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The Child, the Step Parent and the State: Step Parent Visitation and the Voice of the Child

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THE CHILD, THE STEP PARENT, AND THE STATE: STEP PARENT VISITATION AND THE VOICE OF THE CHILD.

Stephen Hellman*

I. INTRODUCTION

Under common law principles, natural parents had a *prima facie* legal right to the independent custody and visitation of their children to the exclusion of all others.[1] The courts recognized that a natural parent's right to raise a child free from state interference was a fundamental liberty interest.[2] Under the ancient concept of *parens patriae*, the state was the ultimate guardian of children.[3] Only in instances of concern for the child's welfare could the state invoke its *parens patriae* power and intrude upon parental control.[4] Concern for the child's welfare focused primarily upon ensuring that the child was free from physical harm,[5] or preserving the child's right to access to education.[6] The notion that natural parents had absolute control over their children precluded a stepparent from attaining standing in order to petition a court for

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[1] Shoemaker v. Shoemaker, 563 So.2d 1032, 1033 (Ala. Civ. App. 1990).

[2] *See In re* Smith v. Lascaris, 106 Misc.2d 1044, 1046, 432 N.Y.S.2d 995, 997 (N.Y. Fam. Ct. 1980) (quoting Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925)); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[3] *Smith*, 106 Misc.2d at 1046-47, 432 N.Y.S.2d at 997.

[4] *Id.* at 1047, 432 N.Y.S.2d at 997.

[5] *See, e.g.*, Humphrey v. Humphrey, 103 Misc.2d 175, 177, 425 N.Y.S.2d 759, 760-61 (N.Y. Fam. Ct. 1980) (noting that "[t]he state, as 'parens patriae,' has the obligation to insure the welfare of all children . . . but it has not displaced the parent in right or responsibility"); *see also In re* Bennett v. Jeffreys, 40 N.Y.2d. 543, 546, 356 N.E.2d 277, 281, 387 N.Y.S.2d 821, 824 (1976) (quoting *Pierce*, 268 U.S. at 535).

[6] *Bennett*, 40 N.Y.2d at 546, 356 N.E.2d at 281, 381 N.Y.S.2d at 824 (quoting Wisconsin v. Yoder, 406 U.S. 205, 213 - 15 (1972)).

visitation with a stepchild. The stepparent-stepchild relationship conferred no rights and imposed no obligations.[7]

This anachronistic view that visitation rights are primarily a benefit to a natural parent, which was to be enjoyed in exchange for compensation for the duty to support the child,[8] has yielded to the presumption that the state has an interest in the welfare of any child whose familial status is affected by its laws.[9] Accordingly, under certain circumstances, courts have recognized that the rights of third parties, including stepparents, to custody and visitation can supersede those of the natural parent.[10]

In many states, stepparents are accorded standing to petition for visitation upon a showing that they had acted in a parental and custodial capacity.[11] A stepparent may show that this requirement has been met under the doctrines of *in loco parentis*,[12] psychological parent,[13] "de facto parent,"[14] and "equitable

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[7] Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978) (holding that a stepfather was entitled to a hearing to determine whether he stood *in loco parentis* to his stepchild, and if so, if it would be in the child's best interest to allow visitation). *Id.* at 68.

[8] Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 13 (Neb. 1991) (quoting Bryan v. Bryan, 645 P.2d 1267 (Ariz. 1982), "[The old rule arose] from an outmoded view that custody and visitation rights [were] primarily a benefit to the parent to be enjoyed in compensation for the duty to support"), *Id.* at 12.

[9] *See id.*

[10] Shoemaker v. Shoemaker, 563 So.2d 1032, 1033 (Ala. Civ. App. 1990).

[11] *See, e.g., Hickenbottom*, 477 N.W.2d at 15 (citing Collins v. Gilbreath, 403 N.E.2d 921 (Ind. 1980)).

[12] *Gribble*, 583 P.2d at 66. The court provided:

> The term *in loco parentis* means in place of a parent, and a person *in loco parentis* is one who has assumed the status and obligations of a parent without the formal adoption. Whether or not one...assumes that status depends on whether the person intends to assume that obligation.

Id.

[13] Temple v. Meyer, 544 A.2d 629, 632 n.3 (Conn. 1988) (quoting J. GOLDSTEIN, A. FREUD & A. SOINIT, BEYOND THE BEST INTERESTS OF THE CHILD 98 (1979)).

> A psychological parent is one who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological . . . adoptive, foster, or common law . . . parent, or any other person.

parent."[15] Once this threshold is met, the court will consider whether visitation by the stepparent would be in the best interests of the child.[16] The rights of natural parents and all other considerations are subordinate to this paramount concern.[17]

The next inquiry the court may make is whether the child's preference should be considered in determining what is in the best interest of that child in a stepparent visitation hearing. While the adage "children should be seen and not heard" has endured within the legal system, the modern day child is considered to have rights, one of which is to voice his or her opinion and have it heard, especially when it is voiced regarding interpersonal relationships.[18]

This note explores the tripartite relationship between the child, the stepparent, and the state. First, it will address the common law history of the autonomy of the parent-child relationship. Second, it will focus upon avenues available to stepparents in order to attain standing to petition for visitation with their stepchildren in states where explicit statutory grants are absent. Third, the note will explore the consideration of the voice of the child when the court utilizes the doctrine of "the best interests of the child" in stepparent visitation determinations.

Id.

[14] *In re* B.G. v. San Bernardino County Welfare Dep't et al., 523 P.2d 244, 253 n.18 (Cal. 1974) (stating that the court "use[s] the term 'de facto parent' to refer to that person who, on a day-to day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care").

[15] Atkinson v. Atkinson, 408 N.W.2d 516, 520 (Mich. App. 1987) (stating that a non-biological father may be considered an "equitable parent" when the husband and the child acknowledge the father and child relationship, or the mother of the child has cooperated in the development of such a relationship over a period of time, and the husband desires the rights afforded a natural parent, and the husband is willing to take on the responsibility of paying child support).

[16] *Gribble*, 583 P.2d at 68 (citing Spells v. Spells, 378 A.2d 879 (Pa. 1977)).

[17] *See e.g., Spells*, 378 A.2d at 882 (holding that the child's interests are paramount, and that a stepfather could not be denied the right to visit his stepchildren simply because he had no blood relation).

[18] *Bennett*, 40 N.Y.2d at 546, 356 N.E.2d at 281, 387 N.Y.S.2d at 825.

II. COMMON LAW HISTORY OF THE PARENT-CHILD RELATIONSHIP

Natural Parents Rights in Conflict With State Interests

It has been recognized that natural parents have full custodial rights over their children,[19] which encompasses the right to decide who may or may not associate with their children.[20] The common law presumed that the "best interests of a child" were served by the rearing of the child by its natural parents.[21] At common law, stepparent visitation was denied solely upon the natural parent's custodial right to refuse consent,[22] even if the child's best interests would have been served by the visitation.[23] It was well established that an award of visitation rights over a natural parent's objections would infringe upon that parent's custodial rights.[24]

Furthermore, the state adhered to the parental rights doctrine, and refused recognition of any relationship compacted by adults, except for the legal parents of the child.[25] Third party relationships were acknowledged only in situations where the legal parents abandoned the child, or upon certification that they were unfit.[26] In virtually all other situations third parties were unable to challenge the will of the natural parent, as the stepparent-stepchild relationship conferred neither rights nor obligations at common law.[27]

However, this "right to decide" is no longer such an absolute. The parental right presumption, which is one of fact and not law,

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[19] *In re* Ronald FF. v. Cindy GG., 70 N.Y.2d 141, 144, 511 N.E.2d 75, 77, 517 N.Y.S.2d 932, 934 (1987).

[20] *Id.*

[21] *Bennett*, 40 N.Y.2d 546, 356 N.E.2d at 281, 387 N.Y.S.2d at 824.

[22] Susan M. Silverman, *Stepparent Visitation Rights: Towards the Best Interests of the Child*, 30 J. FAM. L. 943, 952 (1991/92).

[23] Tinsley v. Plummer, 519 N.E.2d 752, 754 (Ind. 1988). The "best interest of the child" standard is utilized only after a cognizable right to visitation has been established. This standard does not determine the existence of the right. The party petitioning for visitation bears the burden of establishing the threshold requirement of the existence of a custodial and parental relationship. *Id.*

[24] Silverman, *supra* note 22, at 952.

[25] *Id.*

[26] *Bennett*, 40 N.Y.2d at 546, 356 N.E.2d at 282, 387 N.Y.S.2d at 825.

