

Stepparent Custody: An Alternative To Stepparent Adoption

Stepparent adoption is presently the only means of formalizing a stepparent-child relationship, giving it the clear legal identity and psychological stability it needs. There is no intermediate status between an informal steprelationship and a formal adoption. In this article, the author examines the changing needs of children in serial marriages and suggests that adoption by the stepparent is not always possible or desirable as a means of meeting those needs. The concept of stepparent custody is introduced and analyzed as a workable alternative which can meet the needs of the modern stepfamily.

INTRODUCTION

The American family has changed. The incidence of divorce and remarriage in recent years has increased dramatically with the result that stepparent-child relationships have become increasingly common. Nationally, one of every three marriages ends in divorce.¹ In California, it is one of two.² Of the marriages being dissolved, more than half involve children,³ and 80 per cent of their parents will remarry, usually within three years.⁴ Thus, it is estimated that about 25 per cent of the children in America are living with, or are about to live in, a stepfamily, *i.e.*, a family

¹ U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 38 (1977).

² *Id.* at 77.

³ U.S. BUREAU OF THE CENSUS, *Marriage, Divorce, Widowhood and Remarriage by Family Characteristics: June 1975*, 312 CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SERIES P-20, at 8-10 (Aug. 1977). Of the marriages being dissolved in 1972, 62.7% involved children. U.S. DEPT. OF COMMERCE, SOCIAL INDICATORS 66-67 (1976). In 1974, 1,099,000 children were involved in a divorce. *Id.* at 67.

⁴ Close to half of all remarriages occur within three years of divorce. In 1975, among persons 25-75 years old whose first marriage has ended in divorce, close to half of those who remarried did so within three years after the divorce. The same was true of persons whose second marriage ended in divorce. One third of the dissolutions of second marriages occur within two years. U.S. BUREAU OF THE CENSUS, *Number, Timing, and Duration of Marriages and Divorces in the United States: June 1975*, 297 CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SERIES P-20, at 13 (Oct. 1976).

made up of one or more previously existing families.⁵

Multiple marriages create new problems for children within those marriages.⁶ Psychologically, the children must adjust to a new relationship with their parent's spouse and to the new family as a whole.⁷ Solidarity in the new family unit must be achieved. Legally, the children's relationship with their parent's spouse is ill-defined. The existence of a "steprelationship," in and of itself, normally does not create rights and obligations between a stepparent and child.⁸

Stepparent adoption is commonly viewed as a means of meeting the children's need for stability in the new relationship.⁹ Adoption completely severs the relationship between a child and the noncustodial parent,¹⁰ and clearly defines the stepparent's rights and obligations to the child.¹¹ Adoption is a radical change in a child's legal relations, however, and is not always possible.¹²

⁵ D. MAYLEAS, *REWEDDED BLISS* 7 (1977).

⁶ The problems are most acute when the custodial parent remarries. For that reason, this article concentrates on the situation of a child living with the remarried parent. Similar problems exist when the mother of a nonmarital child marries someone other than the natural father.

Even before remarriage, children suffer from the effects of divorce. For further discussion of the effects of parental divorce on children, *see* note 63 *infra*.

⁷ Statistics show that the mother is most often the custodial parent. U.S. BUREAU OF THE CENSUS, *Marital Status and Living Arrangement: March 1977*, 323 CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SERIES P-20, at 6 (April 1978). Thus, the new family is frequently composed of the custodial mother, her children from a previous marriage, her husband, and possibly children from the new marriage.

⁸ Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 FAM. L. Q. 209 (1970).

⁹ Incident to the dramatic increase of divorce and remarriage, stepparent adoptions have increased to the point that they now constitute a significant portion of all adoptions. More than half (9,222 out of 13,559) of all adoptions in California are by a stepparent. U.S. DEPT. OF HEW, *Adoptions in 1974*, 1974 NCSS REPORT E-10; at 7 (April 1976).

¹⁰ CAL. CIV. CODE § 229 (West 1954) removes all rights and responsibilities from the natural parent upon adoption. For a complete discussion of the effects of adoption *see* note 33 *infra*.

¹¹ Statutory adoption establishes a legal relationship which supersedes the natural parent-child relationship. For further discussion *see* note 34 *infra*.

¹² Courts will not grant an adoption unless it is in the best interests of the child. As a further prerequisite, either the consent of the noncustodial parent to the adoption or proof of the parent's unfitness must be shown. CAL. CIV. CODE §§ 224 and 7017 (West Cum. Supp. 1979); Simpson, *The Unfit Parent: Conditions Under Which A Child May Be Adopted Without The Consent of His Parent*, 39 U. DET. L. J. 347, 380 (1962). Furthermore, California's stepparent adoptions require an investigation and recommendation by a probation officer

The most significant obstacle to adoption is the noncustodial parent's refusal to give the necessary consent.¹³ Nor is adoption always desirable. If there are established and meaningful personal ties between the child and the noncustodial natural parent, the child's best interests may be served by a continued legal relationship with the parent.¹⁴ This continued relationship is not possible under the present stepparent adoption procedure.¹⁵

There is currently no intermediate status between an informal steprelationship and a formal stepparent adoption. The stepfamily needs, however, a formal recognition of the steprelationship without the total elimination of the noncustodial parent's rights. Stepparent custody is one such solution.¹⁶ Granting the stepparent equal custody with the custodial parent meets the needs of the steprelationship and does not completely destroy the parental bonds. Stepparent custody is a new concept not currently in use in California but which can easily exist within the framework of the law.

This article examines the changing needs of children in serial marriages and the almost exclusive use of stepparent adoption as an attempt to meet those needs. It shows that although stepparent adoptions differ from ordinary adoptions, the same legal standards and rules govern both procedures. Consequently, stepparent adoptions do not meet the unique needs of stepparents and stepchildren. Finally, it suggests that stepparent custody is a workable alternative which can meet the needs of the modern stepfamily.

I. THE STEPRELATIONSHIP

A general discussion of the steprelationship is helpful in order to understand the necessity of formalizing the steprelationship by

or the county welfare department. CAL. CIV. CODE § 227a (West Cum. Supp. 1979).

¹³ The noncustodial parent's consent is not the only obstacle, although it is the most frequent. The child's consent is also necessary if the child is over twelve years old. CAL. CIV. CODE § 225 (West 1954).

¹⁴ See Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 SO. CAL. L. REV. 10, 41-51 (1975), and Wadlington, *The Divorced Parent and Consent for Adoption*, 36 U. CIN. L. REV. 196, 206-209 (1967), deploring widespread use of the stepparent adoptions of older children in contact with the noncustodial parent.

¹⁵ See note 33 *infra* for a discussion of the effects of adoption.

¹⁶ The concept of "stepparent custody" was originally proposed by Professor Brigitte Bodenheimer in her article *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, *supra* note 14. This article expands upon the concept of stepparent custody and subjects it to further analysis.

a legal method other than an adoption proceeding. The origin and unique nature of the steprelationship will be examined.

A. *Remarriage and the
Establishment of a Steprelationship*

The remarriage of a divorced parent commonly leads to the formation of a stepfamily.¹⁷ The stepfamily is a family in which one or both partners already have children and one spouse is not the biological parent of the other's children.¹⁸ Thus, stepfamilies are the opposite of "broken" homes; they are re-made, composed of one or more previously existing families.¹⁹ Once formed, a stepfamily may prefer to think of itself as just another nuclear family out of the pages of Talcott Parsons or the LADIES' HOME JOURNAL.²⁰ The truth, however, is that a stepfamily is a distinctive structural arrangement that places unique pressures upon its members.

In biological families,²¹ the members have known each other from birth. Family solidarity evolves naturally.²² Expectations, roles, duties and privileges within such families are deliberately cultivated and defined.

In contrast, families of remarriage are composed of parents and children of diverse backgrounds. The members of a stepfamily come to one another with separate histories and, therefore, with different memories, self-conceptions, role definitions, expectations, and patterns of thought and emotion.²³ Family solidarity is absent and must be achieved through the conscious efforts of the stepfamily rather than through a gradual maturation process.²⁴

¹⁷ Stepfamilies are also formed by the death of a parent followed by the remarriage of the spouse, and by the marriage of the mother of a nonmarital child to someone other than the natural father. R. RAPOPORT, R. RAPOPORT & Z. STRELIZ, *FATHERS, MOTHERS AND OTHERS* 111 (1977).

¹⁸ One author refers to this family structure as the "synergistic family" which is distinguished from the "stepfamily" created after death. D. MAYLEAS, *supra* note 5, at 9-10.

¹⁹ R. RAPOPORT, R. RAPOPORT & Z. STRELIZ, *supra* note 17, at 110, citing B. MADDOX, *THE HALFPARENT* 3 (1975).

