Divorce and the Modern Family: Providing In Loco Parentis Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding

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NOTE

DIVORCE AND THE MODERN FAMILY: PROVIDING IN LOCO PARENTIS STEPPARENTS STANDING TO SUE FOR CUSTODY OF THEIR STEPCHILDREN IN A DISSOLUTION PROCEEDING

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I. INTRODUCTION

Increasing rates of divorce and remarriage have led to a growing number of stepparents in this country. Statistics gathered from the 1990 Census showed that approximately five and one-half million married couple households included at least one minor stepchild. Demographers predict that as many as one in three American children can expect to spend some of his or her childhood years in a stepfamily.

Psychological and sociological studies indicate that many stepparents and stepchildren form close, enduring relationships with each other. The dictionary defines a “stepparent” as “[t]he mother or father of a child born during a previous marriage of the other parent and . . . not the natural parent of such child.” BLACK’S LAW DICTIONARY 1268 (5th ed. 1979). However, the increase of illegitimate births in this country necessitates a broader definition in which a stepparent is “[t]he spouse of a parent of a child not his or her offspring.” Janet Mary Riley, Stepparents’ Responsibility of Support, 44 LA. L. REV. 1753, 1753 (1984).

1. See id. at 2, 10 tbl.L; see also Margaret M. Mahoney, A Legal Definition of the Stepfamily: The Example of Incest Regulation, 8 BYU J. PUB. L. 21, 21 (1993).
2. Approximately half of all marriages end in divorce. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, PUB. NO. P23-180, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE 1990’S, at 1 (Oct. 1992) [hereinafter CENSUS]. “Currently, more than 4 out of 10 marriages in the United States involve a second or higher-order marriage for the bride, the groom, or both.” Id. at 5 (citation omitted).
3. See id. at 2, 10 tbl.L; see also Margaret M. Mahoney, A Legal Definition of the Stepfamily: The Example of Incest Regulation, 8 BYU J. PUB. L. 21, 21 (1993).
5. See David R. Fine & Mark A. Fine, Learning from Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies, 97 DICK. L. REV. 49, 64 (1992); see also Lawrence H. Ganong & Marilyn M. Coleman, Stepchildren’s Perceptions of Their Parents, 148 J. GENETIC
increasing rate of remarriage\(^6\) makes it probable that this trend will continue. This increase in stepfamilies also brings the possibility of increased stepfamily dissolutions through divorce.\(^7\) A stepparent, in an effort to maintain an existing relationship with his or her stepchild, may seek custody of the child within the dissolution proceeding. However, many courts deny these stepparents the standing needed to pursue their custody claims.\(^8\) Courts often hold that the jurisdiction statute governing the divorce proceeding does not give them the power to address the issue of custody when someone other than the biological or legal parent is bringing suit for custody.\(^9\) The courts’ rationale stems from a fear that the biological or legal parent’s rights will not be sufficiently protected if the stepparent is allowed to use the dissolution proceeding as a forum to claim custody of the child.\(^10\) This denial of standing, however, operates as an improper absolute preference for biological or legal parents and

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\(^6\) See Census, supra note 2, at 5.
\(^7\) See id. at 6 tbl.D.
\(^8\) See infra notes 119-69 and accompanying text.
\(^9\) This Note focuses on stepparents’ rights to custody only within dissolution proceedings. Most states use different standards depending on the type of proceeding with which the court is faced. For example, in Olvera v. Superior Court, 815 P.2d 925, 926 (Ariz. Ct. App. 1991), the court recognized that Arizona law contained different child custody provisions, one in the domestic relations law and one in the juvenile code.
fails to take into account the best interests of the children involved in the divorce.

This Note argues that stepparents who can show they are *in loco parentis*\textsuperscript{11} with their stepchild should have standing to sue for custody of that child within the dissolution proceeding. Part II of this Note examines the development of stepparents' rights and duties within the stepparent-child relationship. Part III begins by discussing, in depth, the doctrine of *in loco parentis* and how the finding of *in loco parentis* status between a stepparent and child can affect the steprelationship. It concludes by proposing a test for courts to apply to determine whether the *in loco parentis* status exists, which will ensure uniformity in *in loco parentis* determinations. Part IV reviews how various courts have analyzed the stepparent standing issue. Part V concludes that those stepparents who can show an *in loco parentis* relationship with their stepchildren should have the opportunity to be heard on the issue of custody by courts in a dissolution proceeding.

II. THE DEVELOPMENT OF STEPPARENTS' RIGHTS AND DUTIES

Historically, any rights or obligations stepparents had to their stepchildren were coexistent with the marriage to the biological or legal parent, thus ending upon termination of the marriage through divorce or death.\textsuperscript{12} Lawmakers regarded the stepparent-child relationship as derivative, existing only because both parties were related to the biological or legal parent.\textsuperscript{13} Once the marriage ended, the common link shared by the stepparent and the child disappeared and neither party thereafter owed any obligations to the other.\textsuperscript{14}

Despite the ever increasing number of stepfamilies in this country,\textsuperscript{15} courts and legislatures have been reluctant to stray from the traditional belief about stepfamily relationships.\textsuperscript{16} For example, most

\begin{itemize}
\item \textsuperscript{11} *In loco parentis* is the Latin term for "in the place of a parent." BLACK'S LAW DICTIONARY, *supra* note 1, at 708. For a more in-depth discussion of the *in loco parentis* doctrine, see infra Part III.
\item \textsuperscript{13} See Mahoney, *supra* note 10, at 52-53. For an example of this idea at work, see UTAH CODE ANN. § 78-45-4.1 (1992).
\item \textsuperscript{14} See Mahoney, *supra* note 10, at 52-53.
\item \textsuperscript{15} See CENSUS, *supra* note 2, at 5.
\item \textsuperscript{16} See Fine & Fine, *supra* note 5, at 49-50; Mahoney, *supra* note 10, at 39-40; see also Shoemaker v. Shoemaker, 563 So. 2d 1032, 1034 (Ala. Civ. App. 1990) (observing that the legal severance of the stepparent-biological parent relationship also severed any legal relationship the
\end{itemize}
states do not impose any statutory requirements on stepparents to support their stepchildren during the marriage. Even if stepparents are obligated, the responsibility terminates when the stepfamily dissolves. In contrast, as a general rule, biological or legal parents' support obligations continue at least until the children reach the age of majority, whether or not the marriage between the biological or legal parents remains intact. In the absence of legislation, the trend of judicial precedent suggests that courts will continue to sparingly impose child support obligations on stepparents during, or after, marriage.

Courts have been more progressive toward stepparents' rights in the area of visitation after termination of the marriage than in any other area of stepfamily law. Several states have explicit statutory authority granting courts the power to provide stepparents with visitation rights. Other states have "third party" visitation statutes, which some courts have used as a basis for granting stepparents visitation privileges.


18. See Mahoney, supra note 10, at 52. Despite this general rule, in limited circumstances, some courts have required continuing stepparent support after termination of the marriage. See Clevenger v. Clevenger, 11 Cal. Rptr. 707, 714-18 (Ct. App. 1961) (holding stepparent liable for post-marital support of the child based on the theory of equitable estoppel); L. v. L., 497 S.W.2d 840 (Mo. Ct. App. 1973) (imposing post-divorce support obligation on stepfather upon finding he had married the mother while she was pregnant with the child, knew it was not his child, and expressly agreed to care for her child); Burse v. Burse, 356 N.E.2d 755 (Ohio Ct. App. 1976) (imposing post-divorce support obligation on the stepfather since he had married the mother while she was pregnant with another man's child, which under state law terminated the mother's right to sue the biological father for support).


21. See Fine & Fine, supra note 5, at 56.

22. See CAL. FAM. CODE § 3101 (West 1994); KAN. STAT. ANN. § 60-1616(b) (Supp. 1996); TENN. CODE ANN. § 36-6-303 (Supp. 1995); VA. CODE ANN. § 20-107.2 (Michie 1995); WIS. STAT. ANN. § 767.245 (West 1993).


24. See Hutton v. Hutton, 486 N.E.2d 129, 130 (Ohio Ct. App. 1984) (holding that the relevant statute which provided visitation privileges to any "person having an interest in the welfare of the child" allowed the court to consider the visitation rights of a stepfather with his ex-wife's daughter); see also Simmons v. Simmons, 486 N.W.2d 788, 791 (Minn. Ct. App. 1992) (holding that MINN. STAT. ANN. § 257.022 did not preclude the court from granting visitation rights to a former
Either type of statute gives courts the power to grant visitation to stepparents if it is in the "best interest" of the child.\textsuperscript{25} Even in the absence of legislation, some courts have used a "best interest of the child" analysis to grant visitation privileges to stepparents. For example, in \textit{Shoemaker v. Shoemaker},\textsuperscript{27} an Alabama appeals court held that courts can make stepparent visitation orders "only after the best interests and welfare [of the child] are raised and shown to be advanced by such visitation."\textsuperscript{28} The Alabama Code did not contain third-party or stepparent visitation statutes.\textsuperscript{29} In \textit{Honaker v. Burnside},\textsuperscript{30} a West Virginia court applied a best interest of the child standard and granted visitation rights to the child's stepfather and half brother,\textsuperscript{31} even though West Virginia law had not been interpreted to grant stepparents or other third parties visitation privileges.\textsuperscript{32}

Although stepparent visitation law has made some progress, the law dealing with stepparent custody rights remains problematic.\textsuperscript{33} Historical-

\textsuperscript{25}"Best interest" of the child is an ambiguous standard, which gives courts discretion in their decisionmaking when applied. See \textit{Gerber v. Gerber}, 407 N.W.2d 497, 502 (Neb. 1987) (holding that a best interest analysis was to include an analysis of many factors and circumstances such as: the age and health of the child; the character of the non-custodial parent; the place where visitation rights will be exercised; the frequency and duration of visits; the emotional relationship between the visiting parent and the child; the likely effect of visitation on the child; the availability of the child for visitation; the likelihood of disrupting an established lifestyle otherwise beneficial to the child; and, when appropriate, the wishes of the child).