[27] *Gribble*, 583 P.2d at 66.

may be overcome by the stepparent by production of sufficient evidence that visitation is in the child's best interests.[28] For instance, where it has been determined that a stepparent has nurtured a stepchild as his or her own, a natural parent's "mere objection," based upon an assertion that the child would be harmed by ordered visitation, does not preclude such an order in all instances.[29] Moreover, the modern day child is no longer perceived as a sub-person bound to his or her natural parents by an irrevocable and absolute right of possession.[30] "A child has rights . . . ."[31]

Consequently, courts have recognized that in a visitation dispute, the child(ren)'s interests are paramount,[32] and "[t]he rights of parents must yield to that superior demand."[33] Since the welfare of the child is of paramount importance in a stepparent visitation action,[34] that interest supersedes parental rights, and subordinates all other considerations.[35] While the doctrine of parental preference was one in which a parental interest in a child was analogous to that of a property owner's interest in its chattel,[36] in

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[28] *Bennett,* 40 N.Y.2d at 546, 356 N.E.2d at 282, 387 N.Y.S.2d at 826.

[29] Hughes v. Banning, 541 N.E.2d 283, 284 (Ind. 1989) (quoting Collins, 403 N.E.2d at 923); *See also* LoPresti v. LoPresti, 51 A.D.2d 578, 378 N.Y.S.2d 487 (1976) (holding objection by natural parent not sufficient to deny third party visitation rights); *See also Gribble,* 583 P.2d 64 (holding common law presumption is one of fact and not law, which may be overcome by sufficient evidence). *But cf.* Shoemaker v. Shoemaker, 563 So.2d 1032, 1033 (Ala. Civ. App. 1990) (stating natural parents presumptive right to custody and control of their children will not be superseded unless rebutted by a showing that they were unfit or incapable of providing for the best interests of their children).

[30] Honaker v. Burnside, 388 S.E.2d 322, 326 (W. Va. 1989).

[31] *Bennett,* 40 N.Y.2d at 546, 356 N.E.2d at 281, 387 N.Y.S.2d at 825 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)); *see also In re* Gault, 387 U.S. 1, 47 (1967).

[32] Koppenhoefer v. Koppenhoefer, 159 A.D.2d 113, 116, 558 N.Y.S.2d 596, 599 (N.Y. App. Div. 1990) (holding that the trial court erred in not ascertaining the true wishes of the children, who were 15 and 13 at the time of trial and concededly mature).

[33] *Id.* (quoting Lincoln v. Lincoln, 24 N.Y.2d 270, 247 N.E.2d 842, 299 N.Y.S.2d 842 (1969).

[34] *Gribble,* 583 P.2d at 66.

[35] *Id.* at 68.

[36] *In re* B.G. v. San Bernardino County Welfare Dep't et al., 523 P.2d 244, 254 (Cal. 1974).

Looper v. McManus,[37] the Oklahoma Supreme Court held that a natural parent does not have a per se property right to his or her child.[38] The parental interest was deemed analogous to a trust, subjected to the regulation and control of the state.[39]

Although a few jurisdictions still question whether it is in the child's best interests to award visitation to an ex- stepparent,[40] who is "legally a mere 'non-parent,' over the objections of a natural parent,"[41] it is now generally recognized and accepted that visitation is awarded primarily to benefit the child.[42] For example, in New York, the state may intervene[43] and subordinate the rights of natural parents[44] to those of the child,[45] when rare or extraordinary circumstances[46] exist that affect the "best interests of

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[37] 581 P.2d 487 (Okla. 1978).

[38] *Id.* at 489.

[39] *Id.*

[40] Stepparents are most often excluded from child issues. Martin L. Haines III, *Rights of Others in the Lives of Children. Should "Substitute" Parents Have Legal Rights to Child Visitation?*, 14 CHILDREN'S LEGAL RIGHTS JOURNAL, 13-15 (1993).

[41] Shoemaker v. Shoemaker, 563 So.2d 1032, 1034 (Ala. Civ. App. 1990).

[42] Simpson v. Simpson, 586 S.W.2d 33, 35 (Ky. 1979) (holding that the lower court erred by failing to hold a hearing to determine if it would be in the best interest of the child to place a limit on the custody award by granting visitation to his stepmother).

[43] *In re* Bennett v. Jeffreys, 40 N.Y.2d. 543, 544, 356 N.E.2d 277, 280, 387 N.Y.S.2d 821, 823 (1976). "The state may not deprive a natural parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances." *Id.*

[44] Humphrey v. Humphrey, 103 Misc.2d 175, 177-78, 425 N.Y.S.2d 759, 761 (N.Y. Fam. Ct. 1980). The legislature, by the enactment of Article 6 and Article 10 of the Family Court Act, intended to provide due process for determining when the state "may intervene against the wishes of a parent on behalf of a child so that his needs are properly met." *Id.*

[45] Trapp v. Trapp, 126 Misc. 2d 30, 31, 480 N.Y.S.2d 979, 980 (N.Y. Fam. Ct. 1984) (holding that the stepfather had standing to seek visitation rights with his stepchildren where he had lived with the children's stepmother for almost nine years).

[46] *See id.* (finding that disruption of a child's home through the dissolution of his familial structure has been considered an extraordinary circumstance); *see also* Alberto B. v. Rosa O., 423 N.Y.S.2d 111 (N.Y. Fam. Ct 1979) (stating that removal of a "psychological parent" may be a traumatic event).

the child."[47] In *Trapp v. Trapp*, the court found that the severance of a relationship between a stepparent and stepchild that had existed for nine years, during which time the child progressed through developmentally important stages, had a disruptive effect upon the child that created an extraordinary circumstance.[48] Under such conditions, the court held that it must weigh this circumstance in determining the stepparent's petition for visitation.[49]

III. STEP PARENT STANDING TO PETITION FOR VISITATION

A. *Statutory Provisions and the Absence Thereof*

In many jurisdictions, a void exists with reference to the statutory authorization,[50] which allocates to stepparents standing to petition for visitation with a stepchild.[51] While Alaska,[52]

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[47] *Trapp*, 126 Misc.2d at 31, 480 N.Y.S.2d at 980; *see also In re* Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (holding where extraordinary circumstance presents conflict between the rights of natural parents and their children, the best interests of the children are superior to parental custody rights).

[48] *Id.*

[49] *Id.* at 31, 480 N.Y.S.2d at 980.

[50] *Haines*, *supra* note 40 at 14. "[c]ourts are constrained to follow the unimaginative laws of our land that begrudgingly give . . . rights to natural grandparents and none to persons who have actually fulfilled the day-to-day needs of the child . . . ." *Id.*

[51] Until recently, there has been a paucity of authority pertaining to efforts by stepparents to obtain visitation rights. Bryan v. Bryan, 645 P.2d 1267, 1272 (Ariz. 1982); *see also* Tinsley v. Plummer, 519 N.E.2d 752, 753-54 (Ind. 1989). The legislature tacitly left the development of law pertaining to rights of parties other than parents and grandparents to the courts, and the principle of *expressio unius est exclusio alterius* does not preclude stepparent visitation in the absence of statutory authority. *Id.* Furthermore, while visitation rights, pertaining to non-custodial parents, have been the subject of legislation for a long period of time, it has been the courts, and not the legislature, that has recognized third party visitation rights. *Id.*

[52] ALASKA STAT. § 25.24.150(a) (Michie 1998). This statute provides in pertinent part:

> [i]n an action for divorce or for legal separation . . . the court may . . . during the pendency of the action, or at the final hearing or at any time thereafter during the minority of a child of the marriage, make, modify, or vacate an order for the custody of or

California,[53] Connecticut,[54] Hawaii,[55] Kansas,[56] Louisiana,[57] Michigan,[58] Oregon,[59] Tennessee,[60] Utah,[61] Virginia,[62]

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visitation with the minor child that may seem necessary or proper, including an order that provides for visitation by a grandparent or other person if that is in the best interests of the child.

Id.

[53] CAL. CIV. CODE FAM. LAW § 4351.59(b) part 5 div. 4 (West 1983) (repealed 1/1/94). The statute provides in pertinent part: "[i]f a stepparent has petitioned or otherwise applied for an order of reasonable visitation rights pursuant to this section, the court shall set the matter of visitation rights for mediation . . . ." *Id.*

[54] CONN. GEN. STAT. ANN. § 46b-59 (West 1995). The statute states in pertinent part: "[t]he superior court may grant the right of visitation with respect to any minor child or children to any person, upon an application of such person." *Id.*

[55] HAW. REV. STAT. § 571-46(7) (1995). The statute states in pertinent part: "[r]easonable visitation rights shall be awarded to parents, grandparents, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child[.]"*Id.*

[56] KAN. STAT. ANN. § 60-1616(b) (1995). The statute states in pertinent part: "[g]randparents and stepparents may be granted visitation rights." *Id.*

[57] LA. CIV. CODE ANN. art. 136(b) (West 1995). The statute states in pertinent part: "[u]nder extraordinary circumstances, a relative, by blood or affinity, or a former stepparent . . . not granted custody of the child may be granted reasonable visitation...."

