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Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents Under Uniform Adoption Act Sec. 4-113

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ESSAY

OPEN ADOPTION IN CONTEXT: THE WISDOM AND ENFORCEABILITY OF VISITATION ORDERS FOR FORMER PARENTS UNDER UNIFORM ADOPTION ACT § 4-113

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I. INTRODUCTION

In 1994, the National Conference of Commissioners on Uniform State Laws promulgated the long awaited, completely revised Uniform Adoption Act (UAA).[1] Many aspects of the UAA generated widespread and heated

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1. UNIF. ADOPTION ACT, 9 U.L.A. 1-94 (Supp. 1998).

discussion during the drafting process,[2] and the debate continues now as the Act is being reviewed by policymakers and legislators in the state capitols.[3] In these settings, no subject addressed by the UAA has been more controversial than the subject of open adoption.

As used here, the term open adoption refers to the creation of enforceable post-adoption visitation rights for certain individuals, especially the birth parents of the adopted child, through the entry of a visitation order by the adoption court.[4] Currently, the adoption statutes in all but a few states make no provision whatsoever for such open adoption decrees.[5] In the process of drafting the UAA, the commissioners considered a proposal to permit open adoption orders in cases where the adoptive parents agreed to the arrangement.[6] This proposal encountered vehement opposition and was not included in the final draft.[7] As finally promulgated, the UAA authorizes enforceable open adoption orders only in the limited category of stepparent adoptions.[8] Section 4-113 of the UAA authorizes the judicial creation and enforcement of post-adoption visitation rights for the former parent, as well as certain other persons, based on a determination of the

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2. *See* Joan H. Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 347-49 (1996).

3. According to the Family Law Reporter, bills proposing the enactment of the UAA were introduced into six state legislatures during the first year after its approval. *See* 21 Fam. L. Rep. (BNA) 1328, 1328 (1995). Legislative interest continues; a bill was introduced in the Pennsylvania Legislature in February of 1997. *See* S. 544, 181st Leg. (Pa. 1997).

4. Defined most broadly, the term open adoption contemplates other exceptions to the traditional model of the confidential, closed adoption besides the visitation option discussed herein; thus, adoption arrangements that simply permit the adopting family to have information about the birth family are frequently referred to as open adoptions. *See, e.g.*, Marianne Berry, *Risks and Benefits of Open Adoption*, 3 THE FUTURE OF CHILDREN: ADOPTION, Spring 1993, at 125-26 ("Open adoption refers to the sharing of information and/or contacts between the adoptive and biological parents of an adopted child, before and/or after the placement of the child, and perhaps continuing for the life of the child."). Article four of the UAA, which authorizes visitation rights for birth parents and other persons, is the reference point for the definition of open adoption employed in this essay. *See* art. 4 cmt., 9 U.L.A. at 68-69.

5. The following state statutes expressly authorize the adoption court to enter post-adoption visitation orders for certain individuals, including the former parents, or to recognize private visitation agreements in certain specified situations: ALASKA STAT. § 25.23.130(c) (Michie 1995); CAL. FAM. CODE § 8714.7 (West Supp. 1998); IND. CODE ANN. § 31-19-16-1 (Michie 1997); MO. REV. STAT. § 453.080.2 (West 1998); NEB. REV. STAT. §§ 43-162 to -164 (1993 & Supp. 1996); NEV. REV. STAT. ANN. §§ 125A.330.1, 127.171 (Michie 1993 & Supp. 1997); N.M. STAT. ANN. § 32A-5-35 (Michie 1995); N.Y. SOC. SERV. LAW § 383-c (McKinney 1992 & Supp. 1997); OHIO REV. CODE ANN. § 3107.62, 63, 65 (Anderson 1996 & Supp. 1997); OR. REV. STAT. § 109.305(2) (1997); S.D. CODIFIED LAWS § 25-6-17 (Michie Supp. 1997); TENN. CODE ANN. § 36-1-121(f) (1996); VT. STAT. ANN. tit. 15A, § 4-112 (Supp. 1997); W. VA. CODE § 48-4-12 (1997); WASH. REV. CODE ANN. § 26.33.295 (West 1997); WIS. STAT. ANN. § 48.925 (West 1997).

6. *See* Hollinger, *supra* note 2, at 372-77.

7. *See id.*

8. *See id.*

adopted stepchild's best interests.[9]

In the typical stepparent adoption, a child who has been residing for a period of time with his or her custodial biological parent and a stepparent (the custodial parent's spouse) is thereafter adopted by the stepparent.[10]

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9. UAA § 4-113 provides for the creation and enforcement of post-adoption visitation orders in stepparent adoptions, whether or not the parties have agreed to the arrangement, as follows:

> (a) Upon the request of the petitioner in a proceeding for adoption of a minor stepchild, the court shall review a written agreement that permits another individual to visit or communicate with the minor after the decree of adoption becomes final, which must be signed by the individual, the petitioner, the petitioner's spouse, the minor if 12 years of age or older, and, if an agency placed the minor for adoption, an authorized employee of the agency.
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> (b) The court may enter an order approving the agreement only upon determining that the agreement is in the best interest of the minor adoptee. . . .
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> . . . .
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> (c) In addition to any agreement approved pursuant to subsections (a) and (b), the court may approve the continuation of an existing order or issue a new order permitting the minor adoptee's former parent, grandparent, or sibling to visit or communicate with the minor if:
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> (2) the former parent, grandparent, or sibling requests that an existing order be permitted to survive the decree of adoption or that a new order be issued; and
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> (3) the court determines that the requested visitation or communication is in the best interest of the minor.
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> (d) In making a determination under subsection (c)(3), the court shall consider the factors listed in subsection (b) and any objections to the requested order by the adoptive stepparent and the stepparent's spouse.
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> (e) An order issued under this section may be enforced in a civil action only if the court finds that enforcement is in the best interest of a minor adoptee.
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> . . . .
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> (g) Failure to comply with the terms of an order approved under this section or with any other agreement for visitation or communication is not a ground for revoking, setting aside, or otherwise challenging the validity of a consent, relinquishment, or adoption pertaining to a minor stepchild, and the validity of the consent, relinquishment, and adoption is not affected by any later action to enforce, modify, or set aside the order of agreement.

§ 4-113, 9 U.L.A. at 75-76.

10. Notably, article four of the UAA, entitled "Adoption of Minor Stepchild by Stepparent,"

Following the adoption, the custodial parent and the former stepparent (now the adoptive parent) are the child's two legal parents for all purposes.[11] Under established principles of adoption law, the legal status of the other biological parent must be terminated prior to a stepparent adoption.[12] Termination can occur in one of two ways: either the noncustodial parent agrees to give up his or her parental status, or the court determines that the parent is unfit or that other statutory grounds exist to terminate the parent-child relationship.[13] In this context, the open adoption option provided by the UAA, which returns the (former) noncustodial parent to the legal equation, has obvious significance for each of the parties to a stepparent adoption, and for the legal system.

This Essay will analyze section 4-113 of the UAA to the extent that the Act authorizes the judicial creation and enforcement of post-adoption visitation rights for the former noncustodial parent following a stepparent adoption. Part II of this Essay discusses the decision of the UAA's drafters to limit the provision for open adoption to the stepfamily setting. As described therein, strong policy reasons support the establishment of this option for stepfamilies, and many of the same policies would support extension of the open adoption provision to certain other categories of adoption.

According to the drafters, one reason for introducing the open adoption option in the stepfamily setting is to increase the number of stepparent adoptions. Part III explores the manner in which the enactment of section 4-113 is likely to affect the various individuals and institutions whose views on the desirability of stepparent adoption affect the results in particular cases: the noncustodial parent, the custodial parent, the stepparent, the stepchild, the trial court that rules on an adoption petition, and the legislatures and courts that create the general standards for determining when adoption petitions should be granted. The conclusion is reached that

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is not limited to situations where the custodial parent is married to the adopting partner. The Act authorizes adoption by the unmarried same-sex or opposite-sex partner of the custodial parent, when the parent agrees to the adoption, the court approves on the basis of the child's best interests, and the other requirements of the Act have been met. *See* § 4-102(b), 9 U.L.A. at 69. During the past few years, a number of state courts have been asked to determine whether this form of adoption is available when state statutes do not expressly provide for it. The various state courts have reached inconsistent results. *See* Maxwell S. Peltz, Comment, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175, 181-83 (1995) (advocating liberal construction of existing adoption statutes); Sonja Larsen, Annotation, *Adoption of Child by Same-Sex Partners*, 27 A.L.R. 5th 54 (1995 & Supp. 1998) (collecting cases). The Uniform Adoption Act resolves the controversy by authorizing so-called "de facto stepparent" adoptions. *See* § 4-102 cmt., 9 U.L.A. at 69.

11. *See* § 4-103, 9 U.L.A. at 70.

12. *See* 1 JOAN H. HOLLINGER, ADOPTION LAW AND PRACTICE §§ 2.10(3), 133.02(3)(b) (1998).

13. *See id.* §§ 2.10(3), 4.04.

the open adoption provision is likely to increase the number of stepparent adoptions. The desirability of this result is premised on the fact that the adoption courts enter adoption orders following scrutiny of the stepchild's best interest in each case.

Part IV explores in depth the process by which the adoption courts are likely to assess the petition for post-adoption visitation from the former noncustodial parent in particular cases. The "best interests of the child," which is the controlling legal standard, has a special meaning here, defined in part by a list of statutory factors in section 4-113.[14] Of special note, the presence of a private agreement among the parties (the noncustodial parent, the adopting stepparent, the custodial parent, and the child) is an influential factor under this statutory scheme.[15] The existence of an agreement is important primarily because it evidences the willingness of the private parties to cooperate with each other in the future. In the event that such cooperation breaks down, however, the question of enforcement of the former parent's visitation rights will arise. Thus, Part V of this Essay explores the issues raised by the summary statement in section 4-113 that the noncustodial parent may seek future judicial enforcement of a post-stepparent adoption visitation order in these circumstances.[16] Although questions of enforcement are troublesome, the underlying goal of preserving designated family relationships outweighs these concerns in this and in other child custody and visitation settings.

In summary, the model of open adoption for stepfamilies is a desirable proposal for change in U.S. adoption law at the turn of the century. Admittedly, section 4-113 raises complex policy issues as well as practical questions about the implementation of the statutory proposal. In the end, however, section 4-113 in all of its complexity is a well-conceived proposal that responds to the needs of many modern families and the communities in which they reside.

At this time, the general field of family law is a complex and turbulent one. For many individuals in our society, the definition of family is more fluid and flexible than in the past. The resulting demands on the system of laws that govern family relationships are correspondingly greater. As lawmakers, policymakers, and citizens review the existing legal structures and various proposals for change in this historical context, a number of common themes have emerged that assist in understanding and evaluating them. The remainder of this introductory section delineates five of these contemporary themes and describes the manner in which UAA section 4-113 highlights each one of them.

First, the subject of open adoption for stepfamilies raises the key

14. *See* § 4-113(b), 9 U.L.A. at 76.
15. *See id.* § 4-113(c).
16. *See id.* § 4-113(e).

question whether the legal system should recognize and protect the growing number of nontraditional families in our modern society.[17] The inquiry must take account of both the benefits and the costs of creating more complex legal family structures for individuals, the family unit, and society. On the one hand, the goal of recognizing and protecting a child's multiple family connections, such as the ties with both a noncustodial parent and a stepparent, holds great appeal. On the other hand, the recognition of multiple relationships in this manner may entail significant costs. Under traditional adoption law, the courts generally close their doors to the parties once an adoption is final, and the adoptive family thereafter enjoys the same privacy and autonomy as other, traditional nuclear families. By way of contrast, the creation and enforcement of visitation rights for the former parent and others under UAA section 4-113 may result in the ongoing involvement of the judicial system in the affairs of the adoptive stepfamily for many years, thereby imposing added burdens on the family and the courts. These important and competing considerations, which are brought into conflict by the recognition of nontraditional family relationships under section 4-113, are discussed throughout this Essay, especially in Parts II and III.

The image of the open courtroom door raises a second important question about post-adoption visitation by former parents. Namely, by what means will judges enforce these newly recognized rights? Issues of enforcement in the field of domestic relations are often problematic,[18] and no situation creates a greater quandary for the courts than visitation with minor children. Specifically, how can a judge ensure that a noncustodial adult will have meaningful access to a child over time if the custodial parent(s) do not cooperate? While a significant body of law has developed to answer this question in the contexts of grandparent visitation and post-

17. The subject of legal recognition for nontraditional families other than stepfamilies has received considerable scholarly attention in recent years. *See, e.g.*, Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315 (1994); Marc E. Elovitz, *Reforming the Law to Respect Families Created by Lesbian and Gay People*, 3 J.L. & POL'Y 431 (1995); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459(1990); Mary C. Rudasill, *Grandparents Raising Grandchildren: Problems and Policy From an Illinois Perspective*, 3 ELDER L.J. 215 (1995); Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family,"* 29 J. FAM. L. 497 (1991).

18. *See, e.g.*, Carl E. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REFORM 1039, 1047-48, 1056 (1985); Janelle T. Calhoun, Comment, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 MERCER L. REV. 921, 932-46 (1995).

divorce visitation by parents,[19] section 4-113 of the UAA is silent on the question of enforcement remedies in the post-adoption setting. Therefore, Part V of this Essay anticipates the forms that state involvement in the otherwise private adoptive stepfamily might take in the event that the former parent seeks to enforce a visitation order following the child's adoption. The likely effects of judicial enforcement on the family are also discussed.

A third issue of general significance in the field of family law raised by section 4-113 centers around the statutory best interests of the child standard, which typically confers wide discretion on judges to resolve family matters. Not surprisingly, the UAA establishes "the best interest of the child" as the standard to be used by the adoption court judge in deciding whether to include visitation rights for the former parent in an adoption decree.[20] Similarly, the best interest of the child standard governs all subsequent judicial decisions when the former parent returns to court to enforce a post-adoption visitation order.[21] Under this standard, which also governs custody decisions in many other contexts, the judge may generally consider any and all factors that he or she considers to be relevant to the welfare of a particular child.[22]

The best interests of the child standard has been the focal point for a more general discussion in family law circles about the wisdom of creating rules that confer such wide discretion upon judges.[23] An alternative approach involves the use of rules that are more clear-cut and easier to apply. In the stepparent adoption setting, for example, the existing rules in most jurisdictions absolutely disallow visitation orders for former parents.[24] These rules are clear-cut, with the asserted benefit of certainty and predictability of results in every case, and the additional benefit that little judicial time will be required to reach the final result. Of course, the added flexibility of a provision such as section 4-113 enables judges to consider whether the denial of visitation would be the best result in each individual case. Thus, as illustrated throughout this Essay and especially in Part IV, section 4-113 of the UAA can be meaningfully evaluated against the background of the basic debate about discretionary rules in the family law

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19. *See* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURES §§ 6:02, 7:07 (1996).

20. § 4-113(b), (c)(3), 9 U.L.A. at 76.

21. *See id.* § 4-113(e).

22. *See* JOHN D. GREGORY ET AL., UNDERSTANDING FAMILY LAW 371-72 (1993).

23. *See, e.g.*, Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215 (1991). For more wide-ranging discussion of the general tension in family law between the goals of fairness, certainty, and predictability, see Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986); Carl E. Schneider, *The Tension Between Rules and Discretion in Family Law: A Report and Reflection*, 27 FAM. L.Q. 229 (1993).

24. *See supra* note 5 (collecting state statutes that permit visitation) and accompanying text.

field.

