Rights, Responsibilities and Liabilities of a Stepparent

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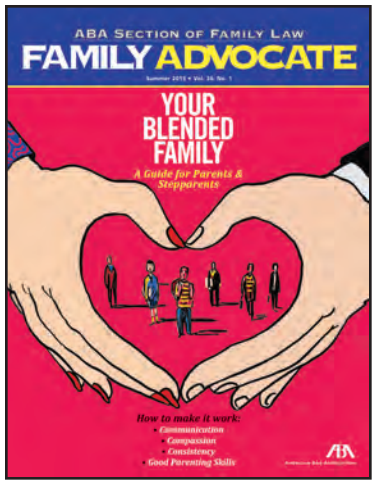

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With the prevalence of divorce and the frequency of remarriage, blended families with stepparents and stepchildren are a common feature of modern domestic society

Ideally, stepparents develop closely bonded relationships with their stepchildren, and vice-versa, providing an additional support system for the children of divorce. These children experience extreme dislocations, both physical and emotional, even when the divorce is as low conflict and amicable as can be.

The beneficial influence of mom and/or dad remarrying a partner who bonds with and cares for their stepchildren cannot be underestimated. Neither can the positive effect of the child's being a key part of two new integral and stable families (i.e., mom and stepdad and dad and stepmom). Again, ideally, the child(ren) now have four parents (two biological and two stepparents) to love, nurture, help, advise, support, and set an example for them. Although this admittedly only scratches the surface of the stepparent/stepchild(ren) dynamic, it might be surprising to realize that the law does not afford any special status to stepparents vis-à-vis their stepchildren.

When biological parents divorce or part ways (if never married), the law in every state sets forth detailed provisions about each parent's rights and duties. These laws provide a framework for how the courts shall intervene when parents cannot agree on issues related to their children. The courts are even empowered to make decisions as to what is in the child(ren)'s best interests when and if the parents cannot agree. Simply put, the law affords biological parents who divorce or part ways with a well-scripted guide full of procedures, rules, and parameters for resolving child-related disputes. However, this is not at all the case for a stepparent.

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Stepparents have no rights

Biological parents may divorce each other, but they do not divorce their children. They don't stop seeing, caring for, nurturing, loving, and raising their children. Nor does divorce eliminate a parental obligation to care for and support one's children. But what happens when the marriage between a biological parent and stepparent ends? What happens to the relationship forged between stepparent and child, perhaps over many years? Is the stepparent expected simply to walk away, even if that is exactly what the biological parent wants? What about the effects on the child of abruptly ending what was (hopefully) a strong and positive bonded relationship with this stepparent?

Unlike a divorce between biological parents, in which the child will continue to have both parents firmly in his or her life, the divorce of a biological parent from a stepparent is more comparable to the death of a loved one because the stepparent is essentially, from the standpoint of the child, here one day and gone the next. A degree in psychology is not a prerequisite to appreciating the extreme negative

effects this can and often does have on a child.

In an ideal world, a biological parent who is divorcing the stepparent would be well aware of the bonds forged between his or her children and the stepparent and would recognize that supporting the child's continuing contact and relationship with the (now former) stepparent would be beneficial to the child. (This, of course, assumes that the child and stepparent did, in fact, enjoy the ideal stepparent-child relationship.) However, the world is unfortunately not ideal.

Just as biological parents embroiled in a divorce (or the aftermath of a divorce) often forget, minimize, and/or deny the importance an estranged or former spouse has had in the lives of their children, so too does the biological parent with respect to the role the stepparent has played. A very important distinction, however, is that biological parents have a well-scripted legal landscape by which to assert and preserve their rights, even absent acknowledgment by the other parent. What does the stepparent have? Nothing.

Another permutation of this issue is when a biological parent dies during an intact marriage to a stepparent. Where does that leave the stepparent with respect to the stepchild(ren)? What if the children's surviving biological parent is unwilling to allow the children any further contact with the stepparent? Or, worse yet, what happens if both biological parents die? What then? These are potentially scary and unsettling questions that no stepparent hopes ever to face. But each year, many stepparents face exactly these questions, and there are often no satisfactory answers.

The impact of *Troxel*

Each state makes its own laws with respect to divorce and the financial and child-related aspects of divorce. Therefore, what follows is a discussion of the law generally as it exists among the states. While many legal tenets of family law are similar from state to state, (especially in the financial area), the law can and does differ significantly from one state to the next. Talk with your lawyer about the law in your state.