[58] MICH. COMP. LAWS ANN. § 722.27.7(b) (West 1995). The statute states in pertinent part: "[p]rovide[s] for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others . . . ." *Id.*

[59] ORE. REV. STAT. § 109.119(1), (2)(b) (1999). The statute states in pertinent part: "(1) [a]ny person including but not limited to a related or non-related foster parent, stepparent . . . who has established emotional ties creating a child-parent relationship with a child or any legal grandparent may petition or file a motion for intervention with the court . . . (2)(b) . . . [for] visitation rights or other generally recognized rights of a parent or person having the ongoing personal relationship."*Id.*

[60] TENN. CODE ANN. § 36-6-302(a) (1995). The statute states in pertinent part, "[t]he provisions of this subsection shall not apply in the case of any child who has been adopted by any person other than a relative of the child or a stepparent of the child." (Deleted by amendment in 1997).

[61] UTAH CODE ANN. § 30-3-5 (1998). The statute states in pertinent part: "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children . . . .In determining visitation right of the parents, grandparents, and other members of the immediate family the court shall consider the best interest of the child." *Id.*

[62] VA. CODE ANN. § 20-107.2 (Michie 1995). The statute states in pertinent part: "[u]pon the entry of the decree providing for the dissolution of a

Washington[63] and Wisconsin[64] provide statutory visitation rights to third parties, stepparents are only specifically mentioned in the California, Kansas, Oregon, Tennessee and Wisconsin statutes.[65] On its face, the absence of statutory authorization for stepparent standing to petition for visitation may seem to preclude the stepparent from obtaining visitation. However, where statutes provide for a determination of visitation of "any child of the marriage,"[66] the trend is for the courts to recognize that the "child of the marriage" may be a stepchild when the stepparent is recognized as a surrogate parent under the doctrine of *in loco parentis*.[67] In this context, *in loco parentis* typically means "in the place of a parent."[68] An individual who assumes the status and obligations of a parent is deemed a person *in loco parentis*.[69] The status of *in loco parentis* is conferred upon a stepparent when that individual accepts the obligations incident to a parental

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marriage . . . the court may make such further decree as it shall deem expedient concerning the custody or visitation . . . of the minor children of the parties . . . ." *Id.*

[63] WASH. REV. CODE ANN. § 26.09.240 (4) (West 1997). The statute states in pertinent part: "[t]he court may order visitation between the petitioner or intervenor and the child between whom a significant relationship exists upon a finding supported by the evidence that the visitation is in the child's best interests." *Id.*

[64] WIS. STAT. ANN. § 767.245(1) (West 1995). The statute states in pertinent part: " . . . [u]pon petition by a . . . stepparent or person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person . . . ." *Id.*

[65] Silverman, *supra* note 22, at 951.

[66] N.Y. DOM. REL. LAW, § 240 (McKinney 1995) provides in pertinent part: "[i]n any action or proceeding brought . . . by petition . . . the custody of or right to visitation with any child of the marriage, the court shall enter order for custody and support as in the court's discretion as justice requires having regard . . . to the best interests of the child." *Id.*

[67] Carter v. Broderick, 644 P.2d 850, 852-53 (Alaska 1982) (citing Collins v. Gilbraith, 403 N.E.2d 921, 922-24 (Ind. 1980)); Simpson v. Simpson, 586 S.W.2d 33, 35-36 (Ky. 1979); Looper v. McManus, 581 P.2d 487, 488-89 (Okla. 1978); Spells v. Spells, 378 A.2d 879, 881-83 (1977); Gribble v. Gribble, 583 P.2d 64, 66-67 (Utah 1978).

[68] *Carter*, 644 P.2d at 853.

[69] *Id.*; *Gribble*, 583 P.2d at 66.

relationship without a formal adoption.[70] *In loco parentis* status confers the same rights as between a natural parent and a child.[71]

At common law, it was recognized that the stepparent-stepchild relationship was terminated upon dissolution of the marriage through death or divorce.[72] However, death or divorce does not dissolve the *in loco parentis* status of the stepparent.[73] As long as these participants in the relationship desire to continue the kinship, all rights conferred by the status survive.[74]

Under the doctrine of *in loco parentis*, the stepparent must first overcome the burden of establishing the threshold requirement that a custodial and parental relationship exists between the stepparent and child.[75] This may be established upon a showing that the stepparent has taken an active role in the stepchild's life.[76] Evidentiary acts include the stepparent's active interest in the stepchild(ren)'s education, school functions, the length of time residing together, involvement in day-to-day care (including discipline), proof of a close and loving relationship, and reference to each other as parent and child.[77]

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[70] Seger v. Seger, 547 A.2d 424, 428 (Pa. Super. Ct. 1988).

[71] *Gribble,* 583 P.2d at 66.

[72] *Id.* at 67.

[73] *Id.*

[74] *Id.*

[75] *Hughes*, 541 N.E.2d at 284. *See also,* ORE. REV. STAT. §109.119(6), which provides in pertinent part:

> ['C]hild-parent relationship' means a relationship that exists or did exist, in whole or in part, within six months preceding the filing of an action . . . and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs.

Id.

[76] Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 17 (Neb. 1991).

[77] *Id.*

Hence, the status of *in loco parentis* equates the stepparent to a natural parent;[78] and therefore, the mere status as a stepparent should not preclude visitation privileges.[79] Courts have recognized that a stepparent's concern for and devotion to a stepchild may be just as strong as that of the natural parent.[80] Furthermore, the stepparent-stepchild relationship may have fostered a deep, mutual bond of love and affection.[81] This may be especially true where the only parent the child has ever loved was in fact the stepparent.[82]

The denial of the right to visit with former stepchildren because of the lack of a biological tie was first recognized as improper in Pennsylvania in *Spells v. Spells*.[83] The *Spells* court acknowledged that the issue of whether a stepparent had standing to claim rights of visitation was of first impression.[84] The court found that for over two years, the children's natural mother had denied the stepfather contact with his stepchildren.[85] The court held that the length of time apart constituted a "striking absence of contact."[86] Recognizing that a stepparent and stepchild may have developed a kinship that had strong bonds of love and devotion, the court held that the lack of a biological tie would not preclude visitation solely because of the mere status as a stepparent.[87] Moreover, the court found that Pennsylvania courts recognized the doctrine of *in loco parentis*[88] and once it has been established that the stepparent has been conferred that status, the right to visitation must be "jealously guarded."[89] Therefore, recognition that the stepparent may be a *person in loco parentis*, with the status of a natural parent, may

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[78] "Persons who . . . assume the role of parent must not be overlooked." *Haines, supra* note 40, at 14.

[79] Gribble v. Gribble, 583 P.2d 64, 68 (Utah 1978).

[80] Spells v. Spells, 378 A.2d 879, 881 (Pa. 1977).

[81] *Id.* at 881; *see also Gribble,* 583 P.2d at 68.

[82] *Spells*, 378 A.2d at 881.

[83] *See generally*, *Spells*, 378 A.2d 879 (holding that a petition for visitation is not to be rejected solely upon party's mere status as a stepparent and not blood relative).

[84] *Id.* at 881.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 883.

now bring the stepparent within the statute[90] that provides visitation rights to parents and third parties.

Opponents of stepparent visitation rights set forth the proposition that there may be situations where a child has numerous stepparents, and visitation by all would be disruptive, and as such, not in the child's best interests.[91] Furthermore, opponents put forward for consideration the issue that a myriad of biologically unrelated third parties,[92] including the "butcher, the baker, and the candlestick maker,"[93] would have standing to petition the court based on affection for the child.[94]

Consequently, the courts have balanced these concerns by mandating that the stepparent seeking visitation must demonstrate that he or she served in a parental and custodial capacity.[95] This prevents the door from being opened to those who have a mere affection for the child, or who, solely by legal title as stepparent, want to petition for and obtain visitation.[96] This methodology protects the child from being used as a pawn by the ex-stepparent in harassing the ex-spouse,[97] while providing standing to petition for visitation by those who merit the right.

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[90] Carter v. Broderick, 644 P.2d 850, 853-54 (Alaska 1982).

[91] Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 19 (Neb. 1991). *See also*, Wendi Swinson Slechter, *The Visitation Rights of Former Stepparents or The Visitation Rights of Former Stepchildren: Which Is It Really?*, 32 U. LOUISVILLE J. FAM. L. 901, 913-14 (1994) (remarking that multiple stepparents may be problematic for the courts, for the court would have to determine who merits visitation and on what terms).

[92] *Carter*, 644 P.2d at 855, n.5.

[93] Simpson v. Simpson, 586 S.W.2d 33, 36 (Ky. 1979) (Stephenson, J., *dissenting*). *See also* Slechter, *supra* note 92 at 914 (noting that most jurisdictions have built in safeguards that assist in minimizing this concern. These safeguards include the doctrines of *in loco parentis*, the best interests of the child, and [de facto parent, equitable parentage, and psychological parentage]). *See also*, *In re* the Marriage of Gallagher, 539 N.W.2d 479 (Iowa 1995) (holding where party is not biological parent, adoptive parent, foster parent, or stepparent, the court should not "foster a superfluity of claims by parties who shared a special relationship with children based neither upon affinity nor consanguinity"). *Id.*

[94] *Carter*, 644 P.2d at 855.

