

# Rethinking Stepparent Rights: Has the ALI Found a Better Definition?

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## I. Introduction

A critical arena of family change, the stepfamily, affects a large percentage of American families, and yet has been virtually ignored as a family law issue. It is estimated that about one-fourth of the children born will live with a stepparent before they reach majority.<sup>1</sup> Initially fashioned for traditional family relations, federal and state legislation are in many ways out of touch with the current needs and emerging patterns of stepfamilies and are sometimes in conflict with each other.<sup>2</sup> Overall there is a lack of legal recognition of the stepparent/stepchild relationship. While marriage clearly defines obligations and rights between the stepparent and the child's natural parent, the stepchild is not considered part of this web of rights and obligations, even when the child resides in the same household.<sup>3</sup> With few exceptions, stepparents have no obligation during the marriage to support their stepchildren, even while they have an obligation to support their spouse, the child's parent.<sup>4</sup> Nor do stepparents have any right of custody or control. If the marriage terminates through divorce or death, they most often have no rights of custody or visitation, no matter how longstanding their stepparent role. And stepparents do not have any obligation to pay child

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1. Frank Furstenberg, *The New Extended Family: The Experience of Parents and Children After Remarriage*, in REMARRIAGE AND STEPPARENTING: CURRENT RESEARCH AND THEORY (K. Pasley & M. Ihinger-Tallman eds., 1987).

2. Barbara Whitehead, *A New Familism?* 5 FAMILY AFFAIRS 1-2 (1992).

3. MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE BATTLE* 120 (2000).

4. *Id.*

support following divorce, even if their stepchildren have depended on their income for many years.<sup>5</sup> Conversely, stepchildren have no right of inheritance in the event of the stepparent's death and do not receive the safety net of continuing benefits that they would with the death of a biological parent.

Recently, the American Law Institute (ALI), in its new publication *Principles of the Law of Family Dissolution*, has attempted to set out the rights to custody and visitation and obligations to support for parents and certain parental figures considered de facto parents and parents by estoppel. As part of this effort, the ALI has attempted to provide a clear and uniform definition of those serving in such a parental capacity. Publication of the *Principles* final draft represents the culmination of eleven years of effort in an attempt to bring clarity to the law of divorce, an area often incoherent in state law.<sup>6</sup> Moreover, the authority of the ALI offers the promise of being adopted across state lines and providing a uniform standard where it is sorely needed. While this effort is not limited to stepparents, and is mainly designed to consider custody and visitation following divorce, it is a major step toward clarifying the legal definition of those non-biological parents who may have parental rights. Because stepparents are a very large subclass of non-biological parental figures, the impact on them deserves close attention. If the *Principles* is widely adopted, the parental categories created therein could be expanded and applied by legislatures and courts in other aspects of family law where clarity of rights and obligations is lacking.

The *Principles* proposes two categories of parental figures (other than legal parents, as defined by state law) that are eligible to participate in custody arrangements following divorce: de facto parents and parents by estoppel. Either of these categories may include, but are not limited to, stepparents.<sup>7</sup> This article will first compare the likely results of applying these definitions to custody and visitation cases involving stepparents to the results in actual cases to determine if they provide a more satisfactory outcome. Next, it will analyze the applicability of these definitions to stepparents in other contexts during the life cycle of stepparent/stepchild relationships; addressing the particular issues of

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5. MARY ANN MASON, THE MODERN AMERICAN STEPFAMILY: PROBLEMS AND POSSIBILITIES (1998). See ALL OUR FAMILIES 102 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., 1998).

6. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000) [hereinafter ALI PRINCIPLES].

7. *Id.*

support, authority and protection during marriage, and issues of custody, inheritance and tort claims at death. While the latter categories are not under the purview of the *Principles*, this analysis may provide guidance for a broader reform in these confused areas of stepparent rights and obligations.

For the purposes of this article, we define a stepparent as a person married to the legal (natural or adoptive) parent of a child. Moreover, we focus our analysis on those stepparents whose spouse is the child's custodial parent since this is the relationship in which stepchildren are most likely to be economically dependent and stepparents most likely to have developed parental ties.

## II. Current Law Pertaining to Stepfamilies

Part of the tradition of lack of legal recognition of stepparents can be attributed to the fact that the roles stepparents play in the lives of their stepchildren differ greatly from family to family, even among residential stepparents.<sup>8</sup> Courts and legislatures have been understandably hesitant to clearly define the legal role and obligations of stepparents; doing so would limit the blended family's autonomy in defining itself. An additional, and perhaps more powerful, reason is that family law has no room for two fathers or two mothers.<sup>9</sup> In the modern era, most stepfamilies are formed following divorce rather than the death of one parent. In these contemporary stepparent families, the natural non-custodial parent is typically still living. The existence of a non-custodial natural parent tends to limit, in law if not in practice, the parenting authority and obligations of the stepparents; it almost always precludes, for example, a stepchild adoption.

But of course, many stepparents do play a significant parenting role in the lives of their stepchildren and most residential stepparents contribute significantly to their economic well-being. For stepchildren, the lack of a legal recognition may cause hardship, particularly in the event of death or divorce. There is no safety net of support and benefits for minor children if the stepparent dies or the parents divorce as there would be with natural parents, and the child may be cut off from a significant parent figure. For stepparents, their lack of access to children in the event of divorce or the death of the custodial parent may cause great anguish.

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8. MASON, *supra* note 3, at 126.

9. *Id.* at 136.

Both state and federal law have struggled with finding a fair way to deal with limited situations in which the parenting ties or the clear dependency of the child would result in a grievous injustice for the child or, to a lesser degree, the stepparent. Over time, several functional concepts for allocating stepparent rights and responsibilities have been fashioned by state legislatures and courts. These formulations have focused on both the actual parenting relationship and the dependency of the child; they include persons *in loco parentis*, de facto parent, and equitable adoption.

The *in loco parentis* doctrine, which is used in many jurisdictions, allows a stepparent who demonstrates an intent to do so to take on support obligations and other parental rights and duties.<sup>10</sup> However, these rights and duties exist only as long as the stepparent lives with the child and continues to manifest intent to act *in loco parentis*.<sup>11</sup> This doctrine attempts to recognize the actual dependency of a child on a stepparent, but because of its limited applicability, does not help a child in the event of death or divorce.

The second legal fabrication, de facto parent, which is occasionally applied to stepparents, is defined differently by various courts and legislatures, and is used most often in visitation disputes following divorce. This concept gives limited recognition to the actual parenting demonstrated by a parent figure, not necessarily a stepparent.<sup>12</sup> Finally, the concept of equitable adoption is sometimes used to establish a stepparent's rights as a parent, either during marriage or at divorce or death.<sup>13</sup> This formulation is most commonly used by a stepchild to claim inheritance rights as a legally adopted child.<sup>14</sup> Equitable adoption usually requires proof that the child would have been adopted but for a legal barrier.<sup>15</sup> However, some courts have held that a stepparent relationship is inconsistent with a claim of equitable adoption.<sup>16</sup>

Overall, the definitions and the rights and duties conferred by these legal constructs vary among states and between different areas of law. As a result, there is little coherence and very limited use of these constructs in state law.<sup>17</sup> Federal rules governing eligibility for benefits are currently the most well developed in providing a clear definition and

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10. MARGARET MAHONEY, STEPFAMILIES AND THE LAW 16–22 (1994).

