CONSTRUCTING PARENTHOOD FOR STEPPARENTS: *PARENTS BY ESTOPPEL* AND *DE FACTO PARENT*S UNDER THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION

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I. INTRODUCTION

The nuclear family, consisting of a married, heterosexual couple and their biological children, is still considered by many to be the preferred family form. However, a large number of children are not living in families that fit the nuclear family model because they have multiple adults in parental roles. Nonetheless, the nuclear family model is a powerful ideal and is used as a template to exclude those who do not fit within its pattern. Of those considered "parents," stepparents frequently fall outside this template and in disputes about children are put on the scrap heap labeled third party claimants. The American Law Institute's *Principles of the Law of Family Dissolution* will salvage the parenthood of a number of stepparents by expanding the definition of "parent."[1]

The *Principles* adopt the theory that parenthood should be a non-exclusive status when a child is not living in a nuclear family.[2] Persons who fulfill parental functions are recognized as important contributors to a child's well being, even though they have no biological tie to the child. The goal of this approach is to lessen the harm to children caused by family separation or dissolution by preserving child-parent attachments.[3] The underlying premise for this approach is that children are better off continuing contact with persons who have taken significant parental roles.[4] The implementation of this non-exclusive status uses several decision rules: 1) deference to private ordering by parents; 2) modeling the post-separation parental roles on the pre-separation parental roles; and 3) rejection of the indeterminate best interest standard in favor of more determinate rules.[5]

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1. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 2 (Tentative Draft No.3, Part 1, 1998) [hereinafter ALI PRINCIPLES 1998].

2. Categories of parents are defined in section 2.03. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (contains an elaboration on the need for a broader concept of "parent" in this context).

3. ALI PRINCIPLES 1998, *supra* note 1, § 2.02 cmt. e.

4. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.09(1)(h) (Tentative Draft No.4, 2000) [hereinafter ALI PRINCIPLES 2000].

5. ALI PRINCIPLES 1998, *supra* note 1, § 2.02.

The *Principles* endorse pluralism in family structure, allowing for multiple models of "family." To a great extent a family's form is defined by parents, with deference given to those who fit the traditional definition of parent, namely biological or adoptive parents. Children, however, have little say in who is deemed to be a parent or in defining their family, are not parties to proceedings, have no standing to bring an action,[6] and have no right to be heard.[7]

This commentary focuses on families composed of two adults, living in an intimate relationship, one of whom has a child from a prior relationship—a typical stepfamily form.[8] This commentary uses an expanded definition of stepfamily that includes cohabitation as well as remarriage.[9] It is necessary to use this expanded stepfamily definition because an increasing number of children are being brought up by unmarried-couple stepfamilies, particularly in families of color, low-income, or gay and lesbian families. Taking a broader and more inclusive view of parenting helps avoid the perpetuation of a system of family law that focuses on white, heterosexual, and higher-income families. The *Principles* also take a broader view and do not focus on marriage as a necessary attribute of parenting, although a comment suggests that marriage can be used as an indication of a "full and permanent" commitment to a child.[10] This expanded view of "family" and the attention paid to functional, rather than formal, relationships are in accord with feminist concepts. Feminists may disagree, however, about whether the *Principles* give sufficient control to the primary caretaker parent and about the status of children.

Part II of this commentary addresses the complexity of stepfamilies in order to provide a framework in which to consider the ALI proposals. Part III explains the terms that are important to understanding the *Principles*' application to stepfamilies, and Part IV tests that application on different stepfamily structures. Part V provides a brief feminist assessment of the application of the new parenting proposals to stepfamilies. This commentary concludes that, on balance, the *Principles* meet a number of feminist goals.

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6. *Id.* § 2.04

7. The court may interview the child or appoint a lawyer or a guardian ad litem for the child, but is not required to do so. *Id.* §§ 2.15-16. The preferences "of a child who has reached a specific age" (which the state should establish) are to be taken into account in custody decision-making, however. ALI PRINCIPLES 2000, *supra* note 4, § 2.09(1)(b).

8. Many of the ALI rules discussed in this commentary apply to two other types of "parents" the ALI identifies—men who functioned as parents while believing that they were the biological father and persons who functioned as parents from the child's birth as part of a co-parenting agreement. *Id.* § 2.03. The case law and rationale for these two types are sufficiently different from the more typical stepfamily form that they are not included in this commentary.

9. Sociologist Andrew Cherlin suggests defining stepfamily "as a household in which: 1) two adults are married or cohabiting, and 2) at least one adult has a child present from a previous marriage or relationship." ANDREW J. CHERLIN, PUBLIC AND PRIVATE FAMILIES 404 (2d ed. 1999).

10. ALI PRINCIPLES 2000, *supra* note 4, § 2.03 cmt. b(iv). The *Principles* do not use the term "stepfamily" or "stepparent" except in the comments and in that context it appears to mean married couples. *See* ALI PRINCIPLES 1998, *supra* note 1, § 2.21 cmt. b; *see also* ALI PRINCIPLES 2000, *supra* note 4, § 3.02A cmt. b.

II. STEPFAMILIES

An estimated twenty-five percent of today's children will become part of a stepfamily by marriage.[11] This percentage would be even greater and would include more families from marginalized groups if the broader definition of stepfamilies (including unmarried couples) were used. Family formation patterns often differ by race. Whites fit more readily into the traditional stepfamily definition, compared to African-Americans, for example, because Whites are more likely to remarry after divorce.[12] Additionally, low-income mothers are often unmarried,[13] and gay and lesbian couples are prevented from marrying. Much of what we currently know about stepfamilies is based on research that uses the traditional definition.

