The Ambiguous Stepparent: Federal Legislation in Search of a Model

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Nearly one-third of all children alive today will become stepchildren before they reach age eighteen.[1] Yet despite the ubiquity of the American stepfamily, it has been virtually ignored as a legal or political issue. Federal and state policies are in many ways out of touch with the current needs and emerging patterns of stepfamily life. There is no coherent framework for dealing with the needs of stepfamilies. In some instances, federal and state legislation is internally inconsistent; sometimes state and federal policy contradict each other. For example, while most states do not require stepparents to support their stepchildren, many government benefit programs, such as Aid to Families with Dependent Children (AFDC),[2] demand consideration of stepparent income in calculating benefits.

One reason no consistent framework exists is because the rapid growth of modern stepfamilies is a recent occurrence, following the precipitous rise in divorce rates since the 1960s.[3] Stepfamilies have always been present to some

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The authors wish to thank Boalt Hall students Susan Buseck and Ann Quirk for their research assistance, and University of California Berkeley faculty Steve Sugarman, David Kirp, and Neil Gilbert for their comments and suggestions on the manuscript. An earlier, limited draft of this article was presented at the Law and Society Conference in Phoenix, June 1994.

1. Paul C. Glick, *Remarried Families, Stepfamilies, and Stepchildren: A Brief Demographic Profile*, FAMILY RELATIONS, Jan. 1989, at 38-1:24-26.

2. 42 U.S.C. § 602 (1988).

3. Frank Furstenberg, *The New Extended Family: The Experience of Parents and Children after Remarriage*, *in* REMARRIAGE AND STEPPARENTING: CURRENT RESEARCH AND THEORY 185, 186 (Pasley and Ihinger-Tallman eds., 1987); Paul C. Glick, *80's Stepfamilies: Forming New Ties*, N.Y. TIMES, Sept. 24, 1987, at 21, 22.

degree, but until recently they usually formed following the death of one parent.[4] Today they are most often formed following divorce, and so, in current stepparent families, the natural noncustodial parent is most often still alive and the existence of the natural parent often precludes the legal option of adoption. This creates the phenomenon of more than two parents, a situation that policy makers are not well-equipped to adequately address.

Moreover, the modern stepfamily is complex. Since both parents are usually living, there are at least two distinct classes of stepparents: those married to the custodial parent (most commonly a stepfather married to a custodial mother) and those married to the noncustodial parent (usually a stepmother married to a noncustodial father).[5] These two configurations normally produce a residential stepparent and a nonresidential stepparent.

While we know little about nonresidential stepparents,[6] residential stepparent families have been fairly well-studied. The National Survey of Children and Families indicates that only one-third of custodial parents, usually mothers, receive any child support once they remarry. This survey also indicates that the remarried women have somewhat lower family incomes and contribute a larger share to the household earnings than women in first marriages.[7] This fact indicates that the stepfamily often experiences more economic strain, and may reflect the fact that the stepparent may also be contributing child support to another family. Nonetheless, the stepfamily operates in most important ways like any other family. Although research and common experience tell us that stepfamilies have special stresses and strains, the majority of children fare well in the new configuration.[8]

State law relating to stepparents focuses mainly on the traditional family law matters of marriage, divorce, adoption, and inheritance, while federal law covers a wide range of programs and policies which impact the lives of

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4. MARY ANN MASON, FROM FATHERS' PROPERTY TO CHILDREN'S RIGHTS: A HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994).

5. In fact, there is another small but growing class of stepparents who are married to a parent who is sharing joint physical custody. This can mean that a child resides 50% of the time with each parent. In one California study 21% of divorcing couples opted for joint physical custody. *See* ROBERT MNOOKIN & ELEANOR MACCOBY, DIVIDING THE CHILD (1991). This can create problems for determining the dependency eligibility requirements for programs that have a residency basis.

6. By definition, nonresidential stepparents are far less likely to develop a parental role with their stepchildren. It is also likely that there is a great deal more variation in this relationship than with the residential stepparent.

7. Furstenberg, *supra* note 3.

8. Researcher Frank Furstenberg observes:

> Most of all they [the research findings] suggest that we should take great care not to stigmatize stepfamilies. We have seen from the data presented, stepfamilies operate differently from nuclear families in certain respects, but these differences are not typically hazardous to children. In our zeal to prevent or ameliorate problems, we sometimes define dangers that do not exist.

Id. at 57.

most Americans, including stepfamilies. As the provider of benefits through such programs as AFDC and Social Security, the federal government sets eligibility standards that affect the economic well-being of many children. As the employer of the armed forces and civil servants, the federal government establishes the guidelines for employee benefits. Moreover, in its regulatory role, the federal government defines the status of stepfamilies for many purposes ranging from immigration eligibility to tax liability.

Federal policy does little to recognize or promote the actual family relationship of most residential stepfamilies. While most federal programs assume that residential stepparents support their stepchildren and that these children are eligible for benefits, as are any other child of the family, others specifically exclude stepchildren from important benefits. While the benefits of natural children are not severed by death or divorce, the benefits of stepchildren most often are. Moreover, there is a great deal of inconsistency in how the numerous federal programs and policies treat the stepparent-stepchild relationship. Federal statutory schemes range from definitions including all stepchildren, residential and nonresidential, to specific prohibitions of any stepchild participation in certain benefit programs.[9]

These inconsistencies do not necessarily indicate different goals; more often they indicate a lack of coherent federal policy toward stepchildren. The absence of a coherent policy which recognizes the actual dependency relationship of children in residential stepparent families can be detrimental to child welfare in at least two ways: first, children dependent upon a residential stepparent may not be receiving their fair share of federal benefits during the marriage and are not protected in the event of divorce or parental death; second, residential stepparents are not given the legal status and authority which are necessary for parenting their stepchildren. On the other hand, even policies which do not take residency or actual dependency into account in providing benefits can unfairly burden the government or the private sector.

A consistent framework that both promotes child welfare and considers government efficiency and fiscal concerns is sorely needed. State legislation offers little guidance for federal legislators; beyond the legal requirement of marriage, state laws do not provide uniform or clear definitions of stepparent rights or obligations. For example, the obligation to support a residential stepchild, a central interface between federal and state policy, receives contradictory treatment among the states. Many states are silent on the subject. The several states that have enacted specific legislation addressing the issue of stepparent liability to support the stepchild have chosen different routes.[10] Few impose any significant affirmative duty of support. For instance, the Delaware statute dealing with the obligation to support dependents establishes a hierarchy

9. *See* text accompanying notes 34-122, *infra*.

10. For an overview of state stepparent support statutes, *see generally* Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 43-45 (1984); Janet Mary Riley, *Symposium: Family Law: Stepparents' Responsibility of Support*, 44 L.A. L. REV. 1753 (1984).

of priorities for support. The duty to support stepchildren is fourth in order of priority, ahead of the "duty to support a poor person" but behind the duty to support one's own child, one's spouse, and a woman pregnant with a child conceived out of wedlock.[11] Other states have extended family expense laws to include stepparents.[12]

A few states have enacted statutes which specifically impose an affirmative duty of support on stepparents, but these vary widely.[13] Under New Hampshire law, "[e]very person . . . owes a duty to support . . . his or her child";[14] "child" is defined to include stepchildren.[15] Similarly, the Utah stepparent support statute provides simply: "A stepparent shall support a stepchild to the same extent that a natural or adoptive parent is required to support a child."[16] This duty of support ends upon the termination of the marriage supporting the stepparent-stepchild relationship.[17] By contrast, under an analogous Missouri law, the duty appears to continue as long as the stepchild lives with the stepparent, regardless of the status of the marriage supporting the relationship.[18]

Another subset of state laws imposes an obligation of support on stepparents if the stepchild is in danger of becoming dependent on public assistance. For example, Hawaii provides that: "A stepparent who acts *in loco parentis* is bound to provide, maintain, and support the stepparent's stepchild during the residence of the child with the stepparent if the legal parents desert the child or are unable to support the child, thereby reducing the child to destitute and necessitous circumstances."[19] Similarly, New York imposes liability for

11. DEL. CODE ANN. tit. 13, § 505 (1993).

12. *See* OR. REV. STAT. § 109.053(1) (1990) ("The expenses of the family and the education of minor children, including stepchildren, are chargeable upon the property of both husband and wife."); WASH. REV. CODE ANN. § 26.16.205 (West 1986).

13. One commentator has found that 13 states have imposed a direct, unqualified duty of support on stepparents. Riley, *supra* note 11, at 1765.

14. N.H. REV. STAT. ANN. § 546-A:2 (1994).

15. N.H. REV. STAT. ANN. § 546-A:1 IV (1994).

16. UTAH CODE ANN. § 78-45-4.1 (1992). *See also* IOWA CODE ANN. § 252A.2-252.A3 (1993) (dependent support laws define "child" to include a stepchild); MO. ANN. STAT. § 453.400 (Vernon 1986); S.D. CODIFIED LAWS ANN. § 25-7-8 (1992) ("A stepparent shall maintain his spouse's children born prior to their marriage and is responsible as a parent for their support and education suitable to his circumstances. . . .").

Minnesota enacted "an apparently unpopular statute requiring stepchild support from the stepparent who shares a home with the child . . .," which was repealed the same year it was passed. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship, supra* note 10, at 45 n.38. *See* MINN. STAT. ANN. § 257.021 (1992), repealed by 1981 Minn. Laws 3d Spec. Sess. ch. 3, § 20.

17. UTAH CODE ANN. § 78-45-4.1 (1992).

18. MO. ANN. STAT. § 453.400 (Vernon 1986) ("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.").

19. HAW. REV. STAT. ANN. tit. 31, § 577-4 (1985). *See also* DEL. CODE ANN. tit. 13, § 501 (1993) ("Where the parents are unable to provide a minor child's minimum needs, a stepparent . . . shall be under a duty to provide those needs. Such duty shall exist only while the child makes his residence with such stepparent. . . .").

support on stepparents with stepchildren under the age of twenty-one who are eligible for public assistance.[20]

State laws almost uniformly terminate the stepparent relationship upon divorce or the death of the natural parent.[21] This means that the support obligations, if there were any, cease, and the stepparent has no rights to visitation or custody. State courts have sometimes found individual exceptions to this rule, but they have not created any clear precedents.[22]

The common law offers equally little help in providing a clarifying framework for federal legislators. The stepparent is at best a shadowy figure in common law, rarely mentioned in case law and deserving of only a phrase or two in legal treatises. Overall, stepparents are afforded extremely limited and tentative rights and responsibilities. Under the common law of sixteenth century England, parents were not legally required to support their natural children, much less their stepchildren.[23] Similarly, under American common law, the mere relationship of stepparent-stepchild, in and of itself, confers no rights and imposes no duties.[24] According to one commentator, "[T]he status of parent is almost never thrust on a stepparent."[25]

However, under one common law interpretation, a stepparent can acquire the status of parent by acting in such manner as to acquire *in loco parentis* status in relation to the stepchild.[26] The *in loco parentis* doctrine asserts that a stepparent is not obligated to support his stepchild, but if he receives the child into his home and supports him, most parental rights and obligations adhere.[27] If a stepparent stands *in loco parentis* to a child, he or she "stands

20. N.Y. Soc. Serv. Law § 101 (McKinney 1993). *See also* 15 Vt. Stat. Ann. § 296 (1988) ("A stepparent has a duty to support a stepchild if they reside in the same household and if the financial resources of the natural or adoptive parents are insufficient to provide the child with a reasonable subsistence consistent with decency and health.").

21. The Missouri statute is the exception to this rule. Mo. Ann. Stat. § 453.400 (Vernon 1986).

22. *See, e.g.*, Clevenger v. Clevenger, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (Cal. Ct. App. 1961) (recognizing equitable estoppel); Wiese v. Wiese, 699 P.2d 700 (Utah 1985) (rejecting equitable estoppel); T... v. T..., 224 S.E.2d 148 (Va. 1976) (recognizing stepfather's liability for support where there was a partially performed express oral contract for maintenance).

23. 1 Sir William Blackstone, Commentaries on the Laws of England 419 (Lewis, ed. 1898).

24. *See* Mason, *supra* note 4, at 24-26. *See also* Trudell v. Leatherby, 300 P. 7, 9 (Sup. Ct. Cal. 1931) ("It appears to be well settled that a stepparent merely by reason of such relationship to his stepchild does not stand in loco parentis to such stepchild."); Rutkowski v. Wasko, 143 N.Y.S.2d 1, 5 (A.D.3d 1955) ("A stepfather does not merely by reason of such relationship acquire a parental status.").