11. MASON, *supra* note 5, at 102.

12. *Id.* at 108.

13. MAHONEY, *supra* note 10, at 34, n.60.

14. *Id.* at 60–63.

15. Johnson v. Johnson, 617 N.W.2d 97 (N.D. 2000).

16. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 40 (2000).

17. See MAHONEY, *supra* note 10.

recognizing the importance of stepparents to children's welfare.<sup>18</sup> Federal law covers a wide range of programs and policies that impact the lives of most Americans, including stepfamilies. As the provider of benefits through such programs as Temporary Assistance for Needy Families (TANF) 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. But federal law has no bearing on the key life issues of support and authority during a marriage, custody and visitation following divorce or of life insurance, wrongful death and inheritance in the event of death.

There is no consistent treatment of stepfamilies across federal programs, and rules ranging from including all stepchildren as children to including none exist.<sup>19</sup> Nonetheless, there is more coherence in federal than state law. Generally, for the purposes of defining the stepparent/stepchild relationship, and thus benefit eligibility, federal legislation relies on a pragmatic test that focuses on a stepchild's dependency.<sup>20</sup> For example, a child is covered for social security survivor benefits purposes if he or she is supported at least 50 percent by that stepparent.<sup>21</sup> In the event of death, social security eligibility as the child of a stepparent is met if the child lived with the stepparent for at least nine months<sup>22</sup> and a waiver of this requirement is possible.<sup>23</sup> In the case of a stepparent's disability or retirement, benefits confer on a dependant stepchild when the relationship has existed for one year.<sup>24</sup>

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18. See generally Mary Ann Mason & David Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445 (1995).

19. See *id.*

20. See *id.* at 457-58.

21. 41 U.S.C. § 402(d)(4), repealed by Pub. L. 104-106, Div. D, Title XLIII, § 4305(a)(2), Feb. 10, 1996, 110 Stat. 665 (current through P.L. 107-203, approved 7-24-02). "A child shall be deemed dependent upon his stepfather or stepmother at the time specified in paragraph (1)(C) if, at such time, the child was receiving at least one-half of his support from such stepfather or stepmother." This provision was amended in 1999. Prior to that amendment, residence with a stepparent was an alternate ground for dependency.

22. 42 U.S.C.S. § 416(e). "The term 'child' means . . . (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died."

23. 42 U.S.C. § 416(k). The requirement that the stepchild of a deceased individual have been such stepchild for not less than nine months immediately preceding the day on which such individual died in order to qualify as such individual's child, shall be deemed to be satisfied, where such individual dies within the applicable nine-month period, if his death is (1) accidental or (2) occurs in the line of duty while he is a member of a uniformed armed services, serving on active duty.

24. 42 U.S.C. § 416(e)(2).

In sum, both the federal and state conceptual efforts to include stepparents and stepchildren have limited application and limited jurisdiction. Stepparents remain unrecognized in most important legal events during marriage and afterward.

### III. Overview of ALI Standards

The ALI's *Principles* attempts to bring a clear and orderly framework for defining parental rights and responsibilities for all parental figures and interested parties at the time of divorce. It seeks to "bring clarity and good judgment to a field where state law—statutory and judge-made—is often incoherent."<sup>25</sup> Because standing to bring action is a significant right, the ALI carefully defines the new categories of parents (in addition to those who are legal parents under existing state law)—de facto parents and parents by estoppel<sup>26</sup>—who may initiate actions seeking to allocate parenting responsibility. The first category is based on demonstrated parenting;<sup>27</sup> the second, primarily on presumed parenthood or an obligation to provide economic support.<sup>28</sup>

Several other aspects of the ALI's scheme are distinctive. First, the ALI rejects the traditional distinction made between visitation and custody rights in favor of a more generic "allocation of parenting responsibility." In addition, the categories of parental figures created are meant to encompass a wide variety of family circumstances. Finally, allocation of parenting responsibility may be made to individuals who lack standing to initiate an action, if such an allocation is found to be in the child's best interests.<sup>29</sup>

Between the two new categories of parental figures defined by the *Principles*, parents by estoppel and de facto parents, stepparents may be most likely to be considered the latter. Under the ALI definition, a de facto parent is a person who shares (at least) equally in primary childcare responsibilities while residing with a child for reasons other than money. The de facto parent's assumption of childcare responsibility must be either with the agreement of the natural parent or result from a parent's inability to care for the child.<sup>30</sup> In addition, an individ-

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25. ALI PRINCIPLES, *supra* note 6, "Foreword" at xiii.

26. ALI PRINCIPLES, *supra* note 6, at 232–33, § 2.04.

27. *Id.* § 2.03(1)(c).

28. *Id.* §2.03(1)(b).

29. *Id.* at 234.

30. *Id.* § 2.03(1)(c)(ii).

ual must have lived with a child for at least two years in order to be considered that child's de facto parent.<sup>31</sup>

Many stepparents may be de facto parents. The duration of the marriage to the child's parent and the level of involvement with the stepchild are the most important factors in determining whether a stepparent is a de facto parent.<sup>32</sup> For example, a stepparent who merely provides for a child by being the family's primary breadwinner would not be a de facto parent.<sup>33</sup> Status as a de facto parent depends on being actively involved in childcare activities, which include discipline, feeding and bathing young children, and involvement with children's activities.<sup>34</sup> In many stepfamilies, the stepparent does play a sufficiently active role in raising children and may qualify as a de facto parent.<sup>35</sup> However, as will be discussed later, because of the emphasis on care-giving activities rather than support, there is a huge class of stepparents, perhaps a majority of residential stepfathers, who, because they serve as the major breadwinners, may contribute less than 50 percent of parenting activities.

Classification as a de facto parent brings many benefits: explicit eligibility for participation in a parenting plan, standing (in many cases) to file or participate in an action to create or modify a parenting plan,<sup>36</sup> and a recognition of the parenting responsibility voluntarily undertaken. Nonetheless, it is an inferior right to both legal parents and parents by estoppel.<sup>37</sup> For example, in most cases, de facto parents cannot receive primary physical custody.<sup>38</sup> In addition, for a de facto parent to have standing in a proceeding to determine allocation of parenting responsibilities, he or she must have lived with the child for the six months immediately preceding the initiation of the proceedings or maintained or attempted to maintain a parental relationship since residing with the child, a restriction not imposed on natural parents.<sup>39</sup>

Although stepparents are most likely to be considered de facto parents, some will qualify as parents by estoppel. These stepparents will have a legally stronger parental interest in their stepchildren than do de

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31. *Id.* at § 2.03(1)(c)(i).

32. *Id.* at § 2.03(1)(c).

33. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 3: Part I, § 2.03(6) & (7) 1998)) (distinguishing between care-taking functions and parenting functions). Financial support is a parenting function. De facto parenthood is based on allocation in care-taking functions.