The stepfamily's agreement to permit visitation by the (former) noncustodial parent following a stepparent adoption plays an important role in the judicial evaluation of open adoption petitions under the UAA. In this regard, section 4-113 highlights the fourth major theme that is currently discussed in the context of many other important family law doctrines. The issue here is whether family members should be permitted to set their own rules by private contract, and thereby supplant the otherwise applicable family law doctrines that would govern their family.[25]

Under the UAA, the existence of an open adoption agreement is not determinative. The judge may refuse to approve the agreement of the custodial parent and adoptive stepparent to allow visitation by the (former) noncustodial parent based on the judge's view of the stepchild's best interests.[26] Conversely, the judge may include visitation rights for the former parent in the adoption decree even though the adoptive family opposes this result.[27] Still, the existence (or lack) of a private agreement is likely to be a very influential factor in most cases. As discussed in Part IV of this Essay, the treatment of private agreements in this manner under section 4-113 mirrors the modern trend toward qualified recognition of private contracts in the wider field of family law.

A final theme highlighted by section 4-113 relates to the normative function of family laws. The ultimate question here is whether lawmakers can or should seek to enact laws that will encourage individuals to make certain behavioral decisions about their families that they might not otherwise make. If so, then what behavior is desirable, and what laws will make people engage in such behavior?[28] In the field of family law, lawmakers frequently express viewpoints about what people "ought to be doing" and shape rules of law with the purpose of getting them to do it.[29]

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25. The issue of family contract enforceability arises in numerous settings, including prenuptial contracts, divorce settlement agreements, and surrogate motherhood contracts. *See* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444-45 (documenting the "preference for private over public ordering" that has emerged in various family law topic areas in recent decades).

26. *See* § 4-113(b), 9 U.L.A. at 76.

27. *See id.* § 4-113(c).

28. *See generally* MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 176 (1993) ("[L]aw serves in part to help constitute a culture, which means that it not only reflects but can shape the purposes that people pursue."); Gary B. Melton & Michael J. Saks, *The Law as an Instrument of Socialization and Social Structure*, *in* THE LAW AS A BEHAVIORAL INSTRUMENT 235, 263 (Gary B. Melton ed., 1986) (evaluating "the law's success in stimulating or suppressing particular behavior" across various fields of law).

29. This phenomenon can be clearly illustrated by various rules of law that have the stated goal of encouraging eligible couples to marry. *See generally* Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 502 (1992) (describing how "family law . . . set[s] a framework of rules, one of whose effects is to shape, sponsor, and sustain the model of

In this vein, the drafters' comments to UAA section 4-113 state that an important purpose of the open adoption law is to increase the number of stepparent adoptions by providing an incentive to noncustodial parents to consent to such procedures.[30]

The careful evaluation of such a provision must ask, first, whether the stated goals are "good," and second, whether the legal incentives will effectively achieve the stated goals. Part III of this Essay grapples with the questions whether more stepparent adoptions is a desirable end, and whether the provision of post-adoption visitation is likely to accomplish this result. Analysis of the UAA from this perspective is not straightforward and produces some surprising results. In the end, however, the normative assumptions that underlie the UAA's open adoption provision appear to be largely valid.

The evaluation of section 4-113 against the backdrop of the various themes that currently dominate the field of family law reaffirms the value of this model statutory provision. Section 4-113 of the UAA effectively extends the recognition and protection of the family law system to an important category of nontraditional families. The unadopted stepchild, who resides with his or her custodial parent and stepparent and simultaneously maintains a relationship with the noncustodial parent, has a more complex family life than the child who is raised in a traditional nuclear family. The UAA provides a model of stepparent adoption whereby the complex reality of the stepchild's life is reflected in the governing rules of law. Within this proposed statutory framework, the emphasis on private decision-making is ultimately a wise method of empowering the family. Of course, no adoption can take place and no visitation rights for the former custodial parent can be established without the order of the court following careful judicial scrutiny of the individual family. This burden is a fair one to impose on the courts, in light of the benefits to be derived for stepchildren from such a case-by-case assessment. Finally, concerns about noncompliance by the parties and the need for judicial enforcement of visitation orders for the former parent do not outweigh the benefits of the

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marriage."). For example, certain courts have denied legal and economic rights to unmarried cohabiting heterosexual couples in order to discourage such relationships and instead encourage marital relationships. *See, e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204, 1210 (Ill. 1979) (stating that Illinois public policy disfavors private contractual alternatives to marriage). A similar pro-marriage policy finds expression in many of the rules that severely limit stepparent responsibility for child support. Here, the courts and legislatures have typically expressed the concern that the financial burden of stepchild support obligations might discourage eligible individuals from deciding to marry the custodial parents of minor children. *See* MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 13-14 (1994); Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 210 (1993); Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 45 (1984).

30. *See* art. 4 cmt., 9 U.L.A. at 68-69.

open adoption model for stepfamilies. Hopefully, potential problems can be contained if the professionals involved in the adoption process provide counseling at the time of adoption, and if mediation or counseling services remain available to the family members thereafter. Where conflicts over visitation nevertheless arise, the involvement of the judicial system is an appropriate method for enforcing private rights and public interests, as in other family law contexts. In summary, the post-adoption visitation provision for former parents in the UAA is a model provision that should be considered and enacted by the state legislatures.

II. STEPPARENT ADOPTION AS THE PREFERRED SETTING FOR OPENNESS

Currently, the adoption laws in most states do not authorize the entry of a visitation order by the adoption court for the former parent(s) of an adopted child.[31] Thus, when the drafters of the UAA discussed the subject of open adoption, they were contemplating an important change to the adoption laws in most states. Following their extensive debates about the subject of open adoption, the drafters provided for post-adoption visitation in stepparent adoptions, but not in other adoption settings.[32] This Part explores the reasons for, and validity of, this significant limitation on the open adoption provision of the UAA.

The drafters' discussions about open adoption took place against the backdrop of an ongoing nationwide debate; much has been written in recent years about this subject, from the perspectives of both law and the social sciences.[33] There is no consensus among the experts in these fields about the wisdom of changing traditional state adoption laws to permit ongoing involvement by the biological parents with their adopted child. The experts disagree about the impact of this and other aspects of the open adoption

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31. *See supra* note 5 (collecting state statutes that authorize visitation orders) and accompanying text.

32. *See* Hollinger, *supra* note 2, at 372 n.84. According to Professor Hollinger, in non-stepparent adoptions under the UAA, "[b]irth parents and adoptive parents may decide for themselves how much contact to have and how much identifying information to share with each other." *Id.* For example, birth and adoptive parents may agree to release identifying information to each other, and "there is no bar to . . . agreements for post-adoption contact or visitation." *Id.* Notably, however, the UAA takes a neutral stance on the enforcement of such arrangements in non-stepparent cases, leaving the question to other provisions of law in the enacting states. *See* § 1-105 cmt., 9 U.L.A. at 9 ("Except in an adoption by a stepparent, the Act terminates any previous order for visitation or communication with an adoptee but leaves to other law of the State whether agreements for post-adoption visitation or communication are enforceable in a separate civil action.").

33. *See* Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can It Survive the Uniform Adoption Act?*, 30 FAM. L.Q. 483, 488-500 (1996) (citing numerous books and articles about the subject of open adoption).

model for each member of the so-called adoption triad: the adopted child, the adoptive parents, and the biological parents. Proponents see many benefits in establishing a more honest and open set of relationships for adopted children, or at least in making such a model available to the parties in individual adoption cases. Opponents of open adoption maintain that families are best served by a more traditional model, which regards adoption as a fresh start for the child in a new family protected by legal guarantees of privacy and autonomy. The many refinements of these arguments have been set forth and catalogued elsewhere by scholars in the field of adoption law and practice.[34]

The debate about open adoption has unfolded against a legal backdrop which largely reflects the views of the opponents of the open adoption model.[35] Adoption in U.S. law is a creature of state statutes. During the second half of the twentieth century, the dominant legislative model has contemplated the adopted child's complete removal from his or her biological family and receipt of a new legal status as the child of the adoptive parents for all purposes. For example, the Arizona adoption law boldly states:

> Upon entry of the decree of adoption, the relationship of parent and child between the adopted person and the persons who were his parents . . . shall be completely severed. . . . [Furthermore], the relationship of parent and child and all the legal rights, privileges, duties, obligations and other legal consequences of the natural relationship of child and parent shall thereafter exist between the adopted person and the adoptive petitioner the same as though the child were born to the adoptive petitioner in lawful wedlock.[36]

Among the numerous "consequences of the natural relationship" that are lost to the biological parent under this type of provision are the parent's custodial rights, including any legally enforceable right of future visitation with the child. For example, in *Kelly v. Blackwell*,[37] an appellate court in

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34. *See, e.g.*, Berry, *supra* note 4; Harriet E. Gross, *Open Adoption: A Research-Based Literature Review and New Data*, 72 CHILD WELFARE 269, 269-75 (1993).

35. In practice, open adoption is more widespread than the state of the law would suggest. That is, the parties involved in adoption proceedings (the birth parents, adoptive parents, and the agency or intermediary with whom they work) may enter into an informal agreement about future visitation or other open practices, even in states that do not legally recognize such arrangements. The parties' agreement may govern their future interaction as long as no disagreements subsequently arise. An open adoption law is important, *inter alia*, because it provides legal remedies in the event of such disagreements.

36. ARIZ. REV. STAT. ANN. § 8-117 (West 1989) (The sequence of statutory provisions has been reversed in the text.).

37. 468 S.E.2d 400 (N.C. Ct. App. 1996).

North Carolina summarily dismissed the petition of a father who, after consenting to his children's adoption, alleged subsequent sexual abuse by the adoptive stepfather and neglect by the mother. According to the court, the former father had no standing to raise these issues, or to seek visitation or custody, because his parental rights had been terminated in the prior adoption proceeding.[38]

In addition to the substantive state law provisions that effectively delete the biological family from the legal picture following adoption, numerous procedural laws are designed to obliterate any record of the adopted child's past. Thus, state statutes typically provide for confidentiality in the adoption process, the sealing of all records in the matter, and the issuance of a new birth certificate for the child listing the names of the adoptive parents.[39]

The UAA largely retains the substantive and procedural aspects of this traditional adoption model, but a major exception appears in article four, which governs stepparent adoptions. First, under article four of the UAA, certain procedural provisions relating to confidentiality are waived in stepparent cases. For example, a provision requiring the adoptee's original name to appear in the decree of adoption authorizes the use of a pseudonym for this purpose *except* in adoptions by the child's stepparent.[40] The apparent rationale for this exception is the practical impossibility of hiding the identities of the parties (the noncustodial parent, the custodial parent, the adoptive stepparent, and the child) from each other when the child is adopted by a stepparent. In addition to such procedural provisions, and more significantly, section 4-113 of the UAA authorizes enforceable visitation orders for the former noncustodial parent or other persons when the adopting adult is the child's stepparent.

Section 4-113 authorizes the adoption court to enter visitation orders in two distinct situations, based on a determination of the best interests of the adopted stepchild. First, the court may enter an enforceable order approving the parties' written agreement, whenever the stepparent and custodial parent have agreed to post-adoption visitation or communication with the adoptee by any specified individual.[41] Second, in the absence of such an agreement, the court may enter an enforceable order allowing communication or visitation by a former parent, grandparent, or sibling of the adopted stepchild.[42] According to Professor Joan Hollinger, the reporter for the UAA, the consensus that emerged in support of this visitation

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38. *Id.* at 401.

39. *See* 2 HOLLINGER, *supra* note 12, § 13.01(a), (b).

40. *See* § 3-705(a)(1), 9 U.L.A. at 61. This section similarly withholds the option of using a pseudonym in place of the child's name when the adopting person is the child's relative.

41. *See* § 4-113(a), (b), 9 U.L.A. at 75-76.

42. *See* § 4-113(c), 9 U.L.A. at 76.

provision in the stepparent article marked a sharp departure from "the deeply divided views of the [drafters] about post-adoption contact in adoptions by nonrelatives."[43] The reasons for preferring stepfamily adoptions for this purpose are not difficult to identify.[44]

The traditional closed adoption model can be applied most readily in the case of a newborn infant, who has no de facto ties with the birth family. The goal of eliminating the biological family from the reality and the record of the child's life may still be controversial in this context, but at least it can, as a practical matter, be accomplished. Modern adoptions, however, most often involve children in other circumstances. Besides the newborn child, they include the child who has been a ward of the state and possibly in foster care, and the child who has been residing with a relative or stepparent who subsequently seeks to adopt. As to the older adoptees in these additional categories, certain goals of the traditional adoption model, such as secrecy and confidentiality, may simply not be achievable. Furthermore, the strength of many of the policy arguments against open adoption seem weaker when these types of adoption are under consideration.

For example, in assessing the needs of adopted children, many proponents of openness stress the child's need to be in touch with his or her biological roots.[45] Conversely, many opponents emphasize the importance of severing biological ties so that the child will not feel torn between two families.[46] The weight of these competing child-related concerns may be different in the case of a newborn, on the one hand, and an older child, on the other. For the newborn child, the heritage interest primarily involves the

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43. Hollinger, *supra* note 2, at 373. Still, the proposal to establish the open adoption option, even in the limited context of stepparent adoption, is not without controversy. Thus, when the North Carolina legislature enacted the stepparent adoption article of the UAA in 1995, all references to post-adoption visitation orders under UAA section 4-113 were deleted from the state statute. *See* N.C. GEN. STAT. §§ 48-4-100 to -105 (1995 & Supp. 1996).

44. The special characteristics of the stepfamily for this purpose have been recognized by scholars in the past who have made proposals for parental visitation following stepparent adoption. *See* Brigitte M. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 49-51 (1975); Linda F. Smith, *Adoption—The Case for More Options*, 1986 UTAH L. REV. 495, 547-57; Judy E. Nathan, Note, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633, 656-64 (1984); Susan F. Koffman, Comment, *Stepparent Adoption: A Comparative Analysis of Laws and Policies in England and the United States*, 7 B.C. INT'L & COMP. L. REV. 469, 509-15 (1984). An alternative model has been promulgated for legally recognizing the stepchild's ties to both biological parents and the stepparent, involving creation of a new legal status for the stepparent while preserving the full parental status of both biological parents. *See* Bodenheimer, *supra*, at 44-47; *see also* Koffman, *supra*, at 502-09 (discussing formal, nonadoptive status available to stepparents under English law).

45. *See* 2 HOLLINGER, *supra* note 12, §§ 8.04(1), 13.02(3)(b).

46. *See id.*

child's future needs to know about his or her ancestry and to relate in some way to biological family members. Post-adoption visitation is one of several devices that may be used to accommodate these needs; others include the sharing of information about the biological relatives through letters, phone calls, or through a third party. By way of contrast, the pre-existing family ties of the older adoptee, such as the child living in a stepfamily, may be well-established at the time of adoption. Here, assessing the child's perceived need "to be in touch with his or her biological roots" includes a decision about how to deal with these established family relationships following the child's adoption. Given the importance generally assigned to the continuity of affectional relationships in children's lives, the heritage argument is more likely to support direct contact, including visitation, in the case of the older adoptee.[47]

Conversely, the argument that closed adoption properly prevents children from experiencing conflicting loyalties to both the adoptive family and the biological parents may be *less* compelling in many cases involving older children, including stepchildren. As to the newborn infant, the closed adoption model can, in fact, prevent the child from knowing his or her biological family while being raised by adoptive parents. In this sense, the child will not feel torn between the demands for loyalty from two sets of parents whom he or she knows and cares for. As to the child who is older when adopted, who has known his or her biological family prior to the adoption, the legal system cannot simply erase the child's past or the relationships that are already established. Admittedly, the legal system can deny enforceable rights of access between the older child and the biological family under the closed adoption model, in an effort to simplify the future structure of the child's life and to avoid situations where the child will experience inconsistent voices of parental authority. But such a law is not likely to eliminate the loyalty that an older child already feels to the parents he or she has known prior to adoption. In the stepparent adoption setting, for example, if the child has established meaningful ties with the noncustodial parent prior to adoption, the denial of post-adoption visitation rights is not likely to eliminate the child's feelings for the former parent. Thus, the goal of closed adoption relating to the creation of a single set of family ties and loyalties seems less compelling here.

