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Stepparents, Biologic Parents, and the Law's Perception of 'Family' After Divorce

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The drama of divorce always contains at least two characters, a woman and a man, and often a third, a child born to the woman and the man. If you have read the other chapters of this book, you have rarely encountered any of the other persons who may be affected by a divorce, such as the children of either person from a prior marriage, or later spouses or partners of either party, or later born children of either party—all the persons who are or become stepchildren or stepparents. You have not encountered them because, in this country, with minor exceptions, they are all ignored by the law bearing on the divorce of the original couple.

Stepfamilies abound in this country today. Mavis Hetherington, in her continuing study of a group of divorced mothers with custody of children, has found that 70 percent of the mothers were remarried by six years after divorce. Constance Ahrons and Lynn Wallish have recently studied a sample of divorced couples and their children in Dane County, Wisconsin, located through court records, and found that three years after divorce 89 percent of the children had at least one parent who was currently remarried or was cohabiting with another person. In only 11 percent of families were both parents without a new partner.

Frank Furstenberg has made estimates for all American children, not just children of divorce. He calculates that about one-fourth of all children born in the early 1980s will live with a stepparent before they reach majority. And many children experience a parental divorce more than once; their custodial parent remarries and then divorces again. It has recently been estimated that over 40 percent of couples who marry when one or both of them have children from a prior marriage or relationship divorce within five years of their marriage.

The increasing number of children who have one or more stepparents has attracted the attention of the psychological and social sciences, generating within the last decade a highly productive surge of research on the
stepparent relationship. At least forty empirical studies resting on non-clinical samples were published in the United States in the decade between 1976 and 1985, dwarfing in quantity the research conducted before then. As ever, the reviewers of the new research identify critical unanswered questions, but all recognize the vast expansion of available information.

By contrast, over the last decade the stepparent-stepchild relationship has attracted only a modest amount of writing by legal scholars. Why so little has been written is not difficult to understand. Legislators and others who shape public policy have tended to consider the biologic parent relationship the only legally significant relationship in a child’s life. Adequate financial support for children is a critical social problem in the United States today, but stepparents are neither blamed as a source of the problem (even when they have divorced a custodial parent) nor widely conscripted as part of the solution.

This chapter relates some of the findings of the recent research on the stepparent relationship and the small, halting ways in which stepparents who live with children are coming to be seen as legally relevant individuals in children’s lives. In the course of the exploration, we will see that even if the law becomes less single-minded about biologic relationships and somewhat more attentive to steprelationships, it is not easy to prescribe what the legal position of the stepparent ought to be.

I focus almost solely on the position of persons who have married a biologic parent after that parent has been divorced. Doing so permits concentrating on two divorces of possible interest to the law: first, the divorce of two biologic parents and the effects of the custodial parent’s remarriage on the legal position of the absent parent and the new stepparent and, second, the later divorce of a custodial parent and stepparent and the legal consequences of that divorce for all three parent figures.

The Varieties and Ambiguities of the Stepparent Relationship

Any consideration of laws or regulations bearing on stepparents must contend with the immense variety of stepparent relationships, a variety that, in one sense, closely mirrors the variety of relationships children form with biologic parents. The biologic parent-child relationship varies, after all, from the remote position of the man who impregnates a woman and never lives with their child, perhaps never knows of the child’s existence, to the
central position of the primary caretaking parent, who becomes the most important figure in the child’s life.

The major difference between the biologic relationship and the steprelationship is that most of us hold in our minds a paradigm of what biologic parent relationships ought to look like, a clear model for thinking about responsibilities and entitlements. For most Americans, the paradigm is the nuclear family of man and woman married to each other and living with their children. Even for the father who never marries the mother or lives with the child, we share deep-seated notions of the significance of blood and the responsibilities that flow from intercourse. Toward their children, to reach back to Blackstone, parents owe “an obligation laid on them not only by nature itself, but by their own proper act in bringing them into the world.”

We may have little agreement about appropriate roles for absent biologic parents in the day-to-day lives of their children (an uncertainty that helps create our uncertainties about the appropriate roles of step-parents), but we at least have a fairly clear vision of the core attributes of biologic parenthood.

The stepparent relationship, by contrast, lacks—and, I would argue, cannot possibly obtain—a single paradigm or model of appropriate responsibilities. As a starting point, children acquire two dramatically different and irretrievably “normal” forms of steprelations—the stepparent who is married to a custodial parent and with whom the child lives (a “residential stepparent,” if you will) and the stepparent who is married to the non-custodial parent and whom the child sees, if at all, on visits. Both are wholly acceptable relationships, yet dramatically different in terms of children’s typical experiences in them.

Even if we consider residential stepparents only, we still lack a single paradigm for the normal relationship of stepchild and stepparent. Whereas the biologic relationship always starts at a common point, the point of conception, and thus offers a roughly predictable progression over the course of the child’s life, the residential steprelationship begins at widely varying points in children’s lives. The child who begins to live with a stepparent while still an infant is likely to develop a different relationship and bond with the stepparent than the child who begins the relationship as an adolescent.

In cases in which the biologic parents have been divorced (in contrast to cases in which one of the biologic parents has died), the course of the stepparent-child relationship is especially difficult to predict because of the very existence of the nonresidential parent and the variations in the frequen-
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...and quality of the visits between the child and the nonresidential parent. Indeed, the range of family compositions in the lives of children one or both of whose parents remarry is vast. Ahrons and Wallish in their study of divorced families cataloged, three years after the divorce, whether the parents had remarried (or recoupled), whether the new partners brought children of their own into the union, and whether the parent and stepparent had new children after their union. They found eighteen patterns of family composition among the ninety-eight couples they studied. 9

It is thus unsurprising that in the burst of research on stepfamilies within the last decade, researchers have confirmed that stepparents and stepchildren come into these relationships uncertain what to expect and what is expected of them. As they begin a stepparent relationship, neither stepparents nor stepchildren have available to them a set of clear norms to guide their behaviors. 10 As Judith Wallerstein has said, “Becoming a stepparent is like arriving in the middle of a very complex conversation. It takes a lot of effort to catch up and to keep up.” 11

To the extent that we do have an image of the stepparent relationship provided to us from our culture, it is a bleak one. Our very use of language reveals an expectation that the stepparent relationship will be detached or uncomfortable. As a metaphor, “stepchild” describes a neglected issue or subject. When people are told stories with identical content with the storyteller varying the family positions of the characters, persons identified as “stepmothers” are described afterward by the listeners in substantially less positive terms than those described as mothers, sisters, aunts, or nieces. 12 Cinderella's stepmother was wicked. Hamlet's stepfather was evil. In 1989, a B-grade thriller entitled Stepfather II came out of Hollywood billed as “the shattering conclusion to one of the scariest films ever made.” He's “coming home,” the advertisement continued, “to slice up more than just the cake!” How many tales do you know of stepparents who were loving or kind? Some researchers believe that our cultural images of the stepparent increase the awkwardnesses of the relationship for those who are entering them. 13

For residential stepfathers, perhaps only one aspect of their roles and responsibilities toward their stepchildren is reasonably clear from the beginning. Apparently, nearly all residential stepfathers perform as parent in one important respect: those who are working nearly always contribute to the financial support of the children with whom they live; many in fact provide all the financial support. 14 In fact, demographers are now so accustomed to regarding children living with a parent and stepparent as eco-
nomically secure in comparison to children living with a single parent that, in reporting on the status of children, they typically group those in biologic families and stepfamilies together under the single label of "two-parent families." 