34. *Id.*

35. See ALI PRINCIPLES, *supra* note 6, at 226, illustration 26.

36. *Id.* at § 2.04(1)(c).

37. See *id.* at 255.

38. *Id.* at § 2.21(1)(a).

39. *Id.* at § 2.04(1)(c).

facto parents.<sup>40</sup> The *Principles* defines two subcategories of parents by estoppel: (1) persons who are liable for paying child support when support is requested by parent or child<sup>41</sup> and (2) persons whom a parent is estopped from asserting are not a parent regardless of whether support is sought.<sup>42</sup> Parents by estoppel enjoy the same privileges as legal parents under the ALI's provisions for determining parenting responsibility at divorce. They also assume the continuing responsibility of support as a legal parent.

Some stepparents may be parents by estoppel under both of these categories. Under the first category a parent or child may bring an action claiming the stepparent is liable for child support following divorce. This support obligation would be most likely to arise out of an implicit or explicit agreement between the parent and stepparent that the stepparent would assume a child support obligation. For example, a stepfather who suggests that his wife stop seeking child support payments from the child's father because he (the stepparent) can provide for the child would almost certainly be found to have undertaken a support obligation and therefore could be a parent by estoppel. However, his status as a parent by estoppel is dependent on either the mother or child seeking child support from him following a divorce.

A stepparent who has not been asked to pay support may assert parental rights as a parent by estoppel if he or she lived with the child

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40. *See, e.g., id.* § 2.21(1)(a).

41. *Id.* § 3.02A:

(1) The court may in exceptional cases impose a parental child-support obligation upon a person who may not be the child's parent under state law, but whose prior course of affirmative conduct equitably estops that person from denying a parental-support obligation to the child. Such estoppel may arise when: (a) there was an explicit or implicit agreement or undertaking by the person to assume a parental-support obligation to the child; . . . . Only the child and the child's parents have standing to assert an estoppel under this section. (2) In deciding whether to impose a support obligation under this section, the court should consider: (a) whether the person and the child act toward each other as parent and child and, if so, the duration and strength of that behavior; (b) whether the parental undertaking of the person supplanted the child's opportunity to develop a relationship with an absent parent and to look to that parent for support; (c) whether the child otherwise has two parents who owe the child a duty of support and are able and available to provide support, and; (d) any other facts that may relate to the equity of imposing a parental-support duty on the person. (3) No continuing obligation to support a child arises merely from a person's former cohabitation with or marriage to the child's parent.

42. *Id.* § 2.03(1)(b). A parent by estoppel is an individual who, though not a legal parent, is: (i) liable for child support under Chapter 3; or (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents) when the court finds that recognition as a parent is in the child's best interests.

for at least two years, assuming full and permanent parenting responsibilities with the agreement of the child's legal parent(s).<sup>43</sup> Under this standard, the focus of analysis is on the stepparent's intent to undertake a permanent parenting role and the consent of any legal parents to that undertaking. In this situation, it is the stepparent who would bring the action, seeking custody or visitation. In seeking that right, the stepparent would also assume the responsibility of continued support.

It is difficult to predict how many stepparents would qualify as parents by estoppel under the second definition. In addition to having lived with the child for at least two years, these stepparents must also have acted fully as a parent with the agreement of both legal parents. Thus, the lack of agreement by a non-custodial parent could prevent a stepparent from becoming a parent by estoppel. Generally, the requirements of parent agreement or noninvolvement are equivalent to those for stepparent adoption; the non-custodial parent must consent or have so little involvement with the child that his rights may be terminated without his consent. Given courts' hesitance to grant stepparent adoption over the objection of a non-residential parent, it is likely that this reluctance will attach itself to the new standard; courts will hesitate to find that natural parents' conduct justifies the stepparent's status as a parent by estoppel and will deny standing. For example, in the case *In the Matter of: Lindsey Ann B.*, the court's rare decision to grant a stepparent adoption over the objection of the non-custodial parent depended on a statute authorizing such an adoption when the natural mother did not communicate with the child for one year and extreme aggravating circumstances existed (the mother had kidnapped her other child from foster care and had other problems, making a finding of unfitness likely).<sup>44</sup>

In at least 25 percent of stepfamilies, however, the whereabouts of the non-custodial parent are unknown or the parent is deceased and in another 25 percent the children see their non-custodial parent once a year or less. And only 34 percent of custodial parents receive child support.<sup>45</sup> This leaves a potentially large pool of stepparents who may be able to claim they are parents by estoppel if the courts generously interpret the rules for termination of parental rights.

Still, it is very difficult to predict how many stepparents will voluntarily make the claim of parent by estoppel since, in contrast with de

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43. *Id.* § 2.03(1)(b)(iv).

44. *In re Lindsey Ann B.*, 2000 Ohio App. LEXIS 4446 (2000).

45. Mary Ann Mason & Jane Mauldon, *The Stepfamily Needs A New Public Policy*, 52.3 J. OF SOC. ISSUES 11 (1996).

facto parents, they must also take on child support obligations. Certainly, there would be some dedicated stepparents who would choose to continue their parental role, regardless of the obligations.

When stepfamilies are disrupted by divorce, the ALI's *Principles* goes a long way toward providing stable and understandable guidelines for determining which stepparents owe child support, which are entitled to custody, and which to visitation. This clarity benefits stepfamilies by providing predictability and focusing on continuity of parenting responsibility.

While the ALI's *Principles* alleviates many of these problems by making the standards for determining which stepparents are eligible to petition for custody clear, focusing on the children's best interests and establishing a clear hierarchy of rights among parental figures, it leaves some of the problems faced by stepparents seeking custody unresolved. First, many stepparents will continue to lack standing to participate in court proceedings to determine allocation of parenting responsibilities following divorce. Many, perhaps most stepparents cannot meet the 50 percent care-taking test, even when they are the significant breadwinner in the family. Those who have not been a residential stepparent for at least two years lack standing, no matter how close a relationship they have formed with their stepchildren. In addition, the hierarchy of parental figures with rights to custodial responsibility maintains the parental preference doctrine and will discourage assignment of custodial responsibility to stepparents who are de facto parents, even when such assignment is in the child's best interests.

Stepparents who fail to qualify as either parents by estoppel or de facto parents have one last opportunity to assert their rights under the *Principles*. The ALI's *Principles* allows other family members to participate as interveners in proceedings to allocate parental responsibility when doing so is in the child's best interests, and other adults, who are not party to the proceedings, may be allocated childcare responsibilities if harm to the child would result from the failure to assign them responsibility. Finally, a court may assign parenting responsibility to a non-parent if the alternative would cause harm to the child.<sup>46</sup>

#### **IV. The Application of the ALI's *Principles* to other Legal Issues**

While the ALI's *Principles* is crafted specifically for visitation, custody and support following the dissolution of a marriage, it may be

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46. ALI PRINCIPLES, *supra* note 6, at § 2.21(2)(c).

a useful construct to clarify the ambiguous stepparent/stepchild roles during an ongoing marriage and in issues other than custody relating to the dissolution of the marriage by divorce or death. Because the ALI's definitions of de facto parent and parent by estoppel are clearly and explicitly defined, so as to apply to a wide variety of parental figures without the need to list possible parenting arrangements, it may be tempting for courts or legislatures to adopt these definitions in other areas in which clarity of parental roles is needed.

