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# Equating a Stepparent's Rights and Liabilities Vis-a-Vis Custody Visitation and Support upon Dissolution of the Marriage with Those of the Natural Parent - An Equitable Solution to a Growing Dilemma

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# EQUATING A STEPPARENT'S RIGHTS AND LIABILITIES VIS-A-VIS CUSTODY VISITATION AND SUPPORT UPON DISSOLUTION OF THE MARRIAGE WITH THOSE OF THE NATURAL PARENT—AN EQUITABLE SOLUTION TO A GROWING DILEMMA?

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## INTRODUCTION

Today, it is widely known and accepted that one half of all marriages end in divorce. Of lesser renown, however, is the fact that the high rate of divorce has been accompanied by a correspondingly high rate of remarriage. It is these remarriages that are, in large part, responsible for the more than thirty five million stepparents in the United States today.[1] Moreover, it has been estimated that thirteen hundred new step families are blended each day.[2]

The typical "blended family" which will be the focus of this article is one in which there exists at least one stepparent and one or more children of a previous marriage. When the "blended family" comes together, it creates a unique set of problems ranging from hostilities toward the new stepparent and resentment towards new siblings to strained relations between ex-spouses and the cessation of support and visitation by the noncustodial spouse. Against this type of setting, the new stepparent is often required to make an emotional as well as a financial commitment in an effort to make the relationship work. Notwithstanding such commitments, however, the survival rate for remarriages is only slightly better than that for first time marriages with over forty-eight percent of all remarriages ending in divorce.[3] Moreover, upon the dissolution of the marriage, the stepparent often finds himself in a contest with the natural parent over custody and visitation rights with the stepchild and support liabilities toward the child.

In the past, the rights and liabilities of the stepparent vis-a-vis custody, visitation and support issues were fairly well settled. At common law, the stepparent incurred no liabilities of support towards a stepchild and

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1. White, *His, Hers and Theirs*, The Atlanta Constitution, April 17, 1985, at C1, col. 5.
2. *Id.*
3. *Id.* at C4, col. 5.

likewise acquired no rights of custody or visitation.[4] Today, however, with the ever increasing numbers of "blended families," issues of the rights and liabilities of stepparents are being raised with greater frequency. Correspondingly, the judicial and legislative responses have resulted in a gradual erosion of the common law status of the stepparent in relation to the stepchild. Although there has not been an absolute equation of the rights and liabilities of the stepparent with those of the natural parent, the trend is moving closer to placing the stepparent on a more equal footing with the natural parent.

This article will examine whether, and under what circumstances, the rights and liabilities of stepparents regarding custody, visitation, and support could justifiably be equated with those of the natural parent. In so doing, the focus will be on the manner in which such established doctrines as in loco parentis, equitable estoppel, and newer doctrines such as "best interest of the child" and "psychological parentage" can effectively be utilized to support an equalization of the rights and liabilities of stepparents and natural parents toward children of a "blended family."

## IMPOSITION OF SUPPORT

### A. *During the Marriage*

At common law, the stepparent and stepchild relationship conferred no rights and imposed no obligations.[5] Consequently, a stepparent at common law had no duty to support a stepchild, either during the marriage or upon its termination. A few states, however, statutorily imposed a duty of support on the stepparent.[6] Moreover, where such duties were not imposed by statute because of the stepparent status, they were often statutorily[7] or judicially[8] imposed under the doctrine of in loco parentis. This doctrine essentially provides that one who has assumed the status and obligation of a natural parent without formal adoption stands in the

4. *See generally* Miller v. United States, 123 F.2d 715, 717 (8th Cir. 1941); *Ex parte* Flynn, 87 N.J. Eq. 413, 416, 100 A. 861, 863 (N.J. Ch. 1917).

5. *E.g., In re* Smith's Estate, 49 Wash. 2d 229, 231, 299 P.2d 550, 551 (1956).

6. N.H. REV. STAT. ANN. § 546-A:1(IV) (1974) ("child" for purposes of imposing support liabilities is defined as either a natural child, adopted child, or stepchild); UTAH CODE ANN. § 78-45-4.1 (Supp. 1986) ("A stepparent shall support a stepchild to the same extent that a natural or adoptive parent is required to support a child."). Other states only impose the support obligation on the stepparent where the stepchild would otherwise become a public charge. *See, e.g.*, N.Y. SOC. SERV. LAW § 101(1) (McKinney 1986) ("Except as otherwise provided by law, the spouse or parent of a recipient of public assistance . . . [is] responsible for the support of such person . . . . Stepparents shall in like manner be responsible for the support of stepchildren under the age of twenty-one years.").

7. N.C. GEN. STAT. § 50-13.4(b) (1984) ("In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of the minor child, and any other person . . . standing in loco parentis shall be secondarily liable for such support.").

8. Taylor v. Taylor, 58 Wash. 2d 510, 513, 364 P.2d 444, 445 (1961).

place of the natural parent.[9]

While it is generally accepted that a stepparent does not stand in loco parentis with the child merely by virtue of his status as such, where the stepparent voluntarily assumes obligations towards the child incidental to the parental relation, he incurs liabilities that have been described as being the same as those of the natural parent.[10] The circumstances under which one can come to acquire the status of in loco parentis were aptly described in *Trotter v. Ashbaugh*.[11] There the Georgia Court of Appeals held that a person who assumes the relationship of a parent to a child, whom he is under no obligation to support, and discharges the duties of that relationship by receiving such child into his family and educating and supporting the child as if the child had been his own, is in a position of in loco parentis with the child.[12]

In the past, where an obligation of support was imposed on a stepparent, either statutorily or by way of the in loco parentis doctrine, the obligation was routinely terminated upon the dissolution of the marriage.[13] This was based in large part on the recognition that because the in loco parentis status was voluntarily created, it could be terminated at will by either the stepchild or the stepparent. In the context of a divorce in which the stepparent was denying support liabilities towards the child, it was generally assumed that the stepparent had no desire to continue the in loco parentis relationship with the child beyond the dissolution of the marriage.[14] Thus, the relationship was considered voluntarily terminated.

### B. *Continuation of Support Liability Beyond the Marriage*

Notwithstanding the generally held view that obligations of support are imposed upon the stepparent only for the duration of the marriage, a number of courts have found ways to impose support obligations on stepparents that extend beyond the dissolution of the marriage. However, an examination of the decisions that have imposed support obligations on the stepparent extending beyond the marriage reveals a substantially similar fact pattern. The overwhelming majority of those cases involved situations in which the natural mother was pregnant with someone else's

9. BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

10. *See* Brummit v. Commonwealth, 357 S.W.2d 37, 39 (Ky. 1962); Dodson v. McAdams, 96 N.C. 149, 155, 2 S.E. 453, 454 (1887).

