VISITATION RIGHTS FOR NATURAL PARENTS AFTER STEPPARENT ADOPTION

I. INTRODUCTION

Many children of the 1980's are stepchildren. High divorce and remarriage rates are producing a generation of children who will have had more than two parental figures by the time they reach majority.[1] The courts are frequently confronted with issues related to the scope of the relationships between these children and their multiple parental figures. One such issue arises when a stepparent petitions for adoption of his stepchildren. Thus far, the Alaska courts have consistently ruled that only a parental figure with legal parental status has enforceable visitation rights. The interests of stepparents and the interests of "replaced" natural parents are treated as mutually exclusive. If a natural parent refuses to consent to the stepparent's adoption of his children, and the stepparent cannot prove that the natural parent has been an inadequate parent, then the stepparent remains a stranger to the children in the eyes of the law.[2] If the natural parent consents to the adoption of his children by the stepparent or is found to have been an inadequate parent, then he loses all rights to visit or contact his children.[3] Alaska law views parenting as an all-or-nothing proposition.

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1. In 1979, approximately 10 percent of the 66 million children under 18 years of age in this country lived as stepchildren. Jacobson, *Stepfamilies: Myths and Realities,* 24 SOC. WORK 202, 202 (1979).

2. If the stepparent is not allowed to adopt the children, he will stand in a secondary position to the "replaced" natural parent if further custody determinations are made necessary by the death of the custodial natural parent. *See* Simons v. Smith, 229 Or. 277, 284, 366 P.2d 875, 878 (1961).

Further, the stepparent, having been denied legal custody, would have neither the right to the children's services and earnings nor the right to make decisions regarding the children's care, control, education, health, or religion. *See, e.g.,* Burge v. City & County of San Francisco, 41 Cal. 2d 608, 617, 262 P.2d 6, 12 (1953) (describing the authority of a parent with legal "care or custody").

3. One court has stated:

> [A] decree of adoption severs forever every part of the parent and child relationship; severs the child entirely from its own family tree and engrafts it upon that of another. For all legal and practical purposes a child is the same as dead to its parents. The parent has lost the right to ever see said child again or to have any real knowledge of its whereabouts.

In re Adoption of Bryant, 134 Ind. App. 480, 487-88, 189 N.E.2d 593, 597 (1963).

The legal effects of an adoption in Alaska are set forth in ALASKA STAT. § 25.23.130 (1983).

This note discusses visitation rights for natural parents whose children have been adopted by stepparents.[4] After reviewing the current treatment of the stepparent adoption issue in Alaska and the common law origins of this treatment, this note explores the recent trend toward flexibility in the legal approach to multiple-parent family structures. The note concludes that alternatives to the all-or-nothing approach to parenting are necessary, and that where the circumstances indicate the best interests of the children will be served by such an arrangement, natural parents who consent to the adoption of their children by the new spouse of the custodial parent should be granted legally protected rights to visit or contact the children.

II. BACKGROUND: CURRENT JUDICIAL TREATMENT OF STEPPARENT ADOPTION DISPUTES IN ALASKA

A recent supreme court case illustrates the manner in which stepparent adoption disputes are typically handled in Alaska. The litigation in *R.N.T. v. J.R.G.*[5] arose out of a fairly common factual setting.[6] R.N.T., the natural father of two children by M.I.G., was divorced from his wife, and M.I.G. had been given custody of the children. Following the divorce, R.N.T. maintained minimal contact with the children. M.I.G. remarried, and J.R.G., M.I.G.'s second husband, petitioned for legal adoption of his stepchildren. As required by law,[7] R.N.T. was notified of the adoption proceeding; he responded by contesting the proposed adoption in court. Once R.N.T. had refused consent to the adoption, the pivotal legal question became whether the adoption could take place without R.N.T.'s consent.[8] Alaska's statutes contain provisions for adoptions without the consent of the natural parent under special circumstances.[9] In accord with these statutes, J.R.G. attempted to demonstrate that

4. The proposal for visitation rights in this note is limited to situations in which the prospective adoptive parent is a stepparent, the spouse of the custodial natural parent. Visitation rights for the natural parent when the adoption is by strangers have also been proposed, *see* Baran, Pannor & Sorosky, *Open Adoption,* 21 SOC. WORK 97 (1976), but consideration of that proposal is beyond the scope of this note.

5. 666 P.2d 1036 (Alaska 1983).

6. The general facts of *R.N.T. v. J.R.G.* were fairly typical of the average contested stepparent adoption case, but many of the specific circumstances, such as the fact that the natural father had been incarcerated, were atypical.

7. ALASKA STAT. § 25.23.040 (1983).

8. *R.N.T.,* 666 P.2d at 1037.

9. ALASKA STAT. § 25.23.050 (1983). Statutory provisions for adoption without the consent of the natural parent under special circumstances are quite common. *See* Comment, *A Survey of State Law Authorizing Stepparent Adoptions Without the Noncustodial Parent's Consent,* 15 AKRON L. REV. 567, 569 (1982).

R.N.T. had, for at least one year, "failed significantly . . . to communicate meaningfully with"[10] or "failed significantly . . . to provide for the care and support of"[11] the children involved.

