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ARTICLES

LEGAL STRANGERS AND THE DUTY OF SUPPORT: BEYOND THE BIOLOGICAL TIE—BUT HOW FAR BEYOND THE MARITAL TIE?

Laurence C. Nolan*

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"... but then I thought well, why should I be paying for a child that isn't mine?"

In 1998, Paula Johnson and Carlton Conley discovered that the child they thought was their biological daughter was not biologically related to them. This child, Callie Marie Conley, had been switched within days of her birth with their own biological daughter at the hospital where both girls were born. The discovery of the mistaken identities occurred only after Ms. Johnson had initiated a hearing for a formal child support order. Callie had been born while Johnson and Conley were living together as unmarried cohabitants. After they discontinued this living arrangement, Mr. Conley voluntarily paid child support. When they disagreed about

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3. See id.
the amount that he should be paying, Ms. Johnson initiated the hearing for court-ordered support. As a stalling tactic to delay the hearing, and which he admitted was such, Mr. Conley disputed for the first time that Callie was not his biological child. Paternity and maternity tests eventually proved that neither he nor Ms. Johnson was Callie's biological parent. They eventually learned their biological daughter's identity and whereabouts. The caregivers of both girls (including Johnson and Conley) agreed to leave the girls with their present caregivers, but all of them would develop a relationship with the two girls. Moreover, Ms. Johnson and Mr. Conley agreed that they would continue the same close parenting relationship with Callie as they always had, including following the same visitation schedule.

Several months after the discovery and after much publicity of the switch, the Green County Juvenile and Domestic Relations Court in Stanardsville, Virginia heard Ms. Johnson's child support petition. Despite the fact that both Ms. Johnson and Mr. Conley agreed to continue their parenting of Callie and their adherence to the same visitation schedule, Judge Frank Somerville, trial judge, ruled that Mr. Conley had no legal duty to support her. He justified the ruling by saying, "I can't order child support from people who aren't parents."

In another case involving cohabitants, a court ruled that it could not order a cohabitant to support his nonbiological, cohabiting child. This judge reasoned that there was no duty

4. See id.
6. Tragically, the persons who thought they were the biological parents of Conley's and Johnson's biological daughter were killed in an automobile accident shortly before they would have learned of the switch. See id.
7. The parents and stepparent of the two deceased persons became the caregivers of Conley's and Johnson's biological daughter. See id.
8. See Blum & Shear, supra note 2. Since that time, Ms. Johnson filed a lawsuit to gain custody of her biological daughter. The court denied her custody, but granted her visitation. See Tamara Jones & Michael D. Shear, Cradle Will Rock, THE WASHINGTON POST, Mar. 5, 2000, (Magazine), at 26.
9. See David Reed, Mother of Switched Baby Retains Custody, THE ASSOCIATED PRESS STATE AND LOCAL WIRE, Sept. 22, 1998. In that same hearing he awarded custody of Callie Marie to Ms. Johnson because there was no other person petitioning for custody. See id.
10. Id.
of support, not only because of the missing biological tie between the cohabitant and the child, but because imposing a support obligation would contribute to the demise of the institution of marriage.\footnote{See id. at 701.}

This article focuses on the duty of support where there is neither a biological tie nor a marital tie. Part I reviews the legal theories, principles, and policies that have traditionally justified the duty of child support where there is no biological tie. This traditional group of legal strangers can be classified as either volunteers or draftees. These legal strangers are typically either stepparents, or husbands whose wives, during the marriage, gave birth to children of whom they are not the biological father, or husbands who gave their consent for their wives to be artificially inseminated by semen from a donor (A.I.D.).\footnote{See People v. Sorensen, 68 Cal. 2d 280 (1968).} Part I concludes by showing that although the most frequent, recurring factor when a legal stranger has a duty to support non-biological children is the marital tie between that person and the child's biological parent, the marital tie is, however, usually not the basis for imposing the duty of support for non-biological children. Part II focuses on unmarried cohabitants\footnote{The term "cohabitants," unless otherwise limited, is inclusive of both heterosexual and homosexual cohabiting couples.} and the legal duty of a cohabitant to support the child of the cohabitant's partner; that is, this child is the partner's biological child, but not the biological child of the cohabitant. This part first explores whether the traditional legal theories, principles, and policies underlying the duty of support of traditional legal strangers are applicable to unmarried cohabitants where there is neither a biological tie nor a marital tie. Part II, then, considers whether there are policy issues that would implicate that the marital tie is a legitimate issue in determining whether to extend the duty of support to cohabitants for their partners' biological children.
I. TRADITIONAL SUPPORT OBLIGORS

A. Persons with a Biological Tie

1. Biological Parents

American society takes for granted that parents are the first legal obligors for the support of their own biological children. This notion was not so clear at common law. Although the Elizabethan Poor Laws of 160115 did impose a legal duty on parents to exhaust their resources before the local parish became obligated for the child,16 the duty of support was viewed as a moral duty owed to children by their parents, not a legal duty. Blackstone concluded that the duty of support was the parents' moral duty because it was "an obligation laid on them not only by nature itself, but by their own proper act in bringing them into the world."17

Support as a moral duty evolved into a legal duty in the United States.18 Originally, the father had the primary duty of support, with the mother being secondarily liable.19 Today, both parents are equally responsible for the support of the child.20 Every jurisdiction has legislation imposing the duty of support on parents for their minor children.21 The law also imposes the duty of support on parents on the public policy ground of protecting the public purse. Parents, and not the taxpayers, should be responsible for the support of their

15. See The Act for Relief of the Poor, 1601, 43 Eliz., ch. 2, § 1 (Eng.).
17. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 447 (Cooley 3d ed. 1884).
19. See id.
20. Most states had imposed the duty of support on both parents prior to the Supreme Court decisions developing gender as a suspect classification. The suspect classification standard would require any discrimination based on gender to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution if the classification did not serve important governmental purposes and was not substantially related to the achievement of those purposes. See Califano v. Webster, 430 U.S. 313 (1977).
21. The legislation includes general statutes imposing the support duty and child support statutes when the parents are separated. See, e.g., DEL. CODE ANN. tit. 13, § 501 (1998); CAL. FAM. CODE § 3900-3901 (West 2000).
children.\textsuperscript{22}

The duty of support for a child born out-of-wedlock developed separately in law from the duty of support for a child born in wedlock.\textsuperscript{23} Initially at common law, this child had no right to be supported by either parent, but the Elizabethan Poor Laws imposed a legal duty on both parents.\textsuperscript{24} The paternity suit developed to identify fathers in order to impose the duty of support.\textsuperscript{25} In this country, the mother of a child born out-of-wedlock was liable for her child’s support but the father was usually not liable for support unless a statute imposed that obligation.\textsuperscript{26} Since 1973, constitutional principles regarding the right to paternal support have eliminated distinctions between children born in or out-of-wedlock.\textsuperscript{27}

2. Other Persons With a Biological Tie

As a general rule, persons, other than parents, with a biological tie to a child are treated as legal strangers and have no duty to support that child.\textsuperscript{28} Such persons may be grandparents, uncles, aunts, or siblings. At common law, the Elizabethan Poor Laws required that grandparents as well as parents exhaust their resources before the local parish became obligated to the child.\textsuperscript{29} No state requires grandparents to be responsible for minor children although from time to time states have enacted such statutes for needy

\begin{footnotes}
\item[22] See, e.g., In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 290 (Ct. App. 1998) ("...the Legislature has declared its preference for assigning individual responsibility for the care and maintenance of children, not leaving the task to the taxpayers. That is why it has gone to considerable lengths to insure that parents will live up to their support obligations.").
\item[24] The Act for Relief of the Poor, 1576, 18 Eliz., ch. 3, § 7 (Eng.) & 1601, 43 Eliz., ch. 2, § 7 (Eng.).
\item[25] See id. (imposing civil support duty on father of illegitimate child once he was identified).
\item[26] See Doughty v. Engler, 211 P. 619 (Kan. 1923) (judicially imposing the duty of support on fathers).
\item[28] See Ex parte Lipscomb, 660 So. 2d 986, 988 (Ala. 1994).
\item[29] See The Act for Relief of the Poor, 1601, 43 Eliz., ch. 2, § 7 (Eng.) ("That the father and grandfather, mother and the grandmother, and the children of every poor, old and impotent person, or other poor person not able to work of a sufficient ability, shall at their own charges relieve and maintain every such person.").
\end{footnotes}
minor grandchildren. A number of jurisdictions in the United States also have family expense statutes based on the Elizabethan Poor Laws or on the civil law expense statutes, which impose a duty of support on adult children for needy parents and on parents for their needy adult children. Approximately 15 states impose a duty upon adult children to support needy parents, and approximately 25 states impose such a duty on the parents to support needy adult children.

Even though non-parental blood relatives are usually treated as legal strangers, they may, however, be responsible for the support of minor blood relatives under other theories of law.

B. Traditional Obligors Beyond the Biological Tie

1. Parents of Adopted Children

Adoption is the legal process of creating the parent-child status regardless of whether there may be a biological tie. When neither adoptive parent has a biological tie to the child, the adoption is frequently referred to as adoption by strangers. Stepparent adoption refers to a situation where a stepparent adopts the stepchild. Some states allow homosexual couples to adopt. When the partner in a

30. Currently, for example, the federal welfare reform law provides that states may enact procedures to require grandparents to be responsible for support of needy grandchildren if the parents of those grandchildren are minors and receiving state assistance. The Act provides in part:

Enforcement of orders against paternal or maternal grandparents. Procedures under which, at the state's option, any child support order enforced under this part with respect to a child of minor parents, if the custodial parent of such child is receiving assistance under the State program under A of this subchapter, shall be enforceable, jointly and severally, against the parents of the noncustodial parent of such child.


32. See infra Part I.B.2-4.


34. See MARGARET MAHONEY, STEPFAMILIES AND THE LAW 162 (1994).

35. See id. at 161.

homosexual relationship adopts the partner’s child, this adoption is sometimes referred to as second parent adoption.\(^\text{37}\)

Persons who adopt are treated in the law as biological parents.\(^\text{38}\) The parental tie is created by law instead of by blood. Adoptive parents, therefore, have the same duty of support for their minor children as do biological parents.\(^\text{39}\) This duty should not be surprising since adoption is voluntary. Adoptive parents, like biological parents, voluntarily obligate themselves to support the adopted child.

**2. Stepparents\(^\text{40}\)**

Although the majority of legal strangers who may owe a duty of support to children who are not related to them, either biologically or by adoption, is stepparents, the stepparent relationship usually does not create a duty of support.\(^\text{41}\) At common law, there was no duty for a stepparent to support a stepchild because of the status of the relationship.\(^\text{42}\) Most states continue to follow that rule.\(^\text{43}\) Nevertheless, at common law, stepparents were liable for the support of stepchildren in their care if they created the status of *in loco parentis*.\(^\text{44}\) *In loco parentis* literally means in place of a parent.\(^\text{45}\) That is, a person voluntarily and intentionally assumes the role of a parent for a child.\(^\text{46}\) The status of *in loco

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\(^{37}\) See Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); In re Evan, 583 N.Y.S.2d 997 (Sur. Ct., N.Y. County 1992); In re B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993); see also, Catherine Connolly, *The Description of Gay and Lesbian Families in Second-Parent Adoption Cases*, 16 BEHAV. SCI. & L. 225 (1998); Glennon, *supra* note 36.

\(^{38}\) See MAHONEY, *supra* note 34, at 161.

\(^{39}\) See *id*.

\(^{40}\) As used in this article, a stepparent is defined as the spouse of a parent who has children by a prior marriage that ended in divorce or death or the spouse of a parent who has children born out-of-wedlock prior to the marriage. In this article, a husband whose wife has a child born during their marriage but who is not his biological child is classified under the term legal fathers, but may be considered as a stepfather. See *infra* Part I.B.3.

\(^{41}\) See Rutkowski v. Wasko, 286 A.D. 327, 331 (N.Y. 1955).

\(^{42}\) See, e.g., Wiese v. Wiese, 699 P.2d 700, 702 (Utah 1985).

\(^{43}\) See, e.g., Ulrich v. Cornell, 484 N.W.2d 545, 548 (Wis. 1992). See *infra* note 68 (listing state statutes imposing the duty of stepparent support).

\(^{44}\) See, e.g., Lantz v. Frey & Wife, 14 Pa. 201 (1850); Harmon v. Department of Soc. and Health Servs., State of Wash., 951 P.2d 770, 774 n.7 (Wash. 1998).

\(^{45}\) See Harmon, 951 P.2d at 774 n.7.

\(^{46}\) See Austin v. Austin, 22 N.W.2d 560, 563 (Neb. 1946).

A person standing *in loco parentis* to a child is one who has placed
A stepparent, accordingly, creates the *in loco parentis* relationship when he or she voluntarily and intentionally takes the child into his or her home and assumes responsibility for the child. It is usually the residential stepparent who would most likely create the *in loco parentis* relationship and who also would most likely be a stepfather. During the relationship the stepparent assumes the obligation for the support of the child. The stepparent can terminate the relationship at will because the *in loco parentis* relationship depends upon the intention of the stepparent to assume the relationship. In most instances, the relationship terminates when the marriage ends. The practical effect of the *in loco parentis* status usually accrues to third parties who may be reimbursed for the cost of necessities provided for the child.

A stepparent may also become liable for the support of stepchildren if he or she voluntarily contracts to do so, either explicitly or implicitly. The duty of support arises from and is defined by their private agreement. Unless prohibited by himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation.

47. See id.

48. The support duty is only during the *in loco parentis* relationship. See generally MAHONEY, supra note 34, at 16-22.

49. Whether or not the *in loco parentis* relationship exists is a question of fact in each case because intent is a factor in classifying the relationship. See Rutkowski v. Wasko, 286 A.D. 327, 331 (N.Y. 1955).

50. See Deal v. Deal, 545 So. 2d 780 (Ala. Civ. App. 1989) (After divorce, when stepchildren are no longer in the stepparent’s custody, there is no *in loco parentis* status and the stepparent is under no obligation to support the stepchildren.); Fuller v. Fuller, 247 A.2d 767 (D.C. 1968) (*In loco parentis* status existed during marriage and stepparent had a duty to support wife’s child but status ends at divorce unless stepparent intends to continue his *in loco parentis* status.).


52. See generally, MAHONEY, supra note 34, at 27-31.

53. See Fuller, 247 A.2d 767 (D.C. 1968) (no express agreement existed to bind the stepparent after divorce; the court found the promise was an inducement to marry and an offer of support for the child while in the same household).
the statute of frauds, proving and enforcing oral agreements depends on the jurisdiction. Of course, oral and implied agreements may be difficult to prove. The remedies for the enforcement of the agreement to pay support are those of contract law.

A stepparent may also be liable for the support of stepchildren if a jurisdiction extends the doctrine of equitable estoppel to stepparents. The doctrine of equitable estoppel requires the proof of three elements: representation, reliance, and detriment. The party requesting that the court apply the doctrine must prove that the other party made a representation, upon which he or she relied to his or her detriment. The underlying principle of the doctrine is to bring about fair and just results in the case. In stepparent cases, the facts would prove that the stepparent made a representation that the stepparent would support the stepchildren, and that the stepchildren or their parent relied upon the representation to their detriment. Applying the doctrine, the stepparent would be estopped from using the defense that a stepparent has no duty of support to the stepchildren.

The form of the representation may either be verbal or conduct. Frequently, the element that is the most difficult to prove is detriment. Most courts have defined detriment to mean financial detriment, but have narrowly interpreted the

54. See id.
56. See Brown v. Brown, 412 A.2d 396 (Md. 1980) (Stepparent signed a separation agreement agreeing to support the stepchild. The separation agreement was incorporated in the judgment of divorce. The court would not enforce the agreement using the contempt power of the court, reasoning the obligation for support was not the court's order relating to family support obligation but was a contract obligation.).
57. Some jurisdictions do not extend the doctrine to stepparents or other legal strangers. See, e.g., NPA v. WBA, 380 S.E.2d 178 (Va. Ct. App. 1989) (noting that Virginia courts have never applied equitable estoppel in the context of child support, and on the facts before the court the requirements for an estoppel were not met).
59. See id. at 360.
60. See Brinkerhoff, 945 P.2d at 117 (“[D]efendant has not asserted any specific conduct or representations by plaintiff . . . . Defendant offers no support for the implied proposition that merely seeking joint legal custody amounts to an affirmative representation by plaintiff to support her former stepchildren.”).
meaning of financial detriment.\textsuperscript{61} The courts usually interpret financial detriment to mean that the stepparent's representation "causes the [child] to be cut off from the [child's] noncustodial natural parent's support."\textsuperscript{62}

Furthermore, the development of an emotional bonding is usually not an example of reliance for ordering support.\textsuperscript{63} Courts have rejected emotional reliance for several reasons, such as penalizing stepparents who develop a warm family environment. Stepparents might also incur a duty to support the children when the marriage ended.\textsuperscript{64} Finally, courts want to encourage stepparents to develop a warm relationship with stepchildren which is in the stepchildren's interests.\textsuperscript{65} The purpose of applying the doctrine cautiously is to encourage voluntary support of children during the marriage.\textsuperscript{66}

The equitable estoppel doctrine, like contract principles, usually requires the stepparent to have the duty of support after the stepparent status ends. Thus, cases applying the equitable estoppel doctrine usually arise when the stepparent and the parent are divorcing.

Finally, the law imposes a duty of support on the basis of the stepparent status only if there is a statute imposing the duty.\textsuperscript{67} There are approximately eighteen jurisdictions with such statutes, which set forth the circumstances giving rise to

\textsuperscript{61} See MAHONEY, supra note 34, at 32.
\textsuperscript{62} Brinkerhoff, 945 P.2d at 117 (quoting Wiese v. Wiese, 699 P.2d 700, 702 (Utah 1985)).
\textsuperscript{63} See Miller, 478 A.2d at 358.
\textsuperscript{64} See id.
\textsuperscript{65} See id.
\textsuperscript{66} See Ulrich v. Cornell, 484 N.W.2d 545, 548-49 (Wis. 1992).
\textsuperscript{67} For extended discussion on stepparent child support obligation imposed by state law, see MAHONEY, supra note 34, at 38-41, and Mahoney, supra note 51, at 43-45. The treatment of stepfamilies under federal law is beyond the scope of this article. See Margaret M. Mahoney, Stepfamilies in the Federal Law, 48 U. PITT. L. REV. 491 (1987) (analyzing federal law); Sarah H. Ramsey & Judith M. Masson, Stepparent Support of Stepchildren: A Comparative Analysis of Policies and Problems in the American and English Experience, 36 SYRACUSE L. REV. 659, 672, 676-80 (1985) (analyzing federal law).

Unlike America, England and many of the Canadian Provinces impose a duty of support on stepparents. For English law, see Ramsey & Masson, id. (analyzing English laws that require residential stepparents to support stepchildren and in some cases after divorce). For Canadian provinces, see R.S.A. 1980 c. M-1 s1 (Alta. 1998) (defining child to include stepchild); Family Relations Act, R.S.B.C. 1998, c. 128 s1 (defining parent to include stepparent under certain conditions).
None of the statutes explicitly impose the duty of support beyond the marriage. Several of the statutes are unimportant because they merely codify the in loco parentis doctrine, where the stepparent can terminate this relationship at will. Some limit the duty only to destitute stepchildren or prevent the stepparent from unilaterally terminating the relationship. As a whole, most of the statutes are limited and do not provide a meaningful source for imposing the duty of support based upon the status of the marital tie.

In sum, without a state statute imposing the duty of support on stepparents, they do not have an obligation to support stepchildren unless they voluntarily agreed to do so under the theories of in loco parentis, contract law, or equitable estoppel. They are seldom volunteers because of the marital tie.

3. Legal Fathers of Non-biological Children

The husband of a married woman is presumed to be the legal father of a child born during the marriage, and, thereby, now as a parent, has the legal duty to support the child. Thus, there is a presumption of legitimacy for a child born during a marriage. This presumption is one of the oldest presumptions in the law. The presumption is a


71. See Mahoney, supra note 51, at 43.


73. The presumption of legitimacy serves several purposes. For example, it protects children from the legal disabilities of being born out-of-wedlock as well as from the social disabilities associated with the stigma from the status of illegitimacy. See Miscovich, 688 A.2d at 726.

74. See Michael H., 491 U.S. at 124. This presumption is also known as the marital presumption. See Traci Dallas, Note, Rebutting the Marital
rebuttable presumption in most jurisdictions. This presumption usually affects two groups of husbands who have no biological tie to the child. The wives of the first group are impregnated by men, who are not their husbands, either during the marriage or prior to the marriage. The resulting child is born during the marriage. The wives of the second group are artificially inseminated from donors who are not their husbands. In both instances, there is a presumption that the husband is the father of the child because the child was born during the marriage.

The first group of husbands usually raises the issue of nonpaternity in divorce actions so that the law will not impose the parental duty of support. In the past, courts were reluctant to allow a child to lose his or her status of legitimacy by the presumed father proving nonpaternity. With the rapid minimization of the stigma of illegitimacy and the proof of paternity becoming more and more accurate, allowing identification of the biological father, courts often allow the husband to prove nonpaternity. Most of the cases now raise the issue of whether a husband should be estopped from proving nonpaternity where he was not deceived and knew that he was not the child's biological father, but accepted and agreed to the status as father of the child. Where there was no deception to the husband many courts apply the doctrine of equitable estoppel, as they have in the stepparent cases.

Clevenger v. Clevenger is usually cited as the seminal case for applying the doctrine of equitable estoppel to presumed fathers. Clevenger required proof of the elements of representation, reliance, and detriment. It limited

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75. In some jurisdictions, it may be conclusive. See, e.g., CAL. EVID. CODE § 621 (West 1987) (after a period of time the presumption becomes conclusive).
78. See id.
79. See id. at 890.
80. Some commentators and courts would classify these husbands as stepparents. See supra note 40.
81. 11 Cal. Rptr. 707 (Ct. App. 1961). It is also cited as the seminal stepparent case applying the doctrine of equitable estoppel. See supra note 40, defining the term stepparent as used in this article.
82. See Clevenger, 11 Cal. Rptr. at 713-17.
detrimental reliance to financial detriment. The court, however, construed financial detriment to mean that as the result of this representation and reliance, the child lost his or her opportunity for paternal support from the natural parent.\textsuperscript{83}

The \textit{Clevenger} court did note the emotional injury to the child if the parent-child relationship was suddenly discarded.\textsuperscript{84} Several recent court decisions seem to apply the doctrine when the detriment is emotional, not just when it is financial. In \textit{M.H.B. v. H.T.B.},\textsuperscript{85} the court seemed to emphasize the psychological detriment the child would suffer. Although the natural father was not exempt from his support obligation, the court did not require the showing that the natural father was unavailable to support the child before applying the doctrine.\textsuperscript{86}

Similar to the stepparent cases, these husbands may also voluntarily bind themselves to support their non-biological children under contract law\textsuperscript{87} or the doctrine of \textit{in loco parentis}.\textsuperscript{88} Under contract principles, such contracts may be explicit or implicit. Likewise, oral agreements would be valid if the statute of frauds did not apply. Furthermore, contract remedies would apply to their enforcement.

In \textit{Clevenger}, the court found that a presumed father had established \textit{in loco parentis} status with the child because he had assumed parental obligation for the child.\textsuperscript{89} The \textit{in loco parentis} status, therefore, would be established in almost all cases where the husband assumes all of the obligations of a parent and holds the child out as his biological child. The status, however, would terminate when he wants to prove nonpaternity.

The second group includes husbands of wives who have been artificially inseminated by donor sperm. They usually raise the issue of nonpaternity at divorce so that the duty of parental support will not apply to them. Artificial

\begin{flushright}
\textsuperscript{83} See id. at 717.
\textsuperscript{84} See id. at 716.
\textsuperscript{85} 498 A.2d 775 (N.J. 1985).
\textsuperscript{86} See id.; see also Pietros v. Pietros, 638 A.2d 545 (R.I. 1994); Minton, \textit{supra} note 76.
\textsuperscript{87} See Daniel v. Daniel, 695 So. 2d 1253 (Fla. 1997) (would enforce if facts proved a contract).
\textsuperscript{88} See \textit{Clevenger}, 11 Cal. Rptr. at 710-12.
\textsuperscript{89} See id.
\end{flushright}
insemination is the process of conception by inserting sperm into a woman's cervix. 90 If the sperm is from a man other than the woman's husband, the process is known as heterologous insemination or artificial insemination by donor (A.I.D.). 91 There would be no biological tie between the woman's child and her husband. Yet, in most cases in which he consents to the procedure, the husband is the child's legal father and responsible for the child's support. This result happens because the majority of states have codified the principle that husbands who consent to artificial insemination by a donor are the legal fathers of the children. 92 Therefore, the law imposes upon them the parental duty of support.

Prior to the widespread enactment of these statutes, courts usually applied the doctrine of equitable estoppel, preventing fathers from asserting nonpaternity, based upon their consent to the procedure and the wife's reliance to her detriment when he wants to disclaim paternity. 93 People v. Sorensen, 94 an influential case for applying the doctrine of equitable estoppel in such cases, reasoned that:

[A] reasonable man who, because of his inability to procreate, actively participates and consents to this wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport. One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whom existence he is directly responsible. 96

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91. See Wadlington, supra note 90.
92. See, e.g., ALA. CODE § 26-17-21(a) (1998); 750 ILL. COMP. STAT. ANN. 40/3-3(a) (West 1998); TEX. FAM. CODE ANN. § 151.101(a) (West 1998).
93. See In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 287 (Ct. App. 1998) (noting that prior to the enactment of California's statute, California courts had used the common law doctrine of estoppel).
94. 68 Cal. 2d 280 (1968).
95. Id. at 285.
In *R.S. v. R.S.*,\(^96\) the court, approving Sorensen's rationale, held that a husband who had not met the requirements of the Kansas artificial insemination statute imposing the support obligation for the resulting child was still obligated to support the child because he had consented to artificial insemination by donor. In stating its holding, the court reasoned that

[A] husband who with his wife orally consents to the treating physician that his wife be heterologously inseminated for the purpose of producing a child of their own is estopped to deny that he is the father of the child, and he has impliedly agreed to support the child and act as its father.\(^97\)

Similarly in *Gursky v. Gursky*,\(^98\) the court stated that "[h]ence, it is reasonable to presume that she was induced so to act and thus changed her position to her detriment in reliance upon the husband's expressed wishes."\(^99\)

In such cases, some courts would also apply contract law. In *Gursky*, the court held that a husband's consent to artificial insemination by donor and the wife's agreeing and submitting to the procedure constituted an implied contract.\(^100\) One might also conclude that during the marriage these husbands would be liable for the support of a child conceived through artificial insemination by a donor under the doctrine of *in loco parentis* since they have accepted the child into the home and assumed parental responsibilities.\(^101\)

Thus, as discussed above, husbands, who are legal fathers of non-biological children born to their wives, are not allowed to disprove paternity when their voluntary action to support these children falls within the theories of *in loco parentis*, contract law, or equitable estoppel,\(^102\) or where the presumption of legitimacy is conclusive. In the case of artificial insemination by donor, most states have enacted statutes preventing them from proving nonpaternity where


\(^{97}\) Id. at 928.


\(^{99}\) Id. at 412.

\(^{100}\) See id. at 411-12. This court also held that he would have been liable for the child's support on the theory of equitable estoppel. See id.

\(^{101}\) See supra note 46 (defining *in loco parentis*).

\(^{102}\) See supra notes 76-89 and accompanying text.
they have consented to the procedure. The basis of these statutes is the codification of the doctrine of equitable estoppel, which is predicated upon the husband's voluntary conduct of agreeing to parent a child born by artificial insemination by donor and the detrimental reliance by the wife and the child.\textsuperscript{103}

4. Others

There are still others who traditionally have become obligors to support non-biological children. This group typically consists of men who marry women who have given birth to a child born out-of-wedlock.\textsuperscript{104} After the marriage, they acknowledge paternity of the wife's child. A similar group consists of men who do not contest paternity actions.\textsuperscript{106} Thus, the duty of support is imposed at this point because of their acknowledgment of parenthood.\textsuperscript{106} Later, they want to prove nonpaternity. These two groups of non-biological parents, even if they could show their acknowledgment of paternity was false, could remain obligors for support under the doctrine of \textit{in loco parentis}, equitable estoppel doctrine, or contract law. The doctrine of \textit{in loco parentis} could apply to most of these non-biological fathers because they took the children into their homes and assumed parental obligations.\textsuperscript{107} Courts have applied the doctrine of equitable estoppel as they have done in the stepparent cases when the facts support the elements of the doctrine.\textsuperscript{108} Courts have also applied contract

\begin{enumerate}
\item [103.] See supra notes 92-99 and accompanying text.
\item [104.] See Lewis v. Lewis, 381 N.Y.S.2d 631 (Sup. Ct. 1976) (after marriage husband signed birth certificate as the biological father of wife's child who was born three years prior to the marriage and whose biological father was not the husband); Ross v. Ross, 314 A.2d 623 (N.J. J. & D. R. 1973), aff'd 342 A.2d 566 (N.J. Super. Ct. App. Div. 1975) (after marriage husband filed certificate admitting paternity of wife's 18-month old child born prior to his marriage although he was not the child's biological parent).
\item [105.] See Watcher v. Ascero, 550 A.2d 1019 (Pa. 1988) (putative father did not challenge paternity, but voluntarily acknowledged paternity and agreed to a support order).
\item [106.] See supra Part I, § I.A.1 (Biological parents are obligated to support their children.).
\item [107.] See Lewis, 381 N.Y.S.2d at 632 (During the marriage the husband raised and supported the child "as his own.").
\item [108.] See Watcher, 550 A.2d at 1019 (court held putative father was equitably estopped from later challenging paternity when his acknowledgment of paternity was voluntary); Lewis, 381 N.Y.S.2d at 633 (court held husband liable for the support of his wife's child who was born before the marriage, but whom he had acknowledged after his marriage on the theory of equitable estoppel);
law if the facts presented an express or implied contract to support the child.\textsuperscript{109}

With the advances in reproductive technology, cases involving artificial insemination and non-biological children have risen more than those pertaining to a married couple and a male donor. In \textit{In re Marriage of Buzzanca},\textsuperscript{110} a husband and wife desired a child and entered into a surrogate contract. Neither the husband, nor the wife, nor the surrogate had a biological tie to the resulting child because none of them were genetically related to the child.\textsuperscript{111} The husband wanted to prove nonpaternity when he and his wife divorced. The court, in determining that the artificial insemination statute would apply in this situation, emphasized that the statute was based on the doctrine of equitable estoppel, where he had caused the conception of the child.\textsuperscript{112} The court also emphasized that he had a contractual agreement, a surrogacy agreement, providing for the birth of this child and thereby, had caused the birth of the child.\textsuperscript{113}

Similarly, in artificial insemination cases involving homosexual couples, courts have applied the principle of equitable estoppel when one of the partners wants to prove nonpaternity or nonmaternity so that there would be no obligation for support. In \textit{Karin T. v. Michael T.},\textsuperscript{114} a New York court applied the equitable estoppel doctrine to hold the lesbian partner of a woman responsible for the support of the woman's two children where the lesbian partner had agreed to these children's conception by artificially inseminating their mother. The court stated that "her course of conduct . . . brought into the world two innocent children."\textsuperscript{115} It would also

\begin{itemize}
\item \textsuperscript{109} Ross, 314 A.2d at 623 (court held that husband, who had acknowledged paternity of his wife's child born prior to the marriage, was estopped from denying that he was the child's parent); Remkiewicz v. Remkiewicz, 429 A.2d 833 (Conn. App. Ct. 1979) (even though husband acknowledged paternity of his wife's child born prior to the marriage, the elements of equitable estoppel were not proven because no detrimental reliance was proven).
\item \textsuperscript{110} See Lewis, 381 N.Y.S.2d at 633 (court also held husband liable for the support of wife's child (not his biological child) born prior to the marriage, but whom he had voluntarily acknowledged after marriage on an implied contract theory).
\item \textsuperscript{111} See id. at 282-83, 288.
\item \textsuperscript{112} See id. at 286-88.
\item \textsuperscript{113} See id. at 288-89.
\item \textsuperscript{114} 484 N.Y.S.2d 780 (Fam. Ct. 1985).
\item \textsuperscript{115} Id. at 784.
\end{itemize}
follow, as in the other artificial insemination cases, that the principles of *in loco parentis* and contract law would apply to artificial insemination involving homosexual couples if the facts presented these same principles.\(^{116}\)

Another group is strangers who take a child into their home to rear but do not adopt the child.\(^{117}\) Later, they do not want to support the child. The creation of the *in loco parentis* status would occur when they took the child into their home and assumed parental obligations.\(^{118}\) It would terminate, however, when they no longer wanted to support the child. Depending upon the circumstances, some courts have applied the doctrine of equitable estoppel\(^{119}\) and contract law\(^{120}\) to find a continuing obligation for support even when the *in loco parentis* status ended.

Similarly, in cases in which there is a biological tie but not the parental tie, courts have found the existence of an *in loco parentis* status.\(^{121}\) When that relationship has

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117. See A.S. v. B.S. 354 A.2d 100 (N.J. Super. Ct. Ch. Div. 1976), aff'd 374 A.2d 1259 (N.J. Super. Ct. App. Div. 1977) (A couple prior to their marriage received a non-biological infant child into their home to rear. The child continued to live with the couple after they married, but no formal adoption occurred. The husband no longer wanted to be responsible for the child's support when the couple divorced.); see also Wener v. Wener, 312 N.Y.S.2d 818 (App. Div. 1970) (A married couple received an infant child into their home to adopt but did not adopt the child. When they divorced after a long separation, the husband objected to a support order because he was not the child's natural or adopted parent.).

118. See A.S., 354 A.2d at 102 ("[T]here is no doubt that, under the classic definition of the doctrine, defendant stood *in loco parentis* to [the child] from March 1963 until January 1972, the date the parties separated.").

119. See id. at 102-03 (court applied doctrine of equitable estoppel because defendant had voluntarily sought the child to rear and his intent to abandon his support obligation would cause irreparable harm to the child).

120. See Wener, 312 N.Y.S.2d at 817-18. The court in Wener found that the husband had impliedly agreed to support a child when he took the child into his home with the intention to adopt and imposing the duty to support the child when the parties divorced "upon the dual foundation of an implied contract to support the child and equitable estoppel." Id. at 818.

121. See *Ex parte* Lipscomb, 660 So. 2d 986 ( Ala. 1994) (Where grandfather and his wife (the step-grandmother) sought and obtained legal custody of his granddaughter, the court held that he stood *in loco parentis* with the child. His duty of support based on the *in loco parentis* status ended when he petitioned the court to give custody to his wife at the time of their divorce. The court, however, held that the grandfather continued to have a duty to support the granddaughter when the divorce court awarded custody of the grandchild to his
terminated, some courts have also employed the doctrine of equitable estoppel to find a continuing obligation for support.¹²² One could also conclude that a relative might enter into an express or implied contract to support a non-biological child as has been enforced in other non-biological cases, such as the stepparent cases.¹²³ Finally, courts have enforced contracts when third parties have guaranteed a parent’s support. When the parent fails to pay the support, the court has enforced the contract and required the guarantor to pay the support as long as the contract was not against public policy.¹²⁴

C. Summary of the Traditional Theories, Principles, and Policies

The general policy underlying the duty of support is that natural parents should be responsible for the support of their children. It is by their own conduct that their biological child is born.¹²⁵ The legislature of each state has codified the natural parent’s duty of support.¹²⁶ As long as the parental tie is not legally terminated, parents remain responsible for the support of their minor children. A corollary policy is that parents and not taxpayers should be responsible for their

wife.).

¹²². See In re Marriage of Valle, 53 Cal. Rptr. 837 (Ct. App. 1975) (An uncle was estopped to deny his duty to support his nephew. The uncle had brought him to the U.S. as an infant with a forged birth certificate as his son and thereafter raised him as his son.).

¹²³. See, e.g., Mahoney, supra note 34, at 27-31 (discussing stepparent cases).

¹²⁴. See Glickman v. Collins, 13 Cal. 3d 852 (1975). A third party, in connection with the negotiation of a separation agreement between a husband and wife, executed a guaranty with the wife, guaranteeing the husband’s support obligation to his children in the custody of the wife. When the husband stopped paying support, the court enforced the guaranty agreement because it did not violate the public policy against promoting divorce because the marriage was “beyond redemption.” Id. at 208; Kovler v. Vagenheim, 130 N.E.2d 557 (Mass. 1955) (brothers of wife and husband signed a premarital agreement indemnifying husband for any support duty to wife and children, and the premarital agreement was enforceable after husband obtained divorce because the agreement supported marriage); but see Capazzoli v. Holzwasser, 490 N.E.2d 420 (Mass. 1986) (A third party and a married woman entered into an oral agreement that if she abandoned her marriage, the third party would support her and her children. She abandoned the marriage. The agreement was unenforceable because it violated the state’s public policy of unreasonably encouraging divorce.).

¹²⁵. See supra Part I.A.

¹²⁶. See supra note 21.
children's support. These policies partly explain the reason why the marital tie is no longer the deciding factor for the duty of support for biological children.

The majority of legal strangers, owing a duty of support to non-biological children, are stepparents and legal fathers. Thus, the marital tie appears to be the recurring factor for non-biological support duty. As Part I has shown, the marital tie itself is usually not the source for imposing the obligation to support non-biological children. Except for statutes that may impose a duty of support or when the presumption of legitimacy is conclusive, the underlying theory that a person has an obligation to support a non-biological child is that the person has volunteered to support the child, either explicitly or implicitly. Accordingly, the principles and doctrines that courts have employed base the obligation on the voluntary conduct of the legal stranger. Thus, a person voluntarily creates the *in loco parentis* relationship. A person voluntarily creates a support contract. A person has voluntarily made representations which others rely upon to their detriment. If a person voluntarily binds him or herself to support a non-biological child so that such binding would normally fall within principles of doctrinal law, then it seems just and fair that doctrinal law should apply. In light of these principles and doctrines, the marital tie is more an illusion than a fact when it comes to bases for non-biological support for traditional legal strangers. Therefore, obligation by their own conduct is the link between the duty of child support of parents and that of traditional legal strangers.

II. UNMARRIED COHABITANTS AND THE COHABITANT'S LEGAL DUTY TO SUPPORT THE CHILD OF THE COHABITANT'S PARTNER

The question of whether a legal stranger should be legally responsible for the support of someone else's child becomes even more poignant with cohabitants. According to statistics, there are 1,520,000 unmarried couples living as cohabitants with minor children. With these numbers, the


128. *See supra* Part I.B.

state has legitimate interests in the welfare of children living in these cohabitation arrangements. Part II explores the circumstances in which cohabitants might be legally responsible for the support of biological children of their partners when they have no biological tie to these children. First, Part II.A examines whether the theories, policies, and principles that presently justify the duty of support of traditional legal strangers beyond the biological tie should extend to include cohabitants. Then, Part II.B considers whether there are policy issues that would implicate that the marital tie is a legitimate issue of concern in extending the duty of support to cohabitants for their partner’s biological children.

A. Are the Traditional Legal Theories, Principles, and Policies for Imposing the Duty of Support on Legal Strangers Applicable to Cohabitants?

The underlying theory of imposing the duty of support on traditional legal strangers is that they have volunteered to support children with whom they have no biological tie. This volunteering is such that society has found it to be just and fair as well as a matter of public policy to give legal consequences as part of our private law. This section explores whether the law should treat cohabitants as traditional legal strangers if they volunteer to support the children of their partners, whose children are not their biological children.

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not differentiate between heterosexual cohabiting couples with common biological children and those with non-biological children. These statistics do not include homosexual couples.

130. “Cohabitation is a relationship that is unlike the legal and common law marriage. It is a status arranged by the parties without the state’s approval and without the need of a divorce decree to terminate the relationship.” Hector Louis Lugo, Estate Planning and Cohabitation Rights of Nonmarital Partners, 51 N.Y. ST. B.J. 41, 43 (1979).

131. See supra Part I.B-C.

132. With stepparents, some parts of our society have ignored whether the legal stranger has volunteered and have imposed the obligation by law based on the status. See supra note 68. With legal fathers, some jurisdictions have also ignored whether the legal stranger has volunteered and have imposed the obligation by law under the conclusive presumption of legitimacy. See supra note 75.
1. Traditional Theories, Principles, and Policies

Cohabitation arrangements were, until recently, illicit and meretricious living arrangements.\(^{133}\) *Marvin v. Marvin*\(^{134}\) is the seminal case in which a court held that cohabiting couples may enter into contracts as long as they could be severed from the meretricious relationship. Therefore, housekeeping, being a companion, and other such domestic services or giving up employment to provide such domestic services may be consideration for the promise of support.\(^{135}\) Additionally, the *Marvin* court held that other equitable principles might apply.\(^{136}\) This section first examines facts and holdings of three cases similar to *Marvin* that have raised the issue of imposing the duty of support for non-biological children on cohabitants. Then, this section argues that the duty of support should extend to cohabitants under the traditional theories of *in loco parentis*, contract law, and equitable estoppel.

a. Three Cases

In *Zaragoza v. Capriola*,\(^{137}\) when her unmarried cohabitation with Dr. Capriola ended, Ms. Zaragoza petitioned the court to impose on Dr. Capriola a duty of support for her child by a previous marriage. She alleged that Dr. Capriola had promised her that he would support this child and told her not to pursue any request for child support or arrears from her former husband. She alleged that she relied upon this representation to her child’s detriment since Dr. Capriola refused to support the child.

Ms. Zaragoza argued that her case was analogous to


\(^{134}\) 18 Cal. 3d 660 (1976) (When the Marvins stopped cohabiting as an unmarried couple, Ms. Marvin alleged that the parties had entered into an oral agreement that provided that while they lived together they would combine their efforts and earnings, they would share equally any property accumulated because of their efforts and earnings, they would hold themselves out as husband and wife, and she would render her services as a companion, homemaker, housekeeper, and cook to Mr. Marvin.).

\(^{135}\) See id. at 665-74.

\(^{136}\) See id. at 674-82.

Miller v. Miller.\textsuperscript{138} In that case, the New Jersey Supreme Court had extended the doctrine of equitable estoppel to stepparents who make representations to support stepchildren, and who discourage the natural father from supporting them.\textsuperscript{139} Ms. Zaragoza argued that Miller's rationale of applying the doctrine of equitable estoppel should also apply to her case. She had relied upon Dr. Capriola's representation to her child's financial detriment. The Zaragoza court, however, distinguished Miller and held that Miller applied to stepparents, not cohabitants.\textsuperscript{140}

In Thomas v. LaRosa,\textsuperscript{141} when the parties stopped cohabiting, Ms. Thomas petitioned the court, alleging that Mr. LaRosa had breached an oral contract that he would support her and her children from a previous marriage. During the cohabitation, Mr. LaRosa provided Ms. Thomas with a stipend of $3,000 a month, covered the household expenses, and supported and educated her children. Before, during, and after their cohabitation, Mr. LaRosa was legally married to another woman. The court held that it would enforce a contract between unmarried cohabitants if it were a legitimate business contract, but the contract in this case amounted to a contract of common law marriage, which was illegal in West Virginia.\textsuperscript{142} The court further emphasized that Mr. LaRosa had an existing wife.

In Featherston v. Steinhoff,\textsuperscript{143} when their cohabitation ended, Ms. Featherston brought a breach of contract action against Mr. Steinhoff, alleging that he had agreed to support her and her children from a previous marriage. In return, she had rendered domestic services to him. The court would enforce the contract if she proved an explicit contract or an implied-in-fact contract of support. In Michigan, the law presumes the rendering of domestic services to be gratuitous.\textsuperscript{144} Ms. Featherson did not overcome this presumption and prove that her services were consideration for his promise of support.

The facts of these three cases would appear to be typical

\textsuperscript{138} 478 A.2d 351 (N.J. 1984).
\textsuperscript{139} See id. at 362.
\textsuperscript{140} See Zaragoza, 492 A.2d at 701.
\textsuperscript{141} 400 S.E.2d 809 (W. Va. 1990).
\textsuperscript{142} See id. at 815.
\textsuperscript{143} 575 N.W.2d 6 (Mich. Ct. App. 1997).
\textsuperscript{144} See id. at 9.
in cohabitation arrangements raising the issue of whether cohabitants should owe a duty of support to their partner's child when the child is not their biological child. The next section argues that the duty of support should extend to cohabitants for the support of the child if the traditional principles of *in loco parentis*, contract law, or equitable estoppel would apply.

b. *Applying the Principles of In Loco Parentis, Contract Law, and Equitable Estoppel to Cohabitants*

Unless the application of the principles of *in loco parentis*, contract law, or equitable estoppel is illegal in a jurisdiction, applying these principles on the basis of a cohabitant's voluntary conduct to support non-biological cohabiting children seems just and fair when traditional obligors are obligated under these principles. In jurisdictions which do not recognize Marvin's severance doctrine, cohabitants cannot enforce express or implied-in-fact contracts for support of non-biological children. Cohabitants in jurisdictions that follow Marvin's severance doctrine may still not be able to prove a contract if the jurisdiction applies the presumption that domestic services rendered during a meretricious relationship are gratuitous. The plaintiff must overcome the presumption with proof that both the parties expected compensation for the services.

There is no reason, however, not to enforce contracts for the support of non-biological children in jurisdictions that allow cohabitants to contract. For example, in stepparent cases and other cases as discussed in Part I, promises to support non-biological children are enforced if a contract is proved. A support obligation is not based upon the relationship between the parties, but on whether there is a contract. Thus, in *Thomas*, the West Virginia court refused to enforce the contract to support the child of the partner of the cohabitant because the consideration for that promise was based on the illicit relationship. On the other hand, the Michigan court in *Featherson* would have enforced the

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145. *See supra* Part I.B-C.
146. *See discussion supra* Part II.A.1.
promise to support if it had found consideration.\textsuperscript{149}

Persons who create the \textit{in loco parentis} relationship assume the duty of support during the relationship.\textsuperscript{160} Without any reason to the contrary, \textit{in loco parentis} status should be recognized in cohabitation arrangements, even in jurisdictions finding the cohabitation illegal. Marriage does not create the \textit{in loco parentis} status for stepparents. It is not limited to stepparents. The status is created when any person voluntarily and intentionally assumes the obligations incidental to the parental relationship and discharges them.\textsuperscript{161} Thus, the facts in \textit{Zaragoza v. Capriola},\textsuperscript{152} \textit{Thomas v. LaRosa},\textsuperscript{153} and \textit{Featherton v. Steinhoff}\textsuperscript{154} demonstrate that Dr. Capriola, Mr. LaRosa, and Mr. Steinhoff created the status of \textit{in loco parentis} with their partner's children during the cohabitation.

Likewise, the doctrine of equitable estoppel is not based on the status of the parties. Instead, the doctrine is based on whether one party has made a representation to another so that the party to whom the representation was made has relied on that promise to his or her detriment. In a variety of cases discussed in Part I, the application of the doctrine of equitable estoppel holds persons liable for the support of non-biological children. For example, in the cases that have applied the doctrine to stepparents, the courts did not apply the doctrine because of the status of being a stepparent. Rather, courts assessed whether it would be just and fair to impose the duty of support on the stepfather because of his representation regarding the support for the stepchild, upon which the child or his parent relied to their detriment.\textsuperscript{155}

In \textit{Zaragoza}, the court misapplied the rationale of \textit{Miller} when it stated that \textit{Miller} was not analogous because it was a stepparent case. It was analogous for determining whether to apply the principle of equitable estoppel. The issue should then have become one of policy as to whether to apply the doctrine of equitable estoppel to cohabitants. Ms. Zaragoza, as did Mrs. Miller, detrimentally relied upon her partner's

\begin{itemize}
\item \textsuperscript{149} See Featherston, 575 N.W.2d at 9.
\item \textsuperscript{150} See Austin v. Austin, 22 N.W.2d 560, 563 (Neb. 1946).
\item \textsuperscript{152} 492 A.2d 698 (N.J. Super. Ct. Ch. Div. 1985).
\item \textsuperscript{153} 400 S.E.2d 809 (W. Va. 1990).
\item \textsuperscript{154} 575 N.W.2d 6 (Mich. Ct. App. 1997).
\item \textsuperscript{155} See Miller v. Miller, 478 A.2d 351 (N.J. 1984).
\end{itemize}
representation that he would support her child, and that she should not pursue child support from the child's natural parent. In the stepparent cases, the duty of support was not based upon the marriage but based upon the principle of equitable estoppel. Similarly, in *Thomas* and in *Featherson*, the basis for the duty of support was not the status of the relationship, but whether the principle of equitable estoppel applied.

It would appear, therefore, that when a jurisdiction cannot enforce contracts between cohabitants because that jurisdiction fails to recognize the severance doctrine, then contracts made by cohabitants to support non-biological, cohabiting children must be enforced. Even in jurisdictions that do not enforce contracts between cohabitants, the traditional doctrines of *in loco parentis* and equitable estoppel should apply. These principles extend support to non-biological persons based upon their voluntary conduct. Cohabitants should not be excluded if these principles apply to their conduct.

2. Policy Considerations for Applying the Traditional Theories, Principles, and Policies to Cohabitants

Even though the traditional principles seem to apply to cohabitants because of their voluntary conduct to support non-biological cohabiting children of their partners, nevertheless, there may be policy considerations that would support or prohibit applying these principles to cohabitants. This section examines those policy considerations, except for those regarding the marital tie.156

a. Shaping Law and Policy Regarding Cohabitation Living Arrangements

American law and policy are still in flux as to cohabitation living arrangements. While law and policy are being shaped, the numbers of people living as cohabitants are a substantial part of society.157 Many of the same disputes arise among cohabitants that arise among married cohabitants.158 It is predictable that more cases regarding

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156. See infra Part II.B (discussing policy considerations regarding the marital tie).
157. See STATISTICS, supra note 129.
158. Compare Miller, 478 A.2d at 351 (raising issue of stepparent support for
enforcement of support for non-biological, cohabiting children will arise given the numbers of cohabiting couples. In shaping law and policy, there is no apparent reason not to apply established legal doctrine to resolve cohabiting support disputes if such doctrine does not conflict with other principles and policies. Applying non-conflicting principles will not lessen the integrity of traditional families. For example, although cohabitation arrangements may be illegal, the biological children of such cohabitants receive support from their cohabiting parents on established legal doctrine.\footnote{A biological parent has a duty to support his or her child regardless of the living arrangement. Similarly, courts apply \emph{in loco parentis} and equitable estoppel doctrines to traditional legal strangers, not on the basis of contract law or on the status of the living arrangement, but on other, independent principles of law. As such, even if a jurisdiction will not enforce contracts between cohabitants, it should apply the doctrines of \emph{in loco parentis} and equitable estoppel. Therefore, applying established legal principles to cohabitation living arrangements is an appropriate method to shape law and policy regarding cohabitation disputes.}

\begin{itemize}
\item[b. Expectations of Cohabitants]
\end{itemize}

Many persons do not marry because they do not want the responsibilities that flow from marriage.\footnote{One, therefore, would not likely have the expectation of being responsible for the support of a non-biological, cohabiting child. Moreover, there are only a few instances in which the law imposes the duty of support of non-biological children even in marital arrangements. A person, however, normally becomes legally bound for non-biological child support because of one’s voluntary promise or conduct. The expectation that one is responsible for his or her voluntary promise and conduct that stepchildren when the marriage ends) with Zaragoza v. Capriola, 492 A.2d 698 (N.J. Super. Ct. Ch. Div. 1985) (raising issue of cohabitant support for partner’s biological child when cohabitation ends).}{\footnote{See Zaragoza, 492 A.2d at 700 (cohabitant had a legal duty to support his biological child, born while he was cohabiting with the plaintiff, after the cohabitation ended).}}{159}

\footnote{See Zaragoza, 492 A.2d at 700 (cohabitant had a legal duty to support his biological child, born while he was cohabiting with the plaintiff, after the cohabitation ended).}{\footnote{See supra Part I.B.}}{160}

\footnote{See supra note 133, at 1684-85.}{\footnote{Reppy, supra note 133, at 1684-85.}}{161}

\footnote{See supra Part I.B.2-3.}{\footnote{See supra Part I.B.2-3.}}{162}

\footnote{See sources cited supra Part I.B.2-3.}{\footnote{See sources cited supra Part I.B.2-3.}}{163}
is legally binding, is accepted as part of American culture. Therefore, applying the traditional doctrines to cohabitants for non-biological child support is not unexpected when one's own voluntary promise or conduct would bind him or her under these established doctrines, which traditionally bind legal strangers.

c. Welfare of the Children

The welfare of children is a substantial interest of the state.\textsuperscript{164} The number of children living in nontraditional families\textsuperscript{165} is not decreasing.\textsuperscript{166} Although not recognized as a de facto or a legal family,\textsuperscript{167} the cohabitants' children are certainly living in a nontraditional family arrangement. A recognized nontraditional family is the step-family.\textsuperscript{168} Most states do not impose a duty of support on stepparents unless their promise or conduct legally binds them.\textsuperscript{169} Although children in cohabitation arrangements are not stepchildren, their economic welfare may be better protected if the state would apply the traditional principles of non-biological support to cohabitants. The basis for these principles is not their status as cohabitants, but on their own legally binding promise or conduct to support these children.

d. Protecting the Public Purse

The state's interest in ensuring adequate support for children reflects its interest in ensuring their support without public expenditure. This interest is one of the underlying policies for the legislature in its "preference for assigning individual responsibility for the care and maintenance of children; not leaving the task to the taxpayers. That is why it has gone to considerable lengths to insure parents will live up

\textsuperscript{164} The U.S. Supreme Court has acknowledged the state's interest in the welfare of children. \textit{See}, e.g., \textit{Santosky v. Kramer}, 455 U.S. 745, 766 (1982) (the state has a "parens patriae interest in preserving and promoting the welfare of the child"); \textit{Lassiter v. Department of Soc. Servs.}, 452 U.S. 18, 27 (1981) ("[S]tate has an urgent interest in the welfare of the child . . . ").

\textsuperscript{165} \textit{See} Christensen, \textit{supra} note 36, at 1302 (The nuclear family, composed of husband, wife, and their children, is usually considered the traditional family.).

\textsuperscript{166} \textit{See} \textit{Statistics}, \textit{supra} note 129 (showing increase of total unmarried couples from 1,589,000 in 1980 to 4,236,000 in 1998).

\textsuperscript{167} \textit{See} \textit{City of Ladue v. Horn}, 720 S.W.2d 745 (Mo. 1986).

\textsuperscript{168} \textit{See} \textit{Mahoney}, \textit{supra} note 51, at 38.

\textsuperscript{169} \textit{See} \textit{supra} Part I.B.2.
to their support obligations."\textsuperscript{170} The application of the traditional reasons for imposing non-biological support on cohabitants would further the policy of protecting the public purse and would insure that cohabitants live up to their support obligations.

B. Policy Considerations and the Marital Tie

"For many, marriage signifies commitment, emotional security and stability."\textsuperscript{171} Marriage, however, has had much more significance to society than just personal meaning. Historically, both society and the law used marriage as the basic unit in the private and public ordering of American family life.\textsuperscript{172} Would allowing non-biological child support in cohabitation arrangements lessen the importance of marriage in the private and public ordering of family life? If so, the marital tie is an important consideration in extending non-biological support duty to cohabitation arrangements. In Zaragoza \textit{v.} Capriola,\textsuperscript{173} the court, in denying a cohabitant's petition that her partner had a duty to support her child from a previous marriage based upon his promise and conduct, reasoned that "[t]he institution of marriage is not yet dead. This Court will not contribute to its demise by imposing the obligations requested."\textsuperscript{174} This section examines whether the policy considerations for extending non-biological child support to include cohabitants would further the "withering away of marriage"\textsuperscript{175} as the court opined in Zaragoza. The section concludes that the crucial issue as to whether cohabitants should have a duty of support to non-biological, cohabiting children is not so much the involvement of the marital tie as are the conduct of the cohabitants and other important interests of the state.

\textsuperscript{170} In \textit{re} Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 290 (Ct. App. 1998).
\textsuperscript{174} Id. at 701.
\textsuperscript{175} The expression "withering away of marriage" is taken from Mary Ann Glendon, \textit{Marriage and the State: The Withering Away of Marriage}, 62 Va. L. Rev. 663 (1976).
1. Law, Morals, and Marriage

a. Moral Changes and Acceptance of Cohabitation

Many commentators have observed a change in public opinion in the United States and in Western society towards marriage as being the only acceptable, moral living arrangement. Further, there is increasingly less consensus that the only sexual morality is heterosexual. There are many factors for these changes in the definition of public morality. Though the development of family law in America reveals that the Christian religion has been the cornerstone for the moral, social, and legal ordering of family law, there has been a gradual decline among Americans as to its importance. Along with the decline of the public's interest in religion, there has been a decrease in discussions of the law in moral terms as defined by religion. As Professor Carl E. Schneider and others have described, at the same time as the decline in religious influence there were both an increasing influence of the ideology of liberal individualism and the rise of the psychological view of personal affairs.

As a result of these and other forces, intolerance for sexual expression in living arrangements other than marriage has given way to the moral acceptance, by many, of heterosexual and homosexual cohabitation. A few concrete examples demonstrate this growing social acceptance. First, many cohabiting couples no longer attempt to conceal their living arrangements from the public, but openly live in such arrangements. Second, the number of such couples

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178. See Carbone, supra note 172, at 273; Andrew H. Friedman, Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage, 35 HOW. L.J. 173 (1992); Jaff, supra note 171, at 236.


181. See Glendon, supra note 175, at 685-86.
continues to rise dramatically without any indication that this trend is temporary or will decline in the future. Third, cohabiting couples are found in all economic groups and social classes. In the past, many considered such arrangements to be practiced by the poor and certain minority and ethnic groups, but public acceptance solidified when the middle class also started openly living in such arrangements.

b. Changes in Constitutional and State Law

Laws in the United States have also made cohabitation more acceptable. Beginning with a series of Supreme Court cases, privacy as a constitutionally protected fundamental right has evolved into the right of the individual to be free of governmental interference in his or her sexual conduct, whether married or not, unless there is a compelling state interest. The doctrine of privacy for personal autonomy for an individual's sexual conduct gives support for the argument that an individual should be able to choose his or her living arrangement, whether it be married or unmarried cohabitation. Nevertheless, the Supreme Court has not extended the right of privacy to homosexual conduct and cohabitation. As a result, the government has more authority to regulate homosexual conduct if it so chooses. Thus, such constitutional doctrines as privacy and fundamental rights have made cohabitation living arrangements more acceptable.

Until recently, state law considered cohabitation, whether heterosexual or homosexual, an illicit relationship,
subject to criminal and civil sanctions. Many states have repealed or have not enforced such laws against adultery, fornication, and sodomy. Moreover, commencing with Marvin v. Marvin, many state judicial decisions have also made cohabitation arrangements more acceptable by settling property rights of cohabitants. Even if the living arrangements may be illicit, the courts have used contract law and equitable principles in settling such property rights. Thus, changes at both federal and state levels have made cohabitation living arrangements more tolerable.

c. State Interest in Cohabitation Living Arrangements

The state's interests in cohabitation living arrangements are intrinsic under both its police powers and its parens patriae powers. "The police power is the state's inherent plenary power both to prevent its citizens from harming one another and to promote all aspects of the public welfare." Accordingly, with the large number of persons living in these arrangements, the state has a significant interest in regulating them.

Under its police powers, the state would have the authority to regulate public morality unless the Constitution limits that authority. Thus, rejecting or accepting cohabitation as illicit is within the state's authority. Moreover, many issues arise between cohabitants that are rooted in this type of living arrangement. When individuals cannot resolve issues, they normally turn to the courts for guidance and resolution. In light of the number of citizens affected, the state has an interest in providing guidance and

191. 18 Cal. 3d 660 (1976) (seminal case).
194. See STATISTICS, supra note 129.
195. See Developments, supra note 187, at 1202.
196. See, e.g., Marvin v. Marvin, 18 Cal. 3d 660 (1976); Blumberg, supra note 183, at 1128-31.
197. See STATISTICS, supra note 129.
access to the law in resolving issues relating to these concerns.198

Furthermore, the state's interest in cohabitation arrangements appears to have become more acute when larger numbers of its middle class citizens accepted cohabitation as a living arrangement of choice.199 The state was dealing with values, norms, and customs of a segment of its community, which has power in determining what the law is.200 The state's interest in the welfare of this community, the fundamental basis of society, is not surprising.

The state also has an important interest in cohabitation if society views it as a viable alternative to marriage.201 Some argue that cohabitation should be treated as a type of family if it functions as the traditional family.202 Others claim that cohabitation is not temporary, but represents a culmination of changes that have been evolving as an alternative to marriage.203 Still others argue that cohabitation should be treated as an alternative to marriage, because many people reject marriage but find the same positive values associated with marriage in cohabitation arrangements.204

The state's interest in marriage, as a basic unit in structuring family life, is of no small importance.205 Therefore, the state's interest in protecting marriage as an institution is significant. One aspect of the state's protection of marriage is not to discourage marriage. The state has an interest, therefore, in not making cohabitation as a lifestyle

198. See Marvin, 18 Cal. 3d at 660.
199. See Eleanor D. Macklin, Heterosexual Cohabitation Among Unmarried College Students, 21 THE FAM. COORDINATOR 463 (1972); Reppy, supra note 133, at 1681-82; Skolnick, supra note 176, at 341.
200. See Reppy, supra note 133; Schneider, supra note 179, at 1852.
201. See, e.g., Mahoney, supra note 51, at 45.
203. See Skolnick, supra note 176.
more attractive than marriage.\textsuperscript{206} The state would allow obligations and consequences to flow from marriage as a lifestyle, but none flow from the cohabitation lifestyle. The conduct of stepparents binds them to support their non-biological children, but the same conduct would not bind cohabitants.\textsuperscript{207} At the same time, the state has an interest in not making cohabitation so similar to marriage as to discourage marriage.\textsuperscript{208}

On the other hand, under the state's \textit{parens patriae} power,\textsuperscript{209} the state has an obligation to protect non-biological children living in these cohabitation arrangements. Among the various issues that arise concerning the care of them is the issue of adequate financial support, especially without resort to public expenditures. Therefore, the state has an interest in the financial sources for the support of these children both during cohabitation and after it ends.

d. \textit{Shift in Law from Public Ordering to Private Ordering}

There has also been a shift in family law from public ordering to private ordering.\textsuperscript{210} The Supreme Court has supported this shift through its interpretation, in privacy cases, of fundamental rights as they relate to personal autonomy of the individual to make various decisions about family life.\textsuperscript{211} This shift facilitates cohabitation. Under private ordering, persons should have the choice privately to order their living arrangements through cohabitation or publicly to order their living arrangements through marriage.

2. \textit{Adapting Law to Social Changes or Adapting Society to Changes in the Law?}

Have the changes in the law regarding cohabitation occurred because the law adapted to society's change in its treatment of cohabitation? Or, has society adapted to the

\begin{itemize}
\item \textsuperscript{206} See Reppy, supra note 133, at 1684.
\item \textsuperscript{207} See supra Part I.B.2.
\item \textsuperscript{208} See Reppy, supra note 133, at 1721.
\item \textsuperscript{210} See generally Christensen, supra note 36; Developments, supra note 187; Jana B. Singer, \textit{The Privatization of Family Law}, 1992 WIS. L. REV. 1443 (1992).
\item \textsuperscript{211} See Developments, supra note 187, at 1198.
\end{itemize}
law's change in its treatment of cohabitation?

Does the acceptance of cohabitation represent a fundamental change in contemporary society's mores? If so, then should the law adapt to the social change in order to promote the general welfare of its citizens? The demographics of cohabitation support this view. They demonstrate that this living arrangement has steadily risen, and has become both commonplace and accepted as an alternative lifestyle. Apparently, a major underpinning of Marvin was the court's belief that society's mores had changed. "The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many." In addition, the Marvin court observed that demographics indicated large numbers of persons were living in these arrangements. Marvin's response can be interpreted as the state's interest in regulating unmarried cohabitation, but, instead of coming from the legislature, the judiciary assumed its role to settle disputes between private parties by grounding its ruling in familiar private doctrinal law: contract and equitable principles. Marvin's response to societal changes may also be interpreted as the court's taking a neutral moral stand to cohabitation arrangements. In any event, Marvin arguably supports the view that law reflects society's attitudes and mores. On the other hand, Marvin was the catalyst for courts in other states to treat cohabitation other than an illicit relationship for all purposes. Many states have adopted some or all of Marvin's holding that cohabitation does not per se prevent cohabitants from

212. See Statistics, supra note 129.
213. See id. (showing increase of total unmarried couples from 1,589,000 in 1980 to 4,936,000 in 1998).
214. See Blumberg, supra note 183, at 1128-31; Glendon, supra note 175, at 685-86 (1976); Reppy, supra note 133, at 1681-82.
216. See id. at 665, 683.
217. See Joseph Grodin, Justice Tobriner: Portrait of the Judge as an Artist, 29 Hastings L.J. 7 (1977); Willemsen, supra note 189.
219. See, e.g., Joseph Grodin, supra note 217; Martha Minow, "Forming Underneath Everything that Grows," Toward a History of Family Law, 1985 Wis. L. Rev. 819; Willemsen, supra note 189.
contracting with one another. Furthermore, some states have passed laws repealing adultery, fornication, and cohabitation statutes as well as enacted statutes prohibiting marital status discrimination. Domestic Partnership laws passed by many municipalities extend certain economic benefits to the cohabitant's domestic partner because of the cohabitant's employment; previously, only spouses were entitled to such benefits.

It is probably accurate to conclude in this article that the changes in the law were precipitated by many persons living publicly as cohabitants, as a result of society's changes in its morality. These changes resulted in greater tolerance and acceptance of these living arrangements. One must also conclude that as one jurisdiction responded with legal remedies, that other jurisdictions followed. Therefore, social and legal changes appear as reciprocal changes in their treatment of cohabitation.

3. Traditional Principles Underlying Legal Strangers' Duty of Support of Non-Biological Children Usually Stems from Conduct and Not from the Marital Tie

When there is no biological tie, the duty of support is usually based on the doctrine of in loco parentis, contract law, or the doctrine of equitable estoppel. The obligation for stepparent support in most cases is not based on the stepparent status, unless there is a specific statute addressing stepparent status. Without such statutes, the imposition of the duty of support on most stepparents flows from their voluntary conduct, rather than a marital tie.

226. See supra Part I.C.
228. See Mahoney, supra note 34, at 16.
Stepparents generally obligate themselves, because they are in loco parentis status with the stepchild, are in a contract to support the stepchild, or their conduct may have resulted in an obligation to support stepchildren based on the doctrine of equitable estoppel. Similarly, husbands who are denied the request to prove non-paternity of extra marital children are usually prohibited because of their own conduct and not because of the presumption that children born to a married woman are presumed to be children of the husband. Therefore, if the obligation is because of conduct in most cases dealing with stepparents and presumed fathers, then a marital tie should not be a factor with cohabitants.

4. Traditional Legal Strangers Already Include Those Who are Beyond the Marital Tie

Stepparents and presumed fathers are legal strangers who are connected by the marital tie. Although they make up the largest group of traditional legal strangers that may have a duty of support for non-biological children, others with no marital tie have also been among the traditional legal strangers. This group includes persons who have taken children into their homes to rear, or persons who have agreed to the birth of non-biological children through artificial insemination, or persons who have guaranteed parental support. All of these legal strangers obligated themselves to support non-biological children, where there was no marital tie because of their own conduct. The basis for imposing the duty of support in these cases is the conduct of these legal strangers. Therefore, the lack of the marital tie should not preclude extending the duty of non-biological child support to cohabitants based upon their conduct.

III. CONCLUSION

The basic reason for allowing support obligations by

traditional legal strangers where there is no biological tie, but
a marital tie, is that they have voluntarily agreed to support
the child under either the doctrine of in loco parentis, contract
law, or the doctrine of equitable estoppel. Seldom are they
ever statutorily drafted because of the status of the marital
relationship. Other traditional legal strangers, where there
is neither a legal nor a marital tie, become obligated because
of their voluntary conduct. Determining whether cohabitants
should be responsible for supporting non-biological,
cohabiting children need not be entangled with the legal
recognition or nonrecognition of cohabitation because support
obligations for non-biological children have not been based
upon the status of the marital relationship, except in a few
statutory instances. For the 21st century it might be an issue
if stepparent obligation is based more and more on the status
of the marriage. Therefore, how far beyond the marital tie
should legal strangers have a duty of support for non-
biological, cohabiting children? This article contends that
legal strangers should be obligated to the extent that their
own actions and conduct would bind them under the
principles of in loco parentis, contract law, or equitable
estoppel.

237. At least one of the stepparent statutes appears explicitly to include
cohabitants:

Where the parents are unable to provide a minor child's minimum
needs, a stepparent or a person who cohabits in the relationship of
husband and wife with the parent of a minor child shall be under a
duty to provide those needs. Such duty shall exist only while the child
makes his residence with such stepparent or person and the marriage
or cohabitation continues.


238. In the case of the switched babies, Carlton Conley signed a handwritten
agreement, drafted by Paula Johnson, agreeing to pay $75.00 per week for the
support of Callie Marie Conley after Judge Somerville refused to order support
because there was no biological tie between him and Callie Marie. David Reed,
Mother of Switched Baby Retains Custody, THE ASSOCIATED PRESS STATE AND
LOCAL WIRE, Sept. 22, 1998. See supra notes 1-10 and accompanying text.