25. David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perception of 'Family' after Divorce, in* Divorce Reform at the Crossroads 125 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

26. Miller v. United States, 123 F.2d 715, 717 (8th Cir. 1941).

27. Many states have codified this common law doctrine. *See* Mont. Code Ann. § 40-6-217 (1989) ("A married person is not bound to support his spouse's children by a former marriage; but if he receives them into his family and supports them, it is presumed he does so as a parent, and . . . they are not liable to him for their support. . . ."); N.D.

in the place of the natural parent, and the reciprocal rights, duties, and obligations of parent and child subsist.''[28] Overall, state courts have shown serious reluctance to apply this common law doctrine. As a Wisconsin court explained, ''A good Samaritan should not be saddled with the legal obligations of another and we think the law should not with alacrity conclude that a stepparent assumes parental relationships to a child.''[29]

Federal policymakers cannot rely on state legislators to create a clear direction regarding the rights and obligations of stepparents. The federal government has already taken the lead, in support acts of 1984 and 1988, in making parents (usually divorced or unwed) more accountable to supporting their children[30] and also offering these parents more rights.[31]

A federal initiative aimed at both strengthening and clarifying the legal rights and support obligations of residential stepparents would strengthen stepparent families and acknowledge their existence as an important emerging family configuration. It would also promote child welfare by enlarging the parental support network, thereby lessening the children's vulnerability to poverty.

Previous analyses of federal laws related to the stepparent-stepchild relationship have focused on selective aspects of federal policy.[32] There has been no attempt to consider the entire scope of relevant federal laws or to suggest a new framework to aid federal policymakers.[33] Part One of this article comprehensively surveys the strengths and weaknesses of existing federal treatment

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CENT. CODE § 14-09-09 (1991) (''A stepparent is not bound to maintain a spouse's dependent children . . . unless the child is received into the stepparent's family.''); OKLA. STAT. ANN. tit. 10, § 15 (West 1987) (''A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, . . . they are not liable to him for their support. . . .'').

28. 67A C.J.S. § 159 at 555 (1978) (footnotes omitted).

29. Niesen v. Niesen, 157 N.W.2d 660, 664 (Wis. 1968).

30. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305; Family Support Act of 1988, Pub. L. No. 100-485, H.R. 1720, 102 Stat. 2343.

31. While federal policy has increasingly insisted upon child support from unwed fathers, the Supreme Court has recognized the liberty interest of unwed fathers in their children for purposes of visitation and custody. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

32. *See* Margaret M. Mahoney, *Stepfamilies in the Federal Law*, 48 U. PITT. L. REV. 491 (1987) (discussing the treatment of stepfamilies in the context of Social Security and immigration policies).

33. There have been a number of studies that have examined the demographics of the changing family, such as Furstenberg, *supra* note 3. Only a few scholars, however, have addressed the legal issues, and these have most often occurred in the context of state law regarding child custody and support. *See* Chambers, *supra* note 25; Katharine T. Bartlett, *Re-Thinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Sarah H. Ramsey & Judith M. Masson, *Stepparent Support of Stepchildren: A Comparative Analysis of Policies and Problems in the American and English Experience*, 36 SYRACUSE L. REV. 659 (1985).

of the stepparent-stepchild relationship, both by Congress and by the courts. This analysis focuses on the efficacy of existing federal statutes in promoting federal policy in this arena and on the internal consistency and fairness of the statutory scheme. It also examines the attempts of federal courts to clarify the statutory definitions of stepchildren and stepparents.

In Part Two, a new model is proposed which attempts to capitalize on the strengths and address the weaknesses of the current statutory scheme. This model attempts to provide consistency and clarification to the existing scheme, but it also suggests a larger role for federal policy in extending and establishing the stepparent-stepchild relationship. To address the needs of stepfamilies, the following criteria must be taken into consideration in formulating a new policy: Is the parental nature of the stepparent-stepchild relationship adequately recognized during the marriage? Are the stepchildren protected in the event of divorce or the death of the natural parent or stepparent? Are obligations to other children of either parent adequately addressed? And is the possibility of multiple parents acknowledged?

The concept of the *de facto* parent, extending from the common law notion of *in loco parentis* is developed to provide a clearer definition of stepparent rights and responsibilities during a marriage and to extend the relationship beyond divorce or the death of the natural parent. This model is also offered to resolve the contradictions between state and federal policies and to provide a leadership role for the federal government in reforming state law to conform with federal policy in this critical arena.

I. Current Federal Treatment of Stepfamilies

This section provides a comprehensive survey of federal treatment of the stepparent-stepchild relationship. It begins with the most far-reaching aspect of the federal treatment of stepfamilies: federal benefit programs. The analysis of federal benefit programs and policies is divided into two categories: means-tested benefit programs, such as Aid to Families with Dependent Children (AFDC) and Supplemental Security Income (SSI), and nonmeans-tested programs, such as Social Security and federal employee benefit programs, including insurance and retirement programs for members of the civil service, military personnel, and veterans. A brief review of other federal programs and policies which deal with the stepparent-stepchild relationship follows the federal benefit analysis. Also examined are attempts by federal courts to clarify the statutory definitions of stepchildren and stepparents.

Our analysis focuses broadly on several issues: how stepchildren are treated as a class compared with other children; under what conditions of dependency stepchildren are recognized; and, in means-tested programs, how stepparent income is calculated compared with the income of natural parents. Additionally, we note how stepchildren are treated subsequent to the divorce of the stepparent from the natural parent, or the death of either the natural parent or the stepparent.

A. *Federal Benefits Programs*

The stepparent-stepchild relationship has a different definition in nearly all major federal programs. Moreover, stepchildren in these programs are almost always treated differently than other classes of children.[34] While some of these differences are related to reasonable goals and actual differences between the programs, others appear to have no rational basis. For instance, two of the means-tested programs, SSI and AFDC, assume that the stepchild is dependent upon the stepparent with whom they live, but each program determines the stepparent's income differently. The result is that children on SSI are more likely to be denied benefits for which similarly situated children would receive AFDC. To confound the matter, children applying for the third means-tested program, Medicaid, are not assumed dependent on stepparent support in any way.

Nonmeans-tested programs are similarly inconsistent. The most important program, Social Security Insurance, has a strict dependency requirement, while the Family Medical Leave Act imposes no dependency requirement at all. Other nonmeans-tested programs, primarily federal employee benefit programs, vary in their treatment of the stepparent-stepchild relationship: some impose a dependency requirement, some do not, and some exclude stepchildren from participation altogether.

1. Means-Tested Programs

The most important and controversial issues in means-tested programs are whether to assume stepparent support in considering the child's eligibility for benefits, and, if support is assumed, how much of the stepparents' income to consider available for support. This controversy reflects federal indecision about the basic nature of the stepparent-stepchild relationship. Is it one in which the stepparent has the same obligation to support as does a natural parent, or is it not?

a. Supplemental Security Income

The SSI program provides monetary benefits to disabled children whose parents are unable to support them financially.[35] In order to determine

34. However, some programs define "children" to include stepchildren. *See, e.g.*, 30 U.S.C. § 902(f)(2)(C)(9) (1988) (Black Lung Benefits) (implementing regulations found at 20 C.F.R. § 410.212); 12 C.F.R § 330.8 (1994) (Bank Deposit Insurance Coverage); 41 C.F.R. § 302-1.4 (1994) (Federal Travel Regulation System); 43 C.F.R. § 2531.1 (1994) (Land Resource Management, Indian allotments).

Similarly, other federal programs simply define "family member," "immediate family member," or "relative" to include stepchildren, stepparents, and sometimes even stepsisters and stepbrothers. *See* 25 U.S.C. § 1903 (1988) (Indian Child Welfare); 13 C.F.R. § 124.100 (1994) (Minority Small Business and Capital Ownership Development); 29 C.F.R. § 500.20 (1994) (Migrant and Seasonal Agricultural Worker Protection); 42 C.F.R. § 406.21(e)(1)(iii) (1994) (Medicare Hospital Insurance Eligibility and Entitlement).

35. 42 U.S.C. §§ 1381-1385 (1988). *See generally* Harvey L. McCormick, Social Security Claims and Procedures, chs. 18-23 (4th Ed. 1991); Frank S. Bloch, Federal Disability Law and Practice (1984).

eligibility, the government first calculates the total financial resources available to the child. The income of a spouse of a parent living in the same household with the child is included in this calculation even if that income is not actually available to the child.[36] While income that the biological or adoptive parent uses to fulfill court-ordered support requirements is specifically excluded from the family income total, it is unclear if such income expended by the stepparent is similarly excluded.[37] The implementing statute refers only to a "parent," a term that in the SSI provisions appears to not include stepparents.[38]

This central controversy—that SSI (like most means-tested programs) assumes stepparent support which is not required by most states—was challenged in *Kollett v. Harris*.[39] The plaintiffs argued that SSI violated due process because a stepparent's income was deemed available even though in Rhode Island stepparents have no legally enforceable obligation of support. The court rejected all arguments alleging unfair treatment of stepchildren and instead deferred to Congress. It held there was no due process violation unless the "statute manifests a patently arbitrary classification, utterly lacking in rational justification."[40] The court concluded that because this assumption of support is generally true, the provision is not unconstitutional even if it causes hardship in a few cases.[41]

The *Kollett* court also rejected an equal protection challenge based on the fact that the provision treats differently "disabled children living in households with persons other than stepparents who are not obligated to support them

36. The child's "income and resources shall be deemed to include any income and resources of a parent of such individual (or the spouse of such a parent) who is living in the same household as such individual, whether or not available to such individual, except to the extent determined by the Secretary to be inequitable under the circumstances." 42 U.S.C. § 1382c(f)(2)(A) (1988). In implementing this regulation, 20 C.F.R. § 416.1202(b) (1995) left out any mention of determining the inclusion to be inequitable under the circumstances. In fact, the Secretary specifically states that "[w]hen the deeming rules apply, it does not matter whether the income of the other person is actually available to you. We must apply these rules anyway." 20 C.F.R. § 416.1160(a) (1995).

37. "We do not include any of the following types of income . . . of an ineligible . . . parent: . . . (10) Income used to comply with the terms of court-ordered support, or support payments enforced under title IV-D of the Act." 20 C.F.R. § 416.1161(a)(10) (1995).

38. A "parent" is different from "the spouse of such a parent" in 42 U.S.C. § 1382c(f)(2) (1988). *See* note 37, *supra*. The C.F.R. makes the same distinction between a parent and the spouse of a parent. 20 C.F.R. §§ 416.1160(a)(2), 416.1202(b) (1995). In § 416.1851, the language refers to parents and stepparents. The C.F.R. section having to do with SSI does not define the term "parent." 20 C.F.R. § 416.1101 (1995). However, in a footnote in *Hammond v. Secretary of Health, Educ. and Welfare*, the Tenth Circuit assumed without explanation that these provisions apply to stepparents as well. 646 F.2d 455, 457, n.4 (10th Cir. 1981).

39. Kollett v. Harris, 619 F.2d 134 (1st Cir. 1980).

40. *Id.* at 139, *quoting* Weinberger v. Salfi, 422 U.S. 749, 768 (1975).

41. *Id.*

. . . from disabled children living with stepparents who are not obligated to support them."[42] Again, the court deferred to Congress, analyzing the question using rational basis scrutiny. It found two possible justifications for this scheme. First, including stepparent income, but not, for instance, the income of an aunt or uncle, is "rational in terms of societal expectations."[43] Second, Congress could have found that a stepparent occupies the equivalent position as that of a parent, and is therefore likely to be providing support for the child. Since these conclusions are not irrational, equal protection is not violated.[44] In sum, the *Kollett* court inferred that Congress intended to treat stepparents as parents. Moreover, the court believed that Congress' expectation of stepparent support reflected "societal expectations."[45]

b. Aid to Families with Dependent Children

AFDC provides supplemental income to children whose parents are unable to support them.[46] As under the SSI scheme, the government must calculate the total resources available to the child in order to determine his or her benefits. With a major policy initiative in 1981, Congress deemed that the income of residential stepparents must be included in calculating total available resources in all states.[47] Prior to 1981, stepparent income could be included in calculations only if the particular state in which the child lived required all stepparents to support their stepchildren.[48]

In contrast to the SSI scheme, certain expenditures are specifically excluded when calculating total stepparent income available to the child: amounts paid by the stepparent to individuals not living in the household but who the stepparent claims as a dependent for federal income tax purposes and payments by

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42. *Id.* at 138.

43. *Id.* at 139-140. This aspect of the decision shows a narrow vision of societal expectations. For many cultures the extended family—including aunts, uncles, and others—is a common and important source of support. Low-income children in such families benefit from the court rejecting this equal protection argument because support they receive from aunts, uncles, and others might not be included in determining their eligibility. Of course, each state can decide on its own to require that such income be included when determining eligibility; the federal government does not forbid the inclusion of such income, but rather requires the inclusion of stepparent income.