The parties stipulated that R.N.T. had not communicated with the children for over two years prior to the filing of the adoption petition. R.N.T. argued that this failure to communicate was justifiable because an incarceration and a restrictive parole arrangement for a theft committed several years earlier had restricted his ability to contact his children.[12]

The supreme court ultimately agreed with R.N.T., finding that his failure to communicate had not been "wilful" as required,[13] and that his failure to support had not been "significant" as required.[14] The court reversed the adoption decree, leaving R.N.T. the legally-recognized father of the children and J.R.G. simply the husband of the children's mother.[15]

Both of the children involved in *R.N.T. v. J.R.G.* consented to the adoption by J.R.B.[16] Although the opinion of the court does not state why R.N.T. sought to prevent his children from obtaining a legally-recognized parental relationship with their stepfather, in many cases the "replaced" natural parent simply does not want to lose his right to continued contact with his children. In fact, frequently the court handling these cases expressly notes that the "replaced" natural parent does not seek to obtain custody of the children but only desires to prevent the adoption in order to preserve some relationship with his children.[17]

As *R.N.T. v. J.R.G.* illustrates, a stepparent who has been denied the natural parent's consent for adoption must meet a fairly heavy burden to succeed in his adoption petition.[18] The reason for this is that the adoption of the stepchildren will result in the termination of

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10. *R.N.T.*, 666 P.2d at 1037; ALASKA STAT. § 25.23.050(a)(2)(A) (1983).

11. *R.N.T.*, 666 P.2d at 1037; ALASKA STAT. § 25.23.050(a)(2)(B) (1983).

12. *R.N.T.*, 666 P.2d at 1038.

13. The court held that the parental conduct which causes the loss of a parent's right to consent to adoption must be wilful, *id.* at 1038-39, and found that the circumstances of R.N.T.'s incarceration and parole made his failure to communicate with his children non-wilful, *id.* at 1039.

14. The court ruled that J.R.G. had not proven R.N.T.'s failure to support to have been "significant." *Id.* at 1040; ALASKA STAT. § 25.23.050 (1983).

15. *R.N.T.*, 666 P.2d at 1040.

16. *Id.* at 1041 (Compton, J., dissenting).

17. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246, 247, *reh'g denied*, 435 U.S. 918 (1978).

18. *See* ALASKA STAT. § 25.23.020(4)(A) (1983) (formerly § 20.15.020(2)(A)). The Alaska Supreme Court has narrowly construed this statute which dispenses with the need for consent from the noncustodial parent in certain situations. *In re* Adoption of K.M.M., 611 P.2d 84, 88 (Alaska 1980) (Presents, letters, and cards sent

the parental rights of the "replaced" natural parent, and the law has never treated this termination lightly.[19]

At early common law, children were viewed essentially as "chattel,"[20] so that the rights of a parent to his status as a parent were given the same degree of protection normally accorded the possession of property. The protection which the older case law provided for parental rights,[21] embodied in the "parental rights doctrine," was invoked in virtually all child custody disputes involving third persons to create a strong presumption in favor of the natural parent.[22] Thus, for example, in one case a natural parent was given custody of a child even over the child's natural grandparents, who had legally adopted the child's half-sister and with whom the child had lived for most of the seven years following the parent's divorce.[23]

The parental rights doctrine has been gradually eroded by the abandonment of the concept which treated the child as property[24] and by an increasing awareness of the importance of psychological,[25]

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on holidays by the noncustodial parent to his children are "meaningful" communications and, therefore, the need for consent from the noncustodial parent remains).

19. The United States Supreme Court has recognized that the parent-child relationship is constitutionally protected. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (14th amendment right to liberty includes the right to "marry, establish a home and bring up children"). It has held that due process requires a hearing to determine whether the parent is unfit before parental rights can be terminated. Stanley v. Illinois, 405 U.S. 645 (1972). But the degree of protection afforded the parent's rights must be balanced against other interests, and an unmarried father's parental rights constitutionally may be terminated solely upon a "best interests of the child" standard. *Quilloin,* 434 U.S. at 255.

20. Note, *Psychological Parents vs. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution,* 17 J. FAM. L. 545, 545 (1978-79); *see* Comment, *Termination of Parental Rights in Adoption Cases: Focusing on the Child,* 14 J. FAM. L. 547, 548 n.5 (1975-76).

21. Even at common law, the rights of natural parents were not absolute, and exceptions to the requirement of parental consent to adoption developed. These exceptions have now been codified. *See supra* note 9.

22. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change,* 49 S. CAL. L. REV. 10, 19 (1975).

The parental rights doctrine was reaffirmed and held applicable to third party custody disputes in Alaska in Turner v. Pannick, 540 P.2d 1051 (Alaska 1975). But the doctrine has been rejected by the Alaska Supreme Court in the context of contested adoption proceedings in which the natural parent seeks to withdraw consent to the adoption. S.O. v. W.S., 643 P.2d 997, 1005 (Alaska 1982). For an analysis of this case, see Casenote, *Family Law: Natural Parent Preference or the Child's Best Interests: The Court's Dilemma in S.O. v. W.S.,* 12 U.C.L.A.-ALASKA L. REV. 141 (1982-83).

23. Hickey v. Bell, 391 P.2d 447, 448 (Alaska 1964).

24. Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties,* 73 YALE L.J. 151, 155 (1963).

25. The concept of the "psychological parent-child relationship" involves a

as distinguished from biological, parenting.[26] In recent years, the prevailing standard for determining child custody has become "the best interests of the child."[27] This standard lacks clear definition, but several factors have been identified which should be considered in applying this standard to custody determinations. The courts using this standard have considered factors ranging from the age of the child[28] to the custodial mother's adulterous relationship.[29] In Alaska, the legislature has codified a set of factors which the courts should consider under the "best interests" standard.[30]

The change in the law's perspective from a focus on the rights of the parent to an emphasis on the rights of the child has set the stage for the quandary which surrounds the courts dealing with contested stepparent adoption petitions.[31] At the heart of the dilemma is a recognition that in many stepparent situations it would be in the child's best interests to allow adoption by the stepparent, but the right of the natural parent to parenthood also deserves protection.[32]

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variety of personal and emotional elements. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (1973).