11. 156 Ga. App. 130, 274 S.E.2d 127 (1980).

12. *Id.* at 131, 132, 274 S.E.2d at 129.

13. *E.g.*, McDowell v. McDowell, 378 S.W.2d 814, 815 (Ky. 1964); Eckhardt v. Eckhardt, 37 A.D.2d 629, 323 N.Y.S.2d 611 (1971); UTAH CODE ANN. § 78-45-4.1 (Supp. 1986).

14. *See, e.g.*, Franklin v. Franklin, 75 Ariz. 151, 156, 253 P.2d 337, 340 (1953); Wood v. Wood, 166 Ga. 519, 519-20, 143 S.E. 770, 773 (1928); Taylor v. Taylor, 58 Wash. 2d 510, 512, 364 P.2d 444, 445 (1961).

child at the time of her marriage to the stepfather.[15] The stepfather, who was aware of the circumstances, would more often than not promise to care for the child as if the child were his own and in fact did so for the duration of the marriage. In many of the cases, because the child was born just prior to the marriage or shortly thereafter, the child would grow up believing that the stepfather was his natural father. As a result of the stepfather's voluntary assumption of the care and support of the child and his acceptance of the child as his own, the mother would routinely allege that the stepfather stood in loco parentis with the child and this allegation was more often than not accepted by the court.[16]

Although the mother had little difficulty establishing an in loco parentis status, the courts were compelled to look beyond the in loco parentis doctrine where they sought to impose support liabilities upon the stepparent that would continue beyond the dissolution of the marriage. In so doing, the two most practical solutions were the doctrines of implied contract and equitable estoppel. The prerequisites for the application of the latter doctrine were discussed at length in an early California decision, *Clevenger v. Clevenger*.[17] In *Clevenger*, although the stepfather had accepted the child into the family from the child's birth, it was not established that he had ever represented himself as the child's natural father. On this basis, the California Court of Appeal held that the stepfather was not estopped from denying his liability for support. The court, nonetheless, approved, in principle, the imposition of support upon a stepparent provided certain prerequisites were met:

> If the facts should show . . . that the husband represented to the boy that he was his father, that the husband intended that his representation be accepted and acted upon by the child, that the child relied upon the representation and treated the husband as his father and gave his love and affection to him, that the child was ignorant of the true facts, we would have the foundation of the elements of estoppel . . . .[18]

Based on the foregoing, it would appear that in *Clevenger*, and the subsequent cases which cited *Clevenger* with approval, the pivotal question was whether the stepfather had actually held himself out to be the natural father of the child. Thus, while the general acceptance of the child into the family unit was held to be sufficient to create the in loco

15. *See, e.g., In re* Marriage of Johnson, 88 Cal. App. 3d 848, 849-50, 152 Cal. Rptr. 121, 122 (1979) (child was born 10 days before marriage of mother to stepfather); Fuller v. Fuller, 247 A.2d 767, 768 (D.C. 1968) (child was born three months after mother's marriage to stepfather); Miller v. Anderson, 43 Ohio St. 473, 3 N.E. 605 (1885) (child was born three months after marriage of mother to stepfather).

16. *See, e.g., Fuller*, 247 A.2d at 770; State v. Shoemaker, 62 Iowa 343, 17 N.W. 589 (1883); Hartford v. Hartford, 53 Ohio App. 2d 79, 86, 371 N.E.2d 591, 596 (1977).

17. 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961).

18. *Id.* at 671, 11 Cal. Rptr. at 714.

parentis status,[19] this was not enough to carry liability beyond the marriage. Before liability extended beyond the marriage it was necessary to establish that the stepfather took the additional action of holding himself out as the natural father of the child.[20] It was this act that was said to induce the requisite reliance by the child so as to warrant an application of equitable estoppel.

### C. *Extension to "Blended Families"*

Although cases such as *Clevenger* laid the foundation for the extension of the support obligation beyond the dissolution of the marriage, their impact on the "blended family" had, until recently, been minimized by the narrowly drawn fact patterns of those decisions.[21] Unlike the situation in *Clevenger*, the typical "blended family" presents a situation where the child has had substantial contact with his natural parent and is aware that the stepparent is not his natural parent. Thus, to the extent that the application of equitable estoppel in the *Clevenger* line of cases was dependent upon a finding that the stepparent had held himself out as the child's natural parent, and the child had relied upon this representation to his detriment, the stepparent in the typical "blended family" would seemingly not be in as vulnerable a position. While the stepparent may treat the child as if he were the stepparent's natural child, it is much less likely that the stepparent would hold himself out as the natural parent of the stepchild and the stepchild, likewise, would not generally look upon the stepparent as his natural parent.

In spite of these dissimilarities, however, the New Jersey Supreme Court recently relied upon the doctrine of equitable estoppel to impose a continuing duty of support on a stepfather in a "blended family." *Miller v. Miller*[22] represents a significant departure from the *Clevenger* line of cases in several respects. To begin with, the stepchildren in *Miller* were not born into the marriage between the stepparent, Miller, and their natural parent as was typical in the *Clevenger* type cases. In addition, the two girls had substantial contact with their natural father prior to their mother's marriage to Miller and were aware that Miller was not their natural father. Even more importantly, Miller never held himself out as the girls' natural father. Notwithstanding the obvious differences between *Miller* and the *Clevenger* line of cases, the court held that Miller would be estopped from denying his obligation to support his stepdaughters, thereby imposing upon Miller an obligation of support that contin-

19. *See, e.g., Fuller*, 247 A.2d at 770; *Taylor*, 58 Wash. 2d at 514, 364 P.2d at 445.

20. *See generally* Clevenger v. Clevenger, 189 Cal. App. 2d at 658, 11 Cal. Rptr. at 707; L. v. L., 497 S.W.2d 840 (Mo. Ct. App. 1973).

21. *L.*, 497 S.W.2d at 840; Ross v. Ross, 126 N.J. Super. 394, 314 A.2d 623 (1973); T. v. T., 216 Va. 867, 224 S.E.2d 148 (1976).

22. 97 N.J. 154, 478 A.2d 351 (1984).

ued beyond the dissolution of the marriage.[23] In so doing, the court relied on evidence that Miller had actively interfered with the relationship between the girls and their natural father, to the point of refusing to allow the girls to visit their natural father or accept any support from him. Instead, Miller voluntarily assumed responsibility for the support of his stepdaughters and claimed them as dependents on his income tax return. Although the girls' natural father refused to consent to their adoption by Miller, they used Miller's surname on their school records with Miller's knowledge and consent.