44. *Id.* at 140. *See also* Hammond v. Secretary of Health, Educ. and Welfare, 646 F.2d 455 (10th Cir. 1981) (construing the statutory language to compel the presumption of the availability of stepparent income, regardless of actual availability).

45. *Id.*

46. 42 U.S.C. §§ 601-687 (1988).

47. 42 U.S.C. § 602(a)(31) (1988) (amending 42 U.S.C. § 602).

48. 42 U.S.C. § 606(a) (1988) (current version at 42 U.S.C. § 602(a)(31) (1981). 45 C.F.R. § 233.90(a)(1). For Supreme Court cases pre-dating the statutory obligation to include stepparent income regardless of laws of general applicability, *see* Van Lare v. Hurley, 421 U.S. 338, 345 (1975) (based upon the federal statute, held that a state is barred from assuming the availability of income of a person who has no legal obligation of support); Lewis v. Martin, 397 U.S. 552, 560 (1970) (In the absence of proof of actual contribution, the state could not require inclusion of a nonlegally obligated stepparent's income.).

stepparents for alimony or child support for individuals not living in the household.[49]

Through this provision, AFDC specifically acknowledges that stepparents commonly have moral and legal support obligations to other people, usually children from a previous marriage. Income that appears to be available to a stepchild in the household often will actually be committed elsewhere. Under the AFDC scheme, only income that exceeds the amount that is committed elsewhere will be presumed to be available to the stepchild when calculating that child's eligibility for AFDC.[50]

c. Medicaid

Medicaid is the federal program that provides medical care to low-income individuals. Two categories of people qualify for Medicaid: those whose income falls below a specified level,[51] and those who are already enrolled in other federal assistance programs, including SSI and AFDC.[52] In its treatment of stepparents, Medicaid differs considerably from the SSI and AFDC programs. Whereas the latter programs require inclusion of stepparent income when calculating a child's eligibility, in some circumstances Medicaid specifically requires that stepparent income not be included, while in other circumstances the law is ambiguous.

The rule is clear when a child is denied AFDC because of the inclusion of the stepparent's income. In this case, the stepparent's income cannot be taken into account when determining the child's eligibility for Medicaid, unless they live in a state that legally obligates a stepparent to support a stepchild.[53]

In all other circumstances—application based upon income level or on eligibility for a federal program other than AFDC, such as SSI—it is unclear how stepparent income is to be treated. The statute ambiguously refers to taking into account only the income of individuals with a financial responsibility to

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49. 42 U.S.C. § 602(a)(31)(C) (1988).

50. 42 U.S.C. § 602(a)(31) (1988). New Jersey has instituted a program that specifically lifts potential barriers to the formation of stepfamilies that this scheme might erect. Upon receipt of a federal exemption, effective July 1, 1992, the program, commonly dubbed Wedfare, allows some welfare mothers to marry without losing benefits. *See* N.J. STAT. ANN. § 44:10-3.4(b) (West 1993). The rationale behind this program is to encourage mothers on AFDC to marry, thereby providing a broader base of support for children. If a parent remarries, the income of the stepparent will not be included when calculating AFDC eligibility unless the family's income exceeds 150% of the poverty line. N.J. STAT. ANN. § 44:10-3.4(b).

51. 42 U.S.C. § 1396a(10) (1988).

52. 42 U.S.C. § 1396a(10) (1988).

53. "The agency must provide Medicaid to: (a) Individuals denied AFDC solely because of policies requiring the deeming of income and resources of . . . (1) Stepparents who are not legally liable for support of stepchildren under a state law of general applicability." 42 C.F.R. § 435.113(a)(1) (1994). *See also* Rose v. Heintz, 806 F.2d 389, 390-91 (2d Cir. 1986); Massachusetts Ass'n of Older Americans v. Sharp, 700 F.2d 749, 751 (1st Cir. 1983); Malloy v. Eichler, 628 F. Supp. 582, 597 (D. Del. 1986).

an applicant who is "such individual's child," without specifying who those individuals might be.[54] Presumably, those individuals include biological and adoptive parents; it is unclear whether stepparents are included as well. Although no case deals directly with this issue, some courts have used broad language which would indicate that in no circumstances can stepparent income be included, despite the ambiguity of the Code.[55]

d. Student financial aid programs

A student's financial aid package is means-tested; assistance is determined by the total financial resources available to him or her. In calculating the expected family contribution to a student's education, a stepparent's income is included if the student's parent and stepparent are married as of the date of the application for the award year.[56] However, this inclusion only applies if the natural parent married to the stepparent declares the student as a dependent for tax purposes, making the income of only one parent set available. Thus, as long as the stepparent is married to the parent declaring the child as a dependent—regardless of whether there is any sort of *de facto* support of the stepchild by the stepparent—the stepparent's income will be included as available in calculating the stepchild's financial aid package.

2. Nonmeans-Tested Program

Nearly all nonmeans-tested federal benefit programs are related to federal employment. Medical benefits, retirement, disability, life insurance, and other employee benefits are a function of employment. When the employee is a stepparent, the issue becomes how to treat that employee's stepchildren as compared with his or her natural children who are beneficiaries. It is in this area that federal policy is most inconsistent. With the exception of Social Security, little consideration of stepchildren appears to have gone into drafting the policies. Conditions of dependency are defined in five different ways, ranging from "living with" to being "in fact dependent" on support from the stepparent.[57] And aside from a few court decisions, the consequences of divorce or death of the natural parents are not addressed.

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54. "[I]nclude reasonable standards . . . for determining eligibility which . . . (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is . . . such individual's child. . . ." 42 U.S.C. § 1396a(a)(17)(D) (1988).

55. Rose, 806 F.2d at 391. In *Massachusetts Ass'n of Older Americans v. Sharp*, a case dealing with Medicaid eligibility under AFDC, the court, *in dicta*, noted the clause mentioning the inclusion of individuals with a financial responsibility and without explanation declared that "[t]he Medicaid Act specifically excludes stepparent's income from eligibility determinations." 700 F.2d 749, 751 (lst. Cir. 1983).

56. 20 U.S.C. § 1087oo(f)(3)(A) (1995). *See also* 34 C.F.R. § 690.32 (1994) (conditions affecting the expected family contribution determination for a dependent student).

57. *See* notes 85-91 and text accompanying, *infra*.

a. Social Security Insurance

Only with Social Security, the largest nonmeans-tested federal benefit program, has the stepparent-stepchild relation been given careful consideration by Congress and the courts. Social Security is an insurance program which provides a safety net for people who become unable to work due to disability or old age. Former wage earners are eligible to receive benefits as are their children.[58] In addition, if a wage earner dies, his or her dependent children are eligible to receive survivor's benefits.[59] At a general level, Social Security policy is similar to AFDC and SSI in that it assumes a stepchild is receiving support from a residential stepparent. However, the manner of approaching the stepfamily under Social Security differs considerably from the means-tested approach.

In order to be eligible for Social Security benefits, a child must demonstrate that he or she is a "child" within the meaning of the statute. Several requirements must be met for a child to come within the statutory definition. First, the program imposes duration-of-relationship requirements. If the insured stepparent is alive when the child is applying (i.e., the insured is disabled or elderly), the marriage creating the stepfamily must have taken place at least one year before the time of application. If the insured stepparent is deceased, the stepfamily relationship needs to have existed for at least nine months before the wage earner's death.[60] Second, the marriage creating the step-relationship must be valid under state law or "would be valid except for a legal impediment."[61]

Once a child shows that he or she is a "child" within the meaning of the statute, he or she must then demonstrate dependency on the insured stepparent. Children born in wedlock and adoptive children are deemed to be dependent, whether or not the insured parent is living with the child or contributing to the child's support.[62] No individualized showing of dependency is necessary.

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58. 42 U.S.C. § 402(d)(1) (1988).

59. 42 U.S.C. § 402(d)(1) (1988).

60. 42 U.S.C. § 416(e)(2) (1988). The nine-month duration-of-relationship requirement for stepchildren is waived in certain circumstances, i.e., a worker's accidental death or death as a servicemember in the line of duty, or if the insured and the spouse were previously married, divorced and then remarried, the relationship existed at the time of the worker's death, and the duration-of-relationship requirement would have been met if the worker had died on the date of the divorce. 42 U.S.C. § 416(k) (1988).

61. 20 C.F.R. § 404.357 (1995). 42 U.S.C. § 416(h)(1)(B)(iv) (1988) (describes legal impediments as those "(I) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (II) resulting from a defect in the procedure followed in connection with such purported marriage.").

62. "A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother . . . [unless] such individual was not living with or contributing to the support of such child and—(A) such child is neither the legitimate nor adopted child of such individual, or (B) such child has been adopted by some other individual." 42 U.S.C. § 402(d)(3) (1988).

This presumption of dependency is made even in the case of parents who were married and subsequently divorced and the insured parent neither lives with the child nor contributes to the child's support.

By contrast, stepchildren must demonstrate dependency in fact.[63] Stepchildren are deemed dependent if they are living with or receiving at least 50 percent of their support from the insured stepparent.[64] This showing is a significantly higher level of dependency than is required for illegitimate children, who must only show that the insured parent is regularly contributing to the support of the child.[65]

Even though the showing of dependency could, in theory, be quite onerous, the lower courts have not applied the provision in this manner. Courts have generally rejected challenges to Social Security's presumption of dependence based on the stepchild residing with his or her stepparent, and have refused to inquire into actual dependency.[66] And in applying the dependency requirement, courts have most often followed a lenient standard, often finding dependency in the close cases.[67] Additionally, the courts have consistently found that any

63. 42 U.S.C. § 402(d)(3) (1988).

64. "A child shall be deemed dependent upon his stepfather or stepmother . . . [if] the child was living with or was receiving at least one-half of his support from such stepfather or stepmother." 42 U.S.C. § 402(d)(4) (1988).

> The insured person provides one-half of [the child's] support if he or she makes regular contributions for . . . ordinary living costs; the amount of these contributions equals or exceeds one-half of your ordinary living costs. . . . Ordinary living costs are the costs . . . [of] food, shelter, routine medical care, and similar necessities. . . . The insured is not providing at least one-half of [the child's] support unless he or she has done so for a reasonable period of time. Ordinarily, we consider a reasonable period to be the 12-month period immediately preceding the time when the one-half support requirements must be met. . . .

20 C.F.R. § 404.366(b) (1995).

65. 42 U.S.C. § 402(d)(3) (1988). Contributions for support means "(1) [t]he insured gives some of his or her own cash or goods to help support [the child]. . . . (2) Contributions must be made regularly and must be large enough to meet an important part of [the child's] ordinary living costs." 20 C.F.R. § 404.366(a) (1995).

66. *See, e.g.*, Kyzar v. Califano, 597 F.2d 68 (5th Cir. 1979) (upholding award of benefits to stepchild even though he was not in fact dependent on his stepfather); Eisenhauer v. Mathews, 535 F.2d 681 (2d Cir. 1976) (upholding award without examining actual dependency).

67. *See, e.g.*, Weatherby v. Sullivan, 942 F.2d 639 (9th Cir. 1991) (finding dependency based on residency despite natural parent's separation from stepparent because the evidence showed that the separation was expected to be temporary). *See also* Wagner v. Finch, 413 F.2d 267, 268 (5th Cir. 1969) (finding, in the context of the eligibility of an illegitimate child, that the "living with" dependency requirement was met even though parents only saw each other on weekends because "[t]hese people were in a low-income group, and because of distance and lack of money, theirs was not a day-by-day relationship"). *But see* Spencer v. Flemming, 188 F. Supp. 517 (D. Kan. 1960) (denying benefits because stepfather moved out of house and committed suicide one week later and therefore was not living with stepchild at time of death).

challenged marriages were "valid except for a legal impediment" and so valid for the purposes of Social Security.[68]

The Supreme Court case *Weinberger v. Salfi*[69] upheld the basic structure of the Social Security laws as they relate to stepfamilies. In *Salfi*, the plaintiff challenged the irrebuttable presumption that stepchildren are not dependent if the stepfamily relationship was created less than nine months before the death of the insured. The Court held that the irrebuttable presumption regarding the duration-of-relationship requirement does not violate the Equal Protection Clause of the Fourteenth Amendment.

In denying the plaintiff's claim, the Court applied a rational basis test.[70] It accepted the government's explanation that insurance programs need to rely on fixed, prophylactic rules to insure that payments are restricted to the risks the program was intended to cover.[71] The Court also looked to the legislative history of the statute to highlight Congress' concern with the possibility of relationships entered into for the purpose of obtaining benefits.[72] Given the legitimacy of the goal of preventing sham marriages, Congress could have rationally concluded that "the duration-of-relationship requirement operates to lessen the likelihood of abuse through sham relationships entered in contemplation of imminent death."[73] Moreover, the ease and certainty of operation of the irrebuttable presumption compensated for any valid marriages it excluded.[74]

A child's eligibility for Social Security benefits is also affected by divorce. The stepparent-stepchild relationship is terminated upon divorce and the stepchild is no longer eligible for benefits even if the child is in fact dependent

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68. *See* Brickey v. Bowen, 722 F. Supp. 318 (S.D. Tex. 1989); Eisenhauer v. Mathews, 535 F.2d 681 (2d Cir. 1976).