26. *See generally id.* at 16-20 Note, *supra* note 24, at 156.

27. Zaharoff, *Access to Children: Towards a Model Statute for Third Parties,* 15 FAM. L.Q. 165, 186-87 (1981-82).

The "best interests" standard has been adopted in Alaska to determine which natural parent will receive custody of the children upon divorce. *See* Rhodes v. Rhodes, 370 P.2d 902, 903 (Alaska 1962).

28. Johnson v. Johnson, 564 P.2d 71, 74-75 (Alaska 1977), *cert. denied,* 434 U.S. 1048 (1978) (use of tender years presumption rejected).

29. Bonjour v. Bonjour, 566 P.2d 667, 668-69 (Alaska 1977), *aff'd on rehearing on other grounds,* 592 P.2d 1233 (Alaska 1979).

30. ALASKA STAT. § 25.24.150(c) (1983) lists six sets of factors to be considered: 1) the physical, emotional, mental, religious, and social needs of a child; 2) the capability and desire of each parent to meet these needs; 3) the child's preference, if the child is of sufficient age and capacity to form a preference; 4) the love and affection existing between the child and each parent; 5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; and 6) the desire and ability of each parent to allow an open and loving frequent relationship between the child and the other parent. This statute is supplemented by ALASKA STAT. § 25.20.060 (1983), which states that "[i]n determining the best interests of the child [in custody disputes,] the court shall consider all relevant factors including those factors enumerated in ALASKA STAT. § 25.24.150(c)."

31. The quandary created by the tension between the rights of natural parents and the best interests of children also envelops courts dealing with conflicts analogous to contested stepparent adoptions — for example, when the prospective adoptive parents are foster parents.

32. There may be a constitutional mandate that the rights of fit natural parents be preserved. The United States Supreme Court has expressly declined to decide whether it is constitutionally permissible for a state to order an adoption in the absence of a determination that the parent whose rights are being terminated is unfit. Caban v. Mohammed, 441 U.S. 380, 394 n.16 (1979).

This view is in accord with the protection the Court appeared to grant parental

Most courts confronting this dilemma have felt constrained to stay within the current system which prohibits contested stepparent adoption unless the natural parent is proven unfit.

III. Recent Flexibility in Multiple-Parent Situations

In response to the tension between the rights of the natural parent and the best interests of the children, legal decisionmakers have recently made some inroads into the traditional approach to multiple-parent conflicts. Legislatures and courts are beginning to recognize that non-exclusive parenthood can be an appropriate resolution of some multiple-parent disputes. Visitation rights are now being granted to persons who concededly have neither a legal obligation to care for the children nor any authority to control them. Courts and legislatures have demonstrated this new flexibility in two areas: grandparent visitation and "open" psychological parent adoption.

A. Grandparent Visitation

Within the past twenty years, a majority of states[33] have enacted statutes that provide grandparents of children whose parents are divorced or deceased[34] with the right to petition for visitation

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rights in Stanley v. Illinois, 405 U.S. 645, 658 (1972), which was later limited somewhat by Quilloin v. Walcott, 434 U.S. 246, 255, *reh'g denied,* 435 U.S. 918 (1978). *See supra* note 19 and accompanying text.

33. ALA. CODE § 30-3-4 (1983); ALASKA STAT. § 25.24.150 (1983); ARK. STAT. ANN. § 34-1211.1 (Supp. 1983); CAL. CIV. CODE § 197.5 (West 1982), *id.* § 4601 (West 1983); COLO. REV. STAT. § 19-1-116 (Supp. 1983); CONN. GEN. STAT. ANN. § 46-56 (West Supp. 1984); FLA. STAT. ANN. §§ 61.13(2)(c), 68.08 (West Supp. 1984); GA. CODE ANN. § 19-7-3 (1982); HAWAII REV. STAT. § 571-46 (1976); IDAHO CODE § 32-1008 (1983); ILL. ANN. STAT. ch. 110½, § 11-7.1 (Smith-Hurd 1978); IND. CODE ANN. § 31-1-11.7-2 (Burns Supp. 1984); IOWA CODE ANN. § 598.35 (West 1981); KAN. STAT. ANN. § 38-129 (Supp. 1982), *id.* § 60-1616 (1983); KY. REV. STAT. ANN. § 405.021 (Baldwin 1983); LA. CIV. CODE ANN. art. 157 (West Supp. 1984); MASS. ANN. LAWS ch. 119, § 39D (Michie/Law. Co-op. Supp. 1984); MICH. COMP. LAWS ANN. § 722.27b (Supp. 1984); MINN. STAT. ANN. § 257.022 (West 1982); MO. ANN. STAT. §§ 452.400, 452.402 (Vernon Supp. 1984); MONT. CODE ANN. §§ 40-4-217, 40-9-102 (1983); N.J. STAT. ANN. § 9:2-7.1 (West 1976); N.M. STAT. ANN. §§ 40-9-1 to -4 (1983); N.Y. DOM. REL. LAW § 72 (McKinney 1977); N.C. GEN. STAT. §§ 50-13.2, 50-13.5(j) (Supp. 1983); N.D. CENT. CODE § 14-09-05.1 (Supp. 1983); OHIO REV. CODE ANN. § 3109.11 (Page 1980); OKLA. STAT. ANN. tit. 10, § 60.16(3) (West Supp. 1983); OR. REV. STAT. § 109.121 (1983); PA. STAT. ANN. tit. 23, §§ 1012-1015 (Purdon Supp. 1984); R.I. GEN. LAWS § 15-5-24.1 to .2 (1981 & Supp. 1983); S.C. CODE ANN. § 20-7-420(33) (Law Co-op. Supp. 1983); TENN. CODE ANN. § 36-1101 to -1102 (1977); TEX. FAM. CODE ANN. § 14.03(e) (Vernon Supp. 1984); UTAH CODE ANN. § 30-5-2 (Supp. 1983); W. VA. CODE § 48-2B-1 (1980); WIS. STAT. ANN. § 767.245(4) (West 1981).