Stepfamilies come in a variety of forms. Consider the variation in family connections that result from the relationships in the hypothetical case of Sue and John. Sue and John lived together for three years and had one child, Ann. They split up when Ann was two and thereafter Ann primarily lived with Sue, but spent time with John as well. A year later, John married Roseanne, who had two daughters from a prior relationship who lived with her. Ann saw John about once a month after his marriage, and usually saw him with his new family around. The next year Sue married Frank, who was the custodial parent of his ten year-old daughter Mary. A year later, they had a son, Bill. Ann now has a stepmother, stepfather, a half-brother and three stepsisters. She primarily lives with her mother, stepfather, half-brother and one stepsister and sees her father, stepmother and other two stepsisters occasionally.

Our hypothetical family is unusual in several respects. Unlike Frank, most divorced fathers are not the custodial parents.[14] Ann's continued contact with her father is also unusual. More often than not, the noncustodial father fades out of the child's life.[15] Recent studies have noted only a slight increase in the post-divorce involvement of fathers.[16] Additional information about how stepfamilies function is needed, but family researchers have had difficulty studying stepfamilies because of the complexity of these family forms.[17]

Researchers have tried to develop typologies for the structural variations in stepfamilies.[18] For example, one researcher identified fifteen stepfamily configurations based on the residence of a new two-parent family with children from prior unions of both adults. This number of configurations doubled when the

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11. *See* Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, 4 FUTURE OF CHILDREN 29, 35 (Spring 1994), *available at* http://www.futureofchildren.org.

12. *Id.* at 32.

13. ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 92 (1992).

14. Patricia H. Shiono and Linda Sandham Quinn, *Epidemiology of Divorce*, 4 FUTURE OF CHILDREN 15, 25 (Spring 1994), *available at* http://www.futureofchildren.org.

15. *Id.*

16. FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES 36 (1991).

17. For surveys of research: *See* Marilyn Coleman et al., *Reinvestigating Remarriage:Another Decade of Progress*, 62 J. OF MARRIAGE & THE FAM. 1288 (2000); Kay Pasley et al., *Remarriage and Stepfamilies: Making Progress in Understanding, in* STEPPARENTING: ISSUES IN THEORY, RESEARCH, AND PRACTICE 1 (Kay Pasley & Marilyn Ihinger-Tallman eds., 1994).

18. LAWRENCE H. GANONG & MARILYN COLEMAN, REMARRIED FAMILY RELATIONSHIPS 5 (1994).

new couple had children together. [19] In addition to variations in stepfamily structure, psychological definitions of stepfamily membership vary as well. One study asked stepchildren to identify the members of their family. The children's responses fell into four groups: some children identified their biological parents as part of their family, but not the stepparent with whom they lived; some replaced the nonresidential biological parent with a stepparent; some only identified the biological parent with whom they lived; and others listed both biological parents and at least one stepparent. [20]

The complexity of stepfamilies may be one reason why stepfamilies, family researchers and lawmakers have struggled to find a model that fits their family form. Even naming step-relationships is a challenge, in part because of the negative connotations of the prefix "step." Stepparents' labels have included half-parents, added parents and acquired parents.[21] Within a stepfamily a child may call a stepparent "Mom" or "Dad" or use a first name. Stepfamilies are labeled as reconstituted, combined, merged, blended and remarried.[22] A researcher studying lesbian stepfamilies rejected the term "stepfamily," in favor of using "step" as an adjective because she felt that "lesbian" and "step" defined the type of family being studied, but that "stepfamily" suggested something other than family.[23]

Judges, family researchers, and stepfamilies themselves have been affected by the power of the nuclear family model and too often use a deficit-comparison approach when assessing stepfamilies.[24] Instead of analyzing the stepfamily as a new family form, they view the stepfamily as a deviation from the norm. The nuclear family is considered positive and any variation from it is considered negative.

Stepfamilies may try to escape the stigma of being a stepfamily by being as much like a "proper" family as possible. Ironically, this may be counterproductive and will produce more family stress. From a clinician's standpoint, the stepfamily that tries to be like a nuclear family must engage in "massive denial and distortion of reality." [25] "It is as if stepfamily members are asked to wipe the slate clean, to forget about prior relationships, and to begin as if nothing that went on before the remarriage actually happened."[26] Moreover, the stepfamily that tries to emulate the nuclear family can encounter resistance both within and outside the stepfamily. A stepchild, for example, may reject the stepparent as "parent" in turn provoking withdrawal by the stepparent.[27] The noncustodial parent may resist being replaced by the stepparent.[28] Particularly with older

19. *See* ESTHER WALD, THE REMARRIED FAMILY: CHALLENGE AND PROMISE (1981), *cited in* GANONG & COLEMAN, *supra* note 18, at 5.

20. *See* P.E. Gross, *Defining Postdivorce Remarriage Families: A Typology Based on the Subjective Perceptions of Children*, 10 J. OF DIVORCE 205 (1987), *cited in* GANONG & COLEMAN, *supra* note 18, at 7.

21. GANONG & COLEMAN, *supra* note 18, at 2.

22. *Id.* at 1.

