2012

The Legal Relationship Between Cohabitants and Their Partners' Children

Cynthia Grant Bowman
Cornell Law School, cgb28@cornell.edu

The Legal Relationship Between Cohabitants and Their Partners' Children

*Cynthia Grant Bowman**

This Article argues that U.S. law should give protection to relationships between cohabitants and their partners' children when necessary to avoid the economic and emotional trauma that may be caused by separation of the child from a member of his or her household if the cohabitation ends. After examining the social science literature about the welfare of both stepchildren and children of cohabitants and the inadequate legal treatment of custody, visitation, and child support issues under current law, the author recommends that cohabiting stepparents (1) be given standing to seek custody if they have acted as de facto parents, with a presumption in favor of custody by the stepparent when the cohabitant who is the child's biological parent has died and the possibility of joint custody in other cases; (2) be awarded visitation if both the ex-cohabitant and child desire it; and (3) be obligated to pay child support for the child if the cohabitation dissolves after a period of two years or more.

INTRODUCTION

The remarkable increase in cohabitation over the last few decades, both in the United States and in other countries, has created a variety of new family relationships, not only between the adults involved but also between the adults and their children. U.S. law has failed to respond to these new circumstances, which have profound effects for the individuals involved. In this Article, I focus on just one of those relationships: the relationship between a child living in the household of a cohabiting couple and the cohabitant who is in a position analogous to that of a stepparent — the partner of the child's biological parent. If the cohabitants are of the same sex, this topic has been

* Dorothea S. Clarke Professor of Law, Cornell Law School, Ithaca, NY.

extensively explored both in litigation and scholarly literature.[1] My focus will therefore be on children living with opposite-sex cohabiting couples, which has not been the subject of a great deal of discussion. I limit my discussion here to issues of custody, visitation, and child support, and will address other issues, such as inheritance and receipt of government benefits, in future work.

Why is this an issue with which family law should be concerned? Perhaps the easiest way to answer this question is to contemplate what scenarios occur if the nonbiological children of cohabitants are considered, as they are now, to be legal strangers to the cohabitant in the position of a stepparent to them. If the child's biological custodial parent dies, the surviving cohabitant has little chance of obtaining custody unless he or she works out an informal agreement with the child's noncustodial biological parent. If the issue is adjudicated, the child will almost certainly be transferred to the custody of the other biological parent, perhaps living with a biologically related person who is truly a stranger, rather than allowed to remain in the household where he or she has been living.[2] If the cohabiting relationship terminates by dissolution rather than death, moreover, the child has no legal right to any contact with a person who may have long been her primary caretaker, the only father she ever knew, or with children she considers brothers and sisters. If the child has been living with the mother's cohabiting partner, both mother and child are likely to have become economically dependent on that partner, and separation of the adult cohabitants can amount to a sudden and immense economic disaster for the child.

In Part I below, I discuss the relationship between cohabitants and the children in their households and the effects that relationship may have upon the children's welfare. There is a limited amount of information available on this topic from studies of cohabiting families, but a large social science literature exists about stepfamilies headed by married couples, about the relationship between stepparents and stepchildren, and about how children fare in these families. The residential stepparent-stepchild relationship is the closest analogy to that between a cohabitant and his or her partner's child, with one difference: the stepparent has legally enforceable obligations to the child's parent and the cohabitant does not. I will draw upon the literature about married stepparents to supplement what we know about cohabitants' children. After reaching some conclusions about whether this relationship

---

1 *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 85-88 (2008).

2 Sarah E.C. Malia, *Balancing Family Members' Interests Regarding Stepparent Rights and Obligations: A Social Policy Challenge*, 54 FAM. REL. 298, 304 (2005).

is one of value, I explore in Part II the current treatment in U.S. law of both married and unmarried stepparent-stepchild relationships and the inadequacy of this treatment.

Before suggesting appropriate legal rules to govern this situation, I review in Part III various recommendations that have been made in the literature about married stepparents, as well as the approaches taken in some other countries. Finally, I discuss what the legal treatment of cohabitants' relationships with their "stepchildren" should be. Unlike the approach suggested in my previous writing,[3] here I argue that a more nuanced approach may be desirable where children are involved, one that is sensitive to the diversity of relationships likely to exist between a cohabitant and a nonbiological child living in his or her household.

I. WHAT DO WE KNOW ABOUT THE RELATIONSHIP BETWEEN COHABITANTS AND THEIR "STEPCHILDREN"?

A. Statistics About Cohabitants with Children in Their Households

Although the census regularly and systematically underestimates the numbers of cohabitants and their children,[4] it is clear that this new family form is shared by large and increasing numbers of people in the United States. The 2000 census reported that there were 4.9 million unmarried-partner households, and thus at least ten million people living with a person of the

---

3 I have previously argued that cohabitants should be treated as though they were married after they have lived together for two years and/or have a child in common, *see* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 224-28 (2010); *see also* Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 45-48 (2007).

4 The census counts households rather than couples, so if two unmarried-partner couples reside in the same household, only one would be counted, or if a son and his unmarried partner resided with his married parents, only a married household would be counted, U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 2 (2003), *available at* http://www.census.gov/prod/2003pubs/censr-5.pdf. In addition, cohabitants responding to survey questions do not always understand that "unmarried partner" refers to their living arrangement, Wendy D. Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data*, 67 J. MARRIAGE & FAM. 989, 999-1000 (2005) (drawing on 115 in-depth interviews with young working-class cohabitants).

opposite sex as an unmarried partner.[5] The 2010 census indicated that this number had increased to 7.529 million couples.[6]

Children live in about forty percent of all cohabiting households.[7] By 2009, it was possible to estimate the number of these children at 4,134,000, or almost six percent of all children in the United States.[8] About half are the biological children of both cohabitants, and about half are children of one of the cohabitants, typically (seventy-five percent) of the woman.[9] The statistics differ dramatically by race and ethnic group. One 1996 study reported, for example, that eight percent of Puerto Rican children, five percent of Mexican American and Black children, and three percent of non-Hispanic white children live in cohabiting families.[10]

B. The Impact of Cohabitation on Children in These Households

The fact that a child's parent is a cohabitant has a variety of impacts on a child's life, both economic and psychological. Because the literature studying these effects is in its infancy, I supplement it here with insights gleaned from the voluminous literature about stepfamilies.[11]

First, women and children gain by the addition of a cohabitant's income to the household, a virtually identical income premium from either cohabitation or marriage — a gain of roughly fifty-five percent in needs-adjusted total

---

5 U.S. CENSUS BUREAU, *supra* note 4, at 1.

6 *America's Families and Living Arrangements, 2010*, U.S. CENSUS BUREAU, tbl. UC1: Opposite Sex Unmarried Couples by Labor Force Status of Both Partners: 2010, http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html (last visited Aug. 1, 2011).

7 U.S. CENSUS BUREAU, *supra* note 4, at 10 (compared with forty-six percent of married-couple households that include children under eighteen).

8 *America's Families and Living Arrangements, 2009*, U.S. CENSUS BUREAU, tbl. C3: Living Arrangements of Children Under 18 Years and Marital Status of Parents, by Age, Sex, Race, and Hispanic Origin and Selected Characteristics of the Child for All Children: 2009, http://www.census.gov/population/www/socdemo/hh-fam/cps2009.html (last visited Aug. 1, 2010).

