**Extending the Family (and the Law of Families) through the Concept of Fiduciary: The case of step-parents and legal nonresidential parents relationship**

**Extending the Family (and Family Law) through the Concept of Fiduciary Trust: A Case of the Stepparent – Legal Nonresidential Parent Relationship**

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1. **Introduction**

Family law usually treats relationships within the context of “status” or “contracts.” However, it would seem that these two categories, as they stand today, cannot encompass the entire range or variety of family relationships and provide an appropriate regulatory response. In a world where family units are increasingly varied – where family relations extend beyond full blood ties or marriage ties; with families increasingly becoming blended and complex; and where the distinction between categories of “relative” and “stranger” is blurring – a study of the concept of ‘fiduciary’ can contribute to the elaboration of family law and its adaptation to changing realities. The notion of fiduciary, in the unique meaning that it carries in family law, and differently from the usual meaning attached to it in the corporate or professional contexts,[[2]](#footnote-2) can place legal obligations between parties to a family relationship (or a sort of familial relations), a relationship, which we will argue here, deserves regulation through legal arrangements.

In order to decipher the way that the fiduciary concept, which was first explored in the writings of Elizabeth Scott and others, may be employed in the context of families, I will, in this article, deal with the text case of the relationship between stepparents and nonresidential parents. This particular relationship, I believe, suffers from a lack of legal arrangements. In order to simplify the presentation of the facts of the case, I present the familial relationship that is my focus graphically:

Fiduciary duty

This article focuses on the affinity between the nonresidential parent, on the right hand side of the illustration, and the stepparent, on the left hand side of the illustration, with the child in the middle. Typically, since even today in most of the cases the primary caretaking parent is the mother[[3]](#footnote-3), this affinity is between the mother’s partner – the stepfather – and the child’s father. However the discussion below is equally appropriate also in circumstances where the residential parent is the father and the relevant stepparent is the stepmother. In order to simplify the situation, however, I will use the example of the nonresidential father, although it is important to emphasize that this does not make him second-best parent. He is nonetheless a legal parent for all intent and purpose, with equal guardianship, and often shares significant physical custody with the other parent.[[4]](#footnote-4) The parent’s partner will hereafter be called “stepparent” or “stepfather.”[[5]](#footnote-5)

In present times, where many children are raised in a household with a stepparent, and the stepparent has significant potential influence over the child, and indirectly, over the child’s relationship with their nonresidential parent,[[6]](#footnote-6) it is crucial, in my view, to consider legal regulations appropriate to such relationships. This move speaks to the call for a better alignment between family law and the variety of families that exist in today’s society.[[7]](#footnote-7) Thus, this article takes its inspiration from the term ‘fiduciary,’ which originates in the commercial realm and in the professional world, and attempts to derive from it conceptual norms that can contribute to the elaboration of family law and its adaptation to present day realities.

At the heart of this article, as noted, are the dilemmas arising from the separation of parents and the establishment of second families through remarriage,[[8]](#footnote-8) resulting in a new partner joining the family. This partner, who is referred to in this paper as the “stepparent,” becomes in some cases a sort of additional parent to the child. No formal legal relationship exists between the nonresidential parent and the stepparent according to present-day conventional legal categories. The nonresidential parent did not chose to have the stepparent in his or her life. In this sense there are no contractual relations between the two parties.[[9]](#footnote-9) Their relationship does not even constitute an identifiable “status.”[[10]](#footnote-10) However, the introduction of the stepparent into the family creates, in practice, an affinity between them, since the influence of the stepparent over the child’s life can be far-reaching and extend to the child’s relationship with the nonresidential parent, who is de facto affected by the behavior and actions of the stepparent. This article will address this paradox through two examples. The first, is behavior on the part of the stepparent which results in turning the child against the nonresidential parent. The second has to do with the behavior and life style of the stepparent, a lifestyle that the child is exposed to and by implication participates in, which constitutes an affront to the beliefs and lifestyle of the nonresidential parent.

Since the law does not recognize the affinity between the stepparent and the nonresidential legal parent and therefore, does not impose upon the stepparent any obligations towards the nonresidents parent, we will suggest the introduction of the concept of fiduciary trust and from it derive, for example, the obligation not to incite the child against the nonresidential parent in the context of our first example; or the obligation to avoid behavior that violates the dignity and faith of the nonresidential parent, in relation to our second example.