23. JANET M. WRIGHT, LESBIAN STEP FAMILIES: AN ETHNOGRAPHY OF LOVE 3 (1998).

24. GANONG & COLEMAN, *supra* note 18, at 148.

25. *Id.* at 124.

26. *Id.*

27. *Id.* at 125.

28. *Id.*

children, the stepparent may be accepted more readily as an adult friend, rather than as a "parent."

In addition to the problem of stigma, another reason stepfamilies try to emulate the nuclear family model is that the nuclear family is a known entity with rules and boundaries. In contrast, the stepfamily is a complex family system that lacks a coherent, socially accepted model. This lack of formalized societal support or incomplete institutionalization has been suggested as an explanation for the slightly higher divorce rate for remarriages as compared to first marriages.[29] Clinicians have also attributed stepfamily stress to the lack of institutionalized societal support including customs, choice of language and law.[30] They have also suggested that the lack of a legal relationship between a stepparent and stepchild is a barrier to the development of a close relationship and adds to the stepparent's feeling of ambiguity and lack of control.[31]

The degree of the law's impact on stepfamilies has been questioned,[32] but it is useful to speculate as to whether the *Principles* would help reduce this ambiguity. Of course, it is important to note that the *Principles* address separation or dissolution and do not directly establish new rules for an on-going family. The *Principles*' influence on societal attitudes toward parent and stepparent roles in an on-going relationship would be through an indirect response to the clearer definitions of roles at the end of the relationship.

As this discussion of stepfamilies demonstrates, developing rules that would be responsive to their diverse family forms at separation or dissolution is a formidable challenge. The next two sections of this commentary analyze how the *Principles* addressed this challenge.

III. DEFINING PARENTING AT SEPARATION OR DISSOLUTION

A. Responsibility Rather than Rights

Traditionally state law defines and allocates custody and visitation rights between parents. The *Principles* took a new approach, changing from an allocation of parental rights in children to an allocation of responsibility for children. New terminology accompanies this new paradigm. The *Principles* replace the traditional terms of "custody" and "visitation" with the term "custodial responsibility;" and "legal custody" with "decision-making responsibility."[33] The comments explain the rationale for this change. Custodial responsibility:

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29. *Id.* at 59. *See generally* Andrew Cherlin, *Remarriage as an Incomplete Institution*, 84 AM. J. OF SOC. 634 (1978).

30. GANONG & COLEMAN, *supra* note 18, at 134-36.

31. *Id.* at 136.

32. *See* David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perception of "Family" After Divorce, in* DIVORCE REFORM AT THE CROSSROADS 102, 126 (Stephan D. Sugarman & Herma Hill Kay eds., 1990) (suggesting that much of the role confusion in stepfamiles is due to their complexity rather than to the lack of legal rules).

33. *See* ALI PRINCIPLES 1998, *supra* note 1, § 2.03 ("(4) *Custodial responsibility* refers to physical custodianship and supervision of a child. It usually includes, but does not necessarily require, residential or overnight responsibility. (5) *Decisionmaking responsibility* refers to authority for making

> is intended to avoid the either-or (custody or visitation) alternatives suggested by more conventional terminology, and to reinforce the notion not only primary responsibility for the child but also all other forms of physical responsibility as well are custodial in nature. While the effects of shifts in terminology on people's perceptions of parenthood are, at best, highly speculative, the unified concept of custodial responsibility may help to strengthen the notion that both parents have responsibility for the child, regardless of the proportion of time each spends with the child, and that neither should be a mere 'visitor.'[34]

The term "decisionmaking responsibility" is used to describe the authority to make significant decisions about the child, such as decisions concerning medical care or education. The phrase "allocation of responsibility" includes both decisionmaking and custodial time.[35]

B. Parenting Roles

The *Principles* distinguish between caretaking and parenting functions, a distinction that follows traditional gender roles to a large extent. Caretaking functions "are tasks that involve interaction with the child or direct the interaction and care provided by others" and include such tasks as feeding and bathing the child, providing moral guidance, and arranging for education, health care, and daycare.[36] These are traditionally the mother's tasks and both custodial mothers and wives of custodial fathers tend to follow this pattern, although one study found that household labor in remarried families was less gender-specific than in first-marriage families.[37] Parenting functions "are tasks that serve the needs of the child or the child's residential family." [38] They include caretaking functions and additional tasks such as providing economic support, home and car maintenance, housecleaning, and purchasing groceries.

The category of caretaking functions is used to allocate custodial responsibility when parents cannot agree. The allocation standard adopted by the *Principles* is that the court "should be required to allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spends performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action. . ." subject to certain qualifications, including the need "to avoid substantial and almost certain harm to the child."[39] This approximation standard "assumes that the division of past caretaking functions correlates well with other factors associated with the child's best interests, such as the quality of each parent's emotional attachment to the child and the parents' respective parenting abilities." [40]

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significant life decisions on behalf of the child, including the child's education, spiritual guidance, and health care. ").

34. *Id.* § 2.03 cmt. d.
35. ALI PRINCIPLES 2000, *supra* note 4, § 2.21.
36. ALI PRINCIPLES 1998, *supra* note 1, § 2.03 (6).
37. GANONG & COLEMAN, *supra* note 18, at 65.
38. *See* ALI PRINCIPLES 1998, *supra* note 1, § 2.03(7).
39. ALI PRINCIPLES 2000, *supra* note 4, § 2.09(1).
40. ALI PRINCIPLES 1998, *supra* note 1, § 2.09 cmt. b.