\textsuperscript{26}See supra notes 22-23. Some state statutes expressly require courts to do a best interest analysis before granting visitation. See, e.g., OHIO REV. CODE ANN. § 3109.05 (B)(1)(c) (granting courts the power to confer visitation privileges on a "person other than a parent" if, among other things, "[t]he court determines that the granting of . . . visitation rights is in the best interest of the child"); TENN. CODE ANN. § 36-6-303(a) (requiring "a finding that such visitation rights would be in the best interests of the minor child" before visitation can be granted); see also Susan M. Silverman, \textit{Note, Stepparent Visitation Rights: Toward the Best Interests of the Child}, 30 J. FAM. L. 943, 951 (1991-92).

\textsuperscript{27}563 So. 2d 1032 (Ala. Civ. App. 1990).

\textsuperscript{28}Id. at 1034. The court also noted that it would be the rare case where the best interest of the child would be advanced by granting visitation privileges to the stepparent. See id.

\textsuperscript{29}See id. The Alabama Code provides grandparents with the legal privilege of visitation but does not provide stepparents or other third parties with that same privilege. See ALA. CODE § 30-3-4 (Supp. 1995).

\textsuperscript{30}388 S.E.2d 322 (W. Va. 1989).

\textsuperscript{31}See id. at 326.

\textsuperscript{32}The court did not refer to any controlling statute in its visitation analysis. See id. However, W. VA. CODE § 48-2(B)-5 to -6 (1995) does provide visitation privileges to grandparents.

\textsuperscript{33}This Part of the Note provides a brief overview of the development of stepparents' rights in the area of custody with respect to the substantive law applied in custody battles between stepparents and biological or legal parents. It should not be confused with the issue of standing, the focus of this Note. Standing is viewed as a procedural and jurisdictional problem since the lack...
ly, the law viewed children as the property of their fathers, making a father's custody right equivalent to a property right.\textsuperscript{34} Change came in the early twentieth century as courts shifted their emphasis in custody disputes away from a father's property right in his child to a natural right of custody based on the parent's biological or legal ties to the child.\textsuperscript{35} Courts began to presume that biological or legal parents were best fit to fulfill the child's needs due to their biological or legal relationship with the child.\textsuperscript{36} This trend has developed into the judicial doctrine now called "the parental preference" standard.\textsuperscript{37} The majority of states apply some form of this standard in custody disputes between biological or legal parents and third parties.\textsuperscript{38}

Application of the parental preference standard requires that courts award custody to the biological or legal parent unless the party bringing suit can prove the parent is unfit\textsuperscript{39} or, as some jurisdictions state, that "extraordinary circumstances\textsuperscript{40}" exist which justify granting custody to the third party. The burden of proof is often very stringent, and rarely satisfied by stepparents or other third parties.\textsuperscript{41} Only after a third party

\textsuperscript{34} See Sanford N. Katz, When Parents Fail 4 (1971). "During the feudal period, custodial rights, which had commercial value, were subject to transfer and sale; a child was primarily a financial asset to his father. During this early period, therefore, a custodial right was essentially a property right." Id.


\textsuperscript{36} See Katz, supra note 34, at 4.

\textsuperscript{37} See id.

\textsuperscript{38} A recent survey indicated that 38 states employ custodial presumptions in favor of biological parents. See Fine & Fine, supra note 5, at 56; see also Hutchison v. Hutchison, 649 P.2d 38, 40 n.2 (Utah 1982). For a more in-depth and detailed analysis of the parental preference standard, see Haynie, supra note 35, at 708-21.

\textsuperscript{39} See, e.g., Schuh v. Roberson, 788 S.W.2d 740, 741 (Ark. 1990) (holding that "[w]here a third party intervenes in a child custody matter, that party has the burden of proving the parents are incompetent or unfit to have custody").

Unfitness can be proven by several factors. Courts have found biological parents unfit based on violence, criminal activity, neglect, and abandonment. See 3 Child Custody and Visitation Manual § 11.04[1-4] (1995).

\textsuperscript{40} Bennett v. Jeffreys, 356 N.E.2d 277, 282 (N.Y. 1976) (holding that courts cannot intervene in the biological parent's right to custody unless there is first a judicial finding of "surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstance[s]" which would drastically affect the welfare of the child).

\textsuperscript{41} See, e.g., Larson v. Larson, 384 S.E.2d 193, 194 (Ga. Ct. App. 1989) (stating that a nonparent must show by "clear and convincing evidence" that the parent is unfit or otherwise not entitled to custody) of the child (quoting Blackburn v. Blackburn, 292 S.E.2d 821, 825 (Ga. 1982))); Grover v. Phillips, 681 P.2d 81, 83 (Okla. 1984) (explaining that a biological parent must affirmatively, not comparatively, be proven an unfit parent).
has successfully satisfied its burden of proof will the court apply the best interest standard to determine who the child's custodian should be.\(^4\)

Some jurisdictions have become dissatisfied with the parental preference standard. The inability of third parties to meet their burden of proof is troubling to some courts because it prevents them from conducting a best interest analysis to ensure that the child's interest is being served by their decision.\(^4\) The Supreme Court of Idaho circumvented the parental preference standard in Stockwell v. Stockwell\(^4\) by holding that in certain circumstances, stepparents can bypass the parental preference standard. The court stated that when the child has been living with a stepparent for a long period of time, resulting in a "longstanding, substantial custodial and parental relationship," courts should determine custody based on the best interest of the child and not apply the parental preference standard.\(^4\) The Stockwell court found that such a relationship existed in this case.\(^4\) Among the factors the court took into account were that the stepfather had been the only father the child had ever known; he had custody equivalent to the custody rights the mother enjoyed; and he had virtually sole custody of the child for two and one-half years.\(^4\)

Other jurisdictions dissatisfied with the parental preference standard have turned to the best interest standard as the sole test in all third-party custody disputes.\(^4\) Under this view, the rights of even a fit parent must yield if the best interest of the child demands placement with the third party.\(^5\) This standard gives courts the flexibility to make custody decisions centered around the needs and welfare of the child, the ultimate

\(^4\) See Bennett, 356 N.E.2d at 283; Hutchison, 649 P.2d at 41.
\(^4\) See Richards, supra note 12, at 1246.
\(^4\) 775 P.2d 611 (Idaho 1989).
\(^4\) See id. at 614.
\(^4\) Id.
\(^4\) See id.
\(^4\) See id.
\(^5\) Hawaii has statutorily adopted a best interest standard that has been described by some commentators as the broadest statute pertaining to third-party custody disputes. See Statutory Review, supra note 17, at 21. The statute provides, in part, that:

(2) Custody may be awarded to persons other than the father or mother whenever the award serves the best interest of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall be entitled prima facie to an award of custody . . . .

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goal of any custody dispute.51

In summary, family law has been slow to respond to the growing need for clear and comprehensive rules that define the rights and responsibilities of parties to the stepparent-child relationship.52 Most state legislatures and courts do not impose statutory requirements on stepparents to support their stepchildren during the marriage or after its termination. Consequently, parents and stepchildren who rely on the stepparent for economic support may be left in a state of financial disarray if such support is terminated.53 Although the law has been more progressive in the area of stepparent visitation, most jurisdictions providing for such visitation require the stepparent to show that it is in the “best interest” of the child.54 The courts’ application of differing definitions of “best interest,” however, have led to inconsistent results.

In the area of custody, the parental preference rule is employed in most jurisdictions. This is a very difficult standard for stepparents and other third parties to overcome,55 and as a result, stepparents are frequently denied the opportunity to maintain the strong emotional bonds that they develop with their stepchildren. Nor may the best interest of the child be served by staying with the biological or legal parent, even though the biological or legal parent may be fit. Given the growing number of stepfamilies and the corresponding growing number of stepfamily dissolutions,56 courts and legislatures need to create new rules, or at least modify the old ones, to properly define and protect the stepfamily relationship.

III. IN LOCO PARENTIS AND THE STEPRELATIONSHIP

At common law, and in most states, the mere existence of a stepparent-child relationship confers no rights and imposes no obligations on either party.57 As the rate of remarriage increases, however, steppar-

52. See Fine & Fine, supra note 5, at 63; Mahoney, supra note 10, at 39.
53. See supra notes 21-32 and accompanying text.
54. See supra note 10, at 54.
55. See supra notes 38-42 and accompanying text.
56. See Census, supra note 2, at 6 tbl.D.
The relationship should be found to exist only if the facts and circumstances show that
the step-parent means to take the place of the lawful father not only in providing support
but also with reference to the natural father's office of educating and instructing and
caring for the general welfare of the child.

143 N.Y.S.2d at 5; see also Miller, 478 A.2d at 355 (holding that an in loco parentis stepparent
is presumed to have assumed the responsibility of maintaining, rearing, and educating the child); In
re Fowler, 288 A.2d 463, 466 (Vt. 1972) (finding that a stepparent must assume the burdens and
duties of support and maintenance of the children to be considered in loco parentis); Boskey, supra
note 59, at 812 (discussing several duties and obligations a parent owes to a child, such as the duties
to provide, protect, and nurture).