²⁰ *Id.*

²¹ A biological family is the family into which children are born and through which they have blood ties.

²² J. BERNARD, *REMARRIAGE* 210 (1956). In the context of this article, "solidarity" is a subtle, social-psychological identification of self with others, which results from intimate, day-by-day living together. *Id.*

²³ *Id.* at 211.

²⁴ *Id.*

B. *The Ambiguous Status of the Stepparent*

The "re-made" nature of the stepfamily makes it difficult for stepparents and children to achieve a successful relationship.²⁵ The problem for both stepchild and stepparent is finding an identity which is appropriate to the steprelationship. The ambiguity of the steprelationship arises, in part, from societal confusion regarding the function a stepparent should fulfill *vis-à-vis* the child and, in part, from limitations the law places on a stepparent's ability to play the role of a natural parent.²⁶ Even when a steprelationship is of long duration and the level of the child's contact with the noncustodial parent is low, the stepparent's status remains unclear.

California law makes it even more difficult for a stepfamily to achieve solidarity since it fails to clarify the extent of stepparents' obligations toward stepchildren. In California, a stepparent does not, merely by reason of the relation, stand *in loco parentis* to a stepchild.²⁷ Accordingly, the law provides that a person is not bound to support his or her spouse's children by a former relationship.²⁸ When stepparents do receive their spouses' children into

²⁵ *Id.* at 14.

²⁶ R. RAPOPORT, R. RAPOPORT & Z. STRELIZ, *supra* note 17. The problem is expressed by MADDOX:

In one sense the stepparent is a stranger. There is no blood tie between the stepparent and stepchild, and there is not even that sense of family that binds together uncles, aunts and cousins whether they like each other or not. The stepparent does not acquire any of a parent's legal rights over a stepchild. Yet on the other hand the stepmother or stepfather has become the person closest to the closest relative a child can have. He or she is right in the centre of the inner family circle with all that implies in physical and emotional proximity to a child. . . . [S]tepparents have acquired a status ridden with powerful myths and contradictory expectations and with no clear obligations at all.

B. MADDOX, *THE HALFPARENT* 20 (1975).

²⁷ *Trudell v. Leatherby*, 212 Cal. 768, 300 P. 7 (1931), *overruled on other grounds*, *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); *Estate of Teddy*, 214 Cal. App. 2d 113, 29 Cal. Rptr. 402 (1st Dist. 1963); *Loomis v. State*, 228 Cal. App. 2d 820, 39 Cal. Rptr. 820 (1st Dist. 1964).

Under the common law doctrine of *in loco parentis*, persons holding themselves out as parents are held to similar, and often the same, standards as natural parents. Katz, *Legal Aspects of Foster Care*, 5 FAM. L. Q. 283, 285-86 (1971).

²⁸ CAL. CIV. CODE § 209 (West Cum. Supp. 1979). However, some states — for example, Washington and New Hampshire — obligate stepparents to support their stepchildren to the same extent as natural parents. See *Archibald v. Whaland*, 555 F.2d 1061 (1st Cir. 1977), holding that the New Hampshire law regarding the support obligation of stepparents is a law of general application, so that

their homes and support them, however, California law presumes that they do so as parents.²⁹ In such cases, stepparents may not seek reimbursement for past support expenses,³⁰ although no future support obligation is imposed.

The presence of a noncustodial natural parent further complicates the role and rights of the stepparent. A stepparent is in the position of having to share the parenting role not only with a spouse, but also with the spouse's previous partner, a parent who is missing from the stepfamily. This sharing, involving such parental functions as coordination of vacation plans and holiday visits, setting up ideals and moral training, creates further tension in the already unstable stepfamily.³¹

II. STEPPARENT ADOPTION

The tension between the noncustodial natural parent and the stepfamily, along with the ambiguous status of the stepparent, often causes stepparents to seek adoption of children in their care. Although any adoption involves significant legal ramifications, in a stepparent adoption the symbolic aspect is probably more important.

A. *The Effect of Adoption upon the Steprelationship*

Regardless of the type of adoption,³² the legal effects are the

the state and the Dept. of Health & Welfare properly terminated AFDC assistance to children living in the home with the stepfather, and see *Washington Statewide Organization of Stepparents v. Smith*, 85 Wash. 2d 564, 536 P.2d 1202 (1975), stating that Washington law requires one to provide for one's stepchildren as long as the relationship continues. Oregon also imposes a support obligation on a stepparent in the event of the natural parent's death or inability to adequately support the child. OR. REV. STAT. § 109.055 (1977). Laws imposing a duty of support upon stepparents may become a trend. If so, there is even more reason to grant corresponding rights.

²⁹ CAL. CIV. CODE § 209 (West Cum. Supp. 1979).

³⁰ *Id.* See also *McKay v. McKay*, 125 Cal. 65, 57 P. 677 (1899), holding that a stepfather who voluntarily incurred the expense of care and education of stepchildren whom he had taken into his home could not compel the father of such children to reimburse him.

³¹ R. RAPOPORT, R. RAPOPORT & Z. STRELIZ, *supra* note 17, at 112, citing GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, JOYS AND SORROWS OF PARENTHOOD 90 (1973).

³² The California Civil Code provides for four types of adoption:

- 1) Adoption of an adult by an adult. CAL. CIV. CODE § 227p (West Cum. Supp. 1979);
- 2) So-called independent or direct adoption, in which the biological parent or parents select adoptive parents, place the child with them and consent to the

same. Adoption severs a former parent-child relationship³³ and creates a new one, giving the adopted child the same status as a biological child.³⁴ Stepparents' motivation to adopt their stepchildren often comes from a desire to establish a clear parental identity and role.³⁵ A stepparent adoption resolves any tension

adoption by them. *Id.* § 224q;

3) So-called relinquishment or agency adoption, in which the biological parent or parents turn the child over to a licensed adoption agency, execute and deliver to the agency a relinquishment of rights and responsibilities, and in which the agency then selects the prospective adoptive parents and places the child with them. *Id.* §§ 224m-224n; and

4) Adoption by a stepparent of a child which is in the custody and control of his or her spouse as its natural or adoptive parent. *Id.* § 227a.

For a good, general discussion of adoption, see Bodenheimer, *supra* note 14, and tenBroek, *California's Adoption Law and Programs*, 6 HASTINGS L. J. 261 (1955).

³³ CAL. CIV. CODE § 229 (West 1954) states the effect of adoption on former relations of the child: "The parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward, and all responsibility for, the child so adopted, and have no right over it." There is no current scheme to permit the natural parent visitation rights after adoption. CAL. CIV. CODE § 4601 (West 1970) provides for the granting of visitation rights to any person as would support the best interests of the child. In view of CAL. CIV. CODE § 229, however, there is serious question whether a court would permit visitation by members of the adoptee's prior family.

Recent California law authorizes courts to grant visitation rights after a stepparent adoption to grandparents and other relatives with whom the child has had a close relationship. CAL. CIV. CODE § 197.5(c) (West Cum. Supp. 1979). Although there is no special provision for natural fathers, the analogy is fairly clear. This provision applies in only one situation, where the parent through whom these persons are related to the child has died. It has been suggested, however, that the present provision is too restrictive, and that such visits should be allowed whether the parent in question has died or not. Bodenheimer, *supra* note 14, at 48 n.204.

³⁴ CAL. CIV. CODE § 228 (West 1954) provides: "After adoption, the two [the adopting parent and the child] shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." The new relation, however, does differ from the old and may be annulled in certain circumstances. CAL. CIV. CODE § 227b (West Cum. Supp. 1979). The recent case of *Adoption of Jason R.*, 88 Cal. App. 3d 11, 151 Cal. Rptr. 501 (2d Dist. 1979), held, though, that a subsequent annulment of the underlying marriage between the adoptive stepfather and a stepchild's mother does not void a stepparent adoption.

³⁵ One commentator suggests that the real reason for stepparents seeking adoption is "a sense of insecurity and lack of confidence in the relationship with their stepchildren." He argues that these psychological and emotional problems stem from the fact that the child is not and never can be a natural child. As such, he concludes that the legal device of adoption cannot solve them. Hoggett, *Adoption by Stepparents*, 17 SOLICITORS' J. 606, 608 (1973).