The present article does not presume to argue that existing law cannot address the said situations. Existing law can provide remedies to these situation through alternative legal grounds, such as parental rights on the one hand, and the interests of the child on the other. Furthermore, an additional remedy might be based on the obligations of the residential parent towards their former partner (the nonresidential parent). This article will demonstrate why these legal foundations are far from optimal, and how the proposed fiduciary concept, in the sense presented here, many be developed into a more appropriate outline for responding to the issues described, as well as to other issues beyond the nonresidential parent - stepparent relationship that characterize the family (and family law) today.

The first part of the article examines the relationship between the stepparent and the nonresidential legal parent, given the increase in blended families characteristic of the recent decades. We will discuss the potential impact of the stepparent over the nonresidential parent and present their complex relationships. This part will present possible alternatives for regulating the relationships between them, including parental rights, on the one hand, and the child's welfare, on the other, both alternatives that are recognized in law in other contexts, and which in this context, I will argue, are less suitable.

After the complex relationship between the nonresidential legal parent and the stepparent is presented and the shortfalls in its regulation become clear, I will proceed, in the second part of the article, to lay out the conceptual infrastructure that I wish to propose as a remedy to this situation. In this section, I will broadly explain the notion of fiduciary trust in private law and consider the role that it has or may have in the family context, especially in the context of the nonresidential parent - stepparent relationship. This will be accomplished by plunging into fiduciary law as formulated in private law generally and, inspired by the writing of Elizabeth Scott and others, in the arena of family law specifically.

In the third part of the article I will present the selected examples and discuss them in the context of the conceptual infrastructure offered by fiduciary law.

1. **Multiple parents and the relationship between the nonresidential parent and the stepparent**

The reality of family formation in recent decades generates a variety of relationships where children reside with parental figures who are not their legal parent, usually in addition to one of their two legal parents.[[11]](#footnote-11) Despite the growing scope of joint custody arrangements, there remain many cases in which a child lives with one key residential parent (usually the mother)[[12]](#footnote-12) and her partner, which we denote here with the term stepparent. There is another parent involved (usually the father), living separately, with whom the child has certain relations to varying extents, which are nonetheless not equal to those with the residential parent. Certainly, opposite cases, ones in which the residential parent is the father, also exist. In such cases, the stepparent in opposite sex couples households is the stepmother.[[13]](#footnote-13)

Such circumstances could be the outcome of two relevant situations: the child’s parents, whether they were married or living together as a couple, divorced or separated, and the parent maintaining custody of the child entered a new relationship; alternatively, the child’s parents never lived together, and the child living with his or her mother and her present partner, maintains a relationship with his or her father. In light of increasing divorce rates, on the one hand, and the large numbers of children born outside of a marriage or recognized relationship, on the other hand, the number of children living in such situations is quite significant,[[14]](#footnote-14) although the precise extent of this phenomenon is difficult to estimate.[[15]](#footnote-15)

A preliminary terminological clarification is required at this point: the same parental figure with whom the child resides, the spouse of the residential parent, is referred to here for simplicity’s sake as the "stepparent".[[16]](#footnote-16) This term has negative connotations, and for this reason, it would have been preferable to use another expression.[[17]](#footnote-17) However, in view of the term’s prevalence and in order to avoid the need to define its exact legal status and to avoid distinctions between a de facto parent, a psychological parent, a functional parent, or a parent who is formally recognized as a parent or not,[[18]](#footnote-18) all distinctions that are not relevant to this article, I will stick to the term “stepparent.” In fact, for the purposes of this article, the stepparent may not be recognized as having a formal-legal relationship with the child. The definition, as employed here, simply describes the fact that he or she is the spouse of the legal parent, living with her or him and with the child in the same household and maintaining meaningful relations with the child. Furthermore, although it is customary to identify as a stepparent only those who are married the legal parent,[[19]](#footnote-19) for the purpose of this article and in light of the demographic changes that characterize our time, a stepparent will refer to the partner of the parent with custody, even if he is not married to him.[[20]](#footnote-20) The co-parent living in the same household for a significant period of time is the relevant factor for our purposes. After all, it is not the formal definition that is important, but the potential influence that the stepparent has on the child and his or her behavior and way of life. This figure, even if not legally recognized as a formal parent or guardian, will be defined here as a "stepparent." Thus, a variety of parental figures whose legal definitions may be quite different, are found under the umbrella of the term "stepparent" used in this article. This variety extends the boundaries of the phenomenon and makes it difficult to assess its scope.[[21]](#footnote-21)