58. See Hickenbottom v. Hickenbottom, 477 N.W.2d 8 (Neb. 1991). In Hickenbottom, the
Nebraska Supreme Court stated:
Clearly, a stepfather and his young stepchildren who live in a family environment may
develop deep and lasting mutual bonds of affection. Courts must acknowledge the fact
that a stepfather (or stepmother) may be the only parent that the child has truly known
and loved during its minority. A stepparent may be as devoted and concerned about the
welfare of a stepchild as a natural parent would be.
Id. at 12 (quoting Spells v. Spells, 378 A.2d 879, 881 (Pa. Super. Ct. 1977)).
59. For a detailed discussion of this concept, see generally James B. Boskey, The Swamps of
60. A non-custodial biological or legal parent is usually entitled to visitation rights with his
or her child unless the parent's visitation will endanger the child's general welfare. See Spells, 378
A.2d at 883. In the absence of legislation, courts have used the in loco parentis doctrine to confer
this parental right on stepparents as well. See, e.g., Simmons v. Simmons, 486 N.W.2d 788, 792-93
(Minn. Ct. App. 1992); Gribble, 583 P.2d at 68. Courts have also used in loco parentis to confer
on stepparents the parental right to custody of their children. See, e.g., Seger v. Seger, 547 A.2d 424,
However, one area where the in loco parentis doctrine has failed to produce changes is state
intestacy law, where state schemes generally do not provide stepfamily members with any rights to
inheritance. See generally Margaret M. Mahoney, Stepfamilies in the Law of Intestate Succession and
Wills, 22 U.C. Davis L. Rev. 917 (1989).
61. The court in Rutkowski discussed some of the parental obligations a stepparent found to
be in loco parentis faces:

non-custodial parent is absent from the child's life or deceased.63

In Spells v. Spells,64 a Pennsylvania court formulated the in loco parentis doctrine as follows:

[A] person may "put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. This status, [known as 'in loco parentis'] embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties."65 "The rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child."66

The stepparent or the child has the right to terminate the in loco parentis relationship at will.67

The intent of the stepparent to enter into the relationship and assume the status of a parent is critical to any in loco parentis determination. The lack of stepparent intent to take the place of a missing biological or legal parent and assume, to his or her exclusion and relief, the burdens and duties of parenthood, precludes a finding of in loco parentis.68 Even if the stepparent has assumed some parental duties toward the child, a court will not hold that an in loco parentis relationship exists without proof of intent.69 For example, in Montell v. Department of Social and Health

63. See, e.g., Simmons, 486 N.W.2d at 789 (biological father had no contact with child and had surrendered his parental rights); Hickenbottom, 477 N.W.2d at 10 (stepfather lived with the child since the age of two; biological father had no contact with the child and did not contribute to her support); Drawbaugh v. Drawbaugh, 647 A.2d 240, 240 (Pa. Super. Ct. 1994) (child had not seen his natural father since he was eight months old and defendant stepfather was the only father the child had ever known); Quinn v. Mowv-Quinn, No. 19045, 1996 WL 457296, at *1 (S.D. Aug. 14, 1996) (child born out of wedlock and stepfather was the only father the child had ever known); E.H. v. M.H., 512 N.W.2d 148 (S.D. 1994) (as of date of trial, natural father had not been in contact with the children for 11 years).
64. 378 A.2d 879.
65. Id. at 881-82 (alteration in original) (quoting Commonwealth ex rel. Morgan v. Smith, 241 A.2d 531, 533 (Pa. 1968)).
66. Id. (quoting Young v. Hipple, 117 A. 185, 188 (Pa. Super. Ct. 1922)).
67. See, e.g., Carter v. Brodrick, 644 P.2d 850, 854 (Alaska 1982); Gribble v. Gribble, 583 P.2d 64, 67 (Utah 1978); In re Marriage of Farrell, 835 P.2d 267, 270 (Wash. Ct. App. 1992). Ordinarily, an in loco parentis relationship established during the marriage is seen as ending upon divorce. See Fine & Fine, supra note 5, at 52. This view is misleading because termination by divorce can only be determined in the context of either the stepparent or the child choosing to terminate the status at that time. See Gribble, 583 P.2d at 67. The rights, duties, and obligations arising from the status continue as long as they choose to continue the relationship. See id.
68. See Paquette v. Paquette, 499 A.2d 23, 27 (Vt. 1985); Fine & Fine, supra note 5, at 52.
69. See In re Fowler, 288 A.2d 463, 466 (Vt. 1972) (finding that the stepfather was not in an in loco parentis relationship because he never intended to assume parental duties over the stepchildren, despite the fact that he contributed to the support of his stepchildren during the
Services, a Washington appellate court held that the stepfather was not in loco parentis with his stepchildren, even though they resided with him and their mother, and were financially supported by him for two years while the biological father was incarcerated. The court found that the stepfather never intended to assume a custodial stepparent relationship with his stepchildren and consequently should not have been forced to contribute financially to their support.

Courts require proof of intent as a matter of public policy for fear that stepparents, never intending to assume parental status, may be hesitant to bring stepchildren into their home voluntarily if they could be subjected to parental obligations such as continuing financial support. The intent requirement allows stepparents the freedom to choose the type of relationship they wish to establish with their stepchildren, without the fear of being subjected to obligations and duties they never intended to assume.

As noted above, an in loco parentis finding allows courts to treat stepparents as biological or legal parents by conferring to them parental rights and obligations which they would not otherwise possess. For example, various courts have used the in loco parentis doctrine: (1) to impose support obligations on stepparents, (2) to award post-dissolution visitation to stepparents, and (3) to bypass the parental preference standard in custody disputes. The use of the in loco parentis doctrine in the following analysis of case law demonstrates that some courts have recognized the important status the stepfamily has achieved in our shifting society and the need for the law to react accordingly.

71. See id. at 979.
72. See id.
73. See id.; see also In re Marriage of Holcomb, 471 N.W.2d 76, 79 (Iowa Ct. App. 1991).
74. See supra notes 57-66 and accompanying text.
75. See infra notes 78-82 and accompanying text.
76. See infra notes 83-90 and accompanying text.
77. See infra notes 91-97 and accompanying text.
A. The Use of In Loco Parentis to Impose Parental Rights and Obligations on Stepparents

1. In Loco Parentis and Stepparent Support Obligations

Absent statutory authority to the contrary, stepparents are not obligated to support their stepchildren during the marriage if they choose not to do so. However, a finding of in loco parentis has been held to abrogate this general principle. In In re Marriage of Farrell, the Washington Court of Appeals found that the child's stepfather stood in loco parentis with the child while she lived with her stepfather and mother. Consequently, the court held that the stepfather had a common law duty to support the child for the period in which she lived with him.

2. In Loco Parentis and Stepparent Visitation

Few states have statutes which explicitly confer visitation privileges on stepparents after termination of the marriage. In response, some courts have used the in loco parentis doctrine to protect and maintain the strong emotional bonds which stepparents and children often develop with one another during the course of their relationship. The Minnesota Supreme Court's decision in Simmons v. Simmons exemplifies this approach. The court held that a former stepparent who was in loco

78. See supra notes 17-20 and accompanying text.
81. See id. at 270.
82. See id.; see also Brummitt v. Commonwealth, 357 S.W.2d 37, 39 (Ky. 1962) (holding that a stepfather who was in loco parentis with his stepson had an obligation to support the child financially).

Generally, this support obligation ceases upon termination of the marriage, even if the in loco parentis relationship continues to exist. See, e.g., Drawbaugh, 647 A.2d at 242; Commonwealth ex rel. McNutt v. McNutt, 496 A.2d 816, 817 (Pa. Super. Ct. 1985). But see Miller v. Miller, 478 A.2d 351, 359 (N.J. 1984) (holding that "in appropriate cases, the doctrine of equitable estoppel may be invoked to impose on a stepparent the duty to support a stepchild after a divorce from the child's natural parent").

83. See CAL. FAM. CODE § 3101 (West 1994); KAN. CIV. PROC. CODE ANN. § 60-1616(b) (West Supp. 1996); TENN. CODE ANN. § 36-6-303 (Supp. 1995); VA. CODE ANN. § 20-107.2 (Michie 1995); WIS. STAT. ANN. § 767.245 (West 1993).
84. In Spells v. Spells, 378 A.2d 879 (Pa. Super. Ct. 1977), the court asserted that "when a stepparent is 'in loco parentis' with his stepchildren, courts must jealously guard his rights to visitation." Id. at 883.
with his former stepchild could be entitled to visitation rights if it was in the best interest of the child.  

Some courts use the in loco parentis doctrine to aid in the interpretation of vague statutory language applicable to stepparent visitation cases. For example, in Gribble v. Gribble, a stepfather sought visitation rights with his stepson as part of the divorce decree. The Utah Supreme Court was faced with a statute that gave the court the power to grant visitation rights to "parents, grandparents, and other relatives." The court held that stepparents found to be in loco parentis with their stepchildren are "parents" for the purposes of the statute and can be awarded visitation rights with their former stepchildren.


In jurisdictions where some form of the parental preference standard is recognized, conflict arises when an in loco parentis stepparent and a fit biological or legal parent fight over custody of the child. In this situation, most courts will not deprive the biological or legal parent of custody, despite the stepparent's relationship with the child. However, such a determination could operate against a child's best interest. Recognizing this, a Florida appeals court, in Gorman v. Gorman, affirmed a trial court's decision to award custody of the child to his stepmother, despite the fact that the biological father was a fit parent. The court reasoned that the stepmother was the child's psychological parent and had treated him as her own child for almost the child's

86. See id. at 791.
87. 583 P.2d 64 (Utah 1978).
88. See id. at 65.
89. Id. at 66 (quoting UTAH CODE ANN. § 30-3-5 (1953)). The current version of this statute has replaced "other relatives" with "other member[s] of the immediate family." UTAH CODE ANN. § 30-3-5 (Supp. 1995).
90. See Gribble, 583 P.2d at 68; see also In re Custody of D.M.M., 404 N.W.2d 530, 534-36 (Wis. 1987) (holding that a great-aunt who stood in loco parentis with her niece could be defined as a "parent" where a state statute gave the court authority to grant visitation rights to "parents, grandparents, or great-grandparents").
91. See supra notes 38-42 and accompanying text.
94. See id. at 78.
95. See id.; see also BEST INTERESTS, supra note 5, at 17-20. The "psychological parent" concept finds its legal basis explicitly or implicitly in the in loco parentis doctrine. See Carter v. Brodick, 644 P.2d 850, 853 & n.2 (Alaska 1982).
entire life. The court noted that applying the parental preference standard would have conflicted with the best interest of the child.