## V. Death in the Stepfamily

Stepfamilies are just as likely as nuclear families to be disrupted by the death of a parent, stepparent or child. In any family, such a disruption brings significant problems. However, when death disrupts a stepfamily, the surviving family members may face additional legal barriers to inheritance, continued custody, or wrongful death claims. The interests at stake may be very different than those surrounding stepfamily dissolution through divorce. Thus, while some form of unification of doctrine would benefit stepfamilies, it is not clear that the concepts of de facto parents and parents by estoppel provided by the ALI's *Principles* are the best solution to the problems stepfamilies face.

### A. Custody When Custodial Parent Is Leaving Stepparent

One of the most disruptive events to strike a stepfamily is the death of a parent. A surviving stepparent will often have little or no legal support for a claim of continuing custody of stepchildren.<sup>47</sup> The ALI's *Principles*, by providing a means of determining which stepparents have played a significant parental role, has the potential to provide greater clarity of their rights in such cases. However, the duration of relationship requirement, while a fair means of determining parental status when the relationship with a child's parent is terminated at the volition of either the parent or stepparent through divorce, serves little purpose when the relationship is ended through unexpected death. The federal government, in establishing eligibility for Social Security survivors' benefits, acknowledges this by reducing the time period for stepchild eligibility from one year to nine months in the event of step-

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47. MAHONEY, *supra* note 10, at 142. Where a stepparent may obtain custody following the death of a custodial parent, the stepparent must demonstrate the unfitness of the surviving parent.

parent death and allowing a waiver of even that duration when the death was accidental and unanticipated.<sup>48</sup>

The failure of the ALI definitions as they stand in providing an equitable result in such cases can be seen by applying them to the facts of *Dodge v. Dodge*,<sup>49</sup> a custody dispute following the death of the natural parent with primary custody of two children. Application of the ALI definitions would only slightly alter the outcome of this complicated case. Here, the mother and stepfather had been married for only nineteen months before the mother died giving birth to another child who lived. Her will named her husband, the stepfather, legal guardian of her two children from a prior marriage, of whom she had primary custody throughout the court proceedings. These children continued to live with their stepfather and new half brother, where he and their maternal grandparents cared for them. The trial court awarded joint custody to the natural father and stepfather and grandparents (together), with primary residence with the stepfather. The father appealed and obtained sole custody on the ground that there is a presumption that in the absence of a finding of unfitness, children's best interests are served by placement with a natural parent. Moreover, while the grandparents received limited visitation rights, the stepfather was found to have no right to visitation. The children's right to visitation with their half brother was apparently not argued, as the court makes no mention of such a consideration. Thus, the stepfather's continued contact with the children is dependent on the goodwill of the grandparents who may share their visitation.

On the facts of this case, and the trial court's determinations regarding the children's best interests, this result is problematic. It depended on an inflexible presumption of best interests and reversion of custody at the death of a parent, ignoring the findings of the trial court, investigations, views of a guardian ad litem, and the relationship with the half brother. Ignoring these considerations, the court of appeals not only denied the stepfather custody, it denied him any right of access to the children.<sup>50</sup>

Despite the ALI's recognition that stepparents may be significant parental figures in a child's life, the definitions of de facto parent and parent by estoppel set out in the *Principles* do not provide for a different result in this case. Because the stepfather had not lived with the children for two years before their mother's death, he failed to meet the two-

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48. See *supra* notes 22–23, 42 U.S.C. § 416(d) and (k).

49. 505 S.E.2d 344 (S.C. Ct. App. 1998).

50. The court also denied the children contact with him.

year requirement for being a de facto parent. However, it seems clear that in all other respects he was a de facto parent, and but for the mother's untimely death would have become a de facto parent within a few months. As death, unlike divorce, ends a relationship without concerted action of the parties, this time limit is arbitrary, given other aspects of the relationship between the children and their stepfather.<sup>51</sup> Nonetheless, under the ALI's standards, this stepfather is neither a de facto parent nor a parent by estoppel.

Despite the stepfather's failure to establish himself as a de facto parent or parent by estoppel, he may be able to establish a right to some involvement with the children under provisions for allocation of responsibility to non-parents.<sup>52</sup> However, his success in obtaining visitation under these provisions is far from certain. Under section 2.21(2)(a), the grandparents would clearly be relatives included in the provision. It is far from clear that a stepfather is a "relative" even if he has developed a significant relationship with the children. Accepting that a stepfather is a relative, the requirement of consent or failure to perform a reasonable share of parenting duties cannot be met in this case.

Although the mother's naming of stepfather as guardian in her will may be read as consent to his undertaking parental responsibilities, because the father objects to a grant of custody or visitation to stepfather and has been involved to the extent prior custody arrangements were permitted, stepfather may not be allocated any responsibility. This provision, designed to deal with issues at divorce, is particularly inadequate for custody disputes resulting from the death of a parent. Here, stepfather's only chance of obtaining custody, visitation, or any right or responsibility for the children would depend on finding that failure

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51. It is not clear, for example, how the ALI settled upon a two-year relationship duration requirement. The federal government requires only a nine-month duration for determining eligibility for survivors' benefits. This seems a more balanced standard for relationships disrupted by death; it recognizes the need for some duration, while acknowledging the nature of the disruption and needs of the survivors. Surviving stepchildren may benefit from the continuity in their relationship with the surviving stepparent. See 42 U.S.C. § 402(d)(1) (1988) (discussed in Mason & Simon, *supra* note 18, at 547).

52. ALI PRINCIPLES, *supra* note 6, at § 2.21. Allocations of responsibility to individuals other than legal parents:

(2) A court should not allocate responsibility to an individual who is not a legal parent, a parent by estoppel, or a de facto parent, over a parent's objection, if that parent is fit and willing to care for the child, unless: (a) the individual is a grandparent or other relative who has developed a significant relationship with the child, and; (i) a legal parent or parent by estoppel consents to the allocation, and; (ii) the parent objecting has not been performing a reasonable share of parenting functions for the child; or (c) the alternatives would cause harm to the child.

to guarantee some contact would harm the children under section 2.21(2)(c). The existence of the half brother and the relationship between him and the other children, combined with the strength of the children's relationship with their stepfather, could lead to a finding of harm if the relationship is cut off completely. However, this requires a factual determination that many courts may hesitate to make.