The approximation standard is easy to criticize: for example, one attorney complained that "the premise of the ALI *Principles* that "primary caretaking" correlates to a deeper emotional attachment between that parent and the child is flawed. Parent-child relationships cannot be so simplistically quantified."[41] This critique does not take into account the additional major justification for the standard, which is that it is more objective and easier to apply than a requirement that a court determine parenting abilities and emotional attachment between parent and child.

The *Principles* also assume that contact with each parent is desirable even if one parent did not perform many caretaking functions. In making a custodial allocation therefore the court should "permit the child to have a relationship with each parent."[42] The amount of time allocated should be enough to allow "a meaningful relationship."[43] When a parent "has performed a reasonable share of parenting functions" the custodial allocation "should not be less than a presumptive amount of custodial time determined through a uniform rule of statewide application."[44] The *Principles* do provide for limitations on a custodial allocation when necessary to prevent harm to the child or the child's parent in situations involving child abuse, domestic abuse and other problems.[45]

The caretaking concept and the importance of maintaining parenting continuity for the child are important in determining who qualifies as a parent as well. The next section explains the new concepts of "parent."

C. Who Is a Parent?

The *Principles* have three categories of "parent"—*legal parents, parents by estoppel,* and *de facto parents.*[46] A *legal parent* is one who is defined as such under state law. Decisions that turn on who fits the state definition of parent, such as the familiar Supreme Court decision in *Michael H. v. Gerald D*,[47] would not be affected by the *Principles. Michael H.* involved a child born to a married couple who was not the biological child of the husband. Michael, the biological father of Victoria, was not a "parent" under California law because Victoria was presumed to be the child of her mother's husband. Under the *Principles*, therefore, Michael would not be a *legal parent*.[48]

The category of *parent by estoppel* prevents a *legal parent* from denying parental status to a person who has acted as a parent in specified ways.[49] A person

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41. Henry Shanoski, *Two Parents for Every Child of Divorce: Sustaining the Shared Parenting Ideal of Maine's Custody Law*, 14 ME. B. J. 86, 88 (1999).

42. *See* ALI PRINCIPLES 2000, *supra* note 4, § 2.09(1)(a).

43. ALI PRINCIPLES 1998, *supra* note 1, § 2.09 cmt. a

44. ALI PRINCIPLES 2000, *supra* note 4, § 2.09(1)(a).

45. ALI PRINCIPLES 1998, *supra* note 1, § 2.13.

46. ALI PRINCIPLES 2000, *supra* note 4, § 2.03(1).

47. 491 U.S. 110 (1989).

48. A person in Michael's position might be able to achieve a *parent by estoppel* or *de facto parent* status, if he met the stringent requirements for one of these categories. Michael did not, however, because his cohabitation with Victoria and her mother was relatively brief and intermittent. He did not even meet the threshold requirement of having lived with Victoria for at least two years. ALI PRINCIPLES 2000, *supra* note 4, § 2.03(1).

49. *Id.* § 2.03 cmt. b.

who has met the *Principles*' *parent by estoppel* requirements is treated like a *legal parent* in the allocation of custodial and decisionmaking responsibility.[50] A *parent by estoppel*, for example, has standing to bring an action and the advantages of the presumptions in favor of a minimum allocation of custodial time and a joint allocation of decisionmaking responsibility.[51] The *Principles* provide four approaches to becoming a *parent by estoppel*: 1) being liable for child support; 2) having a good faith belief that one is the biological father; 3) entering into a co-parenting agreement prior to the child's birth; and 4) living "with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two *legal parents*, both parents), when the court finds that recognition as a parent is in the child's best interests."[52] This last approach is the one that is primarily applicable to the stepfamily form.

The definition of *de facto parent* is narrow "to avoid unnecessary and inappropriate intrusion into the relationships between *legal parents* and their children."[53] The person seeking *de facto parent* status must have lived with the child for a significant period of time, not less than two years. Whether a time period is "significant" depends on a number of factors, including "the age of the child, the frequency of contact, and the intensity of the relationship."[54] In addition, during this time period, for reasons not based primarily on financial compensation, the person must have performed a majority of the caretaking functions or a share that is at least equal to the share assumed by the *legal parent* with whom the child primarily lived. The practical effect of this requirement is that generally the only stepparent who might become a *de facto parent* is the partner of the parent with primary custodial responsibility. The *de facto parent* status is inferior to *legal parent* and *parent by estoppel* status. A *de facto parent* typically would not be allocated primary custodial responsibility when a *legal parent* has also been taking an active parenting role, for example.[55]

As with the category of *parent by estoppel*, the consent of a *legal parent* is a prerequisite for the formation of the *de facto parent* relationship. Consent can be implied, but requires a clear demonstration that the *legal parent* intended to share parenting responsibilities. If the *legal parent* maintains control over matters related to the child's care, such as discipline, then the parent typically has not agreed to share responsibilities. Asking a partner to babysit, for example, does not establish an agreement to a *de facto parent* relationship.[56] *De facto parent* status can also be established without a parent's consent, if no *legal parent* is able or willing to perform caretaking functions as, for example, when a parent abandoned a child or was institutionalized.

