

# A Balancing Act

## The Extent to Which a Stepparent Should Be Held Responsible for a Stepchild's Post-Divorce Support

by Cheryl E. Connors

Family law practitioners are intimately familiar with the second family and the complications that accompany defining the responsibilities of this new family. The relationship between a stepparent and a stepchild can be rewarding and beneficial to all involved. Stepparents often take on the responsibility of supporting their stepchildren during the marriage, and our public policy should encourage such support. However, when the second marriage ends, the consequences to the children can be devastating, both emotionally and financially. Statistics show that approximately "60% of second marriages end in divorce, and about 43% of marriages are remarriages for at least one party."<sup>1</sup>

Under what circumstances should a stepparent be held responsible for a stepchild's support after the marriage is over? Our Supreme Court answered that question in the seminal decision of *Miller v. Miller*.<sup>2</sup>

The majority of states have either recognized under common law that a stepparent has no duty to support a stepchild post-divorce or have interpreted their statutes to exclude imposing a duty of support post-divorce on a stepparent.<sup>3</sup> Some states have imposed obligations on stepparents under the doctrine of equitable estoppel, and other states have imposed liability under implied, as well as express, contracts.

In *Miller*, the New Jersey Supreme Court held that a stepparent may be responsible to support a stepchild after a divorce under the

doctrine of equitable estoppel.<sup>4</sup> The mother in that case sought child support, from her second husband during their divorce, for her children born of a previous marriage. The biological father had provided support after his divorce from the mother until he went to prison, during which time the mother married the stepfather. After the biological father's release from prison, he attempted to send child support but the stepfather tore up his checks. He eventually stopped trying to send child support payments.

During the seven-year marriage, the stepfather supported the children, declared them as dependents on his tax returns and developed a close relationship with them. Although the children knew their stepfather was not their biological father, they considered him as their father and began using his surname at school. The mother testified that the stepfather interfered with the children's ability to visit with their biological father.<sup>5</sup>

The Supreme Court noted that a stepparent's *in loco parentis* relationship with a stepchild only exists as long as the parties and the child desire that it exist.<sup>6</sup> However, a continuing obligation may be imposed under the principles of equitable estoppel.<sup>7</sup> The claiming party must show "that the alleged conduct was done, or representation made, intentionally or under such circumstances that it was both natural and probable that it would induce action."<sup>8</sup> In addition, the claiming party must prove that the conduct was "relied on, and the

relying party must act so as to change his or her position to his or her detriment."<sup>9</sup> In short, the three elements of equitable estoppel must be established: 1) representation, 2) reliance, and 3) detriment.<sup>10</sup>

Although the Supreme Court decided that a permanent support obligation could be imposed on a stepparent on the basis of equitable estoppel, the Court declared that this doctrine should be applied with caution, so as not to discourage voluntary support by a stepparent during a marriage.<sup>11</sup> The natural parent should always be considered the primary source of support. "It is only when a stepparent by his or her conduct actively interferes with the children's support from their natural parent that he or she may be equitably estopped from denying his or her duty to support the children."<sup>12</sup> The stepparent must have made some representation of support to either the children or the natural parent, and the children must have relied on that representation.<sup>13</sup>

The Court rejected the notion that "emotional bonding" could be sufficient to invoke the doctrine of equitable estoppel.<sup>14</sup> It also must be shown that the "children will suffer future financial detriment as a result of the stepparent's representation or conduct that caused the children to be cut off from their natural parent's financial support."<sup>15</sup> An example of such financial detriment, the Court explained, includes a demonstration by the custodial parent that "he or she (1) does not know the whereabouts of the nat-

ural 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.<sup>16</sup>

The crucial inquiry is whether the stepparent has interfered with the natural parent's support obligation.<sup>17</sup>

The Court established a less stringent standard for an application for *pendente lite* support. Specifically, to obtain *pendente lite* child support the claiming party must demonstrate that "he or she is not receiving support for the children from their other natural parent," and that "the stepparent's conduct actively interfered with the children's support by their natural parent so that *pendente lite* support cannot be obtained from the natural parent."<sup>18</sup> The Court concluded that such a standard prevents immediate hardship to children who have relied on a stepparent as their main source of support.<sup>19</sup> Based on the two standards, the Supreme Court concluded that the facts were sufficient to impose a *pendente lite* support obligation, but remanded for the trial court to consider whether a permanent support obligation should be imposed.<sup>20</sup>

In Justice Alan B. Handler's concurrence in part and dissent in part, he opined that the facts were sufficient to impose a permanent duty of support. Justice Handler averred that the critical focus "should be whether, by word and deed, [the stepfather] affirmatively encouraged, and actually succeeded in attaining, the family's financial dependence upon him and, further, whether defendant deliberately and aggressively cut off the support that the children had been receiving or might have received from their natural father."<sup>21</sup> Justice Handler noted that emotional bonding with a stepparent could contribute to the alienation of the natural parent's relationship with the children, and thus may bear upon the natural par-

ent's failure to support the children. With respect to public policy considerations, Justice Handler opined that public policy should not countenance the conduct of a stepfather who seeks to avoid a support obligation to his stepchildren where he "has aggressively alienated children from their natural father and vigorously discouraged any financial support from their father."<sup>22</sup>

Previous to the *Miller* decision and discussed at length in *Miller*, the Appellate Division affirmed the decisions of *Ross v. Ross*<sup>23</sup> and *A.S. v. B.S.*,<sup>24</sup> in which the court imposed a duty of support on the non-biological and non-adoptive fathers. In *Ross*, because the child always believed his stepfather to be his biological father, and the stepfather took steps to acknowledge paternity, he was estopped from denying his obligation to support the child.<sup>25</sup> Likewise, in *A.S.* the non-biological father was estopped from denying his duty to support the child. In that case, the child was delivered to the parties, a husband and wife, when he was one month old, and resided with both parties until their separation. The child used the parents' surname and never received support from the natural parents. The court concluded that "[t]o permit defendant to repudiate his intent to support the child and no longer stand *in loco parentis* to him would cause irreparable harm to the boy," and thus, equitable estoppel was applied to require the husband to pay child support.<sup>26</sup>

In an equally divided Court, the Supreme Court affirmed the Appellate Division's decision in *M.H.B. v. H.T.B.*, which applied the doctrine of equitable estoppel under *Miller* to preclude a stepfather from denying the validity of a voluntary commitment to provide support post-divorce.<sup>27</sup> In *M.H.B.*, the child was born during the marriage, but shortly after her birth the stepfather learned that she might not be his natural child.<sup>28</sup> For five years following the divorce, the stepfather vol-

untarily provided emotional and financial support to the child. When the stepfather remarried, his relationship with his ex-wife deteriorated and he petitioned the court for custody of his two children and his stepdaughter.<sup>29</sup> The stepfather subsequently amended his request for relief and claimed, in the alternative, that he should have no duty to support his stepdaughter.

Relying on the principles of *Miller*, Justice Handler, writing the concurrence for three members of the Court, concluded that the stepfather's support throughout the marriage and following the divorce "constituted a continuous course of conduct toward the child that was tantamount to a knowing and affirmative representation that he would support her as would a natural father."<sup>30</sup> The child reasonably relied on the stepfather's representations, as the trial court found that the stepfather was her psychological parent.<sup>31</sup> If the stepfather were permitted to repudiate his prior actions, the concurrence reasoned that it would cause material and emotional harm to the child.

Justice Handler's opinion next examined the New Jersey Parentage Act,<sup>32</sup> determining that the Legislature did not intend to preclude imposing a duty on a stepparent where equity demands such a result. The concurrence further explicated that under the act the best interests of the child trump any determination of parentage with respect to the support of the child. Lastly, Justice Handler's concurrence makes clear that the obligation to pay support remains mutable.<sup>33</sup>

A stepparent may show changed circumstances warranting an assumption of liability for the support of the child by the biological parent. The assumption of support by the biological father "will be required if changed circumstances show that it would be in the best interest of the child, fair to the stepparent, and legally just as to the biological father."<sup>34</sup>

In Justice Stewart Pollock's dissent in part, he opined that the concurrence improperly expanded the principles of *Miller* because the stepfather in that case had not actively interfered with the natural father's relationship with the child.<sup>35</sup> As such, Justice Pollock, writing for three members of the Court, concluded that the stepfather in *M.H.B.* should be obligated to pay support only until a support order could be entered against the natural father.<sup>36</sup>

Following the principles of the *Miller* decision, the courts have proceeded with caution in this area, and have generally disfavored imposing a duty of support on step-parents. In *Camden County Bd. of Social Servs. v. Yocavitch*, a biological father tried to invoke the doctrine of equitable estoppel to avoid his support obligation.<sup>37</sup> In that case, the mother applied for public assistance, and the Board of Social Services sought support from the biological father, at which time he first learned that he could be the father of the child. The child had resided with the mother and her former husband, who had treated the child as his son.

In denying the biological father's equitable estoppel claim, the court reasoned that the stepfather made no representation to him, and he did not rely on any representation because he was not aware that he was the father.<sup>38</sup> The mere failure of the mother to inform the biological father of the possibility of the child being his son did not constitute "that type of 'positive action' interfering with the natural parent's support obligation" to impose a duty of support on the stepfather.<sup>39</sup>

The court explained that *Miller* does not allow a biological father to use equitable estoppel as a shield, and reaffirmed the principle that the natural parent should always be the primary source of support. Moreover, the desire to spare the child the knowledge that his stepfather is not his natural father is not a basis under the circumstances to

decline to impose a support obligation on the biological father.<sup>40</sup>

Likewise, the family part denied the biological father's request to impose a support obligation on the stepfather in *J.W.P. v. W.W.*<sup>41</sup> In that case, the mother had an affair and conceived the child while married to the stepfather. The stepfather was listed on the child's birth certificate, and the child used his surname. The mother requested that the biological father relinquish his parental rights so the stepfather could adopt the child, and the biological father ceased visitation with the child. However, the adoption never occurred.

In rejecting the biological father's attempt to invoke the doctrine of equitable estoppel, the court explained that the doctrine provides "a safety net for the child whose stepfather...affirmatively interfered with his right to be supported by his natural father."<sup>42</sup> It is not intended to relieve a biological parent's obligation to support his child merely because a stepparent has cared for his child in his absence. The court explained that principles of equity do not allow a father who has failed to fulfill a legal duty to invoke an equitable doctrine for relief.<sup>43</sup> Like the circumstances in *Yocavitch*, the stepfather did not make any representation that he would assume the obligation of support, but merely voluntarily supported the child as a result of the default of that obligation by the natural father.<sup>44</sup>

In the decision of *Cumberland County Board of Social Services v. W.J.P.*, the Appellate Division considered the circumstances under which both the natural father and stepfather are available to support the child.<sup>45</sup> Eight months after the birth of the child, the mother married the stepfather. Upon the parties' separation, the stepfather acknowledged paternity and agreed to pay child support. Several years later, the mother told the child the true identity of her natural father, and the child ceased to have a rela-

tionship with her stepfather. The mother consented to a termination of his child support obligation for his stepchild, and subsequently filed an application for public assistance. The Board of Social Services filed an action against both the natural father and stepfather. The trial court imposed a support obligation on both the natural father and the stepfather.

The court examined whether the stepfather stood *in loco parentis* to the child, namely whether he intended to put himself in the situation of the lawful father of the child and assume the "office and duty of making provision for the child."<sup>46</sup> The court held that "once a natural parent has been identified, has been ordered to pay support and establishes a relationship with the minor, *in loco parentis* support cannot be compelled by a stepfather."<sup>47</sup> The court concluded that it would be inequitable to foist a continuing *in loco parentis* status on the stepfather given that the natural father was paying support and established a bond with the child, and given that the stepfather had terminated his relationship with the child.<sup>48</sup>

In contrast to the holding in *W.J.P.*, the trial court in *J.R. v. L.R.* imposed support obligations on the natural father and stepfather simultaneously.<sup>49</sup> In that case, the mother had an extramarital affair and conceived her daughter. Her husband believed he was the daughter's natural father until she was nine years old. The mother applied for public assistance, and the Ocean County Board of Social Services filed a complaint against the stepfather. The stepfather filed a motion for genetic testing, which revealed that he was not the biological father of the daughter, and child support was ordered only for the parties' biological son. Subsequently, the mother filed a paternity complaint against the biological father, which was consolidated with a motion filed by the stepfather for custody of his son and stepdaughter, and for an order compelling the biological father to

appear for a support hearing. After genetic testing revealed that the biological father was, in fact, the natural father of the child, the trial court determined that he would pay support. The court further ordered the stepfather, as the child's psychological parent, to pay the remaining support because the natural father was unable to pay the entire amount of support needed for the child.<sup>50</sup> The biological father appealed, and the Appellate Division concluded that the trial court reached an equitable result in imposing a burden on both the biological father and psychological father.<sup>51</sup>

In *Bencivenga v. Bencivenga*, the Appellate Division addressed the issue of a mother who was not gainfully employed because she was a stay-at-home mother with her children from her second marriage.<sup>52</sup> The father, who had primary physical custody of the children, filed a motion based on changed circumstances seeking child support from the mother, who previously had no child support obligation. Although the Appellate Division recognized that the mother's husband had no duty to support the children from her first marriage, the court noted that a mother's decision to stay at home may be made possible by the income and resources of her current husband. The court reasoned that "[i]t seems odd that the benefits of her decision to devote a share of the current family resources to her second family's care could work so much to the disadvantage of her first children."<sup>53</sup> On remand, the Appellate Division directed that such facts should be considered by the trial court in any award of support for the children.

The principles of *Miller* were not extended to the circumstance of unmarried cohabitants in *Zaragoza v. Capriola*.<sup>54</sup> The family part reasoned that extending the holding of *Miller* to the context of unmarried cohabitants would be "beyond the bounds of reasonable-

ness and to make a mockery of the institution of marriage and interpersonal relationships."<sup>55</sup> Contrastingly, in *Monmouth County Division of Social Services v. R.K.*, the family part concluded that the *Miller* test applied to the parties despite the absence of any marital union between the natural mother and the man with whom she resided and lived as a family unit.<sup>56</sup> The court reached this conclusion because the man acted as a psychological parent to the child, and because the biological father was unknown.<sup>57</sup>

The case of *Skribner v. Skribner*,<sup>58</sup> which predates the *Miller* decision, squarely rejected the proposition that a child's needs should be considered in whether to impose a duty of support on a stepparent. In that case, the mother argued that her child support from her first husband was inadequate, particularly because her child had special needs. The court concluded that the mother "should not be permitted to obtain through the back door what she cannot obtain directly. The obligation is that of her first husband."<sup>59</sup> The analogy to the back door is interesting, in the sense that a stepparent may open doors that were never accessible before forming the second family. Should the door be shut to a special needs child who has received support that has helped him or her because the second family is dissolving? The trial court in *Skribner* did not have the benefit of the *Miller* decision, and thus did not examine whether there was representation, reliance or detriment under the circumstances.

In *Bengis v. Bengis*, the Appellate Division interpreted what is required to show financial detriment to the child, and specifically recognized the needs of the child as part of that inquiry.<sup>60</sup> In that case, the stepfather told the children they were to be adopted, and allowed the children to use his surname in several contexts. The children called their stepfather "dad,"

and called their natural father by his first name. As a result of an IRS audit, it was revealed that both the stepfather and the natural father were declaring the children as dependents. The stepfather, the mother, the natural father and his wife reached an agreement that the stepfather would adopt the children and the natural father would pay the back taxes resulting from the dependency exemptions and would be relieved of any further child support payments.<sup>61</sup> Although the trial court found that the stepfather made representations that he would support the children, and induced the children and the mother to rely on that representation sufficient to warrant an award of *pendente lite* child support, it concluded that such findings did not require the imposition of a support obligation post-divorce.<sup>62</sup> Because the natural father was available to provide support, the trial court determined that no financial detriment could be shown. In addition, the trial court determined that the agreement between the parties was not binding because an agreement that precludes children from seeking support from a natural parent is void as against public policy.<sup>63</sup>

Justice (then Judge) Virginia Long, writing for the court, determined that demonstrating financial detriment is not limited to a showing that the natural parent is unavailable to support the child. Rather, the question of future financial detriment is a fact-sensitive inquiry that involves a broad spectrum of possibilities.<sup>64</sup> The court further opined that the parties' full financial picture must be scrutinized, including "the actual needs of the children, the ability of both the natural parents and the stepparent to meet those needs and any financial change in the status of the parties which may be said to have come about as a result of reliance on the stepparent's misrepresentations."<sup>65</sup>

The court provides examples of circumstances under which finan-

cial detriment could be proven:

[I]f a well-to-do stepparent promised future support to children of his or her spouses' prior marriage and, in reliance thereon, the children undertook a costly program and higher education which would have been out of the question in the absence of the stepparent's representations, financial detriment might be successfully claimed. Similarly, if a natural parent, relieved of his child support obligations because of the promise of a stepparent, gave up a lucrative profession or undertook new and financially burdensome responsibilities, his ability to support the children might well be considered to have been compromised to their detriment.<sup>66</sup>

Because the trial court made no findings regarding such financial detriment, the matter was remanded for further consideration. Lastly, the Appellate Division explicated that a contract between a natural parent and a third party assigning the duty of support to a financially responsible individual is not void against public policy.<sup>67</sup> On remand, the Appellate Division directed that the trial court consider the nature of the agreement, the consideration and whether the duty imposed on the stepfather was intended to survive dissolution of the marriage, and articulate why the agreement does not warrant judicial enforcement.<sup>68</sup>

There are two competing public policy considerations in the context of imposing a duty of support on a stepparent: 1) encouraging the voluntary assumption of support of a stepchild during a marriage; and 2) the best interests of the child after the dissolution of the second family. Should a stepparent who has established a certain lifestyle to which children have become accustomed be permitted to walk away to the detriment of the children? It may be that the biological parent is available to support the child but not nearly at the standard to which they have become accustomed. A

child may be enrolled in exclusive private schools, which were accessible only because of a stepparent, and which are completely out of reach based on the support received from the biological parent. A child may likewise be enrolled in activities such as horseback riding or skiing, or may be heavily involved in cheerleading, dance or sports at a level that they cannot afford without the stepparent's support. Is it fair for that child to have to start over in a new school or give up an activity he or she loves because the second family is dissolving?

Where the natural parent is available to provide for some, but not all, of the support to meet the needs of the child, should there be simultaneous obligations on the biological father and on the stepfather? The Appellate Division declined to impose simultaneous obligations in *W.J.P.*, because the natural father was available to support the child, and because the child had ceased her relationship with her stepfather.<sup>69</sup> In contrast, the trial court in *J.R.* imposed a support obligation on both the biological father and the stepfather, where the stepfather was the psychological parent. The issue of simultaneous obligations, however, was not directly addressed by the Appellate Division in *J.R.* because the stepfather did not appeal the trial court's decision.<sup>70</sup> As such, this question remains open. Should the stepparent be able to walk away because no biological connection exists where the emotional bond between stepparent and stepchild could be far stronger than between biological parent and child?

Justice Alan Handler aptly noted in his concurrence in *Miller* that emotional bonding with a stepparent could contribute to the alienation of the natural parent's relationship with the children.<sup>71</sup>

The public policy consideration, as expressed by the majority in *Miller*, of encouraging stepparents to assume a role of both emotional

and financial support when marrying a person with children from a previous relationship, lies on the other side of the coin. If we impose an obligation on these individuals who are doing the right thing for their stepchildren during the marriage, we punish them by imposing obligations post-divorce, while rewarding those stepparents who did not support their stepchildren during the marriage.<sup>72</sup> These concerns were at the forefront of the policies considered by the Supreme Court in *Miller*.

The question is whether *Miller* and the decisions that follow have found the right balance between these two policy considerations. This author proposes that Justice (then Judge) Long's opinion in *Bengis* weighed both sides of the argument most effectively, and that Justice Handler's concurrence in *Miller* rightly recognized that the emotional bond may have some bearing on the duty to support.

If a stepparent has represented an intent to support the children, by word and deed, and the children have relied on that representation, the crucial determination is what constitutes detriment, which is an extremely fact-sensitive inquiry. The children's needs should be of paramount concern in determining future financial detriment. The concerns for the stepparent are easily addressed by the Court's clear directive that a stepfather has the right to seek reimbursement from the biological father for the support paid to a stepchild.<sup>73</sup> Moreover, the Court has made clear that the stepparent's duty of support is mutable, and is always subject to a change in circumstances application.<sup>74</sup>

Given the ever-increasing number of second families, and that as many as one in three children can expect to spend some of their childhood living with a stepparent,<sup>75</sup> simultaneous obligations of natural parent and stepparent may be appropriate and should be considered by the court.

*See A Balancing Act on page 103*