The court concluded that as a result of Miller's conduct, he stood in loco parentis with his two stepdaughters. The court then noted that while in loco parentis status generally terminates upon the dissolution of the marriage, in appropriate cases, the stepparent can be estopped from denying an obligation to support the stepchild.[24] Since Miller had induced the girls to rely on him to their emotional and financial detriment, the court decided this was an appropriate case for the application of equitable estoppel, even though Miller had not held himself out to be the girls' father.

### D. *Towards Equalization of Support Liability*

Although the extent to which other jurisdictions may adopt the *Miller* reasoning remains to be seen, *Miller* could have significant implications for the stepparent in the "blended family." This is readily apparent from *Miller*'s deviation from the earlier line of decisions. It is clear, for example, that the emphasis in *Miller* was away from a finding that the stepparent held himself out as the child's natural parent and towards a finding that the stepparent's interference with the relationship between the child and the noncustodial natural parent had impaired the ability of the child to receive support from that parent.[25]

Although *Miller*'s shift in emphasis could seemingly be viewed by the courts as a willingness to broaden the circumstances under which a stepparent might incur ongoing support liabilities, at least one court appears to have given *Miller* a narrow reading in this respect. In *Wiese v. Wiese*,[26] the Supreme Court of Utah, citing *Miller* with approval, found that while the stepfather had supported the child and had treated the child as his own, the prerequisites for the application of equitable estoppel had not been met since there was no evidence that the stepfather had interfered with the relationship between the child and his natural fa-

23. *Id.* at 170, 478 A.2d at 359.
24. *Id.*
25. *Id.* at 168-69, 478 A.2d at 358.
26. 699 P.2d 700 (Utah 1985).

ther.[27] It should also be noted that the court in *Miller* proceeded cautiously as well, by carefully explaining that before the stepparent becomes liable for pendente lite support, the natural parent must show that he is not receiving support from the noncustodial natural parent and that support cannot be obtained from that individual.[28] In addition, in order to receive permanent support from the stepparent, the natural parent must show that there were representations by the stepparent which were relied upon to the detriment of the natural parent and child.[29]

Though the court in *Miller* emphasized that the primary obligation of support remains with the natural parent, *Miller* is indicative of the ever narrowing legal distinctions between the natural parent and the stepparent.[30] The move in this direction would appear to be based largely on a concern for the stepchild's welfare.[31] Long before the *Miller* decision, the importance of facilitating the integration of the stepchild into the family unit by equalizing the rights of the stepchild with those of the natural child had been recognized.[32] It is not uncommon, for example, to find dependency statutes in which children who are deemed to be dependent are defined as including stepchildren.[33] Where stepchildren are not expressly included within such statutes, they are often held to qualify for benefits if it is determined that they are or were in fact dependent upon the stepparent.[34]

The corollary to equating the rights of the stepchild with those of the natural child is the imposition of liabilities upon the stepparent equaling those of the natural parent. This trend towards equalization is further aided by the difficulties associated with obtaining support from an absen-

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27. *Id.* at 702-03.

28. *Miller*, 97 N.J. at 167, 478 A.2d at 358.

29. *Id.* at 168, 478 A.2d at 358.

30. *See generally* Archibald v. Whaland, 555 F.2d 1061, 1067 (1st Cir. 1977); N.H. REV. STAT. ANN. § 546-A:1(IV) (1974); UTAH CODE ANN. § 78-45-4.1 (Supp. 1986). *But see* Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 45-49 (1984) (author discusses at length various arguments presented in opposition to imposing support liabilities on stepparents).

31. *Miller*, 97 N.J. at 171-78, 478 A.2d at 360-63 (Handler, J., concurring in part and dissenting in part).

32. *See* Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 FAM. L.Q. 209, 228 (1970) (author advocates the assumption by the stepfather of all obligations and a phasing out of the involvement of the natural father in order to facilitate the stepchild's adjustment to the new family); *see also* State v. Gillaspie, 8 Wash. App. 560, 562, 507 P.2d 1223, 1224 (1973) (stating that the law has been developing toward the integration of stepchildren into the family with rights equal to those of natural children).

33. "Child" is defined in some states' workers compensation acts to include stepchild. GA. CODE ANN. § 34-9-13(a)(1) (1982); IND. CODE ANN. § 22-3-3-19(f) (West 1981); N.C. GEN. STAT. § 97-2(12) (1985).

34. *See, e.g.*, Cherokee Brick Co. v. Bishop, 156 Tenn. 168, 299 S.W. 770 (1927) (holding that a stepchild who is a member of the employee's family and is dependent upon the employee for support is a dependent child within the ambit of protection of the Workmen's Compensation Act and is entitled to share benefits equally with an actual child of the deceased employee).

tee natural parent. Given the growing concern with the inadequacies of existing support measures, it is probable that courts will begin to look increasingly towards the stepparent as an alternative or as an additional source of support. While stepparents do not yet have support liabilities toward a stepchild equaling those of the natural parent, the courts have consistently stated that persons who stand in loco parentis to a child have the *same rights and obligations as those of the natural parents.*[35]

Based on the equation of the rights and liabilities of one who stands in loco parentis with a child to those of a natural parent, one could argue that upon the establishment of the in loco parentis status, there should be no distinction between the support obligations of the stepparent and the natural parent. While this status normally terminates upon dissolution of the marriage, it has been effectively extended beyond the marriage through the application of equitable estoppel. Thus, given the judicial concern with equalizing the rights of stepchildren with those of natural children in the family unit and increasing the probability that all children with absentee parents will receive adequate support, it appears likely that the support liabilities of the stepparent will continue to move closer to those of the natural parent.