While the ALI's framework provides little change from traditional parental preference doctrines in custody disputes following the death of a custodial parent, some states have adopted statutes explicitly dealing with this issue. For example, in *Taylor v. Becker*, a Delaware court applied a stepparent custody statute and allowed the child to continue to reside with her stepmother after the death of her natural father, who had primary custody despite the objection of the natural mother.<sup>53</sup> The statute authorizing this result stipulates that while the stepparent continues to have custody, he or she shall have all of the rights and obligations of a natural parent.<sup>54</sup> Thus, the best-interests standard is applied to contests between a stepparent and non-custodial birth parent when the stepfamily is disrupted by the death of a parent.<sup>55</sup> Unlike the ALI's *Principles*, this statute places no duration of relationship obstacle in the way of a stepparent seeking to retain custody. While the duration of the relationship between the stepparent and children may bear on whether continued placement with the stepparent is in the child's best interests, it is not a determinative factor that operates against involved stepparents. The Delaware court recognized the blended family of birth parent and stepparent as within the concept of family that is "deeply rooted in this Nation's history and tradition"<sup>56</sup> and approved of protecting the "strong familial bond that may have developed between a stepparent and child."<sup>57</sup>

When a parent dies, leaving children in the custody of a stepparent, the analysis urged by the Delaware statute, which gives consideration to stepparents who have current custody of their stepchildren, seems better suited to evaluating the interests and issues involved in a custody dispute than the ALI standard. In many ways, the analyses under both the Delaware statute and the ALI *Principles* are similar; those stepparents, for whom a court determines continued custody is in the children's best interests, would almost certainly be de facto parents. How-

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53. *Taylor v. Becker*, 708 A.2d 626 (Del. Super. Ct. 1998).

54. *Id.*

55. *See id.*

56. *Id.* at 629 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989)). *See also Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

57. *Taylor*, 708 A.2d at 629.

ever, while the ALI's *Principles* contains a parental preference provision and requires that the stepparent relationship exist for two years before a stepparent is considered a de facto parent, the Delaware statute relies on a factual best interests finding to determine when the stepparent should continue to have custody of the children.

### *B. Inheritance by Stepchild*

Just as the death of a parent raises custody issues in a stepfamily, the death of a stepparent may raise significant issues relating to the stepchildren's inheritance rights. When a stepparent dies intestate, as many do, their stepchildren generally will not inherit.<sup>58</sup> Intestacy laws generally limit inheritance to those related by blood or adoption. Under these rules, unadopted stepchildren are precluded from inheriting when a stepparent dies intestate.<sup>59</sup> As a result, the stepparent's estate may pass to a decedent with a much more distant relation, despite the likely intentions of the stepparent and the possible welfare consequences to a minor stepchild who, with the death of a stepparent, may have lost a significant source of support. While the probate laws of many states are silent as to inheritance from stepparents, those that mention them may provide only limited inheritance rights for stepchildren.<sup>60</sup>

For example, the California Probate Code, appearing on the surface to recognize inheritance rights through stepparents, in fact only does so in very limited circumstances.<sup>61</sup> The stepparent relationship must have begun while the child was a minor and must continue while both stepparent and child are living. In addition, in order to establish inheritance rights from an intestate stepparent, a child must prove that the stepparent would have adopted him or her but was prevented by a legal barrier, such as the objection of a non-custodial parent. In interpreting this rule, California courts have gone further than the plain language seems to require, holding that the legal barrier must have continued to

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58. MASON, *supra* note 5, at 103.

59. Kim A. Feigenbaum, Note: *The Changing Family Structure: Challenging Stepchildren's Lack Of Inheritance Rights*, 66 BROOKLYN L. REV. 167, 167-68 (2000).

60. MASON, *supra* note 5, at 103.

61. CAL. PROB. CODE § 6454 (West 2002). "For the purpose of determining intestate succession by a person or the person's issue from or through a foster parent or stepparent, the relationship of parent and child exists between that person and the person's foster parent or stepparent if both of the following requirements are satisfied: (a) The relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent, and; (b) It is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier."

exist until the time of the stepparent's death. The California Supreme Court stated,

[T]he legal barrier or barriers to adoption of the foster child or stepchild by the foster parent or stepparent must have begun during the foster child or stepchild's minority, and must have continued throughout the joint lifetimes of the foster child or stepchild and the foster parent or stepparent, and that the provision should not be read to allow such barrier or barriers to have existed only at a time at which adoption was contemplated or attempted.<sup>62</sup>

Neither the restrictions of the stepparent inheritance legislation nor the court's restrictive interpretation of it are unusual in state law inheritance schemes.

Applying the ALI's definitions of de facto parents and parents by estoppel to inheritance law may bring intestacy law closer into line with the desires of stepparents than current standards. This application is particularly critical if the stepchild is still a minor dependent upon the care-giving and economic support provided by a stepparent who meets these criteria.

### *C. Wrongful Death Actions*

Depending on the circumstances of a stepparent's death, the ability of a stepchild to bring a wrongful death action may have a significant impact on the future of the family. Here, as in many areas of law affecting stepfamilies, there is little coherence or even awareness of the issues affecting stepfamilies. "The right of stepchildren to maintain an action for the death of a stepparent under various wrongful death statutes has been discussed by the courts in only a few cases. Although in one case a stepchild has been held entitled, under a particular wrongful death statute, to maintain an action for the death of a stepparent, courts in certain other cases, construing particular wrongful death statutes, have held that an action by or for the benefit of a stepchild to recover damages for the death of a stepparent could not be maintained."<sup>63</sup>

For example, in one Missouri wrongful death case, the court held that a stepdaughter could not recover under Missouri's wrongful death statute for the death of her stepfather because she failed to establish her stepfather had equitably adopted her. The weight of evidence indicating the existence of a real parent-child relationship was of no consequence. The stepfather was the only father the woman had known,

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62. *In re Estate of Joseph*, 70 Cal. Rptr. 2d 619 (Cal. 1998).

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

her mother and stepfather had changed her name to his, and she had believed that he was her natural father until told otherwise when she was thirty-four years old, but because her stepfather never petitioned for adoption, she could not bring a wrongful death suit on his behalf.<sup>64</sup> Under the ALI's definitions, this stepfather would have been both a parent by estoppel and a de facto parent. As a parent by estoppel, he would have had the same rights as a natural parent in divorce proceedings. It would therefore make sense for him to have been treated the same as a natural parent in other legal issues. Thus, the definitions that the ALI's *Principles* bring to stepfamily relationships may lead to a more equitable result in cases such as this.

Just as courts read wrongful death statutes narrowly to exclude claims of stepchildren, they have also excluded claims of stepparents. For example, in *Triebel v. Sabo*, the court interpreted a wrongful death statute to preclude a stepfather's recovering for the wrongful death of his adult stepdaughter, despite the extreme length and closeness of the relationship and his open and notorious assumption of parental responsibilities, including support, because he was not a legal parent and could not be acting *in loco parentis* for his competent adult stepdaughter.<sup>65</sup> It is safe to presume on the facts given that this stepfather would have been a parent by estoppel at the time his stepdaughter reached majority. Expanding the ALI's treatment of parents by estoppel as having equal rights with parents to this type of situation would allow him to bring a wrongful death action here. However, if he were merely a de facto parent, the result would likely be unchanged. De facto parents are given access to children in order to provide continuity of caretaking and to recognize the relationship's existing. However, de facto parents do not have a duty to provide continued support and caretaking and thus are less entitled to treatment as legal parents.