Apart from this role as provider, however, the relationship between many stepparents and stepchildren remains unclear and uncomfortable well beyond the initial stages. In his study of children with a residential stepparent, Furstenberg found that children were much less likely to say they felt "quite close" to their stepparent than to say they felt "quite close" to their custodial parent and much less likely to say that they wanted to grow up to be like their stepparent than to say they wanted to be like their custodial parent. In fact, about a third of children living with a stepparent did not mention that person when asked to name the members of their family. Nearly all named their noncustodial parent, even when they saw him or her erratically.

By much the same token, about half the stepfathers in the Furstenberg study said that their stepchildren did not think of them as a "real" parent, about half said that the stepchildren were harder to love than their own children, and about half said that it was easier to think of themselves as a friend than as a parent to the stepchildren. Stepparents had difficulty figuring out their appropriate role in disciplining the child and determining how to show affection for the child. Many stepparents and children remain uninvolved or uncomfortable with each other throughout the years they live together. Some researchers have even attributed to the awkwardness of the stepparent relationship the somewhat higher divorce rate in the early years of second marriages.

Part of the difficulty for stepparents, as Furstenberg's questions themselves may suggest, is that many may believe that they are expected to be seen as a true "parent," an equal at caretaking and counseling, even when they recognize that that role is unlikely to be attainable. To be sure, not all stepparents have difficult relations with their stepchildren. Some—many of those in the other half of Furstenberg's respondents—come to see themselves as a parent and are viewed by children as such. Many others attain a comfortable relationship with the child but not in the role of a parent, establishing themselves over time not as an adult authority figure but as an adult companion and adviser. Those stepparents who prove least comfortable in the stepparent role are often those who find themselves stuck in the role of "other mother" or "other father," seen by themselves and the child as being in a parent role, but competing with and compared unfavorably
with the noncustodial parent. Hetherington's research suggests that, at least for residential stepfathers, the best strategy for gaining acceptance and building a strong relationship with a stepchild is to start slowly, supporting the mother in her parenting role and building over time toward a more active involvement.19

Ultimately, the difficulty for stepparents in our society may be due in part to a want of social imagination, to an incapacity to recognize that, especially in the context of divorce, it will commonly be very hard for a stepparent either to hold a role identical to the biologic parent or, as the partner of the child's biologic parent, to become just a friend. The difficulty in many families of finding the right name for the child to call the stepfather reveals this problem. Neither “Dad” nor “Jim” seems quite right, but they appear to be the only choices. We conceive the stepparent role to be analogous to roles we already know. We expect the stepparent to be “like” someone—and he or she usually falls short.

What we have been unable to do here, as we have been unable to do in so many contexts in which people are perceived as different—the deaf, those from other cultures, those of other colors—is to learn to embrace the differences. The residential stepparent is, after all, in the unique and potentially resourceful position of being the person in the world closest to the person to whom the child is closest, while free of some of the baggage of having a long-term and biologic link with the child. Perhaps it is impossible to forge coherent or flexible middle views. Perhaps it is psychologically inevitable that children will see a stepparent with whom they live as a person assigned to take the place of the absent parent. The least that can be said is that we as a society do not regard the advent of stepparenthood as we do the arrival of a new baby—as a treat that offers the opportunity for rich relationships.

The awkwardness of the stepparent relationship might be thought to suggest that children would in general be better off if their custodial parents did not remarry and that the law ought in general to discourage the formation of stepfamilies. That is not what the current state of research suggests. Most children living with a custodial mother become much better off economically upon their mother's remarriage. Whether they are typically better or worse off in other respects is uncertain. Research that attempts to measure the developmental effects on children of any life event—a parent's remarriage, parents' divorce, whatever—is fraught with difficulties, and thus research on the developmental effects of a parent's remarriage on children is predictably inconclusive. Clinical studies often find that children living
with stepparents have adjustment problems and other difficulties, but so do
children living with a single parent; empirical research typically finds few
systematic differences between children raised in stepfamilies and children
raised in other family configurations. In short, insofar as the needs of
children are concerned, economic considerations suggest that remarriage is
typically beneficial and other considerations point in no definitive direction.

The Law Ignores the Stepparent

How has family law conceived the stepparent relationship? The stepparent as
parent? As friend? As someone in between or as someone entirely different?
Family law, as a formal matter, has largely ignored the relationship. In the
substantial majority of states, stepparents, even when they live with a child,
have no legal obligation to contribute to the child’s support; nor does a
stepparent’s presence in the home alter the support obligations of a non-
custodial parent. The stepparent also has had no authority to make decisions
about the child—no authority to approve emergency medical treatment or
even to sign a permission slip for a field trip to the fire station. State law has
had only one mechanism—adoption—to permit a stepparent married to the
custodial parent to formalize a role with a child.

On the breakup of a marriage between a biologic parent and a stepparent,
the stepparent again has been ignored by the law unless the child has been
adopted. In the absence of adoption or some extraordinary circumstances
noted later, the law in nearly all states imposes no continuing financial
obligations on the stepparent regardless of the extent of support he or she
has provided while living with the child. Similarly, except in unusual cir-
cumstances, the law has not treated the stepparent as an appropriate custo-
dian for the child or aided the stepparent in continuing a relationship with
the child through visitation. On the death of a stepparent, laws of intestate
succession nearly always exclude stepchildren from the list of relations who
will share in the estate.