## CUSTODIAL ISSUES

### A. *Procedural Barriers*

The custody disputes between a natural parent and a stepparent litigated to date tend to fall into one of two categories. The first category consists of a dispute between a noncustodial natural parent and a stepparent with whom the minor child has been living as a result of that stepparent's marriage to the custodial natural parent. A dispute generally arises within this context when the noncustodial parent's attempt to gain legal custody of the child upon the death of the custodial parent is opposed by the stepparent with whom the child has been residing. The second category consists of a dispute between the custodial natural parent and the stepparent for custody of the minor child upon the dissolution of their marriage. While most of the reported cases to date have fallen into the former category, the stepparent, whether in a contest with the custodial natural parent or the noncustodial natural parent, faces an uphill battle in his attempt to gain custody of the child as against the natural parent. The factor which weighs most heavily against the stepparent is the historically recognized right of a natural parent to the cus-

35. Austin v. Austin, 147 Neb. 109, 112-13, 22 N.W.2d 560, 563 (1946) (emphasis added); *see also* Sparks v. Hinckley, 78 Utah 502, 506, 5 P.2d 570, 571-72 (1931) ("where one stands in loco parentis to another, the rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child"). *But see* Berkowitz, *supra* note 32, at 215.

tody of his child as against third parties.[36] Moreover, the stepparent may be faced with procedural barriers as well.[37]

One such procedural barrier stems from basic statutory construction. In many instances, the natural parent and the stepparent will be proceeding under a statute which provides that the court may award custody of "children of the marriage."[38] Some courts have reasoned that a stepchild is not a child "of the marriage" within the meaning of such a statute. The courts have then held that they lacked the authority to make an award of custody in a dispute between the natural parent and the stepparent.[39] Other courts, when presented with this issue have reached a contrary result. In one case where the statute provided that upon divorce the court has the authority to make provision for "minor children of the marriage,"[40] the natural father argued that this phrase did not include children of a former marriage and the court thus lacked authority to make an award of custody to the stepmother. The Kansas Supreme Court, in rejecting the father's argument, relied on an earlier decision in which a stepmother had been allowed to proceed under such a statute. There the child had been brought into the home and the stepmother who had assumed its care stood in loco parentis with the child. The court therefore reasoned that the phrase "minor children of the marriage" could be fairly interpreted to include the child in question.[41]

### B. *Impact of the "Parental Rights" Doctrine*

Even where the stepparent successfully defends against such procedural challenges, he faces an even greater obstacle once the court reaches the merits of the case. Absent extraordinary circumstances, courts his-

36. Pape v. Pape, 444 So. 2d 1058, 1060 (Fla. Dist. Ct. App. 1984); Childs v. Childs, 237 Ga. 177, 178, 227 S.E.2d 49, 50 (1976); Barstad v. Frazier, 118 Wis. 2d 549, 568-69, 348 N.W.2d 479, 483 (1984).

37. *See, e.g.*, Anderson v. Anderson, 191 Kan. 76, 78-79, 379 P.2d 348, 350 (1963); Pierce v. Pierce, 198 Mont. 255, 261, 645 P.2d 1353, 1356-57 (1982) (Absent the adoption of the child by the stepfather, the only circumstances under which the stepfather could obtain standing to request custody of the minor was by termination of the natural mother's parental rights. Since the only person who had standing to bring an action to terminate parental rights was the district attorney, it was held that the stepfather had no standing to sue for custody of the stepchild). *But see* N.C. GEN. STAT. § 50-13.1 (1984) ("Any parent, relative or other person . . . claiming the right to custody of a minor child may institute an action . . . as hereinafter provided.").

38. *E.g.*, GA. CODE ANN. § 19-9.1.(a) (1982); IDAHO CODE § 32-717 (1983); MISS. CODE ANN. § 93-5-23 (1972).

39. Phillips v. Phillips, 176 Ore. 159, 172, 156 P.2d 199, 203 (1945).

> The statute concerning decrees of divorce specifies that the court shall have the power to provide for the future care and custody of the minor children of the marriage. The children in the case at bar are not the "children of the marriage" and the statute gives no power to the court to provide for their custody.

40. *Anderson*, 191 Kan. at 79, 379 P.2d at 350.

41. *Id.* at 79, 379 P.2d at 351 (quoting State v. Taylor, 125 Kan. 594, 596, 264 P. 1069, 1070 (1928)).

torically have been reluctant to disturb the longstanding right of natural parents to the custody of their minor children as against third parties. At common law, the natural father had a proprietary right to the custody of a legitimate minor child which was absolute.[42] Gradually, this common law rule of absolute paternal custody gave way to a preference for the mother where the child was of a young age. However, this maternal preference which became known as the "tender years doctrine" came under increasing attack as being violative of the equal protection clause.[43] Partly in response to these challenges, courts began taking a more facially neutral posture towards custody disputes between natural parents. They began holding that where both parents were fit and proper custodians, the custody determination would be based on the best interest of the child.[44]

While this "best interest of the child" test is now almost uniformly applied to custody disputes between natural parents, most courts have been unwilling to apply this standard to a custody dispute between a natural parent and a third party.[45] Instead, the courts have used a variety of approaches in the latter type of dispute which almost invariably result in an award of custody to the natural parent absent a finding of unfitness.

Some courts, in deciding disputes between natural parents and third parties, have strictly adhered to the "parental rights" doctrine. This doctrine provides that in the absence of extraordinary circumstances, custody of a minor child should be given to the natural parent if that parent is found to be fit.[46] In *Childs v. Childs*,[47] for example, where the juvenile court awarded custody to the grandparents and the father appealed, the Supreme Court of Georgia held that "the law contemplates that one of the natural parents will be awarded custody of the child unless the present unfitness of the parents is established by clear and convincing

42. *E.g., In re* Hudson, 13 Wash. 2d 673, 685, 126 P.2d 765, 771 (1942).

43. *See generally* State *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 180, 350 N.Y.S.2d 285, 288 (1973) (stating that the trend in legislation, commentary and judicial decisions is away from the "tender years presumption"); Devine v. Devine, 398 So. 2d 686 (Ala. 1981). *But see* Albright v. Albright, 437 So. 2d 1003 (Miss. 1983) ("tender years doctrine" reaffirmed).

44. *See generally* Shumway v. Shumway, 106 Idaho 415, 679 P.2d 1133 (1984); Rizzo v. Rizzo, 95 Ill. App. 3d 636, 420 N.E.2d 555 (1981).

45. *See generally* Blackburn v. Blackburn, 168 Ga. App. 66, 70, 308 S.E.2d 193, 197 (1983) (held that between a third party and a natural parent, the natural parent is entitled to custody unless it is shown that the parent is unfit); Drummond v. Fulton County Dep't of Family & Children's Serv., 237 Ga. 449, 228 S.E.2d 839 (1976). *But see* Comer v. Comer, 61 N.C. App. 324, 328, 300 S.E.2d 457, 460 (1983) (held that the "trial judge's discretion is such that he is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person.") (quoting *In re* Kowalzek, 37 N.C. App. 364, 368, 246 S.E.2d 45, 47 (1978)).

46. *E.g.*, White v. Bryan, 236 Ga. 349, 223 S.E.2d 710 (1976); Lord v. Lord, 443 N.E.2d 847, 849 (Ind. Ct. App. 1982).