34. The divorce or death of a natural parent is not always a prerequisite for grandparents to receive visitation rights. *See* IDAHO CODE § 32-1008 (1983) (district court may grant reasonable visitation to any grandparent who has established a

privileges. The enactment of these "grandparent visitation statutes" represents a significant departure from the traditional legal notions of the structure of the family. In earlier times, grandparents were seen as having no legal duties or obligations toward the children and, therefore, were thought to be entitled to no legally recognized privileges.[35] In particular, no legally enforceable right of visitation was recognized.[36] Fit natural parents generally were considered to be the sole guardians of the children's best interests and had complete authority to determine who would have access to the children.[37]

Existing grandparent visitation statutes vary greatly in the categories of persons granted rights,[38] and the courts differ widely on the question of how a subsequent adoption affects the grandparents' visitation rights.[39] The widespread enactment of these statutes, however, indicates a new willingness by lawmakers to confer visitation privileges upon persons who do not possess a traditional legal relationship to the children. Visitation is granted because it is seen as

substantial relationship with the minor child); MINN. STAT. ANN. § 257.022 (West 1982) (visitation rights may be granted when child resided with grandparent for 12 months or more); N.Y. DOM. REL. LAW § 72 (McKinney 1977) (grandparent may apply for habeas corpus where conditions exist in which equity would see fit to intervene).

35. *See, e.g.,* Succession of Reiss, 46 La. Ann. 347, 352, 15 So. 151, 152 (1894).

36. *Id.*

37. *See, e.g.,* Odell v. Lutz, 78 Cal. App. 2d 104, 177 P.2d 628 (1947); Commonwealth *ex rel* Dogole v. Cherry, 196 Pa. Super. 46, 173 A.2d 650 (1961). Grandparents seeking visitation privileges were frequently held not to have standing to receive judicial review of their request for visitation rights. *See, e.g.,* Succession of Reiss, 46 La. Ann. 347, 15 So. 151. *But cf.* Commonwealth *ex rel* Williams v. Miller, 254 Pa. Super. 227, 385 A.2d 992 (1978) (granting visitation rights without a statute). *See generally* Foster & Freed, *Grandparent Visitation: Vagaries and Vicissitudes,* 23 ST. LOUIS U.L.J. 643 (1979).

38. Some of the grandparent visitation statutes expressly include third persons who are not grandparents within their scope. Alaska's statute, for example, provides for possible visitation by "a grandparent or other person." ALASKA STAT. § 25.24.150 (1983).

39. Some courts have held that the visitation rights granted to grandparents are superseded by the rights of adoptive parents to exclusive control over access to the children and that the visitation rights terminate automatically upon adoption. *See, e.g.,* Browning v. Tarwater, 215 Kan. 501, 524 P.2d 1135 (1974); Smith v. Trosclair, 303 So. 2d 926 (La. Ct. App. 1974), *aff'd,* 321 So. 2d 514 (La. 1975); People *ex rel* Levine v. Rado, 54 Misc. 2d 843, 283 N.Y.S.2d 483 (N.Y. Sup. Ct. 1967); Deweese v. Crawford, 520 S.W.2d 522 (Tex. Civ. App. 1975). Other courts and legislatures have differentiated between adoption by relatives and stepparents and adoption by strangers and have permitted continuation of visitation rights in the former situtation. *See* Mimkon v. Ford, 66 N.J. 426, 332 A.2d 199 (1975); Graziano v. David, 50 Ohio App. 2d 83, 90-91, 361 N.E.2d 525, 530 (1976); CAL. CIV. CODE § 197.5(c) (West 1982); MINN. STAT. ANN. § 257.022(3) (West 1977); OKLA. STAT. ANN. tit. 10, § 60.16 (West Supp. 1982).

being in the best interests of the children,[40] and although the objections of the parents still are considered, they are relevant only as one factor in determining the child's "best interests" and not as a controlling factor to preclude visitation.[41]

It may seem that enactment of grandparent visitation statutes, particularly those which explicitly include non-grandparent third persons,[42] are a legislative fiat to recognize the visitation rights of "replaced" natural parents. But two aspects of the grandparent visitation statutes indicate that these statutes will not suffice to confer visitation rights upon "replaced" natural parents. First, the statutes have been justified by reliance upon a presumption that grandparents play a very different role from parents and that the role of grandparent does not interfere with parental authority.[43] Second, most of these statutes are predicated upon the death or divorce of the natural parents,[44] and some courts have held that the rights of the grandparents terminate upon adoption by a new parent.[45] Thus, grandparent visitation statutes cannot be relied upon to extend visitation rights to the stepparent adoption context, where a direct role conflict might be created between the "replaced" natural parent and the stepparent.