## V. Issues During Ongoing Relationships

When a stepfamily is created through the marriage of a child's parent to an unrelated individual, the family must define the individual's roles, rights and responsibilities. Although the law provides detailed guidance to marrying couples regarding their rights and responsibilities with respect to each other and any children they have together, it leaves the status of stepparents largely undefined. Stepparents who do not adopt

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64. *Weidner v. Am. Family Mutual Ins. Co.*, 928 S.W.2d 401 (Mo. Ct. App. 1996).  
65. *Triebel v. Sabo*, C.A. No. 94C-12-213-WTQ, 1996 LEXIS 65 (Del. Super. Ct. 1996).

their stepchildren face uncertainty in authority to make parental decisions,<sup>66</sup> their obligation to provide for their stepchildren, and the effect that their presence, involvement, and support may have on the stepchild's relationship with the non-residential parent.

The extent to which a stepparent becomes involved with the parenting of stepchildren depends largely on informal agreement with the parent.<sup>67</sup> While this informality allows stepfamilies significant flexibility to define their own roles, it results in difficulty in legally enforcing those roles and expectations resulting from them when disputes arise within the stepfamily. In addition, due to the legal ambiguity, third parties may fail to recognize these self-assigned roles and responsibilities. For example, in some states, stepparents are not authorized to consent to medical treatment for their stepchildren.<sup>68</sup> In states that allow stepparent consent, this consent would likely be trumped should the natural parent disagree.<sup>69</sup> Thus, even should a parent and stepparent choose to share equally in parenting responsibilities, the legal system would consider the stepparent's interests inferior to those of the natural parent, thwarting the family's broader desires.<sup>70</sup>

The ALI definition of parent by estoppel could be used to clarify some of the rights and parenting responsibilities of some stepparents during the marriage. Because the *Principles* treats parents by estoppel as the equals of legal parents for purposes of allocating parenting responsibility at divorce, it seems clear that stepparents who are clearly parents by estoppel should have the full and equal rights and responsibilities for children during the marriage as well. However, for stepparents who do not meet this threshold and are de facto parents with rights inferior to legal parents under the ALI framework, this possibility provides little guidance to understanding the extent to which their parental authority would be recognized by law and society. The definitions provided by the ALI, which are intended to be applied only at the termination of marriage, could only assist a family if they understood them and agreed to them at the time of family formation. Moreover, the duration of relationship requirements built into the ALI's definitions, if applied to define rights during an on-going relationship, would create a vague (and extensive—two years is a long time) transitional period from a stepparent's role as a stranger to a recognized parental

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66. MASON, *supra* note 5, at 103, n.29.

67. MAHONEY, *supra* note 10, at 124.

68. *Id.* at 125–27.

69. *Id.*

70. *Id.* at 125, n.2

figure. This result may be undesirable to some families, which would prefer that the marriage of the parent and stepparent itself would create a recognized parental status for the stepparent.

The importance of authority to make parental decisions is most highlighted in situations involving medical treatment or educational decisions for children. However, on the rare occasions when these issues have reached the courts, the analysis of whether a stepparent's consent is sufficient or comparable to a parent's has been largely avoided.<sup>71</sup> For example, in *Tabor v. Scobee*,<sup>72</sup> the court held that in a non-emergency a physician's performance of a surgical procedure without the consent of the patient or her stepmother would constitute battery.<sup>73</sup> The court implied, but did not discuss, that the stepmother's consent would have been sufficient.

Few states provide statutes that explicitly define whether stepparent consent is sufficient to authorize medical treatment.<sup>74</sup> The ALI's standard provides little guidance as to the authority of stepparents under such circumstances; its determination of one's status as a de facto parent or parent by estoppel requires a detailed factual inquiry into the allocation of parenting responsibilities with the family that is carried out when the family dissolves, not while it continues to function. Third parties, such as physicians who need adequate parental authorization, are in no position to make these determinations, and these terms are unfamiliar to the public.

Thus, in the instance of parental consent to make medical and educational<sup>75</sup> decisions, perhaps the better solution is legislation that specifies residential stepparents as a class able to give such authorizations. This would allow third parties to make a simple determination based on common address. Another alternative would allow a parent to designate that a stepparent has authority in these situations, perhaps through the use of a standardized "stepparent authority" form at the time of marriage or later, as the family desires.

Another important area in which stepparents seek clarity in understanding their obligations is the extent to which they are obliged to provide for and support stepchildren during the marriage. Currently, most states do not impose a general obligation to support stepchildren

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71. *Id.* at 127.

72. *Tabor v. Scobee*, 254 S.W.2d 474 (Ky. 1951)

73. *Id.*

74. MAHONEY, *supra* note 10, at 125.

75. Cases relating to consent to educational decisions by stepparents are virtually nonexistent, but the issues and concerns should be similar to those relating to medical decisions.

on stepparents.<sup>76</sup> In a few, a statute imposes an explicit support duty on stepparents. In most states, a stepparent has either no support obligation or one based on a court's finding that the stepparent has promised to support a child or is voluntarily acting *in loco parentis*.<sup>77</sup> Even when an obligation to support does exist, it is extremely limited and may cease when the stepchild, for whatever reason, ceases to reside with the stepparent<sup>78</sup> or may be considered in some circumstances but not others.<sup>79</sup> The hodgepodge of rules governing stepparent support obligations may create distortions in the economic realities of blended families in a way that a clearer obligation would not.

Under the proposed ALI structure, little would change. Section 3.12 stipulates that generally, the income of either parent's spouse or partner should not be considered in calculating a divorced parent's support obligation. To the extent that the income of a parent's spouse (that is, stepparent) is given consideration in determining the support obligations of a nonresidential parent, this income would only affect supplemental support, not base support obligations. This suggests that only when a stepparent affirmatively undertakes to support a stepchild on a permanent basis—for example, by suggesting that the parent no longer seek child support from the non-custodial parent—does the stepparent's support obligation become solidified and formalized to the point at which it will continue to exist after the termination of the relationship with the stepchild's parent. Absent a clear undertaking to establish a support obligation for a stepchild, permanent or otherwise, any support provided during marriage to the child's parent is voluntary and need not be continued after divorce; it may even be discontinued or cut back during the marriage.<sup>80</sup>

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76. JOHN C. MAYOUE, *COMPETING INTERESTS IN FAMILY LAW: LEGAL RIGHTS AND DUTIES OF THIRD PARTIES, SPOUSES, AND SIGNIFICANT OTHERS* 122 (1998).

77. MASON, *supra* note 5, at 102.

78. The Washington Supreme Court has held that a stepparent's obligation to support stepchildren does not continue when children no longer reside in same home, even if the stepparent's marriage to the child's natural parent continues. *Harmon v. Dep't of Soc. and Health Svcs.*, 951 P.2d 770 (Wash. 1998) (finding that stepfather's income should not be considered when calculating the child support mother owes to father). This result denies a child the benefits of additional support which would be due if the mother and stepfather's income were to be considered as a unit.