Generally a person who is not a "parent" under any of these categories would not be allocated any responsibility. In other words, there is no equivalent

50. *Id.*
51. *Id.*
52. *Id.* § 2.03(1)(b)(i-iv).
53. *Id.* § 2.03 cmt c.
54. ALI PRINCIPLES 2000, *supra* note 4, § 2.03 cmt. c(iv.)
55. *Id.* § 2.21 cmt. b.
56. *Id.* § 2.03 cmt. c(iii.).

to a broad visitation statute. A "grandparent or other relative" may be allocated responsibility but only in a very narrow range of cases.[57] Note that a stepparent might not qualify as an "other relative." This restrictive approach "reflect[s] the societal consensus that responsibility for children ordinarily should be retained by a child's parents, while recognizing that there are some exceptional circumstances in which the child's needs are best served by continuity of care by other adults."[58] A further restriction is that a person who did not qualify as a *legal parent*, *parent by estoppel*, or *de facto parent* would not have standing to bring an independent action, although in exceptional circumstances a court can permit intervention in an on-going action.[59]

D. Support

The *Principles* do not impose a general obligation of support on stepparents nor does the allocation of responsibility trigger a support obligation. Child support and the responsibility allocation are considered separately.[60] A stepparent who received a small allocation of responsibility would be expected to care for the child as a volunteer and would not be entitled to support from a parent, however.[61] Some scholars, statutes, and cases suggest that visitation and support should be connected so that a stepparent who wanted continued contact with a child would also be expected to continue to assist in the child's support.[62]

If a stepparent's affirmative behavior is such that the stepparent should be equitably estopped from denying a support obligation, a support obligation may be imposed.[63] These cases would be rare and a stepparent's sharing of resources during the relationship does not provide a basis for ordering support.[64] If a child support obligation is imposed, the stepparent becomes a *parent by estoppel*.[65] The child's *legal parent* can avoid this result by not pursuing the child support claim, but once a stepparent is obligated for support, the stepparent has *parent by estoppel* status, with its attendant rights and privileges.

IV. APPLICATION OF THE PRINCIPLES

In custody cases, state courts have used a variety of equitable doctrines and sometimes vague and open-ended standards to allow stepparents and partners to continue their relationship with a child.[66] The ALI proposals would clarify the basis for recognizing those claims and would be more stringent than the ap-

57. *Id.* § 2.21(2)(i-iii).

58. *Id.* § 2.21 cmt. a.

59. *Id.* § 2.04 (e).

60. ALI PRINCIPLES 2000, *supra* note 4, § 3.02A cmt. b.

61. *Id.* §3.17 cmt. c.

62. *See, e.g.*, Sarah H. Ramsey & Judith M. Masson, *Stepparent Support of Stepchildren: A Comparative Analysis of Policies and Problems in the American and English Experience*, 36 SYRACUSE L. REV. 659, 671-72 (1985); In re Marriage of Gallagher, 539 N.W.2d 479, 481 (Iowa 1995); TENN. CODE ANN. § 36-6-303(a) (1996).

63. *See* ALI PRINCIPLES 2000, *supra* note 4, § 3.02A.

64. *Id.* § 3.02A cmt. b.

65. *See id.* §§ 2.03(1)(b)(i), 3.02A cmt. e.

66. *See* Katharine T. Bartlett, *Reporter's Notes*, ALI PRINCIPLES 2000, *supra* note 4, at 228-32.

proach taken by some states, but more lenient than other states. Looking at the facts of some of these cases and applying the *Principles* provides a mechanism for seeing how the new rules would operate in practice.

A. Death of Custodial Parent

A.R.A. was born two years before her parents' marriage ended.[67] Her mother, Tracy, received custody and remarried a year later. She and her new husband had a child, Joshua, and their marriage continued for two years until she was killed in a plane crash. Tracy's will named her husband Patrick as A.R.A.'s guardian. A.R.A.'s father, Bill, had moved to another state, but visited A.R.A. for "extended periods" approximately once per year and kept in touch by telephone. He was delinquent in his child support payments, however. The trial court awarded custody to Patrick based on A.R.A.'s best interests. The district court found:

> there was a close relationship between Patrick and A.R.A.; that A.R.A. was attached to her brother Joshua; that Patrick's parenting skills are superior to those possessed by Bill; that A.R.A. would be adversely affected by changing schools, therapists, and her primary residence; and that it was in her best interest that she remain in Billings in the family unit to which she had grown accustomed.[68]

The Montana Supreme Court reversed and held that the trial court did not have the authority "to deprive a natural parent of his or her constitutionally protected rights absent a finding of abuse and neglect or dependency."[69]

What would the result be under the *Principles*? Patrick met many of the requirements for *parent by estoppel*. He lived with A.R.A. for at least two years and he likely accepted "full and permanent responsibilities as a parent" with Tracy's consent, because he and Tracy supported A.R.A., and she named him as guardian. Tracy, however, cannot unilaterally confer *parent by estoppel* status on Patrick either during her lifetime or through her will. Bill must also consent, because "[a] parent cannot be estopped from denying parent status to an individual who has functioned as such, if that parent has not agreed."[70] A parent's consent can be implied from the circumstances, however: "[f]or example, the legal father who knows that his child is being raised entirely by the mother and her husband and who fails to visit or support the child has agreed, constructively, to the stepfather's role as the child's parent, and is estopped from later denying parental status to that stepfather. In contrast, the legal father who acknowledges the stepfather's role but who continues to exercise his own parental rights and responsibilities has not agreed to the formation of a parent status by the stepfather."[71] Did Bill give implied consent? This presents a difficult question since he did stay in touch with A.R.A., perhaps as much as he could because of the geographical separation, but he did not financially support her.