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47. Not all adopted stepchildren have established relationships with their noncustodial parents. For example, if the custodial mother was never married to the child's biological father, and if her marriage to the stepfather occurred during the child's infancy, the stepfather may be the only "father figure" the child has ever known. Indeed, a study of adoption in one Pennsylvania county in the early 1980s revealed that a substantial portion of the stepchildren who were adopted did not even know about their biological fathers. *See* Patricia A. Wolf & Emily Mast, *Counseling Issues in Adoptions by Stepparents*, 32 SOCIAL WORK 69, 72 (1987). In such cases, the establishment of post-adoption visitation rights for the noncustodial parent is an unlikely result.

The fact that most stepchildren are older at the time of their adoption is just one of several characteristics that make the category of stepfamilies a likely candidate for open adoption.[48] In many instances, a stepparent adoption involves less disruption for the child than other adoptive placements, because stepparent adoption serves to formalize the child's already-existing family. Thus, adoption does not involve a new household placement for the stepchild, who typically has been residing with the custodial parent and stepparent prior to the adoption. Even a traditional closed adoption does not entail the severance of all biological ties for the stepchild, because the status of the custodial parent (who is married to the stepparent) continues undisturbed. The concept of a "fresh start" is arguably diluted by these other factors in the typical stepfamily adoption, and the prospect of ongoing visitation by the second biological parent may, therefore, be less disturbing.[49]

The final feature of many stepparent adoptions that justifies their preferential treatment in this regard involves the status of the noncustodial parent. The majority of modern stepfamilies are created following the custodial parent's divorce from the noncustodial parent and subsequent

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48. The unique characteristics of stepparent adoption are important for other purposes besides assessing the open adoption issue. Thus, article four of the UAA includes special provisions governing the adoption process that allow the court to waive general requirements relating to the home evaluation and the accounting for expenses in stepparent adoption cases. *See* §§ 4-111, 4-112, 9 U.L.A. at 74-75. Furthermore, the UAA reflects the likelihood of ongoing ties between the adopted stepchild and the family of the noncustodial parent in the provision governing the adopted child's inheritance rights. As a general rule under the UAA, all inheritance rights between the adopted child and the birth family are completely severed, *see* § 1-105, 9 U.L.A. at 8-9, but an exception that adoption "does not affect the right of the adoptee to inheritance or interstate succession through or from the adoptee's former parent," § 4-103(b)(3), 9 U.L.A. at 70.

49. Ironically, the very stability inherent in the pre-adoptive stepfamily, which is created by the marriage between the custodial parent and stepparent, has sometimes led adoption courts to deny stepparent adoption petitions. Unlike many other potential adoptees, the unadopted stepchild does not need an adoption order to create a secure family placement. Thus, stepparent adoption petitions have sometimes been denied, based on the judge's view that the status quo of the unadopted stepchild in the stepfamily household was "good enough." *See In re* J.A.A., 618 P.2d 742 (Colo. Ct. App. 1980) (denying stepfather adoption even though father's rights were terminable based on his failure to contact child for three years); *In re* Hinton, 390 So. 2d 972 (La. Ct. App. 1980) (denying stepfather adoption because best interests of children would be served by receiving love from their stepfather and mother, with whom they resided, and also receiving love from the father who had not seen them for two years); *In re* Adoption of R.M.B., 645 S.W.2d 29 (Mo. Ct. App. 1982) (observing that the stepchild would continue to enjoy "the better part of two worlds" by remaining unadopted); *In re* Gerald G.G., 403 N.Y.S.2d 57 (App. Div. 1978) ("Although we recognize that the child presently enjoys the trappings and benefits of a family unit created by the natural mother and her spouse, it is also equally true that an order of adoption cannot by itself contribute or add anything to the quality of this child's upbringing."). Under the traditional state adoption statutes applied in these cases, the courts did not have the option of ordering ongoing visitation between the stepchild and the noncustodial parent if the adoption petition was granted.

remarriage.[50] In this common fact pattern, the noncustodial parent (most often the father)[51] will have lost primary custody in the divorce proceeding, and this fact is no indicator that the parent was unfit or uncaring. If the noncustodial parent maintained a connection with the child following the divorce and the custodial parent's subsequent remarriage, then he or she may be a very appealing candidate for visitation rights under an open adoption statute. Indeed, if the parent-child connection has been maintained, the noncustodial parent probably retains the legal right to veto any proposal by the stepparent to adopt. Thus, the UAA states that a primary purpose for permitting post-adoption visitation is to encourage more noncustodial parents to consent to stepparent adoptions in these circumstances.[52]

While these various rationales may be offered to explain why the drafters of the UAA limited the availability of post-adoption visitation orders to the stepparent adoption setting, the decision remains a controversial one. Many of these same rationales extend to other types of adoption that also involve older children for whom adoption formalizes an existing placement, such as children adopted by foster parents or by relatives. In other words, the line drawn by the UAA to isolate the types of adoption where the traditional closed model is still functional could have been drawn more narrowly. One alternative would be to continue this model only for the adoption of newborn children.

Indeed, among the current state statutes[53] which authorize post-adoption visitation rights for birth parents, several limit this option to cases involving the adoption of older children. One state, Vermont, has enacted the relevant provisions of the UAA, which only extend the open adoption model to stepfamily adoptions.[54] The other state laws are not modeled after the UAA, but several are limited in other ways that restrict their application to children who are not newborn infants at the time of adoption. Thus, the

50. *See* Marilyn Ihinger-Tallman & Kay Pasley, *Divorce and Remarriage in the American Family: A Historical Review*, *in* REMARRIAGE AND STEPPARENTING 3, 11-13 (Kay Pasley & Marilyn Ihinger-Tallman eds., 1987) (describing the formation of stepfamilies, and noting a substantial decrease in recent years in the number of stepfamilies formed upon the remarriage of a widowed parent and the simultaneous increase in the number of stepfamilies formed by the marriage of a custodial parent who is divorced or never before married).

51. According to the U.S. Census Bureau in 1990, 94% of residential stepparents were men. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P23-180, MARRIAGE, DIVORCE , AND REMARRIAGE IN THE 1990S (1992) [hereinafter CURRENT POPULATION REPORTS], 10 (Table L).

52. *See* art. 4 cmt., 9 U.L.A. at 68-69. This matter is discussed at greater length later in the next Part of this essay.

53. *See supra* note 5 (collecting open adoption statutes).

54. *See* VT. STAT. ANN. tit. 15A, § 4-112 (Supp. 1997).

Nebraska[55] and New York[56] laws apply only to the adoption of children who have been in foster care. Wisconsin and California come closest to the UAA in this regard by making visitation orders available when the child is adopted by a stepparent or by a relative.[57] The remaining state statutes appear to apply to all types of adoption, including adoption by a stepparent.[58]

In the near future, additional states may consider the modification of traditional adoption statutes to permit post-adoption visitation by former parents. The UAA is an important model for such legislative action. Lawmakers who remain unwilling to embrace open adoption as an option for all types of adoption may be receptive to the more limited approach of the UAA. As discussed in this section, the limitation of visitation rights for former parents to the stepparent adoption setting is not unreasonable, because many of the policy arguments that support open adoption have special resonance in the context of the stepfamily.

The drafters of the UAA believed that the creation of enforceable ongoing relationships between former noncustodial parents and adopted stepchildren, in the discretion of the adoption judge, would be an improvement to the traditional closed model of stepparent adoption.[59] Indeed, as discussed in this Part, there are numerous benefits in the open model for the parties and for the communities in which they reside. An additional rationale for including the post-adoption visitation provision for former parents, set forth in the drafters' commentary, involves the desire to increase the number of stepfamily adoptions.[60] The following Part of this

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55. *See* NEB. REV. STAT. §§ 43-162 to -164 (1993 & Supp. 1996).

56. *See* N.Y. SOC. SERV. LAW § 383-c (McKinney 1992 & Supp. 1997).

57. *See* CAL. FAM. CODE § 8714.7(c) (West 1998); WIS. STAT. ANN. § 48.925 (West 1997).

58. A large number of states recognize post-adoption visitation rights for other relatives, especially grandparents, but frequently limit grandparent visitation privileges to stepparent or relative adoptions. *See generally* HOLLINGER, *supra* note 12, app. 1-A (describing the post-adoption grandparent visitation laws in each state); Annotation, *Grandparents' Visitation Rights*, 90 A.L.R. 3d 222 §§ 6, 9 (1979 & Supp. 1997). Grandparent visitation arrangements involve the same conflicting interests that arise in any open adoption model. On the one hand, children may benefit from a loving relationship with their grandparents; on the other hand, custodial and adoptive parents should be free to rear their children without the intrusion of third parties who come armed with court orders to guarantee access. *See* Koreen Labrecque, *Grandparent Visitation After Stepparent Adoption*, 6 CONN. PROB. L.J. 61, 79-80, 85 (1991); Patricia A. Hintz, Comment, *Grandparents' Visitation Rights Following Adoption: Expanding Traditional Boundaries in Wisconsin*, 1994 WIS. L. REV. 483, 507; Nathan, *supra* note 44, at 675. In the post-adoption setting, grandparents have had greater success than parents in convincing legislatures and courts to tilt the balance in their favor, in part because many lawmakers perceive the intrusion on the adoptive family as less threatening when it comes from a grandparent. *See, e.g.*, Mimkon v. Ford, 332 A.2d 199, 204 (N.J. 1975).

59. *See* art. 4 cmt., 9 U.L.A. at 68-69.

60. *See id.*

Essay explores the assumptions made by the drafters that the enactment of UAA section 4-113 would result in more adoptions, and that such an increase would be a positive change.

III. THE INCREASE IN STEPPARENT ADOPTIONS UNDER THE UAA

The commentary accompanying the UAA states that open adoption was included in the stepparent adoption article with the intention of increasing the number of stepparent adoptions. The drafters believed that more noncustodial parents would voluntarily consent to the adoption of their children by stepparents if the law provided for enforceable post-adoption visitation rights. Furthermore, the drafters expressed the view that the resulting increase in the number of stepparent adoptions would be a positive change, because it "would give more children the advantage of living in a household with two legal parents."[61] As lawmakers now consider enacting the UAA in their states, it is important to assess the assumptions the drafters of the UAA made with respect to the open adoption provision of the stepparent adoption article. Beyond this assessment of behavioral incentives for the private parties, this Part also explores the likely impact of section 4-113 on the courts and legislatures as they formulate adoption law policies in the future. It is reasonable to predict that the recognition of post-adoption visitation for former parents will produce liberalized legal standards that could result in a larger number of stepparent adoption orders in contested adoption cases.

According to the U.S. Census Bureau, in 1990 there were approximately 5.25 million stepfamilies, defined as married couples residing with a minor child or children who is biologically related to one spouse but not to the other.[62] Stepfamilies are usually created in one of two ways. First, the never-married custodial mother of minor children may marry a man who is not the biological father. Second, the custodial mother or father may remarry following the death of the other biological parent or following a divorce from that individual. Given the high incidence of children born to unmarried mothers and the high rate of divorce and remarriage in our society, it is not surprising that the number of stepfamilies is large and growing.[63]

By comparison, the number of stepparent adoptions in the United States is relatively small. According to the commentary accompanying the UAA, the total number of adoptions each year is around 130,000, and more than

61. *Id.*

62. CURRENT POPULATION REPORTS, *supra* note 51, at 10 (Table L) (reporting 5,254,000 stepfamily households in 1990, which represented 21% of all married couple households).

63. *See* Ihinger-Tallman & Pasley, *supra* note 50, at 11-13.

half involve minor children adopted by their stepparents or other relatives.[64] In light of the large number of stepfamily households, however, these numbers indicate that adoption within stepfamilies is a relatively rare event.

No reasons are given in the UAA commentary for the drafters' conclusion that an increase in the number of stepparent adoptions is an appropriate goal for lawmakers. The likely reasons, however, easily come to mind. The pre-adoptive stepfamily unit often resembles the traditional nuclear family (defined as minor children residing with their two biological married parents) in many ways. In the stepfamily, the two adults are married to each other, and a biological and legal parent-child relationship exists between the custodial parent and the child. The stepparent and child share the same household, and both enjoy an important relationship with the other adult who resides there. Over time, the stepparent-child relationship may take on additional significance as the stepparent assumes more and more responsibility for the child. When this happens, the stepfamily members may wish to formalize their de facto family by establishing a permanent adoptive parent-child relationship between the stepparent and the child.

Beyond the private interests of the individual stepfamily members, adoption in these circumstances may serve a perceived public interest as well. Many policymakers continue to prefer the traditional nuclear family format over other alternatives,[65] and a stepparent adoption results in the creation of a legal family that comes as close as possible to the nuclear family. According to this viewpoint, the adoptive stepfamily household, headed by a married couple who are the two legal parents of the child with whom they reside, has the desirable qualities of certainty and stability within a traditional family format.

For the stepfamily members, formalizing the stepparent-child relationship may have both symbolic and practical significance. Frequently, the stepchild assumes the same name as the adults in his or her household at the time of adoption, and this change sends a symbolic message to the world that the stepfamily is a "real family." For the stepchild in particular, the commitment, certainty, and normalization of the family involved in a stepparent adoption may have many positive effects on the child's development and future well being.

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64. *See* prefatory note, 9 U.L.A. at 2. Writers in the field of adoption law and practice have criticized the dearth of statistical information that has resulted from the absence of national record keeping in this field. *See* Hollinger, *supra* note 2, at 350 n.15; Kathy S. Stolley, *Statistics on Adoption in the United States*, 3 THE FUTURE OF CHILDREN: ADOPTION 26, 26-27 (1993) (describing the inadequate efforts of government agencies to keep track of adoption information). Thus, the available data about the number of adoptions and the details about adoptive families are not completely reliable.

65. *See* GREGORY ET AL., *supra* note 22, § 1.02(a); Bartlett, *supra* note 17, at 880.

On a more practical level, formalization of the stepfamily through adoption involves a number of changes that are frequently beneficial for the stepfamily members and the community in which they live. Even though the stepparent may have assumed significant economic and custodial responsibility for the child prior to adoption, there is little *legal* significance to such a relationship. The legal relationship of the unadopted child and stepparent is an uncertain affair, with no clearly defined rights and duties in important areas such as child custody, surnames, child support, inheritance, medical and educational decision-making, employee benefits, criminal law, tort law, and tax law.[66] Upon adoption, however, the stepparent assumes all of the same legal rights and duties, in these and other legal contexts, as any other custodial parent.[67] Thereafter, third parties, such as doctors and educators, know that both adults who reside with the child are equally responsible for him or her.

There is, however, another side to stepparent adoption, which involves the loss of the parental status of the noncustodial parent. Admittedly, there are stepfamilies where the second biological parent is not a concern. The parent may be dead, or his or her identity or location may be unknown. However, these are not the families that the UAA seeks to affect through the introduction of a post-adoption visitation provision. Rather, the provision seeks to encourage adoption in families where the noncustodial parent is present, by holding out the promise of future visitation in exchange for the noncustodial parent's consent to adoption.[68] Especially when the child has known this individual as a parent, the loss of parental status may be emotionally wrenching for both of them.

In more practical terms, many important legal rights and duties are lost when the status of the noncustodial parent comes to an end. Indeed, all that is gained in terms of the stepparent-child relationship is, in the eyes of the law, terminated as to the noncustodial parent.[69] Thus, the adopted stepchild loses rights to economic support from the parent for all time, and is no longer a dependent of the parent for purposes of private and public employee benefits. Like a number of existing state adoption statutes, the UAA does retain one significant economic connection: the child remains the heir of the noncustodial parent under state inheritance laws following a stepparent adoption.[70]

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66. *See* MAHONEY, *supra* note 29; David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" After Divorce*, *in* DIVORCE REFORM: AT THE CROSSROADS 102, 108, 120 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

67. *See, e.g.*, § 1-104, 9 U.L.A. at 8.

68. *See* art. 4 cmt., 9 U.L.A. at 68-69.

69. *See, e.g.*, § 1-105, 9 U.L.A. at 8-9.