[95] *Hickenbottom*, 477 N.W.2d at 15.

[96] *Id.* at 17.

[97] *Id.* at 10-11.

B. *The Uniform Marriage and Divorce Act*

"The common law imposed no duties beyond those voluntarily assumed by the stepparent."[98] It is the voluntary assumption of obligations that confers the status of *in loco parentis*.[99] This status may only be terminated at the will of the stepparent [or stepchild].[100] As noted, the stepparent-stepchild relationship is jeopardized by a marriage dissolution proceeding, and also upon the death of the natural custodial parent, where the child's surviving non-custodial natural parent seeks to terminate the rights of the stepparent.[101]

The family law fails to provide certainty and protection for stepparents, since there is a substantive preference in favor of the natural parent against stepparents, and many state statutes are ambiguous pertaining to stepparent visitation rights.[102] This substantive preference has been superseded at times where courts have extended the language of the Uniform Marriage and Divorce Act[103] in order to award stepparents visitation, although the statute exclusively deals with the rights of natural parents.[104]

Under the common law, stepparents had rights to their stepchildren, which were derived from the marriage to the child's

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[98] Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 42 (1984).

[99] *Id.*

[100] *Id.*

[101] *Id.* at 61.

[102] *Id.* at 62.

[103] UNIF. MARRIAGE & DIVORCE ACT, PART IV, § 401(D), 9A U.L.A. (1987) states in pertinent part: "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 resident or found, *but only if he is not in the physical custody of one of his parents.*" [emphasis added]; *see* Bryan v. Bryan, 645 P.2d 1267 (Ariz. 1982) (holding welfare of the child protected by broad reading); *see also* Simpson v. Simpson, 586 S.W.2d 33 (holding where child is not in custody of biological parent, stepparent must show unfitness of biological parent).

[104] Mahoney, *supra* note 99, at 69.

natural parent.[105] Once the marriage was terminated, so was the stepparent-stepchild relationship.[106] However, courts have consistently with the language in the Uniform Marriage and Divorce Act awarded custody or visitation to the stepparent where the stepparent had physical custody of the child at the date of the petition.[107]

C. *The Child Custody Jurisdiction Act*

The Child Custody Jurisdiction Act[108] provides standing to a person who claims a right to visitation with respect to a child, and to a person acting as a parent who has physical custody of the child. Currently thirty-six states have approved the Child Custody Jurisdiction Act.[109]

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[105] Peggy Blotner, *Third Party Custody and Visitation: How Many Ways Should We Slice The Pie?*, 1989 DET. C. L. REV. 163, 172 (1989).

[106] *Id.* at 172.

[107] *Id., but cf.* Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L. Q. 191, 195 (1993). The drafters of the Uniform Marriage and Divorce Act intended to deny third party's standing except under limited circumstances. *Id.*

[108] UNIF. CHILD CUSTODY JURISDICTION ACT § 2(9) 9 U.L.A. (1987). The statute states in pertinent part: " 'person acting as parent' means a person, other than a parent, who has physical custody of a child and who either has been awarded custody by a court or claims a right to custody." *Id.* Moreover, section 2(1) states: " 'contestant' means a person, including a parent, who claims a right to custody or visitation rights with respect to a child." *Id.*

[109] The following states have incorporated the CHILD CUSTODY JURISDICTION ACT: ALA. CODE §§ 30-3(20)-(44) (1975); AS §§ 25.30.010 to 25.30.910; ARIZ. REV. .STAT. §§ 25 (431)-(454) (1978); COLO. REV. STAT. ANN. §§ 14-131(101)-(126) (West 1997); CONN. GEN STAT. ANN. §§ 46b(90)-114 (West 1995); DEL. CODE ANN. tit. 13, §§ 1901 to 1925 (1998); FLA.. STAT. ANN. § 61.1302-1348 (West 1997); GA. CODE ANN. §§ 19-9(40)-(64) (1978); HAW REV. STAT. §§ 583(1)-(26) (1998); IDAHO CODE §§ 32 (1101)-(1126) (1999); ILL. COMP. STAT. ANN. 35/(1)-(26) (West 1993); IND. CODE ANN. §§ 31-17-3(1)-(25) (West 1999); IOWA CODE ANN. §§ 598A.1- 598 A.125 (West 1998); KAN. STAT. ANN. § 38(1301)-(1326) (1979); KY. REV. STAT. ANN §§ 403(400)-(630) (Banks-Baldwin 1980); LA. REV. STAT. ANN. §§ 13(1700)–(1724) (West 1999); ME. REV. STAT. ANN. tit. 19, §§ 1701-1725 (West 1979); MD. CODE ANN. FAMILY LAW §§ 9(201)-(224) (1998); MASS GEN. LAWS ANN. ch. 209B, §§ 1-14 (West 1999); MICH. COMP. LAWS ANN. §§ 600(651) –(673) (West 1961); MO. ANN. STAT. §§ 452(440)-(550) (West 1978); MONT. CODE ANN. §§ 40-7(101)- (125) (Smith 1977); NEV. REV. STAT.. §§ 125A(010)-(250) (1979);

IV. TRACKING THE HISTORY OF STEPPARENT VISITATION RIGHTS

In 1976, in the landmark case *In re Bennett v. Jeffreys,*[110] the New York Court of Appeals recognized an exception to the doctrine of parental privilege.[111] The court held that state interference in a parent-child relationship was warranted when extraordinary circumstances were present.[112] A young unwed mother had voluntarily, but not formally, placed her child with her mother's friend.[113] A few years later, she instituted a proceeding in order to obtain custody from the child's custodian.[114]

The court opined that the right of a parent to the custody of his or her child would not be "enforced inexorably" where extraordinary circumstances were manifest,[115] since it would be contrary to the best interests of the child to do so.[116] The best interests of the child superseded the parental absolute right.[117] Since a child has rights, he is not a sub-person subjected to absolute control by the natural parent.[118] As such, the court held

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N.H. REV. STAT. ANN. §§ 458-A(1)-(25) (1998); N.J. STAT. ANN. §§ 2A34(28)-(52) (West 1979); N.M. STAT. ANN. §§ 40-10(1)-(24); N.Y. DOM. REL. LAW §§ 75(a)-(z) (McKinney 1977); N.C. GEN. STAT. §§ 50A(1)-(25) (1979); NDCC 14-14-01 to 14-14-26; OHIO REV. CODE §§ 3109(21)-37) (West 1977); OKLA. STAT. ANN. tit. §§ 501-527 (West 1998); OR. REV. STAT. §§ 109(700)-(930) (1973); 23 PA. CONS. STAT. ANN. §§ 5341-5366; R.I. GEN. LAWS 15-14(1)-(26) (1956); S.D. CODIFIED LAWS §§ 26-5A(1)-(26) (Michie 1999); TENN. CODE ANN. §§ 36-6(201)-(225) (1979); TEX. FAM. CODE ANN. §§ (001)-(025) (West 1995); UTAH CODE ANN. §§ 78-45)c)-26 (1953); VT. STAT. ANN. tit. 15 §§ 1031-1051 (1979); VA. CODE ANN. §§ 20(125)-(146) (Michie 1950); WASH. REV. CODE ANN. §§ 26.27(010)-(910) (West 1979); W. VA. CODE §§48-10(1)-(26) (1981); WIS. STAT. ANN. §§ . 822(01)-(25); WYO. STAT. ANN. §§ 20-5(101)- 20-5(125) (Michie 1977).

[110] Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976).

[111] *Id.* at 546, 356 N.E.2d at 282, 387 N.Y.S.2d at 825.

[112] *Id.* at 544, 356 N.E.2d at 280, 387 N.Y.S.2d at 823.

[113] *Id.*

[114] *Id.* at 545, 356 N.E.2d at 280, 387 N.Y.S.2d at 824.

[115] *Id.* at 546, 356 N.E.2d at 282, 387 N.Y.S.2d at 825.

[116] *Id.* at 545-46, 356 N.E.2d at 281-82, 387 N.Y.S.2d at 824-25.

[117] *Id.* at 546, 356 N.E.2d at 282, 387 N.Y.S.2d at 825.