B. "Open"[46] Psychological Parent[47] Adoption

The second major area of family law in which new flexibility in the legal approach to multiple-parent conflicts has been demonstrated is the situation in which the natural parent seeks to regain custody of his children from persons with whom the children have formed psychological parent-child relationships. These "psychological parents" are typically either foster parents or third persons voluntarily entrusted with long-term care of the children by the natural

40. Note, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child,* 26 CATH. U.L. REV. 387, 392 (1976).

41. Note, *Visitation Rights of a Grandparent Over the Objection of a Parent: The Best Interests of the Child,* 15 J. FAM. L. 51, 54-57 (1976-77).

42. *See supra* note 38.

43. Mimkon v. Ford, 66 N.J. 426, 436, 332 A.2d 199, 204 (1975).

44. *But see* statutes cited *supra* note 34.

45. *See supra* note 39 and accompanying text.

46. The term "open" is borrowed from a thoughtful article on adoption by strangers, which defined an "open adoption" as "one in which the birth parents meet the adoptive parents, participate in the separation and placement process, relinquish all legal, moral and nurturing rights to the child, but retain the right to continuing contact and to knowledge of the child's whereabouts and welfare." Baran, Pannor & Sorosky, *Open Adoption,* 21 SOC. WORK 97, 97 (1976). In this note, the term "open" includes visitation rights, as the authors creating the term intended. *See id.* at 99.

47. *See supra* note 25.

parent.[48] Some courts have recently indicated a willingness to vest legal custody in the psychological parents and to grant the natural parent visitation rights.[49]

The instances in which courts have resolved multiple-parent custody disputes by allowing adoption by the psychological parents with visitation for the natural parents are still relatively rare. The "open" adoption resolution is a radical departure from the prior legal approach, particularly where the psychological parents are foster parents.[50] Nevertheless, in keeping with the substantial degree of discretion which trial courts always have had in undertaking custody determinations,[51] granting custody to the psychological parents with visitation for the natural parent has been upheld when the adoption has been found to be in the best interests of the children.[52] The visitation allowance protects the right of the natural parent to play a role in the children's lives.

The circumstances of the psychological parent adoption cases which have led the courts to grant "open" psychological parent adoptions are closely analogous to the circumstances of many contested stepparent adoption cases. Stepparents who petition for adoption frequently are already functioning as psychological parents, and often it would be in the children's best interests to grant legal parental status to the stepparent. On the other hand, as in the open psychological parent adoption situation, the natural parent is not "unfit" and a complete termination of that parental relationship would violate the legal tradition of protecting the natural parent's rights. Extending the reasoning and resolution of the open psychological parent adoption situation to the stepparent adoption situation should be easy: allow both stepparent adoption and continued natural parent visitation. The rarity of open psychological parent adoptions,

48. *Compare* D.M. v. State, 515 P.2d 1234, 1236-38 (Alaska 1973) (nine-year-old child had been cared for by foster parents for eight years, court found parent had abandoned child) *with* Turner v. Pannick, 540 P.2d 1051, 1052, 1055 (Alaska 1975) (natural mother had originally entrusted child to the care of the child's aunt, court held no abandonment by parent).

49. Ross v. Hoffman, 280 Md. 172, 372 A.2d 582 (1977); Bennett v. Marrow, 59 A.D.2d 492, 399 N.Y.S.2d 697 (1977); Reflow v. Reflow, 24 Or. App. 365, 545 P.2d 894 (1976).

50. The role of "foster parent" is intended to be temporary, and the legal system has historically resisted efforts to facilitate the attainment of permanent parental status for foster parents. *See* Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change,* 49 S. CAL. L. REV. 10, 34-39 (1975); Derdeyn, Rogoff & Williams, *Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care,* 31 VAND. L. REV. 1165, 1166-71 (1978); Katz, *Legal Aspects of Foster Care,* 5 FAM. L.Q. 283, 290-301 (1971).

51. *See, e.g.,* Horton v. Horton, 519 P.2d 1131, 1132 (Alaska 1974).

52. *See supra* note 49 and accompanying text.

however, makes these cases weak precedent, and the factual context of the psychological parent cases differs from the stepparent context in significant ways. Most importantly, courts may be less willing to cut off the "replaced" natural parent's status as a legal parent when the separation from the children results from divorce rather than from the placement of the children in the care of third persons.

IV. PROPOSAL: FLEXIBILITY IN CASES INVOLVING THE VISITATION RIGHTS OF REPLACED NATURAL PARENTS

While lawmakers have taken some steps toward a less rigid view of parental roles and visitation privileges, these steps have been tentative and limited to the precise factual settings which gave rise to them. Greater flexibility in the legal approach to multiple-parent conflict over stepparent adoptions is necessary. An inflexible approach to parental rights in these situations is outdated and unrealistic. In many stepparent adoption disputes, the interests of the stepparent and those of the "replaced" natural parent are not mutually exclusive, contrary to the view of the law. The stepparent seeks to legalize his relationship to the children, and the natural parent wishes to retain a legally protected right to involvement with the children. In order to serve the best interests of the children, the law should recognize that upon the remarriage of the custodial parent, the children have more than two parental figures. The "replaced" natural parent does not disappear from the children's world,[53] but neither does he hold the same position in the children's lives as he did before the divorce and remarriage. The natural parent still holds an important biological, sociological, and psychological connection with the children,[54] but it is the stepparent who lives with the children and presumably has significant input into the day-to-day decisions about the children's lives. The law should acknowledge this important shift in parental roles. Parenthood is, at times, appropriately non-exclusive.[55]

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53. Psychologists report that children often fantasize about and become obsessed with the noncustodial parent. Benedek & Benedek, *Postdivorce Visitation: A Child's Right,* 16 J. AM. ACAD. CHILD PSYCHIATRY 256, 261 (1977); Wallerstein & Kelly, *Effects of Divorce on the Visiting Father-Child Relationship,* 137 AM. J. PSYCHIATRY 1534, 1536 (1980).

54. Psychological evidence demonstrates that the maintenance of a relationship between the child and the noncustodial parent is critically important to the psychological adjustment of the child after the divorce. *See, e.g.,* Hess & Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children,* 35 J. SOC. ISSUES 79, 92-94 (1979); Wallerstein & Kelly, *Children and Divorce: A Review,* 24 SOC. WORK 468, 471 (1979).

55. In one of the most frequently cited sources in the family law area, three experts argued that, in order to protect the relationship between the child and the custodial parent, the custodial parent should determine the visitation rights of the

The wisdom of providing visitation rights to natural parents after adoption by stepparents already has been recognized by a few courts, primarily where "extraordinary circumstances" are found to exist.[56] In these cases, the court has determined that the facts of the case indicate a special desirability for continued contact between the child and the "replaced" natural parent. Usually, the "extraordinary circumstances" are cultural aspects of the child's background,[57] typically a mixed racial heritage, which may be ignored or lost if the "replaced" parent is not allowed to maintain contact with the child.

In *In re Adoption of Children by F*,[58] a New Jersey court granted the natural parent visitation rights in the context of a stepparent adoption without reliance upon a finding of "extraordinary circumstances." The case involved a petition for adoption by the stepfather, F, of two girls, ages 11 and 9, and an answer to that petition by the natural father, O, conditionally consenting to the adoption. The condition imposed on the consent was that the court grant the children an independent, enforceable right to visit their natural father.[59] In an interview by the court both girls expressed a desire to be adopted by their stepfather but also indicated that they would like the court to permit them to continue to visit their natural father. The court, in granting both the adoption and the visitation privilege, relied upon earlier state cases which liberally construed the adoption statutes in order to protect the rights of all affected parties and upon

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noncustodial parent. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 25, at 38. This position has been disputed by other experts in the field of child psychology, *see* Benedek & Benedek, *supra* note 53, at 263; Friedman, *The Father's Parenting Experience in Divorce,* 137 AM. J. PSYCHIATRY 1177, 1181 (1980), and has been rejected by certain courts, *see e.g.,* Pierce v. Yerkovich, 80 Misc. 2d 613, 623, 363 N.Y.S.2d 403, 412 (Fam. Ct. 1974).

56. *See, e.g., In re* S., [1975] 1 All E.R. 109 (C.A.) (child of mixed racial origin); *In re* J., [1973] 2 All E.R. 410 (Fam.) (child of Jewish father).

57. The "extraordinary circumstances" relied upon by the courts in allowing continued visitation by the noncustodial natural parent after adoption by the stepparent are not always cultural. *See, e.g., In re* Adoption of N., 78 Misc. 2d 105, 355 N.Y.S.2d 956 (Surr. Ct. 1974) (extraordinary circumstances included finding of natural father's parental fitness, despite his technical "abandonment" of child, and custodial mother and stepfather's willingness to allow visitation by natural father).

58. 170 N.J. Super. 419, 406 A.2d 986 (N.J. Super. Ct. Ch. Div. 1979).

59. *Id.* at 421, 406 A.2d at 987. Granting the right to visitation to the children themselves is an acceptable resolution only in a very limited number of instances. Where the children are so young as to be easily manipulated, or where the "replaced" natural parent would fear such manipulation, vesting the right to control visitation in the children is unworkable. Further, even in circumstances where there is little possibility of manipulation by the custodial parent, vesting the child with complete control over visitation by the "replaced" natural parent creates a situation ripe with potentially severe loyalty conflicts for the child.

recently revised adoption laws requiring liberal construction of the statutes for the best interests of the children.[60]

Granting stepparent adoption while maintaining visitation rights for the natural parent can serve the children's best interests and also provide a measure of protection for the natural parent's right to continued contact with the children. In situations where the natural parent's role as legal parent would best be carried out by the stepparent (for example, where the natural parent could not make well-informed health care or disciplinary decisions because he or she lives far from the children or visits infrequently), allowing adoption by the stepparent and establishing protected visitation privileges for the natural parent will best serve the interests of all concerned parties.

Consent to stepparent adoption will be more readily attained when the "replaced" natural parent does not, by consenting, forfeit all right to involvement with the children. More stepparents will become legal parents and many lengthy, difficult, and damaging courtroom battles will be avoided. The children will benefit from a legally stable relationship with the stepparent without the loss of all contact with the "replaced" natural parent. The "replaced" natural parent will attain permanent rights to visit his children but will no longer have either legal responsibility for the children or any obligation to support them.[61]

The resolution reached in *In Re Adoption by F* is not only satisfactory in its ultimate outcome, the adoption granted and visitation rights provided, but the case is exemplary in the manner in which this result was reached. The division of parental roles was not imposed upon the parties at the instigation of the court; it was a resolution reached by the parties themselves. A conditional consent answer was an ideal way for this resolution to be achieved. When the natural father submitted the conditional consent answer, he essentially agreed to have his parental role shifted to that of visiting parent.

There is no mention in the case of the stepfather's reaction to

60. *Id.* at 424, 406 A.2d at 988. The New Jersey statute relied upon by the court states: "This act shall be liberally construed to the end that the best interests of children be promoted. Due regard shall be given to the rights of all persons affected by an adoption." N.J. STAT. ANN. § 9:3-37 (West Supp. 1984).

61. In addition, it is likely that conflicts between the parents will fade as new permanent parental roles are established. A surprising additional benefit to the custodial parent and stepparent may evolve from moderately frequent contact with the "replaced" natural parent; one study indicates greater marital quality exists between divorced-remarried persons who had moderate levels of contact with the former spouse than between divorced-remarrieds who had low or high levels of such contact. *See* Clingempeel, *Quasi-kin Relationships and Marital Quality in Stepfather Families,* 41 J. PERSONALITY & SOC. PSYCHOLOGY 890 (1981).

the conditional consent answer, but it seems probable that most stepparents in similar situations would agree to the condition. If the stepparent in these cases opposes the visitation privileges as a condition to adoption, then the proceeding should be carried out in the manner in which it is currently treated — the court would determine whether the legal parental status of the natural parent should be terminated because the natural parent is "unfit." Given the high standard of proof which the courts typically require of the stepparent in contested adoption proceedings, the stepparent usually will not prevail on his petition. If the adoptive stepparent agrees to the arrangement suggested by the natural parent, then the court should independently review the proposal from the perspective of guarding the best interests of the children. An independent review of each case is necessary to ensure that such an arrangement will be in the children's best interests, since this sort of arrangement is not appropriate in all situations.[62]

The determination whether stepparent adoption with continued visitation would be in the children's best interests depends upon the specific facts of each case and should not be made mechanistically. As a preliminary matter, the court should recognize that the proposed multiple-parent arrangement will not be appropriate in all cases. In some instances, it will be in the children's best interests to grant the adoption in the traditional way, cutting off completely the "replaced" natural parent's right of access to the children. In other instances, it will be in the children's best interests to preserve the "replaced" natural parent's status as legal parent and to deny adoption by the stepparent. The primary goal of the court in resolving each stepparent adoption dispute should be to serve the children's best interests.

There are two separate threshold questions which the court should resolve before granting a petition for stepparent adoption with natural parent visitation. The court must determine if adoption

62. Studies on joint custody arrangements support the intuitive belief that not all parents and children are capable of handling multiple-parent arrangements. *See* Steinman, *Joint Custody: What We Know, What We Have Yet To Learn, and the Judicial and Legislative Implications,* 16 U.C.D. L. REV. 739, 745-49 (1983) (the ability of the parents to separate their roles and feelings as spouses from those as parents is a necessary but not a sufficient condition for the success of joint custody arrangements). *See generally* Kelly, *Further Observations on Joint Custody,* 16 U.C.D. L. REV. 762, 765 (1983) (joint custody may be superior to sole custody for many families); Nestor, *Developing Cooperation Between Hostile Parents at Divorce,* 16 U.C.D.L. REV. 771, 775 (1983) (parents with the potential for successful joint custody arrangements should be led into the requisite sharing gradually); Reece, *Joint Custody: A Cautious View,* 16 U.C.D. L. REV. 775, 777-78 (1983) (additional research is needed to identify characteristics of the families for which joint custody will be successful).

by the stepparent would be beneficial for the children. Independently, the court must also determine if continued visitation by the "replaced" natural parent would be beneficial[63] for the children. The court should allow the proposed arrangement only if it finds that both adoption by the stepparent and visitation by the "replaced" natural parent are beneficial for the children.[64]

There are several factors which the court should consider in answering each of the suggested threshold questions. In determining whether adoption by the stepparent would be beneficial for the children, the court should consider the relationship between the children and the stepparent, the existence of siblings in the care of the stepparent, the length of time the stepparent has invested in the parental relationship, the emotional stability of the stepparent, any history of physical violence or of spousal or child abuse on the part of the stepparent, the ability of the stepparent to meet the children's basic financial needs, and the willingness and ability of the stepparent to cooperate in a multiple-parent arrangement. In determining whether continued visitation by the "replaced" natural parent would be beneficial for the children, the court should consider the quality of the relationship between the children and the "replaced" natural parent, the existence of siblings in the care of the "replaced" natural parent, the frequency and quality of the "replaced" natural parent's visits in the past, the emotional stability of the "replaced" natural parent, any history of physical violence or of spousal or child abuse on the part of the "replaced" natural parent, and the willingness and ability of the "replaced" natural parent to cooperate in a mulitiple-parent arrangement. Additionally, on both questions, the wishes of the children who are old enough to have an opinion should be considered. The weight to be given each of these factors depends upon the specific facts of each case. No one factor should be controlling.

63. The term "beneficial" in this note could also be called "non-detrimental" since a rebuttable presumption should exist that visitation with the replaced natural parent is in the children's best interest. *See supra* text accompanying notes 53-54.

64. The interaction of the two threshold questions can be illustrated by a diagram:

	adoption beneficial	adoption not beneficial
visitation beneficial	Allow adoption with continued visitation.	No adoption. Visitation continues.
visitation not beneficial	Allow adoption. No visitation.	No adoption. No visitation.

The alternative of non-exclusive parenthood should not be confined to those situations in which the parties themselves suggest it.[65] The court should inquire into the acceptability of this arrangement[66] whenever a petition for adoption of stepchildren is contested by the noncustodial natural parent. If the arrangement already has been considered by the parties but was rejected by one or both, the court should take the reasons for this rejection into account in its final decision.[67] The courts should hesitate[68] to use this remedy against the wishes of both parties.[69] As a practical matter, the multiple-parent concept may not work to the children's benefit unless the parties have acquiesced to the arrangement.[70]

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65. Even the most vocal opponents of court-ordered visitation by the noncustodial parent must concede that continued visitation by the "replaced" natural parent after stepparent adoption is at least no more an abrogation of the custodial parent's authority than the current system, under which the natural parent usually does retain visitation rights even against the custodial parent's wishes.

66. Since the judge will ultimately decide whether adoption with continued visitation is an appropriate resolution, the involvement of the judge at the stage of proposing resolutions may raise some of the same concerns as are raised by judicial involvement in settlements. For a general discussion of these concerns, see Oesterle, *Dangers of Judge-Imposed Settlements,* 9 A.B.A. J. LITIG. 29 (Spring 1983).

67. Two factors which the court might consider in evaluating the reasonableness of the objections each party has to the arrangement are the length (or brevity) of the present marriage of the custodial parent and the number of marriages of the custodial parent. The court's consideration of the reasonableness of the parties' objections appears to be authorized by statutes which permit courts to issue orders terminating parental relationships in connection with adoption proceedings on the grounds that the parent is unreasonably withholding consent to the adoption. ALASKA STAT. § 25.23.180(c)(2) (1983). *But cf.* B.J.B.A. v. M.J.B., 620 P.2d 652, 655 (Alaska 1980) (provision governing relinquishment of parental rights not applicable to a consent to adoption).

68. There may be constitutional limits upon the courts' ability to terminate the parental status of persons who have not been found to be unfit. *See supra* note 32.

69. The children are not considered "parties" but should be heard in the matter. The consent of children who are old enough to form an opinion should be a necessary but not a sufficient condition to order an adoption with visitation rights for the natural parent. Alaska currently requires consent of a minor who is sought to be adopted if the child is over 10 years of age, unless the court dispenses with the minor's consent in the minor's best interests. ALASKA STAT. § 25.23.040(a)(5) (1983).

70. The fact that the parties do not initially assent to visitation should not end the inquiry. Psychologists have suggested that visitation ordered by the courts may provide the extra pressure needed to resolve parental conflicts over shared custody and visitation. *See, e.g.,* Benedek & Benedek, *supra* note 53, at 263.

A refusal by either the "replaced" natural parent or the stepparent to cooperate in the proposed arrangement should not bar consideration of this proposal. Stepparents who refuse to assent to continued visitation by the "replaced" natural parent after adoption should be required to prove that the "replaced" natural parent is unfit. *See supra* p. 331. "Replaced" natural parents who refuse to assent to the adoption by the stepparent even when the court has determined that stepparent

VI. CONCLUSION

A more flexible approach to stepparent adoption would be fairly easy to implement in Alaska. The Alaska legislature, by its enactment of a grandparent visitation statute,[71] has demonstrated a willingness to adopt a more flexible legal approach to family structures where the best interests of the children are served by such flexibility. The legislature should encourage the courts confronted with contested stepparent adoption cases to consider granting adoption with continued visitation by the noncustodial natural parent. Enactment of a provision in the adoption laws indicating legislative approval of this type of resolution would increase the probability of the courts' implementation of the more flexible approach.[72]

The Alaska courts have demonstrated a modern approach to other family law issues,[73] and have staunchly protected the rights of natural parents to their legal parental status.[74] The Alaska courts should find the proposal for recognition of non-exclusive parenthood appealing. Recognizing a second parental role for the "replaced" natural parent will safeguard the natural parent's right to contact with his children and also will serve the children's best interests.[75] A more flexible legal approach to multiple parent conflicts ultimately will serve to further the best interests of the entire family.

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adoption would be in the children's best interests and continued visitation would be allowed should have their legal parental status terminated.

71. ALASKA STAT. § 25.24.150 (1983).

72. The statutory provision could be a fairly open-ended one and could include a provision similar to the New Jersey statute discussed *supra* note 60.

73. For example, the Alaska Supreme Court has rejected the "doctrine of tender years" which created a presumption that the custody of young children should be given to the mother. Johnson v. Johnson, 564 P.2d 71, 74-75 (Alaska 1977), *cert. denied,* 434 U.S. 1048 (1978).

74. *See, e.g.,* Turner v. Pannick, 540 P.2d 1051, 1055 (Alaska 1975) (non-parent must show that it clearly would be detrimental to the child to permit natural parent to have custody). *But cf.* S.O. v. W.S., 643 P.2d 997, 1005 (Alaska 1982) (no parental preference where natural parent initially consented to adoption).

75. The issue whether the courts have the authority to grant visitation rights and adoption petitions in the same proceeding has not been reached by Alaska courts. Several courts confronting this issue have held that the courts do have the inherent authority to grant this type of relief. *See, e.g.,* Ross v. Hoffman, 280 Md. 172, 174, 372 A.2d 582, 585 (1977); *In re* L., 53 A.D.2d 669, 670, 385 N.Y.S.2d 103, 105 (1976); *In re* Adoption of N., 78 Misc. 2d 105, 109, 355 N.Y.S.2d 956, 961-62 (Surr. Ct. 1974).