A social worker has pointed out that a stepfather who wishes to give his wife's

and conflict between a stepparent and a noncustodial parent by establishing a new legal parent-child relationship which supersedes the old one. Although stepparent adoption involves significant legal ramifications, the symbolic aspect is probably more important.³⁶ A stepparent adoption confirms the new family's solidarity³⁷ and gives the already existing stepparent-child relationship a clearly defined identity.³⁸

Both the nature of a stepparent adoption and the purpose it attempts to serve are unique. Stepparent adoptions have few of the features and almost none of the problems of ordinary adoptions.³⁹ Ordinary adoptions serve the purpose of providing destitute, homeless and neglected children with an improved environment,⁴⁰ while stepparent adoptions merely formalize an existing

child his name and assume the full role of parent may hope that by so doing he can end the quarrels and disagreements which can arise over the child's behavior. J. ROWE, *PARENTS, CHILDREN AND ADOPTION* 281 (1966). The author states:

People who adopt unrelated babies usually have a fairly clear understanding of the legal and social significance of what they are doing, and have usually given the matter considerable thought, even though they still have some questions and doubts The man and woman applying to adopt the wife's . . . child . . . sometimes . . . seem to be going into adoption almost casually as an easy way to avoid embarrassment of the child having a different name.

Id. at 280.

³⁶ It is doubtful that persons willing to adopt their spouses' children would be less conscientious in their behavior toward the children without the legal sanction of adoption. Their "parentship" is not improved by the formalization of the relationship. J. BERNARD, *supra* note 22, at 220.

³⁷ The adoption gives the family emotional as well as legal solidarity. It gives children a sense of security in knowing that they are wanted as full members of the family in good standing. *Id.*

³⁸ Stepparents adopting a spouse's child insist that adoption will make them one family — a *real* family:

For us, as Americans, this — making a real family — is at the heart of adoptions Taking the children . . . to become our own, we pray that the children in turn will accept us as their true parents. We want to create a real family, and one, we hope, that will be less troubled than are so many real — that is, birth-families.

Mead, *What's Right — and Wrong — About Adoption Today*, REDBOOK, September, 1978, at 39.

³⁹ tenBroek, *supra* note 32, at 268; Bird's Adoption, 183 Cal. App. 2d 140, 147, 6 Cal. Rptr. 675, 679 (2d Dist. 1960).

⁴⁰ The purpose of the adoption statutes is stated in Adoption of McDonald, 43 Cal. 2d 447, 459, 274 P.2d 860, 867 (1954), as "the promotion of the welfare of children, bereft of the benefits of home and care of their real parents, by legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child." Modern adoption laws and practices focus on children's need for a family attachment and, to a limited

relationship.⁴¹ Stepchildren are generally older than children involved in ordinary adoptions.⁴² Because stepparent adoptions rarely involve infants, there is a good possibility that the stepchild will remember and have personal ties with the noncustodial parent. Finally, unlike in ordinary adoptions, a denial of a stepparent's adoption petition does not result in the removal of the child from the home.⁴³ Because of the nature and purpose of stepparent adoptions, therefore, an alternative method of formalizing the steprelationship does not necessarily need to create the same effect as an ordinary adoption.

B. Consent—An Obstacle to Stepparent Adoption

Despite the unique nature of stepparent adoptions, the law treats them the same as ordinary adoptions. With few exceptions, the general provisions of the California Civil Code governing adoption of minors apply to stepparent adoption.⁴⁴ In particular, the statutory requirement that both natural parents consent to the adoption applies to stepparent adoptions.

The requirement that noncustodial parents consent to their children's adoption is the most significant legal obstacle to stepparent adoption.⁴⁵ Noncustodial natural parents are frequently

extent, focus on protecting biological ties. See S. KATZ, WHEN PARENTS FAIL 114 (1971), asserting that adoption laws were originally intended as a means to provide heirs for families.

⁴¹ tenBroek, *supra* note 32, at 268.

⁴² *Id.*

⁴³ *Id.* at 274.

⁴⁴ Stepparent adoptions are administered differently than are other adoptions. For example, the petitioners file consent with the county clerk, not with the department of social services. Also, the general requirement that the adopting parent be 10 years older than the child does not apply. CAL. CIV. CODE §§ 226, 227a (West Cum. Supp. 1979). See tenBroek, *supra* note 32, at 266.

⁴⁵ The law also protects the rights of the unwed father, but to a lesser degree. Prior to the decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), the father of an illegitimate child enjoyed no unconditional rights in the child. In *Stanley*, the Court held violative of equal protection and due process rights an Illinois statute which, upon the death of an unwed mother, made her children wards of the state without according to the father the right to be heard on the issue of custody. The father in that case had physical custody of the children when the mother died. No case has extended the benefit of the *Stanley* rule to a putative father where the natural mother has retained custody and control of the child. Adoption of Rebecca B., 68 Cal. App. 3d 193, 197, 137 Cal. Rptr. 100, 102 (3d Dist. 1977).

The natural father retains certain residual rights in the child which cannot be terminated by adoption without notice and the opportunity to be heard. *Id.* Recent law gives the unwed father veto authority over the adoption if he has

unwilling to consent to stepparent adoptions for a variety of reasons. Most obviously, they may not want to lose contact with their children.⁴⁶ Also, they may wish to use their veto power over

legitimated the child. That is, if a man is a presumed father under CAL. CIV. CODE § 7004(a), his consent is required for an adoption of the child. CAL. CIV. CODE § 7004 (West Cum. Supp. 1979) states that a man is presumed to be the natural father of a child if he was married to, or attempted to marry, the child's mother within a certain period, or received the child into his home and openly held out the child as his own. See *Quilloin v. Walcott*, 434 U.S. 246 (1978), in which the unwed father never had nor sought custody of the child. The court granted the adoption without the consent of the father, noting that the result of the adoption was to give full recognition to an existing family unit. *Id.* at 255. *Rebecca B.*, however, held that the balance of competing interests between the state and a putative father justifies the provision for stepparent adoption of a nonmarital child on the basis of the consent of a mother alone who retains custody and control of the child. The mother had provided good care, and the father had never cohabited with the mother or attempted to marry her, nor had he legitimated the child, supported her, or had custody of her. *Cf. Caban v. Mohammed*, 99 S.Ct. 1760 (1979), a recent case holding that a New York statute which requires consent of the mother, but not the father, as a prerequisite to adoption of an illegitimate child draws a gender-based distinction that bears no substantial relation to state interest in encouraging adoption of illegitimate children and therefore violates the fourteenth amendment's equal protection clause. In that case, the identity of the father was clearly known and the father had manifested a significant paternal interest in the child.

The courts have drawn distinctions between unwed fathers, who may have never shouldered any significant responsibility for their child's rearing, and divorced fathers, who probably have borne full responsibility for their child's rearing during marriage. *Quilloin v. Walcott*, 434 U.S., at 255-56. For a more detailed discussion of the scope of the unwed father's rights in California, see Comment, *The Rights of Fathers of Nonmarital Children to Custody, Visitation and Consent to Adoption*, this issue.

⁴⁶ In California, noncustodial parents lose their automatic entitlement to visitation upon stepparent adoption. CAL. CIV. CODE § 229 (West 1954). Although the court, under CAL. CIV. CODE § 4601 (West 1970) may grant visitation to anyone in the best interests of the child, the courts have not granted visitation rights to former parents upon stepparent adoption. Allowing stepparent adoption to be conditioned upon the continuation of the noncustodial parent's visitation rights would facilitate obtaining that parent's consent in many cases. This would be one solution to the stepparent adoption problem.

A sympathetic description of this situation is provided by Judge Polier in her characterization of the clash which occurs when an attempt is made to terminate the rights of an adult who, but for biology, is a stranger to the child:

The parent may never have provided a home, may have maintained no real contact with the child, and may have no plans for making a home for the child. Still, the possible termination of parental rights comes as a jolt and is seen as punishment, forfeiture of what is theirs, and as a threat to self-esteem which must be fought.

In re P., 71 Misc. 2d 965, 966, 337 N.Y.S.2d, 203, 205 (1972).

the adoption as "a weapon in a post-marital skirmish."⁴⁷

Although the law is solicitous to maintain the integrity of a natural parent-child relationship, it recognizes that the disinterested or destructive conduct of a parent may render such relationship meaningless. A statutory abandonment exception therefore has been carved out of the basic parental consent requirement.⁴⁸ California Civil Code section 224 permits adoption without a non-custodial parent's consent upon his or her failure to contribute to the support of the child and failure to communicate with the child for a period of one year.⁴⁹ The legislature intended this section to facilitate the child's adoption and to provide the child with real parents rather than parents in name only.⁵⁰

The abandonment exception, however, does not always eliminate the noncustodial natural parent as an obstacle to a stepparent adoption. Noncustodial parents who have not "abandoned" their children may, by withholding their consent, create an absolute bar to a stepparent adoption.⁵¹ There is no exception. A non-custodial parent may withhold consent unreasonably or without concern that the adoption is in the best interests of the child.⁵²

It has been suggested that in the stepparent adoption situation, the law should require that only the custodial parent need con-

⁴⁷ *In re Worms*, 252 Cal. App. 2d 130, 135, 60 Cal. Rptr. 88, 91 (1960).