9 *Id.* (for 2,120,000 children, the parent is the other partner; for 2,013,000, the other partner is not the parent).

10 Wendy D. Manning & Daniel T. Lichter, *Parental Cohabitation and Children's Economic Well-Being*, 58 J. MARRIAGE & FAM. 998, 1002-03 (1996).

11 Research published about stepfamilies tripled during the 1990s, Susan L. Pollet, *Still a Patchwork Quilt: A Nationwide Survey of State Law Regarding Stepparent Rights and Obligations*, 48 FAM. CT. REV. 528, 529 (2010) (discussing the proliferating literature about stepfamilies).

family income.[12] If the cohabiting relationship ends, women cohabitants lose about one third of their household income, leaving them with levels of household income similar to that of divorced women.[13] The impact is particularly severe upon African American and Hispanic women and their children.[14] Taking the income of cohabitants living in a household into account makes a dramatic difference in the official poverty statistics. In 2000, for example, 39.7% of children living with cohabiting couples were reported to be living in poverty, but this fell to 20.1% if the cohabiting partner's income was taken into account.[15] In other words, cohabitation substantially reduces the numbers of children living in poverty.[16]

A serious problem for children living in these households is that cohabiting unions are less stable than marriages, so the improvement in economic situation may not be long-lasting. Fifty percent of children living with cohabitants will experience the dissolution of their parents' relationship by the time they are five (versus fifteen percent of children of married parents), and two thirds by the time they are ten.[17] Again, the likelihood of disruption varies by subgroup, with forty percent of Hispanic and non-Hispanic white children born to cohabiting couples and sixty percent of comparable African American children confronting this loss by age five.[18] While some part of the difference

---

12 Audrey Light, *Gender Differences in the Marriage and Cohabitation Income Premium*, 41 DEMOGRAPHY 263, 279 (2004). One study reports that children of divorced parents experience an increase of about $6000 in their median adjusted family income if their custodial parent *either* remarries or cohabits, Donna Ruane Morrison & Amy Ritualo, *Routes to Children's Economic Recovery After Divorce: Are Cohabitation and Remarriage Equivalent?*, 65 AM. SOC. REV. 560, 570 (2000).

13 Sarah Avellar & Pamela J. Smock, *The Economic Consequences of the Dissolution of Cohabiting Unions*, 67 J. MARRIAGE & FAM. 314, 324 (2005).

14 *Id.*

15 Daniel T. Lichter, Zhenchao Qian & Martha L. Crowley, *Child Poverty Among Racial Minorities and Immigrants: Explaining Trends and Differentials*, 86 SOC. SCI. Q. 1037, 1046-47 (2005).

16 While the addition of a cohabiting stepfather makes a substantial difference to a child's economic welfare, the addition of a stepmother may not be as economically beneficial because of the difference in earning capacity between women and men resulting both from structural discrimination and the division of child care responsibilities, *see* Avellar & Smock, *supra* note 13, at 325.

17 Wendy D. Manning, Pamela J. Smock & Debarun Majumdar, *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 POPULATION RES. & POL'Y REV. 135, 136 (2004).

18 *Id.*; *see also* Cynthia Osborne, Wendy D. Manning & Pamela J. Smock, *Married and Cohabiting Parents' Relationship Stability: A Focus on Race and*

in stability between married and cohabiting couples may be attributable to economic factors, there may also be effects of family complexity; blended families can be quite stressful. Second and subsequent marriages, similarly, are more unstable than first marriages, although not as unstable as cohabitation, with sixty percent of remarriages ending in divorce.[19] Transitions in living arrangements are emotionally stressful for children.[20]

Social scientists have only recently turned their attention to studying the psychological, emotional, and educational effects upon children living in cohabiting households and comparing them with children living in married or single-parent households. Many of these studies reach conflicting conclusions.[21] Moreover, most studies of cohabitants and their children do not control for the large number of variables other than family form that may explain these differences. For example, one 2003 study of adolescents reported that teens living with cohabiting stepparents confront a variety of disadvantages compared to those living with two biological married parents, such as higher delinquency scores and lower grades.[22] However, most of these differences were explained by socioeconomic factors like income, race, ethnicity, and parent's education.[23] Given the inconclusive nature of studies about cohabitants, I supplement it with what we know about stepfamilies.

Ethnicity, 69 J. MARRIAGE & FAM. 1345, 1361 (2007) (finding that children born to cohabiting versus married parents have a 184% higher risk of their parents' separating by the time they are three years old).

19 Pollet, *supra* note 11, at 529. Between fifty-seven percent and seventy-six percent of cohabiting unions break up within ten years, varying by race, ethnic group, and employment status, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, NAT'L CENTER FOR HEALTH STATISTICS, COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES: DATA FROM THE NATIONAL SURVEY OF FAMILY GROWTH 17 fig. 17 (2002) (defining breakup as either of the cohabitation or of a marriage subsequent to cohabitation).

20 *See, e.g.*, Manning, Smock & Majumdar, *supra* note 17, at 136; Jay D. Teachman, *The Childhood Living Arrangements of Children and the Characteristics of Their Marriages*, 25 J. FAM. ISSUES 86, 91 (2004) (and articles cited therein).

21 *See* Marion C. Willetts & Nick G. Maroules, *Parental Reports of Adolescent Well-Being: Does Marital Status Matter?*, 43 J. DIVORCE & REMARRIAGE 129, 133 (2005) (describing multiple conflicting studies on all these topics).

22 Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 885-86, 888 (2003).

23 *Id.* at 891. Parental income has been shown to account for fifty percent of the negative effects of divorce upon children, *see* Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 LAW & POL'Y 87, 94 (2004).

Stepfathers are similar to cohabitants in the economic advantage they confer upon both the new wife and her children; thus similar problems are presented if stepfamilies dissolve.[24] Studies have also shown that stepchildren do not fare as well as biological children in a number of ways.[25] For example, significantly less money is invested in the college education of stepchildren.[26] There is also evidence that stepmothers do not invest as much in their stepchildren as they do in their own biological children if the stepfamily is a "blended" one.[27]

Stepparents are a very disparate group — male and female, residential and nonresidential, having their own children either by previous unions or together.[28] The quality of a stepparent-stepchild relationship varies not only with individual characteristics of the two parties, but also with the age of the child at the time of the remarriage and the length of time the two have lived together.[29] In other words, the younger a child at the time a stepparent enters his

---

24 *See, e.g.*, David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" After Divorce*, *in* DIVORCE REFORM AT THE CROSSROADS 102, 107 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Bridget Freisthler et al., *It Was the Best of Times, It Was the Worst of Times: Young Adult Stepchildren Talk About Growing Up in a Stepfamily*, 38 J. DIVORCE & REMARRIAGE 83, 92-93 (2003).