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67. *See generally In re* A.R.A., 919 P.2d 388, 389 (Mont. 1996).
68. *Id.* at 390.
69. *Id.* at 392.
70. *See* ALI PRINCIPLES 2000, *supra* note 4, § 2.03 cmt. b(iv).
71. *Id.*

If Patrick is not a *parent by estoppel* is he at least a *de facto parent*? The case did not discuss who performed the caretaking functions for A.R.A. In order for Patrick to be a *de facto parent*, he would have to perform at least as much caretaking as Tracy did. If they followed fairly traditional roles, it is unlikely that he did so. Probably the result under the *Principles* will be the same as that reached by the Montana court. Patrick does not fit the pattern and is out of the picture.[72]

Can A.R.A. and her half-brother have continued contact? The *Principles* make no provision for this. A.R.A. would have no standing to initiate an action and the provisions for allocating responsibility apply to adults only. No protection is provided for child-child relationships, only for parent-child relationships. An ironic effect of the shift of language from rights to responsibility is that the child's position as subject of a proceeding, rather than as participant, is emphasized. At least in rights talk, a child, as well as a parent, can assert a right to continued contact with persons in her family.[73]

B. Dissolution of the Relationship

When Scott and Judy Hickenbottom married, she had a daughter from a prior marriage who was about four years old.[74] Scott lived with his stepdaughter for almost eight years until he and Judy decided to divorce. Scott and Judy also had two sons which were born during the marriage. According to Scott, his stepdaughter's father had no contact with her and paid no child support. Scott, however, had a father-daughter relationship with her. She called him "Daddy" and was known by his surname. He disciplined her, attended school functions, prepared meals for her and put her to bed. Judy objected at trial to giving Scott visitation with his stepdaughter, stating that:

> I just want to get on with it. I don't want him coming and going when he pleases, you know. She was already abandoned, left—I wouldn't say abandoned, but left by one father. I don't need it by a second father. I won't tolerate it from him. And his harassment, I won't tolerate it.[75]

The Supreme Court of Nebraska upheld the trial court's visitation award, stating that Scott had met the requirement of acting as a parent to the child and had achieved an *in loco parentis* status.[76] The court concluded that:

> [T]he wife is more interested in punishing the husband by denying him access to her daughter than she is in doing what serves the girl's best interests. The girl

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72. Some states would give Patrick rights. *See, e.g.*, Tailor v. Becker, 708 A.2d 626, 627 (Del. 1998) (upholding statute that "effectively gives a stepparent the same status as a natural parent, for purposes of deciding custody, if (i) the child is residing with the stepparent and a natural custodial parent, when (ii) the natural custodial parent dies or becomes disabled.").

73. For example, in *Michael H.*, Victoria asserted a right, albeit unsuccessful, to have continued contact with both her "fathers." Michael H. v. Gerald D., 491 U.S. 110, 130-32 (1989).

74. Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 10 (Neb. 1991). *Hickenbottom* addresses an additional issue that this commentary does not cover, namely the effect of an agreement by the parties related to custody. Although the Nebraska court would not allow the parties' agreement to control the custodial disposition of the children, the *Principles* strongly support private agreements. *See* ALI PRINCIPLES 1998, *supra* note 1, §§ 2.06, 2.07.

75. *See* Hickenbottom, 477 N.W.2d at 11.

76. *Id.* at 17.

> is not a piece of property; she is a living, breathing, and, as is any child, fragile person who is seemingly already distraught by the destruction of what she has known as her family. There is no need to further damage her by removing the emotional support of one who has cared for her during the marriage.[77]

Under the *Principles*, Judy would have little basis for opposing Scott's desire for continued contact, because Scott would be a *parent by estoppel*. Judy apparently consented to Scott's taking on full parental responsibilities and the child's father, through inaction, gave implied consent. Scott took this role for a significant period of time in relation to the child's age and for more than two years. Finally, the court would probably find that giving *parent by estoppel* status to Scott would be in the child's best interests. As a *parent by estoppel*, Scott and Judy would be on an equal footing with regard to the allocation of responsibility. Scott would also benefit from the presumptions in favor of an allocation of joint decisionmaking responsibility and at least a minimum allocation of custodial time.

In both *A.R.A.* and *Hickenbottom*, the conflict over the child involved only two adults, a stepparent and biological parent, because the other biological parent was either deceased or had disappeared from the child's life. The final case this commentary considers is *In re Marriage of Sorensen* that involves a conflict among three "parents."[78] The facts are as follows:

> When the child was two years old, the marriage of her biological parents (father and mother) was dissolved, and each was awarded joint custody of the child. One month later, father married stepmother. That marriage lasted for 11 years. At the beginning of father and stepmother's marriage, the child spent half her time with mother and half her time with father and stepmother. However, when she turned six, the child began residing with father and stepmother and spending less time with mother. That arrangement continued for three years. Between the ages of 10 and 12, mother's involvement with the child diminished even further, with the child having few overnight visits with mother. Over the years, stepmother and the child have developed a very close relationship, with stepmother assuming a primary parenting role. Stepmother has been responsible for making the major decisions that affect the child and for assisting with her education. She has helped feed, clothe, shelter, discipline, obtain medical care and provide emotional support for the child. Still, the child has at all times referred to her biological mother as "mom" and continues to have a good relationship with her. Mother and father continue to share joint legal custody of the child.
>
> After father and stepmother's recent divorce, the child continued to reside with father. Stepmother moved to a nearby residence to facilitate visitations with the child. She and father had a verbal agreement that the child would be allowed to spend an unlimited amount of time with stepmother, and that she would have the freedom to go back and forth between the households as she pleased. Stepmother alleges that within two months, father decided not to abide by that agreement and began making it difficult for stepmother to see the child.[79]

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77. *Id.*
78. 906 P.2d 838 (Or. Ct. App. 1995).
79. *Id.* at 839.