Substantively too, there may be variation in the nature of the relationship between the stepparent and the child, regardless of the formal legal status of the stepparent. The range of existing families,[[22]](#footnote-22) the stage at which the stepparent joins the family, the age of the child, the number of years during which he or she is a stepparent, and the nonresidential parent’s degree of involvement in the child's life, can all dictate differences in the extent of the stepparent’s influence over the child and their relationship with the nonresidential legal parent.[[23]](#footnote-23)

Research literature is divided on the extent of the influence that stepparents have on children in general.[[24]](#footnote-24) A dominant traditional position argued that a stepfather living with the residential mother and her child has no significant effect on child outcomes.[[25]](#footnote-25) However, other scholars question this conclusion:

"We question the conclusion that stepfathers have no or minimal effects on stepchildren, and we doubt that there are many members of stepfather households who would agree with it,"[[26]](#footnote-26) and offer as examples the range of roles played by the stepparent and the influences that he or she exerts over the child and the entire family.

It seems that the difficulty in defining the stepparent’s role in a child's life stems from the great variation in types of stepparents, but also from the absence of norms in relation to the role they are expected to perform.[[27]](#footnote-27) Furthermore, it may be assumed that traditional attitudes towards the limited role of fathers as caregivers in general has influenced the way the image of stepfathers was shaped over time, and it can also be assumed that it has changed with the passage of time and with the evolution of the role of fathers in the family, as it is at present.[[28]](#footnote-28)

The extent of this phenomenon, that is, the large number of children with a stepparent in their lives in addition to the relationships they maintain with their legal parents, on the one hand, and the potential influence of the stepparents on those children's lives, on the other, gives rise to a potentially complex existence. The context chosen for discussion in this article concerns the relationship between the stepparent and the other legal parent, who does not reside with the child. In the typical case, the child is raised by the mother and her current partner (the stepparent), and the extent of the cohabitation by the stepparent and the child is significant, embodying the potential for significant influence over the child and his or her behavior.

This phenomenon has not, to date, benefited from an exhaustive legal discussion, and the parents' relationship has not been treated separately. In fact, even the very existence of conflict between these parental figures is barely noted in the legal literature, although it is found in psychological and sociological research.[[29]](#footnote-29) Even case law deals with this issue only in a limited manner, although by reading between the lines it is possible to identify cases in which the stepparent takes an active part in the conflict.[[30]](#footnote-30) The limited attention it has received does not testify to the absence of this reality from our lives. Each time I presented early drafts of this article ~~to friends and colleagues~~ in professional forums, the audience has flooded me with “real life” examples of the complexity of the relationship between the stepparent and the nonresidential parent and of the conflicts they were exposed to in this context, all of which relate to the phenomenon I wish to discuss in this article. This complexity was aptly described by a group of Missouri University researchers, led by Marilyn Coleman, who deal with conflict management in stepfamilies:

"Interactions with the nonresidential parent can also lead to conflict. Not only can residential and nonresidential parents continue to engage in conflict after divorce […], but the addition of a stepparent can exacerbate these tensions because the nonresidential parent may feel displaced by the stepparent. There are at least three adults who must work together to some degree to make child-related decisions and rules, and children may feel torn loyalty between their new stepparent and their nonresidential parent."[[31]](#footnote-31)

This article is intended to offer an initial consideration of the appropriate legal tools for dealing with potential conflicts between the nonresidential parent and the stepparent. The article does not claim that the law, in its present form, lacks the potential legal tools for dealing with them. It seems that at least two alternatives can be considered for dealing with these conflicts, alternatives based on familiar legal tools. However, neither of these two alternatives are optimal, as will be immediately explained.

