



Step-parents and Support

Rosemarie Boll

“The course of true love never did run smooth.”

William Shakespeare wrote these words about the entanglements of romance – but he could have been writing about the turbulence that lovers face when love ends and step-parents are called on to pay child support.

The obligation to pay child support is regulated at two levels – federal and provincial. The *Divorce Act* is federal legislation and cases decided under that Act apply everywhere in Canada. Each province also has its own laws about step-parents and child support, and the definitions and wording may differ. This article focuses on divorce cases. I will use the following terms:

- *step-parent* means the unrelated new spouse;
- *natural parent* means the biological parent who lives with the child (and usually has custody); and
- *absent parent* means the biological parent who does not live with the child (and may or may not have access).

Who pays?

Section 2(2) of the *Divorce Act* says a *child of the marriage* includes a child to whom the step-parent *stands in the place of a parent*. But what does this mean?

The analysis begins with the Supreme Court of Canada's 1999 decision in *Chartier*. That case establishes the underlying principles: "... the provisions of the *Divorce Act* dealing with children focus on what is in the best interests of the children of the marriage, not on biological parenthood, or the legal status of children ... The interpretation that will best serve children is one that recognizes that when people act as parents toward them, the children can count on that relationship continuing and that these persons will continue to act as parents towards them."

The Court lists factors which help distinguish parental from non-parental figures:

- whether the step-parent includes the child in his extended family the same way as his own biological child;
- whether the step-parent financially supports the child (depends on ability to pay);
- whether the step-parent disciplines the child as would a parent;
- whether the step-parent represents himself to the child, the family, and the world, that he is responsible as a parent to the child; and
- whether the child still has a relationship with his absent parent.

The critical time to assess parental standing is during the marriage, not after the separation. The analysis is objective – what would an onlooker think? The opinions of the step-parent and the child are factors, but not the most important ones. The court will look at the big picture – did the step-parent assume parental responsibility over a time period long enough to reflect a significant committed parental relationship?

In the decade since *Chartier*, the courts have approached the issue in two different ways:

- the *high threshold* approach – this test requires solid evidence of a strong parental relationship. In essence, the step-parent must have substantially replaced the absent parent. This approach appeals to step-parents who want to reduce or eliminate their child support obligation. But one must not ignore the flip-side of parental standing: once a step-parent achieves parental status, the step-parent also acquires rights to custody and access. If the biological parents want to prevent this, they may also prefer the high threshold approach.
- the *low threshold* approach – the step-parent need not *replace* the absent parent. The court's focus is to assess whether the step-parent acted as a parental figure. The level of the absent parent's involvement is of secondary concern. Then, once the parental relationship is proven, there is a strong presumption that the step-parent should pay the *Child Support Guidelines* amount just as a biological parent would.

According to the eminent Canadian scholar Professor Nicholas Bala,¹ judges most frequently apply the high threshold test. This generally means a person will not stand in the place of a parent if the child also maintains a significant relationship with the absent parent.

Evidence Tending To Prove a Parental Relationship

Before separation

- a lengthy relationship, particularly with a younger child
- a good relationship
- birth or adoption of more children into the family
- both parents lead the child or others to believe the step-parent is the biological parent
- little or no involvement by the absent parent, or deliberately excluding the absent parent
- relocating the family so the natural parent must give up support from the absent parent
- discussing or starting adoption or guardianship proceedings
- wanting to change the child's surname, either legally or illegally (e.g., falsifying the birth registration to name the stepfather as the natural father)
- baptizing the child in the step-parent's church and naming the step-parent as the parent on the baptismal certificate
- the child calls the step-parent "dad" or "mom"
- wanting the child's affection and responding with affection
- taking a significant role in discipline
- the child comes to rely on the step-parent's money for her overall welfare and standard of living
- including the child in the step-parent's extended family gatherings
- sharing everyday family activities – meals, going out, playing games, driving to and taking part in activities, buying gifts, and celebrating special events, appearing together in family photographs, helping at the child's summer camp, taking vacations together, going to church
- participating in the child's education – driving to school, attending parent-teacher interviews, helping with homework, signing permission forms, listing the step-parent as a parent on school forms
- providing child care while the natural parent works, or taking a leave of absence from work to care for children when the natural parent is ill
- taking the child to medical appointments
- writing letters referring to self as the parent
- taking various legal steps – declaring the child as a dependent on an application form or for income tax, naming the child in a Will, agreeing to be appointed a guardian in case of the natural parent's death, naming the child in an insurance policy, seeking benefits for a child on a disability insurance policy

After separation

- acknowledging self as a parent by consenting to a child support order or agreement
- applying for custody or access, or having access by consent

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Each judge decides which approach to follow, then scrutinizes the evidence to see if it meets that standard. The test is highly discretionary. The outcome depends on what facts are supported by the evidence.