⁴⁸ CAL. CIV. CODE § 224 (West Cum. Supp. 1979). See Wadlington, *supra* note 14, at 196, stating, "These exceptions recognize that too stringent an application of the consent requirement can obstruct adoptions which clearly would promote the best interests both of the children concerned and of society in general without unfairly terminating any effective parent-child relationship." See also Simpson, *supra* note 12.

⁴⁹ CAL. CIV. CODE § 224 (West Cum. Supp. 1979).

⁵⁰ *Adoption of Van Anda*, 62 Cal. App. 3d 189, 132 Cal. Rptr. 878 (2d Dist. 1976); *Adoption of Easley*, 240 Cal. App. 2d 821, 50 Cal. Rptr. 33 (4th Dist. 1966). As stated in *Adoption of Burton*, 147 Cal. App. 2d 125, 134, 305 P.2d 185, 191 (4th Dist. 1956):

The obvious purpose of the statute is to provide the child . . . with a real [parent], instead of one, who by his past conduct, is proven to be a [parent] in name only, even though related by blood A statute should not be interpreted in favor of a [parent] who seeks the benefit of parental rights but shuns the burden of parental obligations.

⁵¹ CAL. CIV. CODE § 224 (West Cum. Supp. 1979).

⁵² Recent proposals, such as the 1971 version of the UNIFORM ADOPTION ACT, permit adoption without parental consent "in the case of a parent not having custody of a minor [who withholds his consent] unreasonably . . . contrary to the best interest of the minor." UNIFORM ADOPTION ACT § 19(c)(3), *set forth in* 9 UNIF. LAWS ANN. 37, 38 (West 1973). California, however, has not adopted such a provision.

sent to the adoption.⁵³ This suggestion is based upon the proposition that courts cannot consider the best interests of a child as long as they must protect parental rights.⁵⁴ Abolishing or liberalizing the requirement for consent of the noncustodial parent, other than in those cases which the parent is declared unfit,⁵⁵ however, would encroach upon the fundamental constitutional rights of parents to retain their natural ties with their children.⁵⁶ The law cannot ignore such parental interests. Furthermore, it is doubtful that either the courts or legislatures will adopt such a drastic approach.⁵⁷ Fortunately there is an alternative to severing and replacing the natural parent-child relationship.

III. STEPPARENT CUSTODY

The interests of both the noncustodial parent and the stepparent can be served by redefining their respective roles. Such a redefinition of stepparenthood can endow the steprelationship with rights and duties presently attainable only through the adoption process.⁵⁸ In a case where a noncustodial parent refuses to consent, one means of redefining the respective roles of the stepparent and the noncustodial parent is to grant legal custody to the stepparent.⁵⁹ A court decree awarding a stepparent equal

⁵³ Wadlington, *supra* note 14.

⁵⁴ Comment, *Termination of Parental Rights in Adoption Cases: Focusing on the Child*, 14 J. FAM. LAW 547 (1975-76).

⁵⁵ "Unfitness," as used here, refers to a judicial determination of neglect, non-support or abandonment.

⁵⁶ See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), stating that the relationship between parent and child is constitutionally protected, citing *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972), *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923).

⁵⁷ Courts resist termination because of its absoluteness. Derdeyn & Wadlington, *Adoption: The Rights of Parents Versus the Best Interests of Their Children*, 16 J. AM. ACAD. CHILD PSYCH. 238 (1977). For a concise bibliography on the termination question, see Levine, *Foundations for Drafting a Model Statute to Terminate Parental Rights: A Selected Bibliography*, 26 JUV. JUST. 42, 45-56 (1975). For a summary of state termination laws, see Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L. Q. 1, 73-366 (1975).

⁵⁸ Wadlington, *supra* note 14, at 208; Bodenheimer, *supra* note 14, at 45.

⁵⁹ Professor Bodenheimer, *supra* note 14, at 42, states that in some situations courts may relax the rigidity of the traditional one-dimensional approach to adoption proceedings. She cites *San Diego County Dept. of Pub. Welfare v. Superior Court*, 7 Cal. 3d 1, 496 P.2d 453, 101 Cal. Rptr. 541 (1972), in which guardianship and adoption proceedings were consolidated. See also *Guardianship of Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (2d Dist. 1973) in which the court granted guardianship to the child's caretakers and allowed the father regular visitation.

custody with the custodial parent would maintain the established and meaningful ties between the child and the noncustodial parent, while giving the stepparent rights and imposing clearly defined obligations to the child.⁶⁰ Granting the stepparent custody would be a simple process since, by definition, the custodial parent already has physical and legal custody of the child.⁶¹

Two recent English decisions illustrate a break in traditional barriers to stepparent adoption, *In re S.*, [1974] 1 All E.R. 109 (C.A.), and *In re J.*, [1974] 2 All E.R. 410 (Fam.). In both cases, custodial arrangements coupled adoption with visitation. In these cases, the courts found exceptional circumstances which allowed them to approve adoption and, at the same time, permit the non-adopting parent to maintain an existing relationship with his child through continued visits. The differing religious, cultural, and racial heritages of the biological fathers were sufficient justification for the courts to break new ground with their opinions. Derdeyn, Rogoff & Williams, *Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care*, 31 VAND. L. REV. 1165, 1186 (1978). The English Children's Act 1975 and Adoption Act 1976 also provide custodianship as an alternative to adoption where artificially restructuring the child's family relationships is deemed undesirable (e.g. where a relative or stepparent seeks to adopt), or where the court thinks that adoption will not confer greater benefits to the child than custodianship will. One purpose of custodianship is to strengthen certain *de facto* relationships. Eekelaar, *Children in Care and The Children Act 1975*, 40 MOD. L. REV. 121, 136 (1977). Stepparent custody would achieve what some countries accomplish through so-called "weak adoptions" which continue some of the ties with the child's natural family. Bodenheimer, *supra* note 14, at 46.

An award of legal custody has been suggested if adoption is precluded for reasons unrelated to the petitioner's ability to fill the parental role. The UNIFORM ADOPTION ACT OF 1973 § 13(d), 9 UNIF. LAWS ANN. (West 1973), FLA. STAT. ANN. § 63.142(3) (Supp. 1974), and the pilot program under the California Family Protection Act, CAL. WELF. & INST. CODE § 366.5 (West Cum. Supp. 1979). The statutes provide that where parents have maintained a close family relationship with the minor, and the court finds that the minor would benefit from the continuation of the relationship, the court may consider guardianship or long-term foster care placement as alternatives to adoption. Other flexible dispositional alternatives are presented in Oregon by *Reflow v. Reflow*, 24 Or. App. 365, 545 P.2d 894 (1976), and The Oregon Model Dissolution of Parent-Child Relationship Act.

⁶⁰ Bodenheimer, *supra* note 14, at 45. Equal custody with a custodial parent gives the stepparent legal co-responsibility for the care of the child. "Custody" embraces the sum of parental rights with respect to child rearing, including care. It includes the right to children's services and earnings, and the right to direct their activities and make decisions regarding their care and control. The stepparent custody relationship is more formal than the *in loco parentis* relationship. The latter depends upon proof of the intention of the parties and may change without judicial recognition.

⁶¹ The noncustodial parent primarily has visitation rights. CAL. CIV. CODE § 197 (West Cum. Supp. 1979). In the case of divorced parents having joint custody in which both parents have legal responsibility for the child and alternating companionship, stepparent custody is not feasible and is not suggested.

A. *The Advantage of Stepparent Custody: The Child's Continued Relationship with the Natural, Noncustodial Parent*

A major advantage of stepparent custody over adoption is that in granting legal custody to a stepparent, the child does not lose a parent. Stepparent custody permits legal recognition of the value of a continuing relationship with the noncustodial parent. When an original family is no longer intact, visits and continued contact with the noncustodial parent may tremendously benefit the child without disrupting the process of adjustment to a new family.

It is important to a child's emotional well-being to maintain a relationship with each parent after marital dissolution. Children from disrupted families tend to develop their own immature and primitive fantasies about the cause of the disruption.⁶² It is common knowledge that at the time of divorce, children ordinarily experience serious feelings of guilt.⁶³ Such children often feel responsible for the divorce, despite their parents' assurances to the

⁶² Derdeyn, *Children in Divorce: Intervention in the Phase of Separation*, 60 PEDIATRICS 20, 21-22 (1977); Derdeyn, Rogoff & Williams, *supra* note 59, at 1174.