70. *See* § 4-103(b)(3), 9 U.L.A. at 70 ("An adoption by a stepparent does not affect . . . the right of the adoptee or a descendant of the adoptee to inheritance or intestate succession through

The adopted stepchild loses not only important economic ties to the parent, but custodial ties as well. The former parent is no longer entitled, for example, to have access to the child's medical or educational records. Nor does he or she have standing to seek custody in the event that the adoptive family is disrupted by death, divorce, or some other occurrence. Of course, the UAA retains one significant custodial right: Under section 4-113, the former parent may request an order of visitation based on the best interests of the child.

Thus, in the category of stepfamilies where the noncustodial parent is present, the effect of stepparent adoption is to substitute the stepparent for the noncustodial parent as the child's second legal parent. Whether this change is desirable and consistent with the child's welfare surely depends upon the facts and circumstances of each individual case. One relevant factor, which is highlighted by the notion that the adoptive stepparent is replacing the natural parent in the eyes of the law, relates to the strength of the stepparent's economic and emotional commitment to the stepchild.

In a number of reported cases, the adoptive stepparent's commitment to the emotional and economic welfare of the adoptee has broken down at a later time, when the marriage between the adoptive stepparent and the custodial parent ended in divorce.[71] The possibility of divorce following a stepparent adoption is statistically realistic, because the rate of divorce for second marriages is even higher than for first marriages.[72] In the reported cases, each adoptive stepparent sought to set aside, or abrogate, an earlier stepchild adoption when the marriage that created the stepfamily in the first place came to an end.[73] The stepparent may have believed that his or her relationship with the child always remained contingent upon the underlying marriage between the adults, especially if the stepchild was older when the stepparent married the custodial parent.[74]

In the eyes of the law, however, the stepparent's status is permanently

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or from the adoptee's former parent. . . ."). The UAA does not preserve this economic connection when the child is adopted by an adult other than the stepparent. *See generally* 2 HOLLINGER, *supra* note 12, § 12.03 (discussing postadoption inheritance rights under various state laws in both the biological family and the adoptive family).

71. *See generally* 2 HOLLINGER, *supra* note 12, § 8.02(3) (documenting that most reported attempts by adoptive parents to set aside a final adoption fall into two categories: stepparent adoption and adoption of children with special problems); Elizabeth N. Carroll, *Abrogation of Adoption by Adoptive Parents*, 19 FAM. L.Q. 155 (1985) (proposing for uniform state legislation that would include a short time limitation for setting aside adoption orders).

72. *See* Lynn K. White & Alan Booth, *The Quality and Stability of Remarriages: The Role of Stepchildren*, 50 AM. SOC. REV. 689 (1985) (concluding that the presence of stepchildren is a destabilizing factor within remarriages and contributes to a higher rate of divorce for remarried couples).

73. *See* 2 HOLLINGER, *supra* note 12, § 8.02(3)(b).

74. *See* JAMES D. ECKLER, STEP-BY-STEPPARENTING 183-84 (1988) (excerpting interviews with adoptive stepfathers whose marriages subsequently failed).

changed to legal parenthood by an adoption order. Thus, actions to set aside a stepparent adoption at the time of divorce rarely succeed, because the applicable rules of law reflect a strong state interest in the finality of adoption orders.[75] As a general rule, the biological parent and the adoptive stepparent stand on an equal footing at the time of divorce in terms of their future economic and custodial rights and duties vis-à-vis the child.[76]

The permanent nature of the adoptive stepparent-child relationship, embodied in these legal doctrines, should mirror the actual commitment of the stepparent to assume the full status of a legal parent. The UAA includes certain procedures designed to make sure that the adoptive parent understands this. Thus, the UAA requires the judge to include a statement about the nature of the newly-created parent-child relationship in the final adoption decree.[77] The judge, lawyers, and other professionals involved in the adoption proceeding can perform an important counseling function in this regard. Often, stepparent adoptions proceed with less formality than other types of adoptions, but formalities designed to inform the parties about the nature of their post-adoption relationships are crucial.

Even when the stepparent is willing to assume the full responsibilities of parenthood at the time of the adoption proceeding, and on a permanent basis, the judge will grant the adoption petition only if it serves the child's best interests. Besides the court's assessment of the strength of the stepparent's commitment, additional considerations include the nature and stability of the stepfamily, the economic and other costs of losing the legal status of the second biological parent, and all other matters relating to the child's welfare in each case. The behavior-shaping goal of the UAA, then, is to increase the number of stepfamilies that initiate adoption petitions and invite this type of judicial inquiry. The goal is wise and appropriate, in light of all of the private and public interests involved in the matter of stepparent adoption.

The second, related question remains to be answered: whether the open adoption option provided by section 4-113 will in fact increase the number of stepparent adoption petitions and the number of stepparent adoptions. The decisions of several individuals must coalesce before an adoption can take place: the decision of the stepparent to seek the adoption, the decision

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75. *See* 2 HOLLINGER, *supra* note 12, § 8.02(3). *But see In re* Adoption of B.J.H., 564 N.W.2d 387 (Iowa 1997) (setting aside adoption of stepchildren and reinstating parental status of their natural fathers where custodial mother fraudulently induced stepfather to adopt).

76. *See, e.g.*, Bonwich v. Bonwich, 699 P.2d 760 (Utah 1985) (refusing to apply preference for the biological parent in custody dispute during divorce proceeding between father and adoptive stepmother).

77. *See* § 3-705(a)(8), 9 U.L.A. at 66. The other adults who participate in the stepparent adoption proceeding, the custodial parent and the noncustodial parent, must sign consent forms that spell out in detail the specific ramifications of the adoption. *See* §§ 4-105, 4-106, 9 U.L.A. at 71-72.

of the custodial parent (and the child, if he or she has reached a certain age) to support the adoption petition, the decision of the noncustodial parent to consent to a termination of his or her status (in the absence of grounds for involuntary termination), and the decision of the adoption court to grant the petition based on the applicable legal standards. The impact of section 4-113 on each of these decisionmakers must be evaluated in order to understand whether the visitation option will increase the number of stepparent adoptions.

First, the drafters of article four of the UAA and others who have analyzed the open adoption model have assumed that some noncustodial parents will be more likely to consent to a proposed adoption if the adoption order contains an enforceable provision about future visitation.[78] In cases where the parent is not unfit, and no other grounds exist to involuntarily terminate his or her rights, voluntary consent is an absolute prerequisite to adoption. Even in cases where the stepfamily can prove unfitness, or other grounds for involuntarily waiving the parent's consent, the prospect of doing so in a judicial proceeding may be so daunting that they would not proceed with an adoption petition in the absence of consent from the noncustodial parent. Thus, the voluntary participation of the noncustodial parent is often crucial, and the UAA drafters hoped to encourage such behavior by including the visitation provision. Although the matter is speculative, it does seem likely that certain noncustodial parents will, in fact, be tempted by the availability of enforceable visitation rights under section 4-113 coupled with the permanent termination of all future financial responsibility for the child under the general principles of adoption law.[79]

On the other hand, the well-informed noncustodial parent must realize all of the other ramifications of the consent to terminate his or her parental status, especially the loss of all rights as the child's custodian. As an example, many noncustodial fathers have strong feelings about the continued use of the father's last name, even after substantial contact with the child has come to an end.[80] Prior to adoption, the noncustodial parent has no absolute right to insist that the child's name remain unchanged, but the traditional legal standards in this field have nevertheless been slanted

78. *See* Appell, *supra* note 33, at 488 n.21 (citing numerous authorities who support the proposition, not limited to the stepfamily setting, that parents are more likely to consent to adoption if future visitation is assured).

79. The typical adoption order terminates future support duties, but does not eliminate any child support arrearages owed by the parent whose rights are being terminated. *See, e.g.*, § 3-505(1), 9 U.L.A. at 58. The parties to a consensual adoption may agree to the forgiveness of this obligation.

80. *See* Merle H. Weiner, *"We are Family": Valuing Associationalism in Disputes Over Children's Surnames*, 75 N.C. L. REV. 1625, 1649-66 (1997) (discussing why men associate their surnames with their identity).

toward the preservation of paternal surnames.[81] Upon consenting to the child's adoption, however, the former parent loses the legal right to influence naming decisions, along with all other custodial prerogatives. Surely some noncustodial parents, with varying degrees of involvement in their children's lives, will find this scenario unacceptable, in spite of the promise of future visitation under UAA section 4-113.

As discussed at length in Part V of this Essay, the UAA does not clearly define the nature of the visitation rights established for the former parent under section 4-113. These rights do not appear to be as substantial as the well-defined rights of the noncustodial parent, whose legal status has not been terminated, to visit with his or her child. It remains to be seen how zealously the courts will enforce post-adoption visitation orders if problems arise down the road, such as noncooperation by the adoptive stepfamily. Under the UAA, such enforcement is by no means guaranteed.[82] In other words, although the rights that the parent surrenders by consenting to a stepparent adoption are clearly delineated, the nature of the new interest of the former parent regarding future access to the adopted child is a much less certain matter.

Ultimately, most noncustodial parents will base the important decision about consent to a stepparent adoption on considerations of their own self interests as well as their views about their children's best interests. In this context, the legal right to have continued contact with the child will predictably enable some, but not all, noncustodial parents to conclude that adoption is in their best interests.

Besides the consent of the noncustodial parent, stepparent adoption also requires the formal agreement of certain members of the stepfamily: the stepparent, the custodial parent, and the child (if he or she has reached a certain age). The views of the stepfamily members themselves about adoption may well be influenced by the existence of an open adoption law. To the extent that the custodial parent, stepparent, and child welcome and value the child's association with the other biological parent, the current all-or-nothing adoption model may seem inappropriate to them. A new model that sanctions an ongoing legal tie with the former parent following stepparent adoption may encourage such families to view adoption in a

81. *See* MAHONEY, *supra* note 29, at 149, 153-59 (describing the various legal standards employed to resolve conflicts about stepchildren's surnames); Weiner, *supra* note 80, at 1690-1752 (same).

82. The UAA limits judicial assistance to those situations where "the court finds that enforcement is in the best interest of a minor adoptee." § 4-113(e), 9 U.L.A. at 76. Furthermore, the Act does not mention any specific enforcement mechanisms to aid the former parent. By way of contrast, absent exceptional circumstances, parents who do not reside with their children and whose rights have not been terminated have visitation rights that are enforceable through a variety of legal mechanisms. *See* ELROD, *supra* note 19, at ch. 6.

more positive light.

Special concern for the minor stepchild arises in this setting. Under the UAA, the stepchild who is twelve years or older must consent to his or her own adoption,[83] although the adoption court may waive this requirement based on the nonconsenting child's best interests.[84] Notably, when the Vermont legislature recently enacted article four of the UAA, one of the modifications made to the model act was the upward adjustment of the age-of-consent requirement from twelve to fourteen years.[85] Certainly in some families, where the older stepchild has established meaningful ties with the noncustodial parent, giving consent to a stepparent adoption would be experienced as a painful rejection of the parent, even if all of the adults cooperate in the adoption proceeding. The child's concerns may be somewhat allayed, and the child's consent may be more readily forthcoming, if visitation is included in the formal adoption arrangement.

On the other hand, the introduction of a post-adoption visitation law may turn stepparent adoption into a *less* attractive option for other stepfamilies, who regard the noncustodial parent as an unwelcome intruder. The stepparent or the custodial parent may decide that adoption is not desirable if the effect would be to release the noncustodial parent from economic responsibility while maintaining his or her right of access to the child. Of course, the UAA does not automatically provide for post-adoption visitation by former parents in every stepparent adoption. Where the matter is contested, one factor that the judge must consider is the objection of the stepparent and custodial parent to visitation by the former parent.[86] Nevertheless, for families who view adoption as, among other things, a method of getting rid of the noncustodial parent, the visitation provision is likely to discourage, rather than encourage, stepparent adoption petitions.

Thus, while the commentary in the UAA focuses on the positive impact that section 4-113 may have on the decisions of noncustodial parents about stepparent adoption, state legislators considering its enactment should also review other aspects of the private decisionmaking process. Some noncustodial parents may, as the UAA commentary predicts, be influenced to cooperate in an adoption proceeding because future visitation is available.[87] Other noncustodial parents, however, will continue to find the termination of their parental status to be an unacceptable option; for them, a post-adoption visitation law would have no impact. Within the stepfamily, the introduction of a post-adoption visitation law could influence private decision-making in either direction, depending on the attitude and feelings

83. § 4-104, 9 U.L.A. at 71.
84. § 2-402(b)(2), 9 U.L.A. at 30.
85. *See* VT. STAT. ANN. tit. 15A, § 4-103 (Supp. 1996).
86. *See* § 4-113(d), 9 U.L.A. at 76.
87. *See* art. 4 cmt., 9 U.L.A. at 68-69.

of the custodial parent, stepparent, and child about the proper role of the noncustodial parent following a stepparent adoption.

Besides the private decisionmaking of family members, the introduction of a post-adoption visitation law also may influence the decisions of judges and legislators in ways that would predictably increase the number of stepparent adoptions. In every adoption proceeding, the judge must decide whether granting the adoption petition will serve the best interests of the prospective adoptee. Furthermore, if a parent contests the petition, the court must determine whether grounds exist to involuntarily terminate his or her parental status, before the child's adoption can proceed. The legal standards governing this latter decision vary among the states, ranging from the strictest "parental unfitness" standard to the more liberal "best interests of the child" standard.[88] Trial judges exercise a great deal of discretion when they apply the relevant standards to the facts of a contested adoption case and decide whether to grant the adoption petition.[89] Within this framework, the enactment of a post-adoption visitation provision may predictably influence judges to interpret the standards more liberally and to grant more stepparent adoption petitions.

Professor Joan Hollinger has described the competing pressures that influence the exercise of judicial discretion in contested stepparent adoption cases:

> Judicial interpretations of the statutory grounds for forfeiting consent vary greatly. They seem to depend on how solicitous the court is of the interests of the noncustodial parent, or alternatively, of the child's interest in securing legal recognition of what is already likely to be a stable custodial household . . . .[90]

Within this framework, the additional possibility of accommodating the interest of the noncustodial parent through a post-adoption visitation order may encourage judges to grant more stepparent adoption petitions.

Of course, the matter is a speculative one, and the impact of the statutory change proposed by UAA section 4-113 on judicial decision-making would be felt, if at all, in the limited number of cases that judges regard as "close cases." In the contested adoption case where the noncustodial parent has clearly been a fit and involved parent, the judge must still dismiss the contested adoption petition based on the importance

88. *See* MAHONEY, *supra* note 29, at 163-77 (discussing the various state standards for terminating parental rights and their application in particular stepparent adoption cases); 1 HOLLINGER, *supra* note 12, § 2.10[3][c].

89. 2 HOLLINGER, *supra* note 12, § 8.02(1)(a).

90. *Id.* § 2.10[3][c], at 2-99.

of the biological parent-child relationship to both the child and the noncustodial parent. Here, the statutory possibility of a post-adoption visitation order for the noncustodial parent would predictably be irrelevant to the judicial decisionmaking process. On the other hand, the nonconsenting noncustodial parent who has consistently played a less important role in the child's life presents the more difficult case for the judge considering a contested stepparent adoption petition.

Under traditional law, the judge has an all-or-nothing choice to make: order the adoption and totally eliminate the noncustodial parent from the legal picture, or refuse to establish a legal bond between stepparent and child thereby preserving the full legal status of both biological parents. Within this framework, section 4-113 of the UAA would add a third option. In the category of close cases, where the merits of the proposed adoption otherwise outweigh the merits of maintaining the status quo, the statutory visitation provision may enable the court to address its protective concerns about the noncustodial parent, while still proceeding with the adoption. This result would be embodied in a judicial finding that the relevant statutory standards for terminating parental rights and establishing a legal relationship between stepparent and stepchild have been satisfied.