The results in these cases are strange given the concern the courts have attributed to Congress in preventing sham marriages entered into simply in order to be eligible for benefits. While the court in *Eisenhauer* explicitly commented that they did not believe that Congress, in writing this statute, was concerned about people entering into sham marriages to become eligible for benefits, the Court found just the opposite in Weinberger v. Salfi, 422 U.S. 749 (1975), holding that Congress was indeed concerned about sham marriages. The Court distinguished *Eisenhauer* from *Salfi*, but not in a manner that is easily decipherable.

69. 422 U.S. 749 (1975).

70. *Id.* at 772.

71. *Id.* at 776.

72. *Id.* at 777-80.

73. *Id.* at 780.

74. *Id.* The *Salfi* decision has implications for stepparent status in other social welfare programs. In Kollett v. Harris, 619 F.2d 134, 139 (1st Cir. 1980), the appeals court specifically relied on *Salfi* to uphold the SSI statute creating an irrebuttable presumption that the income of stepparents living in the same household as the stepchild is available to that child. Presumably, *Salfi* would also be relied upon to uphold the presumptions that stepchild relationships created less than one year before the stepparent became elderly or disabled are sham arrangements, and that the income of stepparents living in the same household as the stepchild is available for that child's support for purposes of AFDC.

on the insured stepparent.[75] If the divorce were finalized the day before the stepparent's death the child would receive no benefits. However, if a child is already eligible for benefits, divorce does not affect continuing entitlement.[76]

In *Florio v. Richardson*, the stepchild had been deemed dependent on his insured stepfather at the time the insured retired and was already receiving Social Security benefits. After divorcing the child's mother, the stepfather sought to terminate the stepchild's eligibility so that his natural child would receive the entire sum of his insurance benefits. The court held that only four events can terminate eligibility and that divorce was not one of them.[77]

b. Government Employee Benefit Programs

The federal government provides nonmeans-tested benefits to its legions of employees, including civil servants, members of the armed services, and veterans. Most of these benefits take the form of retirement and general employee benefits which may include medical, housing, and life insurance programs.[78]

As with other benefits, government policy toward the stepchildren of federal employees is conflicting. While the general policy thrust is to assume dependency in a residential stepparent-stepchild relationship, and to make all stepchildren eligible for whatever benefits the programs confer on children,[79] there

75. 42 U.S.C. § 416(e) (1988).

76. Florio v. Richardson, 469 F.2d 803 (2nd Cir. 1972).

77. The four events were the child (1) dying, (2) marrying, (3) being adopted by another, or (4) turning 18. *Id.* at 806. Some of these terminating events are waived or modified in the case of a disabled child. 42 U.S.C. § 402(d)(1) (1988).

78. Other statutes and regulations involve prohibitions on nepotism. *See* 5 U.S.C. § 3110 (1994) (general restrictions on public employees); 5 C.F.R. § 310.102 (1994) (same). Others require the inclusion of stepparents and stepchildren in fulfilling financial disclosure rules. *See* 5 U.S.C. App. § 107 (1994) (financial disclosure requirements of federal personnel); 5 C.F.R. § 2634.105 (1995) (same).

79. For programs dealing with civilian employees, *see* 5 U.S.C. § 5561 (1994) (unmarried stepchildren eligible for payments as dependents of missing federal employees); 5 U.S.C. § 6381 (1994) (stepchildren included in definition of "son or daughter" for federal employee family and medical leave); 20 U.S.C. § 932 (1994) (dependent includes minor stepchildren for purposes of "Overseas Defense Dependents' Education"); 42 U.S.C. § 10701 (1988) (stepchildren included for purposes of public safety officers' death benefits); 20 C.F.R. § 219 *et seq.*, 20 C.F.R. § 222.31 (1995) (regulations implementing Railroad Retirement Act defines child to include stepchildren for annuity purposes); 22 C.F.R. § 191.3 (1995) (stepchildren included in definition of family member for purposes of hostage relief assistance); 32 C.F.R. §§ 199.2, 199.3, 199.13 (1995) (for purposes of eligibility for the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), child includes stepchildren); 42 C.F.R. § 31.1 (1994) (dependent family members includes dependent stepchildren for eligibility for Medical Care for Certain Personnel of the Coast Guard, National Ocean Survey, Public Health Service, and Former Lighthouse Service). "Family member" is also defined to include stepchildren, stepparents, and sometimes stepsiblings. 5 U.S.C. § 8101 (1994) (stepparents, stepchildren, and stepsiblings included in workers compensation program); 41 C.F.R. § 302-1.4 (1994) (relocation allowances for federal employees includes all step-relatives).

For programs involving members of the armed services, *see* 10 U.S.C. § 1072 (1994) (medical and dental care for dependents); 10 U.S.C. § 1126 (1994) (eligibility

is still considerable variation in the way these programs treat stepchildren: sometimes stepchildren are rendered eligible to receive benefits without restriction, sometimes they are excluded, and sometimes they are included conditionally. Moreover, definitions of residency and the duration of the dependency following divorce are inconsistent, with at least five different definitions employed in various programs.

Several programs explicitly exclude stepchildren from eligibility for certain benefits. For example, under the eligibility rules for a basic annuity under the Federal Employees' Retirement System, stepchildren are explicitly excluded from the definition of children in determining the default beneficiary without concern for the stepchild's possible dependency.[80] All stepchildren are similarly excluded from eligibility for lump-sum payments under the Foreign Service Retirement and Disability System[81] and the CIA Retirement and Disability program.[82] For the purposes of Basic Life Insurance for federal employees, stepchildren are explicitly excluded from the definition of children in determining the order of default beneficiaries.[83]

It is unclear why Congress chose to exclude stepchildren in these instances; the legislative history of these programs provides no insight into the decision-making process. Perhaps because these programs all give the eligible individual the opportunity to specify his or her beneficiary, it was presumed that any stepchild sufficiently close to the stepparent would be covered by the express request of the stepparent, and that those stepchildren far removed from the stepparent should not be made eligible unless the stepparent specifically requested their inclusion.[84]

More common than the outright exclusion of stepchildren are programs that deny benefits to stepchildren who do not satisfy certain conditions demonstrating dependency. Congress has enacted statutes which impose a variety of conditions that stepchildren must meet in order to qualify for benefits under various programs. These conditions are basically attempts to distinguish step-

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to receive "Gold Star" lapel button); 10 U.S.C. § 1408 (1994) (computation of retired pay); 32 C.F.R. § 818.2 (1994) (personal financial responsibility for Air Force personnel).

For veterans' programs, *see* 38 C.F.R. § 3.850 (1994) (Pension Compensation and Dependency and Indemnity Compensation Relationship for Veterans); 38 C.F.R. § 8.46 (1994) (National Service Life Insurance); 38 C.F.R. § 21.5021 (1994) (Post-Vietnam Era Veterans' Educational Assistance); 38 C.F.R. § 21.5720 (1994) (Educational Assistance Test Program).

80. 5 U.S.C. § 8424(d) (1994).

81. 22 U.S.C. § 4055(f)(3) (1988).

82. 50 U.S.C. § 2002(B)(4) (1988). *See also* 20 C.F.R. § 22.35 (1995) (Railroad Retirement Act).

83. 5 C.F.R. § 870.901(a) (1995). *See also* 5 C.F.R. § 891.102(k)(1)(ii) (1995) (Retired Federal Employees Health Benefits).

84. This approach is also consistent with most state inheritance statutory schemes which do not consider stepchild as intestate beneficiaries. *See* Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C.-DAVIS L. REV. 917, 917-28 (1989).

children who are dependent on the stepparent (generally eligible for benefits) from those who are not dependent (generally excluded). To demonstrate dependency stepchildren may be required to: (1) live with the stepparent in a "regular parent child relationship";[85] (2) receive more than one-half of his or her support from the employee;[86] (3) be "in fact dependent" on support from the stepparent;[87] (4) reside with the stepparent;[88] or (5) be a "part of" or a "member of" the stepparent's household.[89] Still other regulations impose other conditions on step-relative eligibility.[90] Courts have generally interpreted the dependency requirements strictly.[91]

Congress has never fully explained the reasoning behind making these dis-

85. *See* 5 U.S.C. § 8341 (1994) (Civil Service Retirement System survivor annuities) (implemented in regulations at 5 C.F.R. § 831.615); 5 U.S.C. § 8441 (1994) (Federal Employees' Retirement System survivor annuities) (implemented in regulations at 5 C.F.R. § 843.406); 5 U.S.C. § 8701 (1994) (federal employee life insurance); 5 U.S.C. § 8901 (1994) (federal employee health insurance) (implemented in regulations at 5 C.F.R. § 890.302); 10 U.S.C. § 1447 (1994) (survivor benefit plan for military personnel); 28 U.S.C. § 376 (1988) (annuities for survivors of certain judicial officers); 50 U.S.C. § 2002 (1988) (CIA retirement and disability); 5 C.F.R. § 873.702 (1995) (Family Optional Life Insurance); 28 C.F.R. § 32.2 (1995) (public safety officers death and disability benefits; general terms).

86. *See* 22 U.S.C. § 4044 (1988) (Foreign Service Retirement and Disability System) (implemented in regulations at 22 C.F.R. § 19.2); 20 C.F.R. § 222.41(a)(3) (1995) (Railroad Retirement Act annuity) (also requires that the parent married the stepparent before the stepchild was 16); 20 C.F.R. § 222.55 (1995) (Railroad Retirement Act—dependency definition); 32 C.F.R. § 48.102 (1994) (Retired Servicemen's Family Protection Plan); 32 C.F.R. § 68.5 (1994) (provision of free public education for eligible children residing on federal property, wards of U.S. military personnel).

87. *See* 10 U.S.C. § 1435 (1994) (Retired Servicemen's Family Protection Plan); 32 C.F.R. § 48.102(a) (1994) (defining "in fact dependent" for support as receiving more than one-half of their total support).

88. 32 C.F.R. § 571.1(b)(9) (1994) (U.S. Army definition of dependent).

89. 10 U.S.C. § 1477(b)(3) (1994) (Death benefits for members of armed forces); 38 U.S.C. § 101 (1988) (Veterans' benefits, general definition); 38 C.F.R. § 3.57(a)(2)(ii) (1994) (Veterans' Pension Compensation and Dependency and Indemnity Compensation Relationship; includes those who became stepchildren between the ages 18 and 23 and were a member of the veteran's household at the time of his or her death); 38 C.F.R. § 10.41 (1994) (adjusted compensation for children of veterans).

90. *See* 20 C.F.R. § 10.161 (1995) (Workers compensation-selection of payee: for beneficiaries under 18, order of preference includes stepparents who have custody of the beneficiary); 28 C.F.R. § 32.15(a) (1994) (to be eligible for a death benefit, the stepchild of a public safety officer who did not live with the officer at the time of his or her death must demonstrate that he or she was "substantially reliant" for support upon the officers income).

91. *See* Mounts v. United States, 838 F. Supp. 1187 (E.D. Ky. 1993) (stepchildren in foster care do not meet definition of dependent under Civil Service Retirement Act); Mayhew v. Office of Personnel Management, 983 F.2d 1087 (D.C. Cir. 1992) (unpublished opinion) (rejecting a stepchild's claim to survivor benefits because she never actually resided with the stepparent, dismissing the stepchild's argument that she was prevented from living with her stepfather because of age restrictions at his residence which prohibited children).

tinctions or using different language in different provisions.[92] It appears that Congress was aiming toward some general assessment of dependency, but this assessment was not fully thought out. One administrative decision provides some insight into Congress' purpose in imposing these various requirements. In *Salazar v. Office of Personnel Management*,[93] the merit Systems Protection Board, addressing the issue of whether a stepchild was eligible for a survivor's annuity under the Civil Service Retirement Act, concluded that "the congressional purpose in enacting 5 U.S.C. § 8341 [was] providing financial assistance to those most likely dependent on deceased federal employees."[94]

The consequences of divorce or the death of either the natural parent or the stepparent are also poorly articulated. The CHAMPUS regulations, which deal with the provision of health insurance for civilian employees of the military, generally render stepchildren eligible to receive benefits. These regulations directly address the issue of what happens upon the termination of the marriage which creates the stepparent-stepchild relationship with conflicting results. One section provides that, for purposes of determining "who may render services to a beneficiary, the step-relationship continues to exist even if the marriage . . . terminates through divorce or death of one of the parents."[95] However, other sections of the same regulation provide that non-adopted stepchildren do lose eligibility upon the termination of the marriage creating the step-relationship.[96]

Several of the military regulations also deal with the issue of the termination of the stepparent-stepchild relationship. These regulations generally terminate the relationship upon divorce, but not upon death. In the Army, a soldier is not entitled to an allowance for quarters on behalf of stepchildren after divorce from their biological or adoptive parent.[97] This holds true for the Navy as well.[98] For the purposes of Navy Medical and Dental Care for Retired Members and Dependents, a stepchild loses eligibility for health benefits upon divorce, but the stepchild relationship does not cease upon the death of the stepparent unless the natural parent remarries.[99]

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92. The legislative histories of the various statutes do not explain the reasoning behind excluding some stepchildren and including others. For example, the most common restriction—that the stepchild live with the stepparent in a "regular parent-child relationship"—appears to have been introduced in the 1956 Amendments to the Civil Service Retirement Act. Pub. L. No. 84-854, H.R. 7619 (1956). This legislative history provides no comment on the introduction of this qualifying term, other than that the amendments "greatly liberalize[] retirement benefits of Federal employees." CONF. REP. NO. 84-2935, *reprinted in* 1956 U.S.C.C.A.N. 3739, 3742.