⁶³ Behavioral scientists commonly agree that a separation-and-divorce experience is damaging to children. Symptoms following parental separation and divorce generally resemble those following parental death. These include grief, mourning and depression. Benedek & Benedek, *Postdivorce Visitation: A Child's Right*, 16 J. AM. ACAD. CHILD PSYCH. 256, 260 (1977); McDermott, *Parental Divorce in Early Childhood*, 124 AM. J. PSYCH. 1424 (1968). For youngsters especially, the end of marriage can involve not only loss and disruption, but also profound, often bewildering, feelings of rejection, guilt and anger. The effect on the child depends on the child's constitutional makeup, experiences up to, and the actual circumstances of the conflict situation. The damage does not result from the divorce itself, but from the divided family, the tensions leading up to the separation, and the events thereafter. Kapit, *Help for Children of Separation and Divorce*, in CHILDREN OF SEPARATION AND DIVORCE 199, 202 (I. Stuart and L. Abt eds. 1972).

An excellent inquiry into the effects of parental divorce on children and adolescents was conducted by Judith S. Wallerstein, M.S.W., and Joan B. Kelly, Ph.D.; see Wallerstein & Kelly, *The Effects of Parental Divorce: The Adolescent Experience*, in 3 THE CHILD IN HIS FAMILY 479 (E.J. Anthony and C. Koupernik eds. 1974); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. ORTHOPSYCH. 20 (1976); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46 AM. J. ORTHOPSYCH. 256 (1976); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 J. AM. ACAD. CHILD PSYCH. 600 (1975).

For views that children can come through divorce unharmed if they are treated with respect, sensitivity and consideration, see J. SALK, *WHAT EVERY CHILD WOULD LIKE PARENTS TO KNOW ABOUT DIVORCE* (1978), and B. STEINZOR, *WHEN PARENTS DIVORCE* 41-63 (1969).

contrary. Children may interpret the noncustodial parent's absence as a lack of love which, regardless of any excuses proffered, confirms their irrational fears.⁶⁴ Regular visitation tends to disprove any suspicion that they caused the parent's permanent departure and helps them to understand the realities of the situation.⁶⁵

A noncustodial parent's visitation rights, therefore, should remain intact after granting a stepparent custody, unless a court, under California Civil Code section 4601, determines that visitation would be detrimental to the best interests of the child.⁶⁶ Especially today, with no-fault, and in some cases amicable, divorce,⁶⁷ it is likely that noncustodial parents will remain in touch with their children and that the resultant contacts will be in the children's best interests. With each divorce and remarriage, the parents and children involved acquire an entirely new set of relatives, friends and associates. In effect, they stretch their kinship

⁶⁴ Benedek & Benedek, *supra* note 63, at 260.

⁶⁵ *Id.*

⁶⁶ CAL. CIV. CODE § 4601 (West 1970). On the one hand, meaningful visitation rights of the noncustodial parent helps to soften the impact of a custody decision and helps preserve for the child and parent their continuing relationship. On the other hand, if the divorce was not amicable, visitation may prolong the child's involvement with the trauma of divorce. Unfortunately, there are cases in which visitation rights are exercised as much to harrass (or attempt to keep up a relationship with) the former spouse as to retain ties with the child. H. KRAUSE, *FAMILY LAW IN A NUTSHELL* 261 (1977). The determination of visitation rights must be made by a qualified professional after a thorough evaluation, and not by the custodial spouse. A child's expressed preference should not ordinarily be determinative of the visitation rights, either. Ample medical evidence, reflected in the law (*e.g.*, statutory rape and contracts), sustains the proposition that children, particularly young children, are not necessarily able to grasp all the implications of their decisions. Benedek & Benedek, *supra* note 63, at 262-70.

⁶⁷ Perhaps the most important factor contributing to higher divorce rates is the lessened disapproval of divorce itself. In areas where divorce is easily obtainable, the rates are higher. In California, for example, where "irreconcilable differences" is all that is needed as grounds for divorce, there is already one divorce for every two marriages. *See* note 2 *supra*. A survey indicated that in an affluent community like San Mateo, California, seven out of ten marriages fail. R. THAMM, *BEYOND MARRIAGE AND THE NUCLEAR FAMILY* 43 (1975), *citing* W. LEDERER & D. JACKSON, *THE MIRAGES OF MARRIAGE* 13 (1968).

California is making divorce even easier for some people. A new law, effective January 1, 1979, eliminates, in many cases, the requirement that divorcing couples appear in court. Known as a summary dissolution of marriage procedure, it applies to people who have been married no more than two years and have no young children and only a limited amount of property. CAL. CIV. CODE §§ 4550-4556 (West Cum. Supp. 1979). Like no-fault divorce, the summary dissolution procedure is, in part, a legislative recognition of the increasing divorce rate in the United States.

group. Our society, once based on the principle of solid monogamy and the nuclear conjugal family,⁶⁸ is shifting to a pattern of serial polygamy⁶⁹ and the extended family.⁷⁰ The new family, extended to include a noncustodial parent and his or her relatives, can have an important place in a child's life.⁷¹

It is important to remember that a stepparent is an addition to the family, not a replacement of the noncustodial parent.⁷² Most children over the age of two who are separated from a natural parent will keep the image of the parent alive.⁷³ One of the major tasks of the stepparent is to help the child understand that he or she has another parent.⁷⁴ What makes the stepfamily unique is that although it embodies the customs, psychology, emotional ties, and memories of families that once existed, these original families still exist in altered forms, even though in another neighborhood or in another town. These source families are very much alive and influential.⁷⁵

Our present divorce and remarriage style should not break the beneficial ties between the child and both parents.⁷⁶ In many

⁶⁸ The American nuclear conjugal family is simply a married couple living with their children and no others. Rhoades, *Population and Challenges to the American Family Structure*, 12 J. FAM. L. 257, 259 (1972-73). Not only is the nuclear family unit often held to be normal in a statistical sense, but also in terms of its social and cultural desirability. R. RAPOPORT, R. RAPOPORT & Z. STRELIZ, *supra* note 17, at 88.

⁶⁹ For an anthropologist's point of view, see Tiger, *Omnigamy: The New Kinship System*, PSYCH. TODAY, July, 1978, at 14, 17.

⁷⁰ The extended family refers to any grouping related by descent, marriage or adoption which is broader than the nuclear family. Bell & Vogel, *Toward a Framework for Functional Analysis of Family Behavior*, in A MODERN INTRODUCTION TO THE FAMILY 1-3 (N. Bell & E. Vogel eds. 1960).

⁷¹ One author has proposed that the high degree of estrangement between young people and adults in the U.S., and the consequent increase of youthful delinquency, vandalism and violence, is a product of the fragmentation of the extended family. Bronfenbrenner, *The Origins of Alienation*, SCIENTIFIC AM., August, 1974, at 53, 54-55.

⁷² In the days before the divorce rate soared and before the death rate was lowered, the terms "stepmother" and "stepfather" referred to new people in the household who substituted for "real" parents, who were dead. This is not true today in most cases. Bohannon, *Divorce Chains, Households of Remarriage, and Multiple Divorcers*, in DIVORCE AND AFTER 113, 119 (P. Bohannon ed. 1970).

⁷³ R. RAPOPORT, R. RAPOPORT & Z. STRELIZ, *supra* note 17, at 102.

⁷⁴ *Id.*

⁷⁵ D. MAYLEAS, *supra* note 5, at 12.

⁷⁶ Mead, *Anomalies in American Postdivorce Relationships*, in DIVORCE AND AFTER, *supra* note 72, at 97, 109. Mead suggests that the post-divorce conditions which need correction are:

[T]he failure to provide some kind of viable relationship between

cases, stepparent custody will allow a child to maintain close relationships with both the noncustodial parent and the stepparent. It is more advantageous, therefore, than stepparent adoption which severs the child's relationship with the noncustodial parent and terminates the parent's automatic entitlement to visitation.⁷⁷

Granting stepparent custody with its attendant rights and obligations is also compatible with the stepparent's practical and psychological role in a child's life. It is likely that children will become psychologically and emotionally close to the parental figures who surround them everyday. Thus, a stepparent will commonly assume an important role in the child's life.⁷⁸ A psychological parent-child relationship should not have legal recognition withheld from it.

B. Respective Rights and Obligations of the Natural and Stepparents upon Stepparent Custody

Inevitably, with the stepfamily having more than one mother and father sharing the parental roles, there will be disagreements in family decision-making. The question arises: How much influence should the natural parents and stepparent have, respectively? The issue is one of parental rights and obligations versus custodial rights and obligations. The remainder of the article will examine four important areas of these rights and responsibilities: support, the family name used by the stepchild, intestate succession, and custody rights after death or divorce of the natural custodial parent.

parents who are no longer married to each other, so that there may be a continuing relationship between the child and both parents, and so that the child's identity is not shattered by divorce What is needed here are more viable ways in which the divorced parents may share time together with their children, and provide at least brief periods when the children can feel some restoration of the identity on which they were taught to rely, and of which the divorce has robbed them.