47. 237 Ga. 177, 227 S.E.2d 49 (1976).

evidence."[48]

Some courts have gone so far as to say that the natural parents have a constitutional right to custody of their minor children and absent compelling reasons, the court is without authority to displace a fit and able parent in favor of a third party.[49] However, the authorities relied upon by these courts, for the most part, involve the termination of parental rights proceedings.[50] Custody cases involving natural parents and third parties can readily be distinguished from those cases involving the termination of parental rights. The latter cases result in an absolute severance of ties between the parent and child whereas a custodial determination remains modifiable throughout the child's minority. Because of the substantive differences in the outcome of the two proceedings, it can be argued that the same constitutional considerations that apply to a parental rights termination proceeding should not apply to a custody proceeding.

Other courts, while using less direct approaches, effectively reach the same result as those courts strictly adhering to application of the "parental rights" doctrine. For example, some courts which appear to be espousing the "best interest of the child" test rather than the "parental rights" doctrine arrive at the same conclusion one would reach through the application of the latter doctrine by engaging in a presumption that the "best interest" of the child will be served by placing custody of that child with the natural parent absent a finding of unfitness.[51] For courts that engage in such a presumption, the focus of the inquiry is a factual determination of the fitness of the natural parent. If the parent is found to be fit, no separate inquiries pertaining to the child's interest are made. Rather, it is presumed at that point that the child's interest will best be served by leaving custody with the natural parent. Since such a finding is void of any factual determination of whether it would be best for the child to be placed elsewhere notwithstanding a finding that the natural parent is fit, the court's decision is in reality nothing more than a veiled application of the "parental rights" doctrine.

Some courts go even further and profess to have based their decision solely on a determination of what would best serve the child's interest without regard to the rights of the parents. However, a closer examination of these opinions will more often than not reveal either a finding that the natural parent was unfit[52] or a factual basis[53] for such a determina-

48. *Id.* at 178, 277 S.E.2d at 50.

49. Barstad v. Frazier, 118 Wis. 2d 549, 348 N.W.2d 479 (1984).

50. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972).

51. Ross v. Hoffman, 280 Md. 172, 372 A.2d 582 (1977); Plemmons v. Stiles, 65 N.C. App. 341, 309 S.E.2d 504 (1983); *cf.* Root v. Allen, 151 Colo. 311, 377 P.2d 117 (1962).

52. *See, e.g., In re* Ewing, 96 Idaho 424, 426, 529 P.2d 1296, 1298 (1974) (natural father found to have abandoned the child).

53. Alingh v. Alingh, 259 Iowa 219, 144 N.W.2d 134 (1966) (child suffered extensive and severe bodily injuries at hands of mother); New Jersey Div. of Youth & Family Serv. v. Torres, 185

tion. In one such case, *Clifford v. Woodford*,[54] the Arizona Supreme Court, quoting an earlier decision, stated that the 'pole star' by which it was guided to a decision was the best interest of the child and that the parents' prima facie right to custody was not unconditional but was one which gave way to the paramount consideration of the welfare of the child.[55] In spite of this seemingly wholehearted embracement of the "best interest of the child" doctrine, the court subsequently stated that the natural father's relationship with the children was such as to make him unfit to assume the responsibilities of parenthood.[56]

To find that it is in the best interest of the child to be removed from the custody of the natural parent upon a determination that the parent is unfit is superfluous. The same result would be obtained through a strict application of the "parental rights" doctrine. A finding that the natural parent is unfit obviates the necessity of finding that it would be in the best interest of the child to be removed from the custody of that parent. Thus, one can be certain that a decision will be based squarely on the best interest of the child doctrine only where there has been no finding that the natural parent is unfit.

Although the "parental rights" doctrine and the "best interest of the child" doctrine are by no means inherently inapposite, there are circumstances under which an award of custody to a natural parent based on parental right considerations may not coincide with that which is in the best interest of the child. Where these doctrines compel irreconcilable results, only a minority of courts have placed the interest of the child above the rights of the natural parent.[57] Those few courts that are willing to give paramount consideration to the best interest of the child have employed a variety of devices, some of which involve the application of the "parental rights" doctrine. Since this doctrine requires a finding that the natural parent is unfit before that individual can be deprived of custody, some courts simply give the term "unfitness" a broad construction so as to include acts by the natural parent that would not ordinarily come within the meaning of that term. For example, in *In re Cleaves*,[58] the Appellate Division of the New York Supreme Court stated that within judicial definition, an unfit parent includes one who is cruel or unkind towards his child.[59] In *Clifford*, the natural father's lack of interest in his children and his indifference towards them was found to be

N.J. Super. 234, 447 A.2d 1372 (1980) (child had suffered extensive bodily injuries at the hands of the natural parents).

54. 83 Ariz. 257, 320 P.2d 452 (1957).
55. *Id.* at 264, 320 P.2d at 455.
56. *Id.* at 266, 320 P.2d at 458.
57. H. CLARK, LAW OF DOMESTIC RELATIONS 591 (1968).
58. 6 A.D.2d 138, 175 N.Y.S.2d 736 (1958).
59. *Id.* at 140, 175 N.Y.S.2d at 739.

sufficient justification for a finding of unfitness.[60] Thus while it is accepted that acts of abandonment, persistent neglect, and serious physical harm support a finding of unfitness,[61] a liberal construction of the term "unfitness" to encompass acts of indifference and irresponsibility greatly enhances the likelihood of a finding that the natural parent is unfit.

Similarly, it is said that a natural parent will only be deprived of custody if that parent is found to be unfit unless "extraordinary"[62] or "exceptional"[63] circumstances would dictate a contrary result. Although the employment of this language is clearly intended to cover only extreme situations such as abandonment and lengthy separations, some courts have liberally construed "extraordinary" or "exceptional" circumstances to accommodate the interest of the child within the confines of the "parental rights" doctrine.[64] Thus, through a broad construction of statutory terms such as "unfitness" and "extraordinary" circumstances, some courts have liberalized the circumstances under which a natural parent may be deprived of the custody of his child in a dispute with a third party.

### C. *"Best Interest of the Child" and "Psychological Parentage"*

A minority of courts have abandoned the "parental rights" doctrine altogether in favor of the "best interest of the child" test. The Florida District Court of Appeal explained its departure from the "parental rights" doctrine in the following manner.