25 *See, e.g.*, Eirik Evenhouse & Siobhan Reilly, *A Sibling Study of Stepchild Well-Being*, 39 J. HUM. RESOURCES 248 (2004). Sociobiologists and others also claim that stepparents are significantly more likely to abuse their stepchildren than biological parents are, *see, e.g.*, Martin Daly & Margo Wilson, *An Assessment of Some Proposed Exceptions to the Phenomenon of Nepotistic Discrimination Against Stepchildren*, 38 ANNALES ZOOLOGICI FENNICI 287 (2001). I omit discussion of studies on this topic because they appear to be heavily ideological and inconclusive, *see* Francesca Adler-Baeder, *What Do We Know About the Physical Abuse of Stepchildren? A Review of the Literature*, 44 J. DIVORCE & REMARRIAGE 67 (2006); Johanna Nordlund & Hans Temrin, *Do Characteristics of Parental Child Homicide in Sweden Fit Evolutionary Predictions?*, 113 ETHOLOGY 1029 (2007).

26 Keith Zvoch, *Family Type and Investment in Education: A Comparison of Genetic and Stepparent Families*, 20 EVOLUTION & HUM. BEHAV. 453, 461-62 (1999).

27 Maria Schmeeckle, *Gender Dynamics in Stepfamilies: Adult Stepchildren's Views*, 69 J. MARRIAGE & FAM. 174, 182-83 (2007). Men, by contrast, appear to invest more in the child or children of their current mate, those with whom they reside, *id.*; *see also* Kermyt G. Anderson et al., *Paternal Care by Genetic Fathers and Stepfathers I: Reports from Albuquerque Men*, 20 EVOLUTION & HUM. BEHAV. 405 (1999).

28 Chambers, *supra* note 24, at 103-08.

29 *See, e.g.*, *id.* at 104-06; Constance R. Ahrons, *Family Ties After Divorce: Long-Term Implications for Children*, 46 FAM. PROCESS 53, 61 (2006); Maria

or her life, the more likely that the two will develop a strong bond. Adolescent children are difficult for a stepparent to bond with, and there are indications that they tend to fare worse in stepfamilies in general.[30] Similarly, studies of children living with cohabitants show that the impact of cohabitation varies with the age of the child, with adolescents experiencing more emotional and behavioral problems and six- to eleven-year-olds experiencing lower levels of engagement in school, after controlling for parental economic resources.[31]

The quality of the stepparent-stepchild relationship can also vary based on the degree of involvement of the child's nonresidential parent. In this and in other respects, stepfathers tend to have an easier time than stepmothers. Their counterparts, noncustodial fathers, play a peripheral role in most children's lives and may become even less active after the mother remarries.[32] Less is expected of stepfathers than of stepmothers, given widespread cultural expectations of the role of a mother within a family; this works to the advantage of stepfathers in entering this new relationship, which it is important to build slowly.[33] The more detached parenting style of fathers and of stepfathers can assist in this transition.[34] Yet stepfathers are a varied group in this respect as well. Some choose to become very involved in the lives of their stepchildren, and may even come to replace the natural father in the child's life if the noncustodial parent plays little role in it and the new marriage lasts a considerable period of time.[35] Other stepparents, of whichever sex, choose to remain distanced

---

Schmeeckle et al., *What Makes Someone Family? Adult Children's Perceptions of Current and Former Stepparents*, 68 J. MARRIAGE & FAM. 595, 597-98 (2006); *see also* Philip A. Fisher et al., *Parental Monitoring of Children's Behavior: Variation Across Stepmother, Stepfather, and Two-Parent Biological Families*, 52 FAM. REL. 45 (2003) (finding that monitoring, an indicator of positive child outcomes, became more common in stepfather families over time).

30 *See* Kyrre Breivik & Dan Olweus, *Adolescents' Adjustment in Four Post-Divorce Family Structures: Single Mother, Stepfather, Joint Physical Custody and Single Father Families*, 44 J. DIVORCE & REMARRIAGE 99 (2006).

31 Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351, 364 (2004).

32 MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT 127-28 (1999); Malia, *supra* note 2, at 305.

33 Anne C. Bernstein, *Women in Stepfamilies: The Fairy Godmother, the Wicked Witch, and Cinderella Reconstructed*, *in* FAMILY IN TRANSITION 205, 207-09 (Arlene S. Skolnick & Jerome H. Skolnick eds., 11th ed. 2001); Schmeeckle, *supra* note 27, at 178-79.

34 Bernstein, *supra* note 33, at 209.

35 Eric G. Andersen, *Children, Parents, and Nonparents: Protected Interests and*

from their partner's child, especially if that child was an adolescent at the time of the remarriage.[36]

Stepmothers are much rarer than stepfathers (eighty-six percent of residential stepparents are male and, as noted above, seventy-five percent of cohabiting stepparents).[37] The role of a stepmother is very challenging, in part because noncustodial mothers typically play a larger role in their children's lives.[38] The continuing presence of two mothers, with all of the cultural expectations placed upon mothers, can present not only a conflictual situation for the two women but also a conflict of loyalty for the child.[39] Moreover, our societal assumptions about "mothering" result in more intensive interaction with the stepchild, increasing the potential for conflict.[40]

In short, the relationships between children and their stepparents clearly differ in a number of ways from the relationships children have with parents with whom they have lived since birth. This is a disadvantage stepchildren share with children both of single mothers and of cohabitants.[41] However, large numbers of American children no longer live in married families with their biological parents, and stepfamilies of various sorts are currently the fastest growing family form and include the largest group of residential parents.[42]

It is frequently assumed that the stepparent-stepchild relationship will simply disappear if the parent's marriage dissolves. Studies of stepfamilies across time show that this is not necessarily true. Although some stepchildren no longer think of their former stepparents as part of their family system after divorce, for others this relationship continues to be important.[43] Its

---

Legal Standards, 1998 BYU L. REV. 935, 963; *see also* LAWRENCE H. GANONG & MARILYN COLEMAN, STEPFAMILY RELATIONSHIPS: DEVELOPMENT, DYNAMICS, AND INTERVENTIONS 128-30 (2004).

36 Chambers, *supra* note 24, at 106; Pollet, *supra* note 11, at 530.

37 Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 FAM. L.Q. 227, 249 (2002); *see also supra* text accompanying note 9.

38 LAWRENCE H. GANONG & MARILYN COLEMAN, REMARRIED FAMILY RELATIONSHIPS 78 (1994).

39 *Id.*; Bernstein, *supra* note 33, at 208-09.

40 Bernstein, *supra* note 33, at 209; Schmeeckle, *supra* note 27, at 179.

41 Brown, *supra* note 31, at 364 (child outcomes are similar whether a parent remarries or forms a cohabiting stepfamily).

42 MASON, *supra* note 32, at 120; Lynn D. Wardle, *The Evolving Rights and Duties of Step-Parents: Making New Rules for New Families*, *in* PARENTHOOD IN MODERN SOCIETY: LEGAL AND SOCIAL ISSUES FOR THE TWENTY-FIRST CENTURY 377 (John Eekelaar & Petar Sarcevic eds., 1993).