The issue confronting the appellate court was whether the stepmother had standing to intervene in a proceeding that mother initiated against father for custody of the child. The court found that she did have standing to intervene and remanded the case to the trial court for a decision on the merits of the stepmother's claim.

Under the *Principles*, it appears that the stepmother would be a *de facto parent* and hence would have standing not only to intervene in an action, but also to initiate an action.[80] The father apparently consented to her forming a parent-child bond with the daughter and she performed a majority of the caretaking functions. But the stepmother would probably still not be a *parent by estoppel* because the mother did not consent to the stepmother having full rights and responsibilities of a parent, nor could her consent be implied. As noted earlier, "the legal [parent] who acknowledges the [stepparent's] role but who continues to exercise [her] own parental rights and responsibilities has not agreed to the formation of a parent status by the [stepparent]." [81] As a *de facto parent*, the stepmother would not have a status equal to either the mother or the father in the court's decision allocating responsibility. A court should not allocate the majority of custodial responsibility to a *de facto parent* over the objection of a *legal parent* unless the *legal parent* had "not been performing a reasonable share of parenting functions" or "the available alternatives would cause harm to the child. [82] Even if the stepmother performed a majority of the caretaking functions, there is no evidence that father did not perform other parenting functions, such as providing support for the family, and thus he probably met the "reasonable share" requirement.

If the court were inclined to allocate responsibility among the stepmother, father and mother, the court might be concerned about whether doing so would result in too many "parents" in the life of the child. The *Principles* provide that the court should "limit or deny an allocation otherwise to be made if, in light of the number of other individuals to be allocated responsibility, the allocation would be impractical in light of the objectives of this Chapter"[83] (the primary objective of the Chapter is "to serve the child's best interests.")[84] In making this allocation determination a judge should recognize that the *Principles* intended to expand the concept of "parent" and allow more than two "parents." *Sorensen* seems an appropriate case for applying this expanded concept of family. To put it differently, if a court concluded that the stepmother in *Sorensen* should receive no allocation, because such an allocation would result in too many "parents," it would be vitiating the *Principles*' expanded concept of parent.

A similar analysis would be applicable to a gay stepfamily. To use a hypothetical case, Ann and Mary decide to have a child together and have a co-parenting agreement. Ann is the biological mother and Mary is a *parent by es-*

80. *See* ALI PRINCIPLES 2000, *supra* note 4, § 2.04(1)(c).

81. *Id.* § 2.03 cmt. b(iv). See also *supra* note 70 and accompanying text.

82. *Id.* § 2.21(1)(a)(i-iii).

83. *Id.* § 2.21(1)(b).

84. ALI PRINCIPLES 1998, *supra* note 1, § 2.02.

toppel.[85] Ann and Mary separate three years after the child is born. The child stays primarily with Ann, but Mary continues an active parenting role. Ann develops a new relationship after a year and her new partner, Alice, takes an active parenting role, providing as much caretaking as Ann does over the course of their five-year relationship. When Ann and Alice separate, a court could allocate responsibility among Ann, a *legal parent*, Mary, a *parent by estoppel*, and Alice, a *de facto parent*.

V. FEMINIST GOALS

Do the *Principles* further feminist goals? Feminists share a commitment to examining law reform proposals to determine whether their impact on women helps eliminate the disadvantage that law has traditionally imposed on women.[86] Examining the *Principles'* impact on stepfamilies, however, runs into the problem that there is no "essential" woman nor is there an "essential" stepfamily. Women take a variety of parenting roles and stepfamilies have a number of different structures. A law that strengthens the position of one woman or stepfamily may weaken the position of another. A rule that helped a custodial mother prevent a former partner from having continued contact with her child, for example**,** might also prevent a stepmother from maintaining her relationship with a child she has parented.

Considered generally, the *Principles* contain a number of feminist concepts. Feminists have favored expanded definitions of the family that are tied more to function than to formal, legal definitions of connection[87] and enhanced recognition of the importance of caring for children. The *parent by estoppel* and *de facto parent* proposals provide a cautious mechanism for recognizing expanded, informal family forms and moving beyond the constraints of the nuclear family model. Parental status is not exclusively tied to biology, adoption or marriage, but rather is also related to function. Children are not limited to two "parents," but instead can have legally protected relationships with additional persons who performed substantial parenting roles. The *Principles* also provide recognition of the importance of caretaking and use it as a means for assessing an adult's connection and commitment to a child. One troubling aspect of the *Principles* is that children are rendered relatively invisible as individuals, although their well being is considered to be the basis for many of the *Principles*' decision rules.

With regard to maternal roles within a family and custody decisionmaking, feminists do not share a common view of what constitutes disadvantage. Some are equal parent advocates who encourage mothers and fathers to share parenting tasks and labor force participation equally.[88] Others are maternalists who

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85. *See* ALI PRINCIPLES 2000, *supra* note 4, § 2.03 (If Mary adopted the child, she would be a legal parent.). *Id.* § 2.03 cmt. a.

86. *See generally* Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L. Q. 475 (1999).