Id. at 110.

⁷⁷ CAL. CIV. CODE § 229 (West 1954).

⁷⁸ The impact and effects of parent substitution vary from age group to age group. For example, children below the age of six months may be moved from one parent to another with very little or no difficulty. Between the first and seventh or eighth years of life, such moves are much more difficult. When a substitute has served in the parental role for a protracted period of time, the return of the child to a natural parent may be extremely disruptive. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 69 (1969).

1. Support

Legal custody can ease the tension which exists between non-custodial parents and stepparents in the area of child support by modifying the natural parents' support obligation to take into account the stepparents' contributions. Legislative action requiring a shared child support obligation between noncustodial parents and stepparents will reflect more accurately the realities of serial marriages.

Under the present law, natural parents, irrespective of their marital status, are under a continuing legal duty to support their minor children.⁷⁹ While the law requires noncustodial parents to support their children, stepparents are relieved of any support obligations until they choose to adopt their stepchildren.⁸⁰ Despite this fact, many stepparents do support their stepchildren. In reality, they can hardly avoid it. Stepparents cannot practically earmark certain household goods and living necessities for the special use of stepchildren who live and eat under the same roof as the rest of the family.⁸¹

Stepparents awarded legal custody should not have the sole responsibility for supporting their stepchildren, thereby relieving the noncustodial parents of all support obligations. Maintaining

⁷⁹ The statutory obligation of child support, which CAL. CIV. CODE §§ 242 and 4700 (West Cum. Supp. 1979) impose, continues notwithstanding the parent's lack of custody and an agreement between the parties to the contrary. *Armstrong v. Armstrong*, 15 Cal. 3d 942, 544 P.2d 941, 126 Cal. Rptr. 805 (1976). Noncustodial parents are relieved of their support obligations only when they are completely divested of parental "rights" and "duties," as, for example, when another adopts their children.

⁸⁰ The legislature is reluctant to impose child support obligations on stepparents, arguing that such an obligation would discourage men from marrying women with children and thus deter the re-establishment of normal parental, family and home relationships for the children. tenBroek, *The Impact of Welfare Law Upon Family Law*, 42 CALIF. L. REV. 458, 479 (1954). Cf. note 28 *supra*. Other authors have explored the legislature's reluctance:

It is not unlikely that the [stepparent's] exemption from support responsibility reflects ancient notions of the sanctity of blood ties and the indissolubility of marriage rather than any contemporary examination of the social values at stake. Yet, statutory modifications will be difficult to accomplish. No legislator will enthusiastically depart from an historically determined doctrinal framework built upon an emotionally appealing, if simplistic, foundation: Since the natural father brought the children into the world, let him pay for them.

Lewis & Levy, *Family Law and Welfare Politics: The Case For "Dual Systems"*, 54 CALIF. L. REV. 748, 762 (1966).

⁸¹ tenBroek, *supra* note 80.

the noncustodial parent's support obligation, but modifying it to reflect the stepparent's contribution, would give a child maximum financial security. Under current doctrines, a child often has the advantage of the stepparent's support without losing the insurance policy which the noncustodial parent's income represents.⁸² Many natural noncustodial parents do maintain post-divorce financial responsibility for their children. An exclusive stepparent support rule would eliminate this potential source of income, support and security for the children, thereby sacrificing their financial interests.

If a stepparent is given sole responsibility for supporting a stepchild, however, that obligation should be made permanent, *i.e.*, it should continue even though the new marriage may end in divorce.⁸³ The stepparent's exclusive support obligation would have the effect of treating the new family as an integral and autonomous unit. Therefore, it would be unfair to require a noncustodial parent to financially account for the possibility of an ex-spouse's divorce and the resumption of a support obligation which had long since been terminated.⁸⁴ Furthermore, a permanent obligation will seem more "real" to the stepparent, thereby assuring compliance with the obligation.

2. Family Name of the Stepchild

Any successful custody scheme will also have to include an equitable method for deciding which family name a child should assume. When, on divorce, a wife is awarded custody of her children, marries another man and then takes his surname, she may want to change her children's surname to that of her new husband. Her reasons could arise from a wish to blot out reminders of her former husband, to emphasize the identity of the new family unit, or to avoid embarrassing the children with a surname which is not that of their mother or of the other children in the household.⁸⁵

Name change may be desirable to avoid possible confusion and embarrassment, and may be accomplished without the adoption procedure.⁸⁶ Although California Code of Civil Procedure section 1276 allows a parent or guardian to apply for change of name if

⁸² Lewis & Levy, *supra* note 80, at 766.

⁸³ *Id.* at 768.

⁸⁴ *Id.*

⁸⁵ Evans, *Changing a Child's Name After Re-Marriage*, 8 FAM. L. 112 (1978).

⁸⁶ See generally CAL. CODE CIV. PROC. §§ 1275-1279.5 (West Cum. Supp. 1979) covering change of names, and Evans, *supra* note 85.

the child is under 18 years of age,⁸⁷ courts are reluctant to permit children to assume a nonadopting stepfather's name.⁸⁸ The California decisions recognize that a natural father has a protectible interest in having his child bear his surname, even when the mother has custody.⁸⁹

A natural father's right to have his child bear his name should not be absolute, however. Many married women now use their own surname alone or in combination with their husband's surname. This practice indicates a trend away from the custom of using the husband's last name as the family name. The instance of children bearing both their mother's and father's surnames is also becoming increasingly common.⁹⁰

⁸⁷ CAL. CODE CIV. PROC. § 1276 (West Cum. Supp. 1979). Persons opposing a name change must file an objection with the court. The objection must present the court with good reasons for denying a name change. The court may then make an order changing the name or dismissing the application. CAL. CODE CIV. PROC. § 1278 (West 1972).

⁸⁸ The courts have held that children have no right to a double name. See, e.g., *In re Trower*, 260 Cal. App. 2d 75, 66 Cal. Rptr. 873 (1st Dist. 1968), which refused to change, over the father's objection, his minor child's name by adding, after his surname, the surname of the stepfather. The court stated that the refusal was not an abuse of the trial court's discretion, despite the embarrassment and inconvenience the child might suffer by having a surname different from that of her mother, stepfather and half brother, where the father had complied with his duty of financial support and exhibited strong and continuing parental affection. *Trower* may not be compelling, however, as social practice and customs have changed considerably. The court stated that although the petition requested not a removal of the father's name, but only an addition to the parental name, (from "Elizabeth Antoinette Trower" to "Elizabeth Antoinette Trower Dash"), it was "not impressed. Long custom in this country regards the last name as the family name." *Id.* at 78, 66 Cal. Rptr. at 875. Today, the frequency of married women merely adding the husband's surname to their own is a trend which courts may recognize. If so, the judicial resistance to the addition of the stepfather's surname to the child's may weaken.

⁸⁹ *In re Trower*, 260 Cal. App. 2d 75, 66 Cal. Rptr. 873 (1st Dist. 1968); *In re Worms*, 252 Cal. App. 2d 130, 60 Cal. Rptr. 88 (2d Dist. 1967).

In determining whether or not the child's substantial interests require a change of name, the courts have stated that the advantage to the child in having the name changed must be so substantial as to outweigh the natural right of the father that his children bear his name. *In re Worms*, *id.*, at 135, 60 Cal. Rptr. at 91. The weight given to the father's right will, of course, vary from case to case. As stated in *In re Worms*, "The father who has always shown an abiding love for his children obviously is in a better position to urge his desires, than the one who has neglected the relationship and who merely uses his standing before the court as a weapon in a post-marital skirmish." *Id.*

⁹⁰ For additional reading on the use of hyphenated last names for children in America and other cultures, see Cherlin, *Hereditary Hyphens*, PSYCH. TODAY, Dec., 1978, at 150.

A name is a personal item, identifying a person to the rest of the world. Children justifiably desire a name which will associate them with those they love and with whom they live. If they desire a name change, the law should support the change by means of a presumption in favor of adding the stepfamily name to a child's existing name. This presumption would satisfy children's wishes to be known by the name of the stepfamily, to avoid confusion, and to establish their identity within the family. The addition would also protect the continued use of the natural father's surname, thereby serving his interests.

3. Succession

One area which the legislature and courts should not alter, if they implement stepparent custody, is succession.⁹¹ Although the California Probate Code currently allows children to inherit from either their natural or adoptive parents,⁹² it does not provide for inheritance by nonadopted stepchildren.⁹³ The California Probate Code views stepchildren as heirs only under very limited circumstances.⁹⁴

The succession statutes should not be expanded to make a stepchild's rights to inherit from a stepparent the same as the rights of a natural or adopted child. To grant stepparents and their unadopted stepchildren succession rights would conflict with the natural, noncustodial parents' rights to succeed to their children's estates. Furthermore, such a move would make stepchildren heirs to both their parents' estates and their stepparents' estates. This unnecessary generosity to stepchildren would infringe on the succession rights of the stepparents' natural children. The right to succeed to one set of parents' estates is sufficient to provide for a child.