43 *Compare* Jason D. Hans et al., *Financial Responsibilities Toward Older Parents*

continuation, unsurprisingly, appears to depend upon the length of the relationship, the age of the child at its initiation, the strength of the bond formed, and the nature of the divorce.[44] Even if the child's parent goes on to marry again, it is important in many cases to protect these relationships; doing so can preserve important emotional and material resources derived by stepchildren from them.[45] Contrary to the exclusive parenthood assumption underlying U.S. family law, additional adults in a child's life can be valuable in many ways; and it is now commonly accepted that children are able to adjust to multiple "parents" — indeed, that those relationships may prove helpful or essential to their needs.[46]

II. Current Legal Treatment of Married and Cohabiting Stepparents with Respect to Custody, Visitation, and Child Support

Because cohabiting relationships can be valuable to children living in these families, I argue that U.S. family law should protect these relationships with respect to custody, visitation, and child support. Before doing so, in this Part, I examine how cohabiting stepparent-stepchild relationships are treated under current law and what the typical results of that treatment are. I also discuss how current law treats residential stepparents and how their legal status has begun to change, although it remains precarious in most states.

A. Unmarried and Married Stepparents Under Current U.S. Law: Custody

Married and unmarried stepparents confront substantial obstacles to continuing their relationship with their partner's child if the natural parent dies or their relationship dissolves. Custody is virtually impossible to obtain. Cases in which cohabitants petition for custody typically result in almost peremptory

---

and Stepparents Following Divorce and Remarriage, 30 J. Fam. Econ. Issues 55 (2009), *with* Schmeeckle et al., *supra* note 29.

44 Ahrons, *supra* note 29, at 60-61; David R. Fine & Mark A. Fine, *Learning from Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies*, 97 Dick. L. Rev. 49, 65 (1992); Lawrence Ganong & Marilyn Coleman, *Obligations to Stepparents Acquired in Later Life: Relationship Quality and Acuity of Needs*, 61B J. Gerontology S80, S86-87 (2006).

45 Freisthler et al., *supra* note 24, at 98-99.

46 Malia, *supra* note 2, at 308; Pollet, *supra* note 11, at 533. Aging former stepparents may also derive benefits from continuing this relationship, *see* Hans et al., *supra* note 43.

denial.[47] Unless a stepparent has adopted his or her stepchild, which is rare,[48] the stepparent-stepchild relationship has been regarded as derivative of the relationship to the other parent and thus not to survive termination of the marriage.[49] Appellate courts have repeatedly reversed trial court awards of custody to stepparents.[50] The reasons for doing so include the strong preference, or presumption, for custody in a fit natural parent; American law is also very protective of the rights of noncustodial parents yet reluctant to recognize more than two parents.[51]

To assert a claim to custody, a stepparent must first establish standing based either on a state statute concerning third-party custody or by showing that he or she is a psychological or *de facto* parent to the child, or stands *in loco parentis*, all of which require the stepparent's intentional assumption of an active parental role in the child's life and the existence of a parent-child relationship between them.[52] After establishing standing, the stepparent must still defeat the parental presumption, which can be difficult to do in the absence of a finding of parental unfitness. Although developing case law in some areas indicates that this presumption may be rebutted by showing detriment to the child if not placed in the custody of the stepparent, in other states, a court may simply deny standing to a stepparent. For example, in a 2001 New York case, a nonbiological father had lived with a young child and the child's mother for six years, during which they had formed a close and loving relationship, but the court found that he did not even have standing to be heard on the question of custody.[53]

---

47 *See, e.g.*, Engel v. Kenner, 926 S.W.2d 472 (Mo. Ct. App. 1996); *In re* Custody of Dombrowski (Dombrowski v. Goodright), 705 P.2d 1218 (Wash. Ct. App. 1985); Van v. Zahorik, 597 N.W.2d 15 (Mich. 1999); *In re* Nelson, 825 A.2d 501 (N.H. 2003).

48 Kathleen A. Lamb, *"I Want to Be Just Like Their Real Dad": Factors Associated with Stepfather Adoption*, 28. J. FAM. ISSUES 1162, 1183 (2007).

49 June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1312-13 (2005).

50 *See, e.g.*, Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 63-64 (1984).

51 Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 84-88 (2006). Mahoney opines that courts simply give up in the face of the diversity of stepfamily relationships, despairing of finding a rule that could apply to them all, *id.* at 97-100.

52 *Id.* at 100; Malia, *supra* note 2, at 303.

53 Multari v. Sorrell, 731 N.Y.S.2d 238 (N.Y. App. Div. 2001); *see also* Lawrence Schlam, *Third-Party "Standing" and Child Custody Disputes in Washington:*

Courts have nonetheless found ways to award custody to stepparents, both married and unmarried, in extraordinary cases where a child's welfare demands this result. The case most frequently cited as an example is *In re Allen*,[54] a 1981 case in which a married stepmother was awarded custody of her deaf stepson without a finding that the biological parents were unfit. Neither his divorced parents nor his grandparents appeared capable of dealing appropriately with his disability, but his stepmother taught him sign language, learned it herself, and found him special educational training, as a result of which he flourished.[55] In the custody contest that accompanied the couple's separation after four years of marriage, the court awarded custody to the stepmother based on the best interest of the child. The court of appeals affirmed, but held that the best interest standard was not appropriate in a case involving a nonparent, instead making a kind of intermediate finding that the father was unsuitable to parent this particular child with his special needs and the child's development would be detrimentally affected by placement with him.[56] Thus custody was awarded to the stepmother without terminating the father's relationship to his son. The outcome of this case, commentators agree, was a good one, but the judge was stretching the law to reach it.[57]

Similarly, a cohabiting stepmother who had been the primary caretaker of her former partner's diabetic daughter for six years was awarded custody in a North Carolina case because neither the father nor his elderly parents were able to care appropriately for her diabetes.[58] (The child's biological mother had been in a comatose and vegetative state since the birth.[59]) Again, the court clearly was reaching beyond accepted legal categories to avoid what it considered a tragic outcome, awarding custody without requiring

---

Non-Parent Rights — Past, Present, and . . . Future?, 43 GONZ. L. REV. 391, 445-46 (2007-2008) (discussing approaches taken by different states).

54 *In re* Allen, 626 P.2d 16 (Wash. Ct. App. 1981).

55 *Id.* at 19-20.

56 *Id.* at 22-23.

57 Katharine T. Bartlett, *Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 916-17 (1984); Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 195-98 (1993). Revisiting *Allen* in a 2005 case involving the parental rights of a nonbiological lesbian mother, the Washington Supreme Court interpreted it instead as a precursor of the equitable *de facto* parent doctrine adopted in the later case, but subsequently refused to extend the doctrine to stepparents! *See In re* Parentage of L.B., 122 P.3d 161, 168 (Wash. 2005) (en banc); *In re* Parentage of M.F., 228 P.3d 1270 (Wash. 2010) (en banc) (holding that *de facto* parent doctrine does not apply to stepparents).