B. A Proposal for Ensuring Certainty in In Loco Parentis Determinations

Courts have not developed a standard test to determine whether a "parent-child" relationship exists to the degree that would justify a finding of in loco parentis status. Generally, courts look to the facts and circumstances of each case to determine its existence. However, the importance of protecting the welfare of all children involved in the judicial process demands that courts be provided with a test which they can apply when faced with an in loco parentis issue.

Based on the above analysis of case law, the following approach would provide courts with the means to ensure certainty in their in loco parentis determinations. The existence of in loco parentis should be deemed established if the person alleging its existence satisfies each element of the following four-part test. The first element requires

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96. See Gorman, 400 So. 2d at 78.
97. See id. at 77-78.
98. See, e.g., Simmons v. Simmons, 486 N.W.2d 788, 791 (Minn. Ct. App. 1992) (citing London Guarantee & Accident Co. v. Smith, 64 N.W.2d 781, 785 (Minn. 1954)); In re Fowler, 288 A.2d 463, 466 (Vt. 1972) (citing Rutkowski v. Wasko, 143 N.Y.S.2d 1, 5 (App. Div. 1955)). Some courts look at several factors when undertaking an in loco parentis analysis. In McManus v. Hinney, 151 N.W.2d 44 (Wis. 1967), the Supreme Court of Wisconsin looked at "the children's ages, their dependence upon the person claimed to stand in loco parentis, and whether such person in fact supports the children and exercises the duties and obligations of a natural parent" as relevant factors in any in loco parentis analysis. Id. at 45-46; see also Hush v. Devilbiss Co., 259 N.W.2d 170, 174-75 (Mich. Ct. App. 1977) (using a similar set of factors as the McManus court used and found that the plaintiff's grandmother stood in loco parentis to child since she had taken care of him for an extended period of time and performed the day-to-day tasks of caring for the child when the mother could not do so because of illness).
99. See, e.g., Stockwell v. Stockwell, 775 P.2d 611, 613 (Idaho 1989); Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982) (stating that "[i]n a controversy over custody, the paramount consideration is the best interest of the child").
100. For the purposes of this Note, this proposed test will focus on the stepparent-child relationship. However, application of the in loco parentis doctrine is not limited to stepparent-child relationships. See, e.g., Hadden v. Kero-Sun, Inc., 602 N.Y.S.2d 880, 882 (App. Div. 1993) (grandparent); Vicki N. v. Josephine N., 649 A.2d 709, 711 (Pa. Super. Ct. 1994) (aunt). Therefore, this proposed test should be applied in any situation where a court finds itself faced with the need to make an in loco parentis determination.
101. Both the stepparent or other nonparent and the biological or legal parent can allege the existence of in loco parentis between the nonparent and the child. Natural parents typically seek in loco parentis determinations in an effort to convince courts to impose child support obligations on the nonparent. See In re Marriage of Holcomb, 471 N.W.2d 76, 78 (Iowa Ct. App. 1991); Drawbaugh v. Drawbaugh, 647 A.2d 240, 241 (Pa. Super. Ct. 1994). In comparison, nonparents will
proof that the stepparent accepted the child into their household. A stepparent cannot be deemed *in loco parentis* with a child unless he or she had accepted the child into his or her household at the time the *in loco parentis* relationship was established. Acceptance into the stepparent's household is important because it establishes the base from which the "parent-child" relationship will grow.

Second, the party claiming the existence of *in loco parentis* must show that the stepparent supported the child during the relationship, both financially and emotionally. The assumption of financial support is critical to the analysis because of its development as a fundamental obligation of a parent toward their child.

Parental obligations to provide financial support for minor children are an essential part of the family laws. This principle was recognized as a moral obligation even before it was embodied in law . . .

Support obligations within the nuclear family are an efficient mechanism whereby society assures the economic well-being of its members.

To prove emotional support, evidence of a mutually close and loving relationship between the child and the stepparent must exist. The type of evidence that will satisfy this element is contingent on the facts of each case. For example, length of the relationship cannot be a determinative factor because loving stepparent-child relationships may develop in a short amount of time, while others may not develop at all, even after several years. The emotional support requirement


103. See Loomis v. State, 39 Cal. Rptr. 820, 822 (Dist. Ct. App. 1964); Brummitt v. Commonwealth, 357 S.W.2d 37, 39 (Ky. Ct. App. 1962); Devilbiss, 259 N.W.2d at 174-75; Drawbaugh, 647 A.2d at 243.


106. See, e.g., Simmons, 486 N.W.2d at 790 (finding a close relationship between stepparent and child required by the *in loco parentis* doctrine even though the marriage to the biological mother lasted less than two years).

107. See, e.g., McManus v. Himey, 151 N.W.2d 44, 47-48 (Wis. 1967) (finding that the stepfather was not *in loco parentis* with his stepchildren even though an eight year relationship existed between them).
ensures that courts will find an *in loco parentis* relationship only where a true, emotional "parent-child" relationship exists.

Third, a court must consider the involvement of the stepparent in the day-to-day care of the child. Simply being around the child is not enough. The stepparent must act in such a way that demonstrates he or she has a genuine interest in the everyday well-being and general welfare of the child.\(^{108}\) This element may be satisfied through evidence of educational planning,\(^{109}\) performance of everyday household duties for the child,\(^{110}\) discipline of the child,\(^{111}\) and the performance of advisory functions for the child.\(^{112}\) The function of this element is to give courts greater insight into the extent of the stepparent-child relationship before them. A stepparent that is heavily involved in the day-to-day activities of the child's life is more likely to develop a true "parent-child" relationship with the child than a stepparent who takes little interest in the child's life.\(^{113}\)

Finally, there must be a showing of intent on the part of the stepparent to be in this status with the child. This demands evidence that the stepparent intended to assume the burdens and duties of parenthood; the lack thereof will prevent a finding of *in loco parentis* even if the other three elements of this test are satisfied.\(^{114}\) For example, in *In re Fowler*,\(^{115}\) the Supreme Court of Vermont held that the stepfather was not *in loco parentis* with his stepchildren even though he lived with the children, financially supported them, and exercised some care and guidance over them,\(^{116}\) because the stepfather never intended to enter into that relationship.

This four-element test provides courts with needed focus in applying


\(^{111}\) See *id.*; *Hickenbottom*, 477 N.W.2d at 17.

\(^{112}\) See *Loomis*, 39 Cal. Rptr. at 823.

\(^{113}\) As some commentators have stated:

Unlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development. . . . What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached.

**BEST INTERESTS, supra** note 5, at 12-13.

\(^{114}\) For a discussion of the intent requirement and the policy behind its existence see supra notes 68-73 and accompanying text.

\(^{115}\) 288 A.2d 463 (Vt. 1972).

\(^{116}\) See *id.* at 466.
the nebulous *in loco parentis* doctrine. If each element of the test is satisfied, the court should have no doubt that the stepparent assumed a parental role in the child's life to the extent that the relationship demands recognition and protection by the law. Although such a test clearly limits a court's discretion in applying this doctrine, society's expectation that the legal system will protect the general welfare of children demands that courts have the ability to make the most informed and responsible decisions possible on their behalf.

C. Summary

Without the *in loco parentis* doctrine, many stepparents would be unable to effectuate the best interests of their stepchildren. *In loco parentis* serves as a stopgap, filling holes still existing in stepfamily law by protecting real "parental" relationships between stepparents (as well as other third parties) and stepchildren.117 The doctrine recognizes that a "parent" does not necessarily have to be a biological or legal mother or father. However, as Part IV demonstrates, many courts continue to cling to their outdated ideas about the stepfamily, failing to recognize that in some instances the "step" in stepparent may just be a misleading term of art.

IV. The Stepparent Standing Problem in Dissolution Proceedings

Most states empower their courts to hear child custody matters in several different settings. These settings include guardianship, habeas corpus, dependency and neglect proceedings, and marriage dissolution proceedings.118 This Note focuses on child custody determinations within dissolution proceedings.

Courts do not possess unlimited power to hear custody disputes within dissolution proceedings. Before a court can decide a custody issue it must first have jurisdiction to hear the dispute.119 A finding of no

117. See Boskey, *supra* note 59, at 823 (arguing that where an "individual is meeting or has met a substantial proportion of the parental duties, it is appropriate that he or she should be recognized as an effective parent of the child, and that both the child and that person should acquire the mutual rights that attach to parenthood").
118. See Mahoney, *supra* note 10, at 72.
Stepparent standing jurisdiction denies standing to custody disputants and can act as an absolute bar to custody claims within the proceeding. Stepparents, in particular, are affected by such a finding since dissolution jurisdictional statutes do not deal expressly with stepchildren. Divorcing stepparents suing for custody of their stepchildren face potential problems in states which: (1) have adopted the Uniform Marriage and Divorce Act ("UMDA") or (2) have enacted legislation that only authorizes courts to make custody determinations as to "children of the marriage."123

A. Stepparent Standing Under Custody Jurisdiction Statutes Adopted from the UMDA

The UMDA was approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1970 in an attempt to stimulate reform of state divorce laws.124 Section 401(d) of the Act details the jurisdiction requirements of child custody hearings within divorce proceedings as follows:

(d) A child custody proceeding is commenced in the [________] court:  
(1) by a parent, by filing a petition 
   (i) for dissolution or legal separation; or 
   (ii) for custody of the child in the [county, judicial district]  
   in which he is permanently resident or found; or  
(2) by a person other than a parent, by filing a petition for 
   custody of the child in the [county, judicial district] in which he  
   is permanently resident or found, but only if he is not in the physical 
   custody of one of his parents.125

States which have adopted custody jurisdiction statutes of this type include Arizona,126 Colorado,127 Illinois,128 Kentucky,129 Minneso-
Stepparents seeking custody of stepchildren in these jurisdictions face a daunting task of achieving standing, unless the child is not in the physical custody of one of its biological or legal parents.