In this manner, the introduction of a visitation provision such as section 4-113 of the UAA may influence the construction and application of the relevant statutory standards by trial judges in individual adoption cases. Furthermore, the visitation provision also may influence state legislators and appellate judges who revisit and reformulate the legal standards over time. Predictably, these lawmakers may be more willing to "ease up" on the general standards for terminating parental rights and proceeding with stepparent adoptions, if they know that termination does not automatically involve the complete severance of all legal ties between the noncustodial parent and the adoptee.

In contested adoption cases, the interests of the nonconsenting biological parent are important and constitutionally protected.[91]

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91. The Supreme Court has not fully defined the constitutional dimension of parental rights in this context. The Court has reaffirmed the general proposition that parental rights are a fundamental interest in the constitutional scheme, in cases involving evidentiary and procedural issues when the state sued to terminate the rights of parents of neglected children. *See* Santosky v. Kramer, 455 U.S. 745 (1982) (invalidating "fair preponderance of the evidence" standard under New York law because the Constitution requires, at a minimum, a "clear and convincing evidence" standard in termination proceedings initiated by the state); M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (holding that the state of Mississippi may not block an indigent mother's access to appellate review of the sufficiency of the evidence upon which the trial court based its termination of her parental rights).

Furthermore, the Supreme Court has addressed the rights of unmarried fathers in the adoption context on several occasions. As a matter of constitutional law, the father who serves an active parenting role is entitled to the same protection as married parents. *See* HOMER H. CLARK, JR.,

Traditionally, the legal system has protected the parent's interests in this setting by allowing the parent to veto the proposed adoption unless he or she has been an unfit parent. In recent years, however, a number of state laws governing the waiver of parental consent to adoption have been liberalized in order to better accommodate the private and public interests that sometimes conflict with the parent's rights in this setting. Under these statutes, the courts in specified types of adoption proceedings may consider the interests of the child and the adoptive family, along with the fitness of the noncustodial parent, in deciding whether to involuntarily terminate the parent's legal status.[92] For example, the following Massachusetts adoption statute invokes a best interests of the child standard that clearly requires judicial consideration of both the noncustodial parent-child relationship and the child's existing custodial placement:

> Whenever a petition for adoption is filed by a person having the care or custody of a child, the [parent's] consent . . . shall not be required if . . . the court hearing the petition finds that the allowance of the petition is in the best interests of the child. . . .
>
> . . . .
>
> . . . [T]he court shall consider the ability, capacity, [and] fitness . . . of the child's parents . . . and shall also consider the ability, capacity, fitness and readiness of the petitioners.[93]

The rationale for liberalizing the legal standards in this manner appears to be especially strong in the stepfamily adoption context. Professor Homer Clark has expressed this opinion as follows:

> A distinction should be made in [contested adoption] cases between the child who has been taken from his natural parents by a state . . . agency . . . and a child who has been . . . living with one natural parent and a stepparent. . . . In the . . . [stepfamily] the child has very likely been integrated into a new family on a permanent basis . . . . In those circumstances the courts should be much more ready to terminate parental rights than in the foster care cases notwithstanding some

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THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 855-62 (2d ed. 1988) (discussing the constitutional rights of the father of illegitimate children); Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313 (1984); Robert S. Rausch, Note, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85 (1980).

92. *See generally* MAHONEY, *supra* note 29, at 169-77 (describing the shift in the law away from a strict parental unfitness standard for waiving parental consent to stepparent adoption).

93. MASS. GEN. LAWS ANN. ch. 210, § 3(a), (c) (West 1987 & Supp. 1997). This statute was applied in a stepparent adoption case in *Adoption of a Minor*, 389 N.E.2d 90, 91 (Mass. 1979).

contact between the natural parent and the child.[94]

In a number of states, stepparent adoptions have already received the special treatment proposed by Professor Clark, under statutes that permit the court to waive parental consent more readily when the petitioner for adoption is a stepparent.[95] More state legislators and judges may be willing to heed Professor Clark's advice, both in the formulation of legal standards and their application to particular families, if some degree of protection for the noncustodial parent-child relationship is available under a post-adoption visitation statute.

The trend toward liberalizing the standards applied in stepparent adoption cases is illustrated by the opinion of the Alaska Supreme Court in *In re J.J.J.*,[96] which affirmed a trial court's decision to grant an adoption petition over the objection of the noncustodial father. The relevant state statute provided that the adoption could proceed without the father's consent if he had failed to support his child in the past. In *J.J.J.*, the Alaska Supreme Court broadened its earlier construction of this statutory standard in the following manner:

> In this court's prior decisions . . . we have declined to dispense with a noncustodial parent's right to withhold consent to a stepparent adoption as long as the noncustodial parent had made a few perfunctory communications or an occasional gesture of support.
>
> . . . .
>
> We take this opportunity to clarify that, in order for a noncustodial parent to block a stepparent adoption, he or she must have maintained *meaningful* contact with a child, and must have provided regular payments of child support, unless prevented from doing so by circumstances beyond the noncustodial parent's control.[97]

In *J.J.J.*, the court applied this "meaningful contact" standard to the noncustodial father's conduct during the two-year period prior to the stepparent adoption proceeding. During that time, almost all of the father's support contributions had been made in response to collection efforts by a state agency. Furthermore, a period of more than one year had elapsed during which no communication with the child occurred. On these facts, the state high court concluded that the adoption court had properly proceeded with the stepparent adoption over the father's objection. Notably, in the

94. CLARK, *supra* note 91, at 900-01.
95. *See* 1 HOLLINGER, *supra* note 12, app. 1-A (collecting state statutes).
96. 718 P.2d 948 (Alaska 1986).
97. *Id.* at 952-53.

same opinion, the Alaska Supreme Court recommended that the state legislature consider the subject of "'incomplete adoption' [involving post-adoption visitation for the former noncustodial parent] as a middle approach . . . that would allow the courts a more reasonable choice in deciding stepfamily cases."[98]

The dissenting justices in *J.J.J.* strongly disagreed with the majority's decision to affirm the involuntary termination of the noncustodial father's status.[99] While suggesting that the request to legally formalize a stepfamily through adoption presents a unique set of countervailing priorities, the dissenting justices opined that the parent-child relationship must retain first priority. Arguably, these same judges might have more readily accepted the majority's interpretation of the state statute and joined in affirming the trial court's stepparent adoption order in *J.J.J.* if the legal adoption framework offered a new form of continuing protection for the noncustodial parent.

In summary, a post-adoption visitation law, such as the one proposed for state enactment by the UAA, may well have the intended effect of increasing the number of stepparent adoptions. Such a provision may influence lawmakers to liberalize the legal standards that govern the waiver of consent by the noncustodial parent, because visitation rights will provide an alternative form of protection for the noncustodial parent-child relationship. For the same reason, trial courts may more readily construe established standards in favor of the stepparent adoption petition if they are empowered to enter enforceable post-adoption visitation orders. Finally, individual family members, especially noncustodial parents, may be encouraged to voluntarily participate in more stepparent adoption proceedings. In these various (and speculative) ways, the enactment of a post-adoption visitation law may lead to an increase in the number of stepparent adoptions, which has been appropriately embraced as a goal by the drafters of the UAA.

IV. JUDICIAL DETERMINATION OF THE BEST INTERESTS OF THE ADOPTED STEPCHILD: THE SIGNIFICANCE OF A VISITATION AGREEMENT

Section 4-113 of the UAA authorizes the entry of enforceable post-adoption visitation orders in two distinct situations. First, subsection (b) governs consensual cases where the custodial parent, the stepparent, and the stepchild (if twelve years or older) have all agreed to the entry of a post-adoption visitation order. The subsequent subsection contemplates the alternative situation where there is no written agreement among the parties about the future visitation requested by the former parent. Notably, while

98. *Id.* at 951.

99. *See id.* at 959 (Matthews, J., dissenting).

the list of persons who may seek visitation under the consensual provision of 4-113(b) is unlimited, the request for visitation in the absence of stepfamily consent can be made only by the former parent, grandparent, or sibling.

Not surprisingly, section 4-113 establishes "the best interest of the minor adoptee" as the general standard to be applied to all requests for visitation. The Act lists numerous factors that the court must consider, along with "any other factor relevant to the best interest of the minor" in each case. The specific statutory factors are:

> (1) the preference of the minor, if the minor is mature enough to express a preference;
> (2) any special needs of the minor and how they would be affected by performance of the agreement;
> (3) the length and quality of any existing relationship between the minor and the individual who would be entitled to visit or communicate, and the likely effect on the minor of allowing this relationship to continue;
> (4) the specific terms of the agreement and the likelihood that the parties to the agreement will cooperate in performing its terms;
> (5) the recommendation of the minor's guardian ad litem, lawyer, social worker, or other counselor. . . .[100]

One additional factor is added to the mandatory best interests of the child analysis in cases where there is no agreement among the parties. Namely, "the court shall consider . . . any objections to the requested order by the adoptive stepparent and the stepparent's spouse."[101]

The basic bifurcation of section 4-113 highlights the importance of a written agreement among the parties in the judicial analysis of the child's interests relating to post-adoption visitation. Absent such an agreement at the time of the adoption proceeding, the likelihood of the parties' cooperation in the future is called into question. This consideration raises concerns about the specific statutory factor (number four, above) that requires the court to weigh the probability of enforcement problems in the future. If, at the time of adoption, the court can predict that the adoptive family will not readily comply with a visitation order, it may reach the conclusion that adoption coupled with visitation would not be in the child's best interest. Many judges believe that extended fighting and litigation between adults regarding the custody and visitation of a minor child is

100. § 4-113(b)(1)-(5), 9 U.L.A. at 76.
101. *Id.* § 4-113(d).

usually harmful to the child.[102] Section 4-113 of the UAA specifically authorizes the judge to deny the visitation request of a former parent if this concern is present in a particular case and is not outweighed by other statutory factors.

Indeed, in the nascent body of state law on the subject of open adoption, the existence of a contract has often been crucial. Among the existing state statutes discussed earlier that authorize post-adoption visitation by former parents in certain types of adoption,[103] the majority are restricted to situations where the parties have a contract.[104] In addition, there is a small body of case law dealing with open adoption issues in states that have not yet enacted an open adoption statute. As a threshold matter, most courts in these circumstances have simply refused to recognize or enforce any visitation rights for former parents, regardless of whether the adoptive parents agreed to such an arrangement.[105] But in the handful of cases where courts have recognized and enforced open adoption arrangements, even though the state adoption statute was silent on the subject, the presence of a contract between the parties was often a critical factor.[106]

For example, in *Weinschel v. Strople*,[107] the Maryland Court of Special Appeals held that the visitation agreement in a stepparent adoption case was enforceable as a private contract. The court found that the adoptive family's interest in autonomy, which was protected under the adoption statutes, had been waived by the custodial parent and adoptive stepparent when they agreed to future visitation by the former noncustodial parent:

> We read [the adoption statute which terminates all ties with the biological family] as protective of the adoptive parents and their status with the adopted child. It insulates the adoptive parent and child from attack by a disruptive, displeased, dissatisfied or disappointed natural parent. . . . The section,

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102. *See* ELROD, *supra* note 19, §§ 17:01, 17:14.

103. *See supra* note 5 (collecting state open adoption statutes).

104. *See* CAL. FAM. CODE § 8714.7(a), (b) (West Supp. 1998); IND. CODE ANN. § 31-19-16-2(4) (Michie 1996); N.M. STAT. ANN. § 32A-5-35(A) (Michie 1995); OR. REV. STAT. § 109.305(2) (Supp. 1996); WASH. REV. CODE ANN. § 26.33.295(1) (West 1997); W. VA. CODE, § 48-4-12 (1997).

105. In the absence of an open adoption statute, most courts have refused to enforce a private agreement about visitation under contract law principles, ruling that the terms of the contract are contrary to public policy. The same public policy that prevents the adoption courts from entering a visitation order under these circumstances, relating to the importance of a fresh start for the adoptive family under state adoption statutes, also prevents any judicial enforcement of the contract terms. *See, e.g., In re* Adoption of RDS, 787 P.2d 968, 970-71 (Wyo. 1990).

106. *See* Danny R. Veilleux, Annotation, *Postadoption Visitation by Natural Parent*, 78 A.L.R. 4th 218, 230-45 (1990 & Supp. 1996) (cataloging the reported cases based on the existence or nonexistence of a contract).

107. 466 A.2d 1301 (Md. Ct. Spec. App. 1983).

> however, is a shield not a sword. It does not purport to mandate that the adoptive parents and the natural parents may not under any circumstance agree to visitation privileges by the natural parents . . . .[108]

Under this theory, the court ruled that the former noncustodial mother in *Weinschel* was entitled to assert a visitation claim.

This same point of view about the importance of a private agreement is likely to carry weight under section 4-113(c) of the UAA and the existing state statutes that authorize visitation orders even when no agreement exists between the former parent and the adoptive family. Indeed, the circumstances in which the adoption court would enter a visitation order without the stepfamily's consent are probably quite limited. As a threshold matter, such circumstances will almost always arise in cases where grounds exist to involuntarily terminate the parent's legal status under the standards established by state law for this purpose. Whenever such grounds do *not* exist, the noncustodial parent will be in a position to veto the proposed stepparent adoption. Therefore, the parent will have the leverage to make the stepfamily's consent to future visitation a condition to the adoption taking place. If visitation is important to the noncustodial parent, then he or she would be unlikely to consent to the termination of parental rights and adoption by the stepparent unless the adoption decree includes a consensual visitation order. By way of contrast, the noncustodial parent whose rights can be involuntarily terminated by the court has no similar leverage. Here, if the stepfamily is not amenable to a post-adoption visitation order for the former parent, they need not consent to such an arrangement in order for the adoption to go forward. If the noncustodial parent thereafter requests a post-adoption visitation order, the adoption court must decide whether to order visitation over the objection of the adoptive stepfamily.

It is possible to posit a hypothetical situation where the adoption court would involuntarily terminate the parental rights of the noncustodial parent who unsuccessfully contested a stepparent adoption petition, the adoptive stepfamily would actively oppose the former parent's request for future visitation, and the court would nevertheless determine that the child's welfare required a post-adoption visitation order. Apart from the statutory factors relating to the existence of a contract, all of the specific factors that the adoption court must consider in a contested visitation case under section 4-113 of the UAA relate to the welfare of the child. Specifically, the court must consider the preference of the minor, his or her special needs, the nature of the child's connection to the noncustodial parent, and any recommendation from the child's formal representative.[109] In other words,

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108. *Id.* at 1306.

109. *See* § 4-113(b), 9 U.L.A. at 76.

the court may enter the visitation order over the objection of the custodial parent and stepparent if other facts relating to the child's welfare point to this result.

Such a hypothetical situation is more likely to arise in a jurisdiction where the standard for involuntary termination of parental rights in contested stepparent adoption cases is broad. As discussed earlier in Part III, the relevant laws in certain states authorize the involuntary termination of the noncustodial parent's status even if he or she has maintained some forms of parental contact with the child. Specifically, certain state laws authorize the termination of parental rights unless there was significant communication and economic support in the past; others permit the court to sever the parent's rights on the basis of the child's best interests.[110] Under these standards, involuntary termination may be lawful in some cases where the child knows and continues to care about the parent, even though their contact is not "significant" in the legal sense, and stronger family ties have been established over time within the stepfamily. Under the UAA, the adoption court may conclude that the child's interests in such a case will be best served by granting both the contested adoption petition and the contested request for visitation by the noncustodial parent.[111]

Just as the UAA contemplates the possibility of a post-adoption visitation order in the absence of a written agreement, it also empowers the adoption court to deny visitation even though all of the parties have agreed to such an arrangement.[112] This result might be reached, for example, if the judge believes that the custodial parent and stepparent have given their consent to visitation only because they need the noncustodial parent's consent to the adoption, and that they have no sincere intention of complying with a visitation order. The future for the child under a visitation order in these circumstances would likely follow one of two undesirable courses. In the first scenario, the former noncustodial parent would be deterred by the adoptive family's noncompliance with the visitation order over time and thereafter end his or her relationship with the adopted child. In the alternative, the former parent would be angered by the adoptive parents' failure to honor their promise, and would involve the child in future family fights in and out of the courtroom in order to maintain his or

110. *See supra* notes 88-99 and accompanying text (discussing state law standards governing the involuntary termination of parental rights in stepparent adoption proceedings).