How much and how long?

So you stand in the place of a parent – what next?

Section 5 of the *Child Support Guidelines* says: “Where the spouse against whom an order for the support of a child is sought stands in the place of a parent for a child or the parent is not a natural or adoptive parent of the child, the amount of the order is, in respect of that parent or spouse, such amount as the court considers appropriate, having regard to these guidelines and any other parent’s legal duty to support the child.”

Again, the courts have approached the issue in two different ways:

- the narrow interpretation of s. 5 – the court presumes that a step-parent should pay the full guideline amount until the child reaches adulthood. Judges who apply this presumption strictly limit their inquiries to the two matters specifically listed in the statute: first, the guideline table amounts, and second, the legal duty of any other parent to support the child. Other factors, such as the natural parent’s financial means and the quality of the relationship, are not relevant. This approach is based on two principles: first, judges should not do what Parliament did not direct them to do, and second, judges should apply the principle of equality between biological and stepchildren that the SCC established in *Chartier*. Consequently, step-parents must present compelling evidence to overcome the presumption they should pay the Guideline amount.
- the flexible interpretation – the step-parent’s support obligation is always secondary to the absent parent’s. The condition, means, needs, and circumstances of the parties and the child are all relevant. The court can take into account:
 - the duration and quality of the pre-separation relationship;
 - the duration and quality of the post-separation relationship and whether there has been an intention to terminate it;
 - the child’s age;
 - whether the step-parent is denied access;
 - whether the child has other sources of income (e.g., CPP survivor or disability benefits);
 - the natural parent’s financial means (this is controversial); and
 - whether there is a pattern of multiple partners (serial marital and marriage-like relationships).

Professor Bala prefers the flexible approach. He says it is appropriate to order the full Guideline amount for a relatively short term following separation, and the judge need not closely inspect the absent parent’s actual or potential obligation during this time. This protects the child who can continue to rely on the step-parent’s support. However, over the longer term, the natural parent should be obligated to seek support from all potential payors. At that point, the court can reduce the step-parent’s payments to reflect the primacy of the absent parent’s obligation.

Evidence Tending To Disprove a Parental Relationship

- the absent parent is involved in the child's life
- the natural parent opposes the step-parent's parental role
- poor relationship with the child *prior to separation*, particularly if it was a major factor in the parties' separation
- the child is older when the relationship begins
- a short relationship, or periods of separation during the relationship
- the child calls the step-parent by first name
- the step-parent always introduces the child as the natural parent's child
- the relationship is more like a friend than a parent
- the step-parent acts like a new spouse, not a new parent
- the step-parent acts like a babysitter, not a parent
- the step-parent follows the natural parent's instructions in discipline decisions
- school records list the step-parent as a contact person, not a parent
- the step-parent merely shows kindness and affection in the course of the child's daily life

Some legal scholars² suggest that the British Columbia Court of Appeal may have charted a new middle way in its 2008 decision *U.V.H. v. M.W.H.* The Court applied two elements in the following order:

- first, a strict requirement that the absent parent pay the full Guidelines amount. This means that the absent parent him/herself, or all available evidence of that parent's income, must be before the court. The judge first calculates the absent parent's financial obligation.
- then the judge uses a flexible, child-focused enquiry to see what, if any, top-up child support the step-parent should pay. This means the natural parent must produce a child care budget. The absent parent has the primary obligation, and the step-parent makes up any shortfall.

This approach avoids piling of child support awards that would lead to an unfair windfall for the natural parent yet does not shrink from providing the higher standard in appropriate cases.

Conclusion

When a relationship fails and children are involved, it is in their best interests that their parents find happiness in their next relationship. To encourage the formation of second families, society must balance the needs of the children with the needs of their parents' new partners. New partners should not be penalised for acting kindly or giving emotional, physical, and financial support to natural parents who would otherwise be single parents. However, when the new partner makes an indefinite unconditional commitment to stand in the place of a parent, he or she cannot simply walk away. As the Supreme Court of Canada put it, spouses "are entitled to divorce each other, but not the children who were part of the marriage."

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Notes

1. Bala, Nicholas, “Who is a ‘Parent’? ‘Standing in the Place of a Parent’ & Child Support Guidelines s.5”, a paper presented at the Law Society of Upper Canada Continuing Education Program, April 3, 2006
2. Burke, Brian, and Chipeur, Stephanie, “The More the Merrier? – Multiple Parents and Child Support”, a paper presented at the LSUC Six-Minute Family Law Lawyer, 2009

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