For example, in Olvera v. Superior Court, a stepmother petitioned for custody of her stepdaughter during a dissolution proceeding between herself and the child's biological father. The Arizona Court of Appeals reversed the trial court's grant of standing to the stepmother. The court held that the custody jurisdiction statute gave Arizona courts power to grant standing to stepparents only when the stepchild is not in the physical custody of one of its biological or legal parents. Compare Unif. Marriage and Divorce Act § 401(d), 9A U.L.A. 550, with Minn. Stat. Ann. § 518.156. Although clearly adopted from the UMDA, this statute is different in one significant way. Under the Minnesota statute, when a nonparent commences a custody proceeding, that person does not have to prove that the child is not in the physical custody of one of his parents. Compare Unif. Marriage and Divorce Act § 401(d), 9A U.L.A. 550, with Minn. Stat. Ann. § 518.156. See Mont. Code Ann. § 40-4-211 (1995).

A physical custody determination is not based solely on physical possession of the child at the time custody litigation is commenced. It depends on who is providing for the care, custody, and welfare of the child prior to the initiation of the custody proceeding. See In re Marriage of Nicholas, 524 N.E.2d 728, 731-33 (Ill. App. Ct. 1988).

Consequently, a stepparent must pass two difficult hurdles before a court will implement a best interest analysis: (1) standing and (2) proving the unfitness of the custodial parent by clear and convincing evidence. See id. In comparison, the UMDA contains only one hurdle for stepparents to pass, since the Act requires courts to apply a straight best interest analysis once the nonparent is able to achieve standing. See Unif. Marriage and Divorce Act § 402, 9A U.L.A. 561. The protections inherent in the parental preference standard have already been incorporated in § 401(d). See id. § 401 cmt., 9A U.L.A. 550.

See id. at 926.

not in the physical custody of one of his or her parents.\footnote{See Olvera, 815 P.2d at 929.} Since the biological father had physical custody of his daughter when the stepmother filed the custody petition, the stepmother lacked standing to sue for custody.\footnote{See id. at 926.} The court ignored the fact that the stepmother had allegedly been the girl's primary caretaker since the age of two,\footnote{See KY. REV. STAT. ANN. § 403.420 (Michie 1984).} which may have resulted in a parent-child relationship between them. If such a relationship did exist, it may have been in the best interest of the child to grant custody to the stepmother. However, by denying standing, the court never addressed this issue.

The potential problems stepparents can encounter with UMDA custody legislation were demonstrated once again in Simpson v. Simpson.\footnote{See Simpson, 586 S.W.2d at 36.} In this case, a stepmother filed for divorce from her second husband and requested that the court grant her custody of her stepson. The Kentucky Supreme Court, interpreting the jurisdiction statute,\footnote{See KY. REV. STAT. ANN. § 403.420(4)(b).} held that the stepmother had standing to commence the custody proceeding since the child was residing with her, and not his or her father, when she filed the petition.\footnote{See id.} However, it is highly unlikely that the court would have granted standing if the child had been residing with the father when the petition was filed, since stepparents and other third parties in Kentucky do not have standing when the child is in the custody of one of his or her biological or legal parents.\footnote{See KY. REV. STAT. ANN. § 403.420(4)(b).} The court found that the stepmother acted as the child's mother ``from the time he was seventeen months old until he was removed from her care by his father almost six years later.''

Hypothetically, had the

\[\text{Stepparent Standing}\]

\[\text{in loco parentis}\] with the child.\footnote{See id.}
father’s fitness been an issue, the stepmother, who had treated the child as her own for six years, would not have been afforded the opportunity to question the father’s fitness as a parent within the divorce proceeding. As a result of the court’s reasoning, the child’s physical and emotional well-being may be harmed.

B. Stepparent Standing Under “Children of the Marriage” Statutes

The more common custody jurisdiction legislation for dissolution proceedings are “children of the marriage” statutes. A typical “children of the marriage” statute looks very much like California’s jurisdiction statute which states the following:

In a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court has jurisdiction to inquire into and render any judgment and make orders that are appropriate concerning the following:

\[ \ldots\]

(b) The custody of minor children of the marriage.

Many states have enacted jurisdiction statutes similar to California’s, but have yet to apply their statute in cases involving stepparent custodial rights. However, the mere existence of these statutes leaves open the possibility that denial of standing could become more widespread in the future. “Children of the marriage” statutes provide easy answers for courts that still cling to the derivative theory of the stepparent relationship. Courts can invoke the plain meaning reading of this statute and claim jurisdiction only over children born of the current marriage. The Supreme Court of Connecticut came to this conclusion in

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147. Kentucky courts use the parental preference standard in custody proceedings between nonparents and biological or legal parents and will not engage in a best interest analysis unless the custodial parent is shown to be unfit to retain custody. In this case, the stepmother conceded that the biological father was a fit parent and the court held so as a matter of law. See id. at 35.


150. See supra notes 12-14 and accompanying text.
Morrow v. Morrow.151 The stepfather in Morrow treated his wife’s daughter as his own; he even lied under oath that the child was his so that her surname could be changed to Morrow.152 The trial court granted standing to the stepfather. The court held that his declaration of paternity fixed the child’s status as his legitimate daughter by estoppel; thereby making her a “child of the marriage.”153 On appeal, the supreme court gave a literal construction to the jurisdiction statute154 and reversed the trial court’s holding. The court found that if the child was not literally born to the parties during the marriage it could only extend jurisdiction: (1) if the child was adopted by both parties; or (2) if the child was the biological child of one of the parties subsequently adopted by the other party.155 Since neither exception applied in this case, the court denied jurisdiction to the stepfather,156 even though he treated the child as his own for six years.157

Some courts go to considerable lengths to deny standing to stepparents. For example, in In re Marriage of Goetz and Lewis158 the stepfather asked for joint and physical custody of his stepson, with whom he resided for most of the child’s life. He argued to the California Court of Appeals that he had standing to be heard on the custody issue based on a stepparent visitation statute.159 The court disagreed, holding that nothing in the statute could lead one to believe that it was “intended to confer jurisdiction over anything other than a stepparent’s visitation rights.”160 The stepfather’s next argument was that the court had the power to grant him standing, because it had the statutory authority in any custody proceeding to “‘make such order[s] for the custody of the child during minority as may seem necessary and proper.’”161 The court

151. 345 A.2d 561 (Conn. 1974).
152. See id. at 562.
153. Id.
154. See CONN. GEN. STAT. ANN. § 46b-58.
155. See id.; Morrow, 345 A.2d at 562-63.
156. See Morrow, 345 A.2d at 561-62.
157. See id. at 563.
158. 250 Cal. Rptr. 30 (Ct. App. 1988).
159. See id. at 31. California is one of the few states that has statutorily provided visitation rights specifically for stepparents. The current version of this statute states that, “[n]otwithstanding any other provision of law, the court may grant reasonable visitation to a stepparent, if visitation by the stepparent is determined to be in the best interest of the minor child.” CAL. FAM. CODE § 3101 (West 1994).
160. Goetz, 250 Cal. Rptr. at 32.
161. Id. (quoting CAL. CIV. CODE § 4600(a) (West 1983) (repealed 1994)). This statute was re-enacted as CAL. FAM. CODE § 3022 (West 1994).
acknowledged that this statute gave it broad "substantive discretion." The court found, however, that custody jurisdiction in marital dissolution proceedings was governed by a different statute which provided the court with power only over minor children who are children of the marriage. Since the child was not a "child of the marriage," the court held that it could not give the stepfather standing to sue for custody. In essence, the court ignored the fact that the stepfather had fulfilled a parental role for virtually the entire life of the child.

Goetz's reasoning was upheld by the California Court of Appeals in the intriguing case of In re Marriage of Hinman. In Hinman, the biological mother appealed the trial court's award of joint custody of two children to her husband, arguing that the court had no jurisdiction over them since her husband was not the biological father. The court held that the biological mother had invoked the court's jurisdiction over the stepchildren by naming them as "children of the marriage" on her divorce petition. This action estopped her from challenging the custody order on jurisdictional grounds. However, the court made it very clear that under normal circumstances it had no statutory basis to extend jurisdiction over the stepchildren due to the restricting "children of the marriage" language of the jurisdiction statute.

C. The Problems Caused by Jurisdictional Restrictions

Withholding standing to stepparents to sue for custody of their stepchildren in dissolution proceedings can lead to serious repercussions on stepparents, stepchildren, and the judicial system as a whole.