111. *See generally In re* Abraham, 385 N.Y.S.2d 103 (N.Y. App. Div. 1974) (granting both stepfather's petition in adoption, which was contested by the noncustodial father, and visitation for noncustodial father, which was opposed by the adoptive family).

112. *See In re* Adoption of G.T., 610 N.Y.S.2d 734 (Fam. Ct. 1994) (denying adoption petition by great aunt, which contained agreement to permit visitation by mother who consented to the adoption, where court believed that adoption would not serve child's interests because the two adults did not intend petitioner to assume a true parental role vis-à-vis the child).

her access to the child. Anticipating these alternative scenarios, the adoption court may determine that the child's interests would be better served by maintaining the status quo, thus denying the adoption petition. The possibility of adoption without a visitation order for the former parent is not an option in this hypothetical situation, because the parent's consent is required before the adoption can go forward and will predictably be withheld absent a visitation order.

Another situation where the adoption court may be leery of approving the parties' agreement about stepparent adoption coupled with continuing visitation rights for the noncustodial parent involves the stepparent who does not fully grasp the significance of the role that he or she would be assuming. As described at greater length in Part III, adoption is beneficial to the stepchild, as a general rule, only if the adoptive stepparent's commitment to the child is separate and distinct from his or her relationship to the custodial parent.[113] If the adoption court perceives that the stepparent has not made the necessary emotional and economic commitment to the child, then the court may determine that maintenance of the noncustodial parent's legal status would better serve the child's interests. In these circumstances, the stepparent adoption petition would be denied, even if all of the parties agreed to the adoption and visitation provisions.

Although the UAA contemplates and provides for these exceptional cases, it remains clear that the private agreement among the parties to a stepparent adoption plays a very important role under section 4-113. In recent years, the role of private contracts has assumed greater significance in the general field of family law.[114] The agreement between stepfamily members and the noncustodial parent regarding adoption of the stepchild by the stepparent and visitation for the former parent, contemplated by section 4-113, can be understood and evaluated as part of this larger development.

Traditionally, family laws have defined and regulated family status relationships, such as marriage and parent-child relationships, leaving little room for individuals to vary the legal definition in particular cases. These family laws were intended to provide clear and certain rules that guaranteed protection for weaker family members in a manner that was fair to all. The modern trend toward allowing the parties to vary the terms of state-defined family relationships recognizes the important principle of contractual autonomy for individual families at a time when society and de facto family relationships are more varied than in the past. At the same time, however, the courts and legislatures have been unwilling to confer total autonomy on the parties to set aside the provisions of law that protect weak family

113. *See supra* notes 71-77 and accompanying text.

114. *See* Singer, *supra* note 25, at 1443, 1444-46.

members and promote basic societal interests. As a result, the newly-recognized contractual freedom in the family sphere is generally subject to continuing limitations.[115]

The most widespread application of these changes has taken place in the laws governing the marriage relationship.[116] State laws traditionally have defined a unique and extensive list of legal consequences that constitute the legal marriage status.[117] In recent years, marriage partners have sought leeway to vary many of the economic and other legal consequences of this state-imposed marriage contract. For example, the lawmakers in many states have addressed the question whether antenuptial contracts, which attempt to change the future economic rights and duties between the spouses, are enforceable. The response of the state courts and legislatures has not been uniform, as the important and competing policy concerns that arise in this situation have been balanced differently in different jurisdictions.[118]

In a similar fashion, section 4-113 of the UAA confers limited discretion upon the parties to move away from the status relationships defined by traditional adoption law by entering into a private agreement. As explored at length earlier in Part II, the traditional model of stepparent adoption requires the complete termination of the child's ties to the noncustodial parent and his or her relatives.[119] Furthermore, the model establishes the adoptive family as a completely independent and autonomous unit. The open adoption option creates an exception to both of these aspects of the traditional adoption model, and the existence of the parties' contract is very influential in determining whether the option will be exercised in a particular case.

Of course, the autonomy of the private parties under section 4-113 of the UAA is not complete, because any contract between the noncustodial parent and the stepfamily members about post-adoption visitation must be approved by the adoption court based on a determination of the child's best interests. Predictably, the courts will not simply rubber-stamp such

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115. *See id.*

116. Similar questions about the contractual freedom of individuals have challenged traditional notions about family law status in other settings as well, including separation agreements at the time of divorce, and contracts between the parties who conceive children using new reproductive practices. *See id.* at 1460, 1478-79.

117. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 452-84 (1996) (cataloging the legal consequences of the marriage status).

118. *See* Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994); Robert Roy, Annotation, *Enforceability of Premarital Agreements Governing Support or Property Rights Upon Divorce or Separation as Affected by Circumstances Surrounding Execution—Modern Status*, 53 A.L.R. 4th 85 (1988 & Supp. 1997).

119. *See supra* notes 35-38 and accompanying text.

agreements, but will make their own careful assessment of the parties' motivations and the child's needs. The reservation of judicial discretion in this manner is consistent with the general approach taken by the courts toward the acceptance of private contracts about family law issues.[120]

As illustrated by the foregoing discussion, the open adoption option under section 4-113 of the UAA adds to and complicates the work of the adoption courts. Under the current laws in the large majority of jurisdictions, the adoption court has no authority to enter an open adoption order.[121] Therefore, the judicial response to any request for post-adoption visitation in these states must be an automatic "no." Of course, even in states that subscribe to the traditional adoption model, the court has the responsibility to determine whether the noncustodial parent's rights are terminable and whether stepparent adoption would serve the future welfare of the child. The open adoption option adds another inquiry to the court's agenda: whether post-adoption visitation by the former parent would serve the interests of the child in cases where the first two questions are answered in the affirmative.

The additional exercise of judicial discretion in this manner under section 4-113 is well designed to ascertain and facilitate the best interests of many stepchildren and their families. The court in each case must determine whether the child's interests will best be served by judicial action that formalizes the stepparent-child relationship while maintaining a key aspect of the child's legal connection with the noncustodial parent. In many cases, this is the power to simultaneously recognize the stepchild's relationships with the three adults who have served parenting roles, thereby protecting an important category of nontraditional families.

V. THE STATUS OF THE FORMER PARENT UNDER A POST-ADOPTION VISITATION ORDER: ENFORCEMENT ISSUES

Section 4-113 of the UAA authorizes the adoption court to consider requests for future visitation by the noncustodial parent of an adopted stepchild. Absent such a law, every stepparent adoption order inevitably

120. Whenever judges are called upon to make decisions about the future custody of children, they make their own independent determination about the most appropriate disposition. *See* CLARK, *supra* note 91, at 786-89. In the common setting of divorce, for example, the spouses frequently present the court with a separation agreement containing terms about the financial and custody issues arising under state divorce law. As a general rule, the courts are more deferential to the parties regarding the spousal support and property provisions of their contract than the child support and custody-related provisions. *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 306(f), 9A U.L.A. 216-17 (1987) (creating more lenient standard for judicial acceptance of provisions of the separation agreement that deal with issues affecting the spouses rather than the children).

121. *See supra* note 5 (collecting open adoption statutes).

and permanently severs all legal ties between the adoptee and the noncustodial parent.[122] The post-adoption visitation order contemplated by section 4-113 involves the construction of a new legal relationship between the former noncustodial parent and the adopted child, following the termination of their prior parent-child relationship. The final Part of this Essay explores the nature of the new legal relationship established between the former parent and adopted stepchild under these circumstances.

Notably, section 4-113 also provides for judicial enforcement of the visitation rights for former parents established under the UAA, in the event of noncompliance by the adoptive family.[123] As discussed in the last Part, the issue of future compliance is anticipated in the UAA standards that govern the adoption court's initial decision about entering a visitation order for the former parent.[124] Under section 4-113, one of the factors that the court must consider in ruling on the noncustodial parent's request for post-adoption visitation rights relates to the likelihood of future compliance by all of the parties.[125] Nevertheless, compliance problems will surely arise over time in some cases. Therefore, this final Part also investigates the forms of state intervention into the adoptive stepfamily that may be used by the courts if the parties fail to comply with the adoption court's visitation order.

In defining the precise nature of the rights created for the former parent under section 4-113 of the UAA, several helpful reference points exist in well-established family law doctrines. First, the visitation rights of noncustodial parents find clear definition and protection in the laws governing family relationships following divorce.[126] Second, a more recent body of statutory and case law has defined the rights of so-called third parties, who are nonparents for whom protectable rights of access to children also may be established by court order. For example, in recent years, every state legislature has conferred standing on grandparents to seek visitation with their minor grandchildren under certain circumstances, which are frequently limited to situations where the grandparent's child does not have primary custody of the grandchildren.[127] Less common, but on the rise, are legislative and judicial doctrines that confer similar rights upon other third parties, including the siblings or former stepparent of the minor child,

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122. *See* § 1-105, 9 U.L.A. at 8.

123. *See* § 4-113(e), 9 U.L.A. at 76.

124. *See supra* Part IV.

125. *See* § 4-113(b), 9 U.L.A. at 76.

126. *See* ELROD, *supra* note 19, ch. 6.

127. *See* Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319 (1994); Anne Marie Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563 (1994).

or the former cohabitating partner of the child's custodial parent.[128]

As a general rule, such third-party interests are less weighty in the eyes of the law than the rights of noncustodial parents following divorce, and the range of judicial tools available for their enforcement is more limited. Significantly, the UAA refers to the parent for whom a visitation order may be issued in the stepparent adoption proceeding as "the former parent," with the apparent intention of relegating him or her to the category of "third-parties" vis-à-vis the child for this purpose.[129] However, the designation still leaves a great deal of room for lawmakers to subsequently determine the precise place of the former parent's interest in the scheme of legally recognized family relationships.

The distinction drawn in existing family law doctrines between visitation claims by parents and the corresponding claims of third parties has several important ramifications. First, under the U.S. Constitution, every parent whose legal status has not been terminated has a constitutionally protected right to enjoy the company of his or her child.[130] This fundamental right continues to receive legal protection, even when the parent and child do not reside together. For example, a Kansas statute sets out the following stringent standard for determining when the noncustodial parent is *not* entitled to a visitation order: "A parent not granted custody or residency of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health."[131] Parental rights are further protected by a strong presumption in the law that the continuation of legal ties with both parents serves not just the parents' interests but the child's best interests as well.[132] Prior to a stepparent adoption, the noncustodial parent of the stepchild enjoys this protected parental status.

By way of contrast, third parties, including the former parent following a stepparent adoption, have no constitutionally protected interest vis-à-vis minor children. Even when state laws confer standing to seek visitation, the requests of nonparents are resolved strictly on the basis of the best interests of the child. Indeed, the standard set forth in the UAA for deciding whether to grant the former parent's request for visitation with an adopted stepchild is "the best interest of the minor."[133] Here, there is no protectable right of the adult to consider. The grandchild visitation statute in Michigan makes

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128. *See* Annotation, *Visitation Rights of Persons Other Than Natural Parents or Grandparents*, 1 A.L.R. 4th 1270 (1981).

129. § 4-113(c), 9 U.L.A. at 76.

130. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.4, at 506 (4th ed. 1991).

131. KAN. CIV. PROC. CODE ANN. § 60-1616 (West Supp. 1996).

132. *See* CLARK, *supra* note 91, at 812.

133. § 4-113(b), (c)(3), 9 U.L.A. at 76.

this point by stating that "[a] grandparenting time order . . . shall not be considered to have created parental rights in the [grandparent]."[134] Nor is there any general presumption that the child's interests are best served by such associations.[135] Thus, the courts have much wider discretion to deny third party visitation petitions.

Besides affecting the availability of a visitation order in the first place, the petitioner's standing as a parent, on the one hand, or a so-called third party, on the other hand, may also affect the range of remedies available to enforce such an order. Generally speaking, the legal system will go to greater lengths over time to protect a child's ongoing relationship with the noncustodial parent. An in-depth discussion of two reported cases involving the enforcement of court orders regarding visitation with minor children will serve to illustrate this point. The first case, *Ridley v. Ridley*,[136] involved the lengthy dispute between two parents following their divorce. The parties in the second case, *Rhinehart v. Nowlin*,[137] were the custodial father of two minor children and his former wife, who had served as stepmother to the children and had received visitation rights when she and the father divorced. The father in *Ridley* undeniably received greater judicial assistance than the stepmother in *Rhinehart* with the enforcement of visitation rights.

The *Ridley* case was decided by a New Jersey trial court in 1996, eleven years after the divorce court had initially awarded primary custody of the three Ridley children (then ages two, six and eight) to the mother and visitation rights to the father. According to the *Ridley* court, visitation was difficult to arrange "[a]lmost from its inception": the father "sought time and time again to effectively visit with his children and . . . through the years [he] sought the court's aid."[138] Eleven years later, the court clearly shared the father's sense of frustration because "[t]he court's orders have been unavailing, as notwithstanding victories in court, visitation has been

134. MICH. COMP. LAWS ANN. § 722.27b(6) (West Supp. 1997). Other statutes express the limitation on grandparent interests in more specific terms, for example, by stating that the grandparent's interests are not relevant in the event that the child becomes the subject of an adoption proceeding. *See* FLA. STAT. ANN. § 61.13(2)(B)(2)(c) (West 1997). *But see* N.D. CENT. CODE § 14-09-05.1 (1997) ("Joinder of grandparents . . . awarded visitation rights . . . must occur in any proceeding to terminate parental rights.").

135. *But see* N.D. CENT. CODE § 14-09-05.1 ("Visitation rights of grandparents to an unmarried minor are presumed to be in the best interest of the minor.").

136. 675 A.2d 249 (N.J. Super. Ct. Ch. Div. 1996), *rev'd on other grounds*, Ridley v. Dennison, 675 A.2d 249 (N.J. Super. 1997). The appellate court ruled that the trial court's factual findings were incorrect, but not that the state law regulating visitation was incorrectly articulated or applied.

137. 805 P.2d 88 (N.M. Ct. App. 1990).

138. *Ridley*, 675 A.2d at 250.

effectively denied."[139] Indeed, at the time of the *Ridley* case in 1996, the father had not seen his children for approximately eight years. The court placed responsibility for this situation directly on the shoulders of the custodial mother. Although the children had testified about their own negative feelings for the father and their desire not to see him, the court concluded that "it is [the mother] who has, by overt and covert means, influenced the children, resulting in the present estrangement between plaintiff and his three children."[140] In the most recent litigation prior to the 1996 *Ridley* case, the court had approved an agreement between the parties involving increased child support payments from the father, and also ordered the mother to send the children to Germany for three weeks to visit with their father who had a military posting there. The visit did not occur, and the father returned to court one more time.

In *Ridley*, the father first sought an order that would terminate his child support obligation as each child reached age eighteen. (His oldest child, whom he was still supporting, was already nineteen years old, while the other two were ages thirteen and seventeen.) In addition, he sought enforcement of the earlier three-week visitation order, and the imposition of sanctions against the mother for her willful past failure to comply with it. As to child support, the court recited the state's strong public policy on this subject, and refused to limit the father's responsibility. Regarding visitation, the court stressed the public policy that favors and enforces contact between children and both of their parents, as well as the interest of the court in "demonstrat[ing] that recalcitrant behavior [by persons subject to visitation orders] will not be tolerated."[141] The court held the custodial mother in contempt of court, and formulated a number of remedies for the father.