Generally, across all states, stepparents are afforded no special legal status. Instead, the law treats a stepparent seeking custody or visitation of stepchildren as any other unrelated third-party. Grandparents who seek custody or visitation of their grandchildren, against the wishes of the children's parents, find themselves in a similar predicament. Any discussion of third-party visitation and/or custodial rights begins with the June 5, 2000, U.S. Supreme Court decision of *Troxel v. Granville*, 530 U.S. 57 (2000).

In the *Troxel* case, a biological parent objected to a stepparent's request for more expansive visitation. After a trial and appeal, the case went to the U.S. Supreme Court. The Supreme Court found that the Washington State nonparental visitation statute (on which the *Troxel* petition was based) was "breathtakingly broad" to the point of unconstitutionally infringing upon the protection afforded by the Fourteen Amendment against governmental interference with fundamental rights—specifically, the interest of parents in the care, custody, and control of their children, including the presumption that fit parents act in the best interests of their children. The Court indicated that such a right of parents is "perhaps the oldest of the fundamental liberty interests recognized by [the U.S. Supreme Court]."

Therefore, in every state, whenever the rights of third-parties (including stepparents) are involved (whether relying on state statute or case law), the law must bow to, and evolve in light of, the U.S. Supreme Court's decision in *Troxel v. Granville*. Special weight must be afforded the decisions made by fit parents as to whether their children will visit and/or have a relationship with third parties. Thus, nonparental third parties have a significant uphill battle to wage in seeking access to children, not their own, against the wishes of the children's parents. It is in this unenviable position that

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stepparents seeking to gain visitation with former stepchildren find themselves. Again, knowing how the law in your state has evolved since the *Troxel* decision is paramount.

A very interesting and important question in terms of the evolution of state law as to third-party access was specifically not reached by the U.S. Supreme Court in *Troxel*: Does the Due Process Clause of the U.S. Constitution require a showing of harm, or potential harm, to the child as a condition for granting third-party visitation?

State law often evolves to fill in this blank. Knowing the particulars for your state is a key part of the inquiry. For example, in Connecticut, the case law and statutory law evolved after *Troxel* to require that a third party seeking visitation with children must prove that (a) a "parent like" relationship exists between the person and the children; *and* (b) that denial of visitation would result in real and significant harm to the child.

Financial liability

Now, turning to a very different aspect of being a stepparent is whether a stepparent is financially liable for the support of stepchildren. For purposes of asserting custody and visitation rights toward stepchildren, stepparents are, likewise, not responsible under the law for the direct support of their stepchildren. Unlike a biological parent who has a legal duty to support his or her children, there is no collateral legal obligation of a stepparent to support unrelated stepchildren. However, there is the potential, again depending on the particulars of state law, for a stepparent to potentially be indirectly involved in the support of stepchildren.

For example, imagine a situation in which Dad is divorced from Mom. They have a child. Child support orders are put in place at the time of the divorce, based on Mom's and Dad's financial circumstances at that time. A few years after the divorce, Dad remarries Stepmom, and they commence living together and sharing expenses. Both Dad and Stepmom are employed. Mom files a motion asking the court to increase Dad's child support paid to her because his living expenses have now been significantly reduced due to Stepmom's financial contributions to the household and, thus, Dad has more income available for child support than when he was single and living on his own.

The law of your state will provide whether and to what degree Mom has a case in the above example. Also note that the question of whether and how a stepparent's financial contributions to the household affect a spouse's financial exposure to an ex-spouse will likely be different for alimony and for child support issues. This article does not attempt to cover the alimony angle. Presumably, the law will regard Stepmom as a separate financial entity with no obligation financially toward her stepchild and, as such, Stepmom's income cannot directly factor into Dad's child support. However, there may be some angle under the law, and in some circumstances, in which Mom has a case and will have a right to conduct financial discovery of Dad's assets, expenses, and income and, perhaps, also Stepmom's, at least to some degree. Discovery laws are generally broader than the evidence that might ultimately be admissible at trial. Mom will likely have the right to explore whether and how Dad's financial union with Stepmom, including some information acquired directly from Stepmom, has effected Dad's finances.

The allowable disclosure from Stepmom will be in proportion to the degree that the child support laws of the particular state consider resources contributed by the stepparent. For example, in my state, Connecticut, our child support laws would exclude Stepmom's income in calculating Dad's income for child support purposes, but would allow a court to consider to some degree any regularly recurring contri-

butions or gifts from a spouse or domestic partner, provided it is established that the parent has reduced his or her income or experienced an extraordinary reduction in living expenses as a direct result of such contributions or gifts.