The majority of jurisdictions apply some form of the parental preference standard to third-party custody disputes, requiring that the custodial biological or legal parent be proven unfit or that some proof of...
unfitness be presented before a court can examine what would be in the best interest of the child.\textsuperscript{170} When a court holds that it has no jurisdiction to grant standing to stepparents, it allows a biological or legal parent, as a matter of law, to retain custody of his or her child.\textsuperscript{171} Thus, divorce courts are left without means to discover a biological or legal parent's unfitness, even though in theory, an unfit parent is not entitled to retain custody of its children.\textsuperscript{172}

For example, in \textit{Hartshorne v. Hartshorne},\textsuperscript{173} an Ohio appeals court, faced with a "children of the marriage" statute,\textsuperscript{174} found that under normal circumstances it would not be able to invoke its jurisdiction over the stepchildren because the children were not born of the marriage.\textsuperscript{175} The trial court found evidence that the biological mother was unfit and awarded temporary custody of the stepchildren to the state welfare department, pending the disposition by the juvenile court.\textsuperscript{176} The court of appeals affirmed on a procedural technicality.\textsuperscript{177} However, had that technicality not arisen, the court would have had no choice but to reverse the lower court's holding since the trial court did not have the authority to make orders concerning the children not born of the marriage. As a result, the court's only option would have been to return the children to the custody of the mother until the juvenile court determined the issue of her parental fitness. This is quite a dangerous result being that the trial court already found the mother unfit.

This problem exists under statutes derived from the UMDA as well. For example, suppose X, the biological mother, sues Y, the stepfather, for divorce. Y petitions the divorce court for custody of his stepchild, Z, arguing that he can prove that X is an unfit parent. However, at the time of the petition, Z is in X's custody. Courts interpreting their state's

\textsuperscript{170} See supra notes 37-42 and accompanying text.
\textsuperscript{171} See supra Part IV.A-B.
\textsuperscript{173} 185 N.E.2d 329 (Ohio Ct. App. 1959).
\textsuperscript{174} See \textit{OHIO REV. CODE ANN.} § 3105.21 (Anderson Supp. 1995).
\textsuperscript{175} \textit{See Hartshorne,} 185 N.E.2d at 330; \textit{see also} State \textit{ex rel.} McCarroll v. Marion County Superior Court, 515 N.E.2d 1124 (Ind. 1987) (holding that "child of the marriage" language in Indiana's jurisdiction statute prevented the court presiding over the dissolution proceeding from exercising custody jurisdiction over the stepson, despite allegations that the child was in danger due to the mother's neglect and erratic behavior).
\textsuperscript{176} \textit{See Hartshorne,} 185 N.E.2d at 330.
\textsuperscript{177} The mother had not complied with a law that required her, as an appellant, to give a bond approved by the court from whose decree the appeal is being taken. The court held that the act of giving bond was "a prerequisite to the perfecting of the appeal and is the only method by which an appeal in these domestic relation cases may be effected." \textit{Id.} at 331.
version of UMDA § 401(d) would probably hold that Y has no standing, since X had custody of Z when the custody petition was filed. This would force Y to commence a separate custodial action pursuant to the stricter standards of that state’s juvenile court act. However, the extra time needed to commence the separate proceeding could be detrimental to the child, since the child may be endangered if left in the care of an unfit parent longer than necessary.

As discussed above, the primary reason courts deny standing to stepparents is to prevent intrusion on the custodial rights of biological and legal parents. However, in doing so, courts create an absolute preference for biological or legal parents in custody proceedings. Biological and legal parents of minor children have the constitutional right to the custody of such children. Their custodial rights, however, are sufficiently protected by existing substantive standards applicable to third-party custody disputes which, by themselves, create substantial obstacles for stepparents to overcome. This right is checked by the courts’ power to take custody away if the biological or legal parent is found to be an unfit parent. Denial of standing snatches this checking power away from a court.

A court’s refusal to grant standing to any stepparent can operate against the best interest of a stepchild. The paramount consideration in any custody dispute is supposed to be the best interest of the child. As the rate of remarriage increases, the potential exists that more children will develop meaningful emotional bonds with their stepparents.

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179. The commentary to UMDA § 401 states:
Subsection (d)(2) makes it clear that if one of the parents has physical custody of the child, a non-parent may not bring an action to contest that parent’s right to continuing custody . . . . If a non-parent . . . wants to acquire custody, he must commence proceedings under the far more stringent standards for intervention provided in the typical Juvenile Court Act.

180. See supra notes 9-10 and accompanying text.
181. See Mahoney, supra note 10, at 73.
183. See Mahoney, supra note 10, at 73; see also supra notes 33-51 and accompanying text.
186. See CENSUS, supra note 2, at 5.
These emotional bonds may become so strong that upon termination of the marriage, it may be in the best interest of the child to be placed in the custody of the stepparent and not the biological or legal parent. Commentators have noted that "[e]ach child's development unfolds in response to the environmental influences to which he is exposed. His emotional, intellectual, and moral capacities prosper, not in a void, and not without conflict, within his family relationships, and these determine his social reactions." Depending on the factual situation, vesting custody in a stepparent may be the best option toward furthering a child's emotional development.

Extraordinary circumstances may also exist that would justify an award of custody to a stepparent based on the best interest of the child. In these cases, however, denial of standing bars an analysis of the best interest of the stepchild. A Florida appeals court recognized this problem in Golstein v. Golstein, by reversing the lower court's refusal to grant a stepfather standing to petition for custody of his stepson. The appellate court held that its custody jurisdiction was not restricted to the "minor children of the parties" since Florida's circuit courts have "inherent jurisdiction to entertain matters pertaining to custody and enter any orders appropriate to that child's welfare."

Not all courts follow Golstein's analysis, however. In Olvera v. Superior Court, an Arizona appeals court, interpreting a UMDA statute, held that it had no power to grant a stepmother standing to

188. BEST INTERESTS, supra note 5, at 10.
189. See, e.g., Bennett v. Jeffrey, 356 N.E.2d 277, 284 (N.Y. 1976) (finding the protracted separation of the mother from the child, combined with the mother's lack of an established household, her unwed state, and the child's attachment to her nonparent custodian, constituted extraordinary circumstances warranting an examination of the best interest of the child); In re Marriage of Allen, 626 P.2d 16, 21 (Wash. Ct. App. 1981) (finding that the child's physical handicap constituted an extraordinary circumstance, and the stepmother's ability to help the child deal with the handicap justified a custody award to the stepmother upon divorce based on the child's best interest, despite the acknowledged fitness of the natural father).

192. Golstein, 442 So. 2d at 330. But see Phillips v. Phillips, 156 P.2d 199, 200-03 (Or. 1945) (holding that the court did not have jurisdiction to provide the wife with custody of her stepchildren because they were not "children of the marriage," even though the record was full of allegations of physical and emotional abuse of the children by the natural father).
194. See ARIZ. REV. STAT. ANN. § 25-311(B) (West 1991).
sue for custody of her stepdaughter,\textsuperscript{195} even though she alleged that she was the child's primary caretaker for most of the child's life.\textsuperscript{196} Courts exercising similar reasoning must realize that denying standing to stepparents is potentially harmful to the best interest of the child. Stepparents who treat their stepchild as their own are wrongfully treated in the same manner as those stepparents who have never developed meaningful relationships with their stepchildren. As a result, stepparents are prevented from petitioning for custody due solely to their legal status, regardless of the role they may play in the child's life.

The problems caused by denying standing are not limited in effect to stepchildren, and biological or legal parents. Denial of standing can have adverse effects on a state's entire judicial system, as it forces stepparents who refuse to give up the fight for custody to commence proceedings in other forums.\textsuperscript{197} However, the existence of other forums is not a justifiable reason for withholding jurisdiction in the dissolution proceeding. The standards for custodial intervention in these other forums are far more stringent than those found in dissolution proceedings.\textsuperscript{198} Stepparents already face substantial hurdles in dissolution proceedings in trying to overcome substantive third-party custody standards once they achieve standing.\textsuperscript{199} In addition, forcing the stepparent to commence a separate proceeding does not serve the purposes of judicial economy. The court system could just as easily deal with the custody issue within the existing dissolution proceeding.

\textbf{V. SOLVING THE STEPPARENT STANDING PROBLEM}

Denial of standing to stepparents who do not establish close relationships with their stepchildren is not a serious problem for two reasons. First, common sense dictates that stepparents who are not close with their stepchildren are very unlikely to even want custody after termination of the marriage. Second, the lack of closeness or emotional ties between a child and a stepparent infers that it would not be in the child's best interest to be in their custody. Therefore, conferring standing to all stepparents would be unnecessary, judicially inefficient, and beyond the intent of the legislatures which enacted jurisdiction statutes.\textsuperscript{200}

\begin{itemize}
  \item \textsuperscript{195} See Olvera, 815 P.2d at 928-29.
  \item \textsuperscript{196} See id. at 926.
  \item \textsuperscript{197} See supra notes 118, 179 and accompanying text.
  \item \textsuperscript{199} See supra notes 33-51 and accompanying text.
  \item \textsuperscript{200} See Mahoney, supra note 10, at 71.
\end{itemize}
However, the changing dynamics of the American family have generated a growing number of opportunities for stepparents and stepchildren to develop meaningful and lasting emotional relationships with each other. Denial of standing to these stepparents, in essence, fails to acknowledge the reality of that premise. Absent legislative action, it is in the hands of the courts to interpret custody jurisdiction statutes in a way that protects both the stepparent and the stepchild who have established close emotional bonds. The in loco parentis doctrine provides courts with the means to do so.

Stepparents found to be in loco parentis with their stepchildren should have the right to petition the court for custody within a dissolution proceeding. As established above, a finding of in loco parentis allows courts to treat stepparents as if they were the biological or legal parents by conferring parental rights and obligations on them. If stepparents hold themselves out like parents toward a stepchild, a court should treat them as such by granting them the opportunity to sue for custody if they so choose. Thereafter, for stepparents to win custody, they must successfully overcome whatever substantive standard the court applies in third-party custody disputes.

Using the in loco parentis doctrine to confer standing on stepparents solves the problems caused by the denial of standing to all stepparents in dissolution proceedings. First, it gives courts the opportunity to confront issues dealing with the custodial biological or legal parent’s fitness, should any arise in a custody hearing. Second, it does not allow courts to create an absolute preference for the custodial biological or legal parent since an in loco parentis stepparent would have the opportunity to present his or her case. Third, this jurisdiction standard would serve the child’s best interest; the paramount interest in any custody proceeding.