First, the court ordered the mother to pay in excess of six thousand dollars to the father, which represented his counsel fees and court costs for the present litigation, as well as punitive damages "result[ing] from the mother's] willful violation of [the father's] rights."[142] Second, as preparation for the children's three-week visit to Germany, the court ordered the mother to supervise weekly phone calls and letters between the children and their father, beginning immediately. The level of detail in the court's order is striking; for example, the court required the children to respond in their letters to each point raised by the father in his letter from the prior week. Finally, the court appointed a guardian ad litem for the children, setting forth the steps this individual should take to expedite the visit to Germany. The guardian was authorized to interview the recalcitrant

139. *Id.*
140. *Id.* at 251.
141. *Id.*
142. *Id.* at 253.

mother and the children, and to communicate with the children's therapist to obtain helpful information. The guardian was required to oversee the letter-writing and telephoning requirements, bill the mother monthly for expenses, and submit a written report to the court every three months about the status of the case. The court stated more than once that the mother's future failure to comply with all of its present orders or to cooperate with the guardian could result in the imposition of additional sanctions, including incarceration.[143]

Ridley is a striking example of a long-running visitation enforcement case. It illustrates the practical difficulty of actually bringing visitation about through a court order when the custodial parent is stubbornly uncooperative. It stands for the proposition that courts will not give up, in the face of such difficulty, when the visiting adult is a legal parent. Finally, the case illustrates the lengths to which courts are willing to go, in terms of micro-managing the affairs of the custodial family, to vindicate the interest of the court system in having its orders respected.

Like *Ridley*, *Rhinehart v. Nolin* involved a custodial parent, here the father, who willfully flaunted the divorce court's order regarding visitation for his former spouse, the children's stepmother. In *Rhinehart*, the divorce decree incorporated the agreement of the parties regarding the stepmother's future visitation with the children, including provisions for counseling and mediation to facilitate such continuing contact. The children, who were very young at the time of their father's marriage, were six and seven years old at the time of the divorce. More than two years later, the parties returned to court, where the trial court held the father in contempt, based on his pattern of noncompliance with the visitation order.[144] The monetary sanctions imposed on the father at that time, payable to the stepmother, totaled more than twenty-six thousand dollars and represented attorney's fees, costs, and punitive damages. At the same time, however, the court rescinded the visitation order, ruling that this result best served the interests of the children. All of these rulings were affirmed by the New Mexico Court of Appeals in the *Rhinehart* case.

According to the trial court, it was clearly in the children's interests to continue to see their stepmother with whom they had a significant relationship, but "because of the extreme hostility and animosity between the parties, it [was] not in the children's best interests to continue

143. The *Ridley* court denied the father's request for incarceration of the mother because the court believed that such a measure would be punitive rather than coercive under the circumstances existing at that time. *See id.* at 252. Incarceration clearly remained one of the "additional sanctions" alluded to by the court that remained available in the event of continuing noncompliance. *See id.* at 253.

144. *See Rhinehart*, 805 P.2d at 90.

court-mandated visitation."[145] On appeal the *Rhinehart* court accepted the trial court's finding that the "father was primarily responsible for the level of conflict," as well as the decision to restrict sanctions against the father to monetary damages.[146] In other words, the *Rhinehart* court did not require any future-oriented sanctions to vindicate the stepmother's interests or those of the court in having its orders performed.

While there are numerous factual differences between the *Ridley* and *Rhinehart* cases, a key difference involves the status of the adult claiming visitation rights—a noncustodial father in *Ridley*, and a noncustodial stepmother in *Rhinehart*. The stepmother in *Rhinehart*, who was not a biological or adoptive parent, simply did not enjoy the status of "legal parent," and suffered from her categorization as a third-party claimant. This crucial legal distinction was carried over into the discussion of the children's best interests in each case. In *Ridley*, even after eight years of separation and a lack of desire for renewed contact on the part of the children, the trial court had no doubt that judicially coerced visitation with the father would best serve the children's interests. By way of contrast, the stepmother in *Rhinehart* lost the court's support for her claims as soon as enforcement became a problem, because there was no similar assumption about the strength and importance of children's ties with adults other than their parents.

The interests threatened by noncompliance with a judicial visitation order are not just the private interests of the child and the visiting adult, but also the public interest in respect for the legal system. If the parties to whom court orders are addressed can elect not to obey them, then the power of the courts is obviously diminished. In both *Ridley* and *Rhinehart*, the integrity of the court system was threatened by a custodial parent unwilling to comply with a reasonable visitation order,[147] but only the *Ridley* court expressed concern about this matter. Apparently, the *Rhinehart* court felt that less was at stake for the judicial system because the private interests it was protecting in the initial visitation order were less weighty.

The crucial task, then, as lawmakers anticipate the enforcement of visitation rights for former parents under section 4-113 of the UAA, is to specify the nature of these rights and the status of the former parent in the eyes of the law. As discussed earlier in this Part, the UAA clearly terminates the legal parental status and relegates the former parent to the category of "third parties" who may seek judicial help in realizing their

145. *Id.* at 92 (emphasis added).

146. *Id.*

147. *See also* Glesner v. Dembrosky, 327 S.E.2d 60, 63 (N.C. Ct. App. 1985) ("The integrity of the court system and its judgments demands that parties may not cease compliance with judgments at whatever times they may see fit.").

rights of access to children outside their custody.[148] Still, lawmakers could choose to define the newly-created rights and status of former parents more expansively than the rights of other third parties, such as the stepmother in the *Rhinehart* case.

Thus, an argument can be made that greater protection for this new category of third-party claimants would be appropriate, based on the essential nature and de facto possibilities of the former parent's relationship with his or her child. First, biological relationships undeniably play a major role in defining the nature of adult claims to the custody or partial custody of children in various legal contexts. Traditionally, adoption law has eliminated the issue of biological relationships in the post-adoption setting by requiring that the birth parent be totally eliminated from the legal picture.[149] The visitation provision of section 4-113 reopens the door to the former noncustodial parent, who remains biologically related to the child, to make a biology-based argument in the post-adoption visitation context.[150]

Beyond biological considerations, the former noncustodial parent may be a likely candidate for more meaningful protection than other third parties because he or she served the role of legal (as well as biological) parent from the time of the child's birth until the child's adoption by the stepparent. This legal relationship distinguishes the former parent from other third parties who may seek the enforcement of visitation orders in other settings, such as grandparents who obtained visitation rights with minor grandchildren following the divorce of their child, or the stepmother who obtained visitation rights with her minor stepchildren following the divorce from their father in the *Rhinehart* case. Furthermore, many adopted stepchildren and their noncustodial parents will have resided together in the past in a traditional nuclear family when the noncustodial parent and custodial parent were married to each other, prior to the formation of the stepfamily. If these biological, legal, and de facto ties between parent and child were meaningful to the parties in the past, then a higher level of future legal protection may be appropriate for the parent who receives a visitation order as a former parent following stepparent adoption.[151]

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148. *See supra* note 123 and accompanying text.

149. *See, e.g.*, § 1-105, 9 U.L.A. at 8.

150. This consideration has no relevance in cases where the parental status of the former noncustodial parent had been established by adoption rather than birth.

151. Ironically, the fact that the ties between the adopted child and the stepparent may be more compelling than the child's ties with other third parties, such as grandparents, has been used to justify the denial of visitation rights to parents. According to this reasoning, the special nature and degree of involvement by the former parent with the child in the past makes him or her a greater threat to the autonomy of the adoptive family. *See, e.g.*, Mimkon v. Ford, 332 A.2d 199, 204 (N.J. 1975) (reasoning that grandparent visitation is permitted, inter alia, because the grandparent poses less of a threat to the authority of the adoptive family than a former parent).

In practical terms, greater recognition and protection for former parents in the post-stepparent adoption context would require the enhanced enforcement of their visitation rights. A wider range of enforcement sanctions would be placed at the disposal of the courts, and judges would use these remedies in cases where the stepfamily became unreasonably uncooperative after the adoption and visitation orders were entered. In other words, the *Ridley* case, and similar cases involving the enforcement of visitation rights for legal parents following divorce, would provide the model for former parent claims following stepparent adoption.[152]

The subject of judicial enforcement of post-adoption visitation rights for the former parent reduces theoretical discussions about autonomy in the adoptive stepfamily to a very practical level. From the perspective of the former parent, the question is largely one of remedies; namely, what help will be available from the courts to insure that the former parent enjoys the privileges promised in the original adoption order? From the perspective of the adoptive family, the issue may be framed differently; namely, what forms will the continuing intrusion of the legal system into the otherwise autonomous adoptive family take? The UAA provides incomplete answers to these important questions.

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152. Besides the remedies discussed in the text, which involve the judicial enforcement of visitation orders, private remedies arising under tort and contract law doctrines may also be considered by persons whose visitation rights have been thwarted. In recent years, a number of state courts have considered whether a tort cause of action should be recognized when parents allege unlawful interference with their rights of custody or visitation by the other parent or a third party. *See* William L. Hill, Note, *Tort Recovery for Intentional Interference with Visitation Rights: A Necessary Alternative*, 32 U. LOUISVILLE J. FAM. L. 657 (1993-94). Some states have recognized a cause of action, either under the general doctrine of intentional infliction of emotional distress, or under a separate tort action for serious interference with custodial or visitation rights. *See id.* at 662-71. The injured party may recover compensatory and punitive damages under these theories, if the interfering conduct of the defendant was extreme or outrageous and the harm caused by such behavior was severe. *See id.* at 666-69. Other states, however, have refused to extend tort theories to protect family relationships in this manner, or have limited their protection to the primary custodian of children. *See* Edward B. Borris, *Torts Arising Out of Interference with Custody and Visitation*, 7 DIVORCE LITIG. 192 (1995); Hill, *supra* at 667. Indeed, even in states that have protected visitation rights for parents in this manner, an additional extension of tort doctrine would be required to create a cause of action for third parties such as the former parent following a stepparent adoption. Thus, tort theories are not a widely available alternative for the former parent at this time.

Contract law is not likely to be more satisfactory than tort doctrine for this purpose. If the adoption court's visitation order refers to an agreement between the parties regarding future visitation for the former parent, he or she may seek to enforce the contract if the adoptive stepfamily later refuses to comply with the visitation provision. It is not clear whether such a cause of action would be available under the provisions of the UAA, because the contract may be deemed to have "merged" into the visitation order. Furthermore, a contract theory would not likely provide any remedies beyond those available in a proceeding to enforce the court's visitation order, including specific performance and compensatory damages.

First, section 4-113 of the UAA states clearly that the post-adoption visitation order "may be enforced in a civil action. . . ."[153] In other words, the former parent has standing to complain about wrongful interference with his or her visitation rights by the adoptive family in an appropriate legal proceeding. Notably, the UAA does not continue the jurisdiction of the adoption court in the original adoption proceeding for this purpose, so the complaining former parent must initiate a new lawsuit to seek enforcement. The alternative approach to custody and visitation orders, wherein the original decreeing court retains ongoing jurisdiction, is commonly employed by state courts in post-divorce families.[154] Professor Annette Ruth Apell has noted that the handful of state statutes that already recognize post-adoption visitation are split on this issue, and that the UAA model imposes a greater burden on the complaining former parent because it is more burdensome to initiate a new lawsuit than to file a motion to reopen a pending case.[155]

Next, the former parent who initiates an enforcement action in the proper court must cross a substantive hurdle before obtaining judicial assistance under the UAA to enforce a post-adoption visitation order. Namely, section 4-113(e) provides that the adoption court's order "may be enforced in a civil action *only if* the court finds that enforcement is in the best interest of a minor adoptee."[156] Under this standard, the adoptive family has a clear opportunity to argue that intervention on behalf of the former parent at the time of the enforcement proceeding would not benefit the child. If successful, the custodial family could, in effect, lawfully deny all access to the child in spite of the existence of a proper visitation order. Indeed, this result was reached in a recent third-party visitation case involving the enforcement of a visitation order by the grandparent of a child whose parents were divorced.[157] An appellate court in Florida "suspended" the visitation order, based on a determination that current enforcement would not serve the grandchild's best interests in light of the custodial parent's opposition.[158]

If the former parent properly files suit and successfully establishes his or her entitlement to the enforcement of a post-adoption visitation order under the UAA, the question of remedies remains. The UAA has little to say about this important topic. Indeed, the only reference to specific remedies is a negative one: "Failure to comply with the terms of an order . . . for visitation or communication is not a ground for revoking, setting aside, or

153. § 4-113(e), 9 U.L.A. at 76.
154. *See* ELROD, *supra* note 19, § 3:19
155. *See* Appell, *supra* note 33, at 515-16.
156. § 4-113(e), 9 U.L.A. at 76 (emphasis added).
157. *See* Brago v. Brago, 604 So. 2d 866 (Fla. 3d DCA 1992).
158. *See id.* at 866-67.

otherwise challenging the validity of a consent, relinquishment, or adoption pertaining to a minor stepchild."[159] The threat that an adoption may be legally set aside if the adoptive family interferes with the child's continuing relationship with the former parent may appear to be the ultimate coercive tool to assure compliance with a visitation order. Nevertheless, the UAA withholds this remedy, out of deference to the important policy of assuring the finality of adoption orders. In this regard, the UAA is consistent with many of the state statutes that already authorize post-adoption visitation orders, which similarly provide that final adoption orders cannot be set aside because of problems with the performance of a post-adoption visitation agreement or order.[160]

In the absence of a comprehensive statutory scheme that authorizes enforceable post-adoption visitation orders, such as the UAA's stepparent adoption article, a number of state courts have set aside final adoption decrees following the breakdown of informal visitation arrangements between the adoptive stepfamily and the former noncustodial parent.[161] In each of these cases, the noncustodial parent consented to his or her child's adoption by a stepparent in exchange for the adoptive family's promise to permit continuing visitation. Subsequently, the parties returned to court when the plan for visitation failed. In the absence of any legal authority to grant or regulate visitation in the post-adoptive family, most judges have identified just two avenues for their decisionmaking: either to nullify the parties' understanding regarding visitation, or to set aside the adoption on the ground that no true "unconditional" parental consent had been given. In several cases, the courts decided to set aside the adoption, thereby protecting the expectations of the complaining former parent at the expense of the important principle of finality in the adoption process. The UAA, of course, authorizes the adoption court to formally approve the promise of the adoptive family regarding visitation at the time of adoption, and contemplates the subsequent judicial enforcement of the promise through methods other than setting aside the adoption.[162]

Aside from its disavowal of the adoption set-aside remedy, however, the UAA is silent on the subject of specific enforcement remedies, leaving this important matter to the law of each enacting state on the subject. To date, the state statutes providing for post-adoption visitation by former parents that are not modeled on the UAA have similarly failed to address the

159. § 4-113(g), 9 U.L.A. at 76.

160. *See* CAL. FAM. CODE § 8714.7(e)(1) (West Supp. 1998); IND. CODE ANN. § 31-19-16-8 (Michie 1997); NEB. REV. STAT. § 43-164 (1993 & Supp. 1996); N.M. STAT. ANN. § 32A-5-35(D) (Michie 1995); OR. REV. STAT. § 109.305(3) (1997); WASH. REV. CODE ANN. § 26.33.295(3) (West 1997); W. VA. CODE § 48-4-12(e) (1997).

161. *See* MAHONEY, *supra* note 29, at 188 n.77 (collecting cases).

162. *See* § 4-113(b), (c), (g), 9 U.L.A. at 76.

subject of remedies in any comprehensive fashion.[163] In states contemplating enactment of the UAA, the legislatures and courts will have to fill in the blanks in section 4-113 and decide how forcefully and with what sanctions the newly-created right of visitation for former parents will be enforced.