In the next section, I discuss scattered court decisions and unusual state
and federal statutes that impose greater responsibilities on stepparents or
give them more opportunities for custody of children. These decisions and
statutes, however, have probably affected very few stepparents’ or step-
children’s lives, except in the context of families receiving welfare. The vision
of the stepparent relationship that the dominant state of the law conveys is
thus most consistent with an image of the stepparent as stranger or, at most,
as a friend, a relationship that often includes warm feelings but that in itself
carries no legal consequence. The stepparent becomes something more only by adoption, an event that converts the friend into a full legal parent, passing over all intermediate possibilities. Katherine Bartlett, in a provocative article, has identified and criticized this view of parenthood as an “exclusive” status—the stepparent as either all or nothing, full parent or stranger.21

Another, less bipolar view of the current state of the law is possible. It is that the law has, without intention, created a largely neutral environment for the stepparent relationship, leaving it open to the two biologic parents, the stepparent, and the child to fashion whatever sort of relationship seems appropriate to them.22 Apart from minor annoyances regarding the stepparent’s lack of authority to authorize medical treatment and other acts for which a parent’s consent may be necessary, the stepparent can behave like a “mom” or “dad” day by day in the relationship or just be a friend and the law will not interfere. The stepparent and the noncustodial parent can share parenting functions in any way they wish. Stepparents can contribute as little as they choose to the children’s financial support without fear that the state will compel a larger contribution. Conversely, they can contribute a great deal without fear of altering the support obligations of the absent parent or of binding themselves to continued support if the marriage to the custodial parent ends. Or with the consent of the biologic parents, they can adopt the child, and, on divorce, if the parents agree that the child can live with or have visitation with the stepparent courts will typically give force to their agreements.

In this view, the law projects no fixed image of the stepparent relationship—neither stranger nor friend nor parent. It is simply a relationship based on consent, to be shaped by the inclinations of the adults and the child. Of course, this neutral view of the stepparent relationship may also be thought unhelpful. The law’s failure to announce a model or image of the stepparent relation may be thought to contribute to the confusion that stepparents feel over their expected role. Perhaps so. Yet, so far as I can find, no social scientist writing about the stepparent relationship has blamed their confusion, even in part, on the law’s failure to establish a clearer image of the appropriate stepparent relationship.23

When the Law Recognizes the Stepparent Relation

In the United States, the earliest widespread statutory recognition of the stepparent relationship probably occurred in the Workers’ Compensation acts adopted by nearly all states in the early years of this century to provide
for the dependents of workers injured or killed in work-related accidents. Through these acts, some states provided coverage for all persons actually dependent on a worker, others for specific relations who were eligible if dependent. Under either approach, stepchildren actually dependent on a worker were typically provided for. Congress, in the Social Security Act provisions for benefits upon death or disability, continued this form of recognition of stepchildren. Since 1939, Social Security benefits have been available to the stepchild of a deceased covered worker, if the worker had been living with the child for a prescribed period at the time of the worker's death. The extent of coverage for stepchildren, however, has always been narrower than that for biologic children, for the latter are covered whether the parent lives with them or not. Nonetheless, the fact of the coverage of stepchildren, even if limited, is noteworthy.

The drafters of Workers' Compensation and Social Security laws were seeking to ensure that children actually dependent on working adults continue to receive support when the adults are no longer able to provide it. The coverage of stepchildren reflects, appropriately, an awareness that stepparents who are working almost always contribute to the support of the children with whom they live. More broadly, quietly, and fundamentally, the coverage of stepchildren recognizes the stepparent relationship as a socially approved relationship—persons whose coverage would not be objected to by employers or by other workers, those without children, who are forced to contribute to the Social Security fund.

So far as I can tell, at no point has the coverage of stepchildren by Workers' Compensation or Social Security laws been regarded as controversial. The absence of controversy probably has two sources. First, at the time of the enactment of the original Workers' Compensation acts and the Social Security Act amendments of 1939, most residential stepparents where men who had married not divorced women, but widows. In these families, no surviving male parent could have been expected to provide support. Second, even in cases in which there had been a divorce, the coverage typically, though not always, occurred in a manner that had no felt cost to any of the parties. The biologic parents, the stepparent, and the child were all typically pleased by the coverage of the stepparent, for it came to the child at no greater price than any of them would have had to pay otherwise. In most of the other contexts I am about to discuss, the recognition of the stepparent relationship costs someone something and someone feels like a loser: an absent biologic parent opposes adoption or wants to reassert custody; a stepparent objects to being excluded from consideration for custody or to
being pursued for child support; a custodial parent objects to a decrease in a public assistance check because of a stepparent's presence.

Over the fifty years since stepchildren were added to the Social Security Act, as we are about to see, a few other state and federal statutes have dealt with the residential stepparent relationship. So have court decisions in a variety of contexts. While these official pronouncements have altered very little the lives of most stepparents and stepchildren, they are nonetheless instructive about the occasions when governments have accorded legal significance to family relationships in the late twentieth century.

The small changes in the law have not been due to lobbying efforts by stepparents themselves, for they are not a well-organized political force in this country. They have had no voice in the legislatures comparable, say, to that of the senior citizen groups that have advocated for grandparent visitation statutes. Rather, three major initiatives in late-twentieth-century public policy bearing on children have been responsible for shaping recent changes in the law. In large part, the three reflect a direct concern not for the steprelationships themselves but for larger or different issues that happen to bear on them. The three are the efforts to reduce public welfare expenditures, the efforts to provide income to nonpoor mothers and children through the enforcement of child support, and the efforts to recognize and protect children's long-term emotional ties with significant caretakers. Each of these policy initiatives bears on stepparents, but each is affected at all points by the continuing, even growing, drive to recognize and enforce children's biologic relationships. In America, blood is not merely thicker than water; it is thicker than usual.

The Reduction of Welfare Expenditures

For several decades, critics have complained about the inadequacy of the nation's system of public welfare benefits for low-income families with young children. Yet, since the early 1970s, most welfare reform by Congress and the states has taken the form not of striving to ensure that state-provided grants for children are adequate for their needs but of shifting as much of the costs of welfare as possible from the government and onto those whom the state views as appropriately responsible "family" members. How Congress and the states have defined the responsibilities of various family members reveals, of course, social judgments about the significance of various relationships.

By far the largest part of the effort to shift costs has focused on absent
biologic parents, particularly fathers. These efforts began in 1950, but have accelerated in the last fifteen years with the adoption of three substantial amendments to the program of Aid to Families with Dependent Children (AFDC). Through these amendments, the most recent in 1988, Congress has sought to force the states to make more substantial efforts to collect child support from absent biologic parents. The legislation has grown from the perception that most children receiving AFDC have an absent parent, a conviction that such a parent ought to be compelled to contribute, and a hope that, if the states expended more effort, such parents could be forced to pay. (And each new piece of legislation, as Harry Krause discusses in chapter 6, seems to have been successful in the sense of offsetting, even if only slightly more each time, the total governmental expenditures on public assistance for children of divorced parents.)

Under the federal legislation, states must identify absent biologic parents, establish orders of support against them, and, under the newest legislation, require employers after 1994 to deduct from wages all amounts of child support that are due. Except for the first fifty dollars secured each month, the child on AFDC receives no financial benefit from the absent parent’s payments: all moneys recovered are kept by the state and federal governments.30

Beyond its central focus on absent biologic parents, the federal welfare legislation includes a few provisions that deal directly with stepparents. These are complex, and since each state has some freedom to vary the details of the welfare system, they are difficult to describe simply. In capsule form, the federal AFDC program was originally conceived to provide assistance to children living with one parent only (particularly to children living with widowed mothers). If the child had two nondisabled parents, they were expected to provide for the children out of their own labors. The federal government has permitted but not required states to treat residential stepparents as if they were biologic parents and thus to exclude a child from AFDC coverage when the child lived with a stepparent and a biologic parent.31

If a state does not elect to treat the stepparent as a parent under its laws (and only about six states do), then it must treat the child as eligible to be considered for AFDC. But the state must, under federal law, take the income of the stepparent married to and living with the custodial parent into account in determining the child’s financial need and hence the size of the grant the child and the caretaker will receive.32 If the income of the stepparent is sufficiently high, the child will receive no grant at all. Only the income of stepparents actually married to the custodial parent and living with the child
is to be deemed available to the child. By contrast, the income of a residential companion of a custodial parent, no matter how parentlike a relation the person has with the child, may be considered only to the extent that the companion actually provides support to the child.

For all its complexities, the pattern of federal welfare laws paints a fairly coherent congressional vision of proper familial responsibilities. Its chief feature is that biologic parenthood is primary, more important than any other relationship, entailing obligations that endure through time without regard to the residence of the parent or child. Only a termination of parental rights can end the obligations. At the same time, though biology is primary, the stepparent who lives with a child and is married to the child's mother is, by law, more than a stranger. For no person other than a residential stepparent must the states assume that the person's income is made available to the child.

The welfare rules, as they apply to stepparents, are as interesting for their limits as they are for their reach. The federal government and the states have been ardent, rabid even, in their efforts to reduce welfare costs by finding ways to impose the costs on others, but, under the federal legislation, no pressure has been put on the states to treat residential stepparents exactly as if they were biologic parents. Nor has any pressure been applied to the states to seek support after divorce from a stepparent who has lived with a child for many years but no longer does so. Congress, however frugal, recognizes that there are limits on the extent to which our culture perceives stepparents as responsible for children. And even the statute that requires states to treat the income of a residential stepparent as available to children can be seen less as a judgment that stepparents have a moral obligation to provide support than an empirical guess, almost certainly accurate, that stepfathers who are married to the mother and residing with a child nearly always do so in fact.

The legislation requiring the income of a residential stepparent to be taken into account can nonetheless, like many other welfare rules, have perverse and undesirable effects on children. The rules work only to their financial disadvantage. The stepfather's income is relevant only for reducing the amount of public support for the child. Such a result, given the fact that most stepparents actually do provide support, may seem defensible. Nevertheless, because welfare grants, even at their highest, are so meager (well below the poverty level in all states), any rule that reduces the amount of a grant to a child creates in recipients a sense of injustice and a pressure and ready rationalization for evasion. Thus, rather than marry, a mother with a
relationship with a working but low-income man may choose to protect her welfare grant by living furtively in a relationship outside of marriage that may well be less stable and less satisfying.\textsuperscript{35}

The Collection of Child Support for Children Not Receiving Welfare

Until recently, most children whose parents were divorced received either no financial support from their absent parent or far less support than they were entitled to by law. The consequence was many angry custodial parents and their children living at even lower standards of living than they otherwise would have. The recent move by legislatures to increase the collections of child support marks the second theme that has directly and indirectly affected stepparents. Obviously, this theme overlaps the first one—the efforts to reduce welfare costs—but it differs in that these efforts to increase child support payments have been intended primarily to benefit middle-class families.

The two most recent federal amendments to the AFDC statute merge welfare and nonwelfare families insofar as child support is concerned. They do so through an aggressive flexing of federal muscle. In the past, the federal government left the content of family laws outside the welfare context entirely up to the states, and the Reagan administration took office in 1981 hoping to return even more welfare decision making to the states. Despite this, Congress, through the AFDC amendments, conditioned the states' full federal reimbursement of their welfare costs on their making more concerted efforts to collect child support not only on behalf of children receiving AFDC but also on behalf of other children with absent biologic parents, including those from high-income families. The United States now has a formal federal policy declaring the enduring primacy of the biologic relationship for all children. To be sure, nothing in federal law prohibits the states from making stepparents concurrently liable for the support of children, but federal law does require that, in the absence of a termination of parental rights, biologic parents be compelled to support their children and even that the amount of the support follow state-developed uniform guidelines.\textsuperscript{36}

Independently of the federal government, many states had also been improving their systems of child support collection from absent parents. Very little of this legislation directly mentioned stepparents. A few states have had statutes that imposed financial liability on residential stepparents during the course of a marriage,\textsuperscript{37} but, outside the welfare context, these statutes have had little operative content: while children are living with a
stepparent and a parent, the state has few occasions to inquire into family finances to make sure that parental figures, step or biologic, are devoting their income to the support of their children. During the course of a marriage between a parent and stepparent, there is nonetheless one set of questions bearing on the stepparent's responsibilities that frequently arises. These are questions about the effect of a second marriage on preexisting child support obligations. In most states the law is fairly settled: a custodial parent's remarriage does not alter the extent of the liability of the absent biologic parent, even though most absent parents, particularly fathers, probably believe that their former wife's remarriage should reduce the extent of their responsibility for child support. Conversely, though some variation exists among states, the new stepfather cannot obtain a reduction of any child support he may owe for children from a prior relationship by pointing to his de facto responsibilities for new stepchildren, even though he may feel the strongest sense of responsibility (and the greatest psychological pressure) for the needs of his new wife and her children.38 In nearly all states, only the biologic relationships count. A few states, however, seem to be considering rules that look at the economic position of new units formed by either the custodial or the noncustodial parent and exploring ways to take into account the new incomes and new expenses in the reconstituted families.39

The issue of the liability of a residential stepparent for the support of stepchildren is also raised, from rare time to time, upon the breakup of the stepparent's marriage to the custodial parent. Here again, the starting assumption in all American states remains that, whatever state statutes provide during the course of a marriage, no liability survives for the stepparent on the breakup of the marriage to the custodial parent. The stepparent relation is consensual and time-bound. Upon a second divorce, children are expected to fall back upon the support payments of the noncustodial biologic parent, regardless of the length of time the stepparent lived with the child and regardless of the lavishness of the support provided by the stepparent during the marriage to the custodial parent. This general rule has been applied by courts even in some cases in which a child seems to have an unusually compelling claim for continuing support. Thus, the Utah Supreme Court recently dealt with a divorce case in which a woman was divorcing for the second time. She had been pregnant by her first husband at the time of their divorce, and the second husband, though knowing the truth, had signed the birth certificate as the father at the time of the child's birth. The second husband then lived with the child for several years, during which
time the biologic father neither paid support nor visited the child. The court held that, since the second husband never formally adopted the child, he had no obligations to pay support on the breakup of his marriage to the mother.40

To be sure, common law equity notions of estoppel might have been used by the Utah court to impose liability. In fact, the lower court in Utah had adopted such a theory—that the person who holds himself out as a father and behaves as a father cannot later be heard to deny that he has the responsibilities of a father—to impose liability at the trial level. A few other American appellate courts have imposed liability in somewhat more common circumstances—in cases in which the stepparent during the course of his marriage to the custodial parent had actively sought to discourage the noncustodial biologic parent from having any contact with the children.41 In such cases, courts have sometimes made clear, however, that judges may not impose liability simply on finding that a strong bond has developed between a stepparent and child or that the stepfather has generously supported the child during the course of the marriage. Some judges have expressed the fear that expanded rules of liability for stepfathers on divorce might discourage men from marrying women who have children from prior relationships.42

The very modest movement of American courts and legislatures toward imposing continuing responsibility on long-term stepparents stands in stark contrast to the law in England and Wales, where the rule since the 1950s has been that the stepparent may be held liable to contribute to the support of the child on the divorce from the biologic parent if the stepchild had been living with the stepparent and treated as a child of the family before the separation.43 Rather few English appellate cases have dealt with trial court judgments imposing liability in these circumstances, but one case, characterized by a British commentator as the “leading case,”44 stands in marked contrast to the Utah case above. In the English case, the marriage of the mother and stepfather lasted only six months and the stepfather lived with the woman’s two children for only three months. The stepfather was ordered to pay an amount per week only slightly less than the amount ordered to be paid by the biologic father, and the appeals court upheld the decision.45

What could explain the difference in the sensibilities of the English, our legal cousins, and the Americans on the issue of the continuing responsibility of stepparents? One difference, which caught me by surprise when I first read it, is that the English rule may have originated less out of a sense that
stepfathers have a moral obligation to support children who have become financially and emotionally dependent on them than out of a sense that stepfathers are often morally at fault for the breakup of the marriage between the children's biologic parents. The stepfather is seen as a home-wrecker, responsible for the child's imperiled financial condition.

A more recent statement by England's Law Commission painted the responsibility of the stepparent as supplemental to that of the biologic father and commented that the stepfather "shall be regarded as having taken the risk of having to maintain [the stepchild] to the extent that the first husband failed to do so." This statement of an assumption of risk may be merely conclusory or it may reflect the commission's beliefs about what the average English citizen accepts as the responsibilities that flow from marrying a woman with children. Whatever the attitudes of English citizens, I suspect that the current state of American law comports with current American attitudes. Most Americans, I suspect, believe that biologic fathers ought to continue to pay support after a mother's remarriage, that stepfathers ought to make their income available on top of the absent biologic parent's support payments while they live with a stepchild, but that upon divorce the responsibilities of stepfathers end.

Will American sensibilities alter over time? Some empirical evidence suggests that when residential stepparents enter children's lives, the children generally see their absent parents less often than they did before. I have already mentioned the findings that, despite the ambiguities of the stepparent relationship, many individual stepparents do form strong emotional bonds with their stepchildren. They are seen by the child as "parent." And, of course, there is ample corresponding evidence that biologic fathers who do not live with their children will not pay child support unless compelled to do so and that they visit their children less and less as time passes, whether or not the mother remarries. In the future, we may come to view residential stepparents as replacing absent parents and assuming some or all of their responsibilities.

Given the strong public support for policies to ensure adequate support for children without public expenditure, it is possible to imagine in the future the development of rules imposing some continuing liability on stepparents after divorce. Stepparents might, for example, be required to make contributions either until the custodial parent remarries or for some limited period of years. Stepparents, that is, would be responsible for cushioning the blow from the sudden loss of income they have made available to the child and on which the child has become dependent.
Protecting or Fostering Children’s Attachments

Under American law as it has generally existed, a stepparent may acquire formal authority to make decisions in a stepchild’s life or serve as custodian for a stepchild only with the consent of one or, usually, both biologic parents. In the eyes of the law, stepparents become what the biologic parents permit them to become.

Over the last few decades, changes have occurred in the law regarding stepparent adoption and custody that have made it easier in some states for courts to recognize the attachments children develop with stepparents. At the same time, in a manner familiar in other contexts in which judges must resolve children’s custody, legislatures have provided little clear guidance from about how to deal with the cases in which adoption or custody is proposed.

Stepparent Adoption. Adoption entails the termination of the parental rights and obligations of one or both biologic parents and the assumption of those rights and obligations by a new adult. A biologic parent disappears as a legally relevant person and is replaced by someone else. Adoptions by stepparents today typically occur, as they always have, with the explicit consent or acquiescence of the parent who is about to be replaced. Laws that once permitted adoption to occur only when there was such consent (or acquiescence or deliberate “abandonment”) have now, however, commonly been expanded to permit courts to approve adoptions by stepparents in a wider range of cases, including some in which the noncustodial biologic parent strenuously objects to the adoption.

The new statutes vary widely among the states. Some states have adopted the Uniform Adoption Act, which permits adoption by a stepparent without the noncustodial parent’s consent in cases in which the parent “for a period of at least a year has failed significantly without justifiable cause to communicate with the child or to provide for the [child’s] support.” Some other states, such as California and Michigan, require a period in which a parent both fails to communicate and fails to pay support. A few states have enacted statutes that appear to make stepparent adoption much more readily available, permitting courts to authorize adoptions if consent is being “unreasonably withheld contrary to the best interest of the child.”

Almost no information is available about actual patterns of stepparent adoption in this country or about the impact of adoption on the relationships between stepparents and children. For those interested in people’s own conceptions of family and how they use laws to validate those concep-
tions, distressingly little is known about what stepparents and custodial parents consider when deciding whether to seek adoption or about what biologic parents consider when deciding whether to consent. What we are able to calculate is that only a small percentage of stepparents actually adopt their stepchildren, despite the fact that the high proportion of children of divorce who never see or receive support from their noncustodial parent suggests that the number of stepparents eligible to adopt, even over the absent biologic parent's objection, must be very large. We know nothing about what distinguishes the families in which adoption occurs from the families in which it does not. We do not even know whether stepparent adoptions are increasing in frequency. Because of the more generous standards for stepparent adoption and a supportive atmosphere today for stepparent involvement in children's lives, we could guess that more are occurring. On the other hand, as child support enforcement against absent fathers has become more effective in some states, more custodial parents may wish to hold onto this source of income.