This rule recognizes that there are circumstances

201. See Census, supra note 2.
203. See Mahoney, supra note 10, at 71.
204. See supra notes 60-66 and accompanying text.
205. See, e.g., Hickenbottom, 477 N.W.2d at 16-17.
206. See supra notes 33-51 and accompanying text.
207. See supra Part IV.C.
208. See, e.g., Stockwell v. Stockwell, 775 P.2d 611, 613 (Idaho 1989) (“The paramount consideration in any dispute involving the custody and care of a minor child is the child’s best interests.”); Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982) (“In a controversy over custody,
where the best interest of the child may dictate a custody award to the stepparent, despite the custodial rights of the biological or legal parent. One court noted:

The day is long past . . . when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody.

Denial of standing does not allow a court to even reach the question of what is in the best interest of a stepchild. Finally, this standard promotes judicial economy. Where the custodial biological or legal parent’s skills fall below legal standards for retaining custody, an in loco parentis stepparent would not need to commence a separate proceeding in another court. The divorce court would deal with the custody issue in the dissolution proceeding. At the same time, this rule does not open the floodgates to custody litigation. Stepparents who are determined not to be in loco parentis with their stepchild would still be unable to make substantive arguments for custody.

Conceivably, in loco parentis stepparents could use their ability to sue for custody as a coercive tool in the hopes of extracting concessions from their spouses in other areas relating to the divorce. Yet, this threat is not convincing enough to force courts to block the efforts of every stepparent from achieving standing. Despite its moral implications, using the threat of custody litigation as a coercive tool toward reaching

the paramount consideration is the best interest of the child . . . .")

210. Id. at 28 (quoting Bennett v. Jeffreys, 356 N.E.2d 277, 281 (N.Y. 1976)).
211. It is important to note that this standard is only to apply in divorce proceedings where dissolution jurisdiction statutes need to be interpreted. In cases where other parties not involved in the marriage want custody, different proceedings must be commenced which are governed by separate statutes and where jurisdictional requirements may be different than those of dissolution proceedings. See supra notes 118, 179 and accompanying text. Therefore, there is no reason to believe that courts would apply this jurisdictional standard when other persons not a party to the marriage, such as aunts, uncles, or grandparents, seek custody of the children.

212. One court held that any stepparent has standing to sue for custody of his or her stepchildren in a dissolution proceeding. See Stamps v. Rawlins, 761 S.W.2d 933, 935 (Ark. 1988). The court did so despite the governing statute which stated that the court only had custody jurisdiction in divorce proceedings over “children of the marriage.” See ARK. CODE ANN. § 9-13-101 (Michie 1993).

a more favorable resolution is legal and has been used for years by biological or legal parents while in the process of dissolving their marriage.\textsuperscript{214} From a legal standpoint, coercion should not be looked at any differently when dealing with an \textit{in loco parentis} stepparent since his or her status allows courts to impose obligations and duties on them normally reserved for biological or legal parents. The threat of coercion in divorce cases involving an \textit{in loco parentis} stepparent is no greater than in divorce cases involving biological or legal parents.\textsuperscript{215} Until lawmakers propose better solutions, the coercion dilemma will remain a constant problem in all divorce proceedings.\textsuperscript{216}

As noted above,\textsuperscript{217} the issue of stepparent standing typically arises when the jurisdiction statute is one derived from UMDA § 401, or is a “children of the marriage” statute. Since each has its own jurisdictional requirements, the \textit{in loco parentis} stepparent standing rule has to be applied in different ways to fit within the framework of each statute.

\textbf{A. Using the In Loco Parentis Doctrine to Confer Standing Under UMDA Statutes}

Presently, in most UMDA jurisdictions, the only way a stepparent is certain to get standing to petition for custody within a dissolution proceeding is when the stepchild is not in the physical custody of one of his biological or legal parents.\textsuperscript{218} Therefore, stepparents who have established meaningful and lasting bonds with their stepchildren may have no recourse if one of the biological or legal parents has physical custody when the stepparent files the custody petition.\textsuperscript{219} To resolve this problem, this Note suggests that an \textit{in loco parentis} stepparent should be treated as a “parent” for the purposes of UMDA-derived custody jurisdiction statutes. To date, Washington, in \textit{In re Marriage of Allen},\textsuperscript{220} is the only state that has adopted this approach. In \textit{Allen}, the

\begin{itemize}
\item \textsuperscript{214} See id.
\item \textsuperscript{215} See, e.g., \textit{In re Marriage of Holcomb}, 471 N.W.2d 76, 78 (Iowa Ct. App. 1991); Gribble v. Gribble, 583 P.2d 64, 67 (Utah 1978).
\item \textsuperscript{216} See Altman, supra note 213, at 527-29 (asserting that settlement agreements in divorce proceedings should be submitted to courts one stage at a time in order to avoid potential coercive activity).
\item \textsuperscript{217} See supra Part IV.A-B.
\item \textsuperscript{218} See, e.g., ARIZ. REV. STAT. ANN. § 25-331(B)(2) (West 1991); 750 ILL. COMP. STAT. ANN. 5/601(b)(2) (West Supp. 1996); KY. REV. STAT. ANN. § 403.420(4)(b) (Michie 1984); MONT. CODE ANN. § 40-4-211(4)(b) (1995).
\item \textsuperscript{220} 626 P.2d 16 (Wash. Ct. App. 1981).
\end{itemize}
stepmother filed for divorce from the custodial biological father and petitioned the court for custody of her deaf stepson. She tried to adopt the child in the past but was unsuccessful due to the objection of the biological mother. During the four-year marriage, the stepmother greatly assisted her handicapped stepson in his intellectual and social development, while the biological father’s attitude was described as “apathetic and fatalistic.”

Finding the father unsuitable, the trial court held that the stepmother had standing to bring the custody petition, and awarded custody to her as well. On appeal, the Washington Court of Appeals affirmed the grant of standing to the stepmother but on an alternate ground. The court held that stepparents can be defined as a “parent” under the state’s custody jurisdiction statute when they are found to stand in loco parentis in a matter of child custody. After examining the facts, the court found the stepmother stood in loco parentis with her stepson and granted her standing to sue for custody within the dissolution proceeding as a parent as opposed to a nonparent.

In loco parentis has been used to expand the meaning of “parent” in other contexts outside of UMDA legislation. In In re Custody of D.M.M., the Wisconsin Supreme Court used the in loco parentis doctrine to confer visitation rights on a great-aunt who had guardianship of her grandniece for the previous six years. A governing statute provided that “[a] parent is entitled to reasonable visitation rights unless the court finds ... that visitation would endanger the child’s physical, mental or emotional health.” The court held that absent a statutory definition, they were bound to define “parent” as it was commonly and ordinarily understood. After referring to a standard dictionary definition,

221.  Id. at 19.
222.  See id. at 20. Washington’s UMDA jurisdictional statute gives standing to stepparents when “the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.” WASH. REV. CODE ANN. § 26.09.180(1)(b) (West 1984) (repealed 1987). This statute is now codified at WASH. REV. CODE ANN. § 26.10.030 (West Supp. 1996).
223.  See Allen, 626 P.2d at 21. This statute was renumbered as WASH. REV. CODE ANN. § 26.09.180(1)(a) (repealed 1987)). This statute was renumbered as WASH. REV. CODE ANN. § 26.10.030(1) (West 1994).
224.  See Allen, 626 P.2d at 21. One commentator argues that courts should not stop at defining in loco parentis stepparents as “parents” for the purposes of jurisdiction but should allow such stepparents to bypass the parental rights standard as well. This would allow courts to apply a straight best interest standard in these cases. See Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459, 505-06 (1990).
225.  See Allen, 626 P.2d at 21.
226.  404 N.W.2d 530 (Wis. 1987).
227.  Id. at 534 (quoting WIS. STAT. ANN. § 767.245(1) (repealed 1988) (emphasis added)).
the court held that a parent can be defined as “a person standing in loco parentis although not a natural parent.” 228 Although the aunt was granted visitation rights on other grounds, 229 it is significant that the court was willing to acknowledge that a person standing in loco parentis can come within the accepted definition of parent. 230

The Idaho Supreme Court in Stockwell v. Stockwell 231 followed a similar chain of reasoning. There, the court held that the stepfather did have to overcome the parental preference standard in his suit for custody of his stepdaughter. The court was free to decide the custody issue solely on the child’s best interest since he had already established a “substantial custodial and parental relationship” with the child. 232 In essence, the court treated him as a “parent” by not subjecting him to the parental preference standard, a substantive custody standard typically applied where a stepparent or other third-party brings suit for custody of the child in question. 233

Defining an in loco parentis stepparent as a “parent” falls within the policies of the UMDA. The UMDA purposes and rules of construction are as follows:

This Act shall be liberally construed and applied to promote its underlying purposes, which are to: . . .

(2) strengthen and preserve the integrity of marriage and safeguard family relationships; . . .

(4) mitigate the potential harm to the spouses and their children

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228. Id. (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1967)).
229. The court’s holding was actually based on a detailed analysis of the visitation statute’s legislative history from which they concluded that the legislature intended to permit visitation awards to nonparents when it was in the child’s best interest. See In re Custody of D.M.M., 404 N.W.2d at 536-37. Appearing to agree with this analysis, the Wisconsin legislature amended this statute to include the following language:

[Upon petition by a . . . stepparent . . . who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child.
230. For a similar conclusion, see Gribble v. Gribble, 583 P.2d 64, 68 (Utah 1978) (holding that an in loco parentis stepparent can be defined as a “parent” for the purposes of construing a visitation statute).
231. 775 P.2d 611 (Idaho 1989).
232. Id. at 614.
233. See supra notes 33-48 and accompanying text.
caused by the process of legal dissolution of marriage; . . . 234

Granting standing to stepparents in loco parentis with their stepchildren gives stepparents the opportunity to maintain deep, strong, emotional, and meaningful bonds with their stepchildren which developed while the stepfamily was intact. These bonds might otherwise be lost if stepparents are denied the opportunity to even be heard in court. Therefore, broadening the definition of “parent” certainly serves the UMDA goal of “safeguard[ing] family relationships.” 235 In addition, this rule mitigates the harm to stepchildren involved in a divorce since it provides in loco parentis stepparents with a mechanism that may allow them the opportunity to remain a significant part of a stepchild’s life.

