This Child Does Have 2 (Or More) Fathers ...: Step-parents and Support Obligations

Alison Harvison Young*

The Supreme Court of Canada's unanimous ruling in *Chartier* v. *Chartier* has expanded the *in loco parentis* doctrine (or its statutory equivalent) in the context of step-parent support obligations. In holding that a stepfather cannot unilaterally terminate his *in loco parentis* status, the Court has recognised the possibility that a child may have two (or more) "fathers" for the purposes of support obligations, thereby opening the door to the notion of multiple parents and debtors of support (and other) obligations. This comment analyses the implications of the *Chartier* decision, situating it within a broader examination of the norm of the exclusive family and exploring both the Canadian and the comparative contexts.

The comment begins with a discussion of the two conflicting lines of jurisprudence which preceded the Supreme Court's ruling in *Chartier*. The author argues that notwithstanding unresolved questions concerning the determination of threshold and quantum of support, the Court's resolution of the *in loco parentis* issue is a positive development since it reflects a principled approach to the *Divorce Act* which privileges the best interests of the child. Furthermore, this development represents a move towards a less exclusive vision of the family, one which is not paralleled in the American case law. The author considers both the points of divergence and of overlap between Canadian and American case law, noting the ways in which the policy questions explored in both bodies of case law might serve as a useful foundation for further jurisprudence and legislative debate. The author concludes that in virtue of its assertion that once the parental mantle has been assumed, it cannot be unilaterally terminated by a step-parent's post-separation conduct, *Chartier* is to be welcomed for the direction in which it moves Canadian law.

Le jugement unanime de la Cour suprême du Canada dans *Chartier* c. *Chartier* a renforcé l'étendue de la doctrine *in loco parentis* (ou son équivalent législatif) dans le contexte de l'obligation alimentaire des beaux-parents. En soutenant qu'un beau-père ne peut unilatéralement mettre fin à son statut *in loco parentis*, la Cour a reconnu la possibilité qu'un enfant puisse avoir deux «pères» (ou plus) en ce qui a trait à l'obligation alimentaire, et par extension la possibilité d'une pluralité de parents et de créanciers d'aliments (et autres obligations). Ce commentaire analyse la décision *Chartier*, en la plaçant au sein d'une étude plus générale de la norme de la famille exclusive et en s'appuyant sur le contexte canadien ainsi que sur le droit comparé.

Le commentaire expose d'abord les deux tendances incompatibles de la jurisprudence précédant la décision *Chartier*. L'auteur soutient que, malgré des questions non résolues quant à la détermination du seuil et du quantum d'aliments à accorder, la décision de la Cour concernant la question *in loco parentis* est un développement positif étant donné qu'elle adopte une interprétation de la *Loi sur le divorce* qui tient compte des meilleurs intérêts de l'enfant. De plus, ce développement, qui n'a pas d'équivalent dans la jurisprudence américaine, représente un pas vers l'avant pour une perception moins exclusive de la famille. En étudiant la mesure dans laquelle les jurisprudences canadiennes et américaines divergent et se chevauchent, l'auteur prend note des façons par lesquelles les choix de politique considérés dans ces deux systèmes de droit peuvent servir de fondement pour approfondir le débat jurisprudentiel et législatif. L'auteur conclut que la décision *Chartier*, en affirmant que l'autorité parentale, une fois assumée, ne peut être mise à terme unilatéralement dans la période post-séparation par la conduite du beau-parent concerné, met le droit canadien sur la bonne voie.

* Dean and Professor, Faculty of Law, Queen's University, Kingston, Ontario. The author gratefully acknowledges the support of the Social Scieuces and Humanities Research Council of Canada and the opportunity to present an earlier version of this paper at the International Society of Family Law Conference in Albuquerque, New Mexico in June 1999. She is especially indebted to Shannon Chace-Hall for her superb research assistance.

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I. Introduction

A. Exclusivity as a Norm: The Status of Step-parents in Family Law

Family law has been relatively slow to reflect the dramatic social changes which have taken place in this century. As I have argued in a recent article,[1] family law has tended to be preoccupied with excluding players from the family circle rather than with finding ways to encourage and recognize the roles that persons other than biological parents may play, and are increasingly playing, in the day-to-day lives of our children. Of particular relevance to the case of step-parents and the reality of many blended families is the fact that while the law does provide for ending and re-creating family units (as through divorce, remarriage and adoption), each new unit legally "annihilates" the pre-existing unit. The law has been slow to contemplate the reality of overlapping families, children with multiple parents, families in which parenting roles are shared by custodial and non-custodial, natural and step-parents, families that reunite for weddings and funerals and share memories, children, and friends.[2] In this sense, the legal notion of family has constructed boundaries which, by definition, exclude all but a limited number of relationships as relevant. Until very recently, the law has, in effect, created two classes of persons vis-à-vis children: parents (only two) and legal strangers. This norm of exclusivity has served neither the interests of children nor of society as a whole because of the extent to which it severs children (and their parents) from the broader community and, particularly, from certain members of that community who might contribute to children's lives. These individuals could be seen as supplementary and complementary to parents; a list of such persons might include step-parents, birth mothers and gestational mothers.[3]

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[1] A. Harvison Young, "Reconceiving The Family: Challenging the Paradigm of the Exclusive Family" (1998) 6 Am. U. J. Gender & L. 505 *passim*.

[2] A graphic and humorous example of one such overlapping family appeared in *The Globe & Mail*. In a "Back-Page" column entitled "Life with(out) Brian", Anne Martin (a pseudonym) described the relationship that developed between Brian's three ex-wives, who got to know each other throngh the children of the various marriages (who were half-siblings) who visited back and forth (A. Martin, "Life with(out) Brian: the Ex-wives Club" *The Globe & Mail* (8 February 1996) A22). These networks can be supportive and constructive, especially for the children involved, yet our legal constructs generally fail even to acknowledge their existence.

[3] See generally G. A. Holmes, "The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals" (1994) 53 Mod. L. Rev. 358 at 393. An increasing number of American academics are suggesting the importance of visitation and custody laws which recognize children's interests in maintaining relationships with step-parents. See *e.g.* K.L. Burks, "Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve" (1994) 24 Golden Gate U.L. Rev. 223; B. Levine, "Divorce and the Modern Family: Providing *In Loco Parentis* Step-parents Standing to Sue for Custody of their Step-children in a Dissolution Proceeding" (1996) 25 Hofstra L. Rev. 315; and J.K. Mangnall, "Step-parent Custody Rights After Divorce" (1997) 26 Sw. U.L. Rev. 399. More generally, see B. B. Woodhouse, "Hatching the Egg: A Child-Centered Perspective on Parents' Rights" (1993) 14 Cardozo L. Rev. 1747 at 1753. The author

Despite the law's general tardiness in responding, the norm of exclusivity has already been fundamentally challenged by changing social practices. For example, while adoption normally severs all links with the biological family in favour of the new family, "open adoption", which allows the birth mother a continuing role, is becoming increasingly common.[4] Parental figures such as grandparents are also increasingly demanding greater legal recognition for the roles that they frequently play.[5] In addition, the reality of gay and lesbian family units has challenged the notion that a child can have only one mother or one father (for an aggregate of two parents), largely by creating units that understand themselves as, and live as, families with (as is more common) two mothers.[6] Finally, and of particular significance here, are the growing numbers of reconstituted families[7] that typically allocate parenting roles among resi-

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rightly points out that "children know their parents by what they do and not necessarily for what they are." This point can be transposed to other relationships, not just parental ones. It is in itself a basis for recognizing the contributions of various actors who play a role in a child's life. The connections worth maintaining should not be limited to vertical relationships (such as those between a child and a step-parent, for example). Horizontal connections should also be recognized in a more inclusive vision of the family. See *e.g. V.(A.)* v. *P.(M.A.) (Litigation Guardian of)* (1995), 122 D.L.R. (4th) 719, 11 R.F.L. (4th) 95 (Ont. Gen. Div.). In this case, a woman brought two orphaned children to Canada from Mexico. She cared for these children, and they lived with her, for a period of two years. At the end of this period, however, she decided to adopt only one of the children and to make the other a Crown ward. The latter sought access to his sister. In the context of his ruling in the case, Jarvis J. said that, while he was conscious of the effect that the proceedings started by the child must have on the adoptive mother and her family, the relationship of brother and sister was a "basic human relationship" which "existed between these two children long before [the adoptive mother] became involved in their lives" (at 728) (although it is important to note that he also emphasized the role that the "unusual circumstances" played in his decision). The maintenance of such horizontal connections is not systematically seen as worthy of protection. Indeed, courts have, for instance, concluded that the French word "parent" in art. 583 of the *Civil Code of Québec* only refers to the father or the mother of an adopted person and does not include brothers or sisters: *Droit de la famille 2046*, [1994] R.J Q. 2413 (C.Q.); *Droit de la famille 321*, [1987] R.D.F. 1 (Trib. jeun.).

[4] See *e.g.* N. E. Dowd, "A Feminist Analysis of Adoption" (1994) 107 Harv. L. Rev. 913 at 929-932, reviewing E. Bartholet, *Family Bonds: Adoption and the Politics of Parenting* (Boston: Houghton Mifflin, 1993). Also relevant in this context is the recent discussion of the merits of open step-parent adoption in M. Mahoney, "Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents Under Uniform Adoption Act 4-13" (1999) 51 Fla. L. Rev. 89 [hereinafter "Open Adoption"].

[5] See K. Czapanskiy, "Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law" (1994) 26 Conn. L. Rev. 1315 and K. Czapanskiy, "Babies, Parents, and Grandparents: A Story in Two Cases" (1993) 1 Am. U.J. Gender & L. 85.

[6] See in particular M. Minow, "Redefining Families: Who's In and Who's Out" (1991) 62 U. Colo. L. Rev. 269; N. D. Polikoff, "This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families" (1990) 78 Geo. L.J. 459; N. D. Polikoff, "The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?" (1996) 36 Santa Clara L. Rev. 375; and N. D. Polikoff, "The Social Construction of Parenthood in One Planned Lesbian Family" (1996) 22 N.Y.U. Rev. L. & Soc. Change 203. In the Canadian context, see M.A. McCarthy and J.L. Radford, "Family Law for Same Sex Couples: Chart(er)ing the Course" (1998) 15 Can. J. Fam. L. 101.

[7] See generally Holmes, *supra* note 3 at 363.

dential, non-residential and step-parents.[8] Although the law has been slow to recognize the contributions of step-parents, recent developments in Canadian law have opened the door for a reevaluation of the various roles that step-parents play in the lives of children.

B. Challenging the Norm: The Canadian versus the American Perspective

Given the prevalence of step families in Canada and the United States,[9] it is somewhat surprising that there has been relatively little judicial activity concerning the role of step-parents. The issue has recently been brought to the fore in Canada as a result of the Supreme Court of Canada's decision in *Chartier* v. *Chartier*,[10] which held that a step-parent cannot unilaterally terminate a parental relationship and avoid child support after his or her relationship with the natural parent breaks down. This paper will first review the *Chartier* decision and its implications, and consider the extent to

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[8] Joint custody may be understood as a recognition that child-rearing responsibilities may be spread across family units. It may also be understood, however, as arising from a notion of parental "rights" that give parents entitlements over children. For a broader discussion of the issues surrounding joint custody, see A. Harvison Young, "Joint Custody as Norm: Solomon Revisited" (1994) 32 Osgoode Hall L.J. 785.

[9] In a fact sheet entitled "Canadian Families: Diversity and Change", Statistics Canada reported that in 1995, 10% of all families composed of couples with children were stepfamilies (approximately 430,000 in total). According to the data, just over half of these stepfamilies were composed of married couples, while the remainder were common-law couples. The data also suggests the gendered nature of many of the issues relating to stepfamilies: "In 1995, slightly over 50% of step-families consisted only of children who lived with the biological mother and a step-father. Step-families which consisted only of children living with the biological father and a step-mother represented 13% of all step-families. Evidently, mothers who brought their biological children to a new union outnumbered fathers." The remaining 37% of stepfamilies were "blended," with both parents bringing children from previous unions into the new family. See online: Statistics Canada <http://www.statcan.ca/Daily/English/960619/d960619.htm (date accessed: 7 June 1999). In the American context, the data is not as recent: according to the 1990 Current Population Reports, approximately 21% of all married-couple family households with children under 18 were stepfamilies (approximately 5,254,000 in total) (Bureau of the Census, U.S. Department of Commerce, "Marriage, Divorce and Remarriage in the 1990's" in *Current Population Reports: Special Studies Series P23-180* at 10, Table L). In her use of this data, M. Mahoney, "Open Adoption", *supra* note 4 at 104, n. 51, draws attention to the fact that 94% of residential step-parents were men; this statistic underscores the gendered nature of the issues relating to step-parents, which I noted above in the Canadian context as well. As the Step-family Association of America observes, the U.S. Census Bureau no longer provides such data on step-parents. The Step-family Association also suggests that these figures underestimate the number of stepfamilies in the United States. See online: Step-family Association of America <http://www.step-fam.org/facts.htm> (date accessed: 9 July 1999).

[10] (1998), [1999] 1 S.C.R. 242, 168 D.L.R. (4th) 540, [1999] 4 W.W.R. 633 [hereinafter *Chartier* (S.C.C.) cited to S.C.R.]. On appeal from the Manitoba Court of Appeal (1997), 154 D.L.R.(4th) 431, [1997] 8 W.W.R. 348 [hereinafter *Chartier* (C.A.) cited to D.L.R.], allowing in part an appeal and dismissing a cross-appeal from a judgement of De Graves J.: (1996), 111 Man. R. (2d) 27 (Q.B.) [hereinafter *Chartier* (trial)].

which this case has helped to resolve the complex questions central to this area of the law. Secondly, it will attempt to relate this area of law and policy to broader social and legal changes in family forms.

The paper's particular focus is the comparative context, as it explores the *Chartier* decision and the questions it raises in light of both Canadian and American case law and literature on the subject. The discussion will emphasize the fact that while in the pre-*Chartier* context there were two lines of appellate decisions in Canada, one which paralleled the American case law and held that a step-parent can unilaterally terminate their *in loco parentis* standing and another which held that he or she (usually he) cannot,[11] *Chartier* takes Canadian jurisprudence definitively in a direction that contrasts sharply with American case law. American jurisprudence has been quite unequivocal in expressing the view that the *in loco parentis* relationship can be unilaterally terminated,[12] subject to the limited exception of equitable estoppel.[13]

From a comparative perspective, the *Chartier* decision and, more broadly, the relative treatment of the issue of step-parent support in Canada and the United States is significant in two chief respects. First, the basic premise of *Chartier* goes much farther than anything comparable in the American case law: it recognizes the reality of multiple parents and the centrality of the child's interest in maintaining relationships with those who have played significant roles in their lives.[14] Moreover, the imposition of support obligations on the stepfather in Canada does not hinge on the absence of the natural father from the scene, creating a very real possibility of multiple debtors of the child support obligation.[15] Relative to Canadian law, American law has

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[11] In referring to the question of support, I will use the term "stepfather". As noted above, the issues relating to stepfamilies are indeed gendered at a number of levels. First of all, most stepchildren live with their natural mothers and a stepfather (see *supra* note 9); the phenomenon of a residential stepmother and natural father is much less frequent and more likely to arise from the death of the natural mother. Secondly, the phenomenon of a natural father seeking support from a stepmother following the breakdown of their relationship is virtually non-existent in the case law. Interestingly, stepmothers are disproportionately represented among the relatively few cases in which access, visitation, or custody rights are asserted seriously. For a discussion of the centrality of stepmothers in the lives of stepchildren, see David Cheal, "Stories About Step-families" in Statistics Canada, *Growing Up In Canada: National Longitudinal Survey of Children and Youth* (Ottawa: Minister of Industry, 1996) 93. For an exploration of related issues in the American context, particularly the gendered impact of the American laws on step-parent support, see M. Engel, "Pockets of Poverty: The Second Wives Club Examining the Financial (In)Security of Women in Remarriages" (1999) 5 Wm. & Mary J. Women & L. 309.

[12] See *infra* note 18.

[13] For a discussion of equitable estoppel in this context, see *infra* note 19 and the text accompanying notes 58-63.

[14] Some academics in the United States are calling for a reconceptualization of the role of stepparents to recognize these changing—and very common—realities: see *e.g.* M.A. Mason & D.W. Simon, "The Ambiguous Stepparent: Federal Legislation in Search of a Model" (1995) 29 Fam. L. Q. 445 and M. Mahoney, *Stepfamilies and the Law* (Ann Arbor: University of Michigan Press, 1994).

[15] See *e.g. Theriault* v. *Theriault* (1994), 149 A.R. 210, 113 D.L.R. (4th) 57 (C.A.) [hereinafter *Theriault* cited to A.R.], in which the mother had not exhausted her remedies for support against the natu-

been, and continues to be, very reluctant to recognize a notion of multiple parents or overlapping families.[16] This difference may well be linked to the constitutionalization of parental rights in the United States, something that has not materialized in Canada.[17]

Secondly, and somewhat ironically, the policy considerations involved in imposing support obligations on step-parents following divorce or separation have been developed with greater nuance and subtlety in the U.S. case law than has so far been the case in Canada. As I have mentioned, the general rule throughout the United States is

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ral father. Indeed, as the Court notes at 215, she had begun a suit for child support against him. Nonetheless, the Court found a support obligation on the part of the stepfather. Note that the mother and stepfather had attempted to exclude the natural father from the lives of the children—a fact which might have brought the case within the purview of the American doctrine of equitable estoppel. Also of interest here is *Boyle* v. *Boyle* (1998), 41 R.F.L. (4th) 388 (Ont. Gen. Div.) [hereinafter *Boyle*], in which the Court noted that it was "unfortunate" that the natural father, a third party in the case, was "frozen out" by the custodial mother and the stepfather during their marriage (at 391), and that the natural father was never asked to pay support prior to the stepfather's action (at 390). The Court suggested that, as a result, the Child Support Guidelines "in this case appear to trump equity" (at 391). The Court nonetheless applied the Guidelines and assessed the natural father's obligation (according to his gross income relative to the stepfather's) at 37.5% of the total child support.

[16] As I have argued elsewhere, with particular emphasis on the U.S. context, the "history of the legal treatment of unwed fathers and of step-parent adoptions ... serves as a potent metaphor for the exclusive family," as these areas "underline the legal imperative that a child has two parents and cannot have more than two." The law, in other words, "provides no half-way house ... One is either a legal parent, or one is, in effect, a stranger." In successful step-pareut adoption cases, it is the natural father who is rendered a legal stranger. See *supra* note 1 at 519 and 520ff.

[17] In the U.S. context, as E. Anderson has noted,

> The parent's interest enjoys a distinguished legal pedigree, including important affirmation from the Supreme Court and other federal courts, state courts, and state legislatures. Typically framed in terms of "rights," it encompasses the custody and companionship of the child, opportunities to influence the child's values and moral development through religious training, and important education and health care decision ("Children, Parents, and Nonparents: Protected Interests and Legal Standards" (1998) B.Y.U.L. Rev. 935 at 942 [footnotes omitted]).

Canadian jurisprudence has drawn attention to, and been implicitly critical of, the extent of this constitutionalization of parental rights by American courts. In *Young* v. *Young*, [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193 [hereinafter *Young* cited to S.C.R.], La Forest J. noted that "[t]he United States Supreme Court has given a liberal interpretation to the concept of liberty, as it relates to family matters. It has elevated both the notion of the family unit and that of parental rights to the status of constitutional values, through its interpretation of the Fifth and Fourteenth Amendments" (at 369). In comparison to the U.S. position, the various judgements in *Young*, particularly those of L'Heureux-Dubé and McLachlin JJ., reflect a much more cautious approach to the notion of broad parental rights in this sense. This reticenee in terms of recognizing a constitutionally protected parental liberty interest is also evident in *R.B.* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1. Even though the reasons of La Forest, L'Heureux-Dube, Gonthier and McLachlin JJ. and those of Cory, Iacobucci and Major JJ. might be seen as recognizing a parental liberty interest (though the judgemeuts disagree on its breadth), the constitutional protection accorded to this interest is quite narrowly construed in comparison to the rights that parents are granted over their children in American jurisprudence.

that step-parents may unilaterally terminate their relationships with their stepchildren following the end of their relationships with the natural parent, thus eliminating any obligation to pay child support.[18] The exception to this rule has developed within the rubric of the "equitable estoppel" doctrine which has been applied, albeit restrictively, to prevent a step-parent from denying liability for child support.[19] Some of the policy discussions in the context of these American decisions are rich and could provide useful resources for Canadian judges and policymakers as they grapple with the implications of *Chartier*. These policy questions will be addressed below in the context of a discussion of the implications of *Chartier*.

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[18] Numerous American critics have noted and criticized the fact that under U.S. law, *in loco parentis* status is terminable at will. See *e.g. Stepfamilies and the Law*, *supra* note 14 at 22-27. The relevant case law includes *Shoemaker* v. *Shoemaker*, 563 So.2d 1032 (Ala.Civ.App. 1990) (holding, in the context of a stepfather's claim for visitation privileges, that the legal severance of the step-parent/biological parent relationship also severed any legal relationship the step-parent had with the stepchild); *E.H.* v. *M.H.*, 512 N.W.2d 148 (S.D. 1994) (holding that the step-parent had no duty, based on a claim of equitable estoppel, to provide child support for stepchildren after divorce. The Court noted that "[u]sually a stepparent had no legal duty to support the stepchildren after termination of the marriage to the children's natural parent" [footnotes omitted], and, further, that "[e]ven one who accepts the responsibility for a child as *in loco parentis* cannot be required to furnish support for the child subsequent to the dissolution of the marriage" (at 149)); and *Quintela* v. *Quintela*, 544 N.W. 2d 111 (Neb. Ct. App. 1996) (holding, as part of a broader ruling, that the husband's desire to terminate his *in loco parentis* status, evidenced in his denial of paternity and his challenge to the requirement of child support, was sufficient to end all legal rights and responsibilities afforded thereby to the child).

[19] For a recent example of the use of equitable estoppel to establish a post-separation (temporary) support obligation, see in particular *W.* v. *W.*, 728 A.2d 1076 (Coun. 1999) [hereinafter *W.* v. *W.*]. For further discussion of this case, see text accompanying notes 60-63, 68, 70. See also *Miller* v. *Miller*, 478 A.2d 351 (N.J. 1984) [hereinafter *Miller*], and text accompanying notes 59, 61-63, and 70. Some American courts will also impose post-separation support obligations on step-parents in cases in which the separating parties have made a contractual agreement to this effect. See D.B. Sweet, "Annotation: Step-parents Postdivorce Duty to Support Step-child" (1998) 44 A.L.R. 4th 520 at §6 for a more comprehensive review of the case law in this area, which includes *Dewey* v. *Dewey*, 886 P.2d 623 (Alaska 1994) (finding that the stepfather had entered into "an enforceable contractual obligation to support [his stepchild], which was incorporated into the divorce decree" (at 630)); and *Duffey* v. *Duffey*, 438 S.E.2d 445 (N.C. 1994) (finding a step-parent support obligation arising from the combination of the voluntary assumption of *in loco parentis* status and a written agreement to support the stepchild in question). Also of relevance is *Moyer* v. *Moyer*, 471 S.E.2d 676 (N.C. 1996), in which the Court of Appeal overruled the trial court's order that the defendant stepfather provide child support and other benefits, including dental and health insurance, for his stepchild, because the voluntary written agreement between the spouses was not "executed with formalities required by law" (at 677).

II. The Changing Context of Step-parent Support Obligations in Canada: *Chartier* v. *Chartier*

A. An Overview

The *Chartier* case may be seen as the culmination of numerous cases dealing with very similar issues. As a number of judges have observed, these cases have become common and are likely to become more so.[20] For example, the principle of maximizing contact with parents following divorce or separation has become a driving force in family law, as the rise of joint custody illustrates, and the reasons supporting such contact may increasingly apply in step-parent situations. Family breakdown can be devastating for children and one of the stated purposes of the law is to attempt to minimize this detrimental impact.[21] Prior to *Chartier*, however, the law treated stepfamilies very differently. Even the cases which held that a step-parent could not unilaterally terminate parental obligations imposed standards which made it relatively easy for a step-parent to terminate obligations to a child.[22] To this extent, pre-*Chartier* law failed to reflect the changing forms and needs of modern-day families. Today, however, it is clear that the law should seek to endorse broader conceptions of family that encourage the continuation of nurturing and supportive relationships, particularly with respect to children.

The *Chartier* case may be seen as a positive step in this direction. While the approach endorsed by *Chartier* cannot be reduced to a simple and predictable formula, it is based on a purposive and principled interpretation of the *Divorce Act*[23] which gives centrality to the best interests of the child and is to be welcomed for this reason.

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[20] See *e.g.* the comments of Philp J.A. of the Manitoba Court of Appeal in *Chartier* (C.A.), *supra* note 10 at 436, who noted that "modern marriages (and other forms of cohabitation) are often fragile and time-limited relationships", and who queried "how many obligations must divorced or separated parties carry with them as they travel from relationship to relationship?"

[21] See McLachlin J. in *Young*, *supra* note 17 at 117 who observed that s. 16(10) of the *Divorce Act* allows courts "to give effect 'to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child.'" She also noted that the principle of maximizing contact is "the only specific factor which Parliament has seen fit to single out as being something which the judge must consider." In so doing, she argued, "Parliament has expressed its opinion that contact with each parent is valuable."

[22] See *e.g. Andrews* v. *Andrews* (1992), 88 D.L.R. (4th) 426, [1992] 3 W.W.R. 1 (Sask. C.A.) [hereinafter *Andrews* cited to D.L.R.]. For a discussion of this case, see text accompanying note 32.

[23] R.S.C. 1985 (2nd Supp.), c. 3. See s. 2: "For the purposes of the definition 'child of the marriage' in subsection (1), a child of two spouses or former sponses includes (a) any child for whom they both stand in the place of parents; and (2) any child of whom one is the parent and for whom the other stands in the place of a parent." Note that similar considerations have arisen in the interpretation of provincial and territorial statutes. See *e.g. Beatty* v. *Beatty*, [1997] 6 W.W.R. 519, 28 R.F.L. (4th) 211 (B.C.C.A.) (under the *Family Relations Act*, R.S.B.C. 1996, c. 128); *Laracque* v. *Allooloo*, [1993] N.W.T.R. 124, 44 R.F.L. (3d) 10 (S.C.) (under the *Domestic Relations Act*, R.S.N.W.T. 1988, c. D-8); *Spring* v. *Spring* (1987), 61 O.R. (2d) 743 (Unif. Fam. Ct.) (under the *Family Law Act*, R.S.O. 1990, c. F-3).

As will be asserted below, this approach also removes the financial incentives for step-parents to sever contact with their stepchildren after a marriage or relationship breaks down. It would of course be simplistic to assert that, once the financial incentive for a stepfather to repudiate his relationship with his stepchildren following divorce or separation is removed, he will be any more likely to continue to play a significant role in the lives of these stepchildren. The question that thus remains is whether the post-*Chartier* climate will encourage the continuation of constructive step-parent/child relationships after the parental relationship ends.

Chartier and its aftermath raise two related categories of concerns: first, what is the threshold or trigger that renders a step-parent a parent for the purpose of support obligations, and secondly, once that threshold is reached, how should the issue of quantification be resolved. This paper will concentrate on the question of threshold. It is important to recognize, however, that the quantification issue is a vexing one which has already arisen in the Canadian context and is inherent in the possibility of multiple "legal" parents. This issue in Canada arises only two years after the introduction of the *Federal Child Support Guidelines*,[24] which were intended to introduce a level of predictability and consistency in the determination of child support and to reduce litigation. On a practical level, the question of quantification when there is or may be another payor parent in the picture is a difficult one, the resolution of which is not obvious within the present framework of the *Guidelines*.[25] In order to illustrate the impor-

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[24] SOR/97-105 [hereinafter *Guidelines*].

[25] The *Guidelines* came into effect on May 1, 1997. While generally considered successful, their implementation has drawn attention to a number of the complex issues that attend child support settlements. See N. Bala, "The Child Support Guidelines: Highlights and Insights" (Paper delivered to the Family Law Institute, Canadian Bar Association, 29 January 1999) [unpublished] (at para. 1 and 2), online: Family Law Centre Homepage <http://www.familylawcentre.com/cbaobala.html>. Of particular interest in this context is the effect of the *Guidelines* on step-parents' support obligations. Section 5 of the *Guidelines*, *ibid.* [emphasis added] states that "[w]here the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, *such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child*". The wording of this provision creates significant ambiguity as to how the *Guidelines* are to be applied in situations in which there are multiple payors. For a discussion of this issue, see Bala at para. 45-53. For a number of the different approaches taken by courts, see *Bromberg* v. *Bromberg*, [1998] N.S.J. No. 112 (S.C.), online: QL (NSJ) (holding that the stepfather had stood in the place of a parent, and ordering him to pay child support based on the *Guidelines*; the child's natural father had "substantial but sporadic access" to child but had not "lived up to his child support obligations and a substantial arrears had accumulated" (at para. 4)); *Butzelaar* v. *Butzelaar* (1998), 174 Sask. R. 125 (Q.B.) (holding that the stepfather, who had acted *in loco parentis* to the child, was required to pay support in the amount required under the *Guidelines* reduced by the amount paid by the biological father); *Halliday* v. *Halliday* (1998), 164 Sask. R. 12 (Q.B.) (holding that the stepfather, on the basis of the relationship between the stepfather and the child, was required to pay two-thirds of the table amount); and, more recently, *Kolada* v. *Kolada*, [1999] A.J. No. 609 (Q.B.), online: QL (AJ) (holding that the stepfather must pay child support for his stepchild in the amount established by the *Guidelines* for individuals with his gross income;

tance of the *Chartier* decision to the questions surrounding both threshold and, by implication, quantum of support, it will be necessary to explore briefly the law as it existed beforehand.

B. *The Pre-*Chartier *Context*

At first glance, the Canadian law prior to *Chartier* appears difficult to discern, particularly as to whether and how a stepfather could unilaterally sever parental obligations arising in the course of a marriage or relationship with the natural parent. It is fair to suggest that there were two lines of cases on the issue. *Carignan* v. *Carignan*[26] was the leading case supporting the view that such obligations could be unilaterally terminated. Its reasons were heavily dependant on the application of the common law doctrine of *in loco parentis*. Indeed, it is striking that while relatively little time was spent discussing the principles governing the interpretation of the *Divorce Act*, there was considerable discussion of the history of *in loco parentis*, particularly regarding its development in the context of the law of wills and trusts. The Court also held that the 1985 reform of the *Divorce Act* which had, *inter alia*, removed the term "*in loco parentis*" from the section defining "child of the marriage", had not affected the applicability of the common law doctrine.[27] The Court was quite insistent that an essential attribute of the common law doctrine was its voluntary status and that its application thus depended on the intention of the adult "at the time the order is made."[28] This position remains, it seems, an accurate portrayal of the doctrine as it is applied in the United States.[29]

Although the case does seem to have been grounded more in the common law doctrine than the statutory framework, it did reflect on the policy implications of the rule in expressing the view that to impose a legal obligation on a person *in loco parentis* to continue their generosity "might deter many a person from being generous in the first place," which would be "self-defeating from the standpoint of the interests of the child."[30] This argument will be discussed below in relation to *Chartier*, but it is useful to observe at this point that the *in loco parentis* doctrine developed in a context rather far removed from the objects and purposes of modern family law. As Alison Diduck has noted, "The *in loco parentis* doctrine is a creature of 19th century patriarchy. It evolved during a time when it was a morally offensive notion for a man to be held responsible for another man's child."[31] Cases such as *Carignan* thus suggested

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the Court noted that, while the stepfather might have a remedy against the natural father, he would have to sue him in order to realize any such contribution to the child support obligation).

[26] (1989), 64 D.L.R. 4th 119, [1990] 1 W.W.R. 641 (Man. C.A.) [hereinafter *Carignan* cited to D.L.R.].

[27] *Ibid.* at 125.

[28] *Ibid.* at 128.

[29] See *supra* note 18.

[30] *Supra* note 26 at 134.

[31] A. Diduck, "*Carignan* v. *Carignan:* When is a Father not a Father? Another Historical

the need for an updated, and more flexible, interpretation of the *in loco parentis* doctrine appropriate to the changing nature of the family in the late twentieth century.

Another line of cases effectively modified the *Carignan* approach in the following years. This approach was typified by *Andrews*,[32] a 1992 Saskatchewan Court of Appeal decision which rejected the view that a step-parent could unilaterally terminate his or her relationship with the child. Such cases required the court to take factors apart from intention into account, in particular the parental role assumed prior to, as well as following, the separation. This approach, however, seems to have made it relatively easy for a step-parent to avoid the obligation, particularly because of the weight given to the post-separation period. In *Andrews*, the cessation of contact with the stepchildren following separation appears to have been determinative.[33] In the recent Saskatchewan Court of Appeal decision in *Johb* v. *Johb*, [34] it appears that the post-separation conduct played a similar role. In *Johb*, the separation seems to have been rather acrimonious, and the mother both refused to allow the stepfather any access and rebuffed his attempts to contact the children. The Court of Appeal (Jackson J.A. dissenting) held that the mother's post-separation conduct had terminated Mr. Johb's relationship as a parent. The majority's argument rested largely on the view that the mother could not claim support having refused access. Of course, such disputes often arise in cases involving children born during the marriage and, while a parent cannot simply refuse access, a pre-existing access dispute is in no sense a bar to a claim for support. A natural parent cannot opportunistically rely on an access dispute to avoid support obligations, a point that was made by Jackson J.A. in her dissenting reasons.[35]

The 1994 Alberta Court of Appeal decision in *Theriault*[36] may be seen as a "high watermark" prior to *Chartier* as far as step-parent obligations are concerned. In *Theriault*, the parties had been married for 14 years, and the stepfather had acted in a parental role towards the two boys. The stepfather claimed that the relationship had ended prior to the hearing of the application for support and that, as a result, there was no support obligation. Kerans J.A. wrote as follows:

> Our society values parenthood as a vital adjunct to the upbringing of children. Adequate performance of that office is a duty imposed by law whenever our society judges that it is fair to impose it. In the case of the natural parent, the biological contribution towards the new life warrants the imposition of the duty. In the case of a step-parent, it is the voluntary assumption of that role. It is not in the best interests of children that step-parents or natural parents be permitted to abandon their children, and it is their best interests that should govern. Financial responsibility is simply one of the many aspects of the office of parent.

Perspective" (1990) 19 Man. L.J. 580 at 601, cited approvingly by Bastarache J. in *Chartier* (S.C.C.), *supra* note 10 at para. 18.

[32] *Supra* note 22.

[33] *Ibid.* See in particular at 438.

[34] (1998), 165 D.L.R. (4th) 88, 40 R.F.L. (4th) 379 (Sask. C.A.) [hereinafter *Johb* cited to D.L.R.].

[35] *Ibid.* at 99-100.

[36] *Supra* note 15.

> A parent, or step-parent, who refuses or avoids this obligation neglects or abandons the child. This abandonment or neglect is as real as would be a refusal of medical care, or affection, or comfort, or any other need of a child.[37]

The implication of this analysis (and as we shall see, of *Chartier* itself) is that once the role of step-parent is assumed, the child is accorded the status of a "child of the marriage" and is entitled to the sorts of benefits accruing to natural or legally adopted children upon separation or divorce of their parents. This is the hallmark of a very child-centred approach to the notion of support. Kerans J.A. further stated that the existence of the natural father did not preclude the stepfather's liability, and that the financial obligations of all parent figures were joint and several.[38] As will be explained below, this perspective is consistent with developments in other areas of family law. In general, the priority formerly afforded to the rights of parents or adults is giving way to considerations that attempt to focus on the best interests of the child.

C. The Chartier Decision

Chartier itself, in its rejection of a stepfather's unilateral termination of his relationship with and his support obligation to his stepchild, will further the move in Canadian jurisprudence towards decisions that prioritize the best interests of the child. In the case, the parties had begun a common law relationship in November 1989, and subsequently married in June 1991. The wife already had a child from a previous relationship, Jessica, and Jeena was born to the Chartiers in August 1990. The couple separated in 1992. During the time that the parties lived together, the husband had been actively involved in the care of both children and was a father figure for Jessica. The parties had also amended Jessica's birth registration to reflect (falsely) that Mr. Chartier was her natural father.[39] In 1994 proceedings under the *Family Maintenance Act*,[40] the husband acknowledged both children as children of the marriage and was granted access to them. The consent judgment provided for maintenance for his natural daughter but did not deal with the question of support for Jessica and the wife. The wife began divorce proceedings in 1995 and, as part of her claim, requested a declaration that the husband stood in the place of a parent to Jessica. He contested the claim. An October 1995 report from Family Conciliation Services recorded his desire to sever his relationship with Jessica.[41] It is interesting to note the absence of any discussion or evidence in *Chartier* concerning Jessica's natural father, particularly in

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[37] *Ibid.* at 213.

[38] *Ibid.* at 214.

[39] See *Chartier* (S.C.C.), *supra* note 10 at 247. They had apparently discussed the husband's adoption of Jessica as well, but did not proceed with this.

[40] C.C.S.M., c. F20.

[41] See *Chartier* (S.C.C.), *supra* note 10 at 247.

light of the importance placed on the attitude of the stepfamily toward the natural father in applying the doctrine of equitable estoppel in the United States.[42]

At trial, De Graves J. applied *Carignan* and held that the husband had repudiated his parental relationship with Jessica and was therefore not obligated to pay support. The Court of Appeal dismissed the wife's appeal on the same grounds. Philp J.A. was of the view that *Carignan* should be followed as this was not one of those rare cases in which the court was justified in departing from its own earlier ruling.[43] He also observed that *Carignan* had the "virtue of establishing an understandable and easily determined basis for imposing or excusing responsibility."[44]

The Supreme Court of Canada unanimously allowed the appeal. The decision is significant in two key respects. First, it overruled *Carignan* and, in doing so, made it clear that a step-parent cannot unilaterally terminate the parental relationship that gives rise to obligations. Secondly, it rejected the emphasis placed on the post-separation relationship which developed in cases such as *Andrews*. In the post-*Chartier* environment it now seems that once a step-parent assumes the role of a parent, and the child or children qualify as the child or children of the marriage pursuant to the *Divorce Act*, the step-parent remains a parent for the purposes of the Act. This development appears consistent with the direction that family law is taking and arguably should take, despite concerns such as those expressed at the Court of Appeal by Philp J.A. about the number of obligations persons should be obliged to carry around with them in the days of time-limited, fragile relationships.[45] It is suggested that such concerns are unduly exagerrated, particularly relative to the goal of ensuring adequate support for children in situations in which the marriage or relationship between their custodial parent and their step-parent has dissolved.

D. The Chartier *Reconfiguration of the* In Loco Parentis *Doctrine*

Chartier's holdings on step-parent child support obligations are rooted in a reconfiguration and an expansion of the *in loco parentis* doctrine. In its analysis of the pre-*Chartier* caselaw in this area, the Supreme Court observed that in both the cases which allowed and those which denied step-parents' unilateral termination of their

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[42] There is only a brief discussion in the trial judgment of the obligation of the stepchild's natural father, a factor which De Graves J. dismissed as immaterial to the issue at hand: "The petitioner has not, for reasous best known to herself, pursued Jessica's natural father for support. He, as I understand it, is not a person without resources. Counsel for the respondent suggests that on the basis of *Williamson* v. *Williamson* (1991), 112 N.B.R. (2d) 368; 281 A.P.R. 368; 31 R.F.L. (3d) 378 (Q.B. Fam. Div.), I should suspend any order of maintenance for Jessica to be paid by the respondent until Jessica's natural father's obligation is determined. In view of my finding on 'loco parentis' the matter is no longer germane" (*Chartier* (trial), *supra* note 10 at 32-33).

[43] *Chartier* (C.A.), *supra* note 10 at 440. In concurring reasons, Twaddle J.A. declined to discuss the merits of *Carignan* on the basis that he was bound to follow it in any event (at 441).

[44] *Ibid.* at 438.

[45] *Supra* note 20.

relationships with their stepchildren, the courts engaged in an historical review of *in loco parentis* which failed to take adequate account both of the principles of statutory interpretation and of the realities of contemporary society. Bastarache J. cited Elmer Driedger as follows: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[46] Accordingly, Bastarache J. was of the view that the common law principle was not helpful in determining the meaning of "in the place of a parent" in the *Divorce Act*. The proper starting point, he held, was illustrated by the decision of *Theriault* and focused on "what is in the best interests of the children of the marriage, not on biological parenthood or legal status of children."[47] The Court was highly critical of the *Carignan* decision for a number of reasons, in particular due to the fact that it "nullifies the effect of the relevant provisions of the *Divorce Act*." As Bastarache J. asked, "[i]f one can unilaterally terminate a relationship where a person stands in the place of a parent to a child, why define such a relationship as giving rise to obligations under the *Divorce Act*?"[48]

Central to *Chartier* is the unequivocal finding that once the parental link has been established between step-parent and stepchild, it is not contingent on the continued existence of the relationship between the adult partners:

> The breakdown of the parent/child relationship after separation is not a relevant factor in determining whether or not a person stands in the place of a parent for the purposes of the *Divorce Act*. Jessica was as much a part of the family unit as Jeena and should not be treated differently from her because the spouses separated.[49]

This, as will be seen, is the most significant and far-reaching aspect of the decision since it allows for the creation of the parent/child relationship in an ultimately functional way, refusing to draw the traditional distinctions between legal (*i.e.*, natural or adopted) parentage and informal relations which have historically not carried juridical consequences.

Bastarache J. identified the test to be applied as follows:

> Whether a person stands in the place of a parent must take into account all factors relevant to that determination, viewed objectively. What must be determined is the nature of the relationship. The *Divorce Act* makes no mention of formal expressions of intent. The focus on voluntariness and intention in *Carignan* ... was dependent on the common law approach discussed earlier. It

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[46] E. Driedger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87, as cited by Bastarache J. in *Chartier, supra* note 10 at para. 19.

[47] *Chartier* (S.C.C.), *supra* note 10 at 252.

[48] *Ibid.* at 256.

[49] *Ibid.* at 259. Bastarache J. also states that the "material time" factor referred to in the context of the definition of "child of the marriage" applies only "to the age considerations that are a precondition to the determination of need" (*ibid.*).

> was wrong. The Court must determine the nature of the relationship by looking at a number of factors, among which is intention. Intention will not only be expressed formally. The court must also infer intention from actions, and take into consideration that even expressed intentions may sometimes change. The actual fact of forming a new family is a key factor in drawing an inference that the stepparent treats the child as a member of his or her family, *i.e.*, a child of the marriage. The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent. The manifestation of the intention of the stepparent cannot be qualified as to duration, or be otherwise made conditional or qualified, even if the intention is manifested expressly.[50]

After setting out these factors, Bastarache J. noted that "not every adult-child relationship will be determined to be one where the adult stands in the place of a parent. Every case must be determined on its own facts and it must be established from the evidence that the adult acted so as to stand in the place of a parent to the child."[51]

The test developed in *Chartier*, as outlined above, raises a number of issues in terms of the application and development of the law henceforth. How, for example, might the test be applied in a situation in which the natural father has continued his involvement, as in a joint custody arrangement? This point potentially raises once again Philp J.A.'s concern, noted earlier, about how many obligations divorced or separated parties must carry with them as they travel from relationship to relationship.[52] Although this may appear to be a serious concern in this context, a consideration of the application of the test in *Chartier* suggests that it is not likely to be problematic. In *Chartier*, the Supreme Court rejected the notion that the possibility of collecting support from the biological father should preclude characterization of the stepchild as a "child of the marriage."[53] Bastarache J. did, however, include the nature of the child's relationship with the biological parent, as well as existing financial arrangements, as relevant factors in making the determination. This inclusion suggests, for example, that if the child's natural parents have a joint custody arrangement and are both actively involved in the raising of the child, it is less likely that the stepparent would be treated as standing in the place of the parent. Financial support is another factor; the more support and the greater the role played by the natural parent, it appears, the harder it likely will be to show that the step-parent has assumed the parental role. Where the situation is more ambiguous, and where multiple parents have been acting in concurrent parental capacities towards children (including providing fi-

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[50] *Ibid.* at 260-61.
[51] *Ibid.* at 261.
[52] *Supra* note 20.
[53] *Supra* note 10 at 262.

nancial support), it is fully appropriate that the law should recognize and validate this reality. In such circumstances, according to Bastarache J., the obligations are joint and several and the question will be one of relative quantum.[54] In reality, it is probably all too rare that children have multiple persons in their lives who are acting in authentic parental capacities, and the law should risk over-counting rather than under-counting these scenarios.

As Nicholas Bala has documented, there is already considerable case law on the application of the Child Support Guidelines in order to determine the quantum of support payable by a step-parent. Section 5 of the Guidelines, he notes, provides that where the payor spouse is a person "who stands in the place of a parent," the amount of child support shall be "such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child." [55] As Bala points out:

> It seems to be generally accepted that if no child support obligation by the non-custodial natural parent has been established when the stepparent is before the court, the stepparent will be required to pay the full Guideline amount. To reduce the amount of child support without an obligation having been established for another person to pay support would be contrary to the interests of the child.[56]

Not surprisingly in light of the law immediately prior to *Chartier*, issues related to quantum remain to be determined. For example, does a natural parent bear any onus to establish that some attempt has been made to seek support from the other natural parent? Furthermore, once the step-parent has been found to stand in the place of a parent, how should the responsibilities be divided as between the payor step-parent and payor natural parent, assuming they are both before the court?[57] Now that the concurrency of such relationships has been recognized and validated by the Supreme Court in *Chartier*, these issues will perhaps receive greater attention.

Many of the most difficult issues that arise out of *Chartier*, such as ascertaining when the threshold of becoming a "child of the marriage" is met and determining the appropriate allocation of child support obligations among parents, remain to be addressed. It is here that the unpredictability of the decision lies.[58] If the threshold test is

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[54] *Ibid.*

[55] See Bala, *supra* note 25 at para. 49 [footnotes omitted]. As Bala further notes, "[w]ith the adoption of the *Guidelines* in Ontario, the legislature repealed the former s.33(7)(b) of the *Family Law Act* which had 'recognized that the obligation of a natural ... parent outweighs the obligation of a person who is not a natural... parent.' Section 5 of the *Guidelines* appears to give courts significant discretion to award the amount of support considered appropriate."

[56] *Ibid.* at para. 47. In support of this point, Professor Bala cites *Clarke* v. *Clarke*,[1998] B.C.J. No. 2370 (S.C.), online: QL (BCJ).

[57] For a discussion of the various approaches that have been taken to these issues so far, see Bala, *ibid.* at para. 47-52. See also the case law cited *supra* note 25.

[58] In Canada, *Chartier* seems to have been greeted with some alarm, especially by trial court judges. I presented a review of the decision to a session run by the Canadian Judicial Institnte in Quebec City

applied widely, for example, the practical effects will be very significant and vexing (at least in the short term) as questions such as the process for, and the apportionment of, support obligations between natural parents and step-parents are considered. If, however, it is narrowly or strictly applied, it is possible that the net difference between the legal situations in Canada (post-*Chartier)* and the United States (with the application of the equitable estoppel doctrine) will be very small indeed. In order to explain this, it will be useful to describe briefly the legal situation as it currently exists in the United States.

III. The Comparative Context

A. Step-parent Support Obligations in the United States

As I have outlined above, the relationship of stepchild to step-parent is regulated at common law by the *in loco parentis* doctrine. The judicial interpretation of this doctrine in the United States has remained traditional and consistent with the views expressed in the *Carignan* decision. To this extent, the American position has resisted the development of a doctrine that could recognize multiple parents, something that is especially problematic when parental rights have significant constitutional status. This position is very different from the one articulated in *Chartier,* where it is precisely by broadening the notion of *in loco parentis* (or its statutory equivalent) that the Court has opened the door to the notion of multiple parents and debtors of support (and other) obligations.

The potential severity of the strict interpretation of *in loco parentis* in the United States has been mitigated somewhat by the application of the doctrine of equitable estoppel. When its traditional requirements are adapted to the step-parent support context, the doctrine requires proof of the step-parent's "representation of support to either the children or the natural parent as to his or her responsibilities in his or her relationship with them,"as well as reliance on this representation by, and a resulting "economic detriment" to, the children or the natural parent.[59] Under this doctrine, in certain circumstances, the stepfather cannot be heard to deny his parental obligations of support. A review of some of the cases that have applied this doctrine in the United

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in February 1999, just after the reasons were released, and there was, as I noted, a marked divergence of opinion about *Chartier* between the appellate court judges, who generally seemed to welcome the decision, and the trial judges who were very concerned about how to apply the rather vague test set out in Bastarache J.'s reasons to particular fact situations.

[59] *Miller, supra* note 19 at 358-59. The New Jersey Supreme Court's stipulation in *Miller* of the requirements under which post-separation support obligations can be imposed on step-parents through the application of equitable estoppel continues to be an influential precedent in this regard, which is much cited in both case law and scholarship. It is interesting to note that the case itself was remanded to trial for a determination of whether or not these requirements were met on the facts. For useful general discussions of the equitable estoppel standard as it relates to step-parent support obligations, see "Stepfamilies and the Law", *supra* note 14 at 31-38 and Engel, *supra* note 11 at 330-34. These critics explore some of the cases referenced *infra* note 63 in more detail.

States reveals a remarkable consistency in fact patterns with those Canadian cases that have allowed support claims by stepchildren.

In one case, *W.* v. *W.*,[60] the Connecticut Supreme Court upheld a decision in which a stepfather was estopped from denying paternity and ordered to pay temporary child support. On the facts, the stepfather had represented himself generally and to the child as the father, and the court found that the emotional, and more significantly, the financial elements of detrimental reliance had been met. It is clear that this test will not be easily met in all stepfamilies. Although the focus in *W.* v. *W.* was the use of estoppel to prevent a step-parent from denying paternity, the Court engaged in a relevant broader discussion of equitable estoppel as it relates to step-parents seeking to avoid support obligations:

> [W]e conclude that the equitable estoppel doctrine properly imposes a burden on the party seeking to invoke the doctrine to demonstrate representations of financial as well as emotional support. The concerns about misrepresentation and detrimental reliance are placed more appropriately on any promises of emotional *and* financial support, not on any misrepresentations and reliance regarding biological parentage. Requiring that children believe that the stepparent is their natural parent unjustly would deny support to some children who, nevertheless, have relied detrimentally on representations of emotional and financial support.[61]

The court in *W.* v. *W.* emphasized that the test for the application of equitable estoppel is strict. In the wake of *Miller*,[62] there must not only be a representation of support on the part of the step-parent and a resultant financial detriment to the child if this support is withdrawn, but also active interference with the natural parent's support obligations:

> The *Miller* court required that the natural parent invoking the doctrine establish that, if the stepparent is not estopped, the children will suffer *future* financial detriment as a result of the stepparent's past active interference with the financial support by the child's natural parent. It is imperative for the stepparent to have taken positive steps of interference with the natural parent's support obligations in order for the court to bind the stepparent to support the children in the event of a divorce. Future economic detriment is established, for instance, whenever a custodial natural parent proves "that he or she (1) does not know the whereabouts of the natural parent; (2) cannot locate the other natural parent; or (3) cannot secure jurisdiction over the natural parent for valid legal reasons, *and* that the natural parent's unavailability is due to the actions of the stepparent...."[63]

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[60] *Supra* note 19.

[61] *Ibid.* at 1085.

[62] *Supra* note 19.

[63] *Supra* note 19 at 1084-85 [footnotes omitted]. Additional cases which affirm the strictness of this standard include *Murphy* v. *Murphy*, 714 A.2d 576 (R.I. 1998) (finding no support obligation, based on a claim of equitable estoppel, on the part of the stepfather because "[a]lthough [the stepchildren's] natural father has been absent from their lives, that absence was apparently as much by his design as by anyone else's. There were no findings that the plaintiff [the stepfather] was responsible for [the

While such legal tests seem to be largely absent from Canadian case law, it is interesting to note the points at which the Canadian and American case law do converge. If one reviews the facts of most of the step-parent support cases in recent years, the pattern that emerges is one closer to cases such as *W.* v. *W.* than to the multiple or overlapping family situations that have become common. It is clear that the natural father is largely absent in the Canadian cases, and it also seems clear that in some cases this absence has been encouraged at least partly through the wishes of the new stepfamily.[64] Unlike the American cases, however, there is no suggestion so far in Canada that active exclusion of the natural father by the stepfamily is a condition precedent of liability for child support.[65] *Chartier,* for instance, is silent as to the relative importance of the role played by the natural father, except to the extent that the "nature or existence of the child's relationship with the absent biological parent" is listed as one of the factors relevant to a finding that the adult was standing in the place of a parent.[66] It seems unlikely that such a finding would be made in a situation in which the natural father had maintained a continuing involvement in the life of his child and had made significant financial contributions. A more difficult question would arise, however, if the economic disparity between the "fathers," with the stepfather being much better off, was so great that failing to impose any obligation on the affluent stepfather would result in a serious drop in the child's subsequent standard of living.

In short, although the legal tests are very different, there are some striking similarities between the fact patterns which have so far given rise to support obligations in

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stepchildren] not receiving financial support from their natural father, nor was there evidence that the natural father had ever attempted to contact his children only to be rebuffed by plaintiff" (at 581)); *Ulrich* v. *Cornell*, 484 N.W.2d 545 (Wis. 1992) (holding that the husband was not equitably estopped from denying responsibility for financially supporting his stepson after separating from the stepson's mother, even though during the marriage the husband had hired and paid for an attorney to handle the termination of the natural father's rights and had initiated adoption proceedings (which were never completed for financial reasons). The stepson also lived with his stepfather for a 15 month period after the divorce; still, the Court found that the mother was unable to prove that she "terminated the natural father's parental rights and obligations because the stepfather made an unequivocal representation of intent to support the child" (at 546)); *K.A.T.* v. *C.A.B.*, 645 A.2d 570 (D.C. 1994) (holding, in a situation potentially involving the imposition of paternity by estoppel, that equitable estoppel was not applicable because of the absence of financial detriment); and *Knill* v. *Knill*, 510 A.2d 546 (Md. 1986) (holding that the husband was not equitably estopped from denying his duty to support a child, born during the marriage but who was not his biological child, as there was no deprivation of the child's or his mother's right to seek support from the natural father).

[64] See *e.g. Theriault* and *Boyle, supra* note 15.

[65] Though, as Bala has noted, in many of the cases before the courts on this issue (as opposed to issues of quantum of support), the natural parent has not played a major role during the relationship between the other parent and the step-parent and the step-parent has typically been obliging in the arrangement. It accordingly seems unjust to allow the step-parent to escape a financial obligation on the basis of a theoretical obligation existing on the part of the natural parent. See Bala, *supra* note 25 at para. 47.

[66] *Chartier* (S.C.C.), *supra* note 10 at 261.

both Canada and the United States. The American cases have focused very clearly on the nature of the relationship between the stepfather and the stepchildren during the marriage or relationship (not afterwards, as some pre-*Chartier* cases suggested) and the attitude of the mother and stepfather to the natural father. If Canadian courts wished to limit the potential breadth of *Chartier*, these are considerations they could explicitly develop as they already seem to be implicitly important.

IV. Future Developments

A. *The Implications of* Chartier

The above analysis suggests some of the potential points of convergence between American and Canadian case law, and also illustrates the ways in which the policy discussions characteristic of certain American cases might be used to inform future Canadian decisions. There remain, however, fundamental differences between American and Canadian approaches to questions of step-parent support, particularly in the post-*Chartier* context. It is in these differences that *Chartier* reveals its potential in terms of transforming Canadian law. *Chartier* takes a clear and unequivocal stand in rejecting traditional approaches to the definition of "child of the marriage" and in articulating a functional test. Once a person has met this functional test on the basis of the factors set out above, he or she is as much a parent for the purposes of support obligations as a natural parent. *Chartier* thus endorses a basis for familial obligation that is based on the reality of relationships and the needs of children over time.

As I have outlined above, the direction signaled by *Chartier* is different from the approach taken in the American jurisprudence in two key ways. First of all, it is driven by an explicitly child-centred approach; the driving rationale is clearly the concern about the effect on a child of allowing a parent to unilaterally sever relations. Second, this approach opens the door to the possibility of multiple parents; the existence of a stepfather who stands in the place of a father does not preclude the possibility that the natural father (or even a previous stepfather) also occupies such a position.[67] While this approach also opens the door to a number of serious practical and logistical complications (for example, the procedure for determining quantum) it is a welcome shift in principle both because it flows from a consideration of the best interests of children, rather than from a privileging of parental rights over those of children, and also because it reflects the growing and complex realities of modern family life.

At the level of principle, then, *Chartier* unequivocally reinforces two central points. First, the question as to whether a step-parent stands in the place of a parent is to be determined as part of a functional, child-centred exercise. The obligation does

[67] Though having said this, the factors enumerated by Bastarache J. do imply that it will be practically more difficult to establish step-parent obligations when there is an actively involved natural father, but this remains to be seen.

not stand or fall as a matter of status. Secondly, and related, is the clear fact that a number of parents may occupy the role of parent concurrently. Both of these points, however, raise another policy concern which has been the subject of discussion in both Canadian and American case law on this issue: whether imposing financial liability for support upon an actively involved step-parent after the relationship with the natural parent ends will discourage, to the detriment of children, step-parents from becoming active players in the lives of their stepchildren.

Such concerns about creating disincentives to the development of close and loving relationships between step-parents and their step-children are particularly manifest in American courts' development of the doctrine of equitable estoppel in this context. Indeed, these concerns seem to be the primary reason that the courts have insisted not only on "emotional," but also on "financial," detriment. For example, in *W.* v. *W.*, the Court commented as follows: "A requirement of emotional detriment alone would discourage parent-child bonding by rewarding stepparents who do not create a familial bond with their stepchildren, while punishing those who do, by requiring them to be responsible for them as a legal parent in the event of a divorce."[68] Another case, *K.A.T.* v. *C.F.B,* supported the cautious application of the equitable estoppel doctrine and cited the "deep practical concern that extending the *in loco parentis* relationship beyond dissolution of marriage would 'discourage the voluntary support that is so often provided by step-parents.'"[69] In making this point, the court, as in *W.* v. *W.*, drew on the finding in *Miller* that "emotional bonding" was not sufficient for the imposition, through the use of equitable estoppel, of support obligations:

> [T]o hold otherwise would create enormous policy difficulties. A stepparent who tried to create a warm family atmosphere with his or her stepchildren would be penalized by being forced to pay support for them in the event of a divorce. At the same time, a stepparent who refused to have anything to do with his or her stepchildren beyond supporting them would be rewarded by not having to pay support in the event of a divorce.[70]

There seems to be very little in the way of empirical evidence, in either the Canadian or the U.S. context, to support such assertions. Will a concern about possible financial liability for support in fact affect conduct during a happy phase of a relationship when a family unit is being formed? Will this really, for example, deter a stepfather from taking a child to soccer practice? If so, it may well be better, as some have suggested, to have this reticence flushed out early in the relationship, thereby preventing the creation of a doomed family unit. Bastarache J. himself expresses this view in *Chartier.*[71] Clearly,

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[68] *Supra* note 19 at 1085.

[69] *Supra* note 63 at 572.

[70] *Miller, supra* note 19 at 358.

[71] *Chartier* (S.C.C.), *supra* note 10 at para. 41. In this section of his judgement, Bastarache J. draws on the analysis of Beaulieu J. in *Siddall* v. *Siddall* (1994), 11 R.F.L. (4th) 325 (Ont. Gen. Div.) at 337, including the assertion that "[i]f requiring men to continue their relationship, financially and emotionally, with the children is a discouragement of generosity then, perhaps such generosity should be discouraged. This type of generosity which leaves children feeling rejected and shattered once a relation-

the various concerns about deterring step-parents from becoming emotionally involved with their stepchildren should be given some empirical consideration.

While the question of whether imposing support obligations on step-parents will discourage them from establishing strong relationships with their stepchildren during the marriage remains an open one, *Chartier* will eliminate a related problem created by the pre-*Chartier* line of cases led by *Carignan*: the incentive for step-parents to discontinue contact *after* divorce or separation in order to avoid support obligations. The relevance of post-separation contact to the characterization of the step-parent relationship was never entirely clear. Moreover, by placing the emphasis on the post-separation relationship between the child and step-parent, the test in these cases reinforced tendencies that already seem to exist in reality. Step-parent relationships are often not durable after the adult relationship ends and this fact amounts to another loss for the child or children involved. It is very striking that there are relatively few access or custody disputes involving step-parents and stepchildren,[72] especially if one distills out those in which the central issue is really financial obligations and the custody or access issue is being used primarily as a bargaining tool.[73] Although there is no em-

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ship between the adults sours is not beneficial to society in general and the children, in particular." See also D.L. Abraham's article "California's Step-parent Visitation Statute: For the Welfare of the Child, or a Court-Opened Door to Legally Interfere with Parental Autonomy: Where are the Constitutional Safeguards" (1997) 7 S. Cal. Rev. L. & Women's Stud. 125 at 155-56 [footnotes omitted]. She argues, in the American context, that step-parent visitation and support obligations should be corollary to one another:

> Opponents of a step-parent support rule that is correlative with visitation suggest that such a rule would discourage remarriage of people with children. However, "to the extent that a support rule would give pause to the [party] contemplating step-parenthood... the pause could be [greatly] beneficial." One sociologist has observed that, when potential partners do not discuss their finances and expectations of support for step-children, the realities they discover may lead to the destruction of the step-marriage. If step-parent support requirements following a dissolution would promote disclosure, advance planning and possibly discourage dissolution of the step-marriage, then such a rule can only benefit the parties and children involved.

[72] See *e.g.* R. Levy, "Rights and Responsibilities for Extended Family Members?" (1993) 27 Fam. L.Q. 191 at 193-94 [footnotes omitted] who notes that in the American context "[t]here seem to be very few appellate cases adjudicating disputes in which a step-parent has sought custody of a child despite the opposition of a noncustodial biological parent following either the death of, or the step-parent's divorce from, the custodial biological parent. Although there could be many more unappealed trial court decisions, it seems likely that few such claims are in fact made".

[73] Interestingly, there is some indication that there may be a gendered aspect to this issue, with women being more likely to seriously seek custody of, or access to, stepchildren. See *e.g. Brinkerhoff* v. *Brinkerhoff*, 945 P.2d 113 (Utah Ct. App. 1997). Prior to this case, Brenda Brinkerhoff had been awarded joint legal custody of her stepchildren in the parties' divorce decree. The case is interesting because of the Court's finding that Ms. Brinkerhoff did *not* have a post-divorce support obligation towards her stepchildren. The Court rejected Mr. Brinkerhoff's argument that, while "'generally, under Utah law, a step-parent's legal responsibility to support step-children terminates upon divorce'" this principle should not apply to a step-parent who actively pursues and obtains joint legal custody (at 115).

pirical evidence here either, it does seem probable that a person going through a stressful, unhappy and often angry period of separation will respond to a test that emphasizes the post-separation relationship by severing contact to avoid the financial obligations. The removal of the incentive to terminate a relationship may thus result in greater stability for children following the disruption of their family units, although this argument is admittedly speculative.

The crucial point to be made here is that, in developing laws in this area, policy-makers should take care to assess the effects of their decisions on the lives of children. Flowing from the recognition of the possibility of multiple and overlapping parents and family structures is an obligation to try to facilitate and encourage the continuation of the constructive role that various parental figures have in the lives of children. Given that the underlying assumption that the considerations explored here would actually affect step-parents' conduct remains untested and subject to some question, further discussion in both the Canadian and the American contexts of the potential effects of post-separation financial obligations is to be welcomed.

Absent so far from the post-separation step-parent obligation debate is an exploration of how law and legal policy might facilitate and encourage the continuation of step-relationships. The cases cited above assume that the imposition of financial obligations constitutes a "punishment" of sorts. Perhaps there is another way of understanding such obligations.[74] With natural parents, the obligation to pay child support is not understood as penal in nature, but is rather understood as an integral aspect of parental status. While the law has sought to separate the obligation to pay from the right to access, there is a level at which they are corollary to one another.[75] Even as a symbolic matter, an obligation to pay support might serve as a form of institutional validation, an imprimatur of sorts, that would help to encourage the continuation of a relationship, and thereby refute the assumption that the step-parent no longer has a role once the relationship with the natural parent has ended.[76] The evaluation and, ultimately, the resolution of such issues will require not only the direction of further at-

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[74] Of relevance here is Abraham's article, *supra* note 71 at 127, in which she argues that step-parents whose interest in visitation stems from a genuine concern for their stepchildren's well being would not be adverse to assuming support obligations: "[i]f a former step-parent is truly committed to the child, and the relationship between child and adult was substantive, the step-parent petitioning the court for visitation would not be offended, but would in fact welcome a concurrent order of child support to insure the minor's economic welfare."

[75] Some academics argue for a very strong correlation between access and support. See *e.g.* G. Geisman, "Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities" (1993) 38 S.D.L. Rev. 568.

[76] This point is analogous to one made in the context of joint legal custody, where the argument was made that fathers would perform their obligations towards their children more readily if there was—even at a merely symbolic level—some validation of their significance as parents. "Joint custody" denotes a level of commitment and responsibility that "generous access" does not, even though in many jurisdictions and situations the actual legal entitlements of the parent are not very different. E.S. Scott provides a useful overview of this perspective on joint custody in "Pluralism, Parental Preference, and Child Custody" (1992) 80 Calif. L. Rev. 615 at 624-26.

tention to the policy implications of step-parent support obligations following separation, but also the empirical validation of some of the assumptions as to the likely conduct of step-parents.

Conclusion

While *Chartier* does not provide answers to all of the outstanding questions surrounding step-parent support obligations, it does clarify the direction that Canadian jurisprudence on the subject should take. The determinations which courts will now be called upon to make in light of *Chartier* will be both fact-specific and require some time to develop. There will, no doubt, be many cases in which the application of the factors will be difficult. In this sense, a simple benchmark such as post-separation termination of contact might be seen as preferable. Nevertheless, as with issues such as the determination of custody, simple rules are rarely capable of resolving the complexity and diversity of human social life. Judges dealing with family law, moreover, are accustomed to having such discretion.

Despite some continued uncertainty about the application of the law, *Chartier* is to be welcomed both for the direction in which it moves Canadian jurisprudence and, more specifically, for the issues it does resolve: a child can have two (or more) "fathers" for the purposes of support obligations, and the interests of the child motivate the assertion that, once the parental mantle has been assumed, it cannot be cast aside by post-separation conduct. While this perspective differs markedly from that found in American jurisprudence, courts and policy-makers on both sides of the border will increasingly be required to weigh similar sorts of policy concerns as they work through the difficult threshold and (in the Canadian context) quantum issues that lie ahead. Canadian and American lawmakers and policymakers would thus benefit considerably from examining each other's respective perspectives on these challenging issues.