until Butch marries RayAnn."<sup>21</sup>

In reaching its conclusion, the court relied on the language provided in Arkansas's general adoption statute<sup>22</sup> to question the legal effect of A.W.'s adoption on his relationship with RayAnn and on his relationship with Elizabeth.<sup>23</sup> It concluded that the effect was "to make A.W. 'a stranger' to RayAnn 'for all purposes[.]'"<sup>24</sup> and to "create the relationship of parent and child' between Elizabeth and A.W., as if A.W. were her legitimate blood descendant, 'for all purposes[.]'"<sup>25</sup> The court was of the impression that the law should not view A.W. as being anything other than Elizabeth's biological child. In addition, it emphasized the breadth of the state's adoption statute, which establishes a relationship of parent and child for all purposes, *including* the applicability of other statutes.<sup>26</sup> After recognizing that A.W. was a legitimate child when Ms. Morris filed her petition, the court reversed the conferring of standing and, thus, the order granting visitation rights to the Morrises.<sup>27</sup>

Next, the court rejected the Morrises' contention that their previous involvement in caring for A.W. justified an exception to standing based on a theory of *in loco parentis*.<sup>28</sup> The circuit court had not considered that doctrine when it found in favor of Ms. Morris, but instead based its decision on Arkansas Code Annotated section 9-13-103.<sup>29</sup> Nevertheless, the court cited

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18. *Walchli*, 2011 Ark. App. 170, at 6, \_\_\_ S.W.3d at \_\_\_; *see* ARK. CODE ANN. § 9-28-209.

19. *Walchli*, 2011 Ark. App. 170, at 6, \_\_\_ S.W.3d at \_\_\_.

20. *Id.* at 5-6, \_\_\_ S.W.3d at \_\_\_.

21. *Id.* at 4, \_\_\_ S.W.3d at \_\_\_.

22. *See* ARK. CODE ANN. § 9-9-215(a)(1)-(2) (Repl. 2009).

23. *Walchli*, 2011 Ark. App. 170, at 5-6, \_\_\_ S.W.3d at \_\_\_.

24. *Id.* at 5, \_\_\_ S.W.3d at \_\_\_ (citing ARK. CODE ANN. § 9-9-215(a)(1) (Repl. 2009)).

25. *Walchli*, 2011 Ark. App. 170, at 5, \_\_\_ S.W.3d at \_\_\_ (citing ARK. CODE ANN. § 9-9-215(a)(2)).

26. *Walchli*, 2011 Ark. App. 170, at 6, \_\_\_ S.W.3d at \_\_\_ (citing ARK. CODE ANN. § 9-9-215(a)(2)).

27. *Walchli*, 2011 Ark. App. 170, at 6, \_\_\_ S.W.3d at \_\_\_.

28. *Id.*, \_\_\_ S.W.3d at \_\_\_.

29. *Id.* at 6-7, \_\_\_ S.W.3d at \_\_\_.

two cases decided by the Supreme Court of Arkansas which granted visitation rights to illustrate the Morrises' misinterpretation of that doctrine's proper applicability: *Robinson v. Ford-Robinson*<sup>30</sup> and *Bethany v. Jones*.<sup>31</sup> Namely, it observed that, in both *Robinson* and *Bethany*, the petitioners 1) were each a primary caregiver to the child; 2) represented one custodial, biological parent and one petitioning, non-biological co-parent; and 3) stood in the place of a parent to the child.<sup>32</sup>

The court discerned that Ms. Morris was not a co-parent to A.W., but rather a grandparent.<sup>33</sup> Furthermore, she was never a primary caregiver to A.W., nor did Butch ever intend that she be.<sup>34</sup> Also, A.W. lived with both of his parents—not Ms. Morris.<sup>35</sup> The court stated, “Ms. Morris has never had any legal rights [to A.W.] whatsoever,”<sup>36</sup> and held by analogy that precedent would not support the equitable finding that she stood *in loco parentis* to A.W.<sup>37</sup> Because the common law does not give grandparents a presumptive right of custody or visitation, the court clarified the judiciary's position that any such right must come by way of state statute.<sup>38</sup> In the case of the Morrises, Arkansas Code Annotated section 9-13-103(b) was the only means by which they could gain statutory standing to petition for visitation rights.<sup>39</sup> As that section did not apply to A.W., it was consequently inapplicable to the Morrises as well.<sup>40</sup>

Finally, the court reversed the order awarding ad litem fees because of the circuit court's failure to adhere to the proper procedural guidelines set

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30. 362 Ark. 232, 208 S.W.3d 140 (2005).

31. 2011 Ark. 67, \_\_\_ S.W.3d \_\_\_; see generally Rachel A. Orr, *Recent Developments*, 64 ARK. L. REV. 841, 844-46 (2011) (examining *Bethany* further in depth and its application to the doctrine of *in loco parentis*).

32. See *Walchli*, 2011 Ark. App. 170, at 7-8, \_\_\_ S.W.3d at \_\_\_.

33. *Id.* at 7, \_\_\_ S.W.3d at \_\_\_.

34. *Id.* at 8, \_\_\_ S.W.3d at \_\_\_.

35. *Id.*, \_\_\_ S.W.3d at \_\_\_.

36. *Id.*, \_\_\_ S.W.3d at \_\_\_.

37. See *Id.* at 6-9, \_\_\_ S.W.3d at \_\_\_ (discussing common-law rights of parenthood and grandparenthood). The court did acknowledge that the Morrises had been very helpful to Butch in watching over A.W. and taking care of him periodically to assist Butch's efforts at work. *Id.* at 8, \_\_\_ S.W.3d at \_\_\_. However, the limited doctrine of *in loco parentis* does not typically protect behaviors of this type. See, e.g., Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to A Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 108-12 (2004) (analyzing the application of *in loco parentis* with regard to grandparents, and the Supreme Court's best-known decision on the issue: *Troxel v. Granville*, 530 U.S. 57 (2000)). The court presumably found them not so uncommon among grandparent, child, and grandchild.

38. *Walchli*, 2011 Ark. App. 170, at 8, \_\_\_ S.W.3d at \_\_\_ (quoting *Henry v. Buchanan*, 364 Ark. 485, 490, 221 S.W.3d 346, 349 (2006)).

39. See *Walchli*, 2011 Ark. App. 170, at 9, \_\_\_ S.W.3d at \_\_\_ (interpreting ARK. CODE ANN. § 9-13-103(b) (Repl. 2009)).

40. See *Walchli*, 2011 Ark. App. 170, at 9, \_\_\_ S.W.3d at \_\_\_.

forth by the Administrative Office of the Courts (AOC).<sup>41</sup> Reportedly, the circuit judge failed to transmit an order to the AOC for the payment, failed to determine whether the amount requested by the ad litem complied with AOC guidelines,<sup>42</sup> and failed to assess the financial ability of the parties involved to make the payments before granting the order outright.<sup>43</sup>

*Walchli v. Morris* provides that, at the very least for purposes of Arkansas Code Annotated section 9-13-103, the determination of a child's legitimacy will not be confined to whether he or she was born out of wedlock; rather, the ruling sets forth a standard that also honors legitimacy through subsequently-formed, legally-recognized familial relations. The logic behind the court's approach seems to be grounded in axiomatic opposition to perversion of the law—i.e., governmental ruin of its own objectives. That is, if a family has taken all necessary steps to formalize the legal bonds between them, a court's failure to honor such a memorial, even in tangential matters, would reflect a fundamental paradox in the judicial application of law.

Looking forward, the term “illegitimate” may indeed take on a somewhat altered meaning in custody cases, at least in situations where a child's illegitimacy has been “reformed,” so to speak, by subsequent legal establishments of immediate, familial relationships. The ruling also appears to afford adoptive parents with greater discretion over the visitation needs of their children and loved ones. Equally significant by incident, because such determinations may potentially further limit the availability of traditional standing to petition for visitation rights based on illegitimacy, third parties—and, in particular, grandparents—may likely be more apt to argue for relief under the limited doctrine of *in loco parentis* in the future.<sup>44</sup>

\* J. Andy Marshall

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41. *Id.* at 9-10, \_\_\_ S.W.3d at \_\_\_ (citing ARK. CODE ANN. § 9-13-101(e)(2) (Repl. 2009)).

42. *Walchli*, 2011 Ark. App. 170, at 9, \_\_\_ S.W.3d at \_\_\_ (citing ARK. CODE ANN. § 9-13-101(e)(6)).

43. *Walchli*, 2011 Ark. App. 170, at 9, \_\_\_ S.W.3d at \_\_\_ (citing ARK. CODE ANN. § 9-13-101(e)(5)(B)).

44. *Cf. Kavanagh*, *supra* note 37, at 108-12, 135-36.