93. 31 M.S.P.R. 248 (1986) (available on Westlaw, "FLB-MSPB" library).

94. *Id.* at 250.

95. 32 C.F.R. § 199.2 (1994) ("Immediate family").

96. 32 C.F.R. § 199.3(e)(3)(i) (1994) (for NATO personnel); 32 C.F.R. § 199.13(c)(3)(iii)(A) (1994) ("Active Duty Dependents' Dental Plan").

97. 32 C.F.R. § 584.7(a)(2) (1994).

98. 32 C.F.R. § 733.1(b)(3)(ii) (1994) (Stepchildren not included in calculation of allowance for quarters if the stepparent and natural parent are divorced).

99. 32 C.F.R. § 728.31 (1994).

One administrative decision addressing the issue of the termination of the marriage creating the stepparent-stepchild relationship by death dealt with the issue of eligibility as a matter of *de facto* dependency. At issue were veteran benefits for a surviving stepchild of a deceased veteran where the child's natural mother had already died. The administrator concluded that the stepchild was eligible for survivors benefits because the stepfather maintained custody of the child after her mother's death,[100] arguing that such legislation creating benefits should be construed liberally, "which justifies the view that the step-child-stepfather relationship existing between the child in question and the veteran at the death of the child's mother . . . did not terminate with the death of the child's mother, but, on the contrary, continued to exist due to the acts and intention of the veteran."[101]

B. *Other Government Programs and Policies*

Most government programs that address the stepparent-stepchild relationship outside of federal benefits programs are regulatory in nature. These programs generally include some dependency requirement for stepchildren. For example, the Internal Revenue Code includes step-relatives in its definitions of dependents and families provided that they meet the requirements for dependency. If they do, a taxpayer may be entitled to a deduction for his stepchildren or stepparents.[102] Furthermore, in computing taxable income, the code defines "dependent" to potentially include stepchildren, stepparents, and step-siblings.[103]

To claim any person as a dependent, the taxpayer must show that (1) the dependent is either a close relative (taxpayer's parent or lineal descendent) or that he lived the entire year with the taxpayer; (2) the taxpayer provided more than 50 percent of his support; and (3) the dependent had less than $2,450 of gross income (unless the child is less than nineteen years old or is under twenty-four and a full-time student).[104] The code also provides that a stepchild may qualify a taxpayer as a head of a household. Under the rules for the Earned Income Tax Credit, "child" is defined to include stepchildren, provided that the stepparent's residence is the stepchild's principal place of abode.[105]

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100. Administrator's Decision, *Veterans' Administration*, Number 626 (Jan. 22, 1945).

101. *Id.* This argument is similar to the reliance or equitable estoppel arguments put forth at common law to justify extending stepparent support obligations after the death of the natural parent. *See* text accompanying note 192, *infra*.

102. 26 C.F.R. § 1.2-2(b)(3)(ii) (1995).

103. 26 U.S.C. § 152 (1988). *See also* 26 C.F.R. § 1.152-1 (1995); 26 C.F.R. § 1.214-1 (1995). For an example of a court's analysis of whether stepchildren qualify as dependents, *see* von Tersch v. Commissioner of Internal Revenue, 47 T.C. 415 (1967).

104. 26 C.F.R. § 1.152-1 (1995).

105. 26 C.F.R. § 1.32-1(c)(1)(i) (1995).

Similarly, education programs other than the student loan program[106] define "parents" to include stepparents meeting certain dependency qualifications. Local Educational Agencies regulations determine "parent" to include a stepparent who lives with the child or who is the legal guardian of the child for educational purposes.[107] Two other programs define "parent" to include a stepparent with whom the child lives or who is "legally responsible for the child's welfare."[108]

Various employment and training programs define "family" differently, but all limit or exclude the class of stepchildren and stepparents according to dependency conditions. For example, the Trade Adjustment Assistance for Workers program identifies "family to include stepchildren who live with the eligible individual or who would live with him or her if not for unemployment."[109] Both the Indian and Native American Employment and Training Program,[110] and the Job Corps Program[111] define "family" to include stepparents and stepchildren living in a single residence.

The regulations implementing the Civil Liberties Act[112] and the Radiation Exposure Compensation Act[113] both use the familiar dependency qualification that only stepchildren who live with their stepparent in a "regular parent-child relationship" are included in the definition of child.

For the purpose of determining the financial responsibility of parents under Medical Assistance programs, stepparents are included in the definition of "parent" if the parent is equally liable with the natural parent for the support of the child under state law.[114]

The primary exceptions to this principle of dependency-based inclusion of stepchildren are (1) the Family Medical Leave Act and (2) immigration policy. The Family and Medical Leave Act, which covers most American workers, requires employers to provide unpaid leave to their employees when a family member is seriously ill. It defines "son or daughter" to include all stepchildren without qualification.[115] It specifies no residency requirement, thereby leaving open the interpretation that noncustodial stepparents, who may have little or no contact with the child, are entitled to family leave in order to care for that child. This approach is contradictory to other federal benefits

106. *See* text accompanying note 57, *supra*.

107. 34 C.F.R. § 200.6(c)(2) (1994).

108. 34 C.F.R. § 300.13 (1994) (Assistance to States for Education of Children with Disabilities); 34 C.F.R. § 303.18 (1994) (Early Intervention Program for Infants and Toddlers with Disabilities).

109. 20 C.F.R. § 617.3(q) (1995).

110. 20 C.F.R. § 632.4 (1995).

111. 20 C.F.R. § 638.200 (1995).

112. 28 C.F.R. § 74.2(d) (1994).

113. 28 C.F.R. § 79.2(b) (1994).

114. 42 C.F.R. § 435.113 (1994).

115. Pub. L. No. 103-03, H.R. 1 (1993), 107 Stat. 6, 9. *See also* 5 U.S.C. § 6381 (1994) (family and medical leave for federal employees).

programs, and may perhaps be explained by the fact that the federal government dispenses no cash benefits.

Immigration policy toward stepchildren is quite generous and includes no dependency qualification. The statute dealing with issues of nationality and immigration provides: "The term 'child' means an unmarried person under twenty-one years of age who is—a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred."[116]

This definition is important in the context of relative petitions under the Immigration Act.[117] Under this provision, all immigrants must obtain an immigrant visa in order to legally enter the United States. There is a quota system which limits the number of visas given to immigrants from any given country in a given year. The statute creates an exemption to these quotas for potential immigrants who are the immediate relatives of a U.S. citizen for the humanitarian purpose of uniting separated family members.[118]

Congress included stepchildren in this exemption to the quota system in order to promote the goal of uniting families. According to the House Report, the Act "implements the underlying intention of our immigration laws regarding the preservation of the family unit. An American citizen will have the right . . . to bring his alien minor child as a nonquota immigrant."[119] In contrast to many other federal programs, Congress included no requirements of dependency or residency for stepchildren eligibility. Thus, a stepchild who may never have lived with his or her stepparent will be eligible for an exemption to the immigration quota.

The Immigration and Naturalization Service (INS) has, on several occasions, attempted to restrict the availability of nonquota status for certain, nontraditional stepchildren, but the courts have consistently rejected these attempts.[120] In *Palmer v. Reddy*,[121] the Ninth Circuit concluded that "[p]revious decisions have exhaustively studied the legislative history of the stat-

116. 8 U.S.C. § 1101(a)(46) (1994). The evidence required to establish a stepparent/stepchild relationship can be found in the implementing regulations at 8 C.F.R. § 204.2 (1995).

117. 8 U.S.C. § 1151 (1994). For a comprehensive discussion of the treatment of stepchildren under this section of the Immigration Act, *see* Mahoney, *Stepfamilies in the Federal Law, supra* note 32. *See also* Annotation, Who is a "Stepchild" for Purposes of § 101(b)(1)(B) of Immigration and Nationality Act (8 U.S.C.S. § 1101(b)(1)(B)), 54 A.L.R. Fed. 182, 186-87 (1981).

118. Mahoney, *Stepfamilies in the Federal Law, supra* note 32, at 515.

119. H.R. REP. No. 1365, 82d Cong., 2d Sess. 29 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680.

120. *See, e.g.*, Andrade v. Esperdy, 270 F. Supp. 516, 518-19 (S.D.N.Y. 1967) (rejecting INS position that in order for an illegitimate child to qualify as a stepchild, there must have been a "bona fide family unit which included the illegitimate child, the natural father and the stepmother"); Nation v. Esperdy, 239 F. Supp. 531, 536 (S.D.N.Y. 1965) (illegitimate stepchildren eligible for nonquota status based on plain language and legislative history of statute).

121. 622 F.2d 463 (9th Cir. 1980).

ute and concluded that visa preference is available to stepchildren as a class without further qualification. We interpret 'stepchild' literally and hold that it is not impliedly restricted by the INS.''[122]

II. A Model for Federal Policy: Residential Stepparents as *De Facto* Parents

A. *The De Facto Parent*

Federal policy should reflect the modern reality that in many stepfamilies children are dependent upon the stepparent for support and parental caregiving.[123] The primary goal of a reformulation of federal stepparent policy should be to recognize this reality and to encourage stepparents to act more like parents. To this end, federal policy should attempt to enhance stepparent and stepchild rights and to increase stepparent obligations to their stepchildren. Children will benefit from having more responsible adults in their lives rather than fewer. More sources of financial support will lead to less poverty among the nation's children and will lessen the financial burdens on the government.[124] Moreover, a more clearly defined parental role for the ambiguous stepparent may lead to greater family stability.

Federal policy should also recognize that dependency does not always cease immediately with divorce or death and that stepparents may have obligations to other dependent children, with whom they may no longer live. Parenting is not a linear model for stepfamilies. Stepchildren may have two or more sets of parents before they reach their majority. Likewise, a stepparent may

122. *Id.* at 464.

123. The fact that some of these children may also be receiving some additional support from a noncustodial parent (about a third, according to the National Survey of Children) should not impede a federal policy initiative which strengthens the rights and responsibilities of stepparents, encouraging their parental role. Furstenberg, *supra* note 3. *See also* Chambers, *supra* note 25, at 105 (''[N]early all residential stepfathers . . . contribute to the financial support of the children with whom they live; many in fact provide all the financial support.''). *See generally* David R. Fine & Mark A. Fine, *Learning from the Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies*, 97 DICK. L. REV. 49 (1992).

124. Such a policy is consistent with the recent strong federal initiative to enforce the child support obligations of divorced parents and unwed fathers. This policy has been accelerated with the Family Support Act of 1988 which focuses on enforcing child support obligations of divorced and unwed fathers. Pub. L. No. 100-485, H.R. 1720, 102 Stat. 2343 (1988).

There have been many calls for a heightened federal effort to enforce parental support obligations. *See, e.g., Speed the Search for Deadbeat Dads*, N.Y. TIMES, July 17, 1993, at 18 (urging ''a stronger Federal effort to hunt down deadbeat fathers and make them pay child support''). President Clinton has called the widespread failure of parents to pay child support a ''national scandal.'' According to Clinton: ''We have to crack down on this to restore the essential value of parents being responsible for their children.'' *Quoted in* Adam Nagourney, *Clinton Talks Tough, Plain on Child Support*, USA TODAY, May 18, 1992, at 8A.

raise more than one set of children. At any given point a child may have more than two parents actively involved in his or her life. The welfare of the children must always be the first consideration in nonlinear families.