The intestate succession statute is not a large imposition on people's rights to provide for their stepchildren. Dependent step-

⁹¹ The courts have indicated that they will not disturb the status of stepchildren without legislative change. *In re Lima's Estate*, 225 Cal. App. 2d 396, 398-99, 37 Cal. Rptr. 404, 405 (1st Dist. 1964).

⁹² CAL. PROB. CODE §§ 221-222 (West 1956). See CAL. PROB. CODE § 257 (West 1956) relating to adopted children, and CAL. PROB. CODE § 255 (West Cum. Supp. 1979) referring to children out-of-wedlock.

⁹³ *In re Lima's Estate*, 225 Cal. App. 2d 396, 37 Cal. Rptr. 404 (1st Dist. 1964).

⁹⁴ CAL. PROB. CODE § 228 (West Cum. Supp. 1979) allows a child to succeed to a stepparent's estate only if the decedent leaves neither a surviving spouse or other issue, and if the estate, or a portion thereof, was community property of the decedent and a previously deceased spouse, or went to the decedent by virtue of its community character on the death of such spouse.

children justifiably have a cause of action for the wrongful death of their stepparents.⁹⁵ In many cases, stepparents are similarly able to treat stepchildren as relatives for tax purposes.⁹⁶ Furthermore, if stepparents want their stepchildren to inherit from them, they can include them in their wills. A scheme of lineal descent excluding stepchildren would adversely affect only a stepparent's right to inherit from a stepchild who has not made a will. Realistically, this is not a practical concern, for minor stepchildren are unlikely to leave significant estates.

4. The Second Custody Battle

The frequency of divorce and remarriage which makes the discussion of stepparent adoption and custody necessary also gives rise to the question of child custody upon the termination of the marriage of a natural and stepparent through death or divorce. The question which arises when the stepparent is granted equal custody with the natural parent concerns the right of the stepparent to continued custody of the child in the event of divorce or death of the natural, custodial parent.⁹⁷ The two situations will be examined separately.

a. The Stepparent's Right to Custody After Divorce

In the event of divorce,⁹⁸ the current standard for awarding custody should continue to apply in a custody contest between a stepparent and the natural, custodial parent.⁹⁹ Under this stan-

⁹⁵ Only recently did the legislature include "dependent stepchildren" as persons entitled to standing in an action for the wrongful death of a stepparent. CAL. CODE CIV. PROC. § 377(b)(2) (West Cum. Supp. 1979) a 1975 revision. Federal law also states that a dependent stepchild has a cause of action for wrongful death in certain situations. Death on High Seas by Wrongful Act, 46 U.S.C. § 761 (1975); *Spiller v. Thomas M. Lowe, Jr. & Assocs.*, 466 F.2d 903 (8th Cir. 1972).

⁹⁶ See *Loomis v. State*, 228 Cal. App. 2d 820, 39 Cal. Rptr. 820 (1st Dist. 1964), stating that stepparent and stepchild stand "in mutually acknowledged relationship" of parent and child so that a stepson was a Class A donee under CAL. REV. & TAX. CODE § 15110(c) (West 1970).

⁹⁷ A stepparent who has not previously petitioned for stepparent custody should be able to do so at this stage.

⁹⁸ Studies of mass divorce data unequivocally demonstrate that the divorce rate among remarried persons is higher than that among the first-married. It further appears that the divorce rate increases substantially with each successive marriage. J. BERNARD, *supra* note 22, at 66-67.

⁹⁹ CAL. CIV. CODE § 4600 (West Cum. Supp. 1979). The noncustodial parent could also seek modification of the original custody award upon a showing of detriment to the child.

dard, the natural parent has priority over the stepparent unless an award of custody to the stepparent is essential to avert harm to the child.¹⁰⁰ The law should retain this preference for the natural parent who was originally awarded custody. An award of continuing custody to the natural parent is more likely to be in the best interests of the child as this is the person with whom the child has had the longest relationship and the person who is most likely to maintain a continued interest in the child.¹⁰¹ Also, because of the long-term relationship, such an award will not likely cause a major change in the child's life or environment. When the natural parent does retain custody of the child, the stepparent should be able to receive visitation rights.

¹⁰⁰ CAL. CIV. CODE § 4600 (West Cum. Supp. 1979) sets forth the order of preference in which courts should award custody and, in general, the conditions which a court should consider in awarding custody. The statute states that custody should be awarded, first, to either parent according to the best interests of the child; second, to the person or persons in whose home the child has been living in a wholesome and stable environment; and third, to any person or persons the court deems to be suitable and able to provide adequate and proper care and guidance for the child. Section 4600 standards apply "in any proceeding" where child custody is at issue.

CAL. CIV. CODE § 4600 eliminated the need for a finding of parental unfitness before a court can award custody of a child to a nonparent. *Guardianship of Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (2d Dist. 1973); *Guardianship of Pankey*, 38 Cal. App. 3d 919, 113 Cal. Rptr. 858 (1st Dist. 1974). The legislature, however, did not intend to disturb the judicial practice of awarding custody to nonparents in preference to parents only in unusual and extreme cases. *In re B.G.*, 11 Cal. 3d 679, 698, 523 P.2d 244, 257, 114 Cal. Rptr. 444, 457 (1974). Thus, the statute permits an award of custody to a nonparent against a claim of a parent only upon a clear showing that such award is essential to avert harm (*i.e.*, is detrimental) to the child. A finding merely that such an award will promote the best interests or welfare of the child will not suffice. *Id.* at 698-99, 523 P.2d at 257-58, 114 Cal. Rptr. at 457-58; *Cheryl Lynn H. v. Superior Court*, 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (2d Dist. 1974).

¹⁰¹ This is primarily true in those cases where the stepparent initially sought custody for reasons of convenience rather than for a personal desire to establish an emotionally close and permanent relationship with the child. Statistics show that a stepparent's relationship with the child's custodial parent is likely to be relatively short. Redivorce occurs after fewer years of marriage than the first divorce. Persons whose first marriage ended in divorce have a median interval of seven years between marriage and divorce. Persons whose second marriage ended in divorce had a somewhat shorter median interval before redivorce. For men, the interval was 5.0 years; for women, it was 5.5 years. These findings are consistent with the proposition that persons in second marriages tend to have a somewhat greater propensity to eventual divorce than those in first marriages as well as a somewhat shorter period of marriage the second time than the first. U.S. BUREAU OF THE CENSUS, *Number, Timing, and Duration of Marriages and Divorces in the United States: June 1975*, *supra* note 4, at 6, 17.

The court may determine, however, that the natural parent should not have custody. This determination would occur if an award of custody to the natural parent would be detrimental to the child and the award to the stepparent will serve the best interests of the child.¹⁰² In such a case, the custodial stepparent should be able to retain custody of the child. The custodial stepparent's support obligation would, of course, continue.

If either a stepparent or custodial natural parent is granted continued custody, the noncustodial natural parent may intervene and ask for modification. To justify a change of custody, the court should require a showing that the noncustodial parent will provide an environment for the child which is not only better than that which the present custodian can provide, but which is sufficiently better as to overcome the detriment to the child arising from such a wrenching change.¹⁰³ If the noncustodial natural parent has maintained close contact with the child, the change would not necessarily be disruptive. In such a case, the noncustodial parent could easily meet the burden of the proposed benefit-detriment test. Regardless of the ease, however, the noncustodial parent should have the burden of justifying the modification of custody as against either of the two original custodians, i.e., the stepparent or natural parent. The original award of custody should retain priority over the request for custody by the noncustodial parent, even after the divorce of the joint custodians, to protect a stable environment for the child.

b. Custodial Rights After Death of the Natural Parent

Custody problems arising upon the death of the natural, custodial parent present a slightly different problem. In such an instance, custody struggles often arise between a noncustodial natural parent and the stepparent who was married to the deceased parent. Stepparents will argue for continued custody, while surviving natural parents will often insist that custody of the children should "revert" to them, even though the children may have come to look upon the stepparent as the true parent.¹⁰⁴

¹⁰² CAL. CIV. CODE § 4600 (West Cum. Supp. 1979).

¹⁰³ A similar test was used in *Warren v. Warren*, 528 P.2d 1088 (Or. App. 1974), in which the court stated that to justify a change of custody there must be a showing that the noncustodial parent would provide an environment which would not only be better for the children than that of the custodial parent, but which would be sufficiently better as to overcome the detriment and instability caused by a change of custody.