In this process, the existing body of state laws that provide for the enforcement of visitation orders in other settings,[164] such as the New Jersey and New Mexico laws applied in the *Ridley*[165] and *Rhinehart*[166] cases, respectively, provide an important point of reference. As discussed in detail earlier, the range of sanctions employed against the uncooperative custodial parents in these two cases included the finding of contempt for breach of the visitation order, the threat of incarceration, the award of compensatory and punitive damages, and the appointment of a guardian whose responsibilities were almost certain to become intrusive in the ongoing affairs of the custodial family.[167]

An even more comprehensive list of enforcement sanctions appears in a Utah statute, which provides numerous remedies, primarily for noncustodial parents who experience unlawful interference with their visitation rights.[168] First, the custodial parent may be held in contempt of court and enjoined from further noncompliance with the visitation order. The parent may be incarcerated until he or she indicates a willingness to cooperate. The parent may also be required to pay a fine to the court, or

163. Several of the state post-adoption visitation laws, like the UAA, are silent on the subject of affirmative remedies for enforcing post-adoption visitation orders. *See* ALASKA STAT. § 25.23.230 (Michie 1995 & Supp. 1997); CAL. FAM. CODE § 8714.7 (West 1998); NEV. REV. STAT. ANN. §§ 125A.330, 127.171 (Michie 1993 & Supp. 1995); N.M. STAT. ANN. § 32A-5-35(E) (Michie 1995); N.Y. SOC. SERV. LAW § 383-c (Mckinney 1992 & Supp. 1997); S.D. CODIFIED LAWS § 25-6-17 (Michie Supp. 1997); W. VA. CODE § 48-4-12 (1997). The others mention the following specific remedies: IND. CODE ANN. § 31-19-16-4 to 5 (Michie 1997) (providing that court may "compel" performance, but may not award damages); NEB. REV. STAT. § 43-165 (1993 & Supp. 1996) (authorizing award of attorney's fees); OR. REV. STAT. § 109.305(4)(a) (1997) (requiring mediation before any visitation enforcement action can be filed); WASH. REV. CODE ANN. § 26.33.295(4) (West 1997) (authorizing award of attorney's fees); WIS. STAT. ANN. §§ 48.925(4), 785.04(1)(a) (West 1997) (authorizing order of contempt, and limiting sanctions to monetary fines and damage awards). With the possible exception of the Wisconsin statute, it appears that none of these statutes is intended to be a comprehensive treatment of the subject of enforcement of post-adoption visitation orders.

164. *See generally* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 2.8(1), (2) (2d ed. 1993) (cataloging the methods available to the courts to enforce equitable decrees).

165. *See Ridley*, 675 A.2d 249.

166. *See Rhinehart*, 835 P.2d 88.

167. *See supra* text accompanying notes 142-43 & 145.

168. *See* UTAH CODE ANN. § 78-32-12.2 (1996). This provision was to be "implemented only as a pilot program" for a short period of time in a limited area of the state. *See id.* § 78-33-12.2(14). The provision applies to certain third parties as well as parents who enjoy court-ordered visitation rights. *See id.* § 78-32-12.2(1)(b).

reimburse the other party's litigation costs.[169] The court may order "make-up visits" to compensate for missed visits in the past. The uncooperative parent may be ordered to perform community service, or to participate in counseling sessions that teach the value of family relationships. The court may order mediation between the parties designed to resolve their differences. Finally, the family court may refer the case to the criminal law system for possible prosecution of the custodial parent for the crime of interference with the relationship between noncustodial parent and child. Each of the sanctions listed in this comprehensive Utah statute may be invoked in the court's discretion to protect the relationship between the noncustodial parent and his or her child.

Now that every state has enacted legislation authorizing courts to enter grandparent visitation orders, many of these statutes also address the question of enforcement. Some contain an open-ended statement that the court may issue whatever additional orders are necessary to enforce the initial grandparent visitation order.[170] Others list one or more specific remedies available to aid the grandparent who establishes wrongful interference with grandchild visitation, including a finding of contempt,[171] make-up visits,[172] the posting of a bond,[173] the payment of court costs and attorney's fees,[174] and mandatory mediation and/or arbitration.[175] Like the lengthy list of sanctions for disappointed visiting parents provided in the Utah statute, the remedies outlined in these grandparent visitation statutes should be applied in individual cases only if a judge considers such a result to be appropriate.

As lawmakers address the issue of enforcement of post-adoption

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169. In other jurisdictions, the court may also order the uncooperative custodial parent to pay damages to the other parent whose visitation rights have been violated. *See, e.g.*, WASH. REV. CODE ANN. § 26.09.160(2)(b)(iii) ("Upon a finding of contempt, the court shall order . . . [t]he parent to pay, to the moving party, a civil penalty, not less than the sum of one hundred dollars.").

170. *See* FLA. STAT. ANN. § 61.13(2)(b)(2)(c) (West Supp. 1998); HAW. REV. STAT. ANN. § 571-46.3 (Michie 1997); N.M. STAT. ANN. § 40-9-3(A) (Michie 1994 & Supp. 1998); VT. STAT. ANN. tit. 15, § 1014 (1989).

171. *See* COLO. REV. STAT. § 19-1-117.5(2)(e) (Supp. 1997); OHIO REV. CODE ANN. § 3109.051(k) (Anderson 1996 & Supp. 1997).

172. *See* COLO. REV. STAT. § 19-1-117.5(2)(d); OHIO REV. CODE ANN. § 3109.051(K).

173. *See* COLO. REV. STAT. § 19-1-117.5(2)(c).

174. *See* COLO. REV. STAT. § 19-1-117.5(2)(f); OHIO REV. CODE ANN. § 3109.051(K); VT. STAT. ANN. tit. 15, § 1014; W. VA. CODE § 48-2B-8 (1996). *But see* Glesner v. Dembrosky, 327 S.E.2d 60, 63 (N.C. Ct. App. 1985) (disallowing reimbursement of grandparents' litigation-related travel expenses because "[a] North Carolina court has no authority to award damages to a private party in a contempt proceeding").

175. *See* COLO. REV. STAT. § 19-1-117.5(1)(c); N.D. CENT. CODE § 14-09-05.1 (Supp. 1995). *But see In re* Robert D., 198 Cal. Rptr. 801, 805 (Cal. Ct. App. 1984) (setting aside trial court order of mandatory counseling for grandparents and adoptive stepfamily in the absence of legislation authorizing such a remedy to enforce the grandparents' visitation rights).

visitation orders for former parents in states that enact section 4-113 of the UAA, they may profitably refer to the extensive lists of remedies that appear in the *Ridley* and *Rhinehart* opinions,[176] the Utah visitation statute,[177] and the various state grandparent visitation statutes described above.[178] As a practical matter, each of the specific sanctions could be extended to the newly-created enforcement setting of the post-adoptive stepfamily, if such an extension seemed appropriate to state lawmakers.

There is an additional set of enforcement remedies available under the laws of many states in parent versus parent visitation disputes that would not find such easy application in the post-adoptive stepfamily. These additional measures involve the judicial modification of outstanding court orders governing custody, child support, and alimony, usually in the post-divorce family. For example, if the custodial parent fails over time to comply with a visitation order, the family court may determine that a change of primary custody would best serve the child's interests.[179] Besides the terms of custody and visitation orders, many separated or divorced parents of minor children are also bound by the economic terms of a separation agreement or court order relating to child support and possibly spousal support (if the parents had been married to each other). The court's continuing power to adjust the parties' economic affairs may be used as another sanction against the custodial parent who interferes with visitation. Thus, the court may suspend alimony payments to the custodial parent for time periods when he or she denies the other parent's access to the child.[180] A related and controversial tool for enforcing visitation involves the suspension of child support payable by the noncustodial parent.[181] There are obvious financial and other costs to family members associated with these

176. *See supra* text accompanying notes 142-43 & 145.

177. *See* UTAH CODE ANN. § 78-32-12.2.

178. *See supra* notes 170-75.

179. *See, e.g.*, KAN. CIV. PROC. CODE ANN. § 60-1616(e) (West Supp. 1996) ("Repeated unreasonable denial of or interference with visitation rights granted to a parent . . . may be considered a material change of circumstances which justifies modification of a prior order of child custody."); Edward B. Borris, *Interference with Parental Rights of Noncustodial Parent as Grounds for Modification of Child Custody*, 8 DIVORCE LITIG. 1 (1997) (surveying case law and concluding that the majority rule nationwide does permit a change in primary custody in appropriate cases).

180. *See, e.g.*, N.Y. DOM. REL. LAW § 241 (McKinney 1986) ("When it appears to the satisfaction of the court that a custodial parent receiving alimony or maintenance . . . has wrongfully interfered with or withheld visitation rights . . . , the court, in its discretion, may suspend such payments or cancel any arrears that may have accrued during the time that visitation rights have been or are being interfered with or withheld."). *But see* VT. STAT. ANN. tit. 15, § 668a(b) (Supp. 1997) ("When a custodial parent refuses to honor a noncustodial parent's visitation rights, the noncustodial parent shall not fail to pay any ordered . . . alimony.").

181. *See* Greg Geisman, *Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities*, 38 S.D. L. REV. 568 (1992-93).

types of remedies. Nevertheless, they remain available in certain cases to guarantee the meaningful contact between the child and both parents anticipated in the original custody and visitation decrees.

Clearly, this set of remedies is unavailable in visitation cases involving a nonparent. There can be no economic sanction comparable to the suspension of child support or alimony payments because third parties, such as grandparents or the former parent following a stepparent adoption, do not generally owe any economic support to the child or the custodial parent in the first place. Similarly, grandparents and other third parties who do not reside with the minor child generally lack standing to seek primary custody, thereby eliminating any threat of shifting custody to the nonparent as a remedy for the custodial parent's interference with visitation rights.[182] The same standing limitation applies to the former parent whose parental rights have been terminated in the stepparent adoption setting, who has no ongoing custodial interest beyond that provided in the post-adoption visitation order. Thus, the custody, alimony, and child support related sanctions, which may be invoked in parent versus parent disputes, simply have no practical relevance in third-party visitation cases.

A final visitation enforcement sanction, which is widely available in parent versus parent cases, is rarely discussed in third-party visitation cases although it could, as a practical matter, be extended to them. The laws in most jurisdictions currently authorize the family courts in appropriate circumstances to enjoin a proposed relocation by the custodial parent and child in order to protect the existing relationship between the noncustodial parent and child.[183] As a general rule, the courts considering the noncustodial parent's request for such an injunction apply a legal standard weighing the competing interests that inevitably arise when the custodial parent seeks to move with the child to a distant location.[184] On the one hand, the custodial parent heads a family entitled to privacy and autonomy, including the freedom to travel to a new home. On the other hand, the child has an interest in stability, especially in maintaining his or her established relationship with the noncustodial parent, who also has a protectable interest in their relationship. Given the mobile nature of modern society, the relocation issue has arisen with frequency between divorced parents in recent years, and the state courts have struggled to establish fair standards

182. *Cf.* Truitt v. Truitt, 583 N.E.2d 331 (Ohio Ct. App. 1989) (overturning placement of children with the county department of children's services based on custodial mother's failure to cooperate with grandparent visitation).

183. *See* Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L. Q. 245 (1996).

184. *Id.* at 250 (summarizing current state of the law and approving "national trend . . . which restores a custodial parent's relocation opportunities).

to resolve these disputes.[185]

To date, this form of protection has not been widely extended to grandparents or other third-party visitation claimants. Indeed, several grandparent visitation statutes expressly withhold such injunctive relief when the custodial parent relocates with the minor grandchild.[186] In other words, the custodial parent and child are free to move to a distant location in spite of the impact of this change on the grandparents' rights under an existing visitation order.

The relocation issue provides a focal point for evaluating the status of the former parent who is granted visitation rights following a stepparent adoption under section 4-113. On the one hand, the complaint of the former parent could be automatically dismissed, as are the complaints of most grandparents with visitation orders, when the custodial parent decides to relocate with the child.[187] This firm rule would assign clear priority to the value of autonomy in the adoptive stepfamily, and consistently disallow any interference by third parties with important decisions about family domicile. On the other hand, the relationship between the adopted stepchild and the former parent may be regarded as deserving of greater protection. Although the former parent no longer has a protectable interest in the constitutional scheme of things, the child's interests arguably may require some brake on adoptive family autonomy in order to preserve the unique relationship with the other biological parent in appropriate cases. If this latter view prevailed, then discretion might properly be conferred on the courts to decide on a case-by-case basis whether to enjoin a proposed move by the adoptive stepfamily.

The UAA is silent on the subject of relocation by the adoptive stepfamily, as well as most other issues relating to the enforcement of post-adoption visitation orders. Jurisdictions that enact section 4-113 of the UAA will have to determine, without guidance from the model act,

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185. *See id.*

186. *See* COLO. REV. STAT. § 19-1-117(3) (Supp. 1998); FLA. STAT. ANN. § 61.13(2)(b)(2)(c) (West Supp. 1998); MICH. COMP. LAWS ANN. § 722.27b(5) (West Supp. 1998); *cf.* N.M. STAT. ANN. § 40-9-4 (Michie Supp. 1998) (requiring custodial parent merely to notify grandparent of proposed move and provide new address and phone number); *compare* Fisher v. Fisher, 390 So. 2d 142 (Fla. 3d DCA 1980) (denying injunction by reference to Florida statute) *with* Dixon v. Melton, 565 So. 2d 1378, 1381 (Fla. 1st DCA 1990) (enjoining removal of child from the jurisdiction by custodial mother, because "injunction was not entered 'solely' for the purpose of permitting the . . . [paternal grandparents] to visit with the child."); *see also* Patricia Wendlandt, Comment, *Grandparent Visitation Statutes: Remaining Problems and the Need for Uniformity*, 67 MARQ. L. REV. 730, 747-49 (1984) (arguing against any grandparent right to enjoin relocation by custodial parent and child). *But see* CAL. FAM. CODE § 3103(f) (West 1994) (providing that grandparent visitation order is a factor for the court to consider in deciding whether to permit relocation by the custodial parent and child).

187. *See, e.g.*, Fisher, 390 So.2d at 1381.

precisely what enforcement remedies will be placed at the discretion of the courts that are empowered to enforce visitation orders. Furthermore, basic decisions will have to be made about the readiness with which the courts should invoke the available remedies on behalf of former parents in individual cases. In making these policy judgments, state legislators and judges will be greatly influenced by their view of the nature of the newly-created status of the former parent under the UAA. As illustrated throughout this Part, the various questions surrounding the implementation and enforcement of visitation orders for former parents can be properly resolved only after this threshold assessment has been made.

Finally, the extended discussion in this Part about the enforcement of post-adoption visitation rights for former parents has, by definition, focused on the possibility of noncompliance with visitation orders by the custodial family in stepparent adoption cases. Enforcement problems, however, are likely to be the exception and not the rule. Most family members are law-abiding individuals, who do their best to comply with any judicial orders that regulate their family matters. In most cases, the underlying policy considerations on which visitation rights are based can be implemented simply through the entry of a judicial order, especially if the open adoption was agreed to by all of the parties. Indeed, studies of open adoption (largely in the informal, nonstatutory context) indicate that compliance rates are quite high.[188] Furthermore, any problems that arise over time are more likely to be resolved by future agreement if mediation and counseling services are made available to the family. When private efforts to effectuate compliance with a visitation order fail, however, section 4-113 clearly provides for the judicial enforcement of the adoption court's order.[189]

VI. CONCLUSION

In summary, section 4-113 of the Uniform Adoption Act is a well-conceived effort to create a more flexible stepparent adoption law which addresses the needs of an important category of nontraditional families. The post-adoption visitation provision for former parents recognizes that the traditional adoption model simply does not "fit" the situations of many stepchildren and their families. Section 4-113 provides guidance to courts confronted with adoption and visitation petitions by highlighting the factors, including the presence of an agreement between the parties, that should properly guide judicial decisionmaking about the best interests of the child.

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188. *See* Jeanne Etter, *Levels of Cooperation and Satisfaction in 56 Open Adoptions*, 72 CHILD WELFARE 257, 261 (1993) (reporting that 98% of families studied complied with the terms of mediated open adoption contracts).

189. *See* § 4-113(e), 9 U.L.A. at 76.

The added burdens imposed on the courts by section 4-113 to make determinations about visitation in the adoption proceeding and enforcement of the visitation order thereafter, are justified by the important benefits of the post-adoption visitation provision of the UAA.