58 Ellison v. Ramos, 502 S.E.2d 891, 896-97 (N.C. Ct. App. 1998).

59 *Id.* at 892.

the establishment of standing under a statute or equitable principle such as estoppel or *de facto* parenthood and without a hearing to determine that the father was unfit. More recently, other courts have applied a similar standard in stepparent custody cases where the threatened harm to the child was not physical but purely emotional in nature — neither the best interest test appropriate to custody contests between two biological parents nor the unfitness standard traditionally required to deprive a natural parent of custody.[60]

In short, whether it involves stretching the law or developing a new and intermediate standard, courts do in rare cases award custody to a stepparent. This is most likely when, for example, a natural parent has left a child in the custody of the stepparent for a lengthy period or when a mother has allowed her husband to believe that he was the child's biological parent and he has played an active parenting role since birth.[61] Courts also appear to be more sympathetic to stepparent claims in cases where the child has been living with a natural parent and a stepparent for some time and the natural parent dies.[62] But the case law is conflicting and varies from state to state.[63]

---

60 *See, e.g.*, Kinnard v. Kinnard, 43 P.3d 150, 153-54 (Alaska 2002) (awarding joint custody to a stepmother who had served as a child's "psychological parent" during her six-year marriage to the girl's father because to sever the relationship would cause severe harm to the child).

61 Price v. Howard, 484 S.E.2d 528 (N.C. 1997) (holding that a father who had been told, falsely, that he was the child's biological father, and to whose care the mother essentially abandoned the child for several years, may be given custody based on the best interest of the child); *see also* Bupp v. Bupp, 718 A.2d 1278 (Pa. Super. Ct. 1998).

62 *See, e.g.*, Tailor v. Becker, 708 A.2d 626 (Del. 1998) (decided under a Delaware statute that mandates use of the best interest standard in cases involving death of the natural parent); *see also* Kimberly R. Lusk, *What Rights Do You Have to My Child? Analysis of Stepparent Visitation Rights*, 23 CHILD. LEGAL RTS. J. 21 (2003). *But see* Dodge v. Dodge, 505 S.E.2d 344 (S.C. Ct. App. 1998) (awarding custody of the child to the biological father after the mother's death); Simons v. Gisvold, 519 N.W.2d 585 (N.D. 1994) (affirming an award of custody to the natural mother after the child had lived almost from birth with the stepmother and natural father, who had just died, on grounds that the mother had always maintained a relationship with the girl and thus she would not suffer serious detriment if removed from her father's home and transferred to the custody of her mother).

63 *See, e.g.*, Levy, *supra* note 57, at 196.

B. Unmarried and Married Stepparents Under Current U.S. Law: Visitation

While neither married nor cohabiting stepparents are likely to gain custody, they will be treated differently from each other with respect to visitation. A married stepparent is increasingly likely to be awarded visitation upon dissolution of the marriage, but the second parent in a cohabiting relationship must struggle even to obtain access. Many petitions for visitation by cohabitants are dismissed simply for lack of standing, preventing any hearing on the merits of the particular case.[64] Others founder on the requirement that a nonbiological parent show that denial of visitation would clearly be detrimental to the child or that other extraordinary circumstances exist, a difficult standard to overcome.[65] In one Iowa case, for example, a woman had lived for five years with a young child and his father, who was a truck driver frequently away from home; she had served in the role of the child's primary parent on a daily basis.[66] When the relationship between the adults ended after the birth of two additional children, she was denied visitation even though this also terminated the boy's relationship with his two half-sisters and despite the court's own belief that visitation was in the child's best interest. The Iowa Supreme Court held that it had no authority to grant visitation to a nonparent in the face of the biological parent's opposition.[67]

---

64 *See, e.g.*, Taylor v. Kennedy, 649 So.2d 270 (Fla. Dist. Ct. App. 1995) (holding that the lower court lacked authority to award visitation to a cohabitant of six years' standing).

65 *See, e.g.*, Stockey v. Gayden, 280 Cal. Rptr. 862 (Cal. Ct. App. 1991) (holding that visitation may not be allowed under California third-party visitation statute in face of opposition of biological parents without a showing that denial of visitation would be detrimental to the child); Cooper v. Merkel, 470 N.W.2d 253, 256 (S.D. 1991) (holding that visitation must be denied to a cohabitant of seven years in the absence of a finding of parental unfitness or "extraordinary circumstances affecting the welfare of the child"); D.G. v. D.M.K., 557 N.W.2d 235, 243 (S.D. 1997) (holding that there is no legal basis to award visitation to a former cohabitant with whom the child had lived for a year after her biological mother had left the state in the absence of extraordinary circumstances). Third-party visitation statutes often set a higher standard for custody than for visitation, requiring, for example, proof that "it would be significantly detrimental to the child to remain or be placed in the custody of either of the child's living legal parents who wish to retain or obtain custody," ARIZ. REV. STAT. § 25-415A(2) (2007); *see also* OR. REV. STAT. §§ 109.119(4)(a)-(b) (2009).

66 *In re* Marriage of Freel, 448 N.W.2d 26 (Iowa 1989).

67 *Id.* at 27-28; *see also* Bruce v. Sarver, 522 N.W.2d 67, 71 (Iowa 1994) (holding that a common law veto power by custodial parents over visitation between

Most states now have statutes that allow visitation by third parties, usually inspired by grandparents' desire for visitation after the death or divorce of their own child, the grandchild's parent. Most of these statutes are limited by their terms to grandparents and some include stepparents, but several define the third parties broadly enough to include former cohabitants.[68] The statute regarding visitation by unmarried persons in Minnesota, for example, provides that cohabitants of two years' duration are entitled to a hearing on the question of visitation and entitled to visitation if they can show that they have bonded closely with their former cohabitant's child, that visitation would be in the child's best interest, that it would not interfere with the child's relationship to its biological parent, and that, if the child is old enough, the child wants to continue the relationship with the former cohabitant.[69]

Cohabitants unable to take advantage of a third-party visitation statute have asserted standing based on the *de facto* parent doctrine, on their status *in loco parentis* or as a psychological parent, or on other equitable doctrines. These doctrines have been developed most extensively and successfully in the context of cases involving lesbian couples who have had children by artificial insemination of one of the partners.[70] This situation is quite different from that of a stepparent, who enters the family only as a consequence of a relationship to the biological parent some time after the child was born. Nonetheless, the developing case law about lesbian parents encourages courts to decide cases regarding opposite-sex cohabiting parents under it. For example, in one of the first cases to hold that a court had equitable powers to grant visitation to a lesbian in a parent-like relationship, the Wisconsin Supreme Court specifically

---

child and all third parties except for the other biological parent prevented the court from granting visitation to a man who had served in the role of the child's father and supported her for several years); Ash v. Kotecki, 507 N.W.2d 400 (Iowa 1993) (holding that there is no basis under common law or statute to grant visitation to a man who had lived with a child for one year and exercised visitation with her for four years after cohabitation ended).

68 Pollet, *supra* note 11, at 533-34. Third-party visitation statutes are very diverse, *see* Stephen Hellman, *The Child, The Step Parent, and the State: Step Parent Visitation and the Voice of the Child*, 16 TOURO L. REV. 45, 51-53 (1999); Richard S. Victor et al., *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 FAM. L.Q. 19 (1991) (including in an appendix the language of all fifty states' statutes); *see also* Pollet, *supra* note 11, at 536 (describing the results of an all-states' survey).

69 MINN. STAT. ANN. § 257C.08(4) (2007).

70 *See, e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); Mason v. Dwinnell, 660 S.E.2d 58 (N.C. Ct. App. 2008); Jones v. Boring Jones, 884 A.2d 915 (Pa. Super. Ct. 2005).

relied upon its own prior case governing the dissolution of a relationship between opposite-sex cohabitants.[71] Justice Shirley Abrahamson provided a structure of analysis that has been borrowed by courts in other states, holding that a court should proceed to decide whether visitation is in the best interest of the child if the petitioner proves four elements:

> (1) [T]hat the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[72]

Other courts, following Justice Abrahamson's analysis in same-sex parent visitation cases, have specifically agreed that the same standard would govern a case involving unmarried opposite-sex couples as well.[73]

Some states have concluded that the Supreme Court's decision in *Troxel v. Granville*[74] prevents such a conclusion, whether the former partners were of the same or opposite sex.[75] In *Troxel*, involving visitation by grandparents, the Supreme Court found that Washington's visitation statute was unconstitutionally broad because it did not defer to a fit parent's determination that visitation was not in the child's best interest. The visitation statute in California, for example, purports to award visitation to stepparents based on a best interest finding

---

71 Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1995) (relying on Watts v. Watts, 448 N.W.2d 292 (Wis. Ct. App. 1989), a case in which the same court held that it had equitable powers to decide property disputes between unmarried cohabitants).

72 *Id.* at 421.

73 *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 542 (N.J. 2000) ("[T]he standard we enunciate is applicable to all persons who have willingly, and with the approval of the legal parent, undertaken the duties of a parent to a child not related by blood or adoption").

74 Troxel v. Granville, 530 U.S. 57 (2000).

75 *See, e.g.*, Janice M. v. Margaret K., 948 A.2d 73, 86-87, 93 (Md. 2008) (refusing to follow pre-*Troxel* Maryland case law and holding that the court erred in granting visitation to a nonbiological lesbian mother on the grounds that she was a *de facto* parent without finding either that the biological mother was unfit or that exceptional circumstances overcame the parental presumption).

alone, raising the question of its constitutionality under *Troxel*.[76] In 2003, a California appellate court held that courts deciding cases under this statute must nonetheless apply the *Troxel*-mandated presumption that the natural parents were acting in the child's best interest in opposing visitation and that "[w]here natural parents are unified in opposition, nonparental visitation can be ordered only if such visitation is in the best interest of the child *and* denial of visitation would be detrimental to the child."[77] Similarly, when interpreting its own visitation statute in light of *Troxel* in a case involving cohabitants, Arizona read a parental presumption into it, holding that "the court should apply a rebuttable presumption that a fit parent's decision to deny or limit visitation was made in the child's best interests."[78] Other states with third-party visitation statutes broad enough to cover cohabitants include some form of the parental presumption in their text, but it is unclear how the presumption could be rebutted.[79]

Despite substantial legal obstacles, cohabitants have in a few cases succeeded in asserting standing to seek visitation.[80] The former cohabitant must still go on to convince the court that visitation is in the child's best

---

76 *See* Diane L. Abraham, *California's Stepparent Visitation Statute: For the Welfare of the Child, or a Court-Opened Door to Legally Interfere with Parental Autonomy: Where Are the Constitutional Safeguards?*, 7 S. CAL. REV. L. & WOMEN'S STUD. 125 (1997) (arguing, pre-*Troxel*, that the California visitation statute could not survive constitutional challenge); Melissa Curry, *Who Gets to Visit? A History of Third-Party Visitation Rights in Family Court*, 16 J. CONTEMP. LEGAL ISSUES 289, 292-98 (2007); Lusk, *supra* note 62.

77 *In re* Marriage of W., 7 Cal. Rptr. 3d 461, 464-65 (Cal. Ct. App. 2003); *see also* Punsly v. Ho, 105 Cal. Rptr. 2d 139 (Cal. Ct. App. 2001) (holding that the California grandparental visitation statute was unconstitutional as applied in light of *Troxel*).

78 Egan v. Fridlund-Horne, 211 P.3d 1213, 1224 (Ariz. Ct. App. 2009) (remanding for consideration under the parental presumption). The Arizona visitation statute applied to any person who has been "*in loco parentis*," meaning "a person who has been treated as a parent by the child and who has formed a meaningful parental relationship with the child for a substantial period of time." ARIZ. REV. STAT. § 25-415(G)(1) (2007). Since *Troxel*, the Connecticut statute has also been held to be unconstitutional in cases involving grandparental visitation if applied without requiring a showing that the child would suffer real and significant harm if visitation were denied, Roth v. Weston, 789 A.2d 431 (Conn. 2002); Crockett v. Pastore, 789 A.2d 453 (Conn. 2002).

79 *See* NEV. REV. STAT. ANN. §§ 125C.050(2), 125C.050(2)(4), 125C.050(2)(6) (2010); OR. REV. STAT. §§ 109.119(1), 109.119(2), 109.119(4) (2009).

80 *See, e.g.*, Barker v. Briggs, 17 Conn. L. Rptr. 623 (Conn. Super. Ct. 1996).

interest, and he or she is unlikely to succeed if there is another biological parent or parent figure of the same sex in the picture.[81]

The legal treatment of married stepparents is somewhat better, but nonetheless inadequate. Courts have long been more willing to award visitation to stepparents than to award them custody.[82] Typically a stepparent will seek visitation based on the *in loco parentis* doctrine or as a *de facto* or psychological parent.[83] In making its decision, the court will take into account factors such as the length of the relationship, the age of the child, any detriment to the child in cutting off contact, and, if the child is old enough, the child's own wishes.[84] It is clearly easier to show that cutting off all contact after a stepparent-stepchild relationship of long standing would be detrimental to a child than to show that custody should be vested in a nonparent, as courts and commentators have come to believe that continued contact with a stepparent after divorce is generally in the child's best interest.[85]

C. Unmarried and Married Stepparents Under Current U.S. Law: Child Support

Traditionally, stepparents had no duty to support their stepchildren other than indirectly, by support of the child's natural parent if they were married.[86] Some argue that to impose a support obligation as a matter of law would be a disincentive to remarriage, or at least a disincentive to marry someone with children.[87] As of 2000, however, eighteen states had passed statutes imposing such an obligation upon stepparents during their marriage to the

---

81 Temple v. Meyer, 544 A.2d 629, 632 (Conn. 1988) (denying visitation to a man who had believed he was the child's biological father since birth and had served as primary caretaker on the grounds that the mother was now living with another man who had stepped into the role of psychological parent).

82 *See, e.g.*, Spells v. Spells, 378 A.2d 879 (Pa. Super. Ct. 1977) (remanding for decision under the best interest standard); *see also* Janet Leach Richards, *Redefining Parenthood: Parental Rights Versus Child Rights*, 40 WAYNE L. REV. 1227, 1246-48 (1994).

83 *See* Hellman, *supra* note 68, at 53-56.

84 Sarah H. Ramsey, *Stepparents and the Law: A Nebulous Status and a Need for Reform*, *in* STEPPARENTING: ISSUES IN THEORY, RESEARCH, AND PRACTICE 217, 226-27 (Kay Pasley & Marilyn Ihinger-Tallman eds., 1994).

85 Hellman, *supra* note 68.

86 Laurence C. Nolan, *Legal Strangers and the Duty of Support: Beyond the Biological Tie — But How Far Beyond the Marital Tie?*, 41 SANTA CLARA L. REV. 1, 7-8 (2000).

87 Levy, *supra* note 57, at 210.

child's parent.[88] Some states with stepparent support statutes specify that the child's natural parent remains primarily responsible for his or her support and the stepparent is secondarily liable.[89] By contrast, the New Hampshire Supreme Court has held that the duty to stepchildren is identical to that owed to the stepparent's own biological children.[90] Other states' courts have reached conflicting conclusions about this allocation.[91]

In some states, a duty of support has been derived from the stepparent's assumption of parental responsibility under the common law *in loco parentis* doctrine.[92] This obligation, like that to a spouse during the marriage, is enforceable only by creditors, not by the children.[93] It may nonetheless arise in a number of situations involving the stepparent's support obligations to children of a previous union, the child support obligation of the noncustodial parent, and the calculation of needs-based government benefits.

A more controversial question is whether a stepparent has a child support duty after divorce from the child's natural parent. The doctrines of *in loco parentis* or *de facto* parenthood are of little help to a parent seeking child support from a former stepparent, because each status is voluntary and can be terminated at will.[94] The state of North Dakota imposes such an obligation by statute so long as the stepchildren remain in the stepparent's family, but not after divorce from the child's biological parent.[95] The courts in some other states impose a duty of continued support on the basis of equitable estoppel, where, for example, a stepfather has accepted a child into his family, treating him as his own, and represented to the child that he was in fact his father.[96]

A similar logic, based on detriment to the child from long reliance upon the stepparent, underlay the leading case on this issue, the 1984 decision of the

---

88 Nolan, *supra* note 86, at 10-11.

89 Sarah H. Ramsey & Judith M. Masson, *Stepparent Support of Stepchildren: A Comparative Analysis of Policies and Problems in the American and English Experience*, 36 SYRACUSE L. REV. 659, 667 (1985).

90 Logan v. Logan, 424 A.2d 403, 404 (N.H. 1980) (holding that a stepparent's obligations to children in a second family should be taken into account on a motion to modify support owed to biological children under a previous divorce decree).

91 *See, e.g.*, Feltman v. Feltman, 434 N.W.2d 590, 592 (S.D. 1989) (holding that priority must be given to children of a first family).

92 Mahoney, *supra* note 50, at 41-43; Ramsey & Masson, *supra* note 89, at 673-74.

93 Mahoney, *supra* note 50, at 42-43.

94 Ramsey & Masson, *supra* note 89, at 673.

95 N.D. CENT. CODE § 14-09-09 (2009); *see also* Ramsey & Masson, *supra* note 89, at 671-72.

96 Clevenger v. Clevenger, 11 Cal. Rptr. 707 (Cal. Ct. App. 1961).

Supreme Court of New Jersey in *Miller v. Miller*.[97] In *Miller*, the stepfather had been *in loco parentis* to his wife's children during their seven-year marriage, supporting them and actively discouraging any support or visitation from their natural father, who eventually dropped out of his children's lives.[98] The court found that the stepfather had made representations about emotional and financial support upon which the girls had relied to their detriment, ordered him to pay support during the pendency of the divorce litigation, and to continue doing so after the divorce was final if the girls' mother could not locate the natural father and resuscitate his support of them.[99]

In short, when a stepparent essentially replaces a child's natural parent not only emotionally but also as a source of support, he or she may be required to pay permanent child support after divorce from the child's other parent. Cohabitants attempting to claim child support from an unmarried stepparent under *Miller*'s equitable estoppel theory have not been successful.[100] Those attempting to claim on a theory of contract between the cohabitants have not fared much better.[101]

III. Recommendations for Legal Change

In this Part I discuss, first, proposals a number of legal scholars have made for change in the treatment of the stepparent-stepchild relationship with respect to custody, visitation, and child support after the remarriage dissolves, to see whether any of these suggestions might provide a good model for the analogous relationship between cohabiting parents and their partners' children. After describing those models, I offer some recommendations of my own, along with reasons why I believe that legal change in this area is desirable.

---

97 Miller v. Miller, 478 A.2d 351 (N.J. 1984).

98 *Id.* at 353-54.

99 *Id.* at 359.

100 *See* Zaragoza v. Capriola, 492 A.2d 698 (N.J. Super. Ct. App. Div. 1985).

101 *See* Thomas v. LaRosa, 300 S.E.2d 809 (W.Va. 1990) (holding that agreements between cohabitants are not enforceable in West Virginia); Featherston v. Steinhoff, 575 N.W.2d 6 (Mich. Ct. App. 1998) (finding that an implied in fact contract to support her and her children did not exist because the female cohabitant did not overcome the presumption that her services were rendered gratuitously).

A. Proposals Concerning the Married Stepparent-Stepchild Relationship

Legal scholars have been making recommendations for legal reform concerning custody and visitation of stepchildren at least since Kate Bartlett's seminal 1984 article, *Rethinking Parenthood As an Exclusive Status*.[102] Bartlett urged that a stepparent should be considered a potential custodial parent if he or she had served as a psychological parent to the stepchild, requiring a relationship of six months or more, a mutuality of affection, and the consent of the child's natural parent at the time the relationship began.[103] If the stepparent can demonstrate a stronger relationship with the child than the natural parent has, custody should be awarded; alternatively, the stepparent should be allowed to share joint custody with his or her ex-spouse.[104] However, in the context of the natural parent's death, Bartlett argued for a presumption that the child remain in the home in which he or she had been living, that is, with the residential stepparent.[105] In both instances, rights would be shared with the other natural parent or parents, even though this flies in the face of American law's distaste for multiple parenthood. It was important, Bartlett argued, to develop "determinate, principled standards" for these decisions.[106] Other commentators would simply trust judges to reach "outside doctrinal parameters" to rescue any children who might be harmed by them.[107] Visitation by ex-stepparents has occasioned much less resistance than custody because it is less of an incursion into the exclusive status of biological parenthood.[108] Nonetheless Bartlett argues for a stronger presumption, that visitation with a psychological parent "should be denied only if the custodial parent satisfies a heavy burden of proof that the visits are actually detrimental to the child," effectively reversing the standard applied by many courts.[109]

Many legal scholars favor imposing some kind of child support obligation on stepparents after divorce. David Chambers has opined that a rule imposing one year of support after divorce for every two years of co-residence might be appropriate on the grounds that "adults should be responsible for the

---

102 Bartlett, *supra* note 57.

103 *Id.* at 946-49, 953-54. By a somewhat similar logic, David Chambers argued for a presumption that a young child should be placed in the custody of whoever had been his or her long-term primary caretaker, whether that be a parent or stepparent, *see* Chambers, *supra* note 24, at 127.

104 Bartlett, *supra* note 57, at 953-54.

105 *Id.*

106 *Id.* at 962.

107 Levy, *supra* note 57, at 194-98.

108 *Id.* at 201.

109 Bartlett, *supra* note 57, at 950.

dependencies they have fostered and encouraged."[110] Other family law scholars agree that some type of limited duration child support is appropriate as a kind of transitional safety net for stepchildren.[111]

Some American scholars, such as Margaret Mahoney, point to the "child of the family" doctrine in the United Kingdom as a possible model.[112] Since 1958, English law has included stepparents in the group of adults who may be obligated to support children after divorce.[113] In 1970, this obligation was incorporated into the Matrimonial Causes Act, which defines a child of the family to include "any [nonbiological] child . . . who has been treated by both of these parties as a child of their family."[114] A court deciding whether to impose such an obligation on a stepparent is to consider the extent to which the stepparent supported the child during the marriage, the length of the marriage, and the liability of any other person to maintain the child.[115] Canada has adopted a system somewhat similar to that in Britain, but the judge's discretion to determine the amount of support is limited by formulaic guidelines; and the Canadian scheme applies to cohabiting stepfamilies as well as married ones.[116] The stepparent's responsibility is deemed to be secondary to that of the biological parent, but joint and several liability may be imposed, forcing a stepparent to sue the noncustodial parent for contribution.[117]

---

110 Chambers, *supra* note 24, at 128.

111 *See, e.g.*, MASON, *supra* note 32, at 135-36; Mary Ann Mason & David W. Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445, 477-79 (1995) (recommending that residential stepparents who have been responsible for fifty percent or more of their stepchildren's support be required to continue supporting them either for the number of years during which they had been dependent on the stepparent or until their majority).

112 Mahoney, *supra* note 50, at 59-60; *see also* Mason & Simon, *supra* note 111, at 478.

113 It is also possible to obtain an order of support against a stepparent during the marriage, if he or she has accepted the child into the family (which is generally assumed if the child is residing with the stepparent), *see* Ramsey & Masson, *supra* note 89, at 689-91.

114 Matrimonial Causes Act, 1973, c. 18, § 52(1) (Eng.) (discussed in Ramsey & Masson, *supra* note 89, at 694).

115 *Id.* § 25(4) (discussed in Ramsey & Masson, *supra* note 89, at 696).

116 *See* Carol Rogerson, *The Child Support Obligation of Step-Parents*, 18 CAN. J. FAM. L. 9, 15-16, 51 (2001); *see also* Barbara Graham-Siegenthaler, *Support Obligations of Stepparents and Persons "In Loco Parentis" in a Comparative and International Context*, *in* FAMILIES ACROSS FRONTIERS 765, 775-84 (Nigel Lowe & Gillian Douglas eds., 1996).

117 Rogerson, *supra* note 116, at 106-07, 119.

B. Recommendations Concerning the Unmarried Stepparent-Stepchild Relationship

Returning to the context of cohabiting stepparents and their stepchildren, what principles should guide the choice of appropriate legal remedy? First, we should focus upon the interests of the children affected rather than of the adults involved. These interests may vary with the issues involved. In the area of custody and visitation, the goal should be to allow children to preserve emotional connections important to them despite the adults' separation. Many relationships with the partner of a child's parent may be very important, but not all will be, necessitating some screening mechanism to determine which are and which are not. With respect to child support, the concern should be about the impact of the sudden disappearance of economic support upon which a child depends and protection of the child at a time of upheaval over which he or she has no control. As Mahoney has said in the context of stepparent obligation, "[t]he act of forming a de facto family . . . and establishing a home with stepchildren, like the procreative act, may reasonably give rise to economic responsibility for the children."[118]

To screen claims for custody, I would adopt a standing requirement modeled on that which Justice Abrahamson outlined in *Holtzman v. Knott* in the context of visitation by cohabitants:

> (1) that the biological parent fostered the establishment of a parent-like relationship between the cohabitant and the child; (2) that the cohabitant and child lived together; (3) that the cohabitant assumed significant responsibility for the child's care, education, and development, including contributing to the child's support; and (4) that the cohabitant has been in a parental role long enough to have established with the child a bonded, dependent relationship parental in nature.[119]

If a cohabitant fulfills these four criteria, there should be a rebuttable presumption in favor of awarding custody to him or her if the child's natural parent should die, in order to maintain stability in the child's life in the midst of disruption. If the adults separate, however, a presumption in favor of the cohabitant who is the biological parent should apply, subject to rebuttal based on a showing of detriment to the child; and joint custody should be considered in cases appropriate for it.

---

118 Mahoney, *supra* note 50, at 48.

119 Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995). The state of Delaware has recently adopted a similar standard by statute, 77 DEL. LAWS c. 97 §§ 1-3 (2009).

If the parties have lived together as a family for six months or more, there should be a presumption in favor of visitation if both the child and ex-cohabitant desire it.[120] Sudden disruption of a relationship with a member of their functional family is not healthy for children; and studies have shown that they are adaptable in adjusting to, and benefit from, relationships with multiple parents.[121] To incorporate this proposal into American law, a state's highest court must successfully distinguish the relationship between cohabitants and their partners' children from that between children and their grandparents, to escape the parental presumption set out in *Troxel*. In the typical case, children will not have lived with their grandparents, but only have visited with them while the parents were together. A cohabitant, by contrast, has lived with his partner's child, sharing home and daily life for some time, and may even have served as the primary caretaker. In lesbian co-parenting cases, courts are beginning to recognize that *Troxel* should not apply. If the nonbiological partner is found, based on a four-part test like that set forth above, to be a *de facto* parent, the dispute is no longer between a parent and a third party but between two parents.[122] Although similar reasoning should apply to a stepparent, courts have resisted following it because the interests of more than two persons would then be involved.[123]

As for child support, after a period of two years of co-residence with the child — a period after which one may presume that family members have become economically interdependent[124] — a cohabitant should be liable for child support upon separation from the child's parent. A sudden cessation of support can have disastrous consequences for children living in cohabiting families. Support should be apportioned between the two ex-cohabitants and

---

120 For dissenting views, see William C. Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. LEGIS. 263 (2010); Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 90 (Robin Fretwell Wilson ed., 2006).

121 *See, e.g.*, Bartlett, *supra* note 57, at 881-82; Lynn White & Joan G. Gilbreth, *When Children Have Two Fathers: Effects of Relationships with Stepfathers and Noncustodial Fathers on Adolescent Outcomes*, 63 J. MARRIAGE & FAM. 155 (2001).

122 *See* Smith v. Guest, 16 A.3d 920 (Del. 2011); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (en banc).

123 *In re* Parentage of M.F., 228 P.3d 1270, 1272 (Wash. 2010) (en banc) (describing a case where a stepparent fulfilled the four-factor test as involving not "competing interests of *two parents*" but "a third party to M.F.'s two existing parents").

124 *See* BOWMAN, *supra* note 3, at 225-26.

the child's other natural parent, so as not to encourage the disappearance of the noncustodial parent from the child's life; but they should be jointly liable for it.

Like Professor Bartlett, I do not think we can simply rely on judges to make extralegal decisions to rescue children in deserving cases, nor do I think that would be good for the legitimacy of our system of family law. Instead, any new standards should be established by statute, to prevent, insofar as possible, inconsistent and unpredictable judicial decisions in this area. With clear expectations, moreover, cohabiting couples who are separating can make arrangements in the shadow of the law, ones that serve the interests of the child even when those interests may conflict with the parents' own preferences. Finally, procedures should be designed to ensure that the voice of the child, if old enough, will be heard during the process of making decisions on these issues. None of this will be possible, however, unless U.S. law gives up its stubborn adherence to the principle that a child cannot have more than two parents.