Knowing the law in your jurisdiction is crucial to assessing how a stepparent and his or her spouse should handle their financial relationship if potential exposure to a (litigious) ex-spouse may be of concern. Again, most, if not all, states presumably shield a stepparent, at least to some degree. Thus, ask your lawyer how your state approaches the question.

Estate planning

In a typical second marriage, it is very likely that one or both parties will have a child or children from a prior relationship. The new couple also may have children together. Whether or not stepparents have biological children of their own (from a prior or the current relationship), estate planning will likely involve a decision as to whether they want stepchildren to inherit something directly upon their deaths or indirectly at some point thereafter. Which estate planning path is selected will almost certainly depend on whether the stepparent wishes to provide for biological children from the current or a prior relationship, the length of the second marriage, whether children were born of this second marriage, the wealth of each spouse, how long the stepparent has participated in parenting the stepchildren, and the nature and quality of those relationships.

The manner in which title to assets is held is an important first consideration, and each spouse should hold specific and sufficient assets in his or her own name in order for any options in the estate planning documents to effectively distribute assets among each spouse's intended group of beneficiaries, including a spouse, children, and/or stepchildren. Conversely, assets held jointly with a spouse with rights of survivorship would pass directly to the joint owner and be outside the operation and control of estate planning documents. In similar fashion, retirement accounts, assets in irrevocable trusts, and life insurance proceeds pass directly to the named beneficiaries and also are outside the control of estate planning documents.

Because leaving all assets to a surviving spouse in a second marriage may not be desired, each spouse should consider what portion of assets should be left to the spouse and what portion should be left to biological children from the current and/or prior relationship, and, perhaps even to stepchildren. Both federal and most state estate tax laws allow a 100% marital deduction or exemption from federal estate tax for assets left to a surviving spouse who is a U.S. citizen via a will, beneficiary designations (e.g., retirement accounts), and/or by joint ownership with rights of survivorship.

This 100% marital deduction also applies to assets left to the surviving spouse via a qualified terminable interest trust (QTIP trust). To qualify for the 100% marital deduction, such trusts must comply with specific requirements, including that all income of the trust be distributed to the surviving spouse during his or her lifetime. After the death of the surviving spouse and payment of any deferred taxes, the trust can direct assets to the children or even stepchildren of the first spouse to die (i.e., the person who created the trust and whose assets originally went into the trust), in whatever proportion, at whatever times, and subject to whatever further instructions and/or restrictions are specified in the QTIP trust document.

In a second marriage, another common estate-planning option is a federal unified credit for estate and gift taxes used to fund a "credit shelter trust or by-pass trust." Such trusts can benefit one or more of a group of beneficiaries (including a spouse, children, and/or stepchildren) in whatever fashion and per whatever restrictions are written into the trust document. Often such trusts provide for income and occasion-

ally some principal to be paid to the surviving spouse during his or her lifetime and also to the decedent's children (and perhaps even stepchildren) based on need and other instructions in the trust. Upon the surviving spouse's death, the balance of the credit shelter trust would be distributed estate tax-free to the children of the first spouse to die and/or to their stepchildren if desired.

Spouses should consult estate-planning attorneys about specific estate-planning options. Each spouse must decide how much and from what sources monies should go directly to the surviving spouse (and/or children and/or stepchildren) and what amounts will be placed into trust (such as the QTIP or credit shelter options). Trusts provide an excellent mechanism by which the maker can direct and control what portions of assets will eventually pass to children and/or stepchildren, while still making provision for a surviving spouse.

For the stepparent, all desired estate-planning outcomes can be achieved, provided a careful eye and attention is turned to proper estate-planning, as described above. While intestacy laws make provision for biological descendants and surviving spouses, stepchildren would not factor in at all. Thus, ensuring that stepchildren get something on the death of the stepparent requires some level of estate planning.

A Seamless transition

As a last consideration in the estate-planning vein, for a spouse, parent, or stepparent, the least desirable outcome is for your death and the administration of your estate to create a rift, disputes, or bad-blood between your spouse, your children (from the current and/or a former relationship), and your stepchildren. Careful estate planning for both spouses not only can ensure that assets pass as desired, but also that you are not sowing the seeds of a family dispute. It is also advisable to discuss estate planning with your spouse, your children, and stepchildren (when age appropriate, of course) so that questions and concerns can be identified, addressed, and resolved early in the process. Such discussions also ensure that there are no future surprises for anyone involved. FA

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