According to the first alternative, rooted in the basic concept of family law, the legal parent and his or her rights are the focus of family law. Accordingly, the behavior of the stepparent may amount to the detriment of the legal (nonresidential) parent's rights with regard to the child. However, the doctrine of parental rights, which was deeply enshrined in American law,[[32]](#footnote-32) has been undermined in recent years, partly because of its (ideological and practical) harm to children and their rights.[[33]](#footnote-33) The reasoning for critiquing the implementation of parental rights as the basic infrastructure in our context is complex. One aspect of this reasoning focuses on the relationship between the stepparent and the nonresidential parent: Hence, a legal solution based on parental rights, as shaped by the spirit of the liberal-adversarial legal discourse, tends to exacerbate the conflictual and differencing components and to harm the essence of the family relationship. Under the influence of this discourse, the parental claim is formulated as an entitlement, the resulting remedy is perceived as an obligation of the stepparent, and the result from the stepparent’s perspective is damaging. Thus, a "victory" for one is presumed to be "defeat" for the other.[[34]](#footnote-34) This conceptualization often misrepresents reality, or at least undermines the normative aspiration to shape reality as an arena of shared interests rather than of conflict. Another, more powerful reasoning is related to parent-child relations and is consistent with the general criticism that has been leveled in recent years against the conceptual basis of parental rights.[[35]](#footnote-35) According to this reasoning, even when the child is not a formal party to the conflict, the formulation of the existing violation as an infringement of the parent’s rights actually means the "parent's rights to the child." Upholding the concept of parental rights to the child diminishes the child and formulates him or her it as an object owned by the parents. The focus on fiduciary relations as an alternative is a successful way, in my opinion, of avoiding critiques of the emphasis on the parent and parental rights.[[36]](#footnote-36)

The second alternative, which is aligned with the current trends in placing the child at the center, tackles the potential conflict between the stepparent and the nonresidential parent from the perspective of the child's best interest. This approach can attempt to establish a standard of proper behavior between the stepparent and the nonresidential parent from the child's perspective and on the basis of protecting his or her well-being. Thus, to give a brief example, in the vast majority of cases, the best interest of the child dictates that he or she should not be exposed to incitement against the nonresidential parent (i.e., abusive, baseless speech that defames him or her) and that the child maintain a good and meaningful relationship with him or her. In this sense, it is possible to derive remedies that will protect these interests based on the "child’s best interests," which is a central value in family law.[[37]](#footnote-37)

However, this infrastructure is also problematic for several reasons: firstly, and fundamentally, relying on the best interests of the child does not produce a clear and definitive normative standard.[[38]](#footnote-38) The principle of the child’s best interests is vague and its deployment, as has been argued in the literature, may even be manipulative.[[39]](#footnote-39) More to the heart of the matter, and this is the second reason, it would appear to be possible and even necessary to separate the parental interest - the interest of the nonresidential parent to protect his or her relationship with the child, in and of itself - and the child's interests, even if protecting the best interests of the child also indirectly benefits the parent's interests, and despite the fact that in many cases these are common interests. Thirdly, combining these reasons, it is incorrect in my opinion to conceive of this conflict as a conflict between the child and the parent. Rather, the level of relations that is relevant to legal arrangements is the level of relations between the stepparent and the nonresidential legal parent.

Yet another alternative seeks to locate regulation in the arena of the relationship between the legal parents. That is, to attribute the behavior of the stepparent to the obligations of his or her spouse, the residential parent, and to impose upon him or her (rather than on the stepparent) the obligation to maintain and protect the relationship between the nonresidential parent and the child. Although it is possible to identify a legal relationship between the separated parents and to impose mutual obligations between them even years after their separation,[[40]](#footnote-40) certainly as far as their relationship with their child is concerned, and as is indeed the case when appropriate,[[41]](#footnote-41) it would be incorrect, in my opinion, to allow the stepparent to "hide" behind the residential parent. Such a conceptualization diminishes the role of the stepparent in the child's life and his or her significance as an individual with a separate and distinct relationship with the child, and indirectly, with the nonresidential parent. Only recognition of the direct relationship between the stepparent and the nonresidential parent will allow for a full and exhaustive resolution to the consequences of his or her behavior and provide a legal redress appropriate to the needs of a complex family.