> [T]he ultimate test in determining the custody award should be the best interest and welfare of the child. . . . It is true . . . that courts should not lightly encroach on the rights of natural parents to have the custody, care and control of minor children, especially when such parents are found to be fit . . . However, the facts of this case illustrate that there can be conflicts between what is reasonably perceived by a trial judge to be in the child's best interests and a natural parent's preferential right to custody . . . .[65]

In abandoning the "parental rights" doctrine, the various rationales that have been advanced include the "psychological parentage" theory which was discussed at length in *Doe v. Doe*,[66] a case involving a stepmother who sought custody of her husband's two sons, ages sixteen and

60. *Clifford*, 83 Ariz. at 266, 320 P.2d at 458.
61. Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976).
62. *Id.*
63. Daley v. Gunville, 348 N.W.2d 441, 443 (N.D. 1984).
64. *Id.* at 443-44 (the court said that in a custody dispute between a natural mother and a grandmother, "exceptional circumstances" warranting a deprivation of custody by the natural parent existed where the custody dispute pitted "psychological parent against the natural parent") (quoting *In re* D.R.J., 317 N.W.2d 391, 394 (N.D. 1982)).
65. Gorman v. Gorman, 400 So. 2d 75, 77-78 (Fla. Dist. Ct. App. 1981).
66. 92 Misc. 2d 184, 399 N.Y.S.2d 977 (1977).

fifteen. It was noted there that the presumption favoring the natural parent should be rebuttable where the child has developed a secure, stable, and continuing parent/child relationship with a third party who has become a psychological parent. The rationale for continuing the relationship is that disruption of the relationship with the third party could be even more traumatic and devastating than severing the ties between the child and the natural parent.[67] In *Doe*, the New York Supreme Court placed custody of the boys with the stepmother based in part on the close ties that they had developed and the testimony from the boys that they wished to remain with their stepmother as opposed to their natural father.

The "psychological parentage" theory which has been successfully asserted by grandparents and foster parents has gained increasing acceptance by the courts in recent years.[68] The significance of this theory for stepparents is that it compels recognition of familial bonding between persons who are not biologically related and thereby places those stepparents who are able to demonstrate the requisite psychological ties with the stepchild on a more equal footing with the natural parent in a custodial dispute.

The most significant implication of the departure from the "parental rights" doctrine is that the stepparent may be entitled to custody of the child absent a finding that the natural parent is unfit. In *Cebrzynski v. Cebrzynski*,[69] a case which involved a custody dispute between a natural mother and a stepmother following the death of the child's natural father, the stepmother was awarded custody of the child even though the natural mother was found to be fit. In that case, the trial judge was presented with testimony that the child had been living with the stepmother for three and one half years and it would be emotionally damaging to the child to change custody to the natural mother.[70]

In the *Gorman v. Gorman*[71] decision, a Florida District Court of Appeal awarded custody of the husband's thirteen year old son to the stepmother even though the husband was found to be a fit and proper custodian.[72] *Gorman* is one of the most significant decisions to date on the issue of custody between a natural parent and a stepparent. The court there not only awarded custody to the stepparent in the absence of

67. *Id.* at 192, 399 N.Y.S.2d at 982; *see also* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD (1973).

68. *See* Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (where foster families asserted a liberty interest in foster children placed in their care based on "psychological ties" with the children, the Court noted that biological relationships are not the exclusive determination of family).

69. 63 Ill. App. 3d 66, 379 N.E.2d 713 (1978).

70. *Id.*

71. 400 So. 2d 75 (Fla. Dist. Ct. App. 1981).

72. *Id.* at 77.

a determination that the natural parent was unfit, it also made the award of custody to the stepparent even though the child had continuously resided with both the stepparent and the natural parent. In the other cases where the stepparent was awarded custody over the natural parent absent a finding of unfitness, the child had not resided with the natural parent for some period of time.[73] In *Gorman*, the child's natural mother had died in childbirth and the child had resided with the stepmother since he was less than a year old. The child was unaware that the stepmother was not his natural mother until he was approximately ten years old. Although the natural father had continuously resided with the child and was not found to be unfit, it was clear that the child had developed a much closer relationship with the stepmother. The judge in *Gorman* aptly summed up his position when he stated that "this case demonstrates that in a given case a child can be better loved and cared for by a 'stranger' than by its own natural parent."[74]

### D. *In Loco Parentis*

Thus, stepparents have progressed from having virtually no chance of being awarded custody of a stepchild at common law to having an opportunity sometimes equaling that of the natural parent. This reversal, however, has occurred in only a handful of cases to date where the courts have been willing to apply the "best interest of the child" test to a custody dispute between a stepparent and a natural parent. For the most part, stepparents continue to be thwarted in their efforts by the application of the "parental rights" doctrine.

Where courts continue to apply the "parental rights" doctrine, those stepparents who are seeking custody of a stepchild against a noncustodial natural parent are generally in a more favorable position than stepparents who are seeking custody against a custodial natural parent. The factor which weighs most heavily in favor of the stepparent in the former situation is that in many instances the noncustodial parent has not maintained close ties with the child and the stepparent is therefore in a better position to allege that the child has been abandoned by the natural parent and that the natural parent is unfit by reason of neglect and failure to support the child.[75] On the other hand, where the contest is between the stepparent and the custodial natural parent, grounds for alleging neglect and abandonment will often be nonexistent. The only recourse for the stepparent may be an attempt to persuade the court to read the term

73. *See, e.g., Cebrzynski*, 63 Ill. App. 3d at 72-73, 379 N.E.2d at 718.

74. *Gorman*, 400 So. 2d at 78. *But see*, Pape v. Pape, 444 So. 2d 1058, 1060 (Fla. Dist. Ct. App. 1984) (The court noted that the physical possession by a stepparent does not in itself furnish grounds for permanent deprivation of parental custody.).

75. *See generally In re* Ewing, 96 Idaho 424, 427, 529 P.2d 1296, 1299 (1974); Doe v. Doe, 92 Misc. 2d 184, 399 N.Y.S.2d 977 (1977).

"unfitness" broadly enough to include acts of unkindness and indifference towards the child—acts that would not be enough for the court to make a determination of unfitness under normal circumstances.[76]

While the purpose of the "best interest of the child" doctrine is not to equate the custodial rights of the stepparent with those of the natural parent, the effect of the doctrine's application is to place the stepparent on a more equal footing with the natural parent. The stepparent's strongest argument in a custodial dispute with the natural parent is the application of the "best interest of the child" doctrine since it focuses the court's attention on the needs of the child rather than on the status of the parties.

Where the court is unwilling to accept this argument on its face, an alternative approach which has not yet been vigorously pursued within the context of a custody dispute is the assertion of in loco parentis status. This doctrine goes even further than the "best interest of the child" doctrine in equating the rights of stepparents with those of natural parents. The courts may, however, be more receptive to an argument based on in loco parentis because of their longstanding recognition of the doctrine and familiarity with its application, albeit under different circumstances.

