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Stepparents as Third Parties in Relation to Their Stepchildren

MARGARET M. MAHONEY*

I. Stepparents as Third Parties

The "third parties" who inspired this symposium are categories of adults who form de facto family ties with children to whom they do not stand in the relationship of legal parent. In the eyes of the law, the status of parenthood is generally restricted to biological and adoptive parents. Within this frame of reference, stepparents constitute a major category of "third parties" who develop relationships with their stepchildren but are not regarded as legal parents.

A residential stepparent–stepchild relationship is created when the custodial parent of a minor child marries another adult who is not the child's biological or adoptive parent. By virtue of the stepparent's marriage to the child's custodial parent, the elaborate status of marriage is established at law between the two adults who thereafter share a home with the child. The question treated here is whether any legal significance attaches as well to the relationship between the stepparent and the stepchild in these circumstances.

The question of legal recognition for stepparent–child relationships may arise while the stepfamily members reside together as a family unit, or in the event that the marriage between the stepparent and the custodial parent is terminated by divorce or death. Inevitably, the recognition of

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81
residential stepparents as legally significant actors in the lives of their stepchildren in any of these circumstances would require some adjustment to the boundaries of family established in the law.

Both stepfamilies and the broad question of legal recognition for them have a long history. For example, a treatise titled *The Stepfather in the Family*, published in 1940, collected cases in the United States involving the financial rights and obligations of stepfathers dating back to the first half of the nineteenth century. In more recent decades, the number of stepfamilies in the United States has increased dramatically, due to the increased numbers of never-before-married mothers who marry men other than the fathers of their children and custodial parents who remarry following a divorce. During this same period, the level of demand for legal recognition of rights and duties between stepfamily members has risen, with scholars documenting and analyzing the resulting legal developments.

In spite of the long history of stepfamily issues in the legal arena, and the increased demand for regulation in recent decades, little progress has been made in establishing a clear or consistent legal definition of the stepparent status. The state of the law in this area and the reasons for the slow development of a legal status for stepparents are discussed at length in Parts III through VI of this article. Prior to that discussion, Part II presents demographic information about stepfamilies in the United States, derived from the 2000 census, and explores the meaning of the term "stepparent" in the census survey and in the law.

**II. Census Data and Definitions**

The most recent demographic information about stepfamilies is based on data collected by the U.S. Census Bureau in the 2000 census. The Census Bureau reported a total of 4.4 million "stepchildren of householders" in the United States in 2000; 3.3 million of these stepchildren were under

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2. ADELE STUART MERIAM, THE STEPFATHER IN THE FAMILY (1940).
3. See id. at 23-26 (discussing early cases invoking the in loco parentis doctrine as a basis for imposing stepparent support duties).
4. See MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW (1994); David L. Chambers, Stepparents, Biologic Parents, and the Law's Perceptions of "Family" after Divorce, in DIVORCE REFORM AT THE CROSSROADS 102 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Mary Ann Mason, The Modern American Stepfamily: Problems and Possibilities, in ALL OUR FAMILIES 95 (Mary Ann Mason et al. eds., 1998); Mary Ann Mason & Nicole Zayac, Rethinking Stepparent Rights: Has the ALl Found a Better Definition?, 36 FAM. L.Q. 227 (2002). At the same time, stepfamilies have become the subject of numerous empirical studies describing the behavior and attitudes of family members. See Chambers, supra, at 102–03 (describing dozens of empirical studies completed during the 1980s involving various aspects of the relationships established within stepfamilies).
eighteen years of age. The "stepchildren of householders" represented approximately five percent of all "children of householders" counted by the Census Bureau.

The number of stepchildren reported here is underinclusive in one sense, because the number includes "stepchildren of the householder" but omits stepchildren of the householder's spouse living in their home. The census questionnaire required one adult in each surveyed household to designate himself or herself as the "householder." All children in the home were then described by their relationship to the householder. Thus, if the biological parent was designated as the householder in a residential stepfamily, the stepchildren were designated as "biological children" of the householder, and the fact that the householder's spouse was not the second biological parent was not revealed. Notably, the Census Bureau conducted a smaller survey of children in 1996, which did not suffer from the "householder" status limitation on counting stepchildren. This earlier survey estimated that 4.9 million children under age eighteen were living with a stepparent, a number significantly higher than the 3.3 million minor stepchildren of the householder reflected in the millennial census figures.

Another definitional issue emerged in reporting the millennial census data about stepfamilies. According to the Census Bureau report, "[t]hese data reflect the changing usage of the terms "stepchild" and "stepfamily," since they show that some householders considered themselves to be stepparents even though they were not married to the biological parent of the child in their household." This conclusion was reached by looking to the information provided by householders, who claimed to reside with their "stepchildren," about their past and present marriage or domestic partnership status. Although the majority of self-designated "stepparents" were living with a spouse, some of them had never been married. This more expansive definition of stepparent, which includes the unmarried partner

6. Id. (reporting 83,714,107 total children of householders, and 64,651,959 children of householders under age eighteen).
7. Id. at 21. ("Some of the children who are listed in this report as biological children of the householder may also be the stepchildren of the spouse of the householder. . . .")
10. Id. at 19–20.
of a custodial parent, has not been widely implemented in the discussion of legal issues involving stepfamilies.\(^1\)

A final definitional aspect of the information about stepfamilies collected and reported by the Census Bureau is the exclusion of all nonresidential stepparent–child relationships. That is, the child of parents who did not reside together was counted just once, as a member of the household where the child spent the most time. The same child was not counted as a biological child or stepchild in the household of his or her noncustodial parent. According to the government report summarizing the census data about children, “[n]ationally representative surveys do not generally collect information about the relationship between household members and nonresident parents.”\(^1\)\(^2\) This limitation is consistent with the commonly employed definitions of stepparent and stepchild in the law.\(^3\)

III. Numerous Factors Have Slowed the Development of a Legal Status for Stepparents

The legal status of parenthood entails numerous rights and obligations, including custodial rights and financial obligations. Parent–child relationships are regulated in this manner to recognize and strengthen the family unit and protect dependent family members. Under the traditional model of parenthood and family, this important family status is limited to the categories of biological and adoptive parents and excludes stepparents who marry the custodial parents of minor children. Over time, stepfamily members have sought recognition in many of the legal settings where family relationships matter. Claimants maintain that the recognition of stepparenthood as a legal status is necessary to accomplish the general goals of the family law system, regarding protection and support for the family unit and its members, as to the large category of stepfamilies.

The recurring legal issues, governed by the statutes and case law of each state, include the custodial authority of the stepparent while married to the custodial parent of a minor stepchild, stepparent custody or visitation rights following termination of the marriage, the support responsibility of the stepparent during marriage and following divorce, and stepchild rights to inherit from the stepparent who dies without a will. Additional questions have arisen about the status of stepparents in other legal settings,

\(^{11}\) But see UNIF. ADOPTION ACT (1994) § 4-102(b) cmt. (recognizing the “de facto stepparent,” who is not married to the child’s custodial parent, as a “de jure stepparent” with standing to file a stepparent adoption petition).