Just as we know little of the incidence of or motivations for stepparent adoption in the United States, so likewise we know almost nothing about the effects of such adoptions on children. No researcher has ever compared children who were adopted by their stepparents with children living with a stepparent but not adopted in order to learn whether adoption affects children's sense of well-being or even clarifies roles within families.

In the absence of empirical information, I must fall back on the adoption statutes themselves and on reported decisions of courts for the attitudes they convey about stepparents and family composition and about the values to be derived from stepparent adoption. The expanded provisions are themselves revealing for their implicit views about family. The old view of the family was that parenthood, when the parents had been married to each other, persisted as long as the parent chose. The new view has two aspects. The first is that children form new bonds and that it is appropriate for the state to ratify them. The second (also reflected in neglect and abuse laws) is that it is appropriate to terminate old bonds when a biologic parent fails to meet certain responsibilities.

What is interesting, and, in fact, a little bizarre, is the adoption statutes' implicit conception of the responsibilities of the biologic parent. In states that permit a court to dispense with the father's consent only when there has been both failure to communicate and failure to support, a parent can usually prevent a child from being adopted by the stepparent by making occasional payments of child support, even though the parent never visits or otherwise
communicates with the child in any manner.\textsuperscript{58} In fact, in some states, the adoption may be prevented by support payments that are extracted from the parent without his consent and thus are no evidence of any concern or affection whatever for the child.\textsuperscript{59} At the same time, in those states that permit a court to dispense with the parent's consent when there has been \textit{either} a failure to communicate or a failure to support, an adoption can go forward over the father's objection even though he has visited with the child regularly, so long as he has willfully failed to make support payments.\textsuperscript{60} In the context of children receiving welfare payments, the willful failure to pay support may not indicate any lack of concern for the child's well-being or lack of involvement with the child, for the parent knows that almost all the payments he makes are kept by the state and not forwarded to the child. In short, in some states, any amount of support money can prevent an adoption and, in other states, no amount of attention, no matter how great, can prevent one. In both types of states, what turns out to be significant about some biologic relationships is cash.

The anomalies of stepparent adoption do not end with the provisions for defining the circumstances in which the court can proceed without the consent of the biologic parent, for at the core of these statutes is a more unsettling issue. Facing a request for adoption, the judge, even after making a determination whether to proceed without the absent parent's consent, is supposed to make a separate inquiry into whether adoption by the stepparent will serve "the best interests of the child." In any given case, especially one in which the biologic father is protesting, the judge may well be puzzled whether the child will really be any better off if adopted. The immediate benefits to the child from permitting the adoption may be hard to measure—the child is, after all, already living securely with the stepparent who proposes to adopt. Custodial parents and adoptive stepparents would probably claim that they want the adoption to produce family unity and stability and to improve a child's already close relationship with the stepparent.\textsuperscript{61} Given what we know about stepparents' uncertainties about their roles, they may be right about adoption's value for these purposes. On the other hand, as Jessie Bernard once commented, "It is doubtful if the kind of man who is willing to adopt his wife's children would be any less conscientious in his behavior toward the children without the legal sanction of adoption."\textsuperscript{62}

For the court, the most tangible reason for permitting the adoption may be that the mother wants the child to share her new last name or that the children can obtain access to health insurance and other benefits through their stepfather only if he adopts them.\textsuperscript{63} At the same time, the judge can
easily perceive at least one possible harm from permitting the adoption—the biologic parent, now protesting, and the child will lose all legally protected opportunities for contact with each other, and many, perhaps most, adoptive stepparents expect that the child will have no further contact with the absent parent after the adoption.64

The contested cases of stepparent adoption put before judges the most elemental of decisions about the definition of family in a context in which judges can have little idea what the effects of their actions will be. Facing such choices, at least a few judges in appealed cases (and an unknowable number of others in unappealed cases) have imaginatively sought to evade the awesome finality of termination and adoption by straining to find authority to permit the adoption while at the same time ordering continued visitation for the biologic parent.65 Some other judges have cajoled the custodial parent and stepparent into agreeing to visitation before entering the order of termination and adoption and then enforced the coerced agreement.66

A comparison with England may again be instructive, for, as with child support, the English have sought ways to accord legal significance to biologic relationships and steprelationships simultaneously. Adoption in which a stepparent supplants a biologic parent has been regarded much more warily in England than in the United States. At one point in the 1960s, for example, England’s Association of Child Care Officers, the organization representing adoption workers, recommended that stepparent adoption be prohibited altogether in cases of children whose biologic parents had been married.67 Although stepparent adoptions are typically approved when unopposed, the number of such adoptions has declined significantly from the 1960s to the 1980s.68 Instead England has contrived mechanisms other than adoption to permit formal recognition of the stepparent relationship without ending the relationship with the biologic parent. Together with the custodial parent, a residential stepparent may, under certain circumstances, apply for a form of “joint custody” of the child or, in other cases, for custodianship.69 The English joint custody permits the stepparent to make legally recognized decisions on behalf of the child, but does not end the support obligations or visiting privileges of the noncustodial parent.

Stepparent Custody after the Death of or Divorce from a Biologic Parent. The elemental reordering of families also occurs in another context—on occasions when a stepparent proposes to become the primary custodian for a child. Sometimes changes of custody occur without hostility, with all af-
fected family members agreeing on a placement with a stepparent. On the
death of a custodial parent, for example, all family members may agree that
the children will be best off if left with a longtime stepparent.

On occasion, courts become involved in formally adjudicating a stepparent’s request for the custody of stepchildren over the objection of another
parent, either after one parent’s death or at the point of divorce. Probably no
more than twenty-five appellate cases have been decided in the United States
over the last two decades in which a stepparent and biologic parent have
contended for custody. How many more cases have been decided by trial
courts and not appealed is, as usual, impossible to say. Of course, in the
United States today, relatively few parents die during their children’s minor-
ity. Moreover, for at least two reasons, it is also probable that few residential
stepparents seriously consider seeking custody upon divorce, let alone con-
testing the issue in court. First, most residential stepparents are men, and
father custody after divorce, even among biologic fathers, remains much less
frequent than mother custody in this country. Second and more funda-
mental, most stepparents themselves probably believe that the children be-
long with (and to) the biologic parent.

In the occasional cases in which judges must choose between stepparents
and biologic parents, they face much the same ineffable choices that they do
in the context of disputed stepparent adoptions. The appellate opinions
recording these decisions are not a pretty sight. I have read them as much
to observe judges’ attitudes toward stepparent-stepchild relationships and
their ways of characterizing the stepparent and the biologic parent as I have
to learn the developing state of the law. Whichever way one reads, it is
difficult to perceive consistent patterns. The widely differing results of courts
in these custody cases should not come as a surprise, however. The in-
coherent pattern of outcomes and the murky and inconsistent discussions of
the governing rules almost certainly reflect our society’s conflicting and
unresolved attitudes about stepparents, even when loving, and about bio-
logic parents, even when indifferent.

Here are some of the ways these attitudes display themselves. For dealing
with custody disputes involving stepparents, only one state appears to have
adopted legislation that treats them by name as potential custodians, and
only a few others provide general authority for courts to consider requests
for custody by long-term caretakers. Even the Uniform Marriage and
Divorce Act, which deals at length with issues of custody on divorce, never
mentions stepparents and implicitly relegates a stepparent who wishes cus-
tody to search for other sources of statutory authority for any claims. Courts
in some states have thus simply held that they had no jurisdiction to consider a petition by a stepparent for custody, even after a child has lived with the stepparent as her only caretaker for many years.74

Most courts that find jurisdiction to resolve a claim by a stepparent for custody have to rely on legislation drafted without stepparents in particular in mind. Some state courts have taken jurisdiction by fiat, simply failing to discuss the basis for their authority to decide. Others in cases with a compelling case for placement with a stepparent have stretched, brazenly, the language of a custody statute that seemed to apply to biologic parents only.75

When courts have found a basis for jurisdiction, they have then had to grapple with the standard to apply. Are biologic parents and the residential stepparents competing for custody to be treated as equals or does the biologic parent stand in a preferred position before the court? Courts' opinions might have included revealing discussions about the importance of preserving biologic ties or the importance of preserving continuity of caretaking or frank discussions of the rights of biologic parents to the custody of their children regardless of children's needs. Unfortunately, nearly all the discussion is unilluminating. Courts fuss over statements of the standard without explaining what considerations are affecting their inquiry.

Consider, for example Henrikson v. Gable, a recent Michigan case involving a dispute between a residential stepfather and a biologic father after the death of the custodial mother.76 The children, aged nine and ten, had lived in the stepfather's household since infancy and regarded the stepfather as their dad. The biologic father had rarely visited or called. A trial judge, after a long hearing, left the children with the stepfather. Wrestling with the case on appeal, the appellate court found two statutory provisions pointing in conflicting directions—one provision creating a strong preference for biologic parents and the other creating a strong preference for keeping children in "established custodial environments" under prior court orders. Then the court without anything that can generously be called reasoning held that the first section trumped the other and directed the children's return to their biologic father. The court drew on earlier state appellate decisions that make little sense either individually or as a group and at least some of which announce a different standard than the appellate court in Henrikson applied. Courts in some other states have candidly complained that the decisions of their own state's courts have not been wholly consistent.77

In a substantial number of cases, courts with a strongly sympathetic case for a stepparent simply seem to impose on the stepparent the toughest standard that that person can meet, proclaiming with vigor the rights of
biologic parents and the presumptions in their favor but keeping the standard just weak enough that the stepparent can win. In some cases, courts have said in one part of their opinion that there as a strong preference for biologic parents but, in the end, found that the best interests of the child controlled and placed the child with the stepparent on the basis of a standard that seemed to treat the stepparent and biologic parent as equals.

Not all courts, of course, go out of their way to rule for stepparents. Forced to choose between a long-term custodial stepparent and an absent biologic parent who has regularly visited, some courts have, without much explanation, decided that children are better off returned to their biologic parent. Others, dealing with cases in which the biologic parent has had little contact with the child, seem to stretch to place custody in the biologic parent.

Courts also vary widely in the ways they depict the stepparents and biologic parents themselves. Appellate cases that end by ruling for a caretaking stepparent typically recite at length and with warmth the child-tending acts of the stepparent and the passive behavior of the biologic parent. The court speaks of a stepmother who treated a stepchild "as if he were her own child" or "as a member of her own family." Or they refer to the stepparent with approval as the child's "psychological father" or "psychological parent." Not surprisingly, the highest praise for stepparents in custody cases is that they have performed in the way the court believes an ideal blood parent should behave. Courts sometimes in fact have a tone of wonder: look, they seem to be saying, at how far beyond the call of duty this stepparent went for this child.

The cases in which the appellate courts rule for the biologic parent have a different tone. In these cases, the court typically says very little about the behavior of either the biologic parent or the stepparent. They say nothing about parenting acts at all and stress instead some statutory rule or presumption. When courts rely on blood, they have often found little to say.

That courts have not acted consistently and cannot explain cogently why they do what they do should not surprise us. These cases in which a stepparent and a biologic parent contend for custody are often even more difficult than they appear. The choice is not so simple as preserving blood ties versus preserving continuity, for blood ties themselves commonly offer continuity both in the sense of roots and in the sense of ties of desired affection yearned for, often by both absent parent and child, over the years. Conversely, the caretaking stepparent offers more than just continuity. In these custody cases, the stepparent has typically been living with and sharing the bed of the
biologic parent for many years. She or he has been caring for the child with
the endorsement and involvement of the custodial parent. The stepparent
has been “the person closest to the closest relative a child can have.” The
stepparent may not be blood, but she has been far more than a nurse or a
friend.

Katherine Bartlett, in her fine article criticizing America's absorption
with parenthood as an "exclusive status," recommends dealing with cases
such as Henrikson by fashioning rules that permit courts to order shared
custody between biologic parents and long-term caretaking third persons or
by ordering continued visitation between long-term caretakers and chil-
dren. As she points out, many courts are beginning to find authority to
order visitation for stepparents and other caretakers. She has even found one
court that ordered joint legal custody between a stepmother and a biologic
mother upon the death of the custodial father. If courts and legislatures
move toward the adoption of such rules, I hope that they turn out to be ones
that courts rarely impose, that they will be designed instead to set a stage for
conversations and negotiations between biologic parents and caretaking
stepparents (and children old enough to participate) in which all come to
acknowledge the needs of the others.

Some Concluding Words and Reluctant Recommendations

The starting point of my discussion of the law as it relates to stepparents was
that there is no law relating to stepparents. That, of course, proved to be a
mild overstatement. Still, American states today impose few obligations on
stepparents during the course of their marriage to a custodial parent and no
obligations after they leave the marriage. What stepparents do for children
they do by choice. States have expanded the occasions when stepparents may
assume the formal legal status of parent through adoption but the status of
parent is almost never thrust on a stepparent and always requires the
concurrence of both biologic parents or the concurrence of one biologic
parent and the substantial default of the other.