Current federal policy goes part way toward strengthening the role of the stepparent by assuming an obligation of support and the attendant dependency of stepchildren in most programs, even when this policy is in conflict with state laws.[125] It also takes into account the existence of stepparent obligations to other dependent children in most means-tested programs. However, existing stepparent policy falls short in several critical areas. First, there is inconsistency in defining dependency in the context of the stepparent-stepchild relationship, barring some stepchildren from legitimate claims. As shown in Part I, dependency is defined in five different ways in federal employee benefit programs.[126] Second, some programs fail to distinguish between residential, caregiver stepparents and those that have little contact with their stepchildren. Third, stepchildren are sometimes treated unfairly compared with natural children. For example, in several federal employee insurance programs, stepchildren are completely barred from death benefits available to natural children.[127] Finally, under existing policies, benefits to dependent stepchildren are usually immediately severed upon divorce,[128] and most often upon the death of the natural parent and sometimes the stepparent.[129] This policy does not reflect the continuing dependency of stepchildren, and puts them at immediate risk of impoverishment.

We propose a new conceptualization of stepparents which will clarify existing policy and strengthen the legal position of those stepparents who are, in most meaningful ways, acting as parents. This conceptualization requires dividing stepparents into two subclasses: those who are "*de facto*" parents and those who are not.[130] *De facto* parents would be defined as "those steppar-

125. *See supra* notes 35-50 and accompanying text (discussing federal AFDC and SSI policy).

126. *See supra* text accompanying notes 85-91.

127. *See supra* notes 80-84 and accompanying text.

128. *See supra* notes 75-76, 95-101, and accompanying text (various government employee benefits cut-off upon divorce). *But see* Florio v. Richardson, 469 F.2d 803 (2d Cir. 1972) (holding that Social Security benefits are not terminated upon the divorce of the stepfather and natural mother).

129. *See supra* notes 95-101 and accompanying text.

130. While the concept of *de facto* parent has been used descriptively in many legal contexts on the state level to argue for limited recognition of a nonparent who has been acting as a parent, there has been no consistent statutory development of this classification. *See, e.g., In re* B.G. v. San Bernandino County Welfare Dep't, 523 P.2d 244, 253 n.18 (Cal. 1974) (defining *de facto* parent as "that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care."); *In re* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (rejecting *de facto* parent argument in custody dispute of lesbian couple). *See also* U.S. Dep't of Health and Human Services, Model State Adoption Act, 45 Fed. Reg. 10,622, 10,651 § 102(a)(13) (1980) (foster parents who have cared for child for one year accorded status of *de facto* parents).

It is also possible that a legally developed role of *de facto* parent need not be limited

ents legally married to a natural parent who primarily reside with their stepchildren,[131] or provide at least 50 percent of the stepchild's support.''[132] For the purposes of federal policy, under our scheme a *de facto* parent would be treated virtually the same as a natural parent during the marriage; the same rights, obligations, and presumptions would attach vis-à-vis their stepchildren. These rights and duties could continue in some form following the natural parent's death or divorce from the stepparent, or the death of the stepparent. Stepparents who do not meet the *de facto* parent requirements would, in all important respects, disappear from federal policy.

This concept of parent is largely a modern extension of the common law doctrine of *in loco parentis*. At common law, a stepparent can obtain the rights and duties of a parent if he acquired *in loco parentis* status. Acquisition of this status is determined by the stepparent's intent to stand in the place of the parent.[133] A stepparent can ''manifest the requisite intent to assume responsibility by actually providing financial support or by taking over the custodial duties.''[134] Once the status of *in loco parentis* is achieved, he or she ''stands in the place of the natural parent, and the reciprocal rights, duties, and obligations of parent and child subsist.''[135] These rights, duties, and obligations

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to a residential stepparent and could be assumed by other adults who intentionally function as a parent. That issue, however, is beyond the scope of this review and requires a different analysis. The residential stepparent already has a legal status, at least with regard to the natural parent, and is already recognized by federal policy.

131. Since many stepchildren may have visitation arrangements with their natural noncustodial parent, the definition of ''reside'' should be flexible. Perhaps a residence requirement of at least 51% of the time would cover most visitation arrangements. Parents who have elected a strict joint custody 50-50 arrangement would have to modify this arrangement in order for the children to be considered dependent upon the stepparent.

David Chambers makes a similar distinction between residential and nonresidential stepparents in analyzing the different experiences of stepparents. *See* Chambers, *supra* note 25, at 104.

132. This last category would cover stepparents who were living apart, but not divorced, or those on military assignments.

133. *See* Miller v. United States, 123 F.2d 715, 717 (8th Cir. 1941).

134. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship, supra* note 10, at 42. *See also* Trudell v. Leatherby, 300 P. 7, 9 (Cal. 1931) (finding *in loco parentis* relationship where a child was brought into the stepparent's home and was treated and regarded by the stepparent as her own child).

135. 67A C.J.S. § 159 at 555 (footnotes omitted). However, even a stepchild who's stepparent stands *in loco parentis* to him or her is not eligible to inherit from him under most modern intestate succession statutes. *See generally* Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills, supra* note 84, at 917-28. California provides the most liberal intestacy rule for stepchild recovery, including stepchildren, but only if they meet relatively onerous qualifications. CAL. PROB. CODE § 6454 (1995) (stepchildren eligible if (1) the stepparent/stepchild ''relationship began during the person's minority and continued throughout the joint lifetimes'' of the parties and (2) ''it is established by clear and convincing evidence that the . . . stepparent would have adopted the person but for a legal barrier.'').

include the duty to provide financial support,[136] the right to custody and control of the child,[137] immunity from suit by the stepchild,[138] and, less clearly, visitation rights after the dissolution of the marriage by death or divorce.[139]

The *in loco parentis* doctrine does not adequately meet the needs of the modern stepfamily, however. First, it is not easy for a stepparent to achieve *in loco parentis* status. Courts have been reluctant to grant parental rights or to attach obligations to unwilling stepparents. In the words of one New York court: "*In loco parentis* refers to a person who has fully put himself in the situation of a lawful parent by assuming all the obligations incident to the parental relationship and who actually discharges those obligations. . . . The assumption of the parental relationship . . . should not lightly or hastily be inferred."[140] It is neither efficient nor desirable to determine voluntary obligation on a case-by-case basis. Existing federal policy has already rejected this approach. Driven by considerations of child welfare, administrative efficiency, and cost concerns, federal legislation already infers the support obligation of stepparents without evidence of support in most federal programs.

A second problem with the *in loco parentis* doctrine is rooted in changes in stepfamily structure. Today, the marriage creating the stepparent-stepchild is usually created subsequent to divorce rather than the death of the other natural parent.[141] The stepparent is not actually standing in the place of the parent since the divorced noncustodial parent still possesses rights and obligations with respect to the child. A new model must allow for multiple parenting roles.

Finally, *in loco parentis* status lasts only as long as the stepparent wishes and abruptly terminates with the termination of the marriage creating the step-relationship. The rights and duties attaching to a stepparent standing *in*

136. *See* Niesen v. Niesen, 157 N.W.2d 660 (Wis. 1968); Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship, supra* note 10.

137. *See* Miller v. United States, 123 F.2d 715, 716 (8th Cir. 1941); Mahoney, *supra* note 10.

138. *See* Rutkowski v. Wasko, 143 N.Y.S.2d 1, 4 (App. Div. 1955); Trudell v. Leatherby, 300 P. 7, 9 (Sup. Ct. Cal. 1931).

139. *See, e.g.*, Spells v. Spells, 378 A.2d 879, 882 (Pa. Super. Ct. 1977) ("A stepfather who lives with his spouse and her natural children may assume the status 'in loco parentis'. We may expect that a bond will develop between stepparent and stepchild; we, therefore, should protect that relationship by conferring rights of visitation."); Simpson v. Simpson, 586 S.W.2d 33 (Ky. 1979) (holding that visitation rights should be granted to a person standing *in loco parentis* to a child when it is in the best interest of a child). Several courts have granted visitation rights to stepparents because it would be in the best interests of the child. *See, e.g.*, Bryan v. Bryan, 645 P.2d 1267 (Ariz. Ct. App. 1982) (granting visitation rights to stepfather); Looper v. McManus, 581 P.2d 487 (Okla. Ct. App. 1978) (granting visitation rights to stepmother). *But see* Meeks v. Garner, 598 So. 2d 261 (Fla. Dist. Ct. App. 1992) (holding that a stepfather has no legal entitlement to seek court-ordered visitation with his stepdaughter); Shoemaker v. Shoemaker, 563 So. 2d 1032 (Ala. Civ. App. 1990) (holding that neither common law nor state statutes provides a stepfather visitation rights).

140. *See Rutkowski*, 143 N.Y.S.2d at 5.

141. *See* Glick, *supra* note 1, at 21, 22.

loco parentis to a stepchild are terminable at the will of the stepparent.[142] The relationship automatically expires upon the divorce of the stepparent and the natural parent,[143] and usually upon the death of the natural parent.[144] Under common law a stepchild would inherit nothing upon the death of a stepparent.[145]

For the sake of child welfare, abrupt termination of the stepparent-stepchild relationship by death or divorce must be reconsidered. Federal policy can go a long way toward breaking this tradition. When federal benefits are at issue, it is unfair to summarily cut off children who have been dependent, sometimes for years, upon the *de facto* parent. A better policy is to extend federal benefits following divorce, possibly based on a formula which matches the number of years of dependency. In the case of the death of the natural parent, benefits should be similarly extended or continued indefinitely if the child remains in the custody of the stepparent. When a stepparent dies, the child should receive all the survivor and death benefits that would accrue to a natural child.

Critics of this scheme may argue that adoption, not the creation of the legal status of *de facto* parent, is the appropriate vehicle for granting a stepparent full parental rights and responsibilities. If only about a third of the noncustodial parents are supporting the children in stepfamilies, policy initiatives should be directed to terminating the nonpaying parents' rights and promoting stepparent adoption. Termination of parental rights, however, is a difficult procedure against a reluctant parent.[146] Normally, the rights of a parent who maintains contact with the child cannot be terminated even if that parent is not contributing child support. In cases where the rights can be terminated, this procedure leads to termination of the natural parent's visitation rights as well, in most states.[147] It is by no means clear that it is in the best interests of children to terminate contact with a natural parent, even if the parent is not meeting his or her obligation to support.[148]

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142. *See* Mahoney, *supra* note 10, at 42.

143. *See* Miller v. Miller, 478 A.2d 351 (N.J. 1984); Bledsoe v. Bledsoe, 448 A.2d 353 (Md. 1982); Zeller v. Zeller, 407 P.2d 478 (Kan. 1965); Clevenger v. Clevenger, 189 Cal. App. 2d 658, 662, 11 Cal. Rptr. 707, 709 (Cal. Ct. App. 1961).

144. *See In re* Erie County Bd. of Social Welfare v. Schneider, 163 N.Y.S.2d 184, 186 (Children's Court 1957) ("[I]n the absence of a clear statutory provision continuing the obligation of the step-parent after the death of either party to the marriage the relationship and obligation on the part of the survivor terminates.").

145. *See* Mahoney, *supra* note 84, at 917-28.

146. The courts have recognized that the parental rights are fundamental and may not be terminated absent a compelling state interest. *See* Alsager v. District Court of Polk County, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir.). California, for example, provides for involuntary termination of parental rights only when a court finds, by *clear and convincing evidence*, that the parent is unfit because he or she: abandons the child; neglects or abuses the child; is disabled due to alcohol, drugs, or moral depravity; has been convicted of a felony of a nature so as to make him or her unfit; or shown to be incapable of supporting the child because of a developmental disability, mental illness, or mental disability. CAL. FAM. CODE §§ 7820-7829 (1994).

147. *See generally* Bartlett, *supra* note 33; Marsha Garrison, *Why Terminate Parental Rights?*, 35 STANFORD L. REV. 423 (1983).

148. *See* Bartlett, *supra* note 33, at 902; Garrison, *supra* note 147.

Legal recognition of the stepparent's *de facto* parent's rights without terminating the natural parent's rights will lead to multiple parental rights. While this may raise conflicts in child-raising or other issues of parental custody and control, it is worth the price. Multiple parenthood is the reality of many stepfamilies, and clarifying the residential stepparent's position will be more helpful than detrimental.[149]

Another potential objection to the *de facto* parent scheme is that it will discourage marriages where one or both partners have children.[150] Potential stepparents will be reluctant to marry a custodial parent if they understand they must take on responsibilities for the children.[151] However, it is not proven that support obligations for stepchildren will frighten away potential marriage partners. Perhaps such a policy would properly discourage those who are unprepared for the commitment from marrying into an existing family. It is also possible that potential stepparents may be encouraged rather than discouraged to marry if their parental role, including parental rights of custody and control, is more clearly defined in the new family configuration. We know from family researchers that a great deal of the strain in stepparent families can be traced to the ambiguous role of the stepparent.[152] While the law cannot intervene in individual families to clarify parental roles, it can influence the way families think about themselves. Just as the law rarely intervenes in intact marriages to ensure that the couple are supporting one another, it is the assumption of most married couples, based on their understanding of the law, that they will.