\(^{12}\) KREIDER, supra note 5, at 21.

\(^{13}\) See, e.g., Van Dyke v. Thompson, 630 P.2d 420 (Wash. 1981) (excluding nonresidential stepparents from coverage under the state statute creating stepparent support obligations).
such as criminal and tort law and social benefit programs, which are beyond the scope of this article.\textsuperscript{14}

The starting premise under the traditional model of parenthood and family is that claims for legal recognition of the stepparent–child relationship will be denied. The current "law of stepfamilies" consists of a series of limited exceptions, created by the state legislatures and courts, which recognize the stepparent status for a single purpose in the law. Notably, the rules establishing limited recognition in this manner for stepparents as third parties are not uniform from one state to another.

The law of stepparent adoption is an important dimension of the legal regulation of stepfamilies. The adoption laws in every state create a procedure for moving the residential stepparent from the status of third-party adult into the status of legal parent with full parental rights and obligations vis-à-vis the adopted stepchild. The adoptive status, established by court order, is available only if the parental status of the child's noncustodial parent has been legally terminated.

The explanation for the continuing failure of the state courts and legislatures to define a clear and consistent legal status for residential, non-adoptive stepparents has several elements. First and foremost, as described in Part IV, adherence to the traditional model of the family has slowed the willingness of lawmakers to extend family recognition to stepparents and other third-party adults who serve as parent figures for minor children. A more refined aspect of this first consideration, relating to protection for the status of noncustodial parents, is discussed in Part V. Finally, Part VI describes the ways in which a perceived lack of uniformity among stepfamilies, in terms of the level of stepparent involvement with stepchildren, has complicated the task of regulating them in the law. The resulting "law of stepfamilies," which recognizes the stepparent–child relationship for limited purposes, is an essential element in the description of family boundaries in United States law today.

\textbf{IV. Adherence to the Traditional Family Model Has Slowed the Development of a Legal Status for Stepparents}

The comprehensive recognition of stepparenthood as a significant legal status would require a change in the established model of family in the

law. The traditional family model emphasizes biology and adoption as the exclusive bases for establishing legally recognized adult–child relationships. The nonadoptive residential stepparent is not a parent in this sense, although he or she is married to the stepchild’s custodial parent and functions as the second adult in their home, possibly sharing de facto responsibility for the child. The recognition of stepparenthood as a significant legal status would set aside the established principle that adult rights and duties toward children arise exclusively via biology or adoption.

A California trial court highlighted this consideration in the case of Halpern v. Halpern, in denying the visitation request of a stepfather who had served as the primary caretaker of his young stepdaughter from the time of her birth until his marital separation, stating:

I have to find the best interests of the child require there be no visitation because [the stepfather] is a nonparent. He absolutely has no relationship to the child bloodwise or otherwise. . . . This child was well under two years of age. . . . I can’t accept I should burden all of the parties in this matter, including [the stepfather], with conflicts, struggles and disruptions for years to come. . . .

If the stepfather in Halpern had been the child’s biological father, his right to continuing access to the child would have been unquestioned. The court expressly relied upon the absence of this biological connection in reaching the opposite result for Mr. Halpern.

An additional and related challenge to the traditional family model arises in stepfamilies where the stepchild’s second biological parent is present in the child’s life. Here, the residential stepparent challenges the established assumption that the family model, premised on biology, has room for only two parents or parent figures. The legal recognition of a third adult with rights and duties vis-à-vis the child would complicate the family picture, and might be experienced by the noncustodial parent as a dilution of his or her role. Professor Mary Ann Mason has observed that “[m]ultiple parenting is . . . one of the reasons that there has been no consistent effort to reformulate the role of stepparents.”


17. Id. at 747 (quoting portions of the trial court opinion).


19. Mason, supra note 4, at 109–10. See also Chambers, supra note 4, at 110 (“In most [legal] contexts . . . , the recognition of the stepparent relationship costs someone something and someone feels like a loser.”).
The opinion of the Halpern court, quoted above, referred to potential "conflicts, struggles and disruptions for years to come" as a basis for denying stepparent visitation rights following divorce. In the case of biological parents who divorce, the potential for future disagreement does not deter the entry of enforceable custody and visitation orders. As to stepparents such as Mr. Halpern, on the other hand, judicial concerns about additional complications in the postdivorce family may result in the denial of visitation claims, especially when a court has already established enforceable visitation rights for the noncustodial biological parent.

The same concern about "multiple parents" is reflected in the laws allocating the legal decision-making authority for stepchildren who reside with a custodial parent and stepparent. As a starting premise, the authority to make decisions about a child's well-being, in areas such as education, religious training, and medical care, is shared by the child's biological parents. In the event of divorce, the divorce decree would allocate legal (decision-making) custody between the parents. Between never-married parents who do not live together, the issue of custodial responsibility may be addressed by their informal agreement or by court order. If the divorced or never-married parent with primary physical custody of the child subsequently marries, a question arises about the new stepparent's role as another "voice of authority" for the child.  

As a practical matter, the members of each stepfamily define the scope of stepparent authority within their household, as to matters such as children's schedules and discipline. Furthermore, the stepparent inevitably shares major aspects of the custodial parent's decision-making authority when the couple makes major household decisions, such as where the family will reside and what food they will eat. However, a more formal definition of the lines of authority becomes necessary when individuals who deal with children outside the home, such as educators and medical practitioners, enter the picture. These parties look to the adults who have clear legal authority to make decisions for the children.

In the medical field, where practitioners must obtain the patient's informed consent to most medical procedures, the consent of a parent or other authorized adult is usually required before a child can be treated. Common law and statutory rules in every state authorize the child's legal custodian or guardian, typically the parent or both parents in the case of joint legal custody, for this purpose. Under these laws, "[s]tepparents in most states have no . . . authority to give legally effective consent to med-

20. See Mahoney, supra note 4, at 124–29 (discussing custodial authority of residential stepparents); Mason, supra note 4, at 111.

ical treatment for their minor stepchildren."\textsuperscript{22}

The identity of the adult(s) with decision-making authority is important as well to educators who must defer to parents on matters affecting the education of their children. Parents make decisions, for example, about the child's enrollment in a particular school or program and the release of student records.\textsuperscript{23} Stepparents are generally excluded from the laws that establish adult authority as to these matters.\textsuperscript{24} Their limited recognition in school settings then depends largely upon the policies adopted by schools and educators, such as a policy that would allow the stepparent to pick up the child after school upon written consent of the custodial parent.\textsuperscript{25}

The absence of legal standing for residential stepparents in these settings reflects the underlying aversion to "multiple parents" in the law. From the perspective of the medical practitioner or educator, a model that gives a voice to one or two biological parents limits the potential for conflicting messages from additional authority figures, and the need to identify them in the first place. This simple model, however, imposes a burden on step-families in which the stepparent has assumed an active parenting role, because a costly gap is created between the reality of family life and the recognition extended to the family by other parties who deal with the children. In the eyes of the law, this model is the norm, based on the traditional definitions of family and parenthood.