[118] *Id.*

that a child's rights and interests were paramount and not subordinated to the parental right to custody.[119]

Furthermore, intervention by the state was prescribed where there was a finding of "surrender, abandonment, unfitness, persistent neglect; unfortunate or involuntary extended disruption of custody, or other equivalent but rare or extraordinary circumstances."[120] Moreover, the court implicitly acknowledged the doctrine of the psychological parent, as the court held that a child, who had been in the custody of a non-parent for such an extended duration, would be psychologically traumatized due to the separation of the child and its surrogate parent.[121]

As noted previously, in the 1977 Pennsylvania case of first impression, *Spells v. Spells*,[122] a stepfather petitioned the court for the right to visit his two stepchildren.[123] The *Spells* court also implicitly recognized the doctrine of the psychological parent, noting that stepparents and their stepchildren may have developed mutual bonds of affection.[124] As such, the non-existence of a biological tie was insufficient to deny the stepparent visitation privileges.[125]

In addition, the *Spells* court noted that the state of Pennsylvania recognized the status of *in loco parentis*.[126] It found that under this doctrine, when a stepparent assumed a parental role, that individual was conferred the same rights and liabilities as between a natural parent and child.[127] Therefore, whether the stepparent stood as a person *in loco parentis* was a relevant factor in determining whether he or she should be accorded visitation privileges.[128]

However, the court ruled that a determination that one is deemed to be *in loco parentis* does not automatically confer visitation privileges.[129] These privileges must also be in the best interests of

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[119] *Id.*
[120] *Id.* at 550, 356 N.E.2d at 284, 387 N.Y.S.2d at 827.
[121] *Id.*
[122] 378 A.2d 879, 881 (Pa. 1970).
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* at 881-82.
[128] *Id.* at 882.
[129] *Id.*

the child.[130] The stepparent must be allowed to demonstrate what his relationship is to the stepchild(ren), and why his interest in visitation should be protected.[131]

In the 1978 case *Gribble v. Gribble*,[132] a stepfather sought visitation with his stepchild, and asserted that he treated his stepchild like his natural offspring, felt an affinity towards him, and was concerned about the child's future welfare.[133] The Utah statute[134] provided that the court shall consider what is in the best interests of the child when determining visitation rights of parents, grandparents, and other relatives.[135] The court ascertained that the child's welfare was of paramount importance in a visitation determination.[136]

The court opined that although a stepparent-stepchild relationship conferred no rights upon the stepparent at common law, the stepparent may have assumed the status of *in loco parentis* and thereby was elevated into a different category.[137] The person standing *in loco parentis* now had equivalent status as a natural parent regarding its child.[138]

Moreover, the court looked to *Spells* and adopted that court's view that a stepparent's visitation rights must be carefully guarded where a stepparent is a person *in loco parentis* and when it is in the best interests of the child to do so.[139]

The beginning of the next decade brought *Carter v. Brodrick*,[140] a case of first impression in Alaska,[141] where the court explored the issue of whether a stepparent could petition for visitation under a

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[130] *Id.*
[131] *Id.* at 883.
[132] 583 P.2d 64 (Utah 1978).
[133] *Id.* at 65.
[134] UTAH CODE ANN., § 30-3-5 (1953).
[135] Gribble, 583 P.2d at 66.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 67. The court defines *in loco parentis* as "one who has assumed the status and obligations of a parent without formal adoption." *Id.*
[139] Gribble v. Gribble, 583 P.2d 64, 68 (Utah 1978) (citing the *Spells'* decision as being directly on point in that a child's interests are of foremost concern but the court must also recognize that when someone is deemed *in loco parentis* his rights to visitation must be jealously guarded).
[140] 644 P.2d 850 (Alaska 1982).
[141] *Id.* at 852.

statute[142] that provided for visitation "of any child of the marriage."[143] The stepfather asserted that where one is deemed *in loco parentis*, and thus has an identical right to visitation as would a natural parent, then the child is "of the marriage."[144] Therefore, he would be authorized under the statute to obtain visitation privileges.[145]

The court stated that the doctrine of psychological parentage was infused in the common law doctrine of *in loco parentis*.[146] Citing *Gribble v. Gribble*,[147] the court noted that by assuming the status of *in loco parentis*, the stepparent had the same rights as a natural parent and was therefore brought within the statute.[148]

In 1984 in *Trapp v. Trapp*,[149] a stepfather sought visitation privileges under New York's Family Court Act, section 651(b).[150]

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[142] *Id. See* AS § 09.55.205:

> In an action for divorce or for legal separation the court may . . . during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any child of the marriage, make an order for the custody of or visitation with the minor child which may seem necessary and proper and may at any time modify or vacate the order.

Id.

[143] *Carter*, 644 P.2d at 853. The court recognized that there needs to be a determination of whether the parent stands *in loco parentis*. If so, then the court is to consider the best interests of the child when determining if visitation is to be granted. *Id.*

[144] *Id.* at 853.

[145] *Id.*

[146] *Id.* The court noted that "[o]f the six jurisdictions that ruled on stepparent visitation five have recognized it . . . on the premise that the stepparent has become a surrogate parent." *Id.* The court stated that this concept is called "psychological parentage" which "finds its legal basis . . . in the common law doctrine of *in loco parentis*." *Id.*

[147] 583 P.2d 64 (Utah 1978).

[148] *Id.* at 853-54. Where the court recognized that a stepparent who lived with the child most of the child's life, cared for as well as treated him as his biological son, while the natural father had no contact with the child, was conferred "the same rights as a natural parent and thus [brought the] stepparent within the statute." *Id.*

[149] 126 Misc. 2d 30, 480 N.Y.S.2d 979 (N.Y. Fam. Ct 1984).

[150] *Id. See generally,* FAMILY COURT ACT, § 651(b) (McKinney's 1995) (stating that "[w]hen initiated in the family court, the family court has jurisdiction to determine, . . . habeas corpus proceedings and proceedings

The court stated that the statute relied upon by the stepparent only provided the court with jurisdiction to determine matters of visitation; it did not specifically enumerate who in fact had standing to seek such a determination.[151] However, the court did find that it was a general consensus among the New York courts that if a stepparent had an interest in the child's welfare, then that person had standing to petition for visitation.[152]

Furthermore, the court acknowledged the principle that where extraordinary circumstances exist, the paramount concern for the welfare of the child overrides the parental privilege to custody.[153] In this instance, the court determined that the stepfather had resided with the stepchild for a period of nine years, and a kinship had developed between them, which, if severed, would drastically affect the stepchild. [154] Therefore, an extraordinary circumstance existed, and the stepparent's right to visitation should be judicially determined.[155]

The end of the decade brought *Honaker v. Burnside*[156] in 1989, where a stepfather was awarded visitation privileges with his stepdaughter after his wife was killed in a motor vehicle accident, and the natural father obtained custody of his daughter.[157] The court held that the child's welfare is the "polar star by which the discretion of the court will be guided."[158] The court determined that visitation by the stepfather was warranted, since visitation was

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brought by petition and order to show cause, for the determination of the custody or visitation of minors. . .").

[151] *Trapp*, 126 Misc. 2d 30, 480 N.Y.S. 2d at 979.

[152] *See id.* at 979-80. *See also* Humphrey v. Humphrey, 103 Misc. 2d 175, 425 N.Y.S. 2d 759 (N.Y. Fam. Ct. 1980); *In Re* Smith v. Lascaris, 106 Misc. 2d 1044, 432 N.Y.S.2d 995 (N.Y. Fam. Ct. 1980).

[153] Trapp v. Trapp, 126 Misc. 30, 31, 480 N.Y.S.2d 979, 980 (N.Y. Fam. Ct. 1984). "[I]t is only on such a premise that the courts may then proceed to inquire into the best interest of the child and to order a custodial disposition on that ground." *Id.* (citing *In re* Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821(1976)).

[154] *Id.*

[155] *Id.*

[156] 388 S.E.2d 322 (W. Va.1989).

[157] *Id.* at 323-25.

[158] *Id.* at 324 (citing Kiger v. Hancock, 153 W. Va. 404, 405, 168 S.E.2d 798,799 (1969)).

not solely for the benefit of the adults involved, but also for the fulfillment of the child's emotional well being.[159]

The granting of visitation privileges now rested partly upon ensuring that the child is not deprived of its right to the continuance of a close relationship with people that it considers a part of its family.[160] As a result, the stepparent now must show that he or she was in a custodial or parental capacity and that the award of visitation privileges would be in the best interests of the child in that it would foster the continuance of the familial kinship between the stepparent and the stepchild.[161]

The case of *Hughes v. Banning*[162] was also heard in 1989, where a stepmother filed a petition for visitation with her stepchild after the child's natural father was murdered.[163] Indiana did not recognize any statutory authority that provided for visitation to unrelated third parties.[164] However, the court acknowledged that a third party might establish visitation privileges where there is a showing of a custodial and parental capacity and that the third party visitation would be in the best interests of the child.[165] Finding that the stepmother cared for her stepchild full time while the natural father was employed outside the home, that there was evidence of a warm kinship between them, and that the stepmother represented a symbolic representation of the child's father, the

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[159] *Id.* at 325. The West Virginia court determined that "[v]isitation is for the benefit of the parent but it is the interest of the child and the benefit of the child which will be the determining factor in the granting of visitation rights." *Id.*

[160] *Id.* at 326. The court noted that denying visitation rights to her stepfather and stepbrother would compound the tragedy of the child losing her mother, which was one of the three close relationships that the child possessed. *Id.*

[161] *Id.*

[162] 541 N.E.2d 283 (Ind. Ct. App 1989).

[163] *Id.* at 283-84.

[164] *Id.* at 284.