I am of the opinion that the fiduciary alternative offered in this article, and whose full deployment will be presented in the next section, successfully integrates the interests of the parties more correctly. As Scott and Dagan explain in a different family context:

"… the status-based conception of parenthood is normatively problematic, because it 'accords unwarranted legal protection to biological parents in ways that are both directly harmful and symbolically corrosive to the interests of their children'. Conceptualizing parents as fiduciaries offers a much more attractive model of the parent-child relationship than did traditional family law, and represents a typical instance of the fiduciary role as an office. This understanding of parenthood is grounded not in parents' rights, but rather in parents' obligation to serve the child's best interest".[[42]](#footnote-42)

Choosing to employ the fiduciary framework conveys the important message calling for protecting family relations, and specifically the relationship between the parents (be they the formal parents or additional significant figures in the child's life that fulfill parental functions), and ascribes a high importance to the cooperation between them; It provides a space for the present day’s variety of family forms and the variety of parental figures in the child's life, while protecting the child's relationship with these parental figures and treating him or her with due respect. However, jumping to this conclusion, we must first understand fiduciary trust and present in detail the infrastructure upon which the relationship between the stepparent and a nonresidential parent can be established as fiduciary relations.

1. **Fiduciary trust as an inspiration for family law**

**3a. Fiduciary trust in private law**

After having detailed the social reality that gives rise to a range of families in which there are links between non-residential parents and step-parents, as well as having pointed out the inappropriateness of the existing law for regulating these ties, I turn in this section to the proposed model for regulation: the fiduciary model. The first part of the section will begin with a presentation of the characteristics of fiduciary trust in general and as recognized in private law, and then examine the very possibility of extending the conceptual boundaries of fiduciary trust to the legal regulation of family relations. The second part will examine more closely the implications of applying fiduciary law to the unique realm of family law.

In the Kossoy ruling, which is considered a milestone in Israeli fiduciary law, but is rooted in common law as a whole, Supreme Court Justice Aharon Barak defines the purpose of the fiduciary obligation, the framework of its application, and its requirements, thus:

"The law imposes a sense of trust on a person who holds power, thus helping to "create supervision and impose restraint on the holder of power in exercising his power"[…] The principle of trust has wide application. It is applicable to every situation where someone has power and control over another (see L.S. Sealy, "The Director as Trustee" [1967] Camb. L.J. 83)… The list of situations to which trust relationships pertain is not a closed list, and they pertain "to a wide range of legal relationships"[…]. One of those legal relationships is that between a director and his company. The director controls the company. He manages its affairs externally and internally. All this requires that t**he power be accompanied by responsibility, since power without liability will result in chaos.** […] The obligation of trust is a general obligation, and is incumbent upon the holder of power. The meaning of this obligation is that the holder of the power must act in good faith, honestly, and for the purpose of doing his job well. It is a general principle which is inherent in our system, and putting it into practice requires concretization (see T. Frankel, "Fiduciary Law," 71, Calif. L. Rev. 795 [1983])".[[43]](#footnote-43)

The purpose of protecting the "vulnerable" side is repeated in a variety of definitions of the fiduciary role. Thus, for example, Hanoch Dagan notes that **all** fiduciary relations "emerge in the context of legally-constituted or legally-facilitated roles that create a relationship of dependence and vulnerability wherein one party is subject to the authority entrusted to the other." [[44]](#footnote-44)

Similarly, Paul Miller identifies the fiduciary’s discretionary power as the central element in the definition of trust: “[A] fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary).”[[45]](#footnote-45)

Miller further states the general importance of the principles derived from fiduciary law in relationships, enabling coordination and social and economic cooperation.[[46]](#footnote-46) In this sense, the value of fiduciary trust transcends a single concrete relationship and is intended to promote important social goods:

There is reason to believe that fiduciary relationships are important to the realization of a variety of morally important goods. They are a means by which private wealth is secured and/or maximized. They shape the provision of professional services and so indirectly contribute to moral goods realized through the performance of professional roles. Fiduciary principles have informed our understanding of child-focused parenting obligations, including prioritization of the best interests of children. More broadly, fiduciary relationships facilitate interpersonal reliance in the performance of specialized functions and in the achievement of coordination within groups, making it more likely that we will realize various goods that can only - or best - be achieved through specialization and coordination".[[47]](#footnote-47)

Eli Bukspan, who deals at length with the role of trust as social and legal norm, emphasizes (among other things) its importance as a means of achieving "… universal goals of cooperation, risk-taking, and fulfillment of reasonable expectations."[[48]](#footnote-48)

This significance is relevant, as will be explained in the following section, also (and perhaps even more so) in the field of the family, the very existence of which depends on cooperation between its members. Tamar Frankel similarly emphasizes the social value of fiduciary law:

"Regardless of whether they are enforced by law, by social rules, or by cultural pressures, fiduciary rules are a condition to the long-term well-being of a human society. These rules constitute a condition to cooperate-relationships, which requires justly rewarded truthful and reliable expertise and service by humans to other humans. Those who do not wish to live in a community where fraud is admired and is practiced, and where suspicious reigns, might better remember that freedom should not include what fiduciary law prohibits".[[49]](#footnote-49)

This statement corresponds to the central concern about the extensive application of fiduciary law, namely, that it constitutes excessive interference in the conduct of the individual and an infringement on freedom. However, as indicated in her writing, as well as in that of Aharon Barak in the Kossoy case, unlimited power leads to arbitrariness, or, as pointed out by Uriel Procaccia,[[50]](#footnote-50) to imprudence. And imprudence and arbitrariness, after all, are the very contradiction of liberty.

This infrastructure seems to provide a sufficient preliminary-conceptual foundation for the fiduciary relationship between the stepparent and the nonresidential parent. Through the role the stepparent plays in the child's life, he or she has discretionary power in relation to the nonresidential parent and is in a position of power over him or her. The nonresidential parent, in contrast, and in the context treated by this the article, is vulnerable. Furthermore, the social value inherent in ensuring proper family relations, especially those that support parent-child relations and the parents' relations with each other (regarding their children) is considerable.[[51]](#footnote-51)

However, it is important to also consider possible critiques of this move, coming from those who believe that the foundation of the fiduciary system is a contract. To explain: Amir Licht[[52]](#footnote-52) presents two classical approaches to the formulation of fiduciary relations, which provide an answer to the question of the limits of fiduciary trust:[[53]](#footnote-53) One, a casuistic approach that allows for flexibility in formulating or establishing the fiduciary dyads that will be subjected to the duties of trust and other obligations that are imposed by analogy. This approach may be interpreted expansively and in practice lead to the application of fiduciary obligations in a wide variety of relationships and circumstances. The second approach, which is more restrictive, and which he supports, is the conceptual approach.

The casuistic approach, which was supported by earlier Canadian Supreme Court rulings[[54]](#footnote-54) and has since been rejected under the influence of Licht’s interpretations,[[55]](#footnote-55) allows for the identification of ad hoc fiduciaries, including family members such as former spouses. The key test in such identification is the power resting with the fiduciary and the vulnerability of the other. In this sense, "[T]he requirement of trust is an essential legal response to situations of power."[[56]](#footnote-56) Although it is possible to establish the proposed process expanding the fiduciary stepparent- nonresidential parent relationship on the basis of the casuistic approach, I would like to propose another, more challenging move, whereby the expansion is also possible according to the conceptual approach.

According to Licht, in order to recognize a fiduciary relationship, the conceptual approach requires identifying a consensual-contractual component (as a necessary conceptual component) between the parties. Adherence to this approach reveals the complexity of applying fiduciary law in our context. For example, even if contractual relations can be identified between certain family members, first and foremost among spouses (including former spouses[[57]](#footnote-57)), the parties I seek to recognize here as involved in fiduciary relations - the nonresidential parent and the stepparent (who are not and never were spouses) – cannot be seen as being in a contractual relationship. The entry of the stepparent into the family does not entail the consent and wishes of the nonresidential parent (but rather, that of his or her former partner), and therefore, under these circumstances, it is not possible to recognize a contractual relationship between them, even implicitly.[[58]](#footnote-58)

However, Licht's approach (which may be especially apt at the commercial-business level) is not the only known approach in the context of the fiduciary law.[[59]](#footnote-59) Lionel Smith, for example, emphasizes that fiduciary relationships may be based on an affinity in status, rather than on the existence of a contract or voluntary consent. Accordingly, as put by Miller, fiduciary status "may be founded irrespective of mutual consent, and that status prefigures the judicial construction of fiduciary relationships".[[60]](#footnote-60) Or as Smith states explicitly elsewhere, "it is not the case that that all fiduciary obligations can be understood as arising voluntarily."[[61]](#footnote-61)