Federal policy, however, is limited in promoting increased rights and responsibilities for *de facto* parents. Critical matters of everyday custody and control and rights to custody or visitation following a divorce from or death of the custodial parent are determined by the law of the individual states, not the federal government. So, too, are the crucial issues of child support following divorce and inheritance rights. However, once federal policy has mapped out a firm and consistent direction for dealing with stepparents and stepchildren, it can encourage states to move in a similar direction. Federal policymakers can use their considerable fiscal power to encourage state legislators to adopt the concept of *de facto* parent in matters of marriage, divorce, and inheritance, as well everyday legal rights to the custody and control of their stepchildren.

B. *The De Facto Parent Applied to Existing Federal Policy*

1. Means-Tested Programs

The survey of federal policy in Part I demonstrates that Congress has displayed ambivalence in conceptualizing the role of the stepparent in its major

149. For a full discussion of multiple parenthood, *see* Bartlett, *supra* note 33.

150. *See, e.g., In re* Marriage of Holcomb, 471 N.W.2d 76 (Iowa Ct. App. 1991).

151. New Jersey's WEDFARE program, a federally approved exception to AFDC guidelines, makes this assumption. In New Jersey stepparent income is not considered in determining AFDC eligibility unless it raises the family 150% above the poverty line. N.J. Stat. § 44:10-3.4b (1993).

152. *See generally* Furstenberg, *supra* note 3.

means-tested programs which affect benefits to children. Supplemental Security Income (SSI)[153] immediately and consistently assumed stepparent support in its eligibility requirements from its enactment in 1935. Aid to Families With Dependent Children (AFDC) deferred to state law regarding stepparents' obligation to support until 1981, when Congress finally required the inclusion of stepparent income regardless of state law obligations.[154] And Medicaid has never clearly required the inclusion of stepparent income in determining eligibility, and in certain circumstances forbids such inclusion.[155]

Federal court decisions have provided little guidance in formulating stepparents' status in means-tested programs. The *Kollett* decision,[156] which defended the right of Congress to assume stepparent support under SSI, comes closest to defining the stepparent role. The court speculated that Congress

> could rationally conclude that a person who is married to the child's natural parent, living in the same household, and thus, in a sense, occupying the position of the child's other parent, is likely to be supporting the child and that such an assumption is less likely to accord with reality in the case of a person other than a parent or stepparent who is living in the same household as the child.[157]

A statutory imposition of the *de facto* parent model would force uniformity and provide clarity among all three programs. For the purpose of calculating total benefits under these programs, rather than including "any income and resources of a parent of such individual (or the spouse of such a parent) who is living in the same household as such individual, whether or not available to such individual,"[158] the statutory language should be amended to read: "The child's income and resources shall be deemed to include any income and resources of a parent of such individual or a stepparent who acts as a *de facto* parent." In the definitions section of the statute, a *de facto* parent would be defined as: "One who is married to the child's parent and either (a) primarily resides with the child or (b) provides 50 percent of the child's support."

Such statutory language would not alter the current eligibility requirements of SSI and AFDC, but it would focus on the parental relationship of the *de facto* stepparent and the child, rather than the spousal relationship of the stepparent and natural parent. It is this parental relationship which justifies the inclusion of stepparent income. Under the proposed scheme it is the stepparent

153. 42 U.S.C. § 1382c(f)(2) (1988). For a full discussion of these issues, *see supra* text accompanying notes 35-55.

154. 42 U.S.C. § 602(a)(31) (1988). For a full discussion of these issues, *see supra* text accompanying notes 35-55.

155. 42 U.S.C. § 1396a(a)(17)(D). For a full discussion of these issues, *see supra* text accompanying notes 35-55.

156. Kolett v. Harris, 619 F.2d 134 (1st Cir. 1980).

157. *Id.* at 140.

158. This formulation—or a substantially similar one—appears in the SSI statute at 42 U.S.C. § 1382c(f)(2) (1988); and in the AFDC statute at 42 U.S.C. § 602(a)(31) (1988).

rather than the government who consistently assumes, as a natural parent would, financial responsibility for the child.

In addition, it is good policy to follow the lead of the AFDC program and acknowledge that stepparents often have moral and legal support obligations to other people, usually children from a previous marriage. Income that might at first appear to be available to a stepchild often will actually be committed elsewhere. Under the AFDC scheme, only income that exceeds the amount that is committed elsewhere will be presumed to be available to the stepchild when calculating that child's eligibility for AFDC.[159] We would favor implementing a similar provision within the context of the *de facto* parent scheme.

2. Nonmeans-Tested Programs

While means-tested programs focus on the obligation of stepparents to support their stepchildren, nonmeans-tested programs focus on the rights of stepchildren, as dependents, to collect benefits based on their stepparents' employment or status. In determining eligibility for benefits under nonmeans-tested programs, the stepparent is usually the qualifying party, most often because of his or her work. Stepchildren are usually listed as one class of dependent eligible to receive benefits derivatively through his or her stepparent. Fiscal concerns dictate that stepchildren who receive these federal benefits be dependent upon the stepparent; child welfare concerns dictate that dependent stepchildren be adequately covered. Neither of these concerns is satisfied by current federal policy.

As described in Part I, some nonmeans-tested programs carefully define the criteria for determining dependency,[160] some use a wide range of definitions to get at the notion of dependency,[161] and still others fail to limit the class at all and include all stepchildren.[162] Only a very few of the programs consider the issue of dependency following the death of the natural parent or divorce.[163] Some programs specifically bar stepchildren from lump-sum or insurance benefits upon the death of the stepparent without note of the condition of dependency.[164]

Social Security legislation, which provides benefits to children in the event of the death, disability, or old age of their parent, provides the most carefully developed definition of stepchild dependency. This definition, which requires that the parent was legally married to the stepparent and that the child "was living with or was receiving at least one-half of his support from such stepfather

159. Amounts paid by the stepparent to individuals not living in the household but who the stepparent claims as a dependent for federal income tax purposes and payments by stepparents for alimony or child support for individuals not living in the household. 42 U.S.C. § 602(a)(31) (1988).

160. *See supra* notes 78-101 and accompanying text.

161. *See supra* notes 78-101 and accompanying text.

162. *See, e.g.*, Pub. L. No. 103-03, H.R. 1, 107 Stat. 6 (1993) (Family And Medical Leave Act).

163. *See, e.g.*, 32 C.F.R. § 199.2 (1994) (CHAMPUS regulations).

164. *See supra* notes 80-84 and accompanying text.

or stepmother''[165] is nearly identical to the definition we have suggested in our *de facto* parent model. The major problem with the Social Security model is its summary extinction of eligibility for benefits upon the death of the natural parent or the divorce of the natural parent from the stepparent.[166] Thus, if the insured stepparent dies or retires one day following the death of the natural parent or the termination of the marriage of the natural parent and stepparent, the stepchild will receive no benefits. This rule is consistent with common law and state laws which generally recognize no further obligations or rights for the stepparent upon divorce.[167] In this tradition, it is the marriage contract which creates the stepparent relationship and its termination severs the relationship.

By contrast, if the parents of a natural or adopted child divorce, the child continues to be eligible for the noncustodial parent's Social Security benefits, even if the child never lays eyes on the parent again.[168] Also in contrast to this abrupt cut-off of stepchildren's benefits, the Social Security benefits of a spouse are not necessarily automatically severed upon divorce. In a case where the insured is eligible for benefits based on old age or disability, the divorced spouse of the insured is eligible for benefits if he or she is sixty-two, has not remarried, and the marriage lasted ten years immediately preceding the divorce.[169] In the case of the death of the insured, the surviving divorced spouse may be entitled to benefits if he or she is at least sixty years old or between fifty and sixty and disabled.[170] As with old age and disability, the marriage must have lasted the ten years immediately before the effective date of the divorce.[171] Therefore, after ten years of marriage, a spouse's rights vest under Social Security and the spouse can claim those benefits following a divorce.[172]

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165. 42 U.S.C. § 402(d)(4) (1988). In addition to the basic test of dependency, Social Security imposes a duration requirement on the marriage creating the step-relationship. If the insured is alive when the child is applying (i.e., the insured is disabled or elderly), the marriage creating the stepfamily must have taken place at least one year before the time of application. 42 U.S.C. § 416(e)(3)(B)(2) (1988). If the insured is deceased, the stepfamily relationship needs to have existed for at least nine months before the wage earner's death. 42 U.S.C. § 416(e)(3)(B)(2) (1988). These restrictions, approved by the U.S. Supreme Court in Weinberger v. Salfi, 422 U.S. 749 (1975), are designed to avoid sham marriages, and they make sense even under a *de facto* parent analysis. With a short-term dependency, the potential harm accruing to legitimate dependent stepchildren must be balanced against the greater temptation for fraud.

166. 42 U.S.C. § 416(e) (1988).

167. *See Parent & Child,* 67A C.J.S. § 161 at 559.

168. 42 U.S.C. § 402(d)(3) (1988). However, if upon re-marriage the stepparent adopts the child, the child will no longer be eligible based upon the noncustodial parent's benefits. 42 U.S.C. § 402(d)(3) (1988).

169. 42 U.S.C. §§ 402(b)(1), (c)(1) (1988); 42 U.S.C. § 416(d) (1988).

170. 42 U.S.C. §§ 402(e)(1), (f)(1) (1988).

171. 42 U.S.C. §§ 416(d)(2), (d)(4) (1988).

172. Similarly, under another nonmeans-tested federal program, the Comprehensive Omnibus Budget Reconciliation Act of 1986 (COBRA), Pub. L. No. 99-272, H.R. 3128, 100 Stat. 82, *codified at* 29 U.S.C. §§ 1162, 1163 (1988), employers are required

A significant step toward achieving the federal policy goal of promoting child welfare would be to continue eligibility for benefits following the death of the natural parent or a divorce which terminates the marriage. As with natural and adopted children and long-term spouses, federal policy could recognize that reliance upon support should not be abruptly severed.

Perhaps a fair way for federal policymakers to deal with the Social Security retirement or death benefits following death or divorce is to toll the period of coverage for the number of years that the stepparent acted as *de facto* parent. For instance, if the stepparent resided with the stepchild for four years, the child would be covered by Social Security benefits for a period of four years following the divorce. This solution would serve child welfare by at least providing a transitional cushion. It would also be relatively easy to administer. To be truly effective, however, it would have to be combined with other benefits and child support during this period of time, as most stepparents are not likely to either die or retire during this transitional period.

As discussed in Part I, the vast array of nonmeans-tested federal programs outside of Social Security use a wide variety of definitions to determine stepparent eligibility. A few programs, concerned primarily with eligibility to receive lump-sum settlements under federal employee retirement programs, completely bar stepchildren.[173] Others make no requirement of dependency and include nonresidential as well as residential stepparents.[174] Still others impose various different dependency requirements.[175] While most programs cease benefits upon the death or divorce of the natural parent, a few do not.[176]

There is no apparent reason for this greatly inconsistent treatment given to stepparents and stepchildren. The use of the *de facto* parent model to define the stepparent-stepchild relationship would suit virtually all programs and provide both fairness and administrative convenience. The previously proposed definition that "a *de facto* parent is one who is married to the child's parent and either (a) primarily resides with the child or (b) provides 50 percent of the child's support" would provide the basic eligibility requirement for these other nonmeans-tested programs. Beyond that, programs that deal with death, disability, or retirement benefits could adopt the Social Security duration requirements intended to avoid sham marriages.

Consistent with our proposal for modifying the Social Security scheme, all these federal programs should extend their benefits beyond the divorce of the stepparent and the natural parent, or the death of either, for a period of time. These benefits could cushion stepchildren from possible impoverishment dur-

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to continue to make health benefits available for the spouse of an employee for up to 36 months if he or she becomes ineligible for benefits because of divorce. 29 U.S.C. § 1163(3) (1988).

173. *See, e.g.*, 5 U.S.C. § 8424(d) (1994) (Federal Employees' Retirement System); 22 U.S.C. § 4055(f)(3) (1988) (Foreign Service Retirement and Disability System).

174. *See supra* notes 78-101.

175. *See supra* notes 78-101.

176. *See supra* notes 78-101.

ing the vulnerable period following a death or divorce. The above-suggested formula, which extends the benefits for the number of years of the marriage, would provide a workable model for divorce or the death of the natural parent. In the event of the death of the stepparent, all lump-sum benefits which accrue to natural children should be available to *de facto* stepchildren as well.