Just as the law imposes no obligations, so also it gives stepparents no
rights in children. Biologic parents have claims in their own voice. Their
desires for custody or visitation are usually acknowledged as important apart
from the interests of their child. By contrast, the occasional cases in which a
stepparent is given custody of a stepchild rest entirely on a court's judgment
of the needs of the child, not at all on the interests of the stepparent.
In most regards, this state of the law nicely complements the state of stepparent relationships in the United States. Recall the inescapable diversity of such relationships—residential and nonresidential, beginning when the children are infants and when they are teenagers, leading to comfortable relationships in some cases and awkward relationships in others, lasting a few years and lasting many. In this context, it seems sensible to permit those relationships to rest largely on the voluntary arrangements among stepparents and biologic parents. The current state of the law also amply recognizes our nation's continuing absorption with the biologic relationship, especially as it informs our sensibilities about enduring financial obligations.

We could, of course, ask the law to serve a quite different function. Instead of using it to reflect current social attitudes about family, we could try to use it to shape those attitudes. We could, that is, use laws to announce a particular vision of the appropriate stepparent relation, seeking to clarify for stepparents the roles they are expected to perform. But what vision would we choose to impose? Without some new social consensus about either children's needs or adults' responsibilities, is there some new vision we would select? And, even if we developed a new vision and embodied it in rules that, say, treated long-term residential stepparents as equals with biologic parents, eligible for visitation and custody and subject to orders of support, it is far from clear whether such rules would lessen the uncertainties that stepparents experience as they enter or live within these relationships. Even if prospective stepparents learned about new laws or, more diffusely, even if new laws contributed in some modest way to a general understanding of social expectations, most of the confusions of the stepparent role would surely persist. The uncertainties almost certainly inhere in the unpredictable diversity and complexity of the relationships themselves.

If I were forced to recommend specific new rules, I am more confident about what I would prescribe regarding stepparent adoption and child custody than I am about rules I would propose regarding support. My suggested rules for adoption and custody would flow in large part from considerations not much explored in this chapter but developed elsewhere in the family law literature. Both because of ideology and because of theories of child development, I favor maintaining ties for children with persons who have been important in their daily lives. Thus, I find attractive some aspects of the current law regarding stepparent adoption—for example, stepparents through adoption voluntarily obligate themselves to contribute to the long-term support of the children and put themselves into a position in which they are considered appropriate persons for custody or visitation. At the
same time, I have doubts about the further attribute of adoption that dictates an end to children's legally protected opportunities for contact with the absent biologic parent. I would thus favor exploring some of the middle grounds that England has been trying or that Katherine Bartlett suggests.91 Regarding custody and visitation at the end of the marriage of a parent and a residential stepparent, I would recommend that states strive to encourage parent figures to work out our resolutions that they and the child find acceptable and that encourage opportunities for children to have continued contact with persons who lived with them for substantial periods.92 When parents and stepparents simply cannot agree, I would favor in cases of divorce involving young children, a strong presumption for placement with the parent or stepparent who has been the child's long-term primary caretaker,93 and, in cases in which a custodial parent has died, I would recommend a presumption for leaving the child with a long-term residential stepparent if the stepparent has been substantially involved in the child's caretaking.94 In both sorts of cases, I would almost always permit generous visitation with an absent biologic parent. These rules regarding stepparents would, by their very nature, be applied only in cases in which a stepparent came forward seeking a continuing relationship with a child. Nothing in these rules imposes obligations on the residential stepparent who never develops a close relationship with a stepchild and has no desire for continuing contact.

Prescribing rules for child support during and after a remarriage is a greater challenge. During a second marriage, if a custodial parent marries a person with a substantial income, should the absent parent's child support order be adjusted to reflect the new standard of living the children maintain? Similarly, should a stepparent with biologic children from an earlier marriage be permitted to pay less support to the biologic children to reflect the greater expenses he incurs in supporting his new family? The traditional answer to both of these questions has been no. On the other hand, under new child support guidelines, at least a few states would apparently permit continuous adjustment of support at the payor's request to reflect, at each point, the actual living arrangements and incomes of all affected adults and children. Deciding on the wisest approach is difficult. Any rules permitting the downward adjustment of existing support obligations to take into account remarriages risks encouraging undesirable behavior—custodial parents may avoid remarriage to prevent a reduction in support, and non-custodial parents may enter into new marriages in part to punish their former spouses. On the other hand, any rules that fail to take into account
new relationships will, in some cases, lead to transfers from a payor (or family unit) already living at the margin to another family unit living more comfortably. (Consider, for example, the case in which, after divorce, a low-earning man supports a woman and her children while paying child support for children living with his former wife and her higher-earning new spouse. These cases are not the norm, but they are not rare either.) My own pragmatic resolution of this problem would be to continue to provide that the remarriage of either the custodial or the noncustodial parent does not, in itself, mark an occasion for recomputing child support but that, if the custodial parent or the state seeks an upward adjustment in a support award to reflect inflation (or the increased earnings of the supporting parent), the actual current standard of living of both family units would be taken into account in determining whether and how much of an adjustment to grant.

Prescribing rules for child support after the breakup of a marriage between a stepparent and a biologic parent is also difficult but for different reasons. It is difficult because rules imposing support obligations on a stepparent necessarily involve coercing an unwilling stepparent, and, as we have seen, the stepparent relationship, even among residential stepparents, takes so many forms. Of course, as with many rules relating to divorce today, it would be possible to give courts authority to compel a stepparent to pay support and then to prescribe a set of criteria that the court is expected to take into account in fixing an amount—criteria such as the length of time the stepparent lived with the child, the extent of support the stepparent actually provided, and the extent of support the biologic parents provided during the marriage.

Sad to say, courts have applied similar loose criteria for many years in fixing child support orders for biologic children at the point of divorce, and most observers have been dismayed by the lack of uniformity in the orders produced. As we have seen, Congress has in fact now insisted that states develop and follow more precise dollar guidelines in fixing support orders for absent biologic parents. Evenhandedness in the application of loose criteria is likely to be even more of a problem in the context of stepparents, where there is no general agreement about the obligation of support at all. To be sure, precise guidelines might be developed for residential stepparents—say, one year of support after divorce for each two years the stepparent lived with the child. Such guidelines could be justified on the basis of equitable notions that adults should be responsible for dependencies they have fostered and encouraged. Nonetheless, I am uncertain what the effects of such rules would be on people's willingness to enter into marriages with
custodial parents. And what is more fundamental, I am uncertain whether most Americans really believe that someone who makes voluntary contributions toward another’s support should be considered obligated to continue those contributions simply because the other, even a child, becomes dependent on them. I am thus reluctant to recommend such a change in the law. For now, I think that states can justly continue the current rule that stepparents cannot be compelled to provide support to stepchildren after divorce.