79. The Missouri Court of Appeals has held that a stepfather's income may not be imputed to mother in calculating father's support obligation. *Burton v. Donahue*, 959 S.W.2d 946 (Mo. Ct. App. 1998) (the child benefits from the stepfather's income while receiving support from father as though that income did not exist. While this is a benefit to this stepchild, it affects the funds father has available to support other children).

80. While this harsh action may rarely happen, the lack of an obligation for a stepparent to provide support creates distortions in stepfamily economics because

## VI. Duty to Protect

Although a stepparent's right to make parenting decisions and duty to support stepchildren are weak or poorly defined, a stepparent's duties to a stepchild are relatively clear in one area. Stepparents are generally obliged to protect their stepchildren from neglect or abuse, and to obtain needed medical care for their stepchildren. States generally include stepparents in the category of caretakers who owe a special duty of care to children and may be criminally liable for neglect or abuse in addition to civil liability under some circumstances.<sup>81</sup> These obligations go well beyond the ordinary obligations to protect or report that are imposed on babysitters, teachers, and other adults in a position to protect a child. A stepparent may be required to take affirmative actions to intervene in providing medical care or preventing abuse. For example, a Minnesota court was willing to presume that stepparents have special relationship duties toward their stepchildren, absent a clear indication to the contrary.<sup>82</sup>

Under this formulation, the obligation to protect a child extends to all stepparents who do not explicitly deny their status as parents, not merely those who have undertaken parenting functions sufficient to qualify as *de facto* parents. Some states extend this duty of protection even to nonresidential stepparents.<sup>83</sup> This obligation to protect step-

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it fails to recognize that most stepfamilies share resources as a household and non-custodial parents may have additional support obligations. For example, the family may receive more support than it needs from the nonresidential parent. This, in turn, may decrease the support available to other children of that parent.

81. MAHONEY, *supra* note 10, at 201.

82. See *Lundman v. McKown*, 530 N.W.2d 807 (Minn. App. 1995) (found that a Christian Scientist stepfather, along with the mother and other caregivers, had duty to provide medical treatment for a child who died of juvenile onset diabetes due to reliance on Christian Science care. The stepfather was liable for wrongful death in an action brought by the child's natural father. The court found that although "as a stepparent, William McKown usually had no 'final word' control over Ian's health care, we disagree that his relationship as a stepparent did not impose a duty of care." *Id.* at 820).

83. See, e.g., *People v. Carroll*, 715 N.E.2d 500 (N.Y. 1999). A nonresidential stepmother was found to be legally charged with a child's care and therefore could be prosecuted for endangering the welfare of the child. The child was beaten to death by her father in the presence of her stepmother over a three-day period. The stepmother acted as the child's primary caretaker and mother during her visits with her father, and had spent 10 consecutive days and nights visiting at the time of her death. In this case, criminal liability existed even for a non-residential stepmother who would not be a *de facto* parent under the ALI definition. The New York law provided, "A person who acts as a parent in a familial or household setting is legally responsible for a child under § 1012(g) of the N.Y. Family Court Act. Such a person may be presumed to be 'legally charged' with the child's care under § 260.10(2) of N.Y. Penal Law endangering the welfare of a child." Thus, while a stepparent may lack the legal authority to consent to medical treatment or make other parenting decisions, a stepparent will almost certainly be considered legally charged with a child's care under New York

children from abuse sometimes reaches to unmarried partners of natural parents.<sup>84</sup> However, this strong concept of stepparent responsibility has not been universally adopted. For example, at the other end of the spectrum, a Hawaiian court found that a stepparent's duty to protect a stepchild was dependent on the legal parent's desertion or inability to support the child.<sup>85</sup> Under this doctrine, a stepparent acting *in loco parentis* has a legal duty to obtain reasonably necessary and available medical services for a stepchild *only* when the legal parent deserts the child or is unable to support the child.<sup>86</sup> This case is unusual today in its refusal to assign duties to stepparents in child abuse and neglect situations; most states have established a broad set of responsible parties in child protection cases.

The issues surrounding child abuse and duties to protect are therefore perhaps the least in need of clarification for stepparents. Criminal statutes and tort laws applicable in the states generally make it clear that stepparents are in the category of caretakers who owe a special duty of protection to a child. The ALI's *Principles* adds little to this obligation. Even setting aside duration of relationship concerns, the ALI requirements for being a de facto parent are more substantial than one would wish to impose through a duty to protect from child abuse. While in cases of child protection and child abuse the failure of the ALI's definitions to provide guidance is irrelevant because the protection statutes

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law and held criminally liable for child endangerment. "A person may act as the functional equivalent of a parent even though that person assumes only temporary care or custody of the child, so long as the circumstances of the case otherwise warrant such a determination." § 1012(g). "Person legally responsible" includes the child's custodian, guardian, or any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child. § 1012(g). "Person legally responsible" includes the child's custodian, guardian, or any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child. § 260.10(2) of N.Y. Penal Law: A person is guilty of endangering the welfare of a child when being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child," a "neglected child," a "juvenile delinquent," or a "person in need of supervision," as those terms are defined in articles 10, 3, and 7 of the family court act.

84. *Connecticut v. Miranda*, 715 A.2d 680 (Conn. 1998) (a man who lived with girlfriend and her kids for several years and cared for kids, considering himself their stepfather, had a duty to protect them and could be held criminally liable for failing to prevent abuse of the children).

85. *State v. Cabral*, 810 P.2d 672 (Haw. Ct. App. 1991), *aff'd*, 822 P.2d 957 (Haw. 1991).

86. *Id.*

are themselves broadly framed, support obligations and decision making authority remain issues for which additional clarity is needed. The definitions of de facto parents or parents by estoppel provided in the *Principles* provide little guidance in these areas. A standard that provides clarity regarding a stepparent's obligations to and authority over stepchildren to both the family and third parties is needed. Such a standard should be easily applied without a detailed inquiry into the family dynamic and should allow the family some flexibility in defining these roles for itself.

## VII. Conclusion

Overall, the ALI standards take an important step toward clarifying the relationship between children and parents, who act as parental figures with regard to parenting arrangements and support following dissolution. In that context, they provide a helpful boost to some stepparents, particularly those who can be deemed parents by estoppel. For those stepparents, full parental rights to custody as well as full responsibilities are possible as never before. Since with many stepfamilies the non-custodial parent has disappeared, lost regular contact, or fails to pay child support, there is a potentially large pool of stepparents who may be eligible. The strict rules regarding the involvement and consent of the non-custodial parent, however, are a serious barrier, especially for stepfamilies in which the non-custodial parent, while not absent, plays only a limited parenting role.

The other legal category, de facto parent, could provide a legal boost for the truly involved stepparent by providing the standing to seek visitation. Still, the standard of at least 50-percent care-taking is a high threshold, particularly for working stepfathers. By requiring equal care-taking as the condition for being considered a de facto parent, the residential stepfather who is working may not meet the de facto standard and yet fall short of parent by estoppel if there is an active non-custodial parent in the picture.