87. *Id.* at 486-87.

88. *See* Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality*?, 9 J. CONTEMP. LEGAL ISSUES 279, 297 (1998) ("Equal treatment" feminists "embrace equal parenting strategies designed to destabilize domesticity's gender roles" and "special treatment" feminists "ad-

want women's childrearing and other traditional work given increased recognition to support women who take this traditional role.[89] The maternalists would support enhancing the authority of the primary caretaker parent. They might disagree with the result in *A.R.A.* on the basis that Tracy's decision to make her husband a "parent" should have prevailed over the preference of Bill, the biological father. Equal parent advocates might be less disturbed by *A.R.A.* If Patrick, the stepfather, had taken an equal parenting role with Tracy he would be a *de facto parent* even if Bill had taken an active role as well. As a *de facto parent* he could have received an allocation of responsibility even over Bill's objection. If Bill had not taken an active role, Patrick would be a *parent by estoppel*. Thus, the allocation of responsibility between Patrick and Bill depends upon the level of their parenting activities.

Maternalists might also disagree with the result in *Hickenbottom*. They might support Judy's desire to return to the mother-child dyad and agree with her skepticism regarding Scott's long-term commitment to the child. They might view Scott's parenting activities with skepticism as well, considering the court's attention to his caretaking to be more related to the use of a dual standard in assessing parenting—taking Judy's work for granted, as something that was expected, and giving Scott undue credit for performing minimal, though unexpected, caretaking tasks.

Equal parent advocates, however, might find the *Hickenbottom* court's conclusion more acceptable. Scott took an active role, with his wife's consent and encouragement. Recognizing his contribution and allowing him to continue his relationship with the daughter does not seem unfair to Judy, since she agreed to his taking on this role. They might, however, feel that the harassment complaint should have been considered seriously with the court proactively determining if domestic abuse had occurred. If it had, under the *Principles*, Scott's allocation of responsibility could be limited.[90]

Sorensen presents a more difficult case because of the conflict between the biological mother and the primary caretaker, the stepmother. A straightforward application of the maternalists' approach presumably would give the most authority to the stepmother and thus would disapprove of classifying her as only a *de facto parent*.[91] On the other hand, since the biological mother also took an active role, the maternalists might feel uncomfortable with reducing her authority relative to the stepmother. Equal parent advocates might disapprove of the result produced by applying the *Principles* as well, because the parent who performed the most caretaking functions, the stepmother, ends up with a lower priority than the two *legal parents*. *Sorensen* demonstrates the importance of legal parenthood in the *Principles*' allocation structure. This deference to legal par-

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vocate maternalist policies designed to empower women within the role domesticity assigns to them.").

89. *Id. See, e.g.*, MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992).

90. ALI PRINCIPLES 1998, *supra* note 1, § 2.13.

91. Mary Becker might disagree because of her focus on the importance of pregnancy, childbirth and nursing. She also recognizes, however, that women without a genetic link to a child can have an important mothering role. *See* Becker, *supra* note 89, at 220.

enthood does not clearly meet the goals of the maternalists or equal parent advocates, although it may reflect the majority view.[92] The attention to function as well as formality, however, would be a positive feminist contribution.

The *Principles* support flexibility in family forms by acknowledging norms that the family chose rather than prescribing a model family form. In addition to the problems noted above, assessing the impact of this approach on women is difficult because of differences in women's ability to control their family structure. A woman's freedom of choice in a relationship may be illusory because of economic necessity or because she is dominated by her husband or partner. Mothers may not be able to prevent their partners from taking a parenting role even though they view that involvement as undesirable. There is some evidence that women marry because of financial need or social pressure to create a "proper" family for their children.[93] Their caretaking ability may be constrained by the workplace as well. Conversely, researchers have found that remarried women are relatively more powerful than women in first marriages in areas such as decision-making and financial control.[94] It seems safe to assume, however, that some custodial mothers who did not freely chose to confer parental status on their partners, will nonetheless be required to share responsibility upon separation.

VI. CONCLUSION

With regard to childrearing and custody, the *Principles* do not impose the equal parenting model or the maternalists' model on stepfamilies, but rather allow those functioning as parents to make this choice within fairly constrained boundaries. As noted earlier, the noncustodial parent's partner would probably not be able to meet the parenting function requirements of the *Principles* and hence could not achieve *parent by estoppel* or *de facto parent* status. Furthermore, achieving a *de facto parent* status is contingent on the express or implied consent of a parent. For a stepparent to become a *parent by estoppel*, the consent of both *legal parents* is needed, unless the stepparent is liable for child support, and the recognition of the status must be in the child's best interest.[95] The *Principles* thus provide strong support for *legal parents*' control, although the rules are more liberal than those of states that require a showing of parental unfitness before a nonparent's claims are recognized.

Although these are important concerns, the *Principles* further feminist goals by emphasizing function rather than formality and the importance of providing care for children. The *Principles* allow space for establishing new norms for stepfamilies, and for letting these families determine their structure. It is a narrow space, however, limited by deference to parental control. On balance the *Principles* are a positive, incremental step toward recognizing families that do not fit the nuclear family model.

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92. ALI PRINCIPLES 2000, *supra* note 4, § 2.21 cmt. a.

93. GANONG & COLEMAN, *supra* note 18, at 39.

94. *Id.* at 64.

95. ALI PRINCIPLES 2000, *supra* note 4, § 2.03 (b)(iv).