¹⁰⁴ Bodenheimer, *supra* note 14, at 46. See also CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY, REPORT 40 (1966), quoted in *In re B.G.*, 11 Cal. 3d 679,

It is true that where the court awards custody of a child to one parent, such award does not absolutely end the other parent's right to custody and control of the child. It merely determines that as between the parents, the child should be placed in the custody of the one parent until some other disposition is made.¹⁰⁵ As between the noncustodial natural parent and the stepparent, the natural parent has a superior custody claim.¹⁰⁶ Once the stepparent is awarded custody, however, the natural parent can obtain custody only by seeking a modification of that award. It is unclear whether the death of a natural custodial parent alone constitutes a change of circumstances sufficient to support a modification of a custody award. Furthermore, California Civil Code section 4600(b) may foreclose any modification in the absence of unfitness.¹⁰⁷ The courts are reluctant to order a change of custody and will not do so except for substantial reasons, since it is usually desirable to end litigation and undesirable to change a child's established mode of living.¹⁰⁸

Currently, a child gains permanent and secure placement with the stepparent only through adoption.¹⁰⁹ If a stepparent has legal custody of the child when the natural parent dies, however, the stepparent should retain custody pending a subsequent court decree or order. The paramount consideration in determining the custody of a minor child is the welfare and best interests of the child.¹¹⁰ One precept for custody cases is the need for continuity

697, 523 P.2d 244, 256, 114 Cal. Rptr. 444, 456 (1974); *In re Arkle*, 93 Cal. App. 404, 269 P. 689 (1st Dist. 1928), holding that when the custodial parent dies, the so-called right to custody immediately and automatically reverts to the surviving parent; CAL. CIV. CODE § 197 (West Cum. Supp. 1979) establishing the legal parent's equal entitlement to custody and stating that if either the mother or father is dead, the other is entitled to the child's custody.

¹⁰⁵ CAL. CIV. CODE §§ 197, 4600 (West Cum. Supp. 1979).

¹⁰⁶ CAL. CIV. CODE § 4600 (West Cum. Supp. 1979) discussed *supra* note 100.

¹⁰⁷ See note 100 *supra*.

¹⁰⁸ *In re Marriage of Russo*, 21 Cal. App. 3d 72, 98 Cal. Rptr. 501 (1st Dist. 1971). Cf. UNIFORM MARRIAGE AND DIVORCE ACT § 409, set forth in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONS ON UNIFORM STATE LAWS 330 (1973).

¹⁰⁹ See text accompanying notes 32-34 *supra*.

¹¹⁰ *In re Reyna*, 55 Cal. App. 3d 288, 301, 126 Cal. Rptr. 138, 147 (5th Dist. 1976); *In re Marriage of Coleman*, 26 Cal. App. 3d 56, 60, 102 Cal. Rptr. 629, 632 (2d Dist. 1972).

The "best interests of the child" doctrine purports to give courts great latitude in determining placements. In reality, however, it often complements the "parental right" doctrine because judges often assume that the best interests of the child are met when he or she is in the custody of the natural parent. *Derdeyn, Rogoff & Williams, supra* note 59, at 1171.

and permanence in the child's relationships and environment.¹¹¹ Courts now recognize that emotional damage is an inevitable by-product of the uprooting of children from their "psychological parent," regardless of the lack of biological ties, and their placement with parent figures who have had little or no contact with the children.¹¹² The constant shifting between custodians which can sometimes occur is detrimental to a child's welfare, especially where the child is older than one or two years.¹¹³

Recent California cases may promise to protect the child who lives in a stable environment with a stepparent, even when the stepparent does not have legal custody.¹¹⁴ The California Supreme Court's decision in *In re B.G.*¹¹⁵ granted standing to *de facto* parents in an adoption proceeding brought by others. Such action can result in the denial of an adoption and an award of custody to the *de facto* parents. Another recent California case, *Guardianship of Marino*,¹¹⁶ held that section 4600 of the California Civil Code¹¹⁷ eliminated the need for a finding of parental unfitness before custody of a child could be awarded to a nonparent.¹¹⁸ In that case, a child whose mother died soon after childbirth was raised in the family of his mother's sister "as if he were their own son."¹¹⁹ After six years of silence, the father rediscovered an interest in his child and sought custody. Seeking the child's continued healthy emotional development in his only "home," the court named the child's caretakers as his guardians and granted the father regular visitation.¹²⁰

Based on these cases, the courts should be even more receptive to denying a noncustodial parent's petition for custody after the custodial parent's death when the stepparent already has custody. The natural parent's right to the custody and companionship of his or her children, and the right to maintain a home as a family unit, are important if not basic factors in the concept of American society. However, when a long separation disrupts the

¹¹¹ A. WATSON, *PSYCHIATRY FOR LAWYERS* 159, 197 (1968). See also note 78 *supra*; *Schlumpf v. Superior Court*, 79 Cal. App. 3d 892, 145 Cal. Rptr. 190 (3d Dist. 1978).

¹¹² *In re Reyna*, 55 Cal. App. 3d 288, 301, 126 Cal. Rptr. 138, 147 (5th Dist. 1976).

¹¹³ See note 111 *supra*.

¹¹⁴ Bodenheimer, *supra* note 14, at 46-47.

¹¹⁵ 11 Cal. 3d 679, 698, 523 P.2d 244, 257, 114 Cal. Rptr. 444, 457 (1974).

¹¹⁶ 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (2d Dist. 1973).

¹¹⁷ CAL. CIV. CODE § 4600 (West Cum. Supp. 1979).

¹¹⁸ 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (2d Dist. 1973).

¹¹⁹ *Id.* at 954, 106 Cal. Rptr. at 656.

¹²⁰ 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (2d Dist. 1973).

normal relationship between parent and child and the natural ties are thus weakened, the right of the parent should give way to the welfare of the child.¹²¹ In many cases, this means that the child will continue to live with the custodial stepparent.

CONCLUSION

The increase of divorce and remarriage in American society has altered the concept of the family. No longer is the typical American family composed of two parents and their children living together happily ever after. Rather, a typical family may be composed of a parent, a child, a second (or even third) spouse, and possibly the spouse's children. This is commonly referred to as a "stepfamily."

The stepfamily is unique because it is a family unit with its own relationships and daily events, but it is strongly influenced by persons with whom its members previously lived. Most importantly, a stepchild may have a close and beneficial relationship not only with the stepparent, but also with the natural parent with whom he or she is no longer living. Both relationships can be valuable to the child, but the relationships can conflict. The conflict is often a result of the ill-defined role of the stepparent.

Currently, adoption is the only way in which a stepparent can put to rest any conflict between the stepparent and the noncustodial parent. Through adoption, the stepparent assumes all the rights and obligations of a natural parent and extinguishes the former parent-child relationship. Extinguishment of a child's links with one half of the child's own family, however, may be inappropriate in many cases and could be damaging. This drastic step is not in the best interests of those children who have a meaningful and personal relationship with their noncustodial parent. It is important to remember that the stepparent is an addition, not a replacement of the natural, noncustodial parent.

A stepparent is justified in wishing to establish a clear legal identity which comes as close to parent-child recognition as possible. The legislature should enact laws enabling the courts to ap-

¹²¹ Comment, *Custody of Children: Best Interests of Children v. Rights of Parents*, 33 CALIF. L. REV. 306, 316 (1945).

Blood is not always thicker than water. If a child has lived with some other person, this person may have become a psychological parent and have stronger bonds with the child than the biological parent. Comment, *Custody of Children*, 59 KY. L. J. 529, 534 (1970). See also Comment, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L. J. 151, 158-59 (1963).

point a stepparent as a joint custodian of the child. The natural, custodial parent's relationship with the child would continue unchanged, but there would be legal recognition of the psychologically close steprelationship.

Under this proposed legislation, the noncustodial parent will retain any visitation rights which already existed, subject to the courts' power of modification to avert harm to the child. The courts will reduce the noncustodial, natural parent's support obligation in proportion to the stepparent's contribution, but not to the extent of terminating it completely. The stepchild will be able to assume the name of the new family, in addition to the natural father's name. Rights of succession will remain governed by blood relations, but dependent stepchildren will have standing in any cause of action for the loss of support from the stepparent. In the event of divorce, the law will retain the preference for the natural, custodial parent in awarding custody. The stepparent will have visitation rights and modification of support obligations. In the event of the natural, custodial parent's death, the custody of the child will not "revert" to the surviving natural parent. The child will be able to stay in the home of the custodial stepparent.

A stepparent custody award can serve some of the same purposes as an adoption decree, but has the advantage of allowing children to maintain their meaningful ties with the noncustodial natural parent. Stepparent custody affords children the needed stability of a continuous relationship with a stepparent and still avoids severing connections with their past. Ultimately, it will enable the law to meet the demands of an evolving social structure.

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