V. Protection for the Rights of Noncustodial Parents
Limits the Legal Recognition of Stepparents

In cases where a child's biological parents do not reside together and the child lives primarily with one of them, both maintain their rights as parents unless a court order terminates the legal status of the noncustodial


\textsuperscript{24} See MAHONEY, supra note 4, at 128–29.

parent. The noncustodial parent owes support to the child and is entitled to remain involved in the child's life. When a stepparent marries the custodial parent and thereafter resides with the child, certain legal issues may arise that place the interests of the stepparent and the noncustodial parent vis-à-vis the child in direct conflict. Of course, these disputes inevitably involve the interests of other family members, especially the child and the custodial parent.

The issue of stepparent adoption highlights in the starkest fashion the potential conflict between claims of the residential stepparent and the interests of the child's noncustodial parent. On the one hand, an adoption operates to formalize de facto connections already established within the stepfamily, by designating the stepparent as the child's legal parent for all purposes. On the other hand, the stepparent is able to adopt only after the noncustodial parent has been removed from the status of legal parent by consent, court order, or death.

As a procedural matter, the stepparent initiates an adoption proceeding by filing a petition with the adoption court. The participation of the child's custodial parent (the spouse of the stepparent) is generally required, in the form of written consent to the proposed adoption. State adoption statutes generally waive, as to the spouse of the petitioning stepparent, the general requirement that all rights of both biological parents must be terminated prior to an adoption. The child's consent is also required, if the child has

26. Another category of cases that places the stepparent in direct competition with the noncustodial parent involves custody disputes arising upon the death of the custodial parent. Professor David Chambers observed that judges deciding these cases "face much the same inef-fable choices that they do in the context of disputed stepparent adoptions. . . . The incoherent pattern of outcomes and the murky and inconsistent discussions of the governing rules almost certainly reflect our society's conflicting and unresolved attitudes about stepparents, even when loving, and about biologic parents, even when indifferent." Chambers, supra note 4, at 122.

The contested stepchild name-change case may also be seen as a competition between the noncustodial parent and the stepparent, although the stepparent is not usually a named party. Name-change cases arise when stepfamily members (usually the custodial parent and the child) seek to change the child's last name from that of the noncustodial parent (usually the father) to the surname of the stepparent (the stepfather). As in the context of stepparent adoption, state law doctrines governing these disputes vary in terms of the level of protection established for the respective interests involved. See Mahoney, supra note 4, at 149–59; Merle H. Weiner, "We Are Family: "Valuing Associationalism in Disputes over Children's Surnames, 75 N.C. L. Rev. 1625, 1690–1752 (1997). See generally Jay M. Zitter, Annotation, Rights and Remedies of Parents Inter Se with Respect to the Names of Their Children, 40 A.L.R. 5th 697 (1996 & Supp. 2005) (collecting cases).

27. See, e.g., Unif. Adoption Act, supra note 11, at § 4-108.

28. See, e.g., id. at § 4-105 (requiring consent of petitioning stepparent's spouse).

29. See, e.g., id. at § 4-103(b)(1), 1 Joan Heifitz Hollinger, Adoption Law and Practice § 2.10[3], at 2–94 (2004).
reached a certain age or level of maturity. Finally, the noncustodial parent must receive notice of the adoption action and may either consent or object to the adoption.

The noncustodial parent who objects to a proposed stepparent adoption is seeking to protect his or her own legal relationship with the child with all of the benefits and obligations for both parent and child associated with this status. Generally speaking, this relationship is entitled to legal protection as a matter of state policy and constitutional law. The stepparent adoption laws must balance this important set of interests against the competing interests of the child and other family members associated with formal recognition of the stepparent–child relationship.

The standard uniformly applied by the courts in ruling on stepparent adoption petitions is the best interests of the child. Before the court reaches this point in the analysis of a contested stepparent adoption case, however, the court must address the status of the noncustodial parent who is objecting to the adoption. Statutes in every state set out standards pursuant to which the parent’s consent to adoption can be waived, and his or her parental rights terminated by the court. If the state standard for waiving parental consent is met in a stepparent adoption case, then the court may proceed to consider the merits of the adoption petition.

The statutory standards governing the waiver of parental consent to adoption vary from state to state in ways that establish varying levels of protection for the biological parent–child relationship. While the variation in statutory standards is significant, the results in many stepparent adoption cases are also shaped by the enormous amount of discretion exercised by judges in construing and applying these statutes in individual cases. As cited above, the Supreme Court has recognized that parents have a fundamental right to the custody of their children.

30. See, e.g., UNIF. ADOPTION ACT, supra note 11, at § 2-401(c) (establishing age twelve as the age at which the child's consent to adoption is required).
31. See, e.g., id. at § 4-110(a).
32. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.3, at 439 (1997) ("The Supreme Court has recognized that parents have a fundamental right to the custody of their children."). The Supreme Court recently reaffirmed the substantive constitutional rights of parents in the context of a third-party visitation case in Troxel v. Granville, 530 U.S. 57 (2000).
33. See, e.g., UNIF. ADOPTION ACT, supra note 11 at § 3-703; 1 HOLLINGER, supra note 29, § 1.01(2)[b], at 1-12.
34. See JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 6.01[B][1] at 184 (2005) ("Termination of parental rights . . . is, like adoption, a creature of statute."); 1 HOLLINGER, supra note 29, app. 1-A (collecting state statutes governing the waiver of parental consent in adoption proceedings). The involuntary termination of parental rights may also occur outside the adoption context, following intervention by the state to protect children in abusive and neglectful families. The legislatures in some states have established a single set of statutory termination standards to govern all cases; others have enacted specific provisions to govern adoption cases. Id.
in the legislative formulation of standards in this difficult field, there is no consistent approach taken by the state courts to the task of balancing the competing interests that arise in every contested stepparent adoption case.

A key variable in the state stepparent adoption statutes relates to the scope of evidence that the court may consider in ruling on the status of the noncustodial parent. Under the traditional legislative model, the court’s inquiry is limited to information regarding the nonconsenting parent’s past conduct. However, the statutory standards in some states deviate from this model and allow the court to consider as well other evidence relating to the child, including evidence about the child’s existing placement in the stepfamily. In cases where the additional information about the stepfamily is positive, this broader inquiry may have a negative impact on the court’s determination about the status of the noncustodial parent.

The traditional standards governing waiver of consent by the noncustodial parent to a proposed stepparent adoption generally require a judicial determination that the parent intended to abandon the child, or is “unfit” to continue in the status of legal parent. The relevant conduct often involves the “failure to maintain contact with the child, to support the child, or to otherwise carry out the responsibilities of parenthood over a period of time.” Under this statutory model, the well-being of the child apart from his or her relationship to the noncustodial parent becomes relevant only after an affirmative determination of parental unfitness, when the court subsequently determines whether a stepparent adoption would serve the child’s best interests.