[165] The court noted that the legislature had not recognized the right to visitation, and nonetheless imposed such a right according to case law. *Id.* (citing Collins v. Gilbreath, 403 N.E.2d 921 (1980); Tinsley v. Plummer, 519 N.E.2d 752 (Ind. Ct. App. 1988)). The court also stated that "[t]o establish visitation, a third person must first show that a custodial and parental relationship exists and then, that visitation with the third person would be in the 'best interest of the child.'" *Hughes*, 541 N.E.2d at 284. (citing *Tinsley*, 519 N.E.2d at 754).

court determined that the stepmother should be awarded visitation.[166]

The next decade brought *Shoemaker v. Shoemaker*,[167] where a stepparent petitioned for visitation with his stepchild.[168] The court acknowledged the common law principle that natural parents had a *prima facie* absolute right to the control of their children.[169] However, the court held that under certain circumstances,[170] a non-parent may obtain visitation privileges and thereby supersede the rights of the natural parent, when the visitation would further the best interests of the child.[171]

Late in 1991, the Supreme Court of Nebraska heard *Hickenbottom v. Hickenbottom*,[172] where a stepfather petitioned the court in order to obtain visitation with his stepdaughter.[173] The natural mother objected to the visitation, postulating that the stepfather was only interested in visitation in order to harass the mother.[174] The stepfather claimed that he had a kinship with his stepdaughter, that he participated in her daily activities, disciplined her when appropriate, and called her his daughter while the child referred to him as her "daddy."[175]

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[166] *Hughes*, 541 N.E.2d at 284-85.

[167] 563 So.2d 1032 (Ala. Civ. App. 1990).

[168] *Id.* at 1033.

[169] *Id.*

[170] *See id.* (finding that a stepparent is not precluded from visitation privileges in appropriate circumstances where it is in the best interest of the child); *In re* Bennett v. Jeffreys, 40 N.Y.2d. 543, 546, 356 N.E.2d 277, 281, 387 N.Y.S.2d 821, 824-25 (1976) (holding that the best interest of the child supersedes the parental absolute right where a finding of "surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody or other equivalent but rare or extraordinary circumstances exist); Trapp v. Trapp, 126 Misc. 2d at 30, 480 N.Y.S.2d at 980 (finding that extraordinary circumstances such as severing psychological parent from child, created a traumatic event); Honaker v. Burnside, 388 S.E.2d 322, 326 (W. Va. 1989) (allowing visitation in order to vindicate the child's right to continue a relationship with the stepparent who the child considers a part of her family).

[171] *Shoemaker*, 563 So.2d at 1033-34.

[172] 477 N.W.2d 8 (Neb. 1991).

[173] *Id.* at 10.

[174] *Id.* at 10-11.

[175] *Id.* at 11. The court noted that it was the best interests of the child that was at stake, therefore the stepfather was granted visitation rights. *Id.*

The court provided an historical analysis of the leading cases dealing with the issue of stepparent visitation. It recognized that the first jurisdiction to examine this issue was Pennsylvania in *Spells v. Spells*,[176] where it was held that a stepparent who stood *in loco parentis* was considered to possess the same rights to visitation as would a natural parent.[177] Examining *Gribble v. Gribble*,[178] the court found that the Utah statute[179] provided for visitation by "other relatives," and that a stepparent *in loco parentis* was brought within the terms of the statute.[180] Furthermore, the court explained that the state had an interest in the child's welfare when the state's divorce laws affected that child.[181]

Next, the court discussed *Carter v. Brodrick*,[182] where a stepparent was brought within the statute upon a showing that the stepparent was *in loco parentis* with his stepchild and therefore the child was "of the marriage."[183] The court then referred to *Looper v. McManus*,[184] and held that the focus of the propriety of visitation was upon providing the stable, emotional well being of the child, and not solely for the pleasure of the adult.[185] Moreover, visitation by a stepparent may be proper so that the child is not "stripped of the right to continue a close relationship with people [the child] considers . . . family."[186] In addition, the court recognized that there were no specific prohibitions against allowing stepparent visitation privileges,[187] and that such an award may be made if it is

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[176] 378 A.2d 879 (Pa. Super. Ct. 1979).

[177] Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 12.

[178] 583 P.2d 64 (Utah 1978).

[179] UTAH CODE ANN. § 30-3-5 (1953).

[180] *Gribble*, 583 P.2d at 64.

[181] Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 13 (Neb. 1991) *See generally,* Bryan v. Bryan, 645 P.2d 1267 (Ariz. Ct. App. 1982) (stating there is a legitimate state interest in child's welfare where child's home is to be divided by state's divorce laws).

[182] 644 P.2d 850 (Alaska 1982).

[183] *Hickenbottom*, 477 N.W.2d at 14.

[184] 581 P.2d 487 (Okla. Ct. App. 1978).

[185] *Id.*

[186] *Hickenbottom,* 477 N.W.2d at 14 (quoting *Honaker*, 388 S.E.2d at 326).

[187] *See generally* Shoemaker v. Shoemaker, 563 So.2d 1032, 1034 (Ala. Civ. App. 1990) (stating no prohibition against ex-stepparent from seeking and being awarded visitation in appropriate circumstances).

in the best interests of the child.[188] Therefore, stepparent visitation is appropriate where the stepparent demonstrates that he or she is in a parental and custodial capacity,[189] thereby deemed to be '*in loco parentis* with the minor child,[190] and that the visitation is in the child's best interests.[191]

In 1992, the Court of Appeals of Minnesota heard *Simmons v. Simmons*.[192] In this case, a stepfather petitioned for visitation with his stepson.[193] The court held that visitation would be awarded upon a finding that such visitation was in the child's best interests, and if there was a psychological parentage bond between the stepparent and the stepchild.[194] In addition, the court mentioned that a child's preference would be considered if the child was deemed to be of sufficient maturity to express such a preference.[195]

Apparently, the court felt that the psychological parentage doctrine and the doctrine of *in loco parentis* were inexplicably intertwined, since the court held that a person *in loco parentis* with the former stepchild was entitled to visitation.[196]

In 1994 in *Caban v. Healey*,[197] an Indiana court awarded a stepparent visitation with a stepchild where it was demonstrated that a custodial and parental relationship existed, and the child's best interests would be furthered by the continuance of contact with the stepparent.[198]

Thus, courts have awarded stepparents the right to visitation utilizing the doctrines of *in loco parentis* and psychological parentage, and as will be discussed, by the doctrines of "equitable parent" and "de facto parent."

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[188] *Hickenbottom*, 477 N.W.2d at 14.
[189] *Id.* at 15.
[190] *Id.* at 17.
[191] *Id.* at 16.
[192] 486 N.W.2d 788 (Minn. Ct. App. 1992).
[193] *Id.* at 790.
[194] *Id.*
[195] *Id.*
[196] *Id.* at 791.
[197] 634 N.E.2d 540 (Ind. Ct. App. 1994).
[198] *Id.* at 543.

IV. STEPPARENT'S VISITATION RIGHTS ARISING THROUGH GENERAL PRINCIPLES OF EQUITY[199]

A. The Doctrine of "In Loco Parentis"

Courts have relied on a stepparent's status as a person *in loco parentis* in order to allow visitation in situations that otherwise would have been statutorily precluded.[200] For example, in states where statutory language provides for visitation where the child is "of the marriage," if the stepparent stood *in loco parentis*, then the issue to be considered is, whether "[the] stepchild [is] a 'child of the marriage?'" If the child is deemed as such, then the stepparent could petition for visitation.[201]

Under Alaskan statute, a court may grant visitation to a person during the minority of a child of the marriage.[202] In *Carter v. Brodrick*,[203] an ex-stepfather appealed a Superior Court order denying him visitation with his stepchild.[204] The stepfather claimed that he was the only psychological father that his stepchild had ever known.[205] The court analogized the psychological parent to a parent *in loco parentis* and held that where a stepparent is conferred the status of *in loco parentis*, the stepchild is a "child of

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[199] A relatively recent development, some jurisdictions now extend visitation rights to stepparents despite the absence of statutory authorization to do so, utilizing the doctrine of *in loco parentis* in order to bring the stepparent within visitation statutes. *See* Susan M. Silverman, *Stepparent Visitation Rights: Towards the Best Interests of the Child*, 30 J. FAM. L. 943, 952 (1991/92).

[200] *See* Evans v. Evans, 488 A.2d 157, 161 (Md. 1985) (citing Carter v. Broderick, 644 P.2d 850 (Alaska 1982)); *see also* Gribble v. Gribble, 583 P.2d 64 (Utah 1978).

[201] *See* Carter v. Brodrick, 644 P.2d 850, 852 (Alaska 1982).

[202] ALASKA STAT. s.25.24.150(a) (1995) states in pertinent part:

> In an action for divorce or for legal separation, . . . the court may, . . . during the pendency of the action, or at the final hearing or at any time thereafter during the minority of a child of the marriage, make, modify, or vacate an order for the custody of or visitation with the minor child that may seem necessary or proper, including an order that provides for visitation by a grandparent or other person if that is in the best interests of the child.