Based on past decisions, it would appear that where the stepparent can establish that he accepted the child into the family unit and participated in the child's support, education and upbringing, the stepparent should be considered as being in loco parentis with the child. Moreover, the in loco parentis status has been said to confer rights and liabilities upon the stepparents akin to those of a natural parent.[77] Since this doctrine is being relied upon with increasing frequency to impose obligations of support against stepparents, the corresponding rights associated with the doctrine should also be made equally available to the stepparent, namely, a right of custody of the stepchild that equates with the right of the natural parent.[78]

A major drawback to the application of the in loco parentis doctrine, within the context of a custodial dispute, is that in loco parentis status historically has been terminated upon a divorce by the parties. The application of the doctrine under these circumstances would compel an extension of the status beyond the dissolution of the marriage. However,

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76. *See, e.g.*, Daley v. Gunville, 348 N.W.2d 441, 443 (N.D. 1984).

77. *See generally* Austin v. Austin, 147 Neb. 109, 112-13, 22 N.W.2d 560, 563 (1946); Sparks v. Hinckley, 78 Utah 502, 5 P.2d 570 (1931); *In re* Hudson, 13 Wash. 673, 693-94, 126 P.2d 765, 775 (1942) ("parents *or those standing in loco parentis* to minor children primarily have the constitutional right to the custody and control of such minor children . . .") (emphasis added). *But see* Berkowitz, *supra* note 32, at 213.

78. *See* Gribble v. Gribble, 583 P.2d 64, 68 (Utah 1978) (in a proceeding by a stepparent to establish visitation rights, the court noted that in loco parentis does not envision that a stepparent be permitted to enjoy the rights of a natural parent without also accepting the responsibilities that are incurred).

where the status has been said to terminate upon the dissolution of the marriage, the question of termination has arisen within the context of a support proceeding where the stepparent was seeking the termination in order to avoid support liabilities towards the stepchild.[79] To the extent that the status is one that can be voluntarily terminated by the stepparent, it should follow that where the stepparent chooses not to terminate the in loco parentis status, he can retain the status beyond the dissolution of the marriage.[80] In addition, ample precedent for the continuation of the status beyond the dissolution of the marriage has been established in the support cases on the theory of equitable estoppel.[81]

Assuming that the stepparent can successfully argue for the application of the in loco parentis doctrine, courts should be led to an application of the "best interest of the child" test. If this test is applied in disputes between natural parents who stand on equal footing, it arguably should apply to a dispute between a natural parent and a stepparent who has in loco parentis status since the stepparent, by virtue of such status, legally stands in the place of the natural parent.

## VISITATION PRIVILEGES

Stepparents seeking to establish visitation privileges with stepchildren have fared much better overall than those asserting custodial rights. This is largely due to the fact that an award of visitation as compared to an award of custody impacts to a lesser extent on the natural parent's authority and control over the child. An award of visitation to the stepparent results in a temporary interference with the natural parent's custody and control of the child whereas an award of custody to the stepparent is a much more substantial interruption of the relationship between the natural parent and her child. Consequently, a court that is reluctant to award custody of a child to a stepparent may be much more receptive to granting the stepparent visitation privileges with the child.

However, even where the courts are amenable to granting visitation privileges to stepparents, such privileges may not be equated with those of the natural parent. The Virginia Code, for example, provides that a court may make such decree as it deems proper for "visitation *rights* of the parents and visitation *privileges* for the grandparents, stepparents or other family members."[82] In addition, where grandparents have success-

79. *See, e.g.*, Franklin v. Franklin, 75 Ariz. 151, 155-56, 253 P.2d 337, 340 (1953).

80. *See Gribble*, 583 P.2d at 67 (stating that the common law concerning termination of the in loco parentis status is that only the surrogate parent or the child is able to terminate the status at will, and the rights, duties and obligations continue as long as they choose to continue the relationship) (footnote omitted).

81. *See generally* Miller v. Miller, 97 N.J. 154, 478 A.2d 351 (1984); Ross v. Ross, 126 N.J. Super. 394, 314 A.2d 623 (1973).

82. VA. CODE ANN. § 20-107.2 (1983) (emphasis added).

fully asserted a right to visit with grandchildren, this "right" is often contingent upon the occurrence of certain events such as death or divorce of their child.[83] Moreover, the "right" to visitation may be terminated upon the adoption of the grandchild.[84]

In some instances, courts have denied visitation privileges to third parties altogether upon objection to such visitation by the custodial parent.[85] Where this has occurred, the courts have reasoned that the natural parents have a prima facie right to uninterrupted custody of their children which must be overcome by the third party's assertion of visitation rights.[86] This type of reasoning by the courts reflects an implicit recognition of the "parental rights" doctrine which would require deference to the wishes of the natural parent absent exceptional circumstances.

Notwithstanding these historical and, in some cases, present restrictions on visitation privileges by third parties, the trend is definitely towards liberalization of third party visitation privileges. For example, an examination of those cases denying visitation rights to third parties outright reveals that the contest was often between a grandparent and a natural parent prior to the enactment of a grandparent visitation statute. The court was usually deferring to the "rights" of the natural parent in denying the grandparent visitation rights. The precedential value of these cases has since been diminished in a majority of jurisdictions by the enactment of grandparent visitation statutes.[87] In addition, the contest between the grandparent and the natural parent can be distinguished from the contest between the stepparent and the natural parent. In the former the grandparent was often refused visitation rights because he was unable to establish that a substantial relationship existed with the grandchild.[88] In the latter case, the dispute arises within the context of a custody or habeas corpus proceeding and the stepparent, who generally has physical custody of the child, has little difficulty establishing the existence of close ties with the child.

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83. FLA. STAT. ANN. § 752.01 (West 1986):

> The court may . . . award reasonable rights of visitation to grandparents with respect to the child when it is in the best interest of the minor child if: (a) One or both parents of the child are deceased; (b) The marriage of the parents . . . has dissolved; or (c) A parent has deserted the child . . . .

*See also* IND. CODE ANN. § 31-1-11.7.2 (West Supp. 1984); TENN. CODE ANN. § 36-6-301 (1984).

84. *See, e.g.*, FLA. STAT. ANN. § 752.07 (West 1986). Some states distinguish between an adoption of the child by a stepparent and an adoption of the child by a "stranger," terminating the grandparents' visitation in the latter adoption but not the former. *See, e.g., In re* Adoption of Schumacher, 120 Ill. App. 3d 50, 458 N.E.2d 94 (1983); N.C. GEN. STAT. § 50-13.5 (1984); TENN. CODE ANN. § 30-6-301 (1984). *But see* Smith v. Finstad, 247 Ga. 603, 277 S.E.2d 736 (1981).

85. *See* Veazey v. Stewart, 251 Ark. 334, 472 S.W.2d 102 (1971). *But see* Collins v. Gilbreath, 403 N.E.2d 921 (Ind. Ct. App. 1980).