Hanoch Dagan and Elizabeth Scott propose a solution to the debate over the legal relationship between the trustee and the beneficiary - whether contractual or based on status – grounded in a more complex theoretical understanding of the concepts of status and contract. According to them, status and contract are not necessarily binary concepts, and between these two concepts can be found a range of legal institutions whose diversity may be a combination of contract and status. After all, contracts include relational contracts[[62]](#footnote-62) and “offices” (office holders)"[[63]](#footnote-63) can be placed on the status side, and thus the contract-status dichotomy is already blurred: "[f]iduciary relationships vacillate between poles of contract and status, occupying the mediating terrain of offices and relational contracts".[[64]](#footnote-64)

Therefore, a formal contractual relationship is not necessarily required for the application of fiduciary law, and they can be recognized in the context of relationships and under the patronage of “offices.”[[65]](#footnote-65) Or, in the words of Dagan and Scott: "Within fiduciary law we can find both offices and contract types, as well as intermediate configuration between these ideal types."[[66]](#footnote-66)

However, another difficulty raised by this approach has to do with the fact that the relationship between a stepparent and a nonresidential parent is not a recognized status and has not yet been recognized as a legal relationship of any sort. This difficulty can be overcome if we were to view the relationship between a stepparent and a nonresidential parent as a relationship worthy of legal recognition. In an analogy to Amnon Reichman's method, it is possible to conceptualize this relationship as a status in the functional sense.[[67]](#footnote-67) In an article dealing with the right to dignity as a member of the moral community,[[68]](#footnote-68) he writes as follows:

"Membership in the moral community, and accordingly, the demand to avoid harming the expression of this membership, is not merely an abstract matter to be discussed theoretically as if man were detached from the empirical existence of his life or existed alone ... Civil society, in which the moral community is realized, enables its members to act through (but not only) various roles - statuses - which are manned by members of the society. Thus, in civil society, it is possible to speak of an employee, employer, husband, wife, a member of one profession or another, citizen, a government office holder, and the like. These are statuses – roles or “hats "- by virtue of which members of the society can communicate with their friends and the society as a whole, by virtue of which they can claim rights, and by virtue of which they are subject to obligations towards those in contact with them (or those in their ‘vicinity’) and toward the society. Social roles – statuses – both define and are defined by the relationships in which the office holder takes part when acting within the framework of his role. "[[69]](#footnote-69)

Furthermore, he writes:

"When we come into contact with each other by virtue of one status or another, we must relate to one another in accordance with the requirements arising from the status and from the relationships between the different statuses... Treatment of another that is inconsistent with the roles that people fill for one another means in practice that one person deprives another person of the status that this person inhabits ... Such treatment violates the right to human dignity ..."[[70]](#footnote-70)

As I shall argue in the next section, it is possible to refer to harming one of two roles in this context. The first is direct damage to the role relationship between a stepparent and a nonresidential parent (by assuming a parental role in place of the nonresidential parent and having parental interests that are his own), a role relationship that is presented as an innovation in this article; the second is harm incurred indirectly by the behavior of the stepparent to the functional relationship between the nonresidential parent and the child, which is by now a role relationship well-established in the law. It is important to note, as will be elaborated in the following section, that the aforementioned functional relationship was identified by Elizabeth Scott and Robert Scott as a fiduciary status.[[71]](#footnote-71)

Before we discuss the characteristics of the relationship between a stepparent and a nonresidential parent (and between parent and child), and before examining the possibility of classifying them as relationships based on fiduciary duties and discussing the content of those duties, I would like to emphasize that this article does not propose to "transpose" fiduciary law as such and in its entirety onto family law. In fact, as described with great accuracy by Rabbi Hanoch Dagan, it is impossible to speak of "fiduciary law" as a whole. Fiduciary trust is today well-known in a variety of contexts, and even before being expanded to the unique realm that is the focus of this article, is expressed differently in each of them. Nonetheless, it exists under the same conceptual umbrella.[[72]](#footnote-72)

**3b. Fiduciary relations in the family**

Although fiduciary trust is well established in two major fields – the commercial-economic (including corporate law and emissary law) and the professional (including, between lawyer and client and between doctor and patient) - in some of her works written with others since 1995, Elizabeth Scott has proposed to expand the fiduciary framework to include close family relationships.[[73]](#footnote-73) Although the relationship between a stepparent and a nonresidential parent is inherently different from family systems described by Scott, even the stepparent-nonresidential parent relationship may be conceptually suitable to the fiduciary framework and benefit from it, as I shall argue in this section.

The examination of the extent to which the stