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Support and Custody Aspects of the Stepparent-Child Relationship

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INTRODUCTION

The number of stepfamilies in the United States has increased dramatically in conjunction with a rising rate of marriage dissolution and remarriage.[1] The term stepfamily means a family household consisting

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[1] Divorce and remarriage in this country are sizeable and growing phenomena. From 1970 to 1977 the divorce rate in America increased dramatically by 79%. It is projected that over one-third of married people who are now between the ages of 25 and 35 will divorce. Each of these divorces will involve an estimated average of two children. Eighty percent of divorced adults remarry, and 60% of remarriages involve at least one child. Currently, 13% of the nation's children under age 18 are living in a stepfamily.

of a married couple and children who are the natural or adopted children of only one spouse.[2] Family law does not presently provide clear and comprehensive rules to define the rights and responsibilities of parties to the stepparent-child relationship. This Article seeks to provide a basis for correcting that deficiency, by surveying the current law, noting the inadequacy of many existing rules, and proposing a formulation of rights and responsibilities based on policy concerns. The Article focuses on the support and custody aspects of the relationship between stepparent and child.

The natural parent-child status entails many well-defined legal consequences and serves as a logical model for formulating a definition of the stepparent-child status. Courts, and occasionally legislatures, have considered extending the legal aspects of the natural parent-child relationship to the stepfamily context, but only in an ad hoc fashion with inconsistent results among issues and jurisdictions.[3] Family law seeks to protect family members, especially children, interested third parties, and the state, by clearly defining important personal relationships. As family life becomes more diverse, and expectations that all families will conform to a single model erode, the law must create new rules to accomplish the goals of clarity and protection.[4] Given the large number of people currently living in stepfamilies,[5] lawmakers should carefully evaluate and address this aspect of modern family life.[6]

OFFICE OF HUMAN DEV. SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVICES, HELPING YOUTH AND FAMILIES OF SEPARATION, DIVORCE, AND REMARRIAGE 3 (1980).

2 "Such families have been given many names, such as the extended family, stepfamily, blended family, reconstituted family, meta family, and conjugal continuation." M. HYDE, MY FRIEND HAS FOUR PARENTS 1 (1981). The marriage of a parent with custody of minor children born out of wedlock also creates a stepfamily. The definition excludes family relationships created by stepparent adoption of the children or by marriage of the noncustodial natural parent. If natural parents share joint custody of their children and each marries someone else, the children may become members of two stepfamilies pursuant to this definition.

3 *See* Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited,* 4 FAM. L.Q. 209, 209 (1970); *The Step Relationship and Its Legal Status,* 5 ANGLO-AM. L. REV. 259, 269-80 (1976) [hereinafter cited as *Step Relationship*]; Note, *Stepchildren and* In Loco Parentis *Relationships,* 52 HARV. L. REV. 515, 518-21 (1939) [hereinafter cited as Note].

Disciplines other than law have been criticized for paying little attention to stepfamilies. *See, e.g.,* B. MADDOX, THE HALF-PARENT 2 (1975) (suggesting that reasons for inattention by social sciences include painful aspects for family members of discussing subject and inaccessibility of stepfamilies to outsiders).

4 Lawmakers are presently performing this function in response to the increasing incidence of unmarried cohabitation. *See generally, e.g.,* Blumberg, *Cohabitation Without Marriage: A Different Perspective,* 28 U.C.L.A. L. REV. 1125 (1981) (discussing legal treatment of claims by cohabitors against third parties and state); Note, *Beyond* Marvin: *A Proposal for Quasi-Spousal Support,* 30 STAN. L. REV. 359 (1978) (discussing legally enforceable economic relationship between cohabitors).

5 *See supra* note 1 and accompanying text.

6 Professor Lenore Weitzman has pointed out that the assumption underlying many family laws, that every marriage is a first marriage, no longer conforms to the reality of many people's lives. L. WEITZMAN, THE MARRIAGE CONTRACT 153-67 (1981). She has proposed

Current law fails to provide certainty and protection regarding the custody and support aspects of steprelationships. Legislatures have ignored the issues of stepchild custody and visitation following termination of the stepmarriage by death or divorce. Without legislative authorization, courts have been reluctant to assume jurisdiction. In the area of stepparent support during marriage, legislatures in many states have limited their attention to needy stepchildren. Limited equitable doctrines and legislation outside the United States provide the only current authority for continuing support following marriage termination. Thus, laws regulating the stepfamily generally ignore de facto economic and emotional bonds, with harsh results for family members in some cases. The need exists for laws that clearly establish stepparent support duties during marriage, and the jurisdiction of the courts over stepchildren at the time of stepmarriage termination to order continuing stepparent support, custody, or visitation in appropriate cases. Lawmakers must act to provide certainty and protection for stepfamily members in these areas.

I
CHILD SUPPORT OBLIGATIONS

Parental obligations to provide financial support for minor children are an essential part of the family laws. This principle was recognized as a moral obligation even before it was embodied in law.[7] In Blackstone's words:

> The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation . . . laid on them not only by nature itself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved.[8]

Support obligations within the nuclear family are an efficient mechanism whereby society assures the economic well-being of its members. Imposing duties on the parents who caused the entry of a dependent child into the world is reasonable, and places responsibility with those who voluntarily assume it in most cases. Although child support

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that the law allow marriage partners to write the terms of their own marriage contract in order to vary the terms imposed by law. *Id.* at 238. Regarding issues affecting children over which the state retains final authority, and for families without contracts, however, the law of stepfamilies must be clarified.

7 *See* H. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 3 (1981); Foster, Freed & Midonick, *Child Support: The Quick and the Dead,* 26 SYRACUSE L. REV. 1157, 1157-59 (1975).

8 1 W. BLACKSTONE, COMMENTARIES *447.

obligations historically were imposed primarily on fathers,[9] recent constitutional developments in the area of gender-based discrimination,[10] along with statutory reform of family laws in many jurisdictions,[11] have produced a trend toward gender neutral support duties.[12] Modern support obligations are thus imposed upon both parents, whether or not they are married to one another.[13] Parents remain obligated to support the children of their marriage after divorce. When one parent dies, the other's duty to the minor children survives. The parent's obligation ends only at the child's death, emancipation, age of majority, or upon termination of the parent-child relationship by the state.

When one natural parent marries a nonparent, the question arises whether the new spouse should become financially responsible for the child. The first two sections of this part explore the answers offered by the common law doctrine of in loco parentis[14] and by statute in some jurisdictions.[15] Later sections present proposals for assigning stepparents greater duties during marriage, and for balancing concurrent stepparent and natural parent obligations.[16] This part concludes by examining the existing law regarding stepparent support following marriage termination, the merits of imposing continuing obligations in appropriate cases, and suggestions for formulating a post-divorce stepparent support law.[17]

A. In Loco Parentis

At common law, marriage alone does not obligate the stepparent to support stepchildren. Absent an agreement or circumstances to the contrary, however, accepting a stepchild into the marital home creates an assumption that the stepparent is in loco parentis. The stepparent who voluntarily assumes financial responsibility stands "in the place of the

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9 H. CLARK, THE LAW OF DOMESTIC RELATIONS 187-88 (1968).

10 *See, e.g.,* Orr v. Orr, 440 U.S. 268, 278-83 (1979) (husbands-only alimony obligations violate equal protection clause).

11 *See, e.g.,* CAL. CIVIL CODE § 196 (West 1982) (both parents have equal duty to support); Foster, Freed & Midonick, *supra* note 7, at 1169 ("The desexing of . . . child support and a regard for equal protection principles is a marked characteristic of most recent divorce reform.").

12 H. KRAUSE, *supra* note 7, at 4-7. *But see* Dill v. Dill, 232 Ga. 231, 206 S.E.2d 6 (1974) (upholding constitutionality of statute imposing primary child support obligations on father).

13 In Pickett v. Brown, 103 S. Ct. 2199, 2209 (1983), the Supreme Court expanded the rights of children born outside of marriage by holding that a two-year statute of limitations on paternity and support actions for such children violated the fourteenth amendment's equal protection clause.

14 *See infra* part I.A.

15 *See infra* part I.B.

16 *See infra* parts I.C., D.

17 *See infra* parts I.E & I.F. In community property states, even if no independent duty of stepparent support is imposed, the stepparent's earnings may be reachable to the extent of the natural parent's community property interest therein. *See, e.g., In re* Marriage of Brown, 99 Cal. App. 3d 702, 160 Cal. Rptr. 524 (1979) (discussed in Comment, *Cinderella Revisited,* 10 SAN. FERN. V.L. REV. 103, 104-08 (1982)).

parent" with regard to the matter of support.[18]

The common law imposes no duties beyond those voluntarily assumed by the stepparent. The stepparent may manifest the requisite intent to assume responsibility by actually providing financial support or by taking over custodial duties.[19] The types of evidence upon which courts have relied to determine financial responsibility include the performance of household services for the child, counseling by the stepparent, and payment of the child's expenses.[20] Neither adoption of the stepparent's surname by the child nor the presence or absence of the other natural parent affects the determination.[21]

The stepparent may terminate the in loco parentis relationship and its corresponding financial responsibility at will.[22] Even express promises to provide future support will not bind an adult who subsequently chooses to abandon the responsibility.[23] The stepparent may indicate an intention to terminate the in loco parentis relationship by behavior inconsistent with such a status. The stepparent may, for example, physically remove the child from the marital home or enter into a written agreement with the natural parent disavowing responsibility for the child's support. Stepparents choose to terminate the in loco parentis relationship most frequently at the time of divorce.[24]

In general, only third parties, including creditors and the state, can enforce the in loco parentis support obligation.[25] Direct enforcement by

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18 *See* Hails, *In Loco Parentis and the Relevant Child,* 2 ORANGE COUNTY B.J. 712, 713-18 (1975). The law regards the adult standing in loco parentis as the legal parent for purposes other than support. The law does not, however, attach all of the incidents of the natural parent-child relationship to such an adult. *See* Berkowitz, *supra* note 3, at 212-27; *Step Relationship, supra* note 3, at 270-80; Note, *supra* note 3.

19 *See, e.g.,* Hush v. Devilbliss Co., 77 Mich. App. 639, 649, 259 N.W.2d 170, 174-75 (1977) (holding that grandmother's assumption of daily infant care placed her in loco parentis).

20 *See, e.g.,* Loomis v. State, 228 Cal. App. 2d 820, 39 Cal. Rptr. 820 (1964) (stepmother who provided financial support, performance of household duties, discipline, and advice stood in loco parentis).

21 *See* Niesen v. Niesen, 38 Wis. 2d 599, 605, 157 N.W.2d 660, 663-64 (1968); McManus v. Hinney, 35 Wis. 2d 433, 151 N.W.2d 44 (1967); Hails, *supra* note 18, at 714.

22 H. CLARK, *supra* note 9, at 189.

23 Sargeant v. Sargeant, 88 Nev. 223, 230-31, 495 P.2d 618, 623 (1972) (promises made by husband during marital separation held not binding at time of divorce). The child in *Sargeant* was not a stepchild but rather the son of the wife's niece. Although the stepfamily constitutes the most common situation, the in loco parentis doctrine extends to all circumstances where a voluntary de facto parent-child relationship is established.

24 *See infra* part I.E (regarding support following marriage termination).

25 For example, creditors have relied on the in loco parentis doctrine to recover from stepparents for necessary support items provided to stepchildren. *See, e.g.,* Cohen v. Lieberman, 160 Misc. 310, 289 N.Y.S. 797 (N.Y. App. Div. 1936) (dentist could recover from stepfather for services provided to child if in fact stepfather was in loco parentis), *rev'g in part* 157 Misc. 2d 844, 284 N.Y.S. 970 (N.Y. Mun. Ct. 1936) (dentist entitled to payment as matter of law). Similarly, the state may seek to recover from stepparents public funds provided for child support. *See* Kelley v. Iowa Dep't of Social Servs., 197 N.W.2d 192 (Iowa) (state grant terminated after inclusion of stepfather's income), *appeal dismissed mem.,* 409 U.S. 813 (1972).

the stepchild is unavailable, because the stepparent may terminate the in loco parentis relationship at will.[26] The in loco parentis doctrine thus imposes the support duty only at times when a legal obligation is not necessary to guarantee support, and fails to meet the goals of providing protection and certainty for stepchildren.

B. Stepparent Support Statutes

Legislatures in a number of jurisdictions have addressed the issue of stepparent support during marriage, but the current statutes are generally of limited scope. Some statutes simply codify the in loco parentis doctrine. For example, a Montana statute provides:

> A married person is not bound to support his spouse's children by a former marriage; but if he receives them into his family and supports them, it is presumed that he does so as a parent and, where such is the case, they are not liable to him for their support nor he to them for their services.[27]

Other limited statutory approaches include the extension of family expense laws[28] and criminal nonsupport laws[29] to stepchildren.

Legislation in several states imposes liability upon stepparents only for stepchildren who are, or are likely to become, recipients of public assistance.[30] Some statutes provide for direct suit by welfare authorities against the stepparent.[31] A Hawaiian statute combines the voluntary aspect of common law support doctrine with a needy child limitation, extending liability only to "a step-parent who acts in loco parentis . . .

Natural parents are another category of third parties who may rely on the in loco parentis doctrine to reduce their own child support obligations. *See infra* text accompanying notes 65-79.

26 Even within an ongoing family, where the parents cannot terminate their support duty at will, a child can enforce this obligation only in extreme circumstances. *See infra* text accompanying note 64 (discussing reluctance of courts to become involved in financial affairs of ongoing families). Although the stepchildren may not enforce the in loco parentis duty to provide support, the doctrine does prevent the stepparent from seeking recovery from the child for support voluntarily rendered. For example, the Oklahoma statute, which codifies the in loco parentis doctrine, provides:

> A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and where such is the case, they are not liable to him for their support, nor he to them for their services.

OKLA. STAT. ANN. tit. 10, § 15 (West 1966).

27 MONT. CODE ANN. § 40-6-217 (1983); *see also* N.D. CENT. CODE § 14-09-09 (1981); OKLA. STAT. ANN. tit. 10, § 15 (West 1966).

28 *See* OR. REV. STAT. § 109.053 (1983); WASH. REV. CODE ANN. § 26.16.205 (Supp. 1984-85).

29 *See* NEB. REV. STAT. § 28-706 (1979); WASH. REV. CODE ANN. § 26.20.030 (Supp. 1983-84).

30 *See* HAWAII REV. STAT. § 577-4 (1976); KY. REV. STAT. ANN. § 205.310 (Baldwin 1981); N.Y. SOC. SERV. LAW § 101.1 (McKinney 1983); WIS. STAT. ANN. § 49.195 (West Supp. 1983-1984).

31 *See, e.g.*, N.Y. SOC. SERV. LAW § 101.2 (McKinney 1976).

if the legal parents desert the child or are unable to support the child, thereby reducing the child to destitute and necessitous circumstances."[32]

Limited duty statutes have created problems for welfare authorities in a number of states.[33] States commonly assume the availability of stepparent resources for child support in determining eligibility and level of need under the federally assisted aid to families with dependent children program. A federal regulation, with which state welfare plans must comply in order to receive federal funds, provides that the state may assume stepparent support only if the stepparent is "legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children."[34] States with statutes that create stepparent support liability only where children are needy fail to satisfy this requirement.[35] Thus, welfare authorities may not rely on the assumption of support and may consider stepparent resources in determining eligibility and need only if such resources are actually being used for child support.[36]

The Missouri legislature, apparently in response to this regulatory compliance problem,[37] enacted a very broad stepparent support law: "A stepparent shall support his or her stepchild to the same extent that a natural or adoptive parent is required to support his or her child so long

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32 HAWAII REV. STAT. § 577-4 (1976).

33 *See* Goldsmith, *AFDC Eligibility and the Federal Stepparent Regulation,* 57 TEX. L. REV. 79, 79-83 (1978).

34 45 C.F.R. 233.90(a)(1) (1982). This rule does not affect the right of the state to seek reimbursement from stepparents under state statutes creating stepparent support duties to needy stepchildren.

35 *See, e.g.,* Gaither v. Sterrett, 346 F. Supp. 1095, 1100, 1101 (N.D. Ind. 1972), *aff'd,* 409 U.S. 1070 (1972); Uhrovick v. Lavine, 43 A.D.2d 481, 483-84, 352 N.Y.S.2d 529, 531-32, *aff'd,* 35 N.Y.2d 892, 324 N.E.2d 360, 364 N.Y.S.2d 890 (1974); Bunting v. Juras, 11 Or. App. 297, 300-01, 502 P.2d 607, 608-09 (1972). In states with *no* stepparent support statutes, the courts have invalidated similar welfare policies as being inconsistent with the federal regulation. *See, e.g.,* Rosen v. Hursh, 464 F.2d 731, 734 (8th Cir. 1972) (assumption by Minnesota welfare authorities that stepparent income would be used to support stepchildren violates federal regulation); Ojeda v. Hackney, 319 F. Supp. 149, 153 (N.D. Tex. 1970) (same), *vacated in part,* 452 F.2d 947 (5th Cir. 1972); Solman v. Shapiro, 300 F. Supp. 409, 413-14 (D. Conn.) (same), *aff'd mem.,* 396 U.S. 5 (1969).

In Archibald v. Whaland, 555 F.2d 1061 (1st Cir. 1977), the First Circuit upheld New Hampshire's policy of automatic termination of AFDC benefits upon plaintiff's remarriage after finding that the state's stepparent support statute complied with the federal regulation. In a similar manner, the Iowa Supreme Court found that Iowa's common law stepparent support doctrine satisfied the federal requirements. The Iowa court thereby upheld the state's policy of automatically considering stepparent resources in determining level of need when the stepparent resides with the children. Kelley v. Iowa Dep't of Social Servs., 197 N.W.2d 192 (Iowa), *appeal dismissed mem.,* 409 U.S. 813 (1972).

36 *See, e.g.,* Darrow v. D'Elia, 54 A.D.2d 905, 905, 388 N.Y.S.2d 25, 26 (1976) (stepparent resources properly considered in determining level of need when stepparent actually contributes to support).

37 The Missouri law was enacted as part of a bill entitled "Public Health and Welfare: Benefits for Public Assistance Recipients," H.B. 1462, 81st General Assembly (1982).

as the stepchild is living in the same home as the stepparent."[38] The statute dramatically expands the voluntary common law obligation of stepparents. An evaluation of this expanded support duty requires the consideration of many conflicting policies.[39]

C. The Merits of Imposing Liability During Marriage

Many stepparents voluntarily contribute to the support of stepchildren during marriage. As a practical matter, it is often difficult to prevent the child's enjoyment of stepparent contributions for items such as food and housing. A legal duty of support beyond these voluntary or indirect contributions would properly accommodate the interests of all parties.[40]

Opponents of involuntary support obligations have traditionally argued that such a law would discourage marriage to parents with minor children.[41] This argument is based upon questionable assumptions. First, the rationale expresses the family law's historical preference for marriage over other lifestyles.[42] The law's bias toward marriage becomes less compelling, however, in an era when many members of society are exploring alternatives to marriage.[43] The law is beginning to recognize and protect such alternatives.[44]

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38 MO. ANN. STAT. § 453.400.1 (Vernon Supp. 1984). In Minnesota, an apparently unpopular statute requiring stepchild support from the stepparent who shares a home with the child was enacted and repealed in the same year, 1981. MINN. STAT. ANN. § 257.021 (West Supp. 1982), *repealed by* 1981 Minn. Laws 3d Spec. Sess. ch. 3, § 20 (effective Feb. 1, 1982).

39 *See* Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems,"* 54 CALIF. L. REV. 748, 762-72 (1966).

40 *See* Berkowitz, *supra* note 3, at 227-29; *Step Relationship, supra* note 3, at 282-83. *But see* Lewis & Levy, *supra* note 39, at 762-72 (arguing that most stepfathers voluntarily provide adequate support for their stepchildren and that a legal support duty would not fairly balance conflicting interests which arise in varying circumstances).

41 *See, e.g.*, tenBroek, *The Impact of Welfare Law Upon Family Law,* 42 CALIF. L. REV. 458, 479 (1954).

42 In a recent United States Supreme Court case upholding New York State adoption laws which permit adoption of a child without notice to the unmarried natural father, Justice Stevens restated the preference for marriage in the following manner:

> The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. In recoguition of that role, and as part of their general overreaching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.

Lehr v. Robertson, 103 S. Ct. 2985, 2991 (1983) (citations omitted).

43 In 1981, there were 3,616,000 individuals sharing a household with an unrelated person of the opposite sex. There were almost 19 million households with only one member. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 42, 44 (103d ed. 1982-83).

44 *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (recognizing that constitutional rights of privacy extend to individuals, not just marricd couples); Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980) (allowing tort cause of action by cohabitor for loss of consortium); Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122-23, 134 Cal. Rptr. 815, 831

Furthermore, the "discourage marriage" argument assumes that the single parent family is in financial need,[45] and that the addition of a spouse will ease the family's financial situation. It is ironic that the opponents of an involuntary stepparent support requirement rely on the argument to conclude that stepparents should have no financial responsibility to stepchildren. Changes in the family and welfare laws, designed to improve the economic condition of single parents, would serve the interests of these individuals better than the system advocated by opponents of a broad stepparent support obligation. The effective enforcement of noncustodial parents' child support obligations,[46] and increased public support for daycare,[47] for example, would ease the economic pressure on single parents and on their marriage decisions.

Some single parents would prefer marriage for financial or other reasons.[48] For most people, including potential stepparents, the marriage decision is inevitably complex and involves more than economic factors.[49] The laws regulating marriage impose substantial economic burdens upon spouses[50] and do not discourage marriage.[51] These facts

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(1977) (allowing cause of action to enforce express or implied contract between cohabiting unmarried individuals). *But see* Leonardis v. Morton Chem. Co., 184 N.J. Super. 10, 11, 445 A.2d 45, 46 (App. Div. 1982) (expressly rejecting *Bulloch* by disallowing tort cause of action by cohabitor for loss of consortium); Childers v. Shannon, 183 N.J. Super. 591, 594-95, 444 A.2d 1141, 1142 (Law Div. 1982) (same); Hewitt v. Hewitt, 77 Ill. 2d 49, 59, 394 N.E.2d 1204, 1207 (1979) (refusing to recognize cause of action for property division of cohabitors, on oral contract, implied contract, and equitable theories, because recognition might "weaken marriage as the foundation of our family-based society").

45 "There were 18.3 million persons living in families which included a divorced, separated, remarried, or never-married woman. The poverty rate for these persons was 27 percent, compared to 8 percent for all other persons in families." BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS SERIES P-23, NO. 84, DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT 4 (June 1979).

46 *See* D. CHAMBERS, MAKING FATHERS PAY 71-78 (1979); Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women,* 6 HARV. WOMEN'S L.J. 1, 6-15 (1983); Krause, *Reflections On Child Support,* 17 FAM. L.Q. 109 (1983).

47 *See* Zeitlin & Campbell, *Strategies to Address the Impact of the Economic Recovery Tax Act of 1981 and the Omnibus Budget Reconciliation Act of 1981 on the Availability of Child Care for Low-Income Families,* 28 WAYNE L. REV. 1601, 1603-07 (1982) (discussing levels of single mother participation in labor force and corresponding need for child care).

48 The nonfinancial incentives of the single parent to marry include "formidable social pressures," a desire to share child rearing responsibilities, and in some cases pressure from the children who "like to see their parent with a partner." B. MADDOX, THE HALF-PARENT 52-53 (1975).

49 *See* Lewis & Levy, *supra* note 39, at 764.

50 Spouses are required by law to support each other and the children of the marriage. *See* H. CLARK, *supra* note 9, at 181-92; H. KRAUSE, *supra* note 7, at 3-10. Spouses are entitled to share each other's property pursuant to community property laws in eight states, *see* W. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES §§ 2:27-:34 (1982), and pursuant to elective share and equitable distribution laws elsewhere. *See* Bartke, *Marital Sharing—Why Not Do It By Contract?,* 67 GEO. L.J. 1131, 1133 nn.11-12 (1979).

51 In Hunter, *supra* note 46, at 22, the author suggests that the trend in some states toward requiring stepparent support "increases the pressure on women to remarry," thereby *encouraging* marriage.

cast doubt on the assumption that a stepparent support duty would decrease the ability of single parents to find spouses.

To the extent that a support rule would give pause to the individual contemplating stepparenthood, moreover, the pause could be beneficial. One sociologist has observed that financial surprises destroy many stepmarriages.[52] When partners do not discuss their finances in advance of marriage, the realities they discover may lead to unhappiness for themselves and the children, and ultimately to divorce.[53] A study of remarriages revealed that disagreements about children and money were the most frequently stated reasons for marriage breakdown.[54] To the extent that stepparent support requirements would promote disclosure, discussion, and planning in advance of marriage, they might ease the entry into new relationships.[55]

The argument against stepparent support requirements rests not only on the fear of discouraging marriage to single parents, but also on the alleged unfairness of imposing a support duty on one who is not the biological or adoptive parent. According to this argument, the moral responsibility of the parent for support, based on causation,[56] does not extend to the stepparent.

Recent cases in which courts have required paternal support in spite of the mother's fraudulent misrepresentations regarding contraception have reiterated the siguificance attached to the causal (biological) relationship.[57] These courts have regarded the father's intent to avoid conception, even when sabotaged by the mother's behavior, as irrelevant to support obligations. The procreative act alone has served as the basis for imposing responsibility. For example, in a paternity suit in which

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52 D. MAYLEAS, REWEDDED BLISS 39-111 (1977).

53 *Id.*

54 Messinger, *Remarriage Between People With Children From Previous Marriages: A Proposal for Preparation for Remarriage,* 1976 J. OF MARRIAGE & FAM. COUNSELING 2, 193-99. The rate of divorce is higher for second marriages than for first marriages. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS SERIES P-20, NO. 297, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES IN THE UNITED STATES 6 (1975). The presence of stepchildren makes survival of a second marriage even *less* likely. "Within the first five years over 44% of the newly blended families fail." Kargman, *Stepchild Support Obligations of Stepparents,* 1983 FAM. REL. 231, 237.

55 Any attempt to accomplish these goals in a compulsory fashion, for example, by requiring financial disclosure or counseling in order to obtain a marriage license, would raise concerns about the constitutionally protected interests of the parties, as well as the effectiveness and cost of the requirements. The same concerns about cost, effectiveness, and possible privacy violations arise under mandatory counseling provisions in some marriage dissolution statutes. *See* Seidelson, *Systematic Marriage Investigation and Counseling in Divorce: Some Reflections on Its Constitutional Propriety and General Desirability,* 36 GEO. WASH. L. REV. 60 (1967); Note, *Marriage Counseling Through the Divorce Courts—Another Look,* 28 S.C.L. REV. 687 (1977).

56 *See supra* text accompanying notes 7-8.

57 *See, e.g.,* Stephen K. v. Roni L., 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980); Pamela P. v. Frank S., 88 A.D.2d 865, 451 N.Y.S.2d 766 (1982), *aff'd,* 59 N.Y.2d 1, 462 N.Y.S.2d 819, 449 N.E.2d 713 (1983).

the father counterclaimed in tort for fraudulent misrepresentation by the mother, a California appellate court rejected the father's claim as too "radical a change in the socially accepted ideas and views of sexual conduct, family relationship, parental obligations, and *legal and moral responsibility for one's own conduct.*"[58] Other courts have focused upon the more specific interests that underlie the support obligation. In reversing a trial court decision[59] allowing the father's fraud defense in a paternity suit, a New York appellate court stated: "[T]he present provisions [of the civil statute authorizing paternity suits] emphasize the welfare of the child, over even the protection of the public purse . . . . Assuming the father's allegation that he was deceived to be true, how does it logically follow that the child should suffer?"[60]

The act of forming a de facto family by marrying a parent and establishing a home with stepchildren, like the procreative act, may reasonably give rise to economic responsibility for the children. The court in *D.G. v. Hermanez*[61] relied on this theory to deny a mother's petition for child support from paternal grandparents. The court reasoned that the husband shared the mother's primary responsibility for her child: "The stepfather of the child when he married her mother knowing about Pamela assumed a legal obligation towards the child; moreover, a moral and ethical responsibility for that child."[62]

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58 Stephen K. v. Roni L., 105 Cal. App. 3d at 643, 164 Cal. Rptr. at 620 (emphasis added).

59 Pamela P. v. Frank S., 110 Misc. 2d 978, 443 N.Y.S.2d 343 (N.Y. Fam. Ct. 1981). The trial court did not allow the father to assert fraud as a complete defense, but only as a basis for shifting the primary support duty to the mother. *Id.* at 985, 443 N.Y.S.2d at 347-48.

60 Pamela P. v. Frank S., 88 A.D.2d at 865, 451 N.Y.S.2d at 767. The Pennsylvania Supreme Court expressed a similar view in Hughes v. Hutt, 500 Pa. 209, 455 A.2d 623 (1983):

> Indeed, the possibility of fabricated accusations, the less than certain effectiveness of birth control methods, and the fact that claims like appellant's, if successful, could result in the denial of support to innocent children whom the Support Law was designed to protect, all illustrate that allegations of a mother's failure to use birth control have absolutely no place in a proceeding to determine child support.

500 Pa. at 213, 455 A.2d at 625. *Cf.* Inez M. v. Nathan G., 114 Misc. 2d 282, 451 N.Y.S.2d 607 (N.Y. Fam. Ct. 1982) (rejecting fraud defense, on ground of equal protection between illegitimate children and others).

61 204 Misc. 650, 123 N.Y.S.2d 234 (Dom. Rel. Ct. 1953).

62 *Id.* at 651, 123 N.Y.S.2d at 235.

In Fischer v. Fischer, 106 Neb. 477, 184 N.W. 116 (1921), the Nebraska Supreme Court reached a similar conclusion concerning the *nonfinancial* responsibilities of stepparents.

> [W]e would be loath to conclude . . . that a woman marrying a widower with minor children owed no duty of nurture and maternal advice to them . . . . So long as the widowed with children are permitted to remarry, we think the [failure to impose a duty] would be contrary to natural instincts and public policy.

Id. at 483, 184 N.W. at 119. The court held that an antenuptial contract wherein the husband agreed to leave property to the wife's child in exchange for her promise to care for his five minor children was unenforceable. "[T]he agreement of [the wife] to care for and be a mother to the minor children . . . furnishe[d] no good or valuable consideration for the con-

The *Hermanez* court relied on the economic sharing and allocation of responsibilities in marriage to justify its result: "The theory upon which the law . . . holds a stepfather chargeable with the support of his stepchild is that his wife by virtue of the marriage had ended completely her ability and capacity to take care of her dependents, she giving to him her time and efforts and housewifely duties."[63] Although many modern families have rejected this traditional model in which wives do not work outside the home, the larger concept expressed by the court has continuing relevance. Most marriages involve economic sharing, which creates more career and financial options for family members. For example, one partner may forego financial independence, and rely upon the financial resources of the other. Family support duties place the force of law behind these private arrangements in a manner that comports with the expectations of most family members. Including stepchildren in the family for this purpose is fair and consistent with a flexible model of marriage.

D. Balancing Stepparent and Natural Parent Support Duties During Marriage

In formulating a stepparent support law, lawmakers must consider the relationship between the stepparent obligation and the natural parents' duty to support the same child. A support order, enforceable by the child's legal representative, frequently embodies the noncustodial parent support obligation. The child's representative probably could not enforce the stepparent obligation in the same direct manner, due to a judicial policy of noninvolvement in the financial affairs of ongoing families. Acting out of respect for family privacy, unwillingness to interfere in the financial decisionmaking of the ongoing family, and concern that legal intervention might disrupt family integrity, courts generally disallow direct suits by dependent family members against the supporting parent or spouse.[64]

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tract" because she was obligated by law to provide these services. 106 Neb. at 483, 184 N.W. at 119. The same "natural instincts and public policy" relied upon by the court as the basis for an obligation of "maternal advice and nurture" also justify financial duties within the stepfamily.

63 *Hermanez,* 204 Misc. at 653, 123 N.Y.S.2d at 237.

64 *See* McGuire v. McGuire, 157 Neb. 226, 237-38, 59 N.W.2d 336, 342 (1953) (spousal support); *see also* L. WEITZMAN, *supra* note 6, at 40 (discussing *McGuire*); Paulsen, *Support Rights and Duties Between Husband and Wife,* 9 VAND. L. REV. 709, 719-20 (1956) (same).

The policy of judicial noninvolvement has received a great deal of criticism. *See, e.g.,* Hunter, *supra* note 46, at 18-19; Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law,* 1979 WIS. L. REV. 55, 74-79. Serious reevaluation would be appropriate before extending the policy to yet another category of family support obligations, those of the stepfamily. Direct enforcement of the common law support obligation of the stepparent standing in loco parentis is generally unavailable because the stepparent can terminate the relationship at will. *See supra* note 25 and accompanying text.

Enforcement of support obligations in the ongoing family generally takes the form of

Noncustodial parents have sought, with varying degrees of success, to rely upon stepparent support as the basis for reducing their own child support obligations. In *State v. Finister*,[65] the Washington Court of Appeals construed the state's criminal nonsupport statute, which extends to both parents and stepparents, but does not address the relationships among the various duties created. The defendant father argued that the stepparent duty increased the state's burden of proof under the statute to include the child's need as well as the defendant's willful nonsupport. The court held that the stepparent duty affected neither the obligation of the natural parent nor the rule that willful nonsupport alone constituted a prima facie criminal violation:[66]

> We refuse to accept the premise that the legislature intended by [including a stepparent support obligation] to shift the burden of support from the natural parent to the stepparent or to furnish an excuse to the natural parent for not supporting his children. Under the statute, the burden of support is now joint and several.[67]

In a case involving modification of a noncustodial father's court-ordered support obligation, the Iowa Supreme Court similarly held that the addition of another source of support should not affect natural parent support obligations. In *Mears v. Mears*,[68] the court evaluated the father's ability to pay without reference to the stepfather's in loco parentis support obligation. On this basis, the court held that a substantial increase in the father's income justified an upward modification of the support order. As to the needs of the children, the court found that the stepfather enjoyed a more affluent lifestyle than the father, and refused to charge the father with resulting increased support costs. The court held:

> [T]he question of [the stepfather's] duty to support his wife's children while in his home should be limited to the extent their being in his home may have increased the cost of their maintenance by reason of a higher living scale than that experienced during the marriage of their

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third party suits by creditors, welfare authorities, or the state in criminal proceedings for nonsupport. *See, e.g.*, Commissioner of Social Servs. v. Russell, 85 Misc.2d 809, 380 N.Y.S.2d 998 (N.Y. Fam. Ct. 1976). In this case, the Commissioner brought suit for support on behalf of a stepchild under a statute conferring discretion upon the court to make such orders. The court found, however, that the stepfather was not aware of the stepson, who was a public charge, at the time he married the natural mother. The court declined to *indirectly* enforce the stepparent support duty, emphasizing potential negative effects on the stepmarriage.

> A support order against the stepfather in the instant case, would put further strain on this marriage and might very well cause the [stepfather] to seek and secure a divorce. In that event, not only would the child be a public charge, but in all likelihood, so will the mother.

85 Misc. 2d at 815, 380 N.Y.S.2d at 1003.

65 5 Wash. App. 44, 486 P.2d 114 (1971).

66 *Id.* at 47-48, 486 P.2d at 117.

67 *Id.* at 48, 486 P.2d at 117.

68 213 N.W.2d 511 (Iowa 1973).

father and mother.[69]

The natural father remained responsible for the children's needs, computed according to their prior standard of living, to the extent of his ability to pay.[70]

The results in *Mears* and *Finister* enhance the financial well-being of stepchildren by guaranteeing an uninterrupted source of support from the noncustodial parent. Support statutes in some states accomplish the same result by expressly providing that stepparent duties do not affect the natural parent's support obligation.[71]

In *Logan v. Logan,*[72] on the other hand, the New Hampshire Supreme Court held that natural parent support levels may be reduced by virtue of stepparent obligations to the same children.[73] *Logan* involved *three* sets of support obligations. The remarried mother petitioned for enforcement of a child support order against her former husband, who had remarried a woman with children. The court construed the New Hampshire support statute, which imposes support obligations on parents for their minor children and defines children broadly to include stepchildren,[74] as imposing equivalent duties upon parents and stepparents. The court held that evidence of the obligation owed by the custodial mother's new husband was admissible in the hearing to establish the children's level of need.[75] The court also held that the father's new obligation to his stepchildren could affect his ability to pay support for children of his first marriage.[76] On this related issue, the court's broad holding creates desirable flexibility in allocating limited resources among successive families.

The New Hampshire Supreme Court's decision in *Logan* to consider the stepparent's financial ability to satisfy the children's needs when determining the noncustodial parent's support obligation, however, is not a beneficial rule. In many instances, court ordered levels of child support provide only a fraction of support needs, with the custodial parent

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69 *Id.* at 518.

70 *Id. Accord* Klein v. Sarubin, 471 A.2d 881 (Pa. Super. 1984). The Iowa court's exclusive reliance in *Mears* on the common law in loco parentis doctrine to find a basis for stepparent support liability is puzzling. The Uniform Support of Dependents Law, as enacted in Iowa, imposes civil support obligations on all parents for their children and defines children to include stepchildren. IOWA CODE §§ 252A.2(3), 252A.3 (1977). In Kelley v. Iowa Dep't of Social Servs., 197 N.W.2d 192, 200 (Iowa 1972), *appeal dismissed mem.*, 409 U.S. 813 (1972), the court mentioned the statute but placed reliance upon the common law doctrine. *See supra* note 35 (discussing *Kelley*).

71 *See, e.g.,* N.D. CENT. CODE § 14-09-09 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 25-7-8 (Supp. 1983).

72 120 N.H. 839, 424 A.2d 403 (1980).

73 *Id.* at 842-43, 424 A.2d at 405.

74 N.H. REV. STAT. ANN. § 546-A:1 to -A:2 (1974).

75 *Logan,* 120 N.H. at 842, 424 A.2d at 405.

76 *Id.* at 843, 424 A.2d at 405.

or the state making up the difference.[77] The stepparent should share this part of the support burden, to the extent of his or her ability, as required by the Washington and Iowa rules.[78] Reducing the level of contribution from the noncustodial parent, as the New Hampshire court did, jeopardizes the children's financial security and unfairly shifts responsibility from the natural parent, who fully expected to support the children during their minority. Where the noncustodial natural parent has the ability to pay a continuing level of child support, the addition of a stepparent duty should not reduce the obligation.

Thus, during marriage a stepparent support law should require the stepparent to share the obligation of his or her spouse.[79] This approach to stepparent support would authorize third parties, such as creditors and welfare authorities, incurring expenses for the support of minor children, to sue any or all responsible adults. The general rule of judicial noninvolvement in the financial affairs of ongoing families[80] may foreclose direct suit by children against the adults with whom they reside. Direct suit by children against the noncustodial natural parent is available, of course; and the existence of a stepparent duty should not affect the levels of support determined in such proceedings.[81]

E. Post-Divorce Stepparent Support

Support obligations of natural parents end at the child's death, emancipation, or age of majority, or upon legal termination of the relationship by the state. Support obligations survive dissolution of the parents' marriage, and become directly enforceable at that time. As a general rule, however, courts and legislatures have not extended stepparent support obligations beyond marriage termination. This rule of automatic termination of the stepparent support after divorce can, in some cases, produce harsh results for dependent stepfamily members.[82]

Most lawmakers regard the stepparent-child relationship as derivative, that is, existing only by virtue of the marriage of the stepparent to

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77 *See, e.g.*, Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C.D. L. REV. 49, 50-54 (1982) (noting that child support awards rarely meet child's minimal needs).

78 *See supra* text accompanying notes 65-70.

79 Marriage contracts may allocate the support duty between the spouses. *See* L. WEITZMAN, *supra* note 6, at 347-59 (discussing enforceability during ongoing marriage).

80 *See supra* text accompanying note 64.

81 If the state has terminated the child's relationship with the noncustodial parent, then that parent's support duty will not continue. Adoption by the stepparent can generally take place only following such a termination. *See generally* Note, *A Survey of State Law Authorizing Stepparent Adoptions Without the Noncustodial Parent's Consent*, 15 AKRON L. REV. 567 (1982) (discussing easier standard used for involuntary termination in stepparent adoption cases than in other contexts). This Article limits its scope to families where the stepparent has not adopted the children.

82 *See infra* text accompanying note 87.

the natural parent. Even in cases where a support duty existed during marriage, this model allows no extension of the obligation after marriage termination. In the words of one court, "[i]t is manifest, inasmuch as the liability for support of stepchildren is a collateral one, being as it were, an offshoot of the marriage itself, that once the marriage ends or is declared non-existent, the collateral liability to support stepchildren also ends."[83] Other courts have reached the same result, imposing no liability on stepparents following marriage termination.[84] In some jurisdictions, support statutes require the result by express limitation.[85]

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83 Cynthia M. v. Elton M., 69 Misc. 2d 653, 654, 330 N.Y.S.2d 934, 935 (N.Y. Fam. Ct. 1972) (denying mother's petition for child support from former husband).

84 *See, e.g.,* Ncedel v. Needel, 15 Ariz. App. 471, 474, 489 P.2d 729, 732 (1971) (stepchildren are not "minor children of the parties" pursuant to statute authorizing child support awards at time of divorce), *overruled on other grounds,* Becchelli v. Becchelli, 109 Ariz. 229, 234, 508 P.2d 59, 64 (1973); Taylor v. Taylor, 279 So. 2d 364, 366 (Fla. Dist. Ct. App. 1973) (husband does not owe support to another man's child born during the marriage, with whom in loco parentis relationship was established during marriage); Pilgrim v. Pilgrim, 118 Ind. App. 6, 13, 75 N.E.2d 159, 162 (1947) (no continuing duty to child born during marriage); Eckhardt v. Eckhardt, 37 A.D.2d 629, 629, 323 N.Y.S.2d 611, 612 (1971) (divorce court had no authority to order stepchild support); Elwell v. Sisson, 81 Misc. 2d 1070, 1072, 367 N.Y.S.2d 711, 713 (N.Y. Fam. Ct. 1975) (statutory duty to provide support for stepchild who receives public assistance terminates with divorce); Krane v. Krane, 83 Misc. 2d 714, 715, 373 N.Y.S.2d 275, 276 (N.Y. Fam. Ct. 1975) (stepfather's court-ordered obligation to provide support to stepchildren on public charge basis terminated with stepmarriage); Taylor v. Taylor, 58 Wash. 2d 510, 513, 364 P.2d 444, 445 (1961) (stepparent can terminate in loco parentis relationship at time of divorce, thereby ending all support obligations).

Even a stepparent who stood in loco parentis during marriage, and agreed to continue support in a contract that was incorporated into the divorce decree, was held to have no continuing duty to support the family. Brown v. Brown, 287 Md. 273, 284, 412 A.2d 396, 402 (1980). In *Brown,* the Maryland Court of Appeals held that imprisonment for contempt was an inappropriate sanction when the stepfather fell into arrears, because his obligation to the child did not fall into the family support exception to the state's constitutional prohibition against imprisonment for nonpayment of debts. According to one commentator, "[t]he *Brown* decision further clarifies Maryland's position that stepchildren are afforded less protection than natural children. It is inequitable that Maryland, like so many other states, has failed to provide adequate protection for stepchildren . . . ." Case Comment, *Domestic Relations—Support of Stepchildren*—Brown v. Brown, 10 U. BALT. L. REV. 190, 200 (1980) (citations omitted).

85 *See* OR. REV. STAT. § 109.053 (1983); UTAH CODE ANN. § 78-45-4.1 (Supp. 1983); VT. STAT. ANN. tit. 15, § 296 (1974); WASH. REV. CODE ANN. § 26.16.205 (West Supp. 1984).

An earlier version of the Kansas divorce statute contained language broad enough to allow continuing stepparent support orders:

> The court shall make provisions for the custody, support and education of *the minor children* . . . . In connection with any decree under this article, the court may set apart such portion of the property of either the husband or the wife, or both of them, as may seem necessary and proper for the support of all of *the minor children of the parties, or of either of them.*

KAN. STAT. ANN. § 60-1610(a) (1976) (amended 1982) (emphasis added). In Zeller v. Zeller, 195 Kan. 452, 455, 407 P.2d 478, 482 (1965), the Kansas Supreme Court held that the first sentence of § 60-1610(a) did not require a stepfather to provide support for a stepchild, pointing to the language of the second sentence by way of contrast. The legislature subsequently modified the second sentence to eliminate reference to the child of either spouse. The current Kansas divorce statute provides that "the court shall make provisions for the support and education *of the minor children.* . . . [T]he court may set apart any portion of property of

The derivative model of the steprelationship and the resulting automatic support termination rule ignore the variety and complexity of relationships created in the stepfamily setting. The proposal to impose support duties during marriage was based on the existence of the de facto family unit.[86] In many cases, the relationships created in the stepfamily have consequences for family members following marriage termination. Family members may develop emotional and financial expectations and reliance interests based on steprelationships. A rule of law extending support in appropriate cases beyond the termination of marriage would recognize and protect these interests.[87]

A limited body of law supports a rule requiring continuing stepparent support after marriage termination in appropriate situations. A few American cases have, in special circumstances, imposed continuing stepparent support duties.[88] Furthermore, for financial purposes other than support, courts have sometimes regarded the steprelationship as extending beyond marriage termination.[89] Finally, an English statute expressly authorizes dissolution courts to make stepchild support orders.[90] The policies underlying these laws can provide the basis for a more general support duty in the United States.

The limited judicial exception to the general rule of stepparent liability ending at marriage termination applies to the extra-marital child for whom support from the natural father has become unavailable as a result of the stepmarriage. The Court of Appeals of Ohio in *Burse v. Burse*[91] held that "where a man marries a woman who is pregnant by another man, and there is no showing of fraud in the inception of the marriage, the husband is conclusively presumed to be the father of the child."[92] The court noted that under the state's paternity statutes marriage to the stepfather terminated the mother's right to sue the natural father for support as well as the natural father's ability to legitimate the

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either the husband or wife, or both, that seems necessary and proper for the support *of the child*." KAN. STAT. ANN. § 60-1610(a) (1983) (emphasis added). In light of the construction of the "minor children" language in *Zeller*, it is highly unlikely that the current statute will be read to encompass stepchild support orders in divorce proceedings.

A limited exception to the general rule against continuing stepparent liability after marriage termination appears in a North Dakota statute imposing a support duty upon the stepparent who receives stepchildren into the family, and continues the duty "during the marriage and so long thereafter as they remain in the stepparent's family." N.D. CENT. CODE § 14-09-09 (Supp. 1983). The liability prescribed by the statute is similar to the common law in loco parents doctrine in that liability remains voluntary with the stepparent.

86 *See supra* part I.D.

87 *See* Berkowitz, *supra* note 3, at 227-29; *Step Relationship, supra* note 3, at 282-83.

88 *See infra* text accompanying notes 91-100.

89 *See infra* text accompanying notes 102-12.

90 *See infra* text accompanying notes 113-14.

91 48 Ohio App. 2d 244, 356 N.E.2d 755 (1976).

92 *Id.* at 248, 356 N.E.2d at 758.

child.[93] The husband was, therefore, required to fill in the paternal gap created by his marriage to the mother. The rationale extends only to the limited situation where the child is born following the stepmarriage.[94]

Courts in California and New York have also recognized limited exceptions to the general rule of no stepparent support duty following divorce. These exceptions are based on an equitable estoppel theory. *Clevenger v. Clevenger*[95] involved an extra-marital child conceived by the mother while her husband was away in military service. The husband accepted the child, born shortly after his return, into the family home for ten years and held him out to the public as his own son. The California Court of Appeal concluded that locating the natural father for support would be "realistically impossible"[96] after ten years, but held that the husband would be estopped from asserting the child's illegitimacy and his own nonpaternity at the time of divorce only if certain facts were established at trial. The necessary findings would include the husband's misrepresentation to the child expressly or by implication that he was the natural father; the child's belief and reliance upon the misrepresentation; resulting benefit to the husband in the form of parental status and affection; and resulting detriment to the child in terms of lost rights against the biological father and potential harm upon learning his true status.

The doctrine of estoppel as formulated by the court in *Clevenger* provides inadequate protection for stepchildren. Legitimate concerns raised by the *Clevenger* court, including the needs and interests of the

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93 *Id.* at 248, 356 N.E.2d at 758. The Ohio paternity statute referred to in *Burse,* OHIO REV. CODE ANN. § 3111.01 (Page 1980) (repealed 1982), authorized any "unmarried woman" to file a complaint. As construed by the eourt, the mother's marriage terminated the cause of action for the child born thereafter. Relieving the natural father of all future responsibility was not a particularly well-reasoned approach to the issue of support for extra-marital children.

94 *Id.* at 248, 356 N.E.2d at 758. The Ohio rule originated in a suit against the natural father for support, following death of the stepfather who had married the mother during pregnancy. Miller v. Anderson, 43 Ohio St. 473, 3 N.E. 605 (1885). The rule was first applied to resolve the issue of stepparent support at the time of marriage dissolution in Gustin v. Gustin, 108 Ohio App. 171, 161 N.E.2d 68 (1958).

A trial court in New York found a more general basis for extending the stepparent support duty when the marriage relationship was terminated by death. Jones v. Stautz, 5 Misc. 2d 185, 159 N.Y.S.2d 903 (N.Y. Fam. Ct. 1957). In a state-initiated neglect proceeding, the child was removed from the stepfather and placed in the custody of petitioner Jones, who sued the stepfather for support. The court distinguished an earlier New York case in which it had been held that divorce terminated the stepparent support obligation, stating "[t]he death of the mother was not a wilful act. It was an act of God. The relationship of stepparent to stepchild once established is a valid and subsisting relationship that cannot be destroyed at the will of the respondent stepfather." 5 Misc. 2d at 187, 159 N.Y.S.2d at 906.

95 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961); *see also* Hails, *supra* note 18, at 716-18 (discussing *Clevenger*).

96 189 Cal. App. 2d at 671, 11 Cal. Rptr. at 714.

child, remain relevant whether or not the child knows his true status. The court imposed the knowledge limitation, however, because it utilized the well-established remedy of estoppel rather than formulating relief on the basis of the parties' status.[97]

A different formulation of the estoppel doctrine, focusing on the wife's reliance interest, enabled a New York trial court to impose a continuing child support obligation on the stepfather in *Lewis v. Lewis*.[98] The stepfather had supported the child, who was three years old at the time of marriage, and had changed the birth certificate to include his name. According to the court, the mother's reasonable reliance on this behavior as a promise of future security estopped the husband from denying paternity at the time of divorce.[99]

The *Lewis* court's formulation of the equitable estoppel doctrine is broader than that of the *Clevenger* court. First, the *Lewis* court ignored the age of the child at the time of marriage. In addition, the reasonable reliance of the custodial parent on the financially responsible behavior of the stepparent will be easier to establish in many cases than the child's reliance on a misrepresentation of parentage, as required under the *Clevenger* test.[100]

Both the *Lewis* and *Clevenger* formulas require the party seeking the estoppel to show the unavailability of the natural parent. The presence of a natural noncustodial parent with support responsibilities does not prevent members of a stepfamily from forming financial and other expectations regarding the stepparent-child relationship. The estoppel theories developed by the courts are too narrow to accommodate this reality.[101] Legislatures and courts should formulate stepparent support

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97 In *In re* Marriage of Johnson, 88 Cal. App. 3d 848, 152 Cal. Rptr. 121 (1979), the Court of Appeal of California applied the *Clevenger* formula to impose liability on a husband following marriage dissolution. The court required the husband to support his wife's child, who was born just a few days before their marriage. The court expressly found that the boy believed the husband to be his father.

98 85 Misc. 2d 610, 381 N.Y.S.2d 631 (Sup. Ct. 1976).

99 The court will not conjecture as to what actions, if any, Kim's mother may have taken for the child's interests in the absence of her husband's "adoption" of her daughter. Suffice it to say that after the plaintiff's actions, she was justified in relying upon his sincerity in being responsible for the child. Thus, the theory of equitable estoppel now prevents the husband from denying that assumption of responsibility upon which his wife relied.

85 Misc. 2d at 612-13, 381 N.Y.S.2d at 633. *Accord* Miller v. Miller, 97 N.J. 154, 478 A.2d 351 (1984).

100 A Florida court expressly rejected this broader formulation of the estoppel doctrine on facts similar to the *Lewis* case in Albert v. Albert, 415 So. 2d 818 (Fla. Dist. Ct. App. 1982), holding that the misrepresentation must be one "of parentage . . . made to a spouse or child who relied upon it to his or her detriment." *Id.* at 820. The husband's signing of the birth certificate and promise to the mother to treat the child as his own did not estop him from refusing support following marriage termination.

101 Cases in which the husband at the time of marriage dissolution disclaims financial responsibility for a child conceived by artificial insemination during marriage are analogous to the stepparent support situation. In both, spouses rely on the absence of a biological relationship to avoid the support obligation to a child with whom a de facto parent-child rela-

laws to expressly allow for continuing stepparent suppport responsibility in appropriate cases.

Courts have generally been more willing to regard the stepparent-child relationship as independent of the marriage creating it, and thus capable of surviving marriage termination, in the context of legal issues other than support. In *In re Bordeaux' Estate,*[102] for example, the Supreme Court of Washington construed an inheritance tax statute that subjected stepchildren to lower inheritance tax rates. The tax authorities contended that children of the decedent's predeceased wife were not "stepchildren" under the statute because their mother had failed to survive the decedent. The court refused to narrowly construe the word "stepchild" in this fashion, observing that "the modern tendency has been, and rightly so, to assimilate the stepchild to the natural child."[103]

The Maine Supreme Court relied on *Bordeaux* to reach the same result on the inheritance tax rate issue.[104] The court's opinion reveals an understanding of the potential depth and independence of the stepparent-child relationship.

> [T]ies of affinity are often stronger than those between collateral, or even lineal, kinsmen by blood. The relationship of stepchild and stepparent, once created, is not generally regarded as terminated by the death of one of the parties to the marriage or by a divorce, nor by the remarriage of the step-parent.[105]

The inheritance tax cases necessarily involve *voluntary* provision for the stepchild,[106] and are thus distinguishable from the involuntary post-divorce support situation. Nevertheless, these cases support the view that the stepparent-child relationship is not necessarily collateral to the stepmarriage relationship. The policies of "assimilating stepchildren" and protecting de facto relationships, relied on in these cases, bear significantly on the support issue.

In a nonsupport context, the Maryland Court of Special Appeals in

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tionship existed. Courts have had a much easier time finding estoppel in the artificial insemination cases, where the child was conceived in reliance on the husband's representations that he would act as the father. *See* Anonymous v. Anonymous, 41 Misc. 2d 886, 246 N.Y.S.2d 835 (N.Y. Sup. Ct. 1964); Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (N.Y. Sup. Ct. 1963). *See generally* Shaman, *Legal Aspects of Artificial Insemination,* 18 J. FAM. L. 331 (1979-80); Comment, *Artificial Insemination and the Law,* 1982 B.Y.U. L. REV. 935.

The estoppel theory has also been applied to de facto parent-child relationships in the doctrine of adoption by estoppel or equitable adoption. *See* H. CLARK, *supra* note 9, at 653-58.

102 37 Wash. 2d 561, 225 P.2d 433 (1950).

103 37 Wash. 2d at 594, 225 P.2d at 451.

104 Depositors Trust Co. of Augusta v. Johnson, 222 A.2d 49, 52 (Me. 1966).

105 *Id.* at 54.

106 In another context where the stepparent voluntarily provided for the child of a predeceased spouse, the Iowa Supreme Court held that a rule limiting beneficiaries under a fraternal organization's insurance program to "relatives" permitted the designation of a stepchild. Simcoke v. Grand Lodge A.O.U.W. of Iowa, 84 Iowa 383, 51 N.W. 8 (1892).

Strawhorn v. Strawhorn[107] recently made economic provision for a stepchild from resources of the unwilling stepparent at the time of divorce. Pursuant to a statute authorizing exclusive use awards "to permit the children of the family to continue to live in the environment and community which is familiar to them and to permit the continued occupancy of the family home . . . by a spouse with custody of a minor child who has a need to live in that home,"[108] the trial court had awarded use of the marital home to the wife and her child of a former marriage. On appeal, the stepfather emphasized the connection between this type of award and a continuing support obligation, arguing "that although he ha[d] no legal duty to support appellee's son of a former marriage, the use and possession award nevertheless impose[d] such a duty."[109] The mother responded that the award "only r[an] to the benefit of the spouse."[110] The *Strawhorn* court implied its belief that the statute mandated indirect child support, by discussing the legislative concern for children expressed in the legislation. The court relied on this policy in affirming the award.[111]

The stepfather in *Strawhorn* correctly asserted that the stepchild's use of his interest in the home was inconsistent with the general rule imposing no financial responsibility for stepchildren following divorce. The Maryland statute, however, as construed by the court, contemplated deviation from the general rule. The same interests that justified the court's exclusive use order, including the child's needs and the parties' expectations regarding the future, justify other continuing legal obligations between stepparent and child, including support obligations.[112]

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107 49 Md. App. 649, 435 A.2d 466 (1981).

108 MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-06(a) (1984).

109 *Strawhorn,* 49 Md. App. at 651, 435 A.2d at 468.

110 *Id.* at 651, 435 A.2d at 468.

111 *Id.* at 652, 435 A.2d at 468-69.

112 Without mentioning the *Strawhorn* case, the highest court in Maryland subsequently held that the family home statute did not include stepchildren. Bledsoe v. Bledsoe, 294 Md. 183, 448 A.2d 353 (1982). The *Strawhorn* court had relied upon a change in statutory language from an earlier version providing for "children of the parties" to the current "any minor child," and on the current "children of the family" terminology, in holding that the legislature intended to include stepchildren. *Strawhorn,* 49 Md. App. at 655-56, 435 A.2d at 470. The court of appeals in *Bledsoe* considered the same language and legislative history and concluded that "[i]f the legislature had intended to so drastically change the scope of the provision it most certainly would have amended the language 'children of the family.' Clearly, that phrase does not connote any different meaning than 'children of the parties.' " *Bledsoe,* 294 Md. at 192, 448 A.2d at 358. This reading of the statute unquestionably excluded stepchildren.

Another broad construction of statutory language, to the economic advantage of stepchildren following marriage breakdown, occurred in State v. Gillaspie, 8 Wash. App. 560, 507 P.2d 1223 (1973). The court in *Gillaspie* read Washington's criminal nonsupport statute, which expressly applied to stepparents until "the termination of the relationship of husband and wife," to impose support duties during the period of marital separation. The court observed that "the law has been developing toward the integration of stepchildren into the family with rights equal to those of natural children." 8 Wash. App. at 562, 507 P.2d at 1224

F. Formulating a Post-Divorce Support Law

The statutory law of England has for two decades authorized courts to make stepchild support orders in separation and divorce proceedings. The statute protects the "child of the family," defined as any child "who has been treated by both [spouses] as a child of their family."[113] In deciding whether to order child support from a spouse who is not the natural parent, the court must

> have regard (among other circumstances of the case)
> (a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;
> (b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;
> (c) to the liability of any other person to maintain the child.[114]

The English statute provides a model for legislation in the United States that would confer jurisdiction upon courts to make stepparent support orders. The English approach to stepparent support obligations does not constitute a radical departure from procedures presently used in this country with regard to natural child support. Contemporary American child support statutes commonly confer discretion on judges to determine the appropriateness and level of awards by applying a list of factors to each individual case.[115] Although this approach involves

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(citations omitted). *Accord* Tutko v. Tutko, 86 A.D.2d 974, 448 N.Y.S.2d 337 (1982) (civil support statute); Director of Child Support Enforcement Bureau v. Fariello, 74 A.D.2d 905, 425 N.Y.S.2d 854 (1980) (civil support statute); Mercer v. Mercer, 26 A.D.2d 450, 275 N.Y.S.2d 83 (1966) (civil support statute). *But see* Montayre v. Montayre, 175 Misc. 202, 22 N.Y.S.2d 489 (N.Y. Sup. Ct. 1940) (civil support statute).

113 Matrimonial Causes Act, 1973, ch. 18, § 52(1).

An earlier version of the statute referred to the "relevant child" and defined the term to mean "a child of one party to the marriage who has been *accepted* as one of the family by the other party." Matrimonial Causes Act, 1965, ch. 72, § 46(2) (emphasis added) (repealed 1973); *see also* Cretney, *Somebody Else's Child,* 113 SOLIC. J. 4 (1969) (discussing the Act). The change in the law was made to overcome a narrow judicial construction of the word "accepted." Matrimonial Causes Act, 1973, ch. 18, § 52 note.

114 Matrimonial Causes Act, 1973, ch. 18, § 25(3).

115 For example, the Uniform Marriage and Divorce Act child support section provides the following factors:

> In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:
> (1) the financial resources of the child;
> (2) the financial resources of the custodial parent;
> (3) the standard of living the child would have enjoyed had the marriage not been dissolved;
> (4) the physical and emotional condition of the child and his educational needs; and
> (5) the financial resources and needs of the noncustodial parent.

administrative costs and some unpredictability, its flexibility accommodates the diversity of modern families.

A stepparent support law should require courts to consider the following factors when deciding whether to require support following divorce: the length of the marriage, the financial arrangements of the parties during marriage, the abilities of each adult, and projected needs of the child following divorce. The duration of the stepfamily relationship and the arrangements made by the spouses for allocating financial and other responsibilities within the family bear on the determination of whether the parties formed expectations that the resources of the stepparent would be available in the future. For example, the natural parent who sacrificed earning capacity in order to make nonfinancial contributions to the family, in reliance on the financial capacity of the stepparent may be unable to support the stepchild at the time of dissolution. In such a case, the reliance factor weighs in favor of a stepparent support order. During marriage, stepparent support responsibility can be regarded as a sharing of the duty owed by the custodial spouse.[116] Following dissolution, both spouses' duties must be defined separately and balanced with the obligation of the other parent. The best approach would consider all facts and circumstances affecting the financial ability of each adult, in addition to the factors mentioned above, in allocating responsibility.

In summary, the current law imposing stepparent support duties following marriage termination only in limited estoppel situations[117] operates unfairly in some cases. When a stepfamily of substantial duration resulting in economic dependence has been created, continuing economic responsibility would better achieve the family law's goals of clarity and protection. The almost absolute bar to continuing stepparent support orders ignores the variety of factual situations in which the issue may arise. Laws allocating responsibility on the basis of all the circumstances of each case would enhance the interests of stepfamily members and the state.

II
CUSTODY AND VISITATION RIGHTS

In the ongoing natural family, both parents share the right to physical custody and decisionmaking authority for their children, as well as responsibility for support.[118] At the time of marriage dissolution, courts frequently divide the natural parent-child status into its various compo-

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UNIF. MARRIAGE AND DIVORCE ACT § 309 (1973).

116 *See supra* text accompanying notes 77-79.

117 *See supra* text accompanying notes 91-101.

118 According to Blackstone, "[t]he *power* of parents over their children is derived from . . . their duty; this authority being given them, partly to enable the parent more effectually

nents, determining the extent to which each parent will continue to have access to and responsibility for the child. In defining stepparent-child relationships, lawmakers must separately consider the financial and custodial aspects, according to policies relevant to each.[119]

Two distinct factual situations give rise to issues of stepparent custody or visitation rights. First, the stepparent may attempt to assert rights in a marriage dissolution proceeding. The second category of cases arise at the death of the stepparent's spouse when the other natural parent may seek to eliminate all rights of the stepparent. In both situations, termination of the marriage between stepparent and natural parent places the relationship between stepparent and child in jeopardy.[120]

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to perform his duty, and partly as a recompence for his care and trouble in the faithful discharge of it." 1 W. BLACKSTONE, COMMENTARIES *440.

119 There is legal authority defining the stepparent-child status to encompass one, but not the other, of the financial and custodial aspects of the parent-child relationship. For example, the Missouri stepparent support statute states that it "shall not be construed as granting to a stepparent any right to the care and custody of a stepchild." MO. ANN. STAT. § 453.400.4 (Vernon Supp. 1983). Conversely, the Arizona Court of Appeals construed the Uniform Marriage and Divorce Act provision relating to custody jurisdiction to extend to stepchildren, while noting that the child support provision did not authorize support orders for such children. In explaining the discrepancy, the court applauded the legislature's movement away from the "outmoded view that custody and visitation rights are primarily a benefit to the parent, to be enjoyed in compensation for the duty to support." Bryan v. Bryan, 132 Ariz. 353, 356, 645 P.2d 1267, 1270 (Ariz. Ct. App. 1982); *see infra* text accompanying notes 160-66 (discussing *Bryan*).

The Supreme Court of Utah has held, however, that a stepfather's request for visitation also opens the door to potential support liability.

> A hearing could determine not only the right to visitation, but could determine whether that right should be conditioned on a requirement that the stepfather accept an obligation to assist in the support of the child. . . . Loco parentis does not envision that a stepparent be permitted to enjoy the rights of a natural parent without also accepting the responsibilities that are incurred.

Gribble v. Gribble, 583 P.2d 64, 68 (Utah 1978). The English Matrimonial Causes Act authorizes both stepparent support orders and custody awards. Matrimonial Causes Act, 1973, ch. 18, § 52.

120 In the stepfamily, as in the biological family, legal questions of custody and control typically arise only after marriage termination. While the stepfamily is ongoing, the spouses generally resolve disagreements regarding the children on a private basis. During this time, rights of the other natural parent are generally asserted against the custodial parent rather than the stepparent.

The stepparent who stands in loco parentis to the child assumes the rights and responsibilities of parenthood. *See supra* Part I.A. The doctrine should suffice to confer upon the stepparent a custodial interest during the ongoing stepfamily. Frequently, the stepparent's spouse, as primary custodian, will have the decisionmaking responsibility for the child. The in loco parentis doctrine formalizes the reality that the parenting stepparent shares responsibility with the custodial natural parent. *See Step Relationship, supra* note 3, at 280-83 (proposing shared custodial status for parent and stepparent who establishes household with the child); *see also* Aulik, *Stepparent Custody: An Alternative to Stepparent Adoption,* 12 U.C.D. L. REV. 604 (1979) (proposing legislation authorizing stepparent petition for appointment as "joint custodian" with the natural parent).

In the biological family, the issue of parent custody rarely comes to the state's attention while the family is ongoing. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory

Under such circumstances, the court may impose the derivative model of the steprelationship[121] to deny the stepparent continuing custodial rights following marriage termination.

The stepparent who wishes to maintain contact with the child faces difficult substantive and procedural legal hurdles. A substantive preference for the natural parent operates in many cases against stepparents. Moreover, in many states, jurisdiction of the dissolution courts to hear stepparent requests for custody or visitation is ambiguous. As a result, the family laws fail to achieve the goals of providing certainty and protection for stepfamily members.

A. Jurisdiction in Marriage Dissolution Proceedings

Judicial power to hear issues of child custody is not unlimited. Jurisdiction exists, as a general rule, only when the child's family is troubled and judicial intervention is necessary to assure the child's welfare.[122] For example, courts may issue orders regarding the children of divorcing parents. Statutes regulating jurisdiction in marriage dissolution proceedings do not deal expressly with the subject matter of stepchildren. When requested to consider custody and visitation under such laws, some courts have declared themselves powerless to act. Others, confronted with children whose needs would be ignored by judicial nonaction, have construed the statutes broadly to authorize orders regarding stepchildren. The need for unambiguous legislation is compelling.[123]

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education); *In re* Green, 448 Pa. 338, 292 A.2d 387 (1972) (medical treatment). The dependency and neglect laws involve the state in the ongoing family in cases where parents have failed in their custodial responsibilities. *See, e.g.*, MICH. COMP. LAWS §§ 722.621-.636 (1975).

The stepparent standing in loco parentis similarly invites the intervention of the legal system only in limited circumstances. People v. Parris, 130 Ill. App. 933, 267 N.E.2d 39 (1971), for example, affirmed the conviction of a stepfather, who stood in loco parentis, under a statute proscribing willful and unnecessary injury to a child under the defendant's "legal control." For other purposes as well, including consent to medical treatment, third parties, including the state, should acknowledge the role of the stepparent who has assumed parenting responsibilities.

121 Under a derivative model, the stepparent-child relationship is viewed as collateral to, and dependent upon, the marriage that creates it. *See supra* text accompanying notes 83-87.

122 "[T]here are at least eight different legal remedies in California that focus on the same question: Where and with whom should the child live *when something has occurred to disrupt family unity or balance.*" Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law,* 23 STAN. L. REV. 703, 705 (1975) (emphasis added); *see* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 LAW & CONTEMP. PROBS., 226 1975. *See generally* H. CLARK, *supra* note 9, at 572-82 (discussing general jurisdictional bases).

123 In State v. Taylor, 125 Kan. 594, 264 P. 1069 (1928), the Supreme Court of Kansas construed the state's divorce statute broadly to confer jurisdiction over stepchildren. *See infra* text accompanying notes 136-38. The court also described the equitable jurisdiction of courts over matters affecting children, in the following manner:

> Infants have always been regarded as wards of chancery, and district courts exercising chancery powers have jurisdiction to protect infants. Such courts have a broad and comprehensive jurisdiction, and the controlling considera-

B. Custody Jurisdiction Under "Child of the Marriage" Statutes

A number of state statutes authorize custody orders regarding "children of the marriage" in dissolution preceedings.[124] To the clear detriment of the children, parents have successfully resisted stepparent claims to custody by asserting that the courts lack jurisdiction over stepchildren under this type of statute.

In *Palmer v. Palmer,*[125] the Supreme Court of Washington construed a statute conferring jurisdiction over "the custody, support and education of the minor children of [the] marriage,"[126] to exclude jurisdiction over an extra-marital child born during marriage.[127] "He is not a child of the marriage of the parties to this divorce action. The issue of his custody is beyond the scope of the divorce act and, consequently, beyond the jurisdiction of the court in this cause."[128] The divorce decree in *Palmer* had initially incorporated the spouses' agreement to retain joint custody of the stepchild along with their three children, with the husband assuming physical custody except during vacation periods. The divorce court, finding the natural mother unfit, subsequently modified the decree, granting sole custody to the stepfather and restricting the mother's right to visit. The appellate court's reversal on jurisdictional grounds resulted in custody of the stepson by the unfit mother, while his siblings remained with the former husband. The court expressed dissatisfaction with the result, observing that "[w]e do not decide whether or not proper proceedings should be brought to determine either the propriety of [the mother] as his custodian or her present husband's legal relationship to him."[129] Whatever the result in future proceedings, if any, the return of custody to the unfit mother was contrary to the child's welfare, and illustrates the danger inherent in the dissolution statute's jurisdictional gap.[130]

> tion of such custody is the best interests of the child. The statute, however, adds nothing to the power of the court to provide for the custody and welfare of infants.

125 Kan. at 596, 264 P. at 1070. Other courts, to the contrary, have determined the authority of the divorce court to be limited by applicable statutes.

124 *See, e.g.,* OHIO REV. CODE ANN. § 3105.21(A) (Page 1980).

125 42 Wash. 2d 715, 258 P.2d 475 (1953).

126 WASH. REV. CODE ANN. § 26.08.110 (1961), *repealed by* 1973 Wash. Laws ch. 157, § 30.

127 *Palmer,* 42 Wash. 2d at 717, 258 P.2d at 476.

128 42 Wash. 2d at 717, 258 P.2d at 476-77.

129 *Id.* at 718, 258 P.2d at 477.

130 After the *Palmer* decision, Washington enacted the Uniform Marriage and Divorce Act. The Court of Appeals of Washington construed the custody provision of the Act to confer jurisdiction over stepchildren in *In re* Marriage of Allen, 28 Wash. App. 637, 626 P.2d 16 (1981); *see infra* text accompanying notes 152-57 (discussing *Allen*).

A similar custody award to an unfit parent, which would not have been made if the dissolution court had jurisdiction over stepchildren, almost occurred in Hartshorne v. Hartshorne, 185 N.E.2d 329 (Ohio Ct. App. 1959). The dissolution court raiscd sua sponte the issue of custody for the wife's children of a prior marriage who had lived in the marital home.

Morrow v. Morrow[131] follows the pattern of stepchild custody awards reversed on appeal on jurisdictional grounds.[132] The stepfather in *Morrow* had treated the child, born during marriage, as his own and had sworn to paternity in order to change the child's surname. The dissolution court relied on these facts to hold that the stepfather was estopped from denying paternity, thereby making the child "of the marriage."[133] This estoppel analysis is strained because the theory generally operates to the *detriment* of the person whose behavior is at issue. On the merits, the court granted the stepfather's request for custody. The appellate court reversed, relying on a literal construction of the statutory "children of the marriage" language. The statute expressly extended jurisdiction "to children adopted by both parties and any natural child of one of the parties who ha[d] been adopted by the other,"[134] but the stepchild fell into none of the statutory categories. Although the trial court was not effective in applying the estoppel doctrine, its desire to fashion a theory of relief not afforded by the controlling statutes is understandable.[135]

At least one state court has taken a more liberal approach to construing the statutory "children of the marriage" language. In *State v. Taylor*,[136] the defendant father's removal of his child from the stepmother, to whom custody had been awarded in an earlier divorce proceeding, resulted in his conviction for kidnapping. The Supreme Court of Kansas, in approving the divorce court's exercise of jurisdiction, and affirming the criminal conviction, held that the stepchild was properly regarded as a child of the marriage.

In dissolving the marital relation and the breaking up of the home,

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Based on a finding of the mother's unfitness, the court ordered their removal to the state welfare department pending disposition by the juvenile court. On appeal, the Ohio appellate court held that the lower court lacked authority to make the temporary custody order, because the stepchildren were not "children of the marriage" under the relevant dissolution statute. 185 N.E.2d at 330. The *Hartshorne* court, however, affirmed the trial court's judgment on the procedural basis that the appellant mother failed to give bond. 185 N.E.2d at 331. Had the mother not committed a procedural error, the court could not have acted to prevent retention of the children by an unfit parent.

131 165 Conn. 665, 345 A.2d 561 (1974).

132 *See, e.g.*, LaBella v. LaBella, 134 Conn. 312, 316, 57 A.2d 627, 628-29 (1948) ("The applicable statutes . . . refer to children of the marriage in terms or by implication."); Buzzell v. Buzzell, 235 A.2d 828 (Me. 1967) (divorce court must resolve whether husband in divorce proceeding is father of wife's child before it may make orders regarding the child under "children of the parties" statute); Phillips v. Phillips, 176 Or. 159, 172, 156 P.2d 199, 203 (1945) ("The children in the case at bar are not 'the children of the marriage' and the [divorce] statute gives no power to the court to provide for their custody.").

133 165 Conn. at 668, 345 A.2d at 562.

134 CONN. GEN. STAT. ANN. § 46b-58 (West Supp. 1984), *quoted in* 165 Conn. at 668, 345 A.2d at 562.

135 The equitable estoppel theory has been the basis for imposing stepparent support duties in some cases. *See supra* text accompanying notes 91-101.

136 125 Kan. 594, 264 P. 1069 (1928).

> the court necessarily took notice of the fact that there was an infant child in the home for whom provision must be made. . . . As a result of the marriage the child had been brought into the home, and . . . [the wife] assumed its care and stood in loco parentis towards it. We think the expression in the statute "minor children of the marriage," fairly interpreted, included the infant in question, and that the court had the responsibility and duty to make provision for its custody, care, and education when the marriage relation was dissolved.[137]

In *Taylor,* recognition that the stepfamily constitutes a de facto family led the court to provide a forum to protect the child's interests when its family broke down.[138]

C. Visitation Jurisdiction Under "Child of the Marriage" Statutes

The stepparent may seek to continue his or her relationship with stepchildren following marriage termination by requesting visitation rights. The term visitation involves rights of physical access, but excludes the decisionmaking and childrearing responsibilities of legal custody. As with custody, the statutes in most states provide little guidance on the issue of jurisdiction to make stepchild visitation orders in divorce proceedings.

As in the custody area, statutes conferring jurisdiction over "children of the marriage" in dissolution proceedings have been construed by different courts with varied results when the issue is visitation. In *Carter v. Brodrick,*[139] the Supreme Court of Alaska broadly construed a statute authorizing custody and visitation orders regarding "any child of the marriage" to encompass a stepchild visitation order for the stepfather who stood in loco parentis during marriage. The California Court of Appeal's refusal to broadly construe similar "children of the marriage" langnage prompted legislation expressly authorizing stepparent visitation awards.

In *Perry v. Superior Court,*[140] the trial court in California awarded the stepfather visitation rights, in order to protect the interests of the child with whom the stepfather had lived for six years, since the child was nine months old. In reversing the visitation order, the *Perry* court expressed its dissatisfaction with the result.

> We do not find the result in this case particularly palatable. However, in view of the language in the relevant code sections, we feel compelled to hold the trial court had no jurisdiction to make any or-

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137 *Id.* at 596, 264 P. at 1070.

138 In Anderson v. Anderson, 191 Kan. 76, 379 P.2d 348 (1963), the Kansas Supreme Court affirmed a custody award to the stepmother in a divorce proceeding, on the basis of the father's unfitness. The court relied on *Taylor* for the proposition that it had jurisdiction over the child.

139 644 P.2d 850, 855 (Alaska 1982).

140 108 Cal. App. 3d 480, 166 Cal. Rptr. 583 (1980).

> der concerning visitation in the proceeding before it. We are aware that in this modern society there are probably a considerable number of stepparents and stepchildren in situations substantially similar to that before us. The Legislature has the power to address this thorny problem of visitation by stepparents. We, on the other hand, cannot rewrite [the statute] by a strained interpretation of the phrase "minor children of the marriage."[141]

The California legislature reponded to *Perry* by unambiguously conferring jurisdiction to award stepparent visitation in dissolution proceedings.

> [I]n the proceedings under [the code sections dealing with annulment, marriage dissolution and separation proceedings], the . . . court has jurisdiction to award reasonable visitation rights to a person who is a party to the marriage that is the subject of the proceeding with respect to a minor child of the other party to the marriage, if visitation by that person is determined to be in the best interests of the minor child. . . . Any visitation right granted to a stepparent pursuant to this section shall not conflict with any visitation or custodial right of a natural or adoptive parent who is not a party to the proceeding.[142]

The need for this type of unambiguous statute, addressing custody as well as visitation, exists in other jurisdictions.

D. Custody Jurisdiction Under the UMDA

The Uniform Marriage and Divorce Act's custody provision has the same defect as the "child of the marriage" statutes; it does not expressly address the question of jurisdiction over stepchildren in dissolution proceedings. Section 401(d) of the Act provides:

> A child custody proceeding is commenced in the [———] court:
> (1) by a parent, by filing a petition
> (i) for dissolution or legal separation; or
> (ii) for custody of the child in the [county, judicial district] in which he is permanently resident or found; or
> (2) by a person other than a parent, by filing a petition for custody of the child in the [county, judicial district] in which he is permanently

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141 *Id.* at 485, 166 Cal. Rptr. at 586. The concurring opinion in *Perry* showed a willingness to move in the direction of broad construction, by suggesting that an allegation of an in loco parentis stepparent relationship would have placed the child in the statutory category of "children of the marriage." *Id.* at 486, 166 Cal. Rptr. at 586-87 (Hopper, J., concurring). In a subsequent case, Halpern v. Halpern, 133 Cal. App. 3d 297, 184 Cal. Rptr. 740 (1982), the court of appeal reaffirmed the narrow *Perry* construction of the "children of marriage" provision, *id.* at 310, 184 Cal. Rptr. at 747, but concluded that the trial court had properly assumed jurisdiction over a stepchild. The opinion does not state whether the result was based on both spouses' allegations in their initial pleadings that the stepchild was "of the marriage," or rather on the stepfather's allegation of an in loco parentis relationship. *See id.* at 310, 184 Cal. Rptr. at 747.

142 CAL. CIV. CODE §§ 4351.5(a), (i) (West 1983).

> resident or found, but only if he is not in the physical custody of one of his parents.[143]

The drafters' comment to section 401(d) clarifies the limitations in subsection (2) on nonparent-initiated custody jurisdiction.

> [S]ubsection (d)(2) makes it clear that if one of the parents has physical custody of the child, a non-parent may not bring an action to contest that parent's right to continuing custody under the "best interest of the child" standard of [the Act]. *If a non-parent . . . wants to acquire custody, he must commence proceedings under the far more stringent standards for intervention provided in the typical Juvenile Court Act.*[144]

The drafters of the Act imposed the limitations on nonparent standing to protect the interests of the natural parent.

> In short, this subsection has been devised to protect the "parental rights" of custodial parents and to insure that intrusions upon those rights will occur only when the care the parent is providing falls short of the minimum standard imposed by the community at large—the standard incorporated in the neglect or delinquency definitions of the state's Juvenile Court Act.[145]

Subsection (d)(2) and the drafters' comment clearly exclude custody claims by nonparents, outside of the dependency and neglect setting, if a natural parent has physical custody of the child. Several courts have, however, found authority in the language of the Act or in nonuniform amendments to the Act to award stepparent custody following divorce.[146] In *In re Marriage of Tricamo,*[147] for example, the Colorado Court of Appeals relied on a nonuniform provision in the Colorado Act as a basis for stepchild jurisdiction in a marriage dissolution proceeding. In addition to section 401(d)(2) of the Uniform Act which applies "only if the child is not in the physical custody of one of his parents,"[148] the Colorado version authorizes proceedings "commenced . . . [b]y a person other than a parent who has had physical custody of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical custody."[149] In *Tricamo,* the court held that the stepfather, who had shared a household with the child, "had the physical custody of this child, jointly with his wife, for a number of years" and satisfied the statutory requirement.[150] Under this construction, every stepparent who establishes a family home with

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143 UNIF. MARRIAGE AND DIVORCE ACT § 401(d) (1973).

144 UNIF. MARRIAGE AND DIVORCE ACT § 401(d) commissioners' note (1973) (emphasis added).

145 *Id.*

146 *See infra* notes 147-57 and accompanying text.

147 42 Colo. App. 493, 599 P.2d 273 (1979).

148 COLO. REV. STAT. § 14-10-123(b) (1973).

149 *Id.* § 14-10-123(c).

150 42 Colo. App. at 494-95, 599 P.2d at 274.

stepchildren may raise the issue of custody following separation.[151]

In enacting the Uniform Act custody jurisdiction provisions, the Washington state legislature also expanded subsection (d)(2), by authorizing nonparent-initiated proceedings "if the child is not in the physical custody of one of its parents *or if the petitioner alleges that neither parent is a suitable custodian.*"[152] In *In re Marriage of Allen,*[153] the divorce court relied on this amendment as the basis for jurisdiction over the husband's child. In *Allen,* the stepmother had greatly assisted her deaf stepson in his educational and social development in a manner that neither natural parent had been able to do. On these facts, the lower court determined that the father was "unsuitable" and awarded custody to the stepmother. The Court of Appeals of Washington, apparently unwilling to conclude that the father was "unsuitable,"[154] relied instead upon the uniform language of subsection (d)(1) to affirm the award of custody to the stepmother. The court held that jurisdiction under subsection (d)(1), dealing with parent-initiated custody jurisdiction in divorce proceedings,[155] extended "to cases involving stepparents where the stepparent can meet the requirement of standing in loco parentis in a matter of child custody."[156]

The *Allen* court's broad construction of "parent" to include stepparents may be inconsistent with the intent of the Uniform Act's drafters to protect the rights of custodial parents by limiting nonparent-initiated jurisdiction.[157] The assumption of jurisdiction enabling the court to award custody to the stepmother in *Allen,* however, was necessary to protect the child's welfare. In *Allen,* leaving the determination of custody to a dependency or neglect proceeding, as suggested in the comments to the Uniform Act, was not an acceptable result. Reform of the Uniform Act to clearly authorize jurisdiction in cases like *Allen* would provide

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151 The court in *Tricamo* could have construed the statute's language narrowly to mean exclusive, not joint, physical custody by the stepparent. If so interpreted, the section would have applied only to situations where the stepparent no longer had custody, because in cases of exclusive stepparent custody at the time of suit, the preceding provision relating to children not in parental custody would confer jurisdiction.

152 WASH. REV. CODE ANN. § 26.09.180(1)(b) (Supp. 1983) (emphasis added).

153 28 Wash. App. 637, 626 P.2d 16 (1981).

154 *Id.* at 642, 626 P.2d at 20.

155 UNIF. MARRIAGE AND DIVORCE ACT § 401(d)(1) (1973).

156 28 Wash. App. at 644, 626 P.2d at 21. On the merits, the *Allen* court did not continue its treatment of the stepparent as a parent. The court rejected the best interests of the child standard, applicable in conflicts between parents, in favor of a presumption favoring the natural parent rebuttable only if "the child's growth and development would be detrimentally affected by placement with an otherwise fit parent." *Id.* at 647, 626 P.2d at 22. On the facts of *Allen,* the court concluded that the child would be harmed by removal from the household with which he was familiar and the care of his dedicated stepmother. The parental preference used in stepparent versus parent custody cases is discussed *infra* at text accompanying notes 198-215.

157 *See supra* text accompanying notes 144-45.

greater certainty and protection for stepfamily members.[158]

E. Visitation Jurisdiction Under the UMDA

The issue of stepparent visitation rights has arisen in states that have enacted the Uniform Marriage and Divorce Act. The Uniform Act visitation provision deals exclusively with the rights of natural parents.[159] Courts have stretched the statutory language beyond reasonable bounds in order to make stepparent visitation awards.

In *Bryan v. Bryan,*[160] the Arizona Court of Appeals found statutory authority to entertain a stepparent request for visitation privileges at the time of divorce in Uniform Act section 401(d)(1).[161] Section 401(d)(1) enables parents to raise custody issues in dissolution proceedings: "A child custody proceeding is commenced in the [dissolution] court . . . by a parent, by filing a petition . . . for dissolution."[162] The court first held that stepparents may also raise custody issues, provided that the natural parent initiated the dissolution proceeding.[163] The court reasoned that such a broad reading of the statute would protect the welfare

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158 The *Allen* court's holding, that stepparents standing in loco parentis are included under the Uniform Act subsection dealing with parent-initiated dissolution proceedings, has been criticized as unnecessarily broad. One commentator suggests that the court could have relied on the narrower nonparent provisions. *See* Comment, *Jurisdiction, Standing, and Decisional Standards in Parent-Nonparent Custody Disputes—In re* Marriage of Allen, 58 WASH. L. REV. 111, 121-24 (1982). Under subsection (2) of the Uniform Act the petition of the nonparent would confer jurisdiction if the child were not in the physical custody of either parent. *See supra* note 143. The stepmother in *Allen* stayed in the family home with the children following marital separation. The court expressly declined to determine whether the father still had physical custody on these facts. 28 Wash. App. at 645 n.5, 626 P.2d at 21 n.5. Jurisdiction based on parental unsuitability, the additional ground for nonparent-initiated jurisdiction in the Washington statute, was apparently foreclosed by the *Allen* court's statement that the father was not unsuitable as a parent.

159 "A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." UNIF. MARRIAGE AND DIVORCE ACT § 407(a) (1973). In Gribble v. Gribble, 583 P.2d 64 (Utah 1978), the Utah Supreme Court construed a non-Uniform Act provision which provided visitation rights for "parents, grandparents and other relatives." UTAH CODE ANN. § 30-3-5 (1953). The court extended the provision to stepparents choosing to continue an in loco parentis relationship with stepchildren following marriage termination. 583 P.2d at 68. Absent such a broad construction of the word "parent," the Uniform Act visitation section provides no basis for awarding stepparent visitation rights.

160 132 Ariz. 353, 645 P.2d 1267 (Ariz. Ct. App. 1982).

161 *Id.* at 353, 645 P.2d at 1267.

162 UNIF. MARRIAGE AND DIVORCE ACT § 401(d)(1) (1973).

163 It is . . . undisputed that the [natural mother] a "parent" under any reasonable definition of that term, filed the petition for dissolution that began the proceeding below. A literal reading of [this provision] would therefore indicate that the [mother], by filing her petition also commenced a child custody proceeding.

132 Ariz. at 355, 645 P.2d at 1269.

of stepchildren.[164] This protection, however, only extends to cases in which the natural parent initiated the action. It is unlikely that the legislature intended that jurisdiction over stepchildren turn on the procedural posture of the spouses in the dissolution proceeding.

The *Bryan* court next extended the scope of custody jurisdiction under section 401(d)(1) to include the power to grant visitation. According to the court, "[visitation] authority was recognized as an incident of the expressly granted authority to determine matters of custody long before the . . . adoption of the present statute."[165] This construction ignored the fact that a separate section of the Uniform Act expressly treats visitation jurisdiction.[166] The *Bryan* court's determination, that the statute authorizing parent-initiated custody proceedings also confers power to hear stepparent requests for visitation, appears inconsistent with the drafters' intent.

In *Simpson v. Simpson,*[167] the Supreme Court of Kentucky similarly relied upon a custody provision of the Uniform Act as a source of stepchild visitation jurisdiction. In *Simpson,* the stepmother had retained actual custody following separation, and requested legal custody in the dissolution proceeding.[168] She relied upon the Uniform Act provision creating custody jurisdiction in suits initiated by nonparents when the child is not in the physical custody of a natural parent.[169] Because the stepmother did not plead the father's unfitness, however, her request for custody failed as a matter of law.[170] Nevertheless, the court relied upon the custody provision as a basis for considering the stepmother's request for visitation. "Where a nonparent alleges such [an in loco parentis] relationship has been established *in a jurisdictionally viable custody action* the court should hold a hearing to determine whether the granting of visitation privileges to the nonparent would be in the best interest of the child."[171]

The dissenting justices in *Simpson* agreed that "in view of the circumstances of this case it would be desirable that the stepmother con-

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164 The state has a legitimate interest in the welfare of any child whose home is being divided by its laws, and that interest is equally strong regardless of whether the marriage being dissolved is that of both, or only one, of the child's parents. We therefore hold that the proceeding below was a jurisdictionally sound custody proceeding.

Id. at 356, 645 P.2d at 1270.

165 *Id.* at 357, 645 P.2d at 1271.

166 *See* UNIF. MARRIAGE AND DIVORCE ACT § 407(a) (1973).

167 586 S.W.2d 33 (Ky. 1979).

168 *Id.* at 35.

169 *Id.*; *see* UNIF. MARRIAGE AND DIVORCE ACT § 401(d)(2) (1973).

170 *Simpson,* 586 S.W.2d at 35; *see* Chandler v. Chandler, 535 S.W.2d 71, 72 (Ky. 1975) (standard for resolving custody disputes between nonparent and natural parent is unfitness of natural parent).

171 *Simpson,* 586 S.W.2d at 36 (emphasis added).

tinue a relationship with the child."[172] They found no basis in the statute, however, for reaching this "desirable" result.[173] That the *Simpson* court was forced to engage in judicial legislation in order to protect the interests of stepfamily members indicates the need for statutory reform in this area.[174]

F. Desirability of Jurisdiction in Dissolution Proceedings

Analysis of existing case law reveals two types of judicial responses to the lack of clear statutory authority to determine stepchild custody and visitation issues in dissolution proceedings. Some courts have assumed jurisdiction over stepchildren, by ignoring relevant statutes or construing them very broadly, in some cases beyond the limits of legislative intent.[175] Other courts have exercised restraint and denied jurisdiction. This approach results in custody by the natural parent as a matter of law, even when that person is unfit.[176] In addition, this approach denies all stepparent visitation, even when the child's best interests dictate visitation rights.[177] Some judges taking the strict constructionist approach have considered the results "unpalatable" or "undesirable," and have called for legislative reform.[178] Reform of the statutes regulating marriage dissolution would eliminate the judicial dilemma of choosing between these two unsatisfactory approaches to the issue of stepchild jurisdiction.

When children have been living in a de facto family created by their parent's marriage, meaningful parent-child relationships may exist with both spouses at the time of marriage termination. Statutes must recognize this reality and enable courts to protect steprelationships by awarding custody[179] and visitation rights to stepparents in appropriate

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172 *Id.* at 36 (Stephenson, J., dissenting).

173 "There is no statutory provision providing for a separate action for visitation on the part of a nonparent where a parent has custody." *Id.* at 38 (Stephenson, J., dissenting).

174 Other courts have concluded that authority exists to award stepparent custody and visitation in dissolution proceedings without referring to statutes or any other source of subject matter jurisdiciton. *See* Gorman v. Gorman, 400 So. 2d 75, 78 (Fla. Dist. Ct. App. 1981) (custody); Wills v. Wills, 399 So. 2d 1130, 1131 (Fla. Dist. Ct. App. 1981) (visitation); Doe v. Doe, 92 Misc. 2d 184, 192-93, 399 N.Y.S.2d 977, 982-83 (N.Y. Sup. Ct. 1977) (custody); Spells v. Spells, 250 Pa. Super. 168, 172-75, 378 A.2d 879, 881-83 (1977) (visitation).

175 *See, e.g.,* Bryan v. Bryan, 132 Ariz. 353, 355-56, 645 P.2d 1267, 1269-70 (Ariz. Ct. App. 1982) (construing statute authorizing parent-initiated custody jurisdiction to include stepparent-initiated visitation jurisdiction); *see also supra* text accompanying notes 160-66 (discussing *Bryan*).

176 *See, e.g.,* Hartshorne v. Hartshorne, 185 N.E.2d 329 (Ohio Ct. App. 1959); Palmer v. Palmer, 42 Wash. 2d 715, 258 P.2d 475 (1953); *see also supra* text accompanying notes 125-31.

177 *See* Simpson v. Simpson, 586 S.W.2d 33, 36-39 (Ky. 1979) (Stephenson, J.,dissenting); *see also supra* text accompanying notes 172-73 (discussing *Perry* and *Simpson*).

178 *See* Perry v. Superior Court, 108 Cal. App. 3d 480, 485, 166 Cal. Rptr. 583, 586 (1980); Simpson v. Simpson, 586 S.W.2d 33, 39 (Ky. 1979) (Stephenson, J., dissenting); *see also supra* text accompanying notes 140-41, 173 (discussing *Perry* and *Simpson*).

179 When the natural parents have shared legal and physical custody of the child during

cases.[180]

Legislators should also strive to simplify the law regarding custody and visitation.[181] Statutes conferring jurisdiction to decide stepparent rights in dissolution proceedings are the simplest and most appropriate means of protecting the interests of stepfamily members following a family breakdown. In most states, courts are empowered to hear child custody matters in settings other than marriage dissolution. These settings include guardianship, habeas corpus, and dependency and neglect proceedings, as well as cases within the courts' general equitable jurisdiction over minor children.[182] The mere existence of other forums for deciding stepparent claims, however, does not justify withholding jurisdiction in dissolution proceedings.[183]

Allowing stepparent custody claims in dissolution proceedings would erode the legal rights of natural parents. Although the Uniform Marriage and Divorce Act relies upon the doctrine of natural parent rights to limit nonparent-initiated custody proceedings,[184] the principle is not universally accepted.[185] Commentators have argued that the best

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the stepmarriage, the stepparent seeking custody in the dissolution proceeding will encounter serious obstacles. An award of exclusive custody would seriously interfere with the custodial rights of the nonspouse parent, who is not a party to the proceeding, and would therefore be beyond the power of the court. Furthermore, simply substituting the stepparent for the parent may not be possible. Joint custody arrangements generally succeed only when the joint custodians cooperate with each other. The stepparent and nonspouse natural parent may not have a cooperative relationship. These complications argue against allowing stepparent custody claims when the natural parents share custody, but should not bar the courts from considering each case on its merits.

180 The authority created by such legislation would be subject to the limitations imposed by the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.) in cases where a judicial order regarding custody of the stepchild already existed. The U.C.C.J.A. limits the authority of courts in each state to hear custody cases when courts in another state have already asserted jurisdiction. U.C.C.J.A. § 13, 9 U.L.A. 151 (1979).

181 Bodenheimer, *supra* note 122, at 726-34.

182 *See* H. CLARK, *supra* note 9, at 576-81; Bodenheimer, *supra* note 122, at 718-24; Mnookin, *supra* note 122, at 232-44.

183 The suggestion made in the commissioner's note to UNIF. MARRIAGE AND DIVORCE ACT § 401 (1973), that nonparent interests can be protected in dependency or neglect proceedings is not realistic. In order to interfere with parental rights under the dependency and neglect laws, the state generally must satisfy a very strict standard.

Guardianship statutes commonly confer broad jurisdiction over custody issues raised by persons interested in the child. *See* 39 C.J.S. *Guardian & Ward* §§ 21-22 (1976). The stepparent petitioning for guardianship during marriage dissolution may encounter procedural difficulties, however, if different courts have jurisdiction over the two issues.

The habeas corpus proceeding determines whether the person with physical custody of a child is the legal custodian. H. CLARK, *supra* note 9, at 578-80. Like the other bases for custody jurisdiction, however, its limitations make it a poor substitute for raising the issue of stepchild custody during marriage dissolution. *See* Comment, *Child Custody Modification and the Family Code,* 27 BAYLOR L. REV. 725, 729-30 (1975) (discussing 1974 revision of the Texas Family Code limiting standing in habeas corpus proceedings to persons who have legal right to custody).

184 *See supra* text accompanying note 145.

185 *See* McGough & Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-*

interests of the child should control custody determinations, and that the concept of natural parent rights is inconsistent with this principle.[186] In any event, denying a forum for stepparents to claim custody, in order to protect the natural parent's rights, operates improperly to create an *absolute* preference for natural parents. Their interests are properly accommodated in the divorce setting in the substantive standard enunciated for resolving parent-stepparent custody disputes.[187]

In the visitation setting, the parent stands to lose the right to decide who will have access to the child. According to some commentators, the interests of children following family breakdown are best served by protecting the continuity and integrity of the primary custodial relationship.[188] According to this theory, visitation by other adults should not be allowed without the consent of the primary custodian. The laws defining visitation rights for noncustodial parents reject this view. Similarly, when a stepparent has stood in loco parentis, the child's interests require a forum for determining the future relationship between stepparent and child. The court would consider, inter alia, whether a continuing relationship might predictably disrupt the child or the primary custodial relationship. The existence of a forum for stepparent claims might motivate more parents to voluntarily accommodate stepparent visits.[189]

Where the noncustodial natural parent has visitation rights, the court must evaluate the effect of a stepparent visitation order on this additional relationship. Although the dissolution court's order probably cannot affect the noncustodial parent's rights because he or she is not a party to the proceeding, the court must consider the rights of the noncustodial as well as the custodial parent.

The dissent in *Simpson v. Simpson* expressed concern for the custodial spouse arising from the fact that the noncustodial natural parent already had visitation rights.

Third Party Custody Disputes, 27 EMORY L.J. 209, 214 n.24 (1978); Okpaku, *Psychology: Impediment or Aid in Child Custody Cases,* 29 RUTGERS L. REV. 1117, 1123 & n.27 (1976).

186 *See infra* text accompanying notes 214-15.

187 *See infra* text accompanying notes 198-219.

188 *See* J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 116-33 (1979).

189 Another category of nonparents, grandparents, have sought visitation rights. *See, e.g.,* Note, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child,* 26 CATH. U.L. REV. 387 (1977) [hereinafter cited as Note, *Statutory Visitation*]; Note, *Grandparents—Visitation Rights,* 18 J. FAM. L. 857 (1979-80). The judicial and legislative trend has been toward granting courts authority to make grandparent visitation awards, generally according to the best interests of the child. *See* Mirto v. Bodine, 29 Conn. Supp. 510, 294 A.2d 336 (Conn. Super. Ct. 1972); Layton v. Foster, 61 N.Y.2d 747, 460 N.E.2d 1351, 472 N.Y.S.2d 916 (1984); MO. ANN. STAT. § 452.400 (Vernon Supp. 1983); N.J. STAT. ANN. § 9:2-7.1 (West 1976); N.Y. DOM. REL. LAW § 72 (McKinney 1977); OKLA. STAT. ANN. tit. 10, § 5 (West Supp. 1982-83).

> The natural mother of this child already has visitation rights . . . . [E]ven if the stepmother here would not prevail at a hearing, the door is wide open. The father conceivably could spend all his time attending hearings to determine if some other person emotionally attached to the child should have "visitation rights."[190]

The assertion of jurisdiction over visitation claims in *Simpson,* however, extends only to persons standing in loco parentis to the child.[191] Affording this category of nonparents the right to bring visitation claims may complicate the life of the custodial parent to some extent. The denial of jurisdiction over stepchildren, however, protects the custodian's interest in simplicity at the expense of the stepparent and child.

Judicial discretion to make orders regarding future parenting for stepchildren, on the basis of all relevant facts and circumstances, will accommodate the wide variety among modern families. Many families today are reconstituted families. The proper role of the stepparent following marriage dissolution will not be the same in every case. Flat rules that disallow continuing access by the stepparent without consent of the former spouse ignore the child's needs in cases where the relationship is important to the child's welfare. Courts should be empowered to determine issues of stepchild custody and visitation in dissolution cases.

G. Custody and Visitation Jurisdiction upon Death of Natural Parent

When death terminates a stepmarriage, the noncustodial natural parent may seek custody. The parent may request a hearing, pursuant to the continuing jurisdiction of the original dissolution court, or by habeas corpus, or in other proceedings. The courts willingly assume jurisdiction in these parent-initiated custody proceedings.

It remains uncertain, however, whether courts possess authority to

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190 586 S.W.2d 33, 38 (Ky. 1979) (Stephenson, J., dissenting); *see* supra text accompanying notes 167-74 (discussing *Simpson*).

191 586 S.W.2d at 36.

> Viewing a party in loco parentis as having rights equivalent to a natural parent . . . reduces the problems that arise if nonparents generally are given a right to visitation. Nonparent visitation has been criticized because it could interfere with a custodial parent's control if an abundance of relatives and close family friends are allowed visitation. By requiring an initial showing that a nonparent stands in loco parentis many of these claims would be dismissed.

Note, *Visitation for Nonparents: Following the Polestar,* 11 STETSON L. REV. 586, 596-97 (1982) (footnote omitted).

In *In re* Adoption of Children by F., 170 N.J. Super. 419, 406 A.2d 986 (N.J. Super. Ct. Ch. Div. 1979), the court recognized that the stepfamily relationship, although extremely complex, requires the attention and protection of the law. In ordering the adoption of children by their stepfather, the court also provided for visitation by the natural father, contrary to the general rule that adoption totally severs the legal parent-child relationship. *Id.* at 425-26, 406 A.2d at 989.

entertain requests for stepparent visitation when the nonspouse natural parent seeks custody. In *Collins v. Gilbreath,*[192] for example, the Indiana Court of Appeals affirmed a trial court's award of visitation rights to the stepfather in a habeas corpus proceeding brought by the natural father ten days after the mother's suicide. The court reasoned that

> [t]o abrubtly end this close relationship and deny him the privilege of ever seeing the girls again would be unfair and traumatic to both [the stepfather] and the three young girls. The children would in essence lose their second parent in ten days—one by suicide and one by court decree.[193]

The dissent, however, observed that the Indiana visitation statute mentioned only parents and concluded that "[t]he trial court had no statutory or common law authority to award visitation . . . to . . . an unrelated third party."[194]

If the stepparent has retained actual custody following the spouse's death, access to the courts to determine continuing custody rights is generally available.[195] The Uniform Marriage and Divorce Act, for example, includes a basis for child custody jurisdiction on the petition of a nonparent "if [the child] is not in the physical custody of one of his parents."[196] Whether the marriage terminates by death or divorce, however, the stepparent encounters the difficult substantive burden of overcoming a preference for the natural parent.[197]

H. The Substantive Standard in Custody Cases

If the stepparent overcomes the jurisdictional hurdle, he or she faces yet another barrier to asserting custody rights upon termination of the stepmarriage by death or dissolution. As a general principle, cus-

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192 403 N.E.2d 921 (Ind. App. 1980).

193 403 N.E.2d at 923; *see also* Looper v. McManus, 581 P.2d 487 (Okla. Ct. App. 1978) (affirming trial court's sua sponte award of visitation rights to stepmother in proceeding awarding custody to natural mother).

194 403 N.E.2d at 924 (Young, J., dissenting).

195 In Clifford v. Woodford, 83 Ariz. 257, 320 P.2d 452 (1957), the stepfather filed a petition requesting appointment as guardian of his stepdaughters shortly after the father initiated a habeas corpus proceeding in the same court. The Supreme Court of Arizona affirmed the trial court's consolidation of the two proceedings, stating that "[the stepfather] had the *right to have the trial court determine* the question of what would be for their best interests and welfare in this particular litigation. The writ of habeas corpus alone provided adequate legal mechanism for such determination. However, . . . consolidation resulted in no prejudice to either party." *Id.* at 261, 320 P.2d at 455 (emphasis added). The court then affirmed the stepfather's appointment as guardian. *Id.* at 262-66, 320 P.2d at 455-58; *cf. In re* Adoption of Cheney, 244 Iowa 1180, 59 N.W.2d 685 (1953) (setting aside adoption ordered without notification or consent of stepparent). *But cf.* Selanders v. Anderson, 178 Kan. 664, 291 P.2d 425 (1955) (upholding injunction against adoption petition of forum-shopping stepmother).

196 UNIF. MARRIAGE AND DIVORCE ACT § 401(d)(2) (1973); *see supra* text accompanying note 143.

197 *See infra* part II.H.

tody law prefers the natural parent as custodian.[198] This principle operates against the stepparent in contests with the natural parent.[199] In parent versus parent custody disputes, the courts use a "best interests of the child" standard.[200] In parent versus nonparent contests, however, the preference for the natural parent frequently results in a standard weighted in favor of the natural parent.[201]

The weight assigned to the preference for the natural parent varies depending on the jurisdiction and the facts of the case.[202] At one extreme, the presumption in favor of the parent is rebuttable only by proving unfitness. This test considers the merits of the nonparent only if he or she establishes the unfitness of the parent.[203] Some courts give less weight to the preference by looking primarily to the best interests of the child but presuming that the child's best interests are served by granting custody to the natural parent. Under this intermediate standard, the nonparent must prove that he or she is a more suitable custodian than the natural parent.[204] In *Husack v. Husack*,[205] for example, the stepmother prevailed by showing "convincing reasons" why denying custody to the natural parent would serve the best interests of the child.[206]

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198 *See* McGough & Shindell, *supra* note 185, at 212.

199 Stepparents have succeeded in custody battles against *other nonparents* on the basis of an established in loco parentis relationship with the child. *See, e.g., In re* Flasch, 51 N.J. Super. 1, 18-19, 143 A.2d 208, 217 (N.J. Super. Ct. App. Div.) (stepmother versus grandparent), *cert. denied,* 28 N.J. 35, 144 A.2d 736 (1958); *Ex parte* Flynn, 87 N.J. Eq. 413, 416-18, 100 A. 861, 863 (N.J. Ch. 1917) (stepmother versus paternal aunt); *In re* Snyder's Adoption, 403 Pa. 343, 345-47, 169 A.2d 544, 545-46 (1961) (stepmother's petition for adoption following father's death approved as being in the child's best interest, in spite of objection by the child's half-sister).

200 *E.g.,* UNIF. MARRIAGE AND DIVORCE ACT § 402 (1973); *see* Cebrzynski v. Cebrzynski, 63 Ill. App. 3d 66, 72, 379 N.E.2d 713, 717 (1978).

201 Courts have sometimes employed the same parent rights theory in judging nonparent claims to visitation rights. *See* Note, *Statutory Visitation, supra* note 189, at 387-92. However, visitation constitutes less of an intrusion on parent rights, and the best interests standard is frequently used to determine visitation rights of nonparents. *E.g.,* Bryan v. Bryan, 132 Ariz. 353, 645 P.2d 1267 (1982) (child's best interest served by continuation of close relationship with stepfather through visitation); Chodzko v. Chodzko, 66 Ill. 2d 28, 360 N.E.2d 60 (1976) (in grandparent visitation proceedings, parent's natural rights must give way to child's best interest); N.J. STAT. ANN. § 9:2-7.1 (West 1976) (grandparent visitation).

202 *See* H. CLARK, *supra* note 9, at 591-96; Note, *Psychological Parents vs. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution,* 17 J. FAM. L. 545, 548-52 (1978-79); Note, *Child Custody—Rebutting the Presumption of Parental Preference,* 43 MISS. L.J. 247, 247 (1972).

203 *See, e.g.,* Hancock v. Hancock, 198 Ark. 652, 656-57, 130 S.W.2d 1, 3 (1939) (reversing trial court award of custody to stepmother earlier appointed guardian following father's death); *In re* Guardianship of Hight, 194 Okla. 214, 218-19, 148 P.2d 475, 483 (1944) (reversing appointment of stepmother). *But see* Petition of Stuart, 280 N.Y. 245, 250-51, 20 N.E.2d 741, 743-44 (1939) (reversing Appellate Division denial of stepson's petition for stepfather guardianship on ground that father was fit).

204 *See* Note, *Alternatives to "Parental Rights" in Child Custody Disputes Involving Third Parties,* 73 YALE L.J. 151, 154-55 (1963-64).

205 273 Pa. Super. 192, 417 A.2d 233 (1979).

206 The trial court had treated the stepmother as a parent, rather than a third party,

Finally, the court may ignore the fact of biological parenthood in resolving custody issues.[207]

Many courts have been ambiguous concerning the proper standard for resolving custody disputes between parent and stepparent, especially in situations where natural parent rights and the child's best interests appear to conflict. In *Gorman v. Gorman*,[208] for example, a Florida appellate court applied the best interests of the child standard, prescribed by statute for parent versus parent contests, in a stepmarriage dissolution case.[209] The court simultaneously acknowledged the jurisdiction's preference for the natural parent, stating that "courts should not lightly encroach on the rights of natural parents to have the custody, care and control of minor children, especially when such parents are found to be fit."[210] The trial court had found the father to be a fit parent but awarded custody to the stepmother in order to serve the child's best interests.[211] According to the *Gorman* court, "the facts of this case illustrate that there can be conflicts between what is reasonably perceived by a trial judge to be in the child's best interests and a natural parent's preferential right to custody of a child."[212] Not content with simply balancing these competing interests in favor of the child, however, the appellate court observed that "[i]n finding the father a fit and proper parent the trial judge was charitable. We do not hold the trial judge in error in making this finding, but everybody needs to be loved and not rejected . . . ."[213] Thus, after adopting the best interests standard of parent versus parent disputes, the court wavered by acknowledging a special interest of the parent. The court declined to assign decisional weight to that special interest, however, when a conflict with the child's best interests emerged.

The potential for conflict between a natural parent preference and the best interests of the child, realized by the *Gorman* court, has led some commentators to reject the preference.[214] According to these critics, the child's welfare must be the guiding principle in decisionmaking for children, subordinating all other interests.[215]

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because she had acted as the child's mother during marriage to the father, and awarded her custody according to the best interests standard. *Id.* at 195 n.4, 417 A.2d at 235 n.4. The Pennsylvania Superior Court in *Husack* concluded that the stepmother passed the stricter test for nonparents and affirmed the award in her favor. *Id.* at 197-98, 417 A.2d at 236.

207 *See* Stanley D. v. Deborah D., 467 A.2d 249, 250 (1983) (awarding joint legal custody to natural mother and stepfather, and physical custody to stepfather).

208 400 So. 2d 75 (Fla. Dist. Ct. App. 1981).

209 *Id.* at 77.

210 *Id.*

211 *Id.*

212 *Id.* at 77-78.

213 *Id.* at 78.

214 H. CLARK, *supra* note 9, at 592 n.6 (collecting authority).

215 *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 188, at 105-11; McGough & Shindell, *supra* note 185, at 241-44.

Most courts, however, continue to assign decisional weight to the fact of biological parenthood in custody disputes between parent and nonparent.[216] When the nonparent is a stepparent who has shared a family household with the child, the court should carefully weigh the competing interests. In cases arising upon dissolution of marriage, important factors will include the quality of the child's relationship with each adult and the length of time the stepparent and child lived together.[217] When the noncustodial parent seeks custody following death of the stepparent's spouse,[218] the additional factor of stability and continuity of the child's primary relationships may operate to benefit the stepparent.[219] The stepparent will succeed if he or she can satisfy the standard established in the jurisdiction for overcoming the natural parent preference.

CONCLUSION

The existing laws regarding stepfamilies inadequately protect family interests. For the most part, the legal response to this increasingly common alternative to the biological nuclear family has been inattention.

In the support area, the voluntary common law in loco parentis doctrine and the limited duty statutes fail to address the variety of family contexts in which the question of stepchild support may arise. Laws requiring the stepparent to share the child support duty of his or her spouse during marriage would better accommodate the financial interests of family members. Following marriage termination the derivative model of the stepparent-child relationship results in automatic termination of all financial responsibility. The derivative model, widely accepted by courts and legislatures, ignores the fact that many times family relationships have economic ramifications for the parties beyond marriage termination. The need exists for rules enabling the courts to protect the economic interests of family members in each case after the stepmarriage ends.

Legislative inattention has generated great ambiguity regarding the courts' authority to consider future parenting of stepchildren at the time

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216 *See supra* text accompanying notes 198-201.

217 Under the strictest fitness test, the only relevant factor is the fitness of the natural parent.

218 Efforts by the decedent parent to appoint the surviving spouse-stepparent as legal guardian of the children will generally fail if the other natural parent objects. The intention of the decedent cannot affect the presumption that the child belongs with the surviving parent. *E.g., In re* Keyser's Will, 113 N.Y.S.2d 419, 422 (Sur. Ct. 1951) (unfitness standard); *In re* Kosnicki, 468 P.2d 818, 822-23 (Wyo. 1970) (unfitness standard). *But see* Wilkinson v. Deming, 80 Ill. 342, 343 (1875) (because "[b]y the [divorce] decree, the infant is no longer the child of the divorced father, but is entirely under the control of the mother . . . ," the mother may appoint a guardian in her will).

219 *See* Cebrzynski v. Cebrzynski, 63 Ill. App. 3d 66, 73, 379 N.E.2d 713, 718 (1978).

of family breakdown. The reported cases illustrate the hardship that can result from ignoring the needs of stepfamily members. Legal recognition of the complex family network created by steprelationships necessarily complicates the judicial role and the legal issues. Modern families are more varied and often more complex than in the past. The family law must not adhere to the simplistic model of the biological nuclear family in all cases. Lawmakers must clearly establish the courts' jurisdiction over stepfamily members at the time of stepfamily breakdown.

Once jurisdiction is established, a standard must be clearly articulated for resolving the issue of future parenting arrangements for stepchildren at the time of divorce. Courts should employ in this setting the general standard for resolving custody disputes between parent and nonparent. Courts currently resolve conflicts between the noncustodial parent and stepparent, arising upon death of the custodial parent, according to this standard.

Although the law authorizes marriage by parents with children, it fails to address adequately the significance of family relationships between stepparents and stepchildren in determining custody, visitation, and support arrangements. In view of the increasing number of stepfamilies in the United States, lawmakers must seriously consider how best to achieve the family law goals of certainty and protection for stepfamily members.