The Prefatory Note to the UMDA states that “[t]he custody and support provisions of the Act emphasize the interest of children rather than the wishes of their parents.” 236 The use of in loco parentis to expand the definition of “parent” by the courts in Allen and D.M.M. is a recognition that the function of a parent does not necessarily have to be fulfilled by the biological or legal parent themselves. When a stepparent assumes a parental role in the stepchild’s life, the child’s best interest may dictate that the relationship continue after termination of the marriage. Absent legislative changes, the in loco parentis doctrine is the best available option for courts to protect the child’s best interests and the stepparent’s interest as well.

B. Using the In Loco Parentis Doctrine to Confer Standing Under “Children of the Marriage” Statutes

A strict interpretation of a “children of the marriage” statute does not allow courts to invoke their custody jurisdiction over stepchildren in dissolution proceedings. 237 To protect relationships between stepparents

235. Id. § 102(2).
237. See, e.g., In re Marriage of Goetz and Lewis, 250 Cal. Rptr. 30, 32 (Ct. App. 1988); Morrow v. Morrow, 345 A.2d 561, 563 (Conn. 1974); State ex rel. McCarrall v. Marion County Superior Court, 515 N.E.2d 1124, 1125 (Ind. 1987); Phillips v. Phillips, 156 P.2d 199, 203 (Or. 1954); see also In re Marriage of Hinman, 8 Cal. Rptr. 2d 245, 247-48 (Ct. App. 1992) (holding that, although in most cases the court had no jurisdiction over the stepchildren, here the mother invoked the court’s jurisdiction by listing the children as “children of the marriage” on her divorce petition); Hartshorne v. Hartshorne, 185 N.E.2d 329, 330-31 (Ohio Ct. App. 1959) (holding that the court normally would not have jurisdiction to make custody decrees in dissolution proceedings over stepchildren, but they could not reverse the lower court’s grant of standing to the stepparent due to a procedural technicality in the mother’s appeal).
and stepchildren who have formed lasting emotional bonds, this Note suggests that once a court finds that a stepparent is in loco parentis with their stepchild, the stepchild becomes a “child of the marriage” for the purposes of the jurisdiction statute. To date, only three jurisdictions have adopted this approach. The first was Kansas in State v. Taylor. The Kansas Supreme Court found it had jurisdiction over the stepchild, despite a statute which allowed courts to make custody provisions in divorce proceedings for “‘minor children of the marriage.’” The court based its holding on the finding that the stepmother stood in loco parentis with the child. She had received the child into her home and assumed responsibility for its care during the marriage. In the court’s mind, “the expression . . . ‘minor children of the marriage,’ fairly interpreted, included the infant in question . . . .” The court in Anderson v. Anderson affirmed the ruling which held that the eleven year-old stepchild was a “‘minor child[] of the marriage’” for purposes of custody jurisdiction since the stepmother stood in loco parentis with her for the entire marriage.

Alaska followed the reasoning of Taylor and Anderson in Carter v. Brodrick. In Carter, the Alaska Supreme Court interpreted its jurisdiction statute to define a stepchild as a “child of the marriage” where the stepparent had assumed the status of in loco parentis. Although the stepfather only requested visitation, the court clearly extended its reasoning to include stepparent custody as well. The court noted, “relationships that affect the child which are based upon psychological rather than biological parentage may be important enough to protect through custody . . . to ensure that the child’s best interests are being served.”

238. 264 P. 1069 (Kan. 1928).
239. Id. at 1070.
240. See id.
241. Id.
243. Id. at 350-51.
244. 644 P.2d 850 (Alaska 1982).
245. Id. at 852 (citing ALASKA STAT. § 09.55.205 (renumbered as ALASKA STAT. § 25.24.150 (Michie 1995))).
246. See id. at 855.
247. Id. The court also held that “where a stepparent has assumed the status of in loco parentis, a stepchild is a ‘child of the marriage’ within AS 09.55.205” thus providing additional evidence that the court meant for their holding to apply to custody cases as well. Id. (now codified at ALASKA STAT. § 25.24.150 (Michie 1995)) (emphasis added). The statute allowed, and still allows, courts to make custody and visitation orders for any “child of the marriage.” ALASKA STAT. § 25.24.150.
A Vermont court also used the *in loco parentis* doctrine to grant stepparent standing in *Paquette v. Paquette*. In *Paquette*, the stepfather petitioned the court for custody of his twelve-year-old stepson upon filing for divorce from the mother. Faced with a “children of the marriage” statute, the court cited to *Taylor and Carter* as support for holding that stepchildren found to be in an *in loco parentis* relationship with their stepparent are “child[ren] of the marriage” for the purposes of the jurisdiction statute. The court justified its holding by noting that the rights and liabilities arising out of the *in loco parentis* relationship are exactly the same as parent and child. Therefore, it was appropriate for them to define *in loco parentis* stepchildren as “children of the marriage.”

The standing requirements and interpretations of the UMDA and “children of the marriage” statutes are indicative of courts’ and legislatures’ continuous attachment to the traditional derivative theory once thought to govern the steprelationship. This stubborn, idealistic thought process continues, despite the growing opportunities for stepparents and stepchildren to develop mutual, long-lasting, emotional bonds, bonds which may be even stronger than those the child has with his or her biological or legal parent. The Arizona Court of Appeals, in the stepparent visitation case of *Bryan v. Bryan*, recognized this possibility:

The ties that cement the members of a family into a unit of solidarity is (sic) not necessarily the result of blood relation, but they arise out of and are formed by an intimate association sharing with each other the joys and sorrows, the fears and hopes, the successes and failures of each and all. There is a deep seated desire in the breast of every person, whether child or adult, to have some one care about their welfare to whom they may anchor and find peace and contentment in the knowledge that they do care.

To this point, our legal system’s response to the modern realities of the American family as described above in *Bryan* can only be classified

249. *Id.* at 26 (quoting VT. STAT. ANN. § 652(a) (repealed 1985) (now codified at VT. STAT. ANN. tit. 15, §665 (1990))).
250. *Paquette*, 499 A.2d at 26; *see also id.* at 26-30.
251. *Id.* at 27.
252. *See Hickenbottom v. Hickenbottom*, 477 N.W.2d 8 (Neb. 1991); *see also supra* note 5.
254. *Id.* at 1272 (quoting *Clifford v. Woodford*, 320 P.2d 452, 457 (Ariz. 1957)).
as inadequate. The growing prevalence of the stepfamily in our country's way of life only magnifies this inadequate response by our legal system. Acceptance of the in loco parentis doctrine for custody battles within stepparent dissolution proceedings would be one step in the right direction. The doctrine's adoption would give courts the freedom to break away from archaic notions about the stepfamily and allow them to reach a responsible conclusion as to where the child in question is best suited to live and who is most qualified to raise them.

VI. CONCLUSION

The realities of the modern family necessitate new attitudes on the part of legislatures and courts toward the stepfamily. Yet, despite the continual growth of stepfamily relationships in this country,255 lawmakers have failed to provide clear and concise rules to define and protect the rights and obligations of the parties to the steprelationship.256 Clearly, many courts and legislatures continue to cling to the theory that the stepparent-child relationship is derivative of the marriage between the stepparent and the biological or legal parent, with any rights and obligations thereof terminating upon the end of the marriage.257

A court's refusal to grant standing to stepparents to sue for custody in dissolution proceedings amounts to a denial of the significance of the relationship to further protect the custodial rights of the biological or legal parent, who may not deserve custody in the first place. In the end, children suffer the most due to the potential dangers to which they are subjected, such as remaining in the custody of an unfit parent.258 In addition, there are situations where the best interest of the child, the paramount concern in any custody proceeding,259 may dictate a custody award to a stepparent.

The in loco parentis doctrine is a device courts can use to protect those stepparent-child relationships that have developed into substantial parental relationships. Granting parental status in these situations "would allow for the external recognition of a psychological state that the child may have already internalized."260 Children found in loco parentis with

255. See CENSUS, supra note 2, at 5.
256. See supra notes 1-4 and accompanying text.
257. See supra notes 12-14 and accompanying text.
260. See Boskey, supra note 59, at 827.
their stepparent would be protected since a stepparent would now be able to test the substantive standard applied by courts in third-party custody disputes.261 At the same time, biological and legal parents would be protected since only those stepparents that acted as “parents” to their children would be granted standing. In addition, stepparents with standing would still need to satisfy whatever substantive standard the court applies to third-party custody disputes.262

Absent legislative changes in custody jurisdiction statutes, in loco parentis is the judicial system’s best option for balancing the child’s best interest against the biological or legal parent’s right to custody in stepparent custody disputes. It forces courts to look beyond their traditional notions of what the “family” should be and to accept what the “family” has actually become. However, acceptance of the in loco parentis rule should not and cannot become the end of family law reform in the area of stepparentships. Much still needs to be done in other areas such as child support, visitation, and substantive custody law. Lawmakers must recognize the importance of and protect stepparentships considering that the stepfamily has become an accepted part of our society’s way of life.

*Bryce Levine

261. See supra Part V.
262. See Mahoney, supra note 10, at 75-78.