Let us consider what we know about the typical stepfamily and its functioning. We know that the great majority of residential stepparents (86 percent) are stepfathers. Research indicates that the majority of these stepfathers do contribute significantly to the economic well-being of the stepchildren. According to data from the National Survey of Families and Households, the family income in families where the stepparent is a stepfather (by far the most common type of stepfamily), rises threefold upon remarriage, placing these stepfamilies in the same

income bracket as intact families.<sup>87</sup> Other studies have found that a stepparent's income, particularly a stepfather, can play a critical role in raising the lifestyle of the children out of poverty. Only eight percent of children in mother-stepfather households are living below the poverty line, as compared to 49 percent of children in single-mother households.<sup>88</sup> As a result, stepchildren experience the resources that accompany a greater family income: better schools and more life opportunities. In contrast to custodial stepparents, absent biological parents only rarely provide much financial or other help to their children. On average, only 25 percent of all stepfamilies receive some form of child support, and that is likely to be far below what it costs to raise a child.<sup>89</sup>

We know at least two other things about stepfamily households. Most of them are one-pot households; family income is mostly pooled for the use of the household. We also know that residential stepparents contribute significantly to the caretaking of minor stepchildren.<sup>90</sup> The National Survey of Families and Households (NSFH) survey finds that stepfamilies function very much like biological families on important parental care-giving tasks such as helping with homework and having private talks with children.<sup>91</sup> There are differences between the family types as well. The biological parent is more likely to administer discipline in a stepfamily, a recognition of the fact stepparents do not supplant biological parents, yet still serve as parental figures. And most stepparents think of themselves as parental figures with strong affectionate bonds toward their stepchildren. In the NSFH study the great majority believe it is definitely or somewhat false to state that "stepparents don't have the full responsibility of being a parent."<sup>92</sup> Moreover, half believe that stepchildren are just as satisfying as biological children.

The "typical stepfather" supports his stepchildren both in terms of financial support and parental care-taking. Still the typical stepfather, because he is the larger wage earner, may not be able to contribute 50 percent in terms of time spent. Considering the important role that residential stepparents play, a fairer interpretation of the ALI's standard for residential stepparents may be to provide a residential stepparent

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87. MASON & MAULDON, *supra* note 45.

88. Christine Bachrach, *Children in Families: Characteristics of Biological, Step- and Adopted Children*. 45 J. MARRIAGE & FAM. 171 (1983).

89. MASON & MAULDON, *supra* note 45.

90. Mary Ann Mason et al., *Stepparents: De Facto Parents or Legal Strangers?* 23 JOUR. OF FAM. ISSUES 507 (2002).

91. *Id.*

92. *Id.*

“bonus” in applying the standards to stepparents. This would mean that if a stepparent’s care-taking contribution did not quite equal 50 percent, the economic contribution to the family could be included in considering de facto parent status. Similarly, in evaluating the issue of estoppel, the behavior of a stepparent who both significantly contributed to the family income in the absence of child support from the non-custodial parent (the most common occurrence) should be paired with the fact that the stepparent also engaged in parenting activities.

On the other hand, nonresidential parents do not follow the same predictable pattern as residential stepparents. Their involvement ranges from no contact to significant caretaking and involvement. Because of the wide variation, nonresidential stepparents should, arguably, be treated as all other parties for purposes of determining de facto parenthood or parenthood by estoppel. In other contexts in the family life cycle examined in this article, the death of any of the stepfamily members, parental authority in an ongoing marriage and duty to support and protect, the ALI standards have mixed utility for stepfamilies. The most promising application is the application of parent by estoppel in the event of the residential stepparent, particularly in the case of minor stepchildren. The death of a residential stepparent has serious child welfare consequences. The child will not be considered an heir, will be barred from bringing a wrongful death claim, and will not be considered a beneficiary for most life insurance claims. By applying the parent-by-estoppel analysis, combined with the extra boost of a stepparent bonus to assure a generous interpretation, many stepchildren who are currently barred would be able to claim death benefits, life insurance, and wrongful death damages. This rule would follow the spirit of the generous federal rule regarding Social Security, which requires at a minimum of 50-percent residency or 50-percent economic contribution for at least nine months prior to the death of the stepparent in order for a stepchild to receive benefits.

A similar interpretation could be used to determine custody in the event of the death of the custodial parent, the spouse of the stepparent. These cases, like *Dodge v. Dodge*, discussed above, often reveal the most serious deficiencies in current legal doctrine regarding stepparents. The non-custodial biological parent has complete rights unless the parents can be proven unfit while the stepparent has no rights, not even the standing to object. However, if the stepparent met the more generous federal standards, he or she could be considered a parent by estoppel with the same legal rights as the non-custodial parent.

Because the ALI’s *Principles* is focused on who has rights to parent children following divorce, it only looks backward at the conditions of

the stepfamily as it existed during the marriage of the parent and stepparent. As a result it provides no guidance for newly formed stepfamilies in allocating responsibility and understanding their roles in a legal context, or in determining who has parental authority during a marriage, nor does it shed any light on a stepparent's obligation to support during a marriage.

Perhaps the fairest approach would be to grant all residential stepparents the legal authority to make decisions regarding health and educational issues that is normally automatically granted to a natural parent or to a legal guardian. This limited right would both facilitate the everyday parenting of the stepparent and grant public support to a parental figure. However, support is a more difficult matter. Most residential stepparents, according to research, do voluntarily help to support their stepchildren. A fair rule may be the one that many states have adopted, requiring support when a biological parent seeks TANF. A different support issue is the liability of the nonresidential biological parent. Currently the support that the stepparent provides is very rarely taken into account in determining the support level. A fairer approach, given the reality of stepparent support, would be to count at least a portion of the stepparent income against the non-residential parent's obligation.

As a policy issue, prenuptial agreements should be urged upon couples before they consider forming a stepfamily. Although not binding in court, agreements regarding economic and parenting arrangements during the marriage could be useful in developing the new family and in guiding a court as to their status if the issues of de facto or parent by estoppel arise. When possible, these arrangements should involve the second biological parent as well.

Finally, while providing some helpful guidelines, the ALI's *Principles*, with the inclusion of estoppel parents, moves only slightly away from the traditional legal paradigm of two biological parents having rights and responsibilities over all others, unless *both* of them are unfit. The overwhelming focus is on the rights of legal parents over the rights and welfare of children. For example, the ALI comments, "Even a person who is a de facto parent cannot ordinarily receive primary custody if a fit legal parent is able and willing to take such responsibility."<sup>93</sup> And it does not invite serious room for more than two parents, as for example, stepparent adoption without termination of second parent rights. Yet that multiple parenting is the actual situation that many stepfamilies face.

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93. ALI PRINCIPLES, *supra* note 6, at 16.

It is admittedly difficult to fashion general rules that will suit the wide variety of families in which non-biological adults are acting as parents. What should give residential stepparents an advantage, or a bonus, as you will, in applying the new definitions of de facto parent and parent by estoppel is that stepparents, by the act of marrying the custodial parent, signify a permanent relationship and an economic commitment to the custodial parent. And by observed behavior, those who live with stepchildren generally do provide for them and share in the caretaking.