Id.

[203] 644 P.2d 850 (Alaska 1982).

[204] *Id.* at 851.

[205] *Id.*

the marriage."[206] This brought the stepparent within the statute thereby allowing him to petition for visitation.

New York has three statutes that authorize standing to parties petitioning for visitation.[207] The first statute, New York Domestic Relations Law (hereinafter "DRL"), section 70(a),[208] provides that "either parent" has standing to petition the Supreme Court of New York for an adjudication of visitation matters.[209] In *S.M.M. v. Comm'r of Social Services*,[210] a visitation action involving a stepparent and a natural parent was before the court.[211] The court held that the statute did not confer standing upon the stepparent since the court interpreted the term "either parent" to mean a "natural parent."[212]

Under DRL section 240(1),[213] the right to visitation with any "child of the marriage" between the parties lies within the discretion of the court.[214] Although the statute is silent on who may petition the court, the *Comm'r of Social Services* court held that the phrase "child of the parties" meant a biological parent-child relationship.[215] However, the court did state that this section "does not specifically limit standing to parents," and may be of limited utility to a stepparent, although the statute was intended to apply primarily to natural parents.[216]

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[206] *Id.* at 855.

[207] *See In re* Janet S.M.M. v. Comm'r of Social Services, 158 Misc. 2d 851, 854, 601 N.Y.S.2d 781, 784 (N.Y. Fam. Ct. 1993).

[208] N.Y. DOM. REL. LAW § 70 (a) (McKinney 1995) provides in pertinent part: "either parent may apply to the supreme court . . . and . . . which may award . . . custody of such child to either parent . . . ." *Id.*

[209] *Id. See also Comm'r of Social Services*, 158 Misc. 2d at 855, 601 N.Y.S.2d at 783.

[210] 158 Misc. 2d 851, 601 N.Y.S.2d 781 (1993).

[211] *Id.*

[212] *Id.* at 853, 601 N.Y.S.2d at 783.

[213] N.Y. DOM. REL. LAW § 240(1) (McKinney's 1995) states in pertinent part: " [i]n any action . . . by petition . . . the custody of or right to visitation with any child of a marriage, the court must give such direction, between the parties, . . . as [with]in the court's discretion . . . ." *Id.*

[214] *Comm'r of Social Services*, 158 Misc. 2d at 855, 601 N.Y.S.2d at 783 (*quoting* N.Y. DOM. REL. LAW § 240(1) (McKinney's 1995)).

[215] *Id.* at 853, 601 N.Y.S.2d at 783.

[216] *Id.* The court stated that:

> [S]ection 240(3)(2) permits the court to issue an Order of Protection which 'may require any party...to permit a parent to

In *Humphrey v. Humphrey* and *In re Smith v. Lascaris*, the courts recognized that under the Family Court Act, section 651(b),[217] "anyone who has an interest in the welfare of a child has standing to petition for custody."[218] The court in *Comm'r of Social Services* proclaimed that even this statute does not specifically enumerate who in fact has standing to petition for visitation.[219]

B. The Doctrine of "De Facto Parent"

In addition to *in loco parentis* status, a person who assumes the role of a child's parent, fulfilling both the child's psychological and physical needs for care and affection on a day-to-day basis, may be deemed a de facto parent.[220] A stepparent may be deemed a de facto parent and obtain an award of visitation upon a showing

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> visit the child at stated periods.' Although section 240 does not specifically limit standing to parents, the close proximity of the terms 'parents' and 'parties,' the apparent use of the terms interchangeably, especially in the phrase 'child of the parties,' ... demonstrate that the statute was intended to apply primarily to custody disputes between parents. [Section] 240 is, therefore, of limited utility here where petitioner is a non-parent having no relationship by either blood or marriage to the child.

Id.

[217] FAMILY COURT ACT § 651(b) says in pertinent part: "[W]hen initiated in the family court, the family court has jurisdiction to determine . . . proceedings brought by petition . . . for the determination of the custody or visitation of minors . . . ." N.Y. FAM. CT. ACT § 651(b) (McKinney 1995).

[218] Trapp v. Trapp, 126 Misc. 30, 480 N.Y.S.2d 979 (N.Y. Fam. Ct. 1984) (quoting Humphrey v. Humphrey, 103 Misc.2d 175, 425 N.Y.S.2d 759; *In re* Smith, 106 Misc.2d 1044, 432 N.Y.S.2d 995).

[219] *Id.* at 784. *See generally Humphrey*, 425 N.Y.S.2d at 759 (stating the statute is silent as to who may initiate action); *see also In re* Smith, 432 N.Y.S.2d 995 (stating although statute silent about who may initiate a proceeding, "any person who has an interest in the welfare of a child has standing to sue").

[220] Kristine L. Burks, *Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve*, 24 GOLDEN GATE U. L. REV. 223, 245 (1994). *See also In re* B.G., 523 P.2d at 252 (finding that the 'de facto parent's' interest in a visitation proceeding is a substantial one); *In re* Joel H. et al. v. Diane L., 23 Cal. Rptr.2d 878 (Cal. Ct. App. 1993) (stating [a] de facto parent is a person who, on a daily basis, over a substantial period of time, seeks to fulfill the physical and psychological needs of the child by assuming the role of a parent).

that (1) the de facto parent-child relationship is of extended duration, (2) involving a reciprocity of conduct in which the child expressly manifests, or by implication, that the petitioner is its parent,[221] and (3) it would be detrimental to the child to deny visitation.[222]

C. *The Doctrine of "Equitable Parent"*

A person may be accorded the status of "equitable parent" where the petitioner is a non-biological "parent" who wishes to obtain such recognition by showing the willingness to accept the obligations of supporting the child in return for "reciprocal rights" of visitation.[223] The elements of "equitable parent" status are: (1) the stepparent and the child mutually acknowledge a relationship as parent and child, or (2) the biological parent of the child cooperated in fostering such relationship, (3) the non-biological party wants to obtain the rights afforded to a natural parent, and (4) the non-biological party is willing to pay child support.[224] This doctrine is significant in that it is based upon the non-biological party's relationship with the child, not upon that party's marriage to the child's natural parent.[225]

In *Atkinson v. Atkinson*,[226] the petitioner argued that the court erred in treating him as a third party seeking visitation, rather than recognizing him as a parent due to the close father-son relationship they shared.[227] The plaintiff asked that the court adopt the doctrine of "equitable parent," which the court found to be a novel request.[228] Holding that the Michigan Child Custody Act was

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[221] The minor must be of sufficient age and capacity to understand the meaning of a parental relationship. *In re the Marriage of Halpern*, 184 Cal. Rptr. 740, 748 (Cal. Ct. App. 1982).

[222] *Id.* at 748. *But cf.* Clifford S. v. The Superior Court of San Diego County, 45 Cal. Rptr.2d 333 (Cal. Ct. App. 1995) (holding [d]e facto parenthood status does not confer rights and responsibilities of biological parent, and de facto parents do not have rights to reunification services, custody or visitation).

[223] *Burks*, *supra* note 222, at 252.

[224] *Id.*

[225] *Id.* at 252-53.

[226] 408 N.W.2d 516 (Mich. Ct. App. 1986).

[227] *Id.* at 519.

[228] *Id.*

equitable in nature, the court granted the petitioner's request to be accorded the status of "equitable parent," as the petitioner met all the necessary elements of the doctrine.[229]

D. The Doctrine of Psychological Parentage

It is in the best interest of the child to protect its relationship with a stepparent when that kinship is based upon psychological parentage.[230] Removal of a "psychological parent" from a child's life may be a traumatic event.[231] The severance of a psychological parent-child relationship may be even more traumatic and devastating than the separation between a child and its natural parent.[232] Courts have recognized that a relationship between a stepparent and stepchild may exist which has fostered a psychological parent-wanted child affiliation.[233] Where a third party and a child profess a secure and stable relationship, that third party emerges as a "psychological parent."[234] The doctrine of psychological parentage is necessarily intertwined with the doctrine of *in loco parentis*. Where an individual, in this instance a stepparent, interacts on a day-to-day basis with the stepchild, providing care, love, and companionship, that child may view the stepparent as an essential focus in its life.[235]

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[229] *Id.* The court found that where the petitioner is not a biological parent of a child born or conceived during the marriage, the party may be considered the *natural* parent of that child if:

> (1) the party and the child have a relationship that is mutually acknowledged as parent and child, or (2) where the biological parent has cooperated in fostering such a relationship over a period of time, and (3) the party desires to have the rights afforded to a parent, and (4) is willing to accept the responsibility of paying child support.

Id.

[230] Carter v. Broderick, 644 P.2d 850, 855 (Alaska 1982).

[231] Alberto B. v. Rosa O., 102 Misc. 2d 147,149, 423 N.Y.S.2d 111, 114 (N.Y. Fam. Ct. 1979).

[232] Doe v. Doe, 92 Misc. 2d 184, 187, 399 N.Y.S.2d 977, 982 (N.Y. Sup. Ct. 1977).

[233] *Carter*, 644 P.2d at 853.

[234] *Doe*, 92 Misc. 2d at 187, 399 N.Y.S. 2d at 982.

[235] *Id.*

A Minnesota court of appeals recognized that a stepparent might indeed be a "psychological parent."[236] That court held that an award of visitation is predicated upon a finding that established emotional bonds existed between the stepparent and stepchild, which created a parent-child relationship.[237] Where there is a bonding and close personal relationship, the third party becomes the "psychological parent" to whom the child turns for its emotional needs.[238]

The resolution of the factual dispute of the petitioning party's motivation to assume the status of *in loco parentis* or "psychological parent" is only the first inquiry.[239] *In loco parentis* or "psychological parentage" status is not sufficient by itself to confer rights of visitation on a stepparent. It only provides the stepparent with a means of coming within a visitation statute.[240] The court then considers whether visitation by the stepparent is in the best interest of the child.[241] It is this factor that is dispositive in the court's recommendation or denial of stepparent visitation.[242]

V. THE BEST INTERESTS OF THE CHILD: THE WEIGHT OF THE PREFERENCE OF THE CHILD IN STEPPARENT VISITATION PETITIONS?[243]

The propriety of a court to consider a child's perspective was recognized over one hundred and forty years ago in *Curtis v.*

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[236] Simmons v. Simmons, 486 N.W.2d 788 (Minn. Ct. App. 1992).

[237] *Id.* at 790.

[238] Patzer v. Glaser, 396 N.W.2d 740, 743 (N.D. 1986).

[239] *Carter*, 644 P.2d at 855 (Alaska 1982).

[240] Hughes v. Banning, 541 N.E.2d 283, 284 (Ind. 1989).

[241] *Id.* at 284; *see also Carter*, 644 P.2d at 855 (Alaska 1982).

[242] *Carter*, 644 P.2d at 855.

[243] *See generally* ALASKA STAT. § 25.24.150(a) (1995) (visitation order with minor child that may seem necessary or proper if it is in the best interests of the child); CONN. GEN. STAT. ANN. § 46b-59 (1995) (the court shall be guided by the best interests of child); HAW. REV. STAT. § 571-46(2) (1995) (visitation may be awarded if it is in the best interests of the child); MICH. COM.P. LAWS. ANN. § 722.27.7(1)(1995) (child's best interests of paramount importance in determination of visitation rights); ORE. REV. STAT. § 109.119(1) (1994) (visitation rights awarded if to do so is in the best interests of the child); TENN. CODE ANN. § 36-6-302(a) (1995) (visitation to be awarded upon a finding that it

Curtis.[244] In 1855, a minor of 16 years brought an action against her mother asking that the court recognize her wishes to remain with a family of Shakers, which was against her mother's wishes.[245] The court held that it was "established custom" to inquire about a minor's opinion,[246] and that the weight depended on "maturity of mind and capacity to judge."[247] After an examination with the child, the court determined that a minor of sixteen years had the capacity and will to make judgments,[248] and that she was able to decide what would promote her own welfare.[249]

Courts have an obligation as *parens patriae* of children,[250] and in visitation cases the preferential method of determining the child's desires is to conduct an *in camera* interview with the child.[251] A child of sufficient age and maturity should be allowed to articulate his or her preferences to the court.[252] Consideration of a child's view may assist the court in determining his or her attitude and enlighten the court to the relevant facts.[253] This may be especially true where resolution of disputed factual issues are determinative

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would be in the best interests of the child to do so); *see also* WIS. STAT. ANN. § 767.245(1) (1995) (specifically enumerating that visitation rights are to be determined by what is in the best interests of the child); HAW. REV. STAT. § 571-46(3) (which states: "[i]f a child is of sufficient age and capacity to reason, so as to form an intelligent preference, the child's wishes as to custody shall be considered and be given due weight by the court"). *Id.*

[244] Curtis v. Curtis, 71 Mass. 535 (1855).

[245] *Id.* at 535-36.

[246] *Id.* at 537 (stating that "the right to the custody and control of a female of an age to have a will, and a capacity to form some judgment for herself, it is the established custom of the court to ascertain the opinion or inclination of the minor").

[247] *Id.*

[248] *Id.*

[249] *Id.* The court ruled that the child was free from the custody of her mother and was free to go to her guardian appointed by law. *Id.*

[250] Koppenhoefer v. Koppenhoefer, 80 A.D.2d 310, 312, 588 N.Y.S.2d 596, 600 (1990).

[251] *Id.* at 311-312, 588 N.Y.S.2d at 599.

[252] *Id.*

[253] Dintruff v. McGreevy, 34 N.Y.2d 887, 316 N.E.2d 716, 359 N.Y.S.2d 281 (1974).

pertaining to the stepparent's custodial and parental relationship with the stepchild.[254]

While *in camera* interviews with a child are not mandatory,[255] when a child possesses "sufficient intelligence, understanding, and experience,"[256] his or her preference may be a factor to be considered in a stepparent visitation proceeding.[257] Moreover, if a child expresses a preference in an *in camera* interview, providing the court with some indication of what is in the best interests of the child, that preference must be weighed against the child's age and maturity.[258]

While an expressed preference is important, especially if the child is mature, it is not dispositive.[259] The child may have suffered the trauma of a fragmented home and possibly the stress of its stepparent and natural parent vying for its allegiance.[260] These factors may subtract from the child's competency to weigh intelligently the prevailing factors necessary to make a wise choice regarding stepparent visitation.[261]

Consideration of what is in the best interests of the child necessitates consideration of the child's subjective perspective balanced by dependable objective criteria.[262] Furthermore, the courts must consider whether any undue influence was exerted upon the child.[263]

While the wishes of a child are to be afforded some consideration when determining what is in the best interests of a child,[264] it is within the discretion of the trial court in determining

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[254] *In re* Maloney, 90 A.D.2d 551, 455 N.Y.S.2d 129, 130 (N.Y. App. Div. 1982).

[255] Bazant v. Bazant, 80 A.D.2d 310, 312, 439 N.Y.S.2d 521, 524 (N.Y. App. Div. 1981).

[256] Patzer v. Glaser, 396 N.W.2d 740, 742 (N.D. 1986).

[257] *Id.*

[258] Eschbach v. Eschbach, 56 N.Y.2d 167, 173, 436 N.E.2d 1260, 1264, 451 N.Y.S.2d 658, 662 (1982).

[259] Martin v. Martin, 74 A.D.2d 419, 427, 427 N.Y.S.2d 1002, 1008 (N.Y. App. Div. 1980).

[260] *Id.*

[261] *Id.*

[262] Ebert v. Ebert, 38 N.Y.2d 700, 703, 346 N.E.2d 240, 242, 382 N.Y.S.2d 472, 474 (1976).

[263] *Eschbach*, 56 N.Y.2d at 173, 436 N.E.2d at 1264, 451 N.Y.S.2d at 662.

[264] *Doe*, 92 Misc. 2d at 187, 399 N.Y.S.2d at 979.

the weight it will accord a child's preference.[265] Where a child's age and maturity afford meaningful articulation of his or her preferences, great weight should be accorded to that input,[266] although the child's wishes are not determinative.[267] Consideration of a child's perspective may be important, where resolution of disputed factual issues, as to whether a stepparent was in a parental and custodial capacity, are at issue and the child is not of tender years.[268]

Where the child is of tender years, an *in camera* interview may be inappropriate.[269] A child of tender years must be deemed "competent to weigh intelligently the factors necessary to make a wise choice [regarding stepparent visitation]."[270] However, a court appointed law guardian and the utilization of forensic and other appropriate agencies would assist the court in rendering its determination.[271]

VI. CONCLUSION

In the absence of an express statutory grant providing for stepparent visitation, the courts should allow a stepparent to demonstrate that standing as either a person *in loco parentis*, a "de facto parent," an "equitable parent," or "psychological parent" in relation to the stepchild, and that the requested visitation is in the best interests of the child.

With the ever changing familial situations in society, state legislatures should take notice that a stepparent may be a vital force in the stepchild's life, and as such, statutory enactments reflecting this ideology should be forthcoming.

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[265] 2 Foster and Freed, LAW AND THE FAMILY, § 29.12.

[266] Koppenhoefer v. Koppenhoefer, 80 A.D.2d 310, 312, 558 N.Y.S.2d 596, 599 (1990).

[267] *Ebert*, 38 N.Y.2d at 703, 346 N.E.2d at 242, 382 N.Y.S.2d at 474.

[268] *In re Maloney*, 90 A.D.2d at 551, 455 N.Y.S.2d at 130.

[269] Blake v. Blake, 106 A.D.2d 916, 483 N.Y.S.2d 879, 880 (N.Y. App. Div. 1984).

[270] *Bazant*, 80 A.D.2d at 312, 439 N.Y.S.2d at 524.

[271] *Blake*, 106 A.D.2d at 916, 483 N.Y.S.2d at 880.