

8-1-1984

Stepparent Adoption: A Comparative Analysis of Laws and Policies in England and the United States

Susan F. Koffman

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [Comparative and Foreign Law Commons](#), and the [Family Law Commons](#)

Recommended Citation

Susan F. Koffman, *Stepparent Adoption: A Comparative Analysis of Laws and Policies in England and the United States*, 7 B.C. Int'l & Comp. L. Rev. 469 (1984), <http://lawdigitalcommons.bc.edu/iclr/vol7/iss2/11>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

Stepparent Adoption: A Comparative Analysis of Laws and Policies in England and the United States

I. INTRODUCTION

Each year approximately one million children in the United States under the age of 18 become stepchildren, and one-half million adults become stepparents.¹ Between ten and fifteen percent of all households in the United States are stepfamilies.² As the divorce and remarriage rates rise,³ the number of steprela-

1. R. ESPINOZA & Y. NEWMAN, *STEPARENTING* 2-3 (1979) (published by the National Institute of Mental Health); B. MADDOX, *THE HALF-PARENT: LIVING WITH OTHER PEOPLE'S CHILDREN* 8-9 (1975). "Maddox enlisted the aid of demographer Paul Glick to estimate, using 1970 census data, that each year one million children under the age of 18 see a parent marry — 750,000 after a divorce, 200,000 after the death of a parent, and 50,000 as children of unwed parents." ESPINOZA & NEWMAN, *supra* this note, at 15.

For the purpose of this Comment, the following definitions apply:

A *stepfamily* is a household unit in which one or both spouses have children from a previous marriage living most of the time in the same household. A stepfamily is formed when an adult marries someone with children, thereby becoming a *stepparent* to the children of a *natural parent*. Although a stepparent can marry a *noncustodial natural parent* or a parent with illegitimate children, in this Comment the term *stepparent* will refer only to someone who marries a *custodial natural parent* with legitimate children.

A *stepfather* is someone who marries a woman with custody of her legitimate children, regardless of his previous marital status; a *stepmother* is someone who marries a man with custody of his legitimate children, regardless of her previous marital status.

Steprelationships are the links, legal or otherwise, between a *stepchild* and a stepparent, created when the stepparent and a custodial natural parent marry. A remarriage does not create a stepfamily unless there are children from a previous marriage *and*, for this Comment, they reside with the remarried adults. ESPINOZA & NEWMAN, *supra* this note, at 2-3.

Since approximately eighty percent of women divorced in the United States are granted custody of their children, most stepfamilies within the definition used in this Comment comprise a natural mother, her stepchildren, and a stepfather. *Id.* at 15. In this Comment, the term *stepparent adoption* refers to a successful (or unsuccessful) attempt to adopt one's legitimate stepchild.

Background material for the Comment has come from legal and popular sources. For information on stepparenting dynamics, theory, and research, see generally these popular books on stepparenting: MADDOX, *supra* this note (a book frequently cited by other authors, both legal and popular); J. & W. NOBLE, *HOW TO LIVE WITH OTHER PEOPLE'S CHILDREN* (1977); E. & J. VISHER, *STEFFAMILIES: A GUIDE TO WORKING WITH STEPPARENTS AND STEPCHILDREN* (1979) (intended for therapists and counselors; includes an overview of research).

See generally these legal sources on the subject: Bissett-Johnson, *Step-Parent Adoptions in English and Canadian Law*, in *THE CHILD AND THE COURTS* 335 (I. Baxter & M. Eberts eds. 1978); Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10 (1975) (California law only); Hopkins & Benson, *Adoption by Parent and Step-parent*, 128 NEW L.J. 339 (April 6, 1978) (English law only); Oppel, *Step-parent Adoptions in Nova Scotia and British Columbia*, 6 DALHOUSIE L.J. 631 (1981) (also discusses English law); Williams, *Step-parent Adoptions and the Best Interests of the Child in Ontario*, 32 U. TORONTO L.J. 214 (1982) (also discusses English law); Note, *Stepparent Custody: An Alternative to Stepparent Adoption*, 12 U.C.D. L. REV. 604 (1979) (California law) [hereinafter cited as Note, *Stepparent Custody*].

2. ESPINOZA & NEWMAN, *supra* note 1, at 14.

3. VISHER, *supra* note 1, at 38; MADDOX, *supra* note 1, at 7. "Marrying more than once has never been

tionships will rise.⁴ Yet, despite the prevalence of steprelationships, the stepparent under current U.S. law “faces the problem of having neither rights nor clearly defined obligations with respect to the [step]child.”⁵ Marrying someone with children — becoming a stepparent — confers neither parental rights nor duties.⁶ To many stepparents, adoption of the stepchild seems the only way to establish parental standing.⁷

Although an adoption does establish a legal parental relationship between the stepparent and the stepchild, the adoption also severs the child’s relationship with the nonadopting natural parent.⁸ But U.S. law offers no alternative,⁹ no middle course that would grant parental rights and impose obligations on the stepparent while retaining the emotional and legal relationship of the child and the noncustodial natural parent.¹⁰

England presents a model for an alternative middle course. The occurrence of stepparent adoptions in that country had shown a similar pattern of steady increase.¹¹ In 1963, 17,782 adoptions were granted in England and Wales.¹² Of

so popular in contemporary history: one in every three American marriages and one out of every four British marriages is a remarriage for one or both partners.” *Id.*

4. *Id.* at 7-8. It is difficult to determine the exact number of steprelationships, since the “Census Bureau seems reluctant to ask pointed questions.” VISHNER, *supra* note 1, at 38. This is considered a sensitive subject by the Bureau, which fears that asking such an “embarrassing question” would jeopardize the accuracy of other questions on the census form. MADDOX, *supra* note 1, at 8. A booklet published by the National Institute of Mental Health reports that “[s]tepparenting as a subject for research and inquiry is at such a primitive stage that it becomes a challenge merely to locate relevant literature.” ESPINOZA & NEWMAN, *supra* note 1, at 11. Researchers estimate that there were eight million stepchildren in the United States in both 1964 and 1970, but by 1975, there were 15 million stepchildren; in 1977, one in every six children was a stepchild. VISHNER, *supra* note 1, at 37-38.

5. Bodenheimer, *supra* note 1, at 45.

6. See *infra* sections II.C and III.C, *Areas of Concern*. See generally, e.g., Comment, *Cinderella Revisited*, 10 SAN. FERN. V. L. REV. 103 (1982) (duties of stepparents in California). For example, a stepparent is not responsible generally for support of a stepchild, nor can the stepparent give or withhold consent for the stepchild’s medical treatment. 67 C.J.S. *Parent and Child* §§ 159, 161 (1978 & Supp. 1982).

7. Since the adoption process confers parental rights and duties on the adopter, a stepparent can acquire parental rights and duties by adopting the stepchild. See Note, *Stepparent Custody*, *supra* note 1, at 605-06. More than half — 9,222 of 13,559, or 68 percent — of the adoptions in California in 1974 involved a stepparent. *Id.* at 605 n.9; see also Bodenheimer, *supra* note 1, at 13 n.4. Nationally the figure is more than one-third of all adoptions granted. MADDOX, *supra* note 1, at 167. Data is not available on the number of adoptions requested by a stepparent but denied by the court, for reasons such as unfitness of the stepparent, lack of consent from the noncustodial natural parent, refusal by a court to waive that consent, and the best interests of the child. The number of adoptions requested is obviously higher than the number of adoptions actually granted. See generally Comment, *A Survey of State Law Authorizing Stepparent Adoptions without the Noncustodial Parent’s Consent*, 15 AKRON L. REV. 567, 569 (1982) [hereinafter cited as Comment, *Survey*].

8. See Bodenheimer, *supra* note 1, at 45. This occurs whether the nonadopting natural parent has abandoned the child or is still engaged in an ongoing relationship with the child. If the adoption is granted, the law no longer recognizes any relationship between the child and the nonadopting natural parent. See *id.*

9. *Id.*

10. See *id.*

11. MADDOX, *supra* note 1, at 167; L. RIMMER, *FAMILIES IN FOCUS* 51 (1981).

12. Hopkins & Benson, *supra* note 1, at 339.

those, 1,888 — 10.6 percent — were adoptions of legitimate children by their natural and stepparents.¹³ By 1976, the total number of adoptions had not increased, but the proportion of stepparent adoptions had risen startlingly: of 17,621 total adoptions, 7,838 — 44.5 percent — were stepparent adoptions of legitimate children,¹⁴ a fourfold increase in thirteen years.

Without intervention, the trend would have continued to rise with the divorce and remarriage statistics.¹⁵ But a dramatic change in social policy, enacted into law as the Children Act 1975,¹⁶ has reversed the trend. Adoptions granted to natural and stepparents decreased to fewer than 5,000 in 1977, the year after the Children Act became effective.¹⁷

The Children Act requires the court to consider whether adoption by the stepparent is conducive to the immediate and long-term welfare of the child, or whether the child's welfare would be better served by granting the stepparent custody jointly with the custodial natural parent.¹⁸ The practical effect of this legislation is that most applications by stepparents for adoption of a stepchild are dismissed, and stepparents who want legal parental status must pursue a claim for joint custody.¹⁹ The hindrance is intentional, since "[i]n Britain, the prevailing view is that to encourage stepparent adoption is bad social policy."²⁰

The same statement cannot be made about the prevailing view in the United States. Far from discouraging stepparent adoption, some states waive the consent to the adoption of the parent who lost custody in the divorce, regardless of reason.²¹ "The assumption is that since the child will be living with the stepparent anyway, his legal rights and obligations should coincide with the family relationship."²² Clark, author of a treatise on family law, disagrees: "If this is good social

13. *Id.* Another 2,636 adoptions (14.8 percent) were adoptions by natural and stepparents of illegitimate children, in order to legitimate them; the remainder, 74.6 percent, were adoptions by strangers, the so-called conventional adoption. *Id.*

14. *Id.* Another 3,989 adoptions (22.6 percent) were by natural and stepparents of illegitimate children; the remainder, 32.9 percent, were conventional adoptions by strangers. *Id.*

15. See REPORT OF THE DEPARTMENTAL COMMITTEE ON THE ADOPTION OF CHILDREN, CMND. 5107, ¶ 19 (1972) [hereinafter cited as Houghton Report, after the committee's chair, Sir Houghton].

16. Children Act 1975, ch. 72. The first law in Great Britain authorizing adoption was the Adoption of Children Act 1926, which made legal adoptions possible, but did not deal with the activities of adoption societies or agencies. Revisions recommended by a 1936 study committee became the Adoption of Children (Regulation) Act 1939, and later, the Adoption of Children Act 1949. In 1950 the acts were consolidated, with minor amendments, into the Adoption Act 1950. The Hurst Committee recommended changes, which became the Adoption Act 1958. Other minor changes, enacted in 1960, 1964, and 1968, dealt primarily with international adoption orders. The study committee chaired by Sir William Houghton recommended the reforms that became the Children Act 1975. Houghton Report, *supra* note 15, at ¶¶ 11-13.

17. L. RIMMER, FAMILIES IN FOCUS 51 (1981).

18. Children Act 1975, ch. 72, secs. 3, 10(3).

19. Hopkins & Benson, *supra* note 1, at 339.

20. MADDOX, *supra* note 1, at 170.

21. *Id.*

22. *Id.*

policy, it is in sharp conflict with the ideas of parental right, and it does seem hard on the parent who does not have custody."²³

Very little study of the issue of whether stepparent adoption is good social policy has occurred in the United States.²⁴ State laws address the issue haphazardly, with some states facilitating stepparent adoption²⁵ and others hindering it.²⁶ No state, however, approaches the issue in the manner now used in England, nor has there been any legislative study published like the Houghton Report.²⁷

This Comment compares stepparent adoption in the United States and England. Following an overview of the history, the standard procedures, and the legal consequences of adoption is an explanation of the motivations underlying requests for stepparent adoption, such as the desire to unify the stepfamily or the desire to conceal a previous marriage. The author then examines the legal status of the stepparent in the United States, with emphasis on the extent of parental rights and duties of the stepparent, visitation rights of the stepparent at the death or divorce of the custodial natural parent, and the duration and termination of steprelationships. The author describes current U.S. law on two areas of concern to stepfamilies, the succession rights of the stepchild and the issue of the stepchild's surname.

Following an overview of the new English policy of discouraging stepparent adoption, the Comment shows how English laws deal with the same questions of parental rights and duties of stepparents, visitation, termination of the steprelationship, succession rights, and surnames. Finally, the author suggests that the English approach to stepparent adoption be followed in the United States.

II. STEPPARENT ADOPTION IN THE UNITED STATES

A. Background

Adoption is a statutory creation; it did not exist in the common law.²⁸ In essence, adoption is the legal process by which "a child acquires parents other

23. H. CLARK, LAW OF DOMESTIC RELATIONS 636 (1968) (family law in the United States).

24. See generally ESPINOZA & NEWMAN, *supra* note 1, at 11 (difficult even to find literature on the topic). The two major articles on the subject in the United States are written on California law. See Bodenheimer, *supra* note 1, and Note, *Stepparent Custody*, *supra* note 1.

25. *E.g.*, state law collected in Comment, *Survey*, *supra* note 7, at 573-77; for example, VA. CODE § 63.1-225 (1980) (court may grant petition for adoption without a required consent if the court finds the person is withholding consent "contrary to the best interests of the child").

26. *E.g.*, state laws collected in Comment, *Survey*, *supra* note 7, at 587-93; for example, CONN. GEN. STAT. ANN. § 45-63(a) (West Supp. 1981) (stepparent adoption permitted but only after child has been adjudicated free for adoption).

27. See generally Houghton Report, *supra* note 15, and *infra* section III on the English approach to stepparent adoption.

28. S.M. CRETNEY, PRINCIPLES OF FAMILY LAW 531 (3d ed. 1979) (English family law); CLARK, *supra* note 23, at 603.

than his natural parents and parents acquire a child other than [their] natural child."²⁹ Although the practice has roots in antiquity³⁰ and has been recognized in the civil law since before Justinian, the common law did not inherit Roman-style adoption³¹ as the civil law countries did.³² Statutes authorizing adoption were a relatively late development in Great Britain and the United States³³ and differed from civil laws on adoption by emphasizing concern for the welfare of the child, rather than the continuity of the adopter's family.³⁴

While particular details vary, the adoption statutes of the fifty states are remarkable for their "gratifying similarity."³⁵ The statutes describe who may adopt,³⁶ who may be adopted,³⁷ whose consent is required,³⁸ the circumstances

29. CLARK, *supra* note 23, at 602.

30. See generally Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956). The practice was known to the ancient Egyptians, Babylonians, Assyrians, Greeks, and Germans and is mentioned in the Hebrew Testament. *Id.* at 743-45. See generally 2 C.J.S. *Adoption of Persons* § 3 (1972).

31. Roman law permitted two forms of adoption:

The form called *adoptio* applied to unemancipated children, and brought about their transfer from the family and authority of their natural father to that of their adoptive father It is this form of adoption which is the precursor of our modern adoption proceeding. The other form of Roman adoption, called *adrogatio*, applied to adults and is of less importance to us.

CLARK, *supra* note 23, at 602. See also Huard, *supra* note 30, at 743-47.

32. See generally Huard, *supra* note 30, at 745.

One influence on United States adoption law can be traced to the Spanish and French law which acquired a firm and lasting *pied-à-terre* in Louisiana and Texas. French and Spanish jurisprudence was largely modeled on Roman civil law and adoption was a well established practice in those countries.

It is not surprising, therefore, to find cases of Roman-style adoption in the early volumes of the Louisiana and Texas case reports, long before the practice had been generally sanctioned elsewhere in the United States.

Id. at 747.

33. O. STONE, FAMILY LAW 225 (1977) ("At the end of the nineteenth century it became clear that Great Britain was among the few so-called 'advanced' countries without any legal institution of adoption."); Huard, *supra* note 30, at 748 ("The earliest adoption statute [in a common law jurisdiction] is variously reported to be that of Mississippi in 1846 and Massachusetts in 1851"). Huard suggests a reason for the English reluctance to legalize adoption:

Our jurisprudence was largely acquired by inheritance from England. The English had an inordinately high regard for blood lineage and consequently the practice of adoption never acquired a foothold there. The primitive understanding of adoption required the adoptee to become a member of the adopter's family, to acquire a quasi-interest in the adopter's property while the latter lived and to succeed to such property upon the adopter's death. But to the English, heirs meant legitimate children who were heirs of the blood. This was an unalterable maxim

Id. at 745-46 (footnotes omitted). Roman-style adoption was not legally possible in England until the Adoption Act 1926. *Id.* at 746.

34. Huard, *supra* note 30, at 748-49.

35. *Id.* at 750.

36. The right to adopt is purely statutory and can be denied to a person judged unfit. Usually the adopter must be over the age of majority, except in cases of married couples or a person adopting his or her own natural child. The right is limited to natural persons; corporations, firms, and societies cannot adopt. Relatives can adopt when permitted by statute. Some states require the adopter to be a specified number of years older than the adoptee. Marital status is neither a bar nor a requirement in most states. Residency may or may not be required. 2 C.J.S. *Adoption of Persons* §§ 13-17 (1972). In England, requirements that prohibited a single male from adopting a female child have now been removed; however, all adopters must be at least 21 years of age. See generally CRETNEY, *supra* note 28, at 538-42.

under which a required consent may be waived,³⁹ the legal procedures to be followed,⁴⁰ and the effects of the decree.⁴¹

In the simplest terms, an adoption decree "divests the natural parents of all rights and duties respecting the child and vests such rights and duties in the adoptive parents."⁴² The adoptive parents become entitled to custody of the child, and the natural parents lose their entitlement to custody;⁴³ the adoptive parents become responsible for support, and the natural parents cease to be

37. Generally a person can be adopted even if the proposed adopter is his or her spouse. Minors or adults can be adopted. In the absence of express statutory prohibition, race and religion of adoptee and adopter are not bars to adoption. Some states prohibit adoption of one's own legitimate child. 2 C.J.S. *Adoption of Persons* §§ 18-24 (1972). In England, the adoptee must be under 18 and must never have been married. See generally CRETNEY, *supra* note 28, at 538-42.

38. Generally the consent of both natural parents of a legitimate child is required, unless one or both has lost parental rights through abandonment of the child or other conduct that permits a court to dispense with consent. If the child is in the care of a public or private licensed agency, the agency's consent is usually required. Consent of the guardian may be necessary, although consent is not required from a relative who has been caring for the child informally, unless so specified by statute. When the adoptee is older than a specified age, generally twelve or fourteen, the adoptee's consent may be required also. See CLARK, *supra* note 23, at 623-25.

39. Required consents may be waived if doing so is in the best interests of the adoptee. The U.S. Supreme Court indicated in dicta, in *Quilloin v. Walcott*, 434 U.S. 246 (1978), that a statute terminating parental rights without a finding of unfitness may be an unconstitutional violation of due process. Some courts liberally construe the grounds on which unfitness may be based, so that failure to visit or to pay support for six months can be construed as abandonment and, thus, parental unfitness. See Comment, *Survey*, *supra* note 7, at 569. Traditional statutory grounds for dispensing with a required consent include abandonment, termination of parental rights (perhaps in the original divorce decree), mental incompetency, failure to consent due to prolonged unexplained absence, unavailability, or incapacity. D. BRIELAND & J. LEMMON, *SOCIAL WORK AND THE LAW* 380 (1977).

40.

When once it is determined that the child is eligible for adoption by someone, either because the appropriate person has consented, or because parental rights have been terminated, the next step in the process is the establishment of his ties with the adoptive parents. This step may occur as a result of the very hearing which made him eligible for adoption, and the two steps thus may be taken together. Or it may occur at a later time as a result of subsequent legal proceedings.

CLARK, *supra* note 23, at 638. Usually the two steps are taken together in the case of a stepparent adoption. In an agency adoption, where the child has been placed for adoption with an agency, the two steps usually occur in separate stages. *Id.*

41. "On a final decree of adoption the parents' rights are not merely suspended but are completely destroyed." 2 C.J.S. *Adoption of Persons* § 100 (1972). Adoption permanently establishes the legal relationship of parent and child between the adopter and adoptee, and neither the subsequent death of either party nor the marriage of the adoptee will forfeit the legal relationship. The adoptive parent acquires the rights and duties of natural parenthood; the natural parents and relatives are divested of all rights and duties toward the adoptive child. "The adoptive parents may not be compelled to permit the natural grandparents to visit, and communicate, with the child, and adoption has been held to vitiate a prior divorce decree vesting partial custody and visitation rights in a natural grandparent." *Id.* at § 135. "With some exceptions adoption terminates all the rights of the natural parent with respect to the child, including the right of custody, parental control, and the right to see the child again or have any real knowledge as to its whereabouts." *Id.* at § 139. Death of the adoptive parent does not revive the parental relationship between the adoptee and the former natural parent. *Id.*

42. CLARK, *supra* note 23, at 658.

43. 2 C.J.S. *Adoption of Persons* § 100 (1972).

liable for support.⁴⁴ The decree customarily changes the child's surname to the surname of the adoptive father.⁴⁵ The adoption statutes generally provide for issuance of a new birth certificate, so the adopted child's identity is concealed completely.⁴⁶ Adoption proceedings and all records are usually confidential.⁴⁷ Following an adoption, the natural parents are legally no more than strangers to the now adopted child.⁴⁸ The adoption generally has the practical effect of ending all relations between the adopted child and the natural parents.⁴⁹

The procedures and effects of the adoption laws were designed to meet the principal objective of "providing a secure family environment for children who cannot live with their original parents."⁵⁰ Viewing the adoption procedures in light of that objective, "it becomes obvious that the advent of increasing numbers of joint adoptions by one natural parent and a step-parent forms a class of adoptions which was not within the contemplation of the original legislators, and for which the rules governing 'conventional' adoptions may not be appropriate."⁵¹ For example, when a stepparent applies for an adoption, the rights of the natural parent, the stepparent's spouse, are not extinguished.⁵² This is an exception to the general rule that the rights of natural parents are extinguished by adoption.⁵³ Other rules governing "conventional" adoptions⁵⁴ are inappropriate in a stepparent adoption, such as concealing the identities of the natural parents.⁵⁵

44. *Id.* at § 136. "However, where the child is adopted by the spouse of one of the natural parents, the relationship of that natural parent to the child is not terminated, and the legal incidents following adoption are the same as they would have been had both the natural parent and the spouse been the child's natural parents or his adoptive parents." *Id.* at § 139.

45. A change of surname, although permitted, is not necessary for adoption. *Id.* at § 141.

46. See CRETNEY, *supra* note 28, at 559.

47. CLARK, *supra* note 23, at 616.

48. See *supra* note 41.

49. Although the natural parent no longer has a legal right to see the child, the natural parent may have contact with the child after the adoption, but only with the consent of the adoptive parents. *But see In re Adoption of Children by F.*, 170 N.J. Super. 419, 406 A.2d 986 (1979), in which the court, granting the adoption to the stepfather, held that an order for visitation by the natural father could be incorporated into the adoption decree. See also *infra* notes 178-80.

50. Bodenheimer, *supra* note 1, at 16.

51. Oppel, *supra* note 1, at 632.

52. 2 C.J.S. *Adoption of Persons* § 139 (1972). See *supra* note 44.

53. See *supra* note 41 and accompanying text. Some statutes expressly state this exception. CLARK, *supra* note 23, at 658-59.

54. A "conventional" adoption is one in which the natural parents and the adoptive parents do not know one another before the adoption, and the adopters are strangers to the child before the adoption process begins. See Note, *Stepparent Custody*, *supra* note 1, at 61.

55. Some states will, upon request, issue a new birth certificate showing the adoptee to be the child of the adoptive parents. In the typical stepparent adoption, the child knows the natural parent and realizes that the stepparent is not the natural parent; the legal fiction of a new birth certificate thus seems foolish. See generally Note, *Stepparent Custody*, *supra* note 1, at 611; CLARK, *supra* note 23, at 658-59.

Stepparent adoptions have few of the features and almost none of the problems of ordinary adoptions. Ordinary adoptions serve the purpose of providing destitute, homeless and neglected children with an improved environment, while stepparent adoptions merely formalize

A stepparent adoption differs from a conventional adoption in its main effect.

The essence of adoption in the Common Law world has generally been the creation of legal ties where none previously existed, soon after the custodial transfer of the child has occurred. In practice (as opposed to law) step-parent adoptions usually change very little. The child is already legitimate, and so there is no stigma of illegitimacy to remove. The main effect of adoption in such a case is exclusionary: the exclusion and extinguishment of the natural [parent]'s rights.⁵⁶

Stepparent adoptions do not give the stepchild a home, do not remove illegitimacy, and do not create new emotional relationships.⁵⁷

The adoption laws, however, were intended in common law countries to meet the needs of homeless and orphaned children,⁵⁸ with procedures designed to meet that goal and innovations developed to address problems in meeting the goal.⁵⁹ The framers of these laws did not anticipate that stepparents would use the laws to adopt legitimate children whose natural parents have not surrendered them; the conventional adoption procedures seem ill-suited to stepparent adoptions.

B. *Motivations for Stepparent Adoptions*

Why then do stepparents seek to adopt the legitimate children who already reside with them? Maddox, author of a popular guide to stepparenting, describes the legal and psychological advantages to adoption of one's stepchildren.⁶⁰ "Adoption is permanent, and it gives the stepchild status and rights indistinguishable from any other child of the marriage. For many stepfamilies it spells emotional security. The stepparent need not fear losing the child, and the child's natural anxiety about the stepparent withdrawing affection will be allayed"⁶¹ Other commentators, however, ascribe less loving motivations to the parties, reporting that often "the reasons behind the application involve insecur-

an existing relationship. Stepchildren are generally older than children in ordinary adoptions. Because stepparent adoptions rarely involve infants, there is a good possibility that the stepchild will remember and have personal ties with the noncustodial parent. Finally, unlike in ordinary adoptions, a denial of a stepparent's petition does not result in the removal of the child from the home.

Note, *Stepparent Custody*, *supra* note 1, at 611-12.

In California, the procedure for a stepparent adoption is different from the procedure for an ordinary adoption. Petitioners file consent documents with the county clerk, not with the Department of Social Services, and adopters need not be ten years or more older than the child, as is usually required. *Id.* at 612 n.44.

56. Bissett-Johnson, *supra* note 1, at 336.

57. See generally *id.*

58. CLARK, *supra* note 23, at 658-59.

59. *Id.*

60. MADDOX, *supra* note 1, at 169-70.

61. *Id.*

riety and a lack of confidence (particularly after a failed marriage) in the relationship between the child and the step-parent.⁶² The members of the stepfamily may be motivated also by a desire to make the stepchild feel more a part of the family.⁶³ The stepfather may want to adopt for stronger parental standing,⁶⁴ and the two adults may hope that the children will forget the natural parent and grow closer to the stepparent when the natural parent's visits cease.⁶⁵ For the natural parent, consent to the adoption may come from a desire to be free of the child support obligation.⁶⁶

Perhaps, theorizes a social worker, the stepfather hopes that upon giving the child his surname and assuming full parental responsibility, disagreements with the natural mother over the child's behavior will end.⁶⁷ Professor Bissett-Johnson mentions a Canadian case in which the court held that the adoption "was necessary for the *step-mother's feelings* so that she need no longer fear that she was a mere surrogate mother."⁶⁸

Another commentator emphasizes the role of the natural mother in urging the stepfather to adopt, even though she already has custody of the children.⁶⁹ The commentator speculates that there may be considerable hostility between the mother and her ex-husband, and adoption would permit her to have nothing more to do with him.⁷⁰ The mother and stepfather may want to have children and prefer that all the children bear the same surname.⁷¹ This had been the express object of an adoption that was denied by the English Divisional Court.⁷² The judge considered the motive — change of the children's surname — to be insufficient ground for an adoption.⁷³

The motivations described thus far arise from the emotional and personal needs of the involved adults. Some stepfamilies, however, are motivated to pursue adoption because of the inadequate position of a nonadopting stepparent under present U.S. law: "[T]he stepfather may wish to have the security of an

62. Bissett-Johnson, *supra* note 1, at 336.

63. *Id.*

64. *Id.*

65. *Id.* Another commentator suggests that stepparents seek adoption because they feel insecure and have no confidence in their relationship with their stepchildren. "He argues that these psychological and emotional problems stem from the fact that the child is not and never can be a natural child. As such, he concludes that the legal device of adoption cannot solve them." Note, *Stepparent Custody*, *supra* note 1, at 610 n.35 (quoting Hoggett, *Adoption by Stepparents*, 17 SOLICITORS' J. 606, 608 (1973)).

66. See Bissett-Johnson, *supra* note 1, at 336.

67. Note, *Stepparent Custody*, *supra* note 1, at 610 n.35 (quoting J. ROWE, PARENTS, CHILDREN AND ADOPTION 281 (1966)).

68. Bissett-Johnson, *supra* note 1, at 343 (emphasis added) (quoting *Re Children of Alexandra Edith Carter*, 15 N.S.R.2d 181, 215 (Ct. App. 1976)).

69. Williams, *supra* note 1, at 214-15.

70. *Id.*

71. Bissett-Johnson, *supra* note 1, at 336-37.

72. *Re D.*, 1973 Fam. 209, quoted in Bissett-Johnson, *supra* note 1, at 338.

73. *Id.*

order, not only so that he feels that the children 'belong' to him, but also because he would then automatically be entitled to custody of them should the mother die or become incapacitated; . . ."⁷⁴ This concern arises because stepparenthood alone carries no rights under the common law.⁷⁵

Other areas of concern that impel stepparents to pursue adoption also derive from the law's treatment of the steprelationship. The laws of testate and intestate succession operate to exclude members of the stepfamily from inheriting from one another.⁷⁶ Stepparents may be denied custody of, or even visitation with, their stepchildren after the death or divorce of the custodial natural parent.⁷⁷ The lack of parental rights of the stepparent, including the right to consent to emergency medical treatment of the stepchild, and of parental duties, including the duty to support the stepchild during and after the marriage that created the steprelationship, is also a matter of great concern to stepfamilies.

C. Areas of Concern

1. Parental Rights and Duties

The parental rights and duties vested in a natural parent by the common law⁷⁸ are not automatically acquired by the person who marries someone with children and thereby becomes a stepparent.⁷⁹ Generally the intent to act parentally,⁸⁰ to

74. Williams, *supra* note 1, at 214; *see also* Note, *Stepparent Custody*, *supra* note 1, at 608-10.

75. *See, e.g.*, Note, *Stepparent Custody*, *supra* note 1, at 605; MADDOX, *supra* note 1, at 20, 27, 163-64; Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 FAM. L.Q. 209, 211 (1970).

76. *See infra* section II.C.2.

77. *See infra* section II.C.4.

78. Many of the common law rights and duties of a parent have been codified, e.g., the duty to support. The following rights and duties are vested by the common law in a natural parent: the right to control, i.e., determining how and where the child will spend time (also called the right to custody); the right to discipline; the right to access, i.e., enjoying the child's company and companionship; the duty to protect and maintain; the duty to educate and the right to choose the manner of education; the right to determine religious upbringing; the duty to provide, and the right to consent to, medical treatment; the right to select the infant's surname; the right to the child's services; the right to control emigration; the right to consent to marriage and to adoption; the right to appoint a guardian; the right and duty to administer the child's property; the right to act as 'next friend' in legal proceedings and the duty to serve as guardian ad litem in the same. *See generally* H. BEVAN & M. PARRY, CHILDREN ACT 1975 §§ 210-25 (1978); CRETNEY, *supra* note 28, at 431-36.

79. *See, e.g.*, Note, *Stepparent Custody*, *supra* note 1, at 605; MADDOX, *supra* note 1, at 163; Berkowitz, *supra* note 75, at 211.

80. NOBLE, *supra* note 1, at 122.

The crucial item is what your intentions really are. The question most courts ask is whether your attitude toward the child means that you intend to care for her and treat her as a member of your family. If you have taken over the raising of the child and you and your mate are paying the bills too, then you have a legal obligation to continue doing so unless the child already has a parent willingly paying support. If this happens, then, while you may have welcomed the child into your family and even have thought of him as a family member, you aren't *in loco parentis* — at least not from a legal standpoint.

Id.

place oneself within the common law doctrine of *in loco parentis*,⁸¹ is necessary before a limited duty to support exists.⁸² Writers of popular books on stepparenthood advise that acting parentally may carry an obligation to support, but that the stepparent can shed that obligation merely by changing the intent.⁸³ Maddox describes the status of *in loco parentis* as a status anyone can assume, relative or stranger, by giving the "child the protection normally expected of a parent. In America, however, the stepparent who wants to shed the role can usually do so at will. He simply ceases to maintain the child"⁸⁴ Thus stepparenthood, unlike parenthood, does not create a duty to support by virtue of the status alone.⁸⁵ A person must intentionally assume the obligations incident to parenthood, that is, intentionally place oneself *in loco parentis*, before a duty to support can be construed to exist.⁸⁶

In the United States, the duty to support, if found to exist, generally ends at divorce;⁸⁷ cases conflict on whether the duty terminates at the death of the custodial natural parent.⁸⁸ Statutes imposing a support duty on stepparents are in derogation of the common law and thus are strictly construed.⁸⁹ But whether support is statutorily required of a stepparent or is imposed by the common law doctrine of *in loco parentis*, no other parental rights are granted a stepparent by virtue of that status alone.⁹⁰ A stepparent thus can be required to pay the medical bills of a stepchild while being unable to consent legally to the medical treatment of the child.

81. "A person is said to stand in loco parentis [in place of the parent] when he puts himself in the situation of a lawful parent without going through the formalities necessary to a legal adoption." 59 AM. JUR. 2D *Parent and Child* § 88 (1971).

82. The duty is limited because it can end by the intention of the parties to cease the relationship, or by the death or divorce of the stepparent and natural parent. See, e.g., *Kaiser v. Kaiser*, 93 Misc. 2d 36, 402 N.Y.S.2d 171 (1978) (liability for stepchild is collateral to valid marriage between stepparent and natural parent; once marriage ends, by death, divorce, or any other means, stepparent relationship and support obligation end).

83. E.g., NOBLE, *supra* note 1, at 124.

Everything is based on your intention, so once you intend to treat the child as something other than a member of your family — as a boarder, perhaps, or a visitor — and you act accordingly, you have removed yourself from the parental role. At best you become a caretaker, sharing a home with someone else's child

Id. See also sources cited *supra* note 1; 59 AM. JUR. 2D *Parent and Child* § 88 (1971 & Supp. 1983).

84. MADDUX, *supra* note 1, at 165.

85. *Id.*; see also 59 AM. JUR. 2D *Parent and Child* § 91 (1971 & Supp. 1983).

86. MADDUX, *supra* note 1, at 165, 59 AM. JUR. 2D *Parent and Child* § 91 (1971 & Supp. 1983).

87. Annot., 75 A.L.R.3d 1129 (1977); *Kaiser v. Kaiser*, 93 Misc. 2d 36, 402 N.Y.S.2d 171 (1978).

88. Compare *Kaiser v. Kaiser*, 93 Misc. 2d 36, 402 N.Y.S.2d 171 (1978) (stepparent support obligation for stepchild ends at death of natural parent) with *Jones v. Stautz*, 5 Misc. 2d 185, 159 N.Y.S.2d 903 (1957) (steprelationship cannot be destroyed other than by divorce of the natural and stepparent).

89. *Kaiser v. Kaiser*, 93 Misc.2d 36, 38, 402 N.Y.S.2d 171, 173 (1978).

90. E.g., 59 AM. JUR. 2D *Parent and Child* § 91 (1971 & Supp. 1983).

2. Succession Rights

Under the common law on intestate distribution, a stepchild is not entitled to an intestate share of the stepparent's estate.⁹¹ Without statutory intervention, a stepchild generally cannot take as an heir at law, regardless of the establishment *vel non* of an *in loco parentis* relationship.⁹² While this fact has been used to justify the granting of a stepparent adoption,⁹³ it has also been offered as justification for refusal to do so.⁹⁴

The simplistic response is that a stepparent who is concerned and who wants to provide for the stepchildren should write a will.⁹⁵ However, "[c]omparatively few spouses seem to make wills,"⁹⁶ and even the operation of testate law can cause the disinheritance of the stepchildren.⁹⁷ This can occur despite a will intended to benefit the stepchildren. For example, assume the testator, in a loving effort to show that she cared for the stepchildren as if they were her natural children, bequeaths to "the children," without qualifier or differentiation.⁹⁸ Testate law indicates that the term "children" refers to blood relatives only and does not encompass stepchildren.⁹⁹

91. "[T]he law of intestacy is wholly statutory Inheritance is not a vested right and the legislature has the power to modify or to take away any such right." Berkowitz, *supra* note 75, at 224, 225 n.68.

92. *Id.* at 224. *Accord* Note, *Stepparent Custody*, *supra* note 1, at 624. Note that some statutes, e.g., California Probate Code § 228, specify that a stepchild can inherit to prevent escheat, but only when no issue or other next of kin can be found. Berkowitz, *supra* note 75, at 224; *see also* Note, *Stepparent Custody*, *supra* note 1, at 624 n.94 (California law adds the condition that the estate in question be community property from the deceased natural parent).

93. *Re* Robert George Blunden, No. CH 27897 (Nova Scotia County Ct. Aug. 1, 1979), *reported in* 2 *FAM. L. REV.* 136 (1979). The judge thought that the adoption would benefit the child economically, since the boy's intestate or testate rights "will, as far as we can now tell, be in all likelihood much more substantial" under the stepfather than under the natural father. The judge thereby granted the stepparent adoption. 2 *FAM. L. REV.* at 139.

94. *Stoodley v. Blunden*, 17 R.F.L.2d 280 (N.S. App. Div. 1980), *rev'g Re* Robert George Blunden, No. CH 27897 (Nova Scotia County Ct. Aug. 1, 1979), *see supra* note 93.

[W]hat positive advantage will the child receive in the future which could not be obtained by preserving the non-consenting natural parent status [or] . . . by alternative legal means. The [stepfather who seeks adoption] can provide for the economic security of the child, either by will or other means, without the necessity of depriving the child of his inheritance from his natural father.

Id. at 284. *See also* Bissett-Johnson, *supra* note 1, at 344 n.59 (discussing a Canadian case in which the court said the stepfather could write a will if he was sincerely concerned about the stepchildren's future welfare; adoption refused).

95. Note, *Stepparent Custody*, *supra* note 1, at 625; NOBLE, *supra* note 1, at 125.

96. CRETNEY, *supra* note 28, at 259. *Accord* NOBLE, *supra* note 1, at 125-26.

97. Berkowitz, *supra* note 75, at 223; NOBLE, *supra* note 1, at 126-27. Suppose, in an extreme and hypothetical example, a newly wed natural parent and stepparent are in a car accident on their way home from the wedding. Natural parent dies immediately, and stepparent a few hours later. Suppose further that neither has made a will; the stepparent, as surviving spouse, inherits a portion of the natural parent's estate. When the stepparent dies a few hours later, the stepparent's kin and issue inherit, leaving the natural parent's children, the stepchildren, disinherited from that portion of their parent's estate.

98. This example is from NOBLE, *supra* note 1, at 126.

99. Berkowitz, *supra* note 75, at 223, (citing *Barnes v. Greenzebach*, 1 Edw. Ch. 41, 28 A.L.R.3d 1307,

Adoption by the stepparent resolves the problem, since an adopted child becomes the heir of the former stepparent, taking as if the natural child.¹⁰⁰ The child loses all intestate rights to the estates of the nonadoptive parent and relatives,¹⁰¹ although the nonadoptive parent can, of course, choose to name the child in a will, even after adoption has severed the legal relationship.¹⁰² (Curiously, unless the adopting stepparent's relatives also choose to name the child specifically in their wills, the child does not acquire, despite the adoption, any intestate rights in the estates of these relatives.¹⁰³)

A parent generally inherits a minor child's estate, but adoption alters this distribution: without adoption, the noncustodial natural parent shares any estate with the custodial natural parent; after adoption, the former stepparent displaces the nonadoptive natural parent.¹⁰⁴ In every circumstance just described, however, the position of the custodial natural parent and relatives remains unaltered by the stepparent adoption.¹⁰⁵

3. Surnames

The question of whose surname a child bears is a question more of emotion than of reason.¹⁰⁶ Bissett-Johnson reports:

1311 (N.Y. 1831)). This rule can be overturned if an ambiguity is found on the face of the will. Berkowitz describes a case in which the testator bequeathed her estate equally to her "beloved children," when in fact she had one child and six stepchildren. Finding a close relationship between her and the stepchildren, and noting her advanced age and the fact that the will had been drawn by a lay person, the court held that the ambiguous term included the stepchildren. Berkowitz, *supra* note 75, at 223-24 (citing *Re Estate of Gehl*, 39 Wis.2d 206, 159 N.W.2d 72 (1968)).

100. CRETNEY, *supra* note 28, at 559; Bissett-Johnson, *supra* note 1, at 337; CLARK, *supra* note 23, at 659. *But see* Sherrin, *Adopted and Legitimated Children*, 128 *NEW L.J.* 101 (1978) (in English law, adoption does not permit descent of peerage or of a title of honor, nor of property limited to devolution with such peerage or title of honor; adoption cannot eliminate a child's right to the same, nor is a pension payable to child at time of adoption eliminated by the adoption).

101. CLARK, *supra* note 23, at 659-60. "[T]his is the universal rule today and is specifically provided for in most states' adoption or inheritance statutes." *Id.*

102. *See generally* CRETNEY, *supra* note 28, at 559; Note, *Stepparent Custody*, *supra* note 1, at 605, 610, 624.

103. CLARK, *supra* note 23, at 660.

When the adopted child claims an intestate share in the estate of a person related to his adoptive parents, or, in other words, when he seeks to inherit through the adoptive parents, he has been somewhat [un]successful, although the modern statutory trend is in the direction of approving his claim. The case authorities have taken the familiar position that since adoption was unknown to the common law the adoption statutes must be strictly construed. Therefore, unless the application statute expressly permitted the adopted child to inherit through his adoptive parents, he could not do so.

Id. at 660.

104. *See* CLARK, *supra* note 23, at 663.

105. "[W]here the adopted child is deceased and claims to his estate are made by his adoptive parents or other kindred, and by his natural relatives, the position of the great majority of states is that the adoptive parents and kindred inherit and the natural relatives do not, again with the exception that a stepparent adoption should not affect the rights of the natural parent married to the stepparent." CLARK, *supra* note 23, at 661.

106. *See infra* text accompanying notes 316-18. Since the mother is most often the custodial parent, a

A related reason [for stepparent adoption] is to give the child the same name as her mother and her step-father, and indeed the question of the name often has a symbolic importance which those practising outside this area of family law totally fail to comprehend. It symbolizes the sort of relationship that it is hoped to create within the new family.¹⁰⁷

Other commentators mention the desire for a single family name as a strong motivating factor in seeking a stepparent adoption.¹⁰⁸ Judges and commentators have criticized the use of adoption merely to change a child's surname, calling the action an attempt to conceal a previous failure at marriage¹⁰⁹ or to deprive the natural father of his heritage, as symbolized by the passing of the family name.¹¹⁰

The common law allows individuals to change their names at will, absent an attempt to defraud.¹¹¹ The traditional change of a woman's name at marriage, for instance, is a change by common law rather than by statutory requirement.¹¹² The common law also allows parents to give their child any surname they choose.¹¹³ This right, however, is unlike the other parental rights,¹¹⁴ which are

new stepfamily usually comprises a custodial mother, her husband, and her children from the previous marriage; it sometimes also includes children from the new marriage and (rarely) children from his previous marriage. Note, *Stepparent Custody*, *supra* note 1, at 605 n.9. Since most women change their surnames, by custom, upon marriage, U. STANNARD, *MARRIED WOMEN v. HUSBANDS' NAMES: THE CASE FOR WOMEN WHO KEEP THEIR OWN NAME I* (1973), the concern arises because the mother has the stepfather's name and the children have the natural father's surname.

107. Bissett-Johnson, *supra* note 1, at 336-37.

108. See, e.g., Oppel, *supra* note 1, at 635; Note, *Stepparent Custody*, *supra* note 1 at 610 n.35.

109. E.g., *Wolfe v. Cherrett*, 28 N.S.R.2d 17, 32 n.23 (N.S. App. Div. 1978) (father appealed an adoption granted despite his lack of consent; court dismissed adoption, because the expressed purpose of the adoption was to give the children the mother's new surname, probably, said the court, to disguise her previous marriage failure); Note, *Stepparent Custody*, *supra* note 1, at 610 n.35.

110. See generally *W. v. A.* (child: surname), [1981] 1 All E.R. 100 (C.A. 1980) (mother moving away with new husband cannot change children's name when natural father does not consent); Bissett-Johnson, *Name Changes*, 4 *ADOPTION AND FOSTERING* 58, 61 (1978) ("children may need to feel that they have not had their good name filched from them by their mothers and their ties with their fathers weakened").

111. E.g., *Hall v. Hall*, 30 Md. App. 214, 351 A.2d 917 (1976); see generally STANNARD, *supra* note 106.

112. See STANNARD, *supra* note 106, at 22; see also 65 C.J.S. *Names* §§ 11(1), 11(2) (1966); *Stuart v. Board of Supervisors of Elections*, 226 Md. 440, 295 A.2d 223 (1973). A person may change his or her name by simply using a different name, as long as the usage is consistent and there is no intent to defraud by assuming a different name. See STANNARD, *supra* note 106, at 22. A person may also change his or her name by obtaining a court order; generally a change-of-name statute does not affect or abrogate the common law right to change one's name without resort to legal proceedings. 65 C.J.S. *Names* § 11(2) (1966 & Supp. 1982) and cases cited therein.

113. E.g., *Donald J. v. Evna M.-W.*, 81 Cal. App. 3d 929, 147 Cal. Rptr. 15 (1978); *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 366 N.E.2d 717 (1977) (parents need not give child father's surname; they may use mother's maiden name hyphenated with father's surname), noted in *W. WADLINGTON & M. PAULSEN, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* 257 (1978). "The son of Jane Fonda and Tom Hayden, born July 7, 1973 was given the name Troy O'Donovan Garity." STANNARD, *supra* note 106, at 48.

114. See *supra* note 78.

exercisable jointly or independently, in that it cannot be exercised unilaterally.¹¹⁵ Courts in the United States have refused to permit mothers to change their children's surnames, either by usage or by court order.¹¹⁶ Post-divorce attempts to change a child's name to that of a nonadopting stepfather or to the maiden name of the custodial mother are largely unsuccessful.¹¹⁷

As Bissett-Johnson suggests, surnames are important symbols.¹¹⁸ The stepfamily distressed by the difference in surnames may pursue a stepparent adoption to create a uniform family surname.¹¹⁹ The courts consider this to be an inappropriate reason for an adoption,¹²⁰ yet under the present U.S. laws and cases, no other legal process is likely to result in a new surname for the stepchild.¹²¹

4. Duration and Termination of the Steprelationship

Adoption is permanent and irrevocable; a steprelationship is neither.¹²² A sense of permanency is important to the emotional security of the new family unit,¹²³ but whether the need for permanency is sufficient justification for granting a stepparent adoption is debatable.¹²⁴ The lack of legal permanency is clearly critical, however, in two instances: when the stepparent's spouse dies, leaving minor natural children, and when the natural parent and stepparent divorce. As

115. When two or more persons have a parental right or duty jointly, any one of them may exercise it without the involvement, agreement, or consent of the others, assuming no express disapproval of that exercise. A third party is entitled to rely on the exercise of a parental right by either party having the right, absent knowledge of the other right-holder's disapproval. At common law, all parental rights were vested in the father. Reforms have equalized the rights and authorities of mothers and fathers, so that all parental rights are now exercisable by either parent unilaterally, except the right to change the child's surname. *CRETNEY*, *supra* note 28, at 436, 440; *see also* *CLARK*, *supra* note 23, at 245, 573.

116. *E.g.*, Petition for Change of Name for Harris, 236 S.E.2d 426 (W. Va. 1977) (despite change-of-name statute, mother's petition denied while father is still supporting and taking an interest in child); *Laks v. Laks*, 25 Ariz. App. 58, 540 P.2d 1277 (1975) (divorced mother enjoined from changing children's names from father's surname to hyphenated version of his surname and her maiden name).

117. *See supra* note 116, and cases cited in 57 AM. JUR. 2D *Names* § 14 (Supp. 1983).

118. Bissett-Johnson, *supra* note 1, at 336-37.

119. *Id.*

120. *See, e.g.*, cases cited *supra* note 109.

121. Note, *Stepparent Custody*, *supra* note 1, at 623.

122. *See, e.g.*, *CRETNEY*, *supra* note 28, at 527; *MADDOX*, *supra* note 1, at 169; *Oppel*, *supra* note 1, at 635; Note, *Stepparent Custody*, *supra* note 1, at 610-11.

123. *MADDOX*, *supra* note 1, at 169. *See supra* text accompanying note 61. "Adoption, because of its finality, will also put an end to any further custody battles between the natural parents," *Oppel*, *supra* note 1, at 635, and end the disruption caused by visits from the natural parent, Bissett-Johnson, *supra* note 1, at 336.

124. *See generally* Bissett-Johnson, *supra* note 1, at 340, 354 nn. 32 & 40. The author describes an English case in which the adoption was overturned because, although the stepfamily understandably desired emotional security, the children's best interests were served by having two fathers, natural and step, rather than only one. He also criticizes a Canadian case in which adoption was granted contrary to the father's wishes, because his attempts at visitation had disturbed the stepfamily. Bissett-Johnson suggests that termination of access for a while would have served the court's aims as well as stepparent adoption did. *Id.* *See also supra* note 65.

a general rule, stepparents have no rights in either instance.¹²⁵ Stepparents fear that the noncustodial natural parent has a superior right to custody of the children, and that at the death of the custodial natural parent, custody of the stepchildren would revert to the surviving natural parent.¹²⁶ In a steprelationship of long standing and closeness, this fear is a strong incentive for seeking a stepparent adoption.¹²⁷

The fear is well-grounded, as U.S. law now stands. When custody is granted at a divorce, the noncustodial parent's right to custody is not barred, but rather is held in abeyance;¹²⁸ "upon the death of the [parent with custody], his or her right does not descend nor can it be transmitted, and therefore the right of the other spouse to the custody of the child revives or attaches as against third persons."¹²⁹ The right revives automatically. No modification of the original decree is necessary, assuming, of course, that the decree did not permanently terminate the parental rights.¹³⁰

A few recent cases have granted custody to the stepparent following the death of the custodial natural parent.¹³¹ But these cases depended on a successful

125. "As against a third person, a parent is entitled to the custody of a child unless he is unfit for the task or the best interests of the child require that a third person have custody." 24 AM. JUR. 2D *Divorce and Separation* § 806 (1966). This rule prevails whether the controversy between the natural parent and a third person, i.e., the stepparent, arises because the custodial natural parent died or because the custodial natural parent and the stepparent divorced. *Id.* The burden of proving the natural parent's unfitness is on the stepparent who seeks the custody. *Id.* See also *Halpern v. Halpern*, 133 Cal. App. 3d 297, 184 Cal. Rptr. 740 (1982) (right of natural parent to custody upon divorce from stepparent can only be interfered with if custody is seriously detrimental to child and award to non-parent is necessary for child's best interest; visitation also denied to stepfather in face of mother's objection); but see *Gorman v. Gorman*, 400 So. 2d 75 (Fla. Dist. Ct. App. 1981) (stepmother granted custody of 13-year old stepson who did not know she was not his natural mother; natural mother dead, and natural father had abused child; custody in the best interests of child).

126. See, e.g., *Collins v. Gilbreath*, ___ Ind. App. ___, 403 N.E.2d 921 (1980) (court granted natural father custody of three children ten days after suicide of natural mother; stepfather, with whom the children lived, had no grounds for receiving custody; visitation, despite natural father's dissent, granted in the best interests of the children). The court found both men equally fit and capable of providing for the children. The children were "understandably confused and frightened, given the recency of their mother's suicide and the hastily called habeas corpus hearing to determine with whom they would live." *Id.* at 923. The trial court granted visitation because

Gilbreath had loved and cared for the children as a father for two and one-half years. To abruptly end this close relationship and deny him the privilege of ever seeing the girls again would be unfair and traumatic to both *Gilbreath* and the three young girls. The children would in essence lose their second parent in ten days — one by suicide and one by court decree.

Id. at 923. It is interesting that *Gilbreath* had not filed any pleadings or counterpetition in response to the natural father's habeas corpus request, nor did he provide the appellate court with a brief, nor had he ever requested visitation rights! A vigorous dissent contends an unrelated third party has no standing to receive visitation rights in the absence of a judicial finding that the natural parent is unfit. *Id.* at 924.

127. E.g., Note, *Stepparent Custody*, *supra* note 1, at 628.

128. 24 AM. JUR. 2D *Divorce and Separation* § 806 (1966 & Supp. 1983).

129. *Id.*

130. *Id.*; cf. *Gribble v. Gribble*, 583 P.2d 64, 67 n.16 (Utah 1978).

131. E.g., *Gorman v. Gorman*, 400 So. 2d 75 (Fla. Dist. Ct. App. 1978) (stepmother of six children

showing that the natural parent is unfit, and they do not overturn the usual presumption in favor of a natural parent.¹³² If the natural parent does not seek court intervention and the stepparent and stepchildren simply continue living together after the death, the stepparent has no parental rights unless a court grants custodial or guardian status.¹³³

Appointment by the custodial natural parent of the stepparent as testamentary guardian¹³⁴ does not ensure the stepfamily's continued existence. The common law will not permit enforcement of provisions in the deceased natural parent's will that divest the surviving natural parent of the right to custody.¹³⁵ Statutes allowing a testamentary appointment usually provide that the appointment is not effective if there is a surviving natural parent.¹³⁶ Thus, appointment of a stepparent as testamentary guardian will not succeed, even if the noncustodial surviving natural parent does not object; given those circumstances, the court might appoint the stepparent as the stepchild's guardian of the person.¹³⁷

Although stepparents have obtained custody of minor stepchildren when the stepparent and natural parent divorce,¹³⁸ the grant of custody is made because of the child's best interests, not because the stepparent has any natural or legal right to assert.¹³⁹ Custody is granted to the stepparent only because the natural parents

granted custody of youngest, a 13-year old boy, whom she had been caring for since he was a few months old; custody in his best interests, rather than custody with the natural father who had abused him). See generally Annot., 10 A.L.R.4th 767 (1981).

132. In *Perry v. Superior Court*, 108 Cal. App. 3d 480, 166 Cal. Rptr. 583 (1980), the court held that a stepparent may not be granted visitation rights in a divorce proceeding on the ground that the court lacks jurisdiction. Jurisdiction of the superior court in a divorce is limited to those minors who are "children of the marriage." Since the stepchild, who had lived with Perry from the age of nine months until the divorce when the boy was seven, was not Perry's child, he was not a child of the marriage. The superior court lacked jurisdiction over his custody and visitation. Comment, *Perry v. Superior Court: Best Interest Standard Ignored in Deciding Stepparent Visitation*, 5 J. Juv. L. 53 (1981)[hereinafter cited as Comment, *Perry*].

133. MADDOX, *supra* note 1, at 164. Cf. *Re Ewing*, 96 Idaho 424, 529 P.2d 1296 (1974); *In re N.*, 1974 Fam. 40 ("It seems to me clear that the only way an individual who is not one of the natural parents can acquire parental rights is by some formal legal process vesting in that person the so-called parental rights . . .")

134. "The statutes of many states authorize the appointment of guardians of person or estate by will. Such guardians are known as testamentary guardians. Aside from the method of appointment, which is available only where authorized by statute, such guardians have the same duties as other guardians of the person or the estate." CLARK, *supra* note 23, at 245. In England, the appointment may be by will or by deed. See *infra* text accompanying notes 326-333.

135. CLARK, *supra* note 23, at 581.

136. *Id.*

137. "In practice, the testamentary appointment is generally confirmed unless the guardian is unfit for the task." *Id.* If the other natural parent is alive, the testamentary appointment is void. If that natural parent cannot be located, however, or declines to accept custody or responsibility for the children, the stepparent may be appointed as guardian of the person at that point. This is not a testamentary appointment, even though the person appointed by the court coincides with the person (the stepparent) named in the deceased natural parent's will.

138. E.g., *Gorman v. Gorman*, 400 So. 2d 75 (Fla. Dist. Ct. App. 1981). See also Annot., 10 A.L.R.4th 767 (1981).

139. See *Gorman v. Gorman*, 400 So. 2d 75 (Fla. Dist. Ct. App. 1981). But see *Perry v. Superior Court*,

are gravely unfit to retain or receive custody.¹⁴⁰ Some courts have held, however, that they lack power to grant custody to a stepparent, reasoning that the court has jurisdiction in a divorce action to provide for the future care of children of the marriage, and stepchildren, by definition, are not children of the marriage.¹⁴¹

Reliance on the *in loco parentis* doctrine will not enhance the stepparent's position in seeking custody of stepchildren. Although some courts have decided the *in loco parentis* relationship can end only if the stepparent and stepchild choose to end it,¹⁴² most courts find that the relationship ends when the natural parent and stepparent divorce.¹⁴³

5. Visitation Rights

The issue of visitation is, like the issue of surnames, a source of anxiety in a stepfamily. One motive for stepparent adoption is to eliminate the noncustodial natural parent's right to visit,¹⁴⁴ while that parent may oppose adoption solely to preserve the right.¹⁴⁵ Commentators¹⁴⁶ and courts¹⁴⁷ have suggested that visita-

108 Cal. App. 3d 480, 166 Cal. Rptr. 583 (1980) (divorce court has no jurisdiction over stepchildren because they are not "children of the marriage").

140. See generally CLARK, *supra* note 23, at 573-78.

141. See *supra* note 132.

142. "The common law concerning termination of the *in loco parentis* status is that only the surrogate parent or the child is able to terminate the status at will, and the rights, duties, and obligations continue as long as they choose to continue the relationship." *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978). In this case, the trial court held that the stepfather was not entitled, as a matter of law, to a hearing on whether he should be allowed to visit his stepson, since one who cannot assert a custody right cannot assert a right to visitation. The supreme court remanded for a hearing, holding that if the stepfather were found to be *in loco parentis* to the boy, he would then be entitled to argue for visitation. Interestingly, the court held further that the stepfather has no legal duty to pay child support for the boy. It seems the rights of the *in loco parentis* status continue by the will of the child and stepfather, but the duties and obligations can cease, without disturbing the status. The supreme court, recognizing the inconsistency, ordered the lower court to determine whether the right to visitation, if ordered, should be coupled with an obligation to assist in the child's support.

143.

The relationship between stepparent and stepchild arises as a result of the remarriage of the natural parent. Liability for support of stepchildren is therefore collateral to the existence of a valid marriage. Once the marriage is dissolved, be it by divorce, death, or for any other reason whatsoever, the stepparent relationship ceases and with it the obligation of the stepparent to pay support for the stepchild.

Kaiser v. Kaiser, 93 Misc. 2d 36, 38, 402 N.Y.S.2d 171, 173 (Fam. Ct. 1978) (stepmother need not support stepdaughter after death of natural father). *Cf. Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979) (hearing ordered to see if stepmother should get visitation despite having no legal right to custody; strong dissent, saying the right of the natural parent to control who sees the child outweighs the desire of an emotionally attached non-parent to interfere by visiting).

144. *E.g.*, Bissett-Johnson, *supra* note 1, at 336.

145. *Id. But cf. supra* note 49 and case discussed therein.

146. *E.g.*, Williams, *supra* note 1, at 229-30, suggests a form of limited access, either infrequent visits, perhaps once or twice a year, or provision of photographs and information to the nonadopting natural parent; Oppel, *supra* note 1, at 653-58, suggests that visitation is the right of the child, not the parent, and cannot be terminated by adoption unless access is no longer in the child's best interests.

147. *E.g.*, *In re Adoption of Children by F.*, 170 N.J. Super. 419, 406 A.2d 986 (1979) (visitation

tion by the natural parent ought to continue after a stepparent adoption, although it is questionable whether such an order is consistent with "the whole ethos of adoption, which is to create a new relationship between [adoptive] parent and natural child."¹⁴⁸

Visitation is also an issue in the stepparent custody situations described above.¹⁴⁹ While some courts have granted visitation to the stepparent upon divorce from the custodial natural parent, other courts suggest that such grants are *ultra vires*.¹⁵⁰ The same problem with visitation occurs when custody of the stepchild is given to the noncustodial natural parent after the death of the stepparent's spouse.¹⁵¹

Visitation is not an issue when a stepparent who has adopted the stepchild subsequently divorces.¹⁵² The stepparent who has become an adoptive parent is then in the same position as his or her spouse, the natural parent.¹⁵³ The court applies the same criteria — best interests of the child, child's preference, and parental fitness — to decide custody and visitation in this divorce proceeding as the court would apply in a proceeding between two natural parents.¹⁵⁴ The natural parent may have an advantage over the former stepparent, however, because the natural parent has known the child longer, i.e., for the child's entire life,¹⁵⁵ although theoretically this should not be considered by the court.¹⁵⁶

granted to natural father after children's adoption by stepfather, despite objections from stepfather and natural mother; visitation held a right of the children; guardian ad litem appointed to enforce the children's exercise of the right despite the parents' opposition); *Kerr v. McWhannel and McWhannel*, 16 R.F.L. 185 (B.C. Ct. App. 1974) ("I see nothing inconsistent in the child's being adopted by the [natural mother and stepfather], while at the same time the [divorced natural father] retains his rights of access. Adoption affects legal relationships of the child. Custody and access rights can be given in proper cases to persons who have no legal relationship to the child involved.")

148. *Bissett-Johnson*, *supra* note 1, at 336. See also *Stepparent Custody*, *supra* note 1, at 610 n.33; see further *supra* notes 49 and 132, and cases discussed therein.

149. See *supra* section II.C.4.

150. See *Simpson v. Simpson*, 586 S.W.2d 33, 36-39 (Ky. 1978); see also Comment, *Perry*, *supra* note 132, at 64, in which the author argues that the *Perry* decision "makes adoption a requirement for stepparents if they want custody and visitation rights to attach."

151. In *Collins v. Gilbreath*, ___, Ind. App. ___, 403 N.E.2d 921 (1980), discussed *supra* note 126, the court held that the stepfather could visit the stepchildren, whose custody had reverted to the natural father following the suicide of the natural mother, because these visits would be in the best interests of the children.

In so holding we do not intend to diminish the rights of a natural parent concerning his or her minor children. Nor do we intend to open the door and permit the granting of visitation rights to a myriad of unrelated persons, including grandparents, who happen to feel affection for a child. Our decision is explicitly limited to the type of factual situation presented by this case, i.e., where the party seeking visitation has acted in a custodial and parental capacity.

Id. at 923-24 (citing *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979)).

152. See generally CLARK, *supra* note 23, at 658-59; Annot., 1 A.L.R.4TH 1270 (1980).

153. See generally *Halpern v. Halpern*, 133 Cal. App. 3d 297, 303, 184 Cal. Rptr. 740, 743 (1982) (stepfather denied visitation because he was a "non-parent").

154. See generally CLARK, *supra* note 23 at 584-91.

155. The natural parent has known the child the child's entire life. Because of this long-term relationship, custody to the former natural parent is less likely to be as disruptive to the child. See further Note, *Stepparent Custody*, *supra* note 1, at 626.

156. The adoption technically eliminates the child's former parental relationship with the adoptive

For the U.S. stepparent who has not adopted the stepchild, divorce from the custodial natural parent may end the steprelationship entirely.¹⁵⁷ Strong case law states that the obligation to support terminates with this divorce.¹⁵⁸ The stepparent does not have a natural parent's right to visitation privileges.¹⁵⁹ Courts will grant visitation to a noncustodial natural parent over the objections of the custodial natural parent,¹⁶⁰ but they seldom grant access to a "non-parent" if the custodial parent objects.¹⁶¹ The stepparent is therefore unlikely to receive visitation privileges if the custodial natural parent does not agree.

Even obtaining standing to litigate the claim is difficult. The Utah Supreme Court, in *Gribble v. Gribble*, reversed the lower court's denial of a hearing on visitation for a stepfather being divorced by his stepchild's natural mother.¹⁶² The court had denied the hearing as a matter of law, since the statute in question referred to the visitation rights of "parents, grandparents and other relatives."¹⁶³ "For the appellant [stepfather] to assert visitation rights, he must, therefore, stand in the relationship of parent, grandparent, or other relative to this child, keeping in mind the paramount concern of the child's welfare."¹⁶⁴ The lower

parents. Since this adoptive relationship supersedes the extinguished natural relationship, *see id.* at 605 n. 10-11, the adoptive parents, regardless of their former status vis-à-vis the adopted child, begin their new legal relationship with the child at the same moment in time. Thus, theoretically, the stepparent and the natural parent both became related to the child at the same instant; both have legally "known" the child for the same amount of time. *See generally* Schwartz v. Schwartz, 170 Ind. App. 241, 351 N.E.2d 900 (1976) (custody granted to the former natural father; visitation to the former stepmother after her stepparent adoption and their subsequent divorce).

157. *E.g.*, Halpern v. Halpern, 133 Cal. App. 3d 297, 184 Cal. Rptr. 740 (1982); *but see* Gribble v. Gribble, 583 P.2d 64 (Utah 1978), discussed *supra* note 142, which said in dicta that the relationship ends only by the will of the surrogate parent or the child, and a divorce neither sought nor desired by the stepparent does not terminate the relationship.

158. *E.g.*, Gribble v. Gribble, 583 P.2d 64 (Utah 1978) (although the *in loco parentis* relationship may not end at divorce, the support obligation of a stepparent does); Kaiser v. Kaiser, 93 Misc. 2d 36, 406 N.Y.S.2d 171 (Fam. Ct. 1978) (obligation to support ends when marriage ends whether by death or divorce).

159. *But see* Gribble, 583 P.2d at 67-68, in which the court was willing to consider visitation a privilege that accompanies *in loco parentis* status. "It is our belief that a stepfather may not be denied the right to visit his stepchildren merely because of his lack of a blood relationship to them. . . . Rejection of visitation privileges cannot be grounded in the mere status as a stepparent." *Id.* at 67-68 (quoting Spells v. Spells, 250 Pa. Super. 168, 378 A.2d 879 (1977)).

In other cases, the right to visitation has been granted because of the needs of the child, *Looper v. McManus*, 581 P.2d 487 (Okla. Ct. App. 1978) (stepmother granted visitation after divorce, although custody of stepson had returned to the natural mother, because the two-year old boy's mental health required continued contact); or because the court has held that the right belongs to the children, *id.* *See also In re* Adoption of Children of F., 170 N.J. Super. 419, 406 A.2d 986 (1979) (visitation considered the right of the children, so they could visit natural father even after their adoption by stepfather; guardian ad litem appointed to enforce the children's right over the objections of the parents).

160. *Collins v. Gilbreath*, — Ind. App. —, 403 N.E.2d 921 (1980).

161. *Id.* However, "[t]he mere protest of a parent who asserts that visitation by another person would somehow harm his or her child should not be enough to deny visitation in all cases." *Id.* at 923. *See* Halpern v. Halpern, 133 Cal. App. 3d 297, 312-13, 184 Cal. Rptr. 740, 748 (1982).

162. 583 P.2d 64 (Utah 1978).

163. *Id.* at 66.

164. *Id.*

court, interpreting this language literally, had held that the stepfather had no right to visitation and thus no right to a hearing on the issue.¹⁶⁵ The supreme court acknowledged that a stepparent relationship confers no rights and imposes no obligations on the parties to it;¹⁶⁶ however, an *in loco parentis* relationship might.¹⁶⁷ "If we are to find that the status of loco parentis confers the same rights upon a stepparent as those enjoyed by a natural parent, then *a fortiori*, the rights of the stepparent cannot be terminated without an opportunity to be heard on the matter."¹⁶⁸ The case was remanded to determine if the stepparent had established an *in loco parentis* status.¹⁶⁹

Other courts have ordered stepparent visitation or at least a hearing on the issue¹⁷⁰ by holding that the statute in question does not explicitly prohibit such an order and that visitation in the case at bar is in the best interests of the stepchild.¹⁷¹

In so holding we do not intend to diminish the rights of the natural parent concerning his or her minor children. Nor do we intend to open the door and permit the granting of visitation rights to a myriad of unrelated third persons, including grandparents, who happen to feel affection for a child. Our decision is explicitly limited to the type of factual situation presented by this case, *i.e.*, where the party seeking visitation has acted in a custodial and parental capacity.¹⁷²

The *Collins* court held that the stepfather was entitled to a hearing, and visitation was granted, in the best interests of the children.¹⁷³

Visitation can be an issue when a natural parent and a stepparent apply to adopt the stepchildren, since adoption terminates the visitation rights, as well as all the other parental rights and duties, of the nonadopting natural parent.¹⁷⁴ Some courts, while granting the adoption to the natural and stepparents, have expressed a wish to grant continued visitation to the nonadopting natural parent, either with the voluntary cooperation of the adoptive parents¹⁷⁵ or as a

165. *Id.* at 65.

166. *Id.* at 66.

167. *Id.* at 67.

168. *Id.*

169. *Id.* at 68.

170. *E.g.*, *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978) (hearing ordered): *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979) (visitation granted in the best interests of the child).

171. *E.g.*, *Collins v. Gilbreath*, Ind. App., 403 N.E.2d 921 (1980) (visitation granted to stepfather).

172. *Id.* at 923-24.

173. *Id.* at 924.

174. Note, *Stepparent Custody*, *supra* note 1, at 605, 610 n.33. See generally CLARK, *supra* note 23, at 659-62; see *supra* note 41 (natural grandparents' rights terminated as well).

175. See *Oppel*, *supra* note 1, at 653, discussing decisions by the Nova Scotia County Court Judge O'Hearn, who has never failed to waive the natural parent's consent and grant the stepparent adoption. In more than fourteen years on the bench, Judge O'Hearn has always considered adoption the best resolution; however, he has frequently expressed a wish that the parents would permit the nonadopting natural parent access to the child. *Id.* at 643, 653-54. See also *infra* note 371.

condition of the adoption decree.¹⁷⁶ Professor Bissett-Johnson reports that courts have denied adoptions that otherwise would have been granted, because of their inability to include visitation for the natural parent in the adoption decree.¹⁷⁷

In only one case has a U.S. court granted a stepparent adoption while allowing visitation rights to the natural father.¹⁷⁸ The court concluded that it was in the best interests of the stepdaughters to grant them an independent right to visit their natural father and appointed a guardian ad litem to enforce their right.¹⁷⁹ This unusual case has not been followed in any other jurisdiction and apparently does not establish a precedential change in the general rule against granting conditional adoptions.¹⁸⁰

176. *In re Adoption of Children by F.*, 170 N.J. Super. 419, 406 A.2d 986 (1979); Recent Developments, *Rights of Natural Father After Adoption of Children by Stepfather*, 4 AM. J. TRIAL ADVOC. 199 (1980). See also Williams, *supra* note 1, at 226-27.

177. Bissett-Johnson, *supra* note 1, at 344.

178. *In re Adoption of Children by F.*, 170 N.J. Super. 419, 406 A.2d 989 (1979). The children were nine and eleven years old and had not lived with or seen their natural father since the divorce, six years prior to the adoption request. During the six years, the natural mother had lived in Minnesota and New Jersey, and the natural father had remained in Alaska. The court apparently blamed the natural mother for hindering the natural father's visitations; the court noted she had moved twice and had not given him the new addresses. Because a court had twice conditioned support payments on the exercise of his visitation rights, the natural father had not made any support payments. When the adoption request was filed, the natural father consented conditionally, but reserved the right to visit his daughters after the adoption if they so desired.

179. *Id.* at 421, 406 A.2d at 989.

Based on the testimony of the parties, this court finds that the best interests of the children will be promoted by granting unto the two children an independent privilege to visit, at their option, and to maintain contact with their natural father. Future litigation will be avoided. Accordingly, a *guardian ad litem* will be appointed by this court whom the children may contact to enforce this right, should their natural mother or adoptive father attempt in the future to frustrate their attempt to maintain a relationship with their natural father. *In re Adoption of Children by F.*, 170 N.J. Super. 419, 421, 406 A.2d 986, 989 (1979).

180. The court cited cases from New York to support its proposition that visitation orders and adoption orders are *not* incompatible; yet the cases cited do not stand for that proposition. Indeed, one of the cases, *In re Gerald G.G.*, 61 A.D.2d 521, 403 N.Y.S.2d 57 (1978), is cited for declaring that "a best interest of the child standard would apply to the grant or denial of visitation rights to a natural parent subsequent to adoption." 170 N.J. Super. at 421, 405 A.2d at 989. But the *Gerald G.G.* case actually holds that an adoption precludes the granting of visitation rights to the natural father. The New York court had denied the adoption precisely because of reluctance to sever the natural parent's relationship. *In re Gerald G.G.*, 61 A.D.2d 521, 525, 403 N.Y.S.2d 57, 61 (1978). The other cases cited in support by the New Jersey court deal with the rights of a natural father in blocking the adoption of an illegitimate child. Although the cases state that the court does have jurisdiction to decide visitation after adoption, neither case actually granted visitation.

In addition to its questionable use of authority, the New Jersey case creates a remedy of dubious value. Granting the girls an independent right, which will be enforced by a guardian ad litem despite the opposition of the natural mother and adoptive father, creates a potentially divisive interference with the rights of the parents to determine their daughters' associations. If the girls' interests are best served by retaining a legal relationship with their natural father, the adoption order was inappropriate.

6. Summary of the Current Legal Position of U.S. Stepfamilies

A stepparent acquires no parental rights or duties by virtue of that status alone. Even if an *in loco parentis* relationship is found to exist, the finding confers limited duties and more limited rights on the parties, and it remains unsettled when and how the *in loco parentis* relationship terminates. There is little likelihood that an unadopted stepchild can bear the same surname as the rest of the stepfamily. Issues of visitation and custody are generally resolved against the stepparent. As the law in the United States now stands, the stepparent who cannot or does not want to adopt the stepchildren is in a tenuous and anxious position. Only adoption is available to resolve the problems of rights, duties, surnames, succession, termination, visitation, and custody for the stepparent, yet adoption is a harsh resolution for the nonadoptive natural parent who desires a continued relationship with his or her natural child. In England, however, the effects of a law drafted intentionally to discourage stepparent adoption, the Children Act 1975, and certain other laws combine fortuitously to enhance the English stepparent's legal position.

III. THE ENGLISH APPROACH TO STEPPARENT ADOPTION

A. Background

In 1969 the English Home Department created the Departmental Committee on the Adoption of Children (the Houghton Committee) to examine adoption law, policy, and procedure, and to recommend desirable changes.¹⁸¹ The committee published its recommendations in 1972,¹⁸² and the recommendations were enacted in large measure into the 1975 revision of the adoption laws,¹⁸³ the Children Act 1975.¹⁸⁴

181. Statement of purpose, Houghton Report, *supra* note 15, at ¶ 1. The Home Department is a cabinet-level department, headed by a minister who sits on the cabinet, and a secretary who administers the daily operations. This department is responsible for various functions, including advising the government on family and domestic legislation. See generally P. JAMES, INTRODUCTION TO ENGLISH LAW 132-37 (1979).

The Houghton Committee is occasionally referred to as the Stockdale Committee, after its second chair Judge F.A. Stockdale. The committee comprised members of Parliament, social workers, doctors, academics, and judges. On the basis of previous research projects sponsored by the government and the collected knowledge of the members, the committee produced a working paper in 1970 and then solicited comments both in writing and from witnesses who appeared at forty-eight public hearings. In addition, the committee commissioned a series of studies and surveys. The committee's work culminated in submission of the Houghton Report to the Home Secretary, who in turn presented it to the Prime Minister for submission to Parliament. See generally Houghton Report, *supra* note 15, at ¶¶ 1-8; Bromley, *The New English Law of Adoption*, in *THE CHILD AND THE COURTS* 359 (I. Baxter & M. Eberts eds. 1978).

182. Houghton Report, *supra* note 15.

183. See *supra* note 16; see also STONE, *supra* note 33, at 225-30, for an overview of adoption laws since the beginning of the century in England.

184. Children Act 1975, ch. 72. This act, consolidated with other laws on adoption into the Adoption

Of major concern to the Houghton Committee was the dramatic increase in adoptions of legitimate children by their own relatives, especially by their natural and stepparents.¹⁸⁵ Defining adoption as "the complete severance of the legal relationship between parents and child and the establishment of a new one between the child and his adoptive parents,"¹⁸⁶ the committee noted that an adoption by a natural and stepparent "severs in law, but not in fact, an existing relationship of blood or of affinity, and creates an adoptive relationship in place of the natural one which in fact, though not in law, continues unchanged."¹⁸⁷ The main effect of such an adoption is the legal extinction of a legitimate child's relationship with one-half of his or her own family, and the concomitant extinguishing of the nonadopting natural parent's rights,¹⁸⁸ an effect the committee felt was "inappropriate and could be damaging."¹⁸⁹

Since stepparent adoption changes little in the stepfamily — the natural parent and stepparent are already caring for the child and will continue to do so whether or not the stepparent adopts¹⁹⁰ — the committee suggested that stepparent adoptions be sharply curtailed.¹⁹¹ The suggestion mirrored the serious misgivings of the English judiciary concerning the use of adoption laws to give stepparents parental rights, misgivings expressed in various stepparent adoption cases.¹⁹²

Act 1976, ch. 36, is not yet wholly in effect. English legislation can be brought into operation piece-by-piece, as the enabling appropriations are approved. The provisions of the Children Act 1975 that establish a national service for matching adoptees with adoptive families have not yet been activated, for lack of funds. Bromley, *supra* note 181, at 364. The consolidated legislation, the Adoption Act 1976, was not yet in operation six years after enactment. Samuels, *Adoption: The Social, Professional and Legal Trends*, 12 FAM. LAW 186, 188 (1982). However, the section discussed in this article, sec. 10(3) of the Children Act 1976, is presently in effect, having received the Royal Assent on January 1, 1976. STONE, *supra* note 33, at 227.

185. The Houghton Committee relied on a survey, commissioned by the Home Department, for figures on the incidence of adoptions by natural and stepparents of their own children. Stating that in 1966, 29 percent of all adoptions in Great Britain (7,140 of 24,832) were by parents, generally a natural and stepparent applying jointly, the committee reported that the number of such adoptions had increased since then, and that this trend was likely to continue. Houghton Report, *supra* note 15, at ¶ 97. See also *id.* at ¶ 19 and Appendix B, Table 3, for figures.

186. *Id.* at ¶ 14.

187. *Id.* at ¶ 97.

188. See Bissett-Johnson, *supra* note 1, at 336; Hopkins & Benson, *supra* note 1, at 339.

189. Houghton Report, *supra* note 15, at ¶ 105.

190. *Id.* at ¶ 97. See also Bissett-Johnson, *supra* note 1, at 336. Certainly adoption changes the legal relationship of the child and the adopting parents. However, these writers are comparing the adoption of a legitimate child by its custodial natural parent and stepparent, with the adoption of an orphan or illegitimate child by strangers, the so-called "conventional" adoption. See *supra* notes 54-55; *In re S. (Infants) (Adoption by parent)*, 1977 Fam. 173, 178.

191. In the 1970 working paper published to provoke public comment and input, the Houghton Committee suggested that stepparent adoptions of legitimate children be banned entirely. Overwhelming adverse public response convinced the committee to modify its position. See Hopkins & Benson, *supra* note 1, at 339.

192. *E.g., Re D.*, 1973 Fam. 209; *Re M.*, 124 NEW. L.J. 566 (1974). See Bissett-Johnson, *supra* note 1, at 338.

The committee instead recommended that guardianship laws should be extended to stepparents.¹⁹³ Allowing stepparents to become the legal guardians of their spouse's children would confer rights¹⁹⁴ and impose duties¹⁹⁵ on the stepparent without extinguishing the ties of the noncustodial natural parent (and grandparents and other relatives).¹⁹⁶ Furthermore, this arrangement would be open to periodic review.¹⁹⁷

The recommendation became section 10(3) of the Children Act 1975.¹⁹⁸ This section requires a court to dismiss the adoption application filed by a natural parent and stepparent¹⁹⁹ if the court considers the matter to be more appropri-

193. Houghton Report, *supra* note 15, Recommendation 20. This recommendation covered other relatives, including adoptions by a grandparent, sister, brother, aunt, uncle, or natural father, although the report stated that only five percent of the adoptions in 1966 were by such relatives. *Id.* at ch. 5.

194. A person has parental rights only if they have been conferred by some legal process. See CRETNEY, *supra* note 28, at 440-43. Parental duties are also imposed by statute. *Id.* at 436. While certain duties have been imposed by statute on English stepparents, *e.g.*, the duty to support a child of the family, a stepparent has no parental rights by virtue of that status. *In re N.*, 1974 Fam. 40. The guardianship that the Houghton Committee proposed for stepparents would have conferred all those parental rights and duties generally conferred on natural parents, including: the right to physical possession (custody); the right to determine the child's education; the right to discipline; the right to choose a religion; the right to receive the child's domestic services; the right to represent the child in legal proceedings; the right to determine medical treatment and consent thereto; the right to access; the right to consent to the child's marriage; and the duty to maintain. The committee recommended certain other rights, which were subsequently deleted by Parliament, namely the right to control the child's property (guardian of the estate powers); the right to consent to the child's adoption; the right to change the child's surname; and the right to effect the child's emigration from the United Kingdom. CRETNEY, *supra* note 28, at 437. See generally *id.* at 427-44; Bissett-Johnson, *supra* note 1, at 345.

The parental rights of a natural parent include also the right to transmit the parental rights by appointing a testamentary guardian. See *supra* text accompanying notes 134-136. This right, however, is not included in the rights conferred on a stepparent by custodianship, nor is the right to change the child's religion. CRETNEY, *supra* note 28, at 438, 525.

195. Duties that may be required of a legal guardian include the duty to maintain. CRETNEY, *supra* note 28, at 443. See further section III.C.1.

196. Houghton Report, *supra* note 15, at ¶ 105.

Although the terms "custody," "custodianship," and "guardianship" are often used interchangeably, they have different meanings in the common law, and in the Houghton Report. Custody, in its narrowest sense, means the physical care and control of the child. In its broadest sense, it is synonymous with guardianship. See CRETNEY, *supra* note 28, at 430. The Houghton Committee, wishing to confer the broadest possible range of parental rights of a natural or adoptive parent, discussed granting guardianships to stepparents and other relatives in lieu of adoptions. See Houghton Report, *supra* note 15, at ¶¶ 106, 112, 114. When the committee's recommendations were enacted into the Children Act 1975, the terminology was changed to "custodianship." Since a guardian traditionally has certain powers — to deal with the ward's property and to consent to the ward's adoption — that Parliament declined to confer on nonadopting stepparents and other relatives, Parliament changed the term and diminished the powers. Consequently, in the application of the Children Act discussed in this Comment, stepparents can receive custodianships, which give them joint legal custody of their stepchildren and confer all the parental duties and rights of a natural parent, except for those rights described above as withheld. See generally Bissett-Johnson, *supra* note 1, at 338; CRETNEY, *supra* note 28, at 437-40, 525-30.

197. Bissett-Johnson, *supra* note 1, at 338; CRETNEY, *supra* note 28, at ¶ 131.

198. Children Act 1975, ch. 72.

199.

Adoption by a step-father alone extinguishes his wife's rights and responsibilities. This is why applications have to be made jointly in these cases. Some mothers have objected to having to

ately dealt with under section 42 of the Matrimonial Causes Act 1973.²⁰⁰ Because of the requirement, most stepparent adoption applications are dismissed when first brought in any court having jurisdiction over children.²⁰¹ These courts then refer the application to the divorce court that initially issued custody orders to the stepparent's spouse.²⁰² The divorce court can modify the custody arrangement and give the stepparent joint custody with the custodial natural parent.²⁰³

The Children Act uses the phrase "better dealt with"²⁰⁴ to describe matters that should be dismissed and referred to a divorce court. In applying the statute, the court must first determine if the matter can be "dealt with" by a divorce court.²⁰⁵ No English divorce court has jurisdiction if the stepchild has never been the subject of a divorce court order, either because the child's parents were never married or because the divorce was granted by a foreign court.²⁰⁶ If the child has been the subject of an English order but the order is now vacated, e.g., because the other natural parent has died,²⁰⁷ the divorce court has no jurisdiction.²⁰⁸ In other words, the divorce court cannot deal with the matter.

adopt their own children in order to confer rights and responsibilities on the stepfather. In future a mother will not have to do so because the step-father will be able to apply for guardianship. A guardianship order will not extinguish the mother's legal rights and obligations but will result in her sharing them with her husband.

Houghton Report, *supra* note 15, at ¶ 110.

200. Matrimonial Causes Act 1973, ch. 18. This law deals with the dissolution of marriage. Section 42 empowers the court to make any order regarding a child of the parties, or a child of the family, *see infra* note 283 for definition, that the court deems necessary for the welfare of the child. A custody order can be made at any time, during or after the divorce proceedings. In this connection, the section is used to modify the original custody order by creating joint custody, shared by the stepparent and the natural parent who already has custody.

201. Applications for adoption may be brought, depending on the amount of money the applicant can afford to pay in fees, to High Court, county court, or magistrates' court. R.M. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 256 n.1 (6th ed. 1972). *See also*, BEVAN & PARRY, *supra* note 78, at ¶ 277. Even if the family division court can hear the stepparent's application, because the child has never been the subject of another court's order, the Children Act still discourages the granting of a stepparent adoption. Section 37 of the act requires that the court consider whether a simple custodianship is more beneficial for the child. If so, the adoption application must be treated as if it were a custodianship application. CRETNEY, *supra* note 28, at 529.

203. Bissett-Johnson, *supra* note 1, at 338.

204. Children Act 1975, ch. 72, sec. 10(3).

205. The divorce court retains jurisdiction over the custody of any child who was the subject of a decree made by that court. Matrimonial Causes Act 1973, ch. 18, sec. 42; CRETNEY, *supra* note 28, at 469. The court may make whatever order it sees fit for the custody and education of any minor child of the family. *Id.* Because the stepparent may be compelled to seek a remedy in the court that granted his or her spouse's earlier divorce, the Matrimonial Causes Rules 1977, r.92(3), enables the stepparent to apply for custody without first receiving leave to intervene as a third party. BEVAN & PARRY, *supra* note 78, at ¶ 260, n.2.

206. *Id.* at ¶ 260. *See supra* note 202.

207. *Id.* If the noncustodial natural parent has died, the stepparent can apply to High Court, county court, or a magistrates' court for the adoption. However, even in these circumstances, the court is directed to determine whether the matter could be better handled by naming the stepparent legal guardian, with parental rights fully equal to the surviving natural parent, rather than severing the child's relationship with the deceased natural parent's relatives. CRETNEY, *supra* note 28, at 541-42.

208. Thus, the matter must remain in the High Court, county court, or magistrates' court, where it can be dismissed outright, granted with a waiver of the natural parent's consent, granted with the consent of both natural parents, or treated as a request for guardianship. *See id.* at 539-42.

If the adoption court determines that a divorce court *can* hear the matter, the court must then consider whether the divorce court *should* hear it, that is, whether the matter is better dealt with in divorce court than in adoption court.²⁰⁹ The adoption court will grant a stepparent adoption only "if adoption will safeguard and promote the welfare of the child better than the existing arrangements and better than any other arrangements that could be made under the divorce jurisdiction (such as an order giving joint custody to the mother and stepfather)."²¹⁰ Even if the nonadopting natural parent has consented to the adoption, the court cannot grant the request unless the adoption would bring greater benefit to the child than maintenance of the status quo or revision of the custody order would bring.²¹¹ The view of the courts is that a child "being brought up in the home of one of his natural parents and a stepparent . . . already has the material advantages that adoption can provide, so that the advantages of adoption have to be found, if at all, in the intangible results which flow from it."²¹²

B. *Motivations for Stepparent Adoptions*

Although the "emphasis now clearly lies against the making of adoption orders in favour of a step-parent,"²¹³ there are cases in which the "intangible results" indicate that adoption is the better course. A successful stepparent adoption application is likely only when the child is very young at the time of the application; has lived very little or not at all with the nonadopting natural parent; does not presently have a significant relationship or contact with that parent; and is unlikely to come into contact in the future with that parent and with his or her relatives.²¹⁴ By contrast, the unsuccessful stepparent adoption generally involves

209. The act does not provide much guidance for the court in deciding which course of action is preferable. Section 3 suggests:

In reaching any decision relating to the adoption of a child, a court or adoption agency shall have regard for all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood; and shall as far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.

Children Act 1975, ch. 72, sec. 3. This section deviates from earlier English law by deliberately omitting the standard phrase used in laws since 1925, "the court shall regard the welfare of the child as the first and paramount consideration." [emphasis added] The deliberate omission seems to leave room for consideration of the rights of the adults involved as well, although the child's welfare is primary. See generally Bromley, *supra* note 181, at 361. See further *In re S. (Infants) (Adoption by parents)*, 1977 Fam. 173, discussed *infra* notes 216-27 and accompanying text, for a judicial interpretation of the phrase "better dealt with."

210. CRETNEY, *supra* note 28, at 539-40, discussing the *In re S.* test.

211. See *In re S.*, 1977 Fam. at 177. "It is not, therefore, sufficient that adoption would be beneficial to the child; it has to be shown that it will be better than the alternatives." CRETNEY, *supra* note 28, at 540.

212. CRETNEY, *supra* note 28, at 540, (paraphrasing *In re S.*, 3 All E.R. at 675).

213. CRETNEY, *supra* note 28, at 540.

214. Hopkins & Benson, *supra* note 1, at 341 (paraphrasing Lord Ormrod's opinion in *In re S.*); see generally *In re S. (Infants) (Adoption by parents)*, 1977 Fam. 173.

a legitimate child who has lived with the nonadopting natural parent; has even a minimal relationship with that parent; will be remaining in the same physical environment whether the stepparent adoption is granted or not; and, as a member of the stepfamily, already has all the material advantages that adoption would bring.²¹⁵

The leading case of *In re S.*²¹⁶ illustrates these factors, in a dismissal of a stepparent adoption application. The divorced mother of three boys, ages six to eleven, and her husband of three months applied for adoption orders.²¹⁷ Her previous marriage had ended two-and-a-half years earlier. The mother had received custody, and the natural father regular visitation privileges (or access, as the English call it) and a weekly support requirement. Although he lived only a few miles away, the father rarely exercised his access rights, seeing the boys once in the summer of 1975 and not requesting another visit until March 1976.²¹⁸

In March 1976, the mother married a man whom she had been dating for two years. "It was said that the relationship [between the stepfather and the three boys] was a close one; they were pleased to accept him as a father and he, as the [lower court] judge put it, 'regards them as his sons.'"²¹⁹ Although the natural father consented to the adoption, the lower court dismissed the application in accord with section 10(3) of the Children Act 1975.²²⁰

The applicants appealed, saying that the adoption would be in the children's best interest, that the natural father and the boys had consented, and that the natural father had no feelings for the boys, not having seen them or supported them for over a year.²²¹ In addition, they contended, the judge had erred in reasoning that it would be advantageous for the boys to retain a legal link to their natural father, so that they could someday re-establish a relationship with him.²²² The Court of Appeal dismissed the appeal²²³ and stated:

215. Hopkins & Benson, *supra* note 1, at 341.

216. *In re S.* (Infants) (Adoption by parents), 1977 Fam. 173.

217. *Id.* at 173.

218. *Id.* at 175.

219. *Id.*

220. *Id.* at 174.

221. *Id.* at 175.

222. *Id.* at 174.

223. One of the points on appeal was that section 10(3) did not apply in this case since the original county court hearing had occurred five months before the effective date of section 10(3), *see supra* note 184. In addition, the natural parents had been divorced in Edinburgh, Scotland, and the section was applicable only to divorces granted in England and Wales. (The legislation subsequently was extended to cover Scotland as well.) The lower court judge, while acknowledging that he was not bound by section 10(3), nonetheless applied the philosophy behind it in reaching his decision. The Court of Appeal held that this was within his discretion and upheld his interpretation of the section. *Id.* at 177-78.

Because no English divorce court had jurisdiction in this case, the county court was able to entertain the adoption application. Having determined that adoption was not appropriate, the county court could and did make a joint custody order in favor of the natural mother and the stepfather. The couple appealed the county court's refusal to grant the adoption. *Id.*

[T]he advantages of adoption [in this kind of case] are vague and uncertain. It was suggested that the children would feel more secure if they were adopted, and wanted to "belong" to [the stepfather]. They had said they wanted to be adopted, and, like so many children, wanted to be known by the same surname as their mother and stepfather. The judge rightly took into account, but largely discounted, the children's views because they were too young to be able to understand the true effects of adoption. He did not think that adoption would increase their sense of security or make them feel more "integrated" into the new family unit.²²⁴

The Court of Appeal therefore upheld the lower court's denial of the adoption, leaving the stepfather as joint custodian of the boys and the natural father still linked legally to his sons.²²⁵ Warning the lower courts to investigate this kind of case with extreme care,²²⁶ the Court of Appeal added, "Sometimes, it is the step-parent who feels the need to be integrated into the family and who may be helped by an adoption order. He or she, after all, is always the late-comer."²²⁷

The question the court must ask is whether and to what extent the adoption will safeguard and promote the welfare of the child.²²⁸ The court must compare the child's position after adoption with the child's position under the existing arrangements and under a joint custody arrangement, while bearing in mind that the situation at bar is the reverse of the conventional adoption.²²⁹ "In the normal class of adoption where the adopters are strangers and the child is a small baby, and usually illegitimate, the answer . . . , once the adopters are shown to be suitable parents, is so obvious that it is taken for granted and the question scarcely even asked."²³⁰ But in the case of a stepparent adoption, the adoption must do more than safeguard and promote the child's welfare; it must do so *better* than any other possible arrangement, or it must be denied.

A recent case, *In re D. (Minors)*,²³¹ illustrates the rare successful adoption

224. *Id.* at 178.

225. *Id.*

226. *Id.* at 178-79. Because a court must now choose between granting an adoption, maintaining the status quo, or awarding joint custody, considerably more investigation is required in these cases than in a conventional adoption, where a satisfactory report from the guardian ad litem is usually sufficient. The court suggested that judges hear evidence from the other natural parent, even if he or she has consented, and that a detailed examination of the proposed adopters' motives be made, perhaps by having the guardian ad litem conduct a cross-examination in court. The Court of Appeal also charged guardians ad litem with the responsibility of delineating the disadvantages as well as the advantages of the proposed adoption. *Id.*

227. *Id.* at 179.

228. *Id.* at 177.

229. *Id.*

230. *Id.*

231. *In re D. (Minors) (Adoption by Step-parent)*, 2 F.L.R. 102 (Ct. App. 1980) Appeal heard on June 12, 1980, by the Court of Appeal, from a judgment by Watford County Court on April 14, 1980. The case is available in the United States on LEXIS, Enggen library, Cases file. The court refers to the parents only as the D. parents and to the children as M. and S.

application of a natural parent and stepparent. The Court of Appeal reversed the lower court and granted the application to Mr. and Mrs. Dyer. Mrs. Dyer had had custody of Michelle, age 13, and Simone, age 11, since her divorce in 1973. Sporadic contact with the natural father continued until Christmas 1977, when Michelle refused further visitation; Simone ended her contact with him in September 1978, although he continued to send the weekly support money. Mr. and Mrs. Dyer married in 1976²³² and, at the time of the adoption request, wanted to emigrate to Australia. In view of the proposed emigration, the adults felt it desirable for Mr. Dyer to adopt the girls. Despite the consent of the natural father and of the two girls, the lower court refused to grant the adoption, seeing no advantage to adoption over a change to joint custody. The court added that since the girls clearly remembered their natural father, an adoption would be a futile attempt to "rewrite history."²³³ The adoption, said the lower court, was more for Mr. Dyer's benefit, to enhance his sense of paternal authority.²³⁴

In overturning the lower court, the Court of Appeal described four factors that distinguished the case and supported the granting of the adoption. First, the girls' surname had been changed legally to Dyer in September 1976, with the consent of the natural father.²³⁵ Second, the girls on their own initiative had begun calling Mr. Dyer "Dad" and their natural father "Uncle Jim".²³⁶ Third, the court found that they were old enough to understand the meaning and implications of adoption, that they were freely consenting, and that they greatly desired the adoption, to unite the family and give Mr. Dyer a legal standing.²³⁷ The court noted finally that the family intended to move to Australia and that the girls had had, and would have, no contact with the natural paternal grandparents or other paternal relatives.²³⁸

232. Mr. Dyer had been married previously also, and the new family unit included Mr. Dyer's children, ages 10 and 13, from the earlier marriage. Mr. Dyer had had custody of his children since his divorce in 1973, but their natural mother had not seen or contacted her children since the divorce, and her present whereabouts were unknown. Although the Dyers did not feel it was necessary for the current Mrs. Dyer to adopt her stepchildren, the lower court judge and the guardian ad litem were concerned that the adoption of only two of the four children in the family would disturb the balance of the family unit. The Dyers, saying that the natural mother had disappeared completely, felt that the second adoption was unnecessary. The Court of Appeal deferred to the Dyers' assessment on this point. *Id.*

233. *Id.* at 11 (LEXIS format).

234. *Id.*

235. Mrs. Dyer's original custody papers had been issued by a magistrates' court, rather than by a divorce court, under the magistrates' court's jurisdiction over domestic separations. Since the children thus were not subjects of an order issued under the Matrimonial Causes Act 1973, no restriction barred them from changing their surname. A restriction does bar the custodial parent who received custody in or following a divorce under the Matrimonial Causes Act 1973. (It is thus rare for the stepchildren in a stepparent adoption case to bear their stepparent's surname already.) See Bissett-Johnson, *supra* note 1, at 348.

236. *In re D.*, at 4 and 8 (LEXIS format).

237. *Id.* at 8 (LEXIS format).

238. *Id.*

Lord Justice Ormrod held that these factors distinguished the case from other stepparent adoption cases.²³⁹ Noting that the natural father had dropped out of the girls' lives both physically and psychologically, the Lord Justice stated: "It is reasonable to infer that the children see themselves as members of the Dyer family to a much, much greater extent than children of divorced parents normally do."²⁴⁰ Finding that adoption would clarify the family's legal position in Australia, the court held that for this family, adoption was more beneficial than a joint custody arrangement.²⁴¹ That the girls remembered their natural father, a fact the lower court judge had found critical, was not "in itself a reason for not making an adoption order"²⁴² when the other factors weighed so heavily in favor of adoption.

In comparing Lord Justice Ormrod's application of the factors to the successful *Dyer* application and the unsuccessful *S.* application,²⁴³ the crucial factor is the likelihood of future contact between the children and the nonadopting natural parent. Both the *Dyer* girls and the *S.* boys remembered their natural fathers. Both sets of children had consented to the adoptions, although the *Dyer* judge accepted the consent and the *S.* judge rejected it.²⁴⁴ The *S.* boys ranged in age from three to eight at the time of their parents' divorce; the *Dyer* girls were three and six at their parents' divorce. In both cases, contact with the nonadopting natural parent had ceased, although the party initiating the cessation differed: the children in the *Dyer* family, the adults in the *S.* family.²⁴⁵

The two major differences between the cases are the length of time the mother had been remarried — three months for Mrs. *S.*, four years for Mrs. *Dyer* — and the likelihood that the children would come into contact with the natural father — highly probable for the *S.* boys, who lived a few miles away, highly improbable for the *Dyer* girls, who were moving to Australia. One can infer that the contact factor was more critical to the holding from the reference to the proposed move in *Dyer*²⁴⁶ and the absence of any discussion of the length of the new marriages.

The other leading case in which the court held that the matter was *not* better dealt with by denial of the adoption is *In re D. (An infant)*.²⁴⁷ The parents married

239. *Id.* at 7 (LEXIS format).

240. *Id.* at 7-8 (LEXIS format).

241. *Id.* at 13 (LEXIS format).

242. *Id.* at 8 (LEXIS format).

243. See *supra* notes 216-30 and accompanying text.

244. See *supra* text accompanying note 224.

245. The *Dyer* girls, apparently on their own initiative, ended contact with their natural father. *In re D.*, at 2 (LEXIS format). Mrs. *R.*, the natural mother, refused to allow the natural father to visit the *S.* boys the last time he requested access. This request came in the month in which she was scheduled to remarry. Once denied, Mr. *S.* did not ask to see the boys again. *In re S.*, 1977 Fam. at 175.

246. See *In re D.*, at 8 (LEXIS format).

247. *In re D. (An infant) (Adoption: Parent's Consent)* [1976] 3 W.L.R. 12, [1977] A.C. 602 (C.A.), *rev'd.*, [1977] 2 W.L.R. 79, [1977] A.C. 617 (H.L.). See, e.g., 126 New L.J. 265 (1976); Samuels, *supra* note 184, at 187; for discussions of this case.

in 1966 and separated in 1967, shortly after the birth of their son.²⁴⁸ In 1971 the mother obtained an uncontested divorce alleging cruelty; the major allegation was that the father was a practicing homosexual. The mother received custody of the child, and the father was granted reasonable access. In 1972 the mother unilaterally changed the boy's surname to that of the man with whom she was living and whom she married two years later. During the six years preceding this marriage, the natural father visited the boy occasionally at the mother's home, but the boy did not realize that this visitor was his natural father.²⁴⁹

The mother and stepfather applied for a stepparent adoption in 1975 and asked that the natural father's consent be waived because he had failed to maintain the child and was a practicing homosexual.²⁵⁰ The court granted the adoption, waiving the consent of the father on the ground that he was acting unreasonably in withholding it.²⁵¹

The Court of Appeal reversed²⁵² and was in turn reversed by the House of Lords,²⁵³ which reinstated the adoption decree. Although the House of Lords upheld the trial court on discretionary grounds,²⁵⁴ the opinion affirmed the trial court's reasoning that continued access by the natural father was not in the best interests of the boy, and that the advantages of adoption outweighed the net benefit to the boy of retaining an unbroken legal link with the natural father.²⁵⁵

The outcome in this case meets the test for predicting a successful stepparent adoption case,²⁵⁶ even if one excludes the factor of the father's sexual preference. The boy was young at the time of the application (seven years old), had lived with the natural father only a few months when an infant, did not have a significant relationship presently with the natural father — indeed, he did not even realize that this man was his father — and was unlikely to come into contact in the future with the father or his relatives. For these reasons, the court granted the adoption, and the House of Lords affirmed.

Although the case is unusual, it is not unique: stepparent adoptions did not

248. *In re D.*, [1976] 2 All E.R. at 342.

249. *Id.*

250. *Id.*

251. *Id.* at 342-43.

252. *Id.* at 346-47 (C.A.).

253. *In re D.*, [1977] 1 All E.R. 145, 146 (H.L.).

254.

Since the judge had applied the right test to the facts which he had found, his conclusion that the father's consent was unreasonably withheld could not be disturbed. In any event . . . since appeals from the county court on questions of fact in respect of the making or refusing of adoption orders did not lie to the Court of Appeal and since the county court judge had not misdirected himself in law the Court of Appeal was not competent to entertain the appeal and ought to have dismissed it.

Id. at 146.

255. *Id.* The Court of Appeal had suggested that concern over the boy's exposure to homosexuality could be quelled by controlling the access of the natural father, for example, by restricting visits to take place only at the paternal grandparents' home. *In re D.*, [1976] 2 All E.R. at 346.

256. See *supra* notes 214-15 and accompanying text.

end entirely following the passage of the Children Act 1975.²⁵⁷ Instead, the emphasis has changed. The contemporary thinking in England, stemming from the Houghton Report²⁵⁸ and the Children Act, is that "adoption is not desirable if it would effectively sever a real link between a child and a parent, e.g., a non-custodial father, and custody in one form or another, which is always subject to review and change, is preferable to the finality of adoption."²⁵⁹ Although "[i]t was originally thought that parental or step-parental adoption would become virtually extinct"²⁶⁰ under the Children Act, this has not occurred. In 1980, of the 10,600 adoptions in England, 3,700 — 34.9 percent — were adoptions of legitimate children by their natural and stepparents.²⁶¹

"[T]he judicial policy is clearly not to reject [stepparent] adoption to the same extent as it had been assumed that Parliament and the statute required or expected."²⁶² Emphasis is on careful investigation, comparing custody arrangements and the requested adoption, to ascertain the more appropriate measure.²⁶³ Unconditional orders are desirable for the stepparent adoptions that are granted, with access generally considered incompatible with adoption.²⁶⁴ Courts try to discourage the "artificial" adoption.²⁶⁵

The statute does not prohibit adoption. It discourages the "artificial" adoption, e.g., the natural father has had considerable contact with the child and the child knows that the step-father is a step-father. It does not prohibit the "natural" adoption, e.g., the natural father has had no contact with the child since babyhood and the child looks upon his step-father as his real father.²⁶⁶

The *D.* case discussed above illustrates a natural adoption.

Although the policy against permissive granting of adoption to stepparents is clear,²⁶⁷ Lord Justice Ormrod warns that the "procedure in these stepparent adoption cases has still not been fully worked out in my view and it is very difficult for the judge, where he has to exercise a statutory jurisdiction, which

257. Samuels, *supra* note 184, at 186.

258. Bissett-Johnson mentions cases, some of which predate the Houghton Report, in which the English judiciary expressed misgivings about the granting of stepparent adoptions. He is not sure whether these misgivings were influenced by the Houghton Committee's work or were developed independently. Bissett-Johnson, *supra* note 1, at 338, 339. The committee, rather than instigating a new attitude, may have reflected a trend already extant.

259. Samuels, *supra* note 184, at 186.

260. *Id.* at 187.

261. *Id.* at 186. See *supra* notes 12-17 and accompanying text for comparison figures.

262. *Id.* at 187.

263. *Id.* at 188.

264. "An order subject to conditions [such as access for relatives after adoption] is inherently undesirable. Either make an unconditional order or do not make one at all." *Id.*

265. *Id.* at 187.

266. *Id.*

267. See generally CRETNEY, *supra* note 28, at 539; Bissett-Johnson, *supra* note 1, at 339; Bromley, *supra* note 181, at 375; Hopkins & Benson, *supra* note 1, at 340.

may very well involve his refusing an application which is unilaterally made and not opposed."²⁶⁸ Even in a case in which all the adults and children consent, and all seem to be giving an informed consent, adoption will not be granted as a matter of right,²⁶⁹ unless the judge is convinced that the advantages of adoption — a statutory "guillotine"²⁷⁰ — outweigh the advantages of the existing arrangements or a modification that gives the stepparent joint custody with the custodial natural parent.²⁷¹

But the concerns that motivate stepparents to pursue adoption of their stepchildren²⁷² reflect issues more extensive than the question of physical control. The English laws help the English stepparent who can not or does not adopt, in each of the areas of concern discussed above, far more than the U.S. laws help the U.S. stepparent. What does the English stepparent accomplish by a grant of joint custody, that a stepparent in the United States cannot accomplish with an *in loco parentis* relationship?

C. Areas of Concern

1. Parental Rights and Duties

The English divorce court, in arranging joint custody, can vest the stepparent with all the rights and duties vested in a natural parent except the right to change the child's surname unilaterally,²⁷³ the right to arrange and effect the child's emigration,²⁷⁴ and the right to consent to the child's adoption.²⁷⁵ English scholars reason further that a stepparent with custody cannot appoint a testamentary guardian,²⁷⁶ although this prohibition is not stated explicitly in any law.²⁷⁷ In

268. *Re C. and C. (infants)*, No. 80 01797 (Transcript: Association) (C.A. hearing date June 8, 1981) (available on LEXIS, Enggen library, Cases file), at 9 (LEXIS format).

269. *See, e.g., In re S.*, (Infants) (Adoption by parents), 1977 Fam. 173; Hopkins & Benson, *supra* note 1, at 341.

270. Lord Justice Cumming-Bruce said, in a concurring opinion, that

while it is strongly in the child's interest that he should be settled in the family life of the mother and her second husband, it is "quite wrong to use the adoption law to extinguish the relationship between the protesting father and the child, unless there is some really serious factor which justifies the use of the statutory guillotine. The courts should not encourage the idea that after divorce the children of the family can be reshuffled and dealt out like a pack of cards in a second rubber of bridge."

Khan, *Adoption by Parent and Step-parent*, 8 FAM. LAW 146, 147 (1978) (quoting *Re B. (a minor)*, [1975] 2 W.L.R. 569).

271. *See* Bissett-Johnson, *supra* note 1, at 338.

272. *See supra* notes 60-77 and accompanying text. *Cf.* Bissett-Johnson, *supra* note 1, at 336-37.

273. Bissett-Johnson, *supra* note 1, at 345.

274. BEVAN & PARRY, *supra* note 78, at ¶ 231.

275. *Id.* at ¶ 233.

276. *Id.* at ¶ 234. Since a custodian has only those rights that relate to the person of the child, *id.* at ¶ 233, and since a testamentary appointment vests all the parental rights and duties in the testamentary guardian, it follows that the custodian cannot pass on more rights than he possesses (*nemo dat quod non habet*). *Id.* at ¶¶ 233-34. *See also* CRETNEY, *supra* note 1, at 436-37.

277. BEVAN & PARRY, *supra* note 78, at ¶ 234.

modifying the original custody decree, the court can also modify any arrangements previously made for access by the noncustodial natural parent or for support required from any party.²⁷⁸

A stepparent without custodian or guardian status conferred by a court has no rights at all.²⁷⁹ "In certain circumstances stepfathers, as well as other custodians of minor children, acquire certain liabilities at common law and a great many more liabilities by statute, but that is not because they are stepfathers; that is because they are adults having de facto control of children."²⁸⁰ Even the "rights and obligations which are acquired by stepfathers *who take the necessary steps, or adopt the necessary attitude*, to make minor children of their wives by previous marriages children of the family"²⁸¹ are rights and duties conferred by statute and not by virtue of status.

One statutory liability that can be imposed on a stepparent, with or without joint custody of the stepchild, is the duty to support.²⁸² Under the Domestic Proceedings and Magistrates' Courts Act 1978, either party to a marriage may petition a magistrates' court for an order compelling the other party to support the petitioner or any "child of the family."²⁸³ If the child to be supported is a child of the family but not the child of the respondent party, e.g., a stepchild, the court can consider, among all other circumstances in the case, whether the respondent has been supporting the child to date and with knowledge that the child was not the respondent's offspring.²⁸⁴ Orders made under this statute²⁸⁵ continue, regardless of whether the parties divorce, until the death of either party to the marriage,²⁸⁶ until the child reaches majority, or until the remarriage of the petitioner.²⁸⁷ Either party can request action under the statute whenever

278. See generally CRETNEY, *supra* note 1, at 529-30; STONE, *supra* note 33, at 199-203.

279. *In re N.*, 1974 Fam. 40.

280. 1974 Fam at 42.

281. *Id.* (emphasis added).

282. Bissett-Johnson, *supra* note 1, at 337.

283. Domestic Proceedings and Magistrates' Courts Act 1978, ch. 22, sec. 1. "Child of the family" refers to any child of both the parties to a marriage and to *any other child*, save a foster child placed by a licensed or state agency (such agency being *in loco parentis*), who has been treated by both of the parties as a member of the family. This definition is found in the Matrimonial Causes Act 1973, ch. 18, sec. 52(1), and the Domestic Proceedings and Magistrates' Courts Act 1978, ch. 22, sec. 88(1). It is intended to be extremely broad in coverage, CRETNEY, *supra* note 28, at 467-68, and to include all children of both parties, whether legitimate, illegitimate, legitimated, or adopted; and it includes those children who have been treated as members of the family, such as stepchildren. *Id.*

284. Domestic Proceedings and Magistrates' Courts Act 1978, ch. 22, sec. 3(3).

285. Orders made by a divorce court under the Matrimonial Causes Act 1973 for custody and other arrangements can be made either in the divorce decree or before or after it. CRETNEY, *supra* note 28, at 469. If the parties do not complete the divorce, orders can still be made within a reasonable amount of time after the dismissal of the suit. CRETNEY, *supra* note 28, at 469 (citing Matrimonial Causes Act 1973), ch. 18, sec. 42(1)). Orders regarding a child of the family made under the Domestic Proceedings and Magistrates' Courts Act can be made at any time during a marriage and are not dependent on the initiation of a divorce suit. CRETNEY, *supra* note 28, at 483-84.

286. Domestic Proceedings and Magistrates' Courts Act 1978, ch. 22, sec. 4(a).

287. *Id.* at sec. 4(b).

the other party fails to provide reasonable maintenance for the applicant or for any child of the family.²⁸⁸ The statute is not limited to use in marital proceedings, although it was enacted for use primarily during separations due to domestic violence.²⁸⁹

The fact that a child is a "child of the family" does not guarantee that a spouse who is neither the natural nor the adoptive parent of the child will be compelled to assume the child's complete support.²⁹⁰ Statutes ensure that the court can assign support obligations equitably.²⁹¹ Thus, no one can be "tricked into a short marriage solely in an attempt to foist on him liability" for someone else's child;²⁹² faced with such an inequity, the court would decline to order support.²⁹³

Since the magistrates' court can order any party to a marriage to support the children of the family, even a stepparent without legal custody can be required to support a stepchild.²⁹⁴ Should the stepparent seek joint custody, an order for support, modified by any support required from the noncustodial natural parent, can be incorporated into the new custody decree in the divorce court.²⁹⁵ In both instances, the support order will survive the dissolution of the natural and stepparents' marriage,²⁹⁶ thereby ensuring the stepchild's support.

2. Succession Rights

In the United States and England, "[w]hile the court is able to exercise some discretion in deciding if a stepchild is to be included in a certain devise, the law of intestacy is wholly statutory."²⁹⁷ An English statute, the Inheritance (Provision for Family and Dependents) Act 1975,²⁹⁸ gives the English courts considerable

288. *Id.* at sec. 1.

289. The matrimonial jurisdiction of the magistrates' courts originated in Parliament's desire to provide an accessible forum for battered wives from the poorer classes. CRETNEY, *supra* note 28, at 197. The act states that orders expire if parties who were separated at the time of the application begin living together again. Orders for financial support of a minor, however, do not expire automatically, even if separated parties resume living together. *Id.* at 488.

290. Both the divorce court, under the Matrimonial Causes Act 1973, and the magistrates' court, under the Domestic Proceedings and Magistrates' Court Act 1978, have equitable latitude to adjust obligations fairly. CRETNEY, *supra* note 28, at 468 and 487.

291. Matrimonial Causes Act 1973, sec. 25(3), as amended by Domestic Proceedings and Magistrates' Court Act 1978, sec. 63; Domestic Proceedings and Magistrates' Courts Act 1978, secs. 3(3), 11(5). These provisions direct the court to consider, among other circumstances of the case, three factors when deciding whether to order financial provision for a child of the family who is not a child of the parties, namely: the basis, extent, and length of time a party has assumed responsibility for a child's maintenance; whether the party did so with the knowledge that the child was not his or her own offspring; and the liability of any other person for the maintenance of the child. *See also* CRETNEY, *supra* note 28, at 468 and 487.

292. CRETNEY, *supra* note 28, at 468.

293. *Id.*

294. Bissett-Johnson, *supra* note 1, at 337.

295. *Id.* at 338.

296. *See supra* text accompanying notes 285-87.

297. Berkowitz, *supra* note 75, at 224 (inheritance not a vested right; granted by the legislature).

298. Inheritance (Provision for Family and Dependents) Act 1975, ch. 63.

latitude to deal equitably with intestate problems. Under this act, dependents may apply to the court for a share of the deceased supporter's estate.²⁹⁹ If the court is satisfied that, "looked at objectively, the disposition of his estate is unreasonable,"³⁰⁰ the court can order relief. The relief can be ordered whether the will itself or the laws governing intestate distribution, or both, caused the petitioning dependent to receive an unreasonable share.³⁰¹

Those who may apply for relief include the spouse of the deceased, any former spouse who has not remarried, a child of the deceased (including an adopted child) of any age or marital status, and "any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage."³⁰² Any person not included in these clauses, who was wholly or partially supported by the deceased at the time of death, e.g., a mistress or live-in relative, is also an eligible applicant.³⁰³

The court must be satisfied that under the will as it stands, or under the intestate law, or both, no reasonable financial provision has been made for the applicant.³⁰⁴ In the case of a stepchild, the court can order the estate to maintain the child until majority, but cannot order the estate to give the child capital.³⁰⁵ Although the maintenance expires at majority, the court must consider in these cases the manner in which the stepchild was being or expected to be educated, and make provision accordingly.³⁰⁶

The act is applied generally when the deceased has excluded the applicant entirely or has made a token bequest while giving a relatively large amount to a mistress or to charity.³⁰⁷ It can also be used, however, when the testator has tried to provide for the applicant in a will, but the devise or bequest has failed, or when the deceased has died intestate.³⁰⁸ Thus the act is applicable when a stepparent has not provided for a stepchild, has died intestate, or has tried to provide but has failed to do so under strict rules of construction.³⁰⁹

Although the Inheritance Act does give the court considerable latitude to

299. CRETNEY, *supra* note 28, at 261-62.

300. *Id.*

301. *Id.*

302. Inheritance Act 1975, sec. 1(1).

303. *Id.* at § 1(1)(d); CRETNEY, *supra* note 28, at 263.

304. Inheritance Act 1975, sec. 2(1).

305. *See* CRETNEY, *supra* note 28, at 267-68.

306. Inheritance Act 1975, sec. 3(3); CRETNEY, *supra* note 28, at 266-67. Section 3 of the act lists other circumstances the court should consider in determining whether and how to exercise its powers. These circumstances include the criteria discussed in note 291, *supra*, as well as the financial needs and resources of the applicant, the named beneficiaries and other applicants, and the size of the estate.

307. CRETNEY, *supra* note 28, at 264-65.

308. *Id.* at 265.

309. *See, e.g.*, CRETNEY, *supra* note 28, at 264-65.

distribute family assets on a discretionary basis,³¹⁰ the guiding principle continues to be that "an Englishman remains at liberty to dispose of his property in whatever way he chooses."³¹¹ Nevertheless, the act does offer stepchildren better protection after the death of a supporting stepparent than they had before its enactment.³¹²

3. Surnames

The Houghton Committee did not see the question of multiple surnames on the mailbox as a difficult problem to resolve.³¹³ The committee thought that stepparents could simply obtain a legal change of name, rather than adopt the stepchildren to unify the family surname.³¹⁴ The Court of Appeal, in one line of cases, dismissed the problem as one "of little moment and formalistic."³¹⁵ Both bodies, however, were underestimating the emotional intensity of the issue.³¹⁶ Maddox quotes a stepfather with a distinguished family name:

How do other stepparents feel about a strange child taking their name? He just uses my name. He wants it. He won't change his other name legally, and there are all sorts of embarrassments with passports and things. But my family name, well, I suppose I'm ridiculous, but it's an old [local] name and I resent him using it.³¹⁷

Maddox adds, "This man did not object to the fact that the boy, who had lived with him since infancy, called him Daddy."³¹⁸

Parliament was sufficiently concerned to amend the Matrimonial Causes Rules³¹⁹ by forbidding the custodial parent to change a child's surname without the consent of the other natural parent or the hard-to-obtain leave of a court to dispense with consent.³²⁰ Indeed, "[s]ince early in 1975, slips reminding parents of this have generally been appended to or included in custody orders."³²¹

310. *Id.* at 268.

311. *Id.* at 259.

312. See STONE, *supra* note 33, at 148-51, 162 (1977).

313. Bissett-Johnson, *supra* note 1, at 348.

314. Houghton Report, *supra* note 15, at ¶ 106.

315. See Glover, *Changing a Child's Surname*, 128 *New L.J.* 1240, 1241 (1978), and cases discussed therein. However, another line of cases described the issue as a "matter of importance." *Id.*

316.

A marriage could be dissolved but not parenthood. The parents in most cases continued to play an important role in their children's emotional lives and development. From the point of view of the children's best interests it was essential that the parents' feelings should be taken very carefully, and anxiously into consideration.

W. v. A. (child: surname), [1981] 1 *All E.R.* 100 (C.A.). In this case, the mother and stepfather wished to emigrate to Australia. The natural father consented to the move on the condition that the children retain his surname. The mother's appeal from a judgment in the father's favor was unsuccessful.

317. MADDOX, *supra* note 1, at 41-42.

318. *Id.* at 42.

319. Matrimonial Causes Rule 92, Stat. Inst. 2168 (1974).

320. Bissett-Johnson, *supra* note 1, at 348.

321. *Id.*

Unlike the other areas of concern to a stepfamily, concerns that might motivate a stepparent to pursue adoption if the law provided no alternative, this area has not been reformed by English innovations. No intermediate resolution is available in English law; only adoption will allow the stepfamily to use a single surname, despite the common law, which gives individuals the right to choose any surname absent intent to defraud.³²²

4. Duration and Termination of the Steprelationship

Unlike the U.S. stepfamily, the English stepfamily need not end with the death of the custodial natural parent. If the natural parent and stepparent sought and received joint custody while the natural parent was alive, the stepparent continues as surviving custodian if the custodial natural parent dies while the stepchildren are minors.³²³ This arrangement continues automatically unless and until the surviving natural parent intervenes.³²⁴ In the resulting court hearing, the claims of the custodial stepparent and the noncustodial natural parent would be weighed against the welfare of the children.³²⁵

English law strengthens a stepparent's position in another way: the stepparent can be named as a testamentary guardian by the natural parent.³²⁶ Either natural parent may appoint, by deed or will, any person to serve as guardian of the minor children after that parent's death.³²⁷ Unlike U.S. law on testamentary guardians,³²⁸ the appointment is valid even if there is a surviving natural parent.³²⁹ Absent objection by the surviving natural parent, the guardian serves jointly with that surviving parent.³³⁰

If the surviving natural parent or the testamentary guardian (in this case, the stepparent) does object, the court can either order the joint guardianship to continue, order exclusive authority for the testamentary guardian, or refuse to accept the testamentary appointment, thus leaving the surviving natural parent with exclusive parental rights.³³¹ In the absence of a will or deed, the court has

322. See *supra* notes 111-13 and accompanying text.

323. See CRETNEY, *supra* note 28, at 436. On the death of a person who is entitled to exercise parental rights jointly, such as a natural parent with custody, the rights and duties accrue to the survivor. The stepparent, as one of the persons jointly exercising custodial rights and duties, continues as custodian. The noncustodial surviving parent still exercises certain rights and duties, which are possessed by the noncustodial parent even while the custodial parent is alive. These rights and duties include the duty to maintain, the right to access, the right to consent to adoption, and the right to arrange the child's emigration. The latter two rights are reserved for natural parents, regardless of custody, and guardians only. See *supra* notes 196, 198, & 276.

324. See CRETNEY, *supra* note 28, at 436.

325. *Id.*

326. See CRETNEY, *supra* note 28, at 441.

327. *Id.*

328. See *supra* text accompanying notes 134-36.

329. CRETNEY, *supra* note 28, at 441.

330. *Id.* This matter is governed by the Guardianship of Minors Act 1971, ch. 3.

331. CRETNEY, *supra* note 28, at 441; Guardianship of Minors Act 1971, ch. 3, sec. 4(4).

discretionary power to appoint a guardian and to exclude the surviving natural parent.³³² A joint-custodial stepparent in England whose spouse dies thus can continue to have custody of the stepchildren; if a testamentary appointment was made, either by will or deed, the stepparent's position is further strengthened. Assuming the stepparent is fit and the members of the stepfamily so prefer, the stepfamily is likely to survive the death of the custodial natural parent.³³³

If the stepparent and natural parent divorce, English courts have the power to provide for the future care of any child of the family,³³⁴ including stepchildren.³³⁵ No finding of *in loco parentis* is needed; no question arises of whether divorce terminates the *in loco parentis* duties.³³⁶ Instead, support by the stepparent is presumed unless circumstances indicate such support is inequitable.³³⁷

5. Access

Whether or not the stepparent has received joint custody of the minor stepchildren, the English courts dealing with domestic matters³³⁸ have power to order access to any minor child of the family,³³⁹ the order can be made at any time before, during, or after divorce proceedings.³⁴⁰ The right to access can be granted to the parent of the child in question, or to either party of the dissolving marriage, whether a natural parent or a stepparent.³⁴¹ The paramount consideration is the welfare of the child, rather than whether a stepparent is entitled to visitation.³⁴²

6. Summary of the Current Legal Position of the English Stepfamily

Unlike the stepparent in the United States, the English stepparent is not compelled to adopt the stepchildren as the only means of acquiring strong parental rights and duties. The stepparent is discouraged, rather than compelled, from using the adoption laws for this purpose. Instead, the stepparent is

332. CRETNEY, *supra* note 28, at 442.

333. Compare this to the situation in *Collins v. Gilbreath*, discussed fully *supra* at notes 126 and 151, in which the stepfather and stepchildren were separated when custody reverted to the natural father ten days after the suicide of the natural mother.

334. Domestic Proceedings and Magistrates' Court Act 1978, ch. 22, sec. 1; Matrimonial Causes Act 1973, ch. 18, sec. 27(1), as amended by Domestic Proceedings and Magistrates' Court Act, sec. 63(1); see *supra* note 283 for the definition of "child of the family."

335. See *supra* text accompanying note 294.

336. See *supra* notes 142-43 and accompanying text.

337. See *supra* notes 290-293 and accompanying text.

338. The High Court, any county court, and the magistrates' courts have jurisdiction over domestic matters. STONE, *supra* note 33, at 137-39.

339. See CRETNEY, *supra* note 28, at 475-77.

340. Matrimonial Causes Act, sec. 42(1)(a); CRETNEY, *supra* note 28, at 475.

341. Domestic Proceedings and Magistrates' Court Act 1978, sec. 8(2); CRETNEY, *supra* note 28, at 484.

342. CRETNEY, *supra* note 28, at 491-99. Compare with text accompanying notes 149-51 *supra*.

encouraged to apply for joint custody, which will confer the strongest bundle of rights available to the stepparent.

In addition, English law protects the stepchild at the termination, by death or divorce, of the marriage of the stepparent and natural parent. If the marriage ends with the death of the stepparent, the stepchild can apply for maintenance from the stepparent's estate under the Inheritance Act 1975. If the custodial natural parent has died, the stepchild is able to remain with the stepparent if that is desired, because the stepparent is the surviving custodian or because the stepparent is the testamentary guardian. If the marriage has ended in divorce, the stepchild's welfare is protected because the court can require support from the stepparent and can permit access.

Like the U.S. stepparent, the English stepparent cannot change the stepchild's surname without the consent of the noncustodial natural parent and the court. Without consent, the only other way to acquire a uniform family surname is to adopt.

IV. ANALYSIS OF THE STEPPARENT'S POSITION IN ENGLAND AND THE UNITED STATES AND PROPOSALS FOR CHANGE

A. *The Legal Positions*

English stepparents and U.S. stepparents have the same three options available after their marriage to a person with children. They can simply be a stepparent; they can seek modification of the natural parent's custody order and be a joint custodial stepparent; or they can pursue adoption and become an adoptive parent. The consequences of adoption are the same in the two countries: adoption completely severs the child's legal relationship with the nonadopting natural parent and relatives, while it establishes a legal parental relationship between the child and the adoptive stepparent.³⁴³ The stepparent becomes a natural parent in the eyes of the law, and the nonadopting natural parent becomes a stranger.³⁴⁴

But the consequences of basic stepparenthood are not the same in the two countries. In the United States, the basic stepparent — a person who does nothing to create a legal status other than marry someone with children — acquires no parental rights whatsoever, although he or she may incur a limited duty to support.³⁴⁵ Succession is unaltered by basic stepparenthood,³⁴⁶ and a

343. Houghton Report, *supra* note 15, at ¶ 14; Bodenheimer, *supra* note 1, at 45.

344. CLARK, *supra* note 23, at 658; *see also supra* note 48.

345. A stepparent's duty to support may arise statutorily, *see, e.g.*, Del. Code Ann. tit. 13, § 501 (1980) (duty imposed on stepparent when natural parents cannot supply child's minimum needs); or it may arise from the *in loco parentis* status, *see, e.g.*, Kaiser v. Kaiser, 93 Misc. 2d 36, 402 N.Y.S.2d 171 (1978) (liability for stepchild from *in loco parentis* status ends at death of natural parent or divorce of stepparent and natural parent).

346. *See supra* text accompanying notes 91-92.

basic stepparent is unlikely to receive custody of stepchildren, whether the marriage ends by divorce or by death.³⁴⁷

Similarly, in England, no parental rights are conferred on the basic stepparent.³⁴⁸ A court might find that the duty to support the stepchildren exists, but the finding depends less on the intentions of the stepparent to be *in loco parentis*, and more on the simple fact that the stepchild is a member of the stepparent's household.³⁴⁹ The English approach further differs from the U.S. approach in that the duty to support does not end necessarily at divorce. The English divorce court can order support from a stepparent if it finds the stepchild to be a "child of the family."³⁵⁰ The likelihood of custody or even access being given to the basic stepparent, as in the United States, is low, but English inheritance law does protect the dependent stepchild from being disinherited as a matter of law at the death of a testate or intestate stepparent.³⁵¹

For the U.S. stepparent who wants as little responsibility for stepchildren as possible, intentional inaction is the best way to accomplish that goal. Not even an *in loco parentis* status exists in those circumstances.³⁵² In England the stepparent cannot place the stepchild in so vulnerable a position; the considerable latitude given the courts, by the inheritance laws to distribute estates and by the domestic proceedings laws to order support during and after a marriage for a child of the family, offers a safeguard for the English stepchild. The "child of the family" status cannot be discarded merely by the intention of the stepparent.

The consequences of seeking a modification of the spouse's custody order also differ in the two countries. Given the new social policy encouraging an alternative to stepparent adoption, the likelihood that the English stepparent will get joint custody is high. English laws delineate the rights and duties conferred on the joint custodian³⁵³ and describe the mechanisms for sharing custody jointly,

347. See *supra* notes 132-33 & 141 and accompanying text. See *Collins v. Gilbreath*, discussed fully in notes 126 and 151; Commonwealth of Pennsylvania *ex rel. Patricia L.F. v. Malbert J.F., Jr.*, 278 Pa. Super. Ct. 343, 420 A.2d 572 (1980) (stepfather is not a natural parent; in custody decisions, the proper standard to apply is the comparison of natural parent and unrelated third party, with presumption of custody to the natural parent, regardless of stepfather being *in loco parentis*).

348. *In re N.*, 1974 Fam. 40.

349. See *supra* notes 282-83 and accompanying text; Bissett-Johnson, *supra* note 1, at 297.

350. See *supra* note 283 and accompanying text.

351. See Inheritance (Provision for Family and Dependents) Act 1971, ch. 63.

352. See *supra* text accompanying notes 84-88.

353. *E.g.*, Guardianship of Minors Act 1971, at sec. 4(1)(2), restricts the power to appoint a testamentary guardian to the natural mother or natural father; Children Act 1975, at sec. 12(1), states that a person with legal custody does not have the power to consent to adoption; Matrimonial Causes Rules 1977, at r. 92(8), states that the person with custody cannot change the child's surname unilaterally. See also *supra* note 273 and accompanying text. CRETNEY, *supra* note 28, at 525-30, discusses the custodianship orders that will be available to stepparents who are not required to seek modification of a custody order in the divorce court. Certain sections of the Children Act 1975 that have not yet been put into effect describe the rights, duties, mechanisms for dispute resolution, and other details of a "custodianship order" made in favor of a stepparent and a natural parent. Children Act 1975, Pt. II; CRETNEY,

even among three or more persons, and for resolving disputes among custodians.³⁵⁴ This clarity encourages the success of a joint custody arrangement in England.

But the idea of joint custody, shared by a natural parent and stepparent, is a new idea in the United States.³⁵⁵ Since this country has not developed a strong social policy against stepparent adoption, a judge in the United States has no support, from statute or theoretical model, for a decision granting joint custody to a stepparent, especially if the noncustodial natural parent objects. Even the term "joint custody" has a different meaning: in the United States, the term generally refers to custody shared by the two natural parents after the divorce.³⁵⁶ The role of a stepparent in a joint custody arrangement has not been studied in this country.

B. *Proposals for Change*

For the U.S. stepparent who wants family security and as many parental rights and duties as possible, only adoption will suffice under the present laws. Yet adoption is a "statutory guillotine" severing the child/parent relationship forever, a harsh penalty for the natural parent who lost custody in the divorce and for the natural grandparents and other relatives.³⁵⁷ Professor Bodenheimer has suggested that courts grant joint custody to stepparents who have been denied stepparent adoptions.³⁵⁸ If the child, the stepparent, and the custodial natural parent desire, suggests Bodenheimer, the court should change the child's surname and eliminate the noncustodial natural parent's visitation rights and support obligations.³⁵⁹

Bodenheimer's suggestion and similar proposals³⁶⁰ are attempts to create a middle course, an alternative that gives the stepparent parental authority and responsibility while the legal status of the noncustodial natural parent continues. The proposals are inadequate, however, because they fail to elaborate on what specific parental rights and duties the joint custodian stepparent will exercise,

supra note 28, at 525. Cretney feels that other laws now in effect, the Guardianship of Minors Acts 1971 and 1973, fail to clarify these issues for custodians and joint custodians appointed under the divorce court's jurisdiction, and for guardians appointed by testament, by deed, or by the court. *Id.* at 438-40.

354. Domestic Proceedings and Magistrates' Court Act 1978, sec. 13. See CRETNEY, *supra* note 28, at 485 and 485 n.26.

355. See Miller, *Joint Custody*, 13 FAM. L.Q. 345 (1979).

356. *Id.* at 360. For an example of a state statute that uses the term to refer to custody shared by the two natural parents, see 23 PA. CONS. STAT. ANN. § 1003 (Purdon 1983). See generally W. WEYRAUCH & S. KATZ, *AMERICAN FAMILY LAW IN TRANSITION* 515-21 (1983).

357. See *supra* notes 41 and 270.

358. Bodenheimer, *supra* note 1, at 45.

359. *Id.*

360. See Note, *Stepparent Custody*, *supra* note 1, at 621. See also *supra* note 146, for suggestions by Oppel and Williams.

other than the duty to support and the right to physical custody of the child.³⁶¹ By changing the child's surname and eliminating the noncustodial natural parent's duty to support and right to visit, the proposals suggest a scheme that severs the relationship between the child and natural parent as surely as if there had been an adoption. Lacking the legal right to visit, the noncustodial natural parent can be barred by the joint custodians from all contact with the child.³⁶² The relationship between the child and noncustodial natural parent would exist in name only.³⁶³

In addition to those major flaws, the proposals fail to address the problems faced by stepfamilies in other areas of concern. The laws governing testate and intestate distribution can operate to exclude stepchildren from a share of the stepparent's dependency,³⁶⁴ and the proposals do not suggest remedies.³⁶⁵ Questions of custody at the death or divorce of the joint custodians are answered lightly or not at all.³⁶⁶

This Comment proposes that the English approach to the issue of stepparent adoption be enacted in the United States. The English approach began with a policy decision that permissive escalation of stepparent adoption is not desirable,³⁶⁷ and a recognition that the adoption laws were not designed for stepparent adoption and are ill-fitted for that use.³⁶⁸ Once the English reached that decision, the laws governing adoption and custody were revised to reflect the premise that stepparent adoptions are permissible only when adoption is better than any other alternative.³⁶⁹

361. See generally Bodenheimer, *supra* note 1, at 45; Note, *Stepparent Custody*, *supra* note 1, at 621-29.

362. The natural parent, lacking a court-ordered right to visit the child, can be barred from doing so, since the right to determine the child's associations is a right of the legal custodian. *But see In re Adoption of Children by F.*, 170 N.J. Super. 419, 406 A.2d 986 (1979) (children granted a right to visit natural father even after adoption by stepfather, and guardian ad litem appointed to enforce right even if natural mother and stepfather object).

363. No real relationship exists between a child and the parent who cannot visit and who need not support. Intestate succession rights continue, so that the natural parent might inherit the child's estate and the child the estate of the natural parent; the child continues to bear the parent's surname if the natural parent is a father; and the natural parent can reacquire all parental rights and duties, as well as custody, if circumstances in the future so require. These rights stand as legal eventualities, but the daily relationship is non-existent. Such an arrangement does not differ from the severity of adoption in any way but permanency.

364. See *supra* notes 91-99 and accompanying text.

365. The author of *Stepparent Custody* states that changing the succession statutes to permit stepchildren to inherit from their nonadopting stepparents is "unnecessary generosity." Note, *Stepparent Custody*, *supra* note 1, at 624. This criticism assumes that the statutes would be changed to allow stepchildren to inherit from both their stepparents and from their noncustodial natural parents, and that the stepparent's natural children would be disinherited. See *id.* A more equitable change, however, could be enacted.

366. The author of *Stepparent Custody* suggests that the standard currently applied at the divorce of a natural parent and a stepparent, that is, treating the stepparent as an unrelated third party opposing a natural parent, should continue to apply. *Id.* at 625-26.

367. MADDIX, *supra* note 1, at 170. See Houghton Report, *supra* note 15, at chap. 5.

368. Oppel, *supra* note 1, at 632.

369. Children Act 1975, ch. 72; see *supra* text accompanying note 210.

Recognition that a stepparent adoption differs in motivation, circumstances, and practical effects from a conventional adoption is the first step in deciding that stepparent adoptions should be treated differently by the legal system. Complete elimination of adoptions by stepparents of legitimate children is inappropriate, since a stepparent adoption is desirable under some circumstances.³⁷⁰ A requirement that such adoptions occur only when the noncustodial natural parent consents would bar adoption when that parent withholds consent maliciously; but laws allowing courts to waive consent can be used too permissively by judges who approve of stepparent adoptions, permitting all applications to succeed.³⁷¹

Requiring, however, that courts grant stepparent adoptions only when the adoption is better than all other available alternatives is not sufficient. The range of alternatives available must be broadened, and the legal position of the stepparent who does not adopt must be strengthened, while laws that hinder the stepfamily's stability are reformed. For example, succession rights should be enlarged, so that a stepchild will not be disinherited simply because the stepparent failed to write a will.³⁷² Joint custody must be defined to include custody shared by a natural parent and a stepparent, and the rights and duties conferred by joint custodial status should be delineated in the law.

The only issue that cannot be resolved equitably is the issue of surnames. The English generally refuse to allow the stepchild's name to be changed.³⁷³

370. See *supra* note 266. Stepparent adoption is certainly desirable, for example, when the natural parent has abandoned the child, when the natural parent's parental rights have been terminated because of child abuse, or perhaps when the natural parent has died. Stepparent adoption is also appropriate for families like the Dyers, who proposed to emigrate to a distant country, especially when the natural parent and the children consent.

371. Extensive research by Oppel disclosed not "a single case concerning a step-parent adoption in which His Honour [County Court Judge O'Hearn] had refused to dispense with a natural parent's consent." Oppel, *supra* note 1, at 643. A high proportion of the adoption cases in Nova Scotia come before Judge O'Hearn, who has stated: "I have yet to see a case where the decision (to dispense with the natural parent's consent) did not prove the better solution." *Id.* (quoting *In re Hill*, 20 N.S.R.2d 528, 534 (N.S. Co. Ct. 1975)). Oppel adds that there is no doubt this judge personally approves of stepparent adoptions, a position apparent from his judicial and extra-judicial statements. *Id.* "The adoption cases decided by Judge O'Hearn are highly instructive, if for no other reason, than that they illustrate how the psychological 'set' of a trial judge may affect the outcome of a case." *Id.* at 644. Judge O'Hearn has granted the stepparent adoption application of a stepfather who had been married only three months at the time of application. See *id.* at 643 n.62, for cases involving stepparent adoptions and Judge O'Hearn. See also *supra* note 175.

372. See *supra* notes 91-92 and accompanying text; Berkowitz, *supra* note 75, at 224.

373. Matrimonial Causes Rules, r. 92(8), states that the parent with custody cannot change the child's surname by deed poll. See *supra* text accompanying notes 319-21. See *W. v. A.* (child: surname), [1981] 1 All E.R. 100, for a discussion of whether to grant a change in surname. In that case, the parents married in 1966, had two children, divorced in 1971, and each remarried. Custody of the boy and girl had been granted jointly to the natural parents. The mother's second husband was an Australian who desired to return permanently to Australia with his stepfamily. The natural father agreed to the move, provided the children retained his surname. The court of appeal upheld the lower court's decision to deny the request.

Bodenheimer suggests the choice belongs exclusively to the child and the joint custodians.³⁷⁴ Compromise alternatives might include appending the stepfather's surname to the natural father's surname or changing the entire stepfamily's surname to the surname of the natural mother or stepmother, to signify creation of a new family unit.

Maddox dismisses all the suggestions simply and straightforwardly:

There should be a general acceptance of two last names within a family. Mailboxes should read Smith and Jones. A society that wants nearly a million divorces a year cannot afford to be embarrassed when the children in a household don't have the same surname as their father and mother. Like millions of other children, they have their father's name and their mother has remarried. What is difficult about that?³⁷⁵

As the custom of women changing their surnames at marriage wanes and women retain their maiden names, mailboxes can read Smith and Brown and Jones, or Cooper and Koffman and Plante.³⁷⁶ But, until the United States and England accept the multiple surnames found in families in other cultures, the unadopted stepchild will carry the surname given at birth.

The English system clearly defines the rights and duties of the stepparent who is given joint custody. The system preserves the legal relationship of the stepchild and the noncustodial natural parent, while giving the stepparent the legal incidents of parenthood, and protects the stepchild by giving courts far-reaching equitable powers to require support from stepparent and natural parent alike and to distribute estates fairly. Implementation of the English system in all fifty states will be more difficult to accomplish than implementation was in England, where a single act of Parliament can legislate for the entire country. The first step toward acceptance of the English approach is to publicize its existence and to continue research into its success.

V. CONCLUSION

The United States should follow the English lead and discourage the increasing use of adoption by stepparents to adopt their legitimate stepchildren. Severance of a child's relationship with one half of its natural family is harmful and inappropriate, to the child, to the noncustodial natural parent whose relationship with the child is destroyed permanently and without a finding of unfitness,

374. Bodenheimer, *supra* note 1, at 45. Professor Bodenheimer suggests that the court ought to grant a request by the child and the joint custodians, i.e., the natural parent and stepparent, to change the child's surname to that of the stepfather, regardless of the opposition of the natural father. *Id.*

375. MADDUX, *supra* note 1, at 171.

376. See generally STANNARD, *supra* note 106. The stepfather keeps his name, the natural mother retains her maiden name, and the children keep their birth surnames, regardless of the mother's current marital status.

and to the natural grandparents and other relatives. Stepparent adoption should be limited to those cases in which adoption enhances, rather than diminishes, the child's family; for example, adoptions of a stepchild who is illegitimate, or who has been abandoned by an absent natural parent and has no other familial ties, or whose absent natural parent has died, with no other familial ties, are appropriate stepparent adoptions.

Changes in other laws that affect stepfamilies also are needed to ensure the welfare of the stepfamily for which adoption is inappropriate. Joint custody for stepparents should be encouraged, and the respective rights and duties, as well as mechanisms for dispute resolution, should be determined and developed. The law on testamentary guardians should be changed to the English model, to permit appointment of the custodial stepparent jointly with the surviving natural parent, in order to maintain the continuity of the stepchild's relationships after death of the custodial natural parent. The equitable power of the probate courts should be expanded to allow the court to protect stepchildren after the death of a parent or a stepparent. Support obligations by stepparents with joint custody should survive the termination of the underlying marriage, and the stepparent's rights to custody and visitation at divorce or death of the spouse should be clarified. The stepparent's rights should be determined by the best interests of the child rather than by the legal status or lack of legal status of the stepparent.

The stepparent in the United States is at present without any resort other than to adopt. The English stepparent is not compelled to adopt his or her stepchildren in order to establish a legal relationship; the joint custody system and the supporting laws in other areas of concern give the English stepfamily a secure legal position without resort to an artificial adoption and severance of the natural parent's relationship. The success of this approach is not merely theoretical. Its application in England is reassuring evidence that the system works and provides an adoptable model for this country.

Susan F. Koffman