The only exception to the uniform use of the *de facto* parent model in federal policy might be federal immigration policy. It is sensible that the requirements for reuniting families do not restrict eligibility to residential stepparents.[177] Under the current statutory scheme, the stepparent is already in this country, living apart from his or her stepchildren while applying to bring them here. Administratively, it would be too difficult to determine the residential circumstances of the stepparent before he or she emigrated. In balancing potential fraud (a nonresidential stepparent claiming a dependent) and difficulties of proof, it is fairer to lean toward overinclusion.

C. *State Family Law*

Since state law governs most areas of family law—including marriage, divorce, custody and control of children, child support, and inheritance—a complete legal role for the stepparent as a *de facto* parent can only be established by encouraging reform in this confused arena. Once federal policy has developed a firm and consistent direction in dealing with stepparents who act as *de facto* parents, it can encourage states to move in a similar direction. It is to the great advantage of the federal government, particularly with regard to the impact on means-tested programs like AFDC, that states impose stricter support obligations on residential stepparents during the marriage and following the termination of the marriage as well. Such effectively shifts the child support burden from the government to the stepparent. This approach is consistent with the ongoing federal initiative to enforce the child support obligations of unwed and divorced fathers,[178] which is also aimed at promoting responsibility for the support of children who might otherwise become dependent on federal and state support.

The first step in promoting this new policy is to insist that all states pass stepparent general support obligation laws which would require stepparents acting as *de facto* parents to support their stepchildren as they do their natural children.[179] Federal policy already assumes this support in figuring eligibility

177. As discussed in § I2B, virtually all stepchildren or legal immigrants are eligible for an exemption to the immigration quota system. 8 U.S.C. § 1151 (1994). For a full discussion of immigration policy, *see supra* notes 116-122 and accompanying text.

178. *See supra* note 124.

179. The various arguments for and against imposing support obligations on stepfathers are introduced and analyzed in Thomas P. Lewis & Robert J. Levy, *Family Law and Welfare Policies: The Case for 'Dual Systems'*, 54 CAL. L. REV. 748 (1966). In fairness, in cases where the natural noncustodial parent is paying child support, the obligation of stepparent support could trigger a reduction in the child support amounts.

in many programs, but it has not insisted that states change their laws.[180] This goal could be accomplished by making stepparent general support obligation laws a prerequisite for receiving federal AFDC grants. Precedent for this strategy has been set by the Family Support Acts of 1984 and 1988 which mandated that states set up strict child support enforcement laws for divorced parents and unwed fathers at AFDC levels in order to secure AFDC funding.[181] As noted earlier, many states already have such general obligation support laws in place.[182]

Such a policy has been initiated in Great Britain[183] where parliament has imposed significant support liability on stepparents through the Matrimonial Causes Act of 1973.[184] Under this legislation, stepparents may be required to maintain any child considered a "child of the family." This is defined to include a natural child of both spouses or any other child "who has been treated by both of these parties as a child of their family."[185] Generally, if the stepparent lives in the same household as the stepchild, the stepchild will be considered a child of the family; in fact, a child is usually considered a "child of the family" unless the child has been "definitely excluded from the family."[186]

Requiring stepparent support, however, raises a central issue of fairness. If the stepparent is indeed supporting the child, there is a question about the support obligations of the noncustodial parent. Traditionally, most states have not recognized the stepparent contribution as an offset to child support.[187] While this policy promotes administrative efficiency, it may not be fair; particularly since federal policy already assumes stepparent support. An important advance in recognizing the existence of multiple parents is to recognize multiple support obligations. The few states that require stepparent obligation have given limited attention to apportionment of child support obligations, offering no clear guidelines.[188] We propose that state statutory requirements for stepparent obligation as *de facto* parents also include clear guidelines for apportionment of child support between the noncustodial natural parent and the stepparent.

The next logical, albeit more radical, step would be to require states to impose child support obligations on stepparents following the death of the natural parent or his or her divorce from the stepparent. This approach would

180. *See supra* notes 10-20 and accompanying text.

181. Pub. L. No. 100-485, H.R. 1720, 102 Stat. 2343 (1988).

182. *See supra* text accompanying notes 10-20.

183. *See generally* Ramsey & Masson, *supra* note 33.

184. Matrimonial Causes Act, 1973, ch. 18, §§ 25(4), 52(1).

185. *Id.* at § 52(1).

186. Ramsey & Masson, *supra* note 33, at 695.

187. For a full discussion of this issue, *see* generally Ramsey & Masson, *supra* note 33.

188. Of the fourteen states that require stepparent support seven states indicate that the natural parent remains primarily liable for support. *See* Ramsey & Masson, *supra* note 34, at 561.

conform with our policy proposal extending federal benefits following divorce or death. If federal policy took the lead in extending benefits to children following divorce where the parent qualified as a *de facto* parent, states might be required to follow a similar scheme regarding child support. This policy would be consistent with the federally mandated child support requirements for divorced fathers,[189] but it would be cutting new legal ground for stepparents. Only a few courts have ruled in favor of support payments following divorce, and this has been under the doctrine of detrimental reliance.[190] Only one state, Missouri, statutorily continues stepparent support obligations following divorce.[191]

It would be in the fiscal best interests of both state and federal governments to allow an extended period of support following divorce. Many families might well seek AFDC and additional state benefits if stepparent support were abruptly cut off at divorce. A formula similar to that suggested for federal benefits could be appropriate. A stepparent who qualified as a *de facto* parent for at least one year must contribute child support for the number of years of dependency or until the child reached majority.[192] While it may be said that this policy would discourage marriage, it could also be said to discourage divorce. Stepparents might consider working harder at maintaining a marriage if divorce had some real costs.

If stepparents are required to accept parental support obligations, equal protection and fairness concerns dictate that they must also be given parental rights. Currently, the law recognizes only natural or adoptive parents; a stepparent has no legal authority over a stepchild. According to one commentator, a stepparent "has no authority to make decisions about the child—no authority to approve emergency medical treatment or even to sign a permission slip for a field trip to the fire station."[193] A new federal policy which insists that states require *de facto* parent/stepparent support should also insist that states grant parental rights of custody and control to *de facto* stepparents. This approach is consistent with the common law doctrine of *in loco parentis*, which grants rights of custody and control when the stepparent is supporting the child.[194] In some cases, as when the parents have shared legal custody, the law would be recognizing the parental rights of three parents, rather than two. While this sounds unusual, it is an accurate reflection of how many families now raise their children. Most often however, it would be only the custodial parent

189. Pub. L. No. 100-485, H.R. 1720, 102 Stat. 2343 (1988).

190. *See* Clevenger v. Clevenger, 189 Cal. App. 2d 658 (1961) (requiring support upon divorce based on equitable estoppel). *But see* Wiese v. Wiese, 699 P.2d 700 (Utah 1985) (rejecting equitable estoppel argument).

191. MO. ANN. STAT. § 453.400 (Vernon 1986) (when the stepchild lives with the stepparent).

192. If the natural noncustodial parent were still paying support payments, the amount could be apportioned.

193. Chambers, *supra* note 25, at 108.

194. *See Parent & Child*, 67A C.J.S. § 159.

and his or her spouse, the *de facto* parent, who would have authority to make decisions for the children in their home.

Likewise, if federal policy mandates child support following divorce or death, the divorced or widowed stepparent must be able to pursue visitation or custody. Stepparents have not fared well in seeking continuing access to their stepchildren.[195] Currently, only a few states authorize stepparents to seek visitation.[196] Custody is almost always granted to a biological parent upon divorce,[197] and even in the event of the death of the natural parent, the noncustodial natural parent is usually granted custody.

State inheritance laws are frequently archaic, and perhaps farthest out of reach of federal policymakers of all state family law. Yet a consistent reformation aimed at strengthening the rights and obligations of stepparents should make this stretch. Under existing state law, even a stepchild whose stepparent stands *in loco parentis* to him or her is not eligible to inherit from him under most modern intestate succession statutes.[198] California provides the most liberal intestacy rule for stepchild recovery, but only if they meet relatively onerous qualifications.[199] While Social Security and other federal survivor benefits are based on the premise that a child relies on the support of the residential stepparent and will suffer the same hardship as natural children if the stepparent dies, state inheritance laws decree that only biology, not dependency, counts. The existing model is inadequate; state laws should assume that a *de facto* parent would wish to have all his dependents receive a share of his estate if he died intestate.

Similarly, whether stepparents or stepchildren can recover for wrongful death varies from state to state. Although one state law case permitted a

195. The courts generally grant visitation only under exceptional circumstances. *See supra* cases cited in note 139. The trend, however, seems to be toward increased consideration of stepparent visitation rights after divorce. For example, while California courts have rejected stepparent visitation, *see* Perry v. Superior Court, 108 Cal. App. 3d 480 (1980), the legislature recently amended the Family Code to allow stepparent visitation when it is in the best interests of the child. CAL. FAM. CODE § 3101(a) (West 1994). *See generally* Susan Silverman, *Stepparent Visitation Rights: Toward the Best Interests of the Child*, 30 J. FAM. L. 943 (1991/92).

196. The Draft Proposed Model Act Establishing Rights and Duties of Stepparents (currently under consideration by the ABA Family Law Section) expresses the reservations of most statutes. "A stepparent is not presumed to be entitled to visitation with the child, but must establish by clear and convincing evidence that he or she has standing to make application for visitation."

197. One very unusual case granted custody to a stepmother after her divorce from the child's natural father. *In re* Allen, 626 P.2d 16 (Wash. 1981). The court found that the child, who was deaf, would not likely thrive with his father, who did not know sign language. It therefore granted custody to the stepmother who did know sign language and was heavily involved in the child's education. *Id.*

198. *See generally* Mahoney, *supra* note 84, at 917-28.

199. CAL. PROB. CODE § 6408 (1993) (stepchildren eligible if (1) the stepparent-stepchild relationship began during the person's minority and continued throughout the parties' joint lifetimes and (2) it is established by clear and convincing evidence that the stepparent would have adopted the person but for a legal barrier).

stepchild to recover damages for the death of a stepparent,[200] the majority of cases bar recovery.[201] This aspect of state law should also be reformed to conform with a change in inheritance laws which recognizes the stepchildren of *de facto* parents.

III. Conclusion

Children are emotionally and economically vulnerable when the family configuration changes. Most of the federal and state efforts to strengthen the position of the changing family have focused on securing support from divorced parents and unwed fathers. The stepfamily has received little attention. The modern stepfamily offers a particular challenge since it often presents the possibility of children having more than two parents, a situation for which the law is unprepared. Federal policy has been willing, on a limited and inconsistent basis, to recognize the supportive role that residential stepparents actually do play, even when there are two living biological parents. State law, for the most part, has not. Neither state nor federal law has extended the rights or obligations of a stepparent beyond the termination of the marriage by divorce or the death of the natural parent—events which trigger vulnerability for children.

This article has proposed a new policy framework for looking at the stepparent-stepchild relationship which emphasizes the way in which most stepfamilies who live together actually function. Considering the residential stepparent as a *de facto* parent emphasizes the everyday parenting and support that stepparents engage in and suggests that they be given full parental rights and obligations toward the stepchildren during a marriage and reasonable transitional rights and obligations following the termination of the marriage. The relationship between the stepparent and the stepchild, rather than the marriage of the stepparent to the custodial parent, would be the focal point of law and policy. With this approach a stepparent who did not live with a stepchild would hold little interest for policymakers. The concept of *de facto* parent is in many ways an extension of the common law doctrine of *in loco parentis*, but in today's family the stepparent may not be replacing the natural parent who is most often alive, and sometimes active as a parent. Moreover, a new legal concept is useful to replace the limited and inadequate common law rule.

Federal policy should take the initiative in defining a parental status for residential stepparents in all federal programs. A clear definition of stepparent as *de facto* parent would eliminate the inconsistencies regarding stepparents which plague current federal policies. Furthermore, the *de facto* relationship would not be completely severed by divorce or by the death of either the natural parent or the stepparent. This recognition could provide a protective cushion for children in the event of death or divorce.

200. Moon Distribs. Inc. v. White, 434 S.W.2d 56 (Ark. 1968).

201. *See* Daniel E. Feld, *Annotation: Action for Death of Stepparent by or for Benefit of Stepchild*, 68 A.L.R.3d 1220.

Federal policy should also encourage an extension of the *de facto* parent concept to state policies, beginning with a revision of state laws to include an obligation on the part of the stepparent to support a stepchild with whom he or she lives.[202] As a fair exchange for support during the marriage and for a transition period afterwards, a stepparent should receive parental rights of custody and control, including the right to seek continued access following termination of the marriage.

Children are best served by being raised in a strong family. Strengthening the role of the ambiguous stepparent would both provide more protection for children and strengthen the stepparent-stepchild bond.

202. Ultimately the best vehicle for reformation of state law might be a Uniform Stepparent Law sponsored by the State Commission on Uniform Law. This route has been taken in other areas of state family law including enforcement of child custody and support and adoption.