86. Commonwealth *ex rel.* Williams v. Miller, 254 Pa. Super. 227, 385 A.2d 992 (1978).

87. 1985 Survey of American Family Law, 11 FAM. L. REP. (BNA) 3020 (May 7, 1985).

88. *See, e.g., Veazey*, 251 Ark. at 334, 572 S.W.2d at 102.

### A. *Statutory Authority*

In some instances, the stepparent's efforts to obtain visitation privileges are facilitated by the presence of statutes which provide for third party visitation.[89] At least one statute expressly grants visitation to stepparents.[90] Where there is no statute in force that is worded broadly enough to encompass stepparent visitation, those statutes that grant visitation rights specifically to grandparents have been the subject of arguments both for and against stepparent visitation.

For instance, in *Evans v. Evans*,[91] where a stepparent was seeking visitation privileges, it was argued that the amendment of the statute to include visitation by grandparents evidenced a legislative intent to limit visitation to a class of persons consisting of parents and grandparents only. The Maryland Supreme Court noted, however, that the statutory provisions in effect before the amendment constituted a broad grant of authority to courts to determine who should be awarded visitation rights and concluded that the legislature did not intend in any way to limit this authority by amendment.[92]

While it was asserted in *Evans* that the statute should be narrowly construed to limit visitation to grandparents, it can be persuasively argued that grandparent visitation statutes are indicative of a legislative recognition of circumstances which warrant the granting of visitation privileges to persons other than the natural parents. It can also be argued that those same circumstances, namely consideration of the child's welfare, compel an extension of visitation privileges to stepparents.

### B. *Best Interest of the Child" and In Loco Parentis as a Basis for Visitation Rights*

Some courts that hold that a stepparent has no right to visitation with a stepchild solely on the basis of his status as a stepparent will allow the visitation if the stepparent can establish that he stands in loco parentis with the child.[93] In *Gribble v. Gribble*[94] the Utah Supreme Court concluded that if nothing more than the step relationship existed, the stepparent had no standing to assert a right of visitation, but then proceeded to hold that the stepparent was entitled to an opportunity to establish

89. *E.g.*, CAL. CIV. CODE § 4601 (West 1983); VA. CODE ANN. § 20-107.2 (1983); WASH. REV. CODE § 26.09.240 (1986).

90. VA. CODE ANN. § 20-107.2 (1983) ("upon decreeing the dissolution of a marriage . . . the court may make such . . . decree as it shall deem expedient . . . concerning visitation rights for grandparents, stepparents, or other family members . . .").

91. 302 Md. 334, 488 A.2d 157 (1985).

92. *Id.* at 339, 488 A.2d at 161.

93. Bryan v. Bryan, 132 Ariz. 353, 359, 645 P.2d 1267, 1273 (Ariz. Ct. App. 1982); Carter v. Broderick, 644 P.2d 850, 853 (Alaska 1982).

94. 583 P.2d 64, 68 (Utah 1978).

that he stood in loco parentis with the child. Assuming then, that a stepparent can establish that he stands in loco parentis with the stepchild, this status should entitle the stepparent to visitation on the theory that this status places the stepparent in the same position as the natural parent vis-a-vis the child.

Absent statutory authority and the ability to establish an in loco parentis relationship, the stepparent can resort to the "best interest of the child" doctrine. The utility of this assertion for the stepparent is that it focuses the court's attention on the needs and concerns of the child rather than the status of the stepparent with the result that the significance of the natural parent's biological ties to the child are diminished and the stepparent's psychological ties to the child are enhanced.

In general, where stepparents have asserted rights of visitation with a stepchild absent explicit statutory authority, courts have been amenable to granting such visitation on a theory of in loco parentis or "best interest of the child." As stepparents become more persistent in asserting their rights of visitation, legislatures that have not already done so, are apt to respond by revising visitation statutes to specifically include stepparent visitation as Virginia[95] has done, or to include third party visitation which would be inclusive of stepparents as California[96] and Washington[97] have done. Having granted such visitation privileges to grandparents on the theory that it would be in the best interest of the child, it would be difficult to rationalize a retreat from this position as it relates to a stepparent's right of visitation.

## CONCLUSION

Although stepparents had no rights and obligations towards stepchildren at common law, as a result of judicial and statutory changes, stepparents today can assert rights of custody and visitation and likewise can be held liable for the support of a stepchild. While in some cases, the stepparent's rights and liabilities are created by virtue of his status as such, in most instances, something more than one's status as a stepparent is required in order to confer rights and impose liabilities. The doctrine under which stepparents most often acquire rights and incur obligations towards a stepchild by virtue of their conduct is the in loco parentis doctrine.

With respect to custody actions and visitation, the in loco parentis doctrine is potentially the most significant for the stepparent, in that it has been said to give one who attains that status the same rights and obligations as the natural parent. In practice, however, the courts have

95. VA. CODE ANN. § 20-107.2 (1983).
96. CAL. CIVIL CODE § 4601 (West 1983).
97. WASH. REV. CODE ANN. § 26.09.240 (1986).

not, in fact, equated the rights and obligations of the stepparent with those of the natural parent in absolute fashion even when applying the in loco parentis doctrine. In the support area, for example, a natural parent is required to support a child both during and after the marriage, while a stepparent, even if required to support the child during the marriage by virtue of an in loco parentis status, will not be required to support the child beyond the marriage absent some further conduct by the stepparent that would warrant imposition of equitable estoppel. Because the stepparent's obligations have not yet been fully equated with those of the natural parent in support cases, the argument that in loco parentis compels equal treatment in the areas of custody and visitation is substantially weakened.

Thus, until the in loco parentis doctrine is applied in a manner so as to absolutely equate the rights and liabilities of the stepparents with those of the natural parent, the most important doctrine for the stepparent in custody and visitation actions is the "best interest of the child" doctrine. Here, the stepparent is, in effect, given the same treatment as the natural parent, not because the stepparent is said to have rights equaling those of the natural parent, but because the court is only concerned with the interest of the child. Moreover, given that the trend, however slow, is away from and not towards the application of the "parental rights" doctrine, the "best interest of the child" doctrine should continue to be one of the most significant forces behind the equation of the stepparent's position with that of the natural parent in custody cases.

In support actions, in loco parentis and equitable estoppel remain the most forceful arguments for the imposition of support liabilities against the stepparent that equate with those of the natural parent. In both custody and support actions, it is anticipated that the continued shifting of emphasis from "parental rights" to the "best interests of the child" doctrine will result in an increasing number of decisions that obscure the distinction between stepparents and natural parents in the "blended family."