The Illinois case of In re Adoption of Syck dramatically illustrates the impact of limiting the evidence in this manner in the threshold determination about the status of the noncustodial parent. The Illinois statute applied in this case permitted the waiver of consent if the parent was “found by the court, by clear and convincing evidence, to be an unfit person.” The adoption court found the noncustodial mother in Syck to be an

35. See I Hollinger, supra note 29, § 2.10[3], at 2-97 to -99.
36. See id. at 2-106 to -108.
37. MAHONEY, supra note 4, at 165. See also I Hollinger, supra note 29, § 2.10[3], at 2-97 to -99.
39. Id. at 183-84. The heightened evidentiary standard of “clear and convincing evidence” in the Illinois statute applied in this case is a common feature of state statutes governing the involuntary termination of parental rights, enacted in response to the ruling of the Supreme Court in Santosky v. Kramer, 455 U.S. 745 (1982) (holding that the Due Process Clause required the heightened standard in a case involving state-initiated termination of parental rights). The heightened evidentiary standard establishes greater protection for the noncustodial parent in stepparent adoption cases. See, e.g., In re I.R.D., 971 P.2d 702, 705 (1998) (“Because the fundamental liberty interest of the parent in the relationship with the child is involved, the
“unfit person” under this provision, and terminated her parental rights. An intermediate appellate court affirmed. But the Illinois Supreme Court reversed, holding that the lower courts had erroneously factored the child’s interest in being adopted into their analyses of the noncustodial mother’s status under the waiver of consent statute.  

The legislative provisions in other states deviate from this traditional model, and allow the courts making waiver of consent/termination decisions to consider factors besides the past conduct of the noncustodial parent. The Uniform Adoption Act of 1994, which provides a model rule for enactment by the states, illustrates this alternative approach. The act would require the court to find, “upon clear and convincing evidence,” that the noncustodial parent “failed to . . . make reasonable and consistent [support] payments . . . [and failed to] communicate or visit regularly with the minor” for a period of at least six months immediately preceding the adoption petition; and would also require the court to find, “by a preponderance of the evidence, that termination is in the best interests of the minor.” This broader standard would authorize the court to consider evidence about the child’s relationship with the noncustodial parent, as under the traditional “fitness” inquiry, and would also enable the court to consider evidence—both positive and negative—about the stepfamily. Under this model, the same evidence might inform both the judicial decision to terminate the rights of the noncustodial parent and the subsequent determination whether a stepparent adoption would serve the child’s best interests.

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40. Syck, 562 N.E.2d at 183.
42. UNIF. ADOPTION ACt, supra note 11 at § 3-504(c)(2) (governing cases involving children older than six months who have been residing with a parent). See also WASH. REV. CODE ANN. § 26.33.120(1) (West 2005) (“[T]he parent-child relationship of a parent may be terminated upon a showing by clear, cogent, and convincing evidence that it is in the best interest of the child to terminate the relationship and that the parent has failed to perform parental duties under circumstances showing a substantial lack of regard for his or her parental obligations and is withholding consent to adoption contrary to the best interest of the child.”) (emphasis added).
43. The method used by the Colorado courts to resolve the dual issues of waiver of consent and stepparent adoption guarantees that the adoption court will consider information about the child’s best interests in every case, even though the waiver of consent statute focuses, in the traditional manner, exclusively on parental conduct. The Colorado courts first consider whether a proposed adoption is in the best interests of the child, an inquiry that typically involves full consideration of the child’s relationships with all parties. The courts apply the waiver of consent statute, which requires abandonment by the parent or the failure to provide support to the child.
However broad or narrow the state statutory standard for dispensing with parental consent to adoption, the courts exercise a great deal of discretion in construing and applying the state statutes in this field. According to Professor Joan Hollinger, the variations in judicial interpretation of the parental consent statutes reflect differing approaches to the task of balancing the competing interests in stepparent adoption cases.

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

A prime example of the exercise of discretion involves the judicial construction of language such as the “fail[ure] to communicate or visit regularly with the minor” provision of the Uniform Adoption Act, quoted above. At one extreme, in a recent stepparent adoption case in Ohio, a single ten-minute accidental encounter by the noncustodial mother with her child at the county fair preserved her right to prevent a proposed stepparent adoption. The trial court in this case, In re Vaughn, had determined that the mother's consent to adoption should be waived under the Ohio statute allowing such a waiver when “the parent has failed without justifiable case to communicate with the minor... for a period of at least one year.” In reversing this decision, the appellate court stated that “we are properly obliged to strictly construe [the state statute] to protect the interests of the nonconsenting parent who may be subjected to forfeiture or abandonment of his or her parental rights.”

By way of contrast, other state courts have ruled that such “incidental contact” by the noncustodial parent does not constitute the “visitation or communication with the child” required to preserve the parent’s rights.

An additional element of judicial discretion in these cases is the authority of the adoption court to preserve the status of the noncustodial parent, for one year, only in cases where an affirmative determination has been made on the threshold question of the child’s best interests. See In re R.H.N., 710 P.2d 782, 785 (Colo. 1985) (applying Colorado waiver of consent statute currently codified at COLO. REV. STAT. § 19-5-203(1)(D)(II) (2004)).

44. See HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 895–905 (2d ed. 1988) (discussing judicial construction and application of statutory standards governing the involuntary termination of the parental status).

45. 1 HOLLINGER, supra note 29, § 2-10[3], at 2-99.


47. Id. at *2.

48. See, e.g., In re Adoption of R.W.B., 7 P.3d 306, 310 (Kan. Ct. App. 2000) (applying a state statute that expressly “allow[ed] the court to disregard incidental visits, contact communications, or contributions”); 1 HOLLINGER, supra note 29, § 2.10[3], at 2-103 to -106 (collecting cases).
even after ruling that statutory grounds exist to terminate the parent’s rights. This result is usually based on the judge’s general understanding that children’s interests are best served by continuing a legal connection to their biological parents. This viewpoint was expressed, for example, in the Colorado case of *In re J.A.A.*, where the adoption court determined that the noncustodial father’s abandonment of his child for more than three years constituted grounds for terminating his parental rights. In spite of this finding, the adoption court refused to terminate the father’s rights and grant the stepparent adoption petition, stating that “it would be in the best interest of the child to maintain and develop a relationship with his natural father.” The appellate court subsequently ruled that “[this] decision is within the discretion of the trial court.” The exercise of judicial discretion in this case clearly assigned priority, as between the competing interests that are present in every stepparent adoption case, to the set of interests associated with maintaining the noncustodial parent–child relationship.

The category of stepparent adoption cases involves certain special considerations relating to the child’s existing placement, which do not arise in other types of adoption cases. Here the potential adoptive parent (the stepparent) has been selected for a parenting role by the child’s custodial parent, to whom the care of the child is already entrusted. Furthermore, a stepparent adoption does not require a new placement for the child who already resides with the custodial parent and the petitioning stepparent, and formalizes established relationships within the stepfamily. These special circumstances may influence the exercise of judicial discretion in contested cases.

50. *Id.* at 743.
51. Stepparent adoptions receive special legal treatment, compared with other categories of adoption, in certain provisions of the state adoption codes. First, the waiver of consent statutes in some states include grounds that apply only in stepparent adoption cases. See, e.g., KAN. STAT. ANN. § 59-2136 (1994) (establishing ground of “fail[ure] or refus[al] to assume the duties of a parent for two years” in stepparent cases); LA. CHILD CODE ANN. art. 1245 C (2004) (establishing six-month period of nonsupport or failure to communicate for six months as ground for waiver of consent in stepparent cases). Furthermore, many state adoption codes authorize the courts to waive certain procedural requirements, such as financial accounting and home inspection requirements, in stepparent cases. See, e.g., ALA. CODE § 26-10A-27 (1992) (“Any person may adopt his or her spouse’s child according to the provisions [regulating adoptions], except that . . . [n]o investigation . . . shall occur unless otherwise directed by the court, and . . . no report of fees and charges . . . shall be made unless ordered by the court.”). See generally Unif. ADOPTION ACT supra note 11, at art. 4 cmt. (describing special features of the stepfamily that justify different procedural rules in stepparent adoption cases); 1 HOLLINGER, supra note 29, § 3.02[1][a], 3-10 n.12 (noting that “in some situations a refusal to waive the home-study requirement or an insistence on a waiting period may be advisable, especially if any doubts are raised about the...
Thus, the special circumstances of the residential stepchild led one appellate court to conclude that judicial discretion should, as a general rule, be exercised in favor of stepparent adoption petitions, as follows:

[P]ublic policy favors stepparent adoption because the adoption helps solidify an already existing family unit consisting of one of the biological parents. . . . [T]he modern trend is to make stepparent adoption easier. . . . The conflict between the best interests of the child and the natural parent’s right to parenthood, which can arise in a stepparent adoption . . . is resolved in Colorado law by placing primary importance on the best interests of the child.52

Elsewhere, however, the stability of the stepchild’s existing placement has led to the opposite conclusion, that judges should be less willing to grant contested adoption petitions in stepparent cases than in other types of adoption cases. This viewpoint was explained by Professor David Chambers, as follows:

In any given case, especially one in which the biologic father is protesting, the judge may well be puzzled whether the child will really be any better off if adopted. The immediate benefits to the child from permitting the adoption may be hard to measure—the child is, after all, already living securely with the stepparent who proposes to adopt.53

Some of the benefits that may accrue to the established stepfamily upon adoption are intangible, such as the symbolic value to family members of creating a formal legal status between stepparent and child. The formal change of the stepchild’s surname reflects this symbolic shift in many adoption cases. Furthermore, certain immediate, practical consequences may flow from the child’s changed legal status, such as eligibility for benefits under the adoptive parent’s employee benefit programs, and standing of the adoptive parent to act for the child vis-à-vis third party educators and medical practitioners. Finally, all of the future consequences of legal parenthood, such as support responsibility and custodial rights, replace the uncertain status of the nonadoptive stepparent. Of course, in contested stepparent adoption cases, the benefit of these changes must be weighed against the loss of the symbolic and legal connections between the adopted child and the noncustodial parent.

The opinion of the Missouri Court of Appeals in the case of L. v. L.54

quality of the relationship between a child and an actual or prospective stepparent”) (citing 1987 report indicating “disproportionate incidence” of abuse and homicide of children by residential partners of custodial parents).

52. E.R.S. v. O.D.A., 779 P.2d 844, 849-50 (Colo. 1989) (holding that a provision relating to nonsupport as the basis for termination of parental rights under the Colorado waiver of parental consent statute should be construed in favor of easier termination).

53. Chambers, supra note 4, at 112.

provides more insight than the opinions in many other stepparent adoption cases about the motivations of the custodial father, the petitioning stepmother, and the noncustodial mother who successfully contested the proposed adoption. Notably, the parties focused on important legal changes that would take place in the event of the stepmother’s adoption of her stepson.

According to the court in *L. v. L.*, the custodial father and stepmother “both testified that they filed the petition for adoption because they were concerned about the custody situation if something were to happen to [the father].”55 The stepfamily’s concern about the child’s future placement was premised on the fact, conceded by the mother, that she could not “provide [the child] with an adequate home and care.”56 Under general child custody principles, in the event of a custodial parent’s death, a presumption exists that the noncustodial parent has exclusive custodial rights, and the stepparent has none.57 On the other hand, if the stepmother in *L v. L.* adopted her stepchild, the noncustodial mother’s rights would be terminated and, in the event of the father’s death, the adoptive stepmother would enjoy the role of sole surviving parent.

The noncustodial mother in *L. v. L.* expressed a different legal concern. Namely, she opposed the proposed stepparent adoption because she did not want to lose the enforceable right to visit with her son. The court explained the validity of this concern, as follows: “All agree that it is in the best interest of [the child] that he maintain the relationship with his mother. However, once the adoption becomes final that relationship can continue to exist only upon the option of the adoptive parents.”58

The adoption court in *L. v. L.* determined that the noncustodial mother had “continuously neglected to provide [her child] with necessary care and protection” for at least six months, which established the ground for waiving her consent to the proposed adoption. In overruling this determination, the appellate court addressed the parties’ respective concerns

55. *Id.* at 736.
56. *Id.* at 736–37.
57. See 1 LINDA D. ELROD, CHILD CUSTODY PRACTICE & PROCEDURE §§ 7:13–14 (2004) (discussing state laws governing parent versus stepparent custody disputes); Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045 (1996) (proposing different standards to govern parent versus stepparent custody disputes depending upon whether the conflict arises between the custodial parent and stepparent at the time of divorce, or between the noncustodial parent and stepparent following death of the custodial parent). See generally Margaret M. Mahoney, *Stepfamilies from a Legal Perspective* 231, 243–47, in STEPFAMILIES: HISTORY, RES., AND POL’Y (Irene Levin & Marvin B. Sussman eds., 1997) (noting that the authority of the custodial parent to affect the respective rights of the stepparent and noncustodial parent by executing a will or other legal document is limited).
58. *L. v. L.*, 937 S.W.2d at 738.
about the legal consequences of adoption. According to the court, the stepfamily’s concern about the child’s future custody “is a valid consideration in a stepparent adoption but we do not find it outweighs the benefits to the child arising from his relationship with his natural mother.”

The specific legal concerns raised by the parties in *L. v. L.* highlighted the all-or-nothing nature of adoption law. That is, in order to establish future custodial rights for the stepmother in *L. v. L.*, the noncustodial mother’s present rights of access had to be terminated. An alternative, more flexible legal model could be established that would recognize rights for both the noncustodial parent and the stepparent in appropriate cases. The most frequently discussed alternative is an “open adoption” law that would permit the court to enter an enforceable third-party visitation order for the noncustodial parent whose status is terminated by consent or by court order prior to adoption. In these circumstances, the former parent with a visitation order entered by the adoption court would enter the ranks of the “third parties” featured in this symposium.

The all-or-nothing model of adoption, embodied in the state laws discussed in this Part, reflects traditional understandings about family boundaries in the law. Stepparent adoption involves the replacement of one legal parent figure (the noncustodial parent) with another (the stepparent), thus reflecting the general principle that legal parenthood, limited to two adults at one time, must be created by biology or adoption. Furthermore, a court will grant the stepparent’s petition to adopt only if a determination has been made that grounds exist to terminate the status of the biological parent, thus illustrating the level of protection extended in the law to the status of biological parenthood.

**VI. The Lack of Uniformity of Stepfamilies Has Slowed the Development of a Legal Status for Stepparents**

Another consideration, relating to the nature of the stepfamily itself, has contributed to the slow development of “stepfamily law” in nonadop-
tive stepfamilies. Namely, it is generally understood by lawmakers and policy analysts that the functional relationships formed between stepparents and their stepchildren vary widely from one family to the next, in terms of the levels of family connectedness and responsibility. Numerous empirical studies indicate that the attitudes of stepfamily members toward each other and the involvement in parenting undertaken by stepparents are not consistent from one family to the next.61

Professor David Chambers described the variation among stepparent roles, and its impact on lawmaking, as follows: “The stepparent relationship, by contrast [to the biological parent role], lacks—and, I would argue, cannot possibly obtain—a single paradigm or model of appropriate responsibilities.”62 Chambers highlighted two factual variables that affect the roles assumed by stepparents: the age of the child when the stepfamily is formed and the extent of involvement by the child’s noncustodial parent. But the constant and most significant factor contributing to lack of consistency in stepparent roles, observed by Chambers, was the absence of any “set of clear norms to guide their behaviors.”63

This perceived lack of consistency among stepfamilies makes their legal regulation a more complex undertaking than the regulation of traditional families where the assumption of basic uniformity, however erroneous, exists. A one-size-fits-all set of affirmative rights and duties for residential stepparents toward their stepchildren would be a misfit for too many of the regulated families. The traditional legal response to this dilemma is to ignore the stepparent in the family.

A. Nonrecognition of Stepfamilies Is the Default Position in the Law

The law of inheritance, which governs the distribution of property to the heirs of an individual who dies without a will, illustrates this traditional approach to stepfamily regulation. The distribution of property in these circumstances is governed by state intestacy statutes, which list the property owner’s closest family members as heirs. The intestacy statutes in every state include biological and adopted children and exclude unadopted stepchildren as heirs.64

62. Chambers, supra note 4, at 104–05.
63. Id.
The intestacy statutes establish a one-size-fits-all "estate plan" for those individuals who fail to tailor their own plan for property distribution at death by executing a will. The goals of the legislation are to accurately identify the categories of family members who are the "natural objects of bounty" of the average decedent, thereby protecting the donative intentions of the property owner and achieving economic fairness within the family, and to keep simple the process of fitting the statutory model onto individual family trees. Within this framework, the exclusion of stepchildren implies that they are not likely to be regarded as "natural objects of bounty" by the average property owner, and that eligibility for stepchildren might complicate the process of identifying the decedent's heirs in some cases.

Not surprisingly, compelling cases have emerged where the exclusion of unadopted stepchildren from inheritance has defeated the intentions of an individual property owner and produced unfair results. In families where close family ties have formed between stepparent and stepchild, excluding the stepchild as an heir produces the "wrong" result. Of course, any one-size-fits-all approach to property distribution inevitably produces "wrong" results in some cases. Thus, the children of a deceased property owner may be "undeserving heirs" in this sense, under the rules that include all biological and adopted children whatever the nature of the parent-child relationship in each case. The premise of the state intestacy statutes is that donative intent and fair results are most likely to be accomplished in the largest number of cases through the inclusion of biological and adopted children, but not stepchildren.

An alternative approach to rulemaking would require the case-by-case evaluation of stepparent-child relationships to determine whether the heirs, along with the biological and adopted children of the decedent, in certain circumstances. Few stepchildren are likely to qualify as heirs under the statute, which requires proof that the "stepparent would have adopted [the child] but for a legal barrier." See CAL. PROB. CODE § 6454 (West Supp. 2006). See generally L.S. Tellier, Annotation, Descent and Distribution from Stepparents to Stepchildren or Vice Versa, 63 A.L.R.2d 303 (1959 & Later Case Serv. 1994) (collecting stepfamily inheritance cases).


66. See, e.g., In re Berge's Estate, 47 N.W.2d 428 (Minn. 1951). In some jurisdictions stepchildren, along with others who are excluded as heirs under the state intestacy statute, may inherit under the judicial doctrine of equitable adoption. The standard established under the equitable doctrine requires proof of a contractual promise by the property owner to adopt the children, a scenario that exists in very few stepparent inheritance cases. See MAHONEY, supra note 4, at 60–63; Ralph C. Brasher, Children and Inheritance in the Nontraditional Family, 1996 UTAH L. REV. 93, 172–74. See generally Tracy Bateman Farrell, Annotation, Modern Status of Law as to Equitable Adoption or Adoption by Estoppel, 122 A.L.R. 5th 205 (2004) (summarizing case law not limited to stepfamily cases).
assignment of legal consequences, such as inheritance rights, would be fair and appropriate. In the field of inheritance law, the state legislatures have eschewed this approach and maintained an across-the-board rejection of stepchildren as heirs. In other areas of law, however, the legislatures and courts in certain states have adopted a more refined approach to regulating stepfamilies.

B. Regulation under the in Loco Parentis Doctrine

The in loco parentis doctrine has been developed and applied by state legislatures and courts for the purpose of identifying those residential stepparents (and other adults) who assume an active parental role in the life of a child, and attaching specific legal consequences to this voluntary behavior. The in loco parentis doctrine literally requires the stepparent to demonstrate, through statements and actions, the intention to stand “in the place of a parent.” Statutes and common law rules in each state assign legal consequences to the in loco parentis status in areas such as child support, child custody and visitation, and medical consent for the treatment of minors.

The in loco parentis doctrine has wide application in the area of child support. The starting premise in the law of child support is that the two biological parents, who cause children to enter the world, bear exclusive financial responsibility for them. Against this backdrop of mandatory responsibility, the in loco parentis doctrine acknowledges the additional, voluntary responsibility for stepchildren undertaken by their stepparents. Notably, the stepparent support duty arising under the in loco parentis

67. See generally Feigenbaum, supra note 64 (summarizing scholarly proposals for reform to allow stepchild inheritance).


69. The voluntary nature of stepparent support responsibility under the in loco parentis doctrine highlights an important normative consideration that has helped to shape the law of economic responsibility for stepchildren. The normative consideration is that family laws should not discourage marriage, especially marriage to single parents whose economic standard of living along with that of their children might improve upon marriage. See generally Mary Ann Mason et al., supra note 61, at 509 (referring to empirical studies that document the improved economic position of children upon marriage of their single parent). Within this framework, a perception has long existed that compulsory economic responsibility for stepchildren might discourage individual decisions to marry custodial parents. See, e.g., Van Dyke v. Thompson, 630 P.2d 420, 423 (Wash. 1981) (opining that a broad construction of the state stepparent support statute, which would extend support duties to nonresidential stepparents, “would be contrary to . . . compelling
doctrine terminates upon the end of the stepparent’s marriage to the child’s custodial parent.\textsuperscript{70}

During the ongoing marriage, the practical significance of a stepparent support obligation involves third parties,\textsuperscript{71} such as creditors who provided items necessary for the support of the steppchild and thereafter seek payment from the stepparent.\textsuperscript{72} Another category of persons outside the stepfamily who may be interested in the existence of stepparent support obligations consists of noncustodial parents who owe support to minor children residing in stepfamilies. As a general rule, however, the existence of a stepparent support duty has not been regarded by judges in child support cases as a basis for relieving the noncustodial parent of responsibility.\textsuperscript{73}

The common law in loco parentis doctrine developed in the state courts...
is not limited to stepparents. Other adults who assume responsible roles in the lives of children may also receive recognition for various legal purposes, including child support, because they stand "in the place of a parent." By way of contrast, a number of state legislatures have codified the in loco parentis doctrine for the purpose of imposing support obligations exclusively upon residential stepparents.74

By distinguishing those residential stepfamilies where the actual roles played by family members warrant legal regulation, the in loco parentis doctrine is designed to produce more just results than the traditional laws that deny recognition to all stepparents. The more tailored approach, however, involves well-understood costs for family members and for the legal system, relating to the uncertainty and expense incurred under a rule requiring case-by-case application.75

C. A Third Approach to Rulemaking Recognizes All Residential Stepparents

A scattering of state statutes, primarily in the fields of child support and postdivorce visitation, avoid the necessity of case-by-case determinations by extending legal recognition to all residential stepparents without regard to the role of the stepparent in the stepfamily. For example, the support statute in Missouri provides that "[a] stepparent shall support his or her stepchild to the same extent that a natural or adoptive parent is required to support his or her child so long as the stepchild is living in the same home as the stepparent."76 As under the in loco parentis doctrine, stepparent support responsibility arising under this broader type of support doctrine terminates with the marriage that created the duty.77


77. See 3 Arnold H. Rutkin, Family Law and Practice § 33.02[f] (2005). But see supra
The primary downside of this third approach to stepfamily regulation is overbreadth. In enacting the support statute quoted above, the Missouri legislature chose to disregard the concerns raised by empirical data about the range of attitudes and roles assumed by people living in stepfamilies. The legislation treats all residential stepparents alike, and just like biological and adoptive families, for the purpose of the support statute. In this legal environment, the support responsibility of a parent can be established by procreation, by adoption, or by marriage to and residence with the custodial parent of a minor child.

D. The Law of Stepparent Visitation Illustrates the Various Approaches to Law-making for Stepfamilies

The issue of stepparent visitation at the time of divorce, like the child support issue described above, is governed by state laws that take a wide range of approaches to stepfamily regulation. To begin, the traditional common law rule establishes custody and visitation rights exclusively for legal parents, and generally denies standing to stepparents and other third parties to seek judicial visitation orders. The denial of legal recognition to the stepparent in this context enhances the authority of the custodial parent to make decisions for the child, including decisions about access to other persons. This traditional rule continues as the default rule governing stepfamily visitation disputes in some jurisdictions.

In recent decades, a number of state courts and legislatures have broken with this tradition by establishing the right to petition for judicial visitation orders for certain categories of nonparents, including stepparents. The third-party visitation laws attempt to balance the interests of the parent and the child associated with parental authority, against the competing interests arising out of the child’s established relationships with other family members. In the words of the United States Supreme Court:

The States’ nonparental visitation statutes are . . . supported by a recognition . . . that children should have the opportunity to benefit from relationships with statutorily specified persons . . . . The extension of statutory rights . . . comes with an obvious cost . . . . [A]n independent third-party interest in a child can place a substantial burden on the traditional parent–child relationship.

note 70 (discussing doctrine of equitable estoppel, which creates an exception to the general rule that stepparent support duties automatically terminate upon divorce).


79. Id.

80. Troxel v. Granville, 530 U.S. 57, 64 (2000) (ruling that the Washington state third-party visitation statute, as applied by the trial court to resolve a grandparent visitation dispute in Troxel, was unconstitutional).
As applied in the stepfamily, the third-party visitation laws enable the stepparent, usually at the time of divorce from the custodial parent, to seek to establish an enforceable right to continue seeing the child in spite of the parent’s objections.81

Under the legislative model implemented in some states, all stepparents have standing to seek a visitation order.82 Elsewhere, the state visitation statutes limit standing to stepparents (and sometimes other individuals) who stand in loco parentis to the stepchild or otherwise enjoy a meaningful family relationship with the child.83 The South Dakota visitation statute spells out this limitation, stating that stepparents do not have standing to seek visitation “merely because the stepparent was married to or living with the child’s parent.”84 Nationwide, these various visitation laws reflect the

81. See Mahoney, supra note 4, at 129-37; John DeWitt Gregory, Defining the Family in the Millennium: The Troxel Follies, 32 U. MEM. L. REV. 687, 689-93 (2002). The stepparent may seek a visitation order at other times of family transition, such as the death of the custodial parent when primary custody of the child shifts to the noncustodial parent or another relative. See 3 Little, supra note 78, § 16.12[2]. Furthermore, stepparents may vie for primary physical and legal custody of the stepchild, either at the time of divorce or upon death of the custodial parent. The issue of standing and the substantive standards applied in stepparent custody cases are beyond the scope of this article. See generally sources cited supra note 57.


83. See Ariz. Rev. Stat. § 25-415[C], [D] (2000) (“a person other than a legal parent...[if the person] stands in loco parentis to the child”); Or. Rev. Stat. § 109.119 (Supp. 1998) (“any person, including but not limited to a...stepparent...who has established emotional ties creating a child–parent relationship or an ongoing personal relationship with a child”); S.D. Codified Laws § 25-5-29 (Supp. 2003) (“any person other than the parent of a child with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship”).

84. S.D. Codified Laws § 25-5-31 (Supp. 2003). Even in the absence of such legislative guidance, the courts ruling on stepparent requests for visitation have sometimes imposed the same in loco parentis limitation on standing. See, e.g., Carter v. Brodrick, 644 P.2d 850 n.5 (Alaska 1982); 3 Little, supra note 78, § 16.12[2][c]; Gregory, supra note 81, at 692 (“The rationale that courts have relied on most frequently in granting visitation rights to stepparent is the in loco parentis doctrine...”).
same three approaches to stepfamily regulation described above in the con-
text of stepparent support duties during marriage: first, nonrecognition;
second, recognition for all residential stepparents; and third, recognition
only for stepparents who stand in loco parentis to their stepchildren.

Notably, the "overbreadth" concern raised by the support statutes that
apply across the board to all stepparents is alleviated to some extent in the
visitation context under the statutes that confer standing on all stepparents.
Specifically, all of the state visitation statutes require a court to address
the stepparent visitation petition in each case, to determine whether visitation
would be in the best interests of the child or would satisfy some other sub-
stantive standard. The alternative statutory standards are generally stricter
than the best interests of the child standard requiring, for example, proof
that visitation by the stepparent is necessary to prevent harm to the child.85
These substantive requirements, like the in loco parentis requirement built
into the standing provisions of certain visitation statutes, operate to screen
out the claims of stepparents whose level of involvement with the child
does not warrant legal recognition.

E. An Alternative Approach to Legal Regulation:
A Registration System for Stepparents

An alternative approach to regulating stepparents under the law would
employ a voluntary registration system for residential stepparents who
desire formal recognition of their status. The participation of the steppar-
ent's spouse, the custodial parent, would be a necessary element of the
stepparent registration procedure. In recent years, domestic partnership
registration systems have been established at both the local and state levels
in the United States and in other nations, as a means for creating legally

85. See LA. CIv. CODE ANN. art. 136 (B) (Supp. 2005) ("Under extraordinary circumstances
a . . . former stepparent . . . may be granted reasonable visitation rights if the court finds that it
is in the best interest of the child."); MO. REV. STAT. § 452.375(5)(a) (Supp. 2004) ("When the
court finds that each parent is unfit, unsuitable, or unable to be a custodian, or the welfare of
the child requires, and it is in the best interests of the child, then custody . . . or visitation may be
awarded to any other person . . . ."); OR. REV. STAT. § 109.119 (Supp. 1998) (subjecting best
interests of the child standard to a "presumption that the legal parent acts in the best interest of
the child" in visitation cases); TENN. CODE ANN. § 36-6-303(a) (2001) (requiring "that such
stepparent is actually providing or contributing towards the support of such child").

See also AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.18(2)(c) (2002)
(authorizing third-party visitation or custody only if "the available alternatives would cause
harm to the child"); Martin Guggenheim, The Making of the Model Third-Party (Non-Parental)
(describing standard under the Academy's model statute, which would require proof "that the
child would suffer a serious loss if contact were not awarded and that the parent's denial of con-
tact was unreasonable and not in the child's best interest").
significant status relationships between adults. No similar system of voluntary registration has been established in the United States for stepparents. The state legislatures have felt no pressure from stepfamilies, analogous to the lobbying efforts on behalf of adult domestic partners, to establish a comprehensive legal status for stepparents. The category of stepfamilies who may be dissatisfied with the current state of the law is not an organized or vocal group.

The crucial decision for lawmakers in establishing such a system would involve the selection of rights and duties for the "registered stepparent" status. A voluntary status would likely be most attractive to stepparents if legal benefits were emphasized. For example, the creation of custodial authority during the stepparent's marriage and a right to petition for visitation with the child thereafter would predictably attract more registrants than the creation of support obligations. On the other hand, lawmakers (presumably the state legislatures) might determine that the stepparent status should be defined to include economic responsibility, including postdivorce support duties, along with certain benefits of parenthood. Even if fewer stepparents signed up, they would likely be individuals who took seriously their role in the child's life, both present and future.

This type of approach to defining family status relationships has the benefit of certainty for both family members and members of the public who deal with them. The formal registration procedure would leave no doubt about the identity of those residential stepparents who were entitled to legal recognition. Furthermore, the consequences of entering the status of registered stepparent would be clearly stated and understood. On the other hand, the major downside to a self-selecting system of legal regulation would be the exclusion from legal recognition, protection, and responsibility for those who failed to register.


87. English law provides for the creation of a legal status for the residential stepparent, with the participation of the custodial parent, by agreement or court order. See Children Act, 1989, § 12, amended by Adoption and Children Act, 2002, c.38, § 212 (Eng.), discussed in 3 European Family Law in Action 392 (Katharina Boele-Woelki et al. eds., 2005).

88. See Chambers, supra note 4, at 111 ("The small changes in the law [that extend legal recognition to stepparents] have not been due to lobbying efforts by stepparents themselves, for they are not a well-organized political force in this country.

89. See generally Mahoney, supra note 69, at 185-87 (assessing merits of the registration model for defining a legal status for unmarried, opposite-sex couples).
The creation of a registration system for stepparents would function as an alternative to the present system of lawmaking for nonadoptive, residential stepparents, which involves the various legislative and judicial approaches described in this Part. The wide range of approaches to defining stepparent rights and obligations, in areas such as child support and visitation, reflects a reluctance to make blanket assumptions, like those made about traditional nuclear families, that all stepfamilies are alike for the purposes of legal regulation. This factor helps to explain the absence of a comprehensive and consistent definition of stepparent–child relationships in the law.

VII. Conclusion

As described earlier in this article, the legal recognition and regulation of nonadoptive, residential stepparents has occurred on an issue-by-issue basis within the legislatures and courts of each state. This process has produced an irregular pattern of regulation for stepfamilies in the United States.

For many family-law purposes, such as family inheritance rights, the stepparent–child relationship receives no recognition. For other family-law purposes, stepparents have received recognition as “third parties,” whose interests must be reconciled with the primary interests of the stepchild’s legal parents. Often, such recognition is extended only if the residential stepparent meets a standard, such as the in loco parentis standard, involving proof of an established, parent-like relationship with the child. This type of treatment appears, for example, in some of the state laws governing stepparent support responsibility during the period of marriage to the stepchild’s custodial parent, and the laws establishing stepparent standing to seek visitation following termination of the marriage. The recognition of third-party claims by residential stepparents in this manner has caused a limited shift in the established boundaries of family in the law.

Under the law of stepparent adoption, the adoptive stepparent takes the place of the noncustodial parent whose parental rights have been legally terminated. Here, the stepparent ceases to be a third party and assumes full parental status vis-à-vis the adopted stepchild. The resulting adoptive family falls within the traditional boundaries of family, involving a child and two biological or adoptive parents.

The large majority of residential stepparents do not adopt their minor stepchildren. The analysis of family issues in the nonadoptive stepfamily and the formulation of limited, third-party rights and obligations for stepparents, is an important piece of the family law picture in the new millennium. Confronted with this large category of nontraditional families, the
legal system has reaffirmed the primacy of biological and adoptive parenthood. At the same time, the boundaries of family have been adjusted, in particular jurisdictions for particular legal purposes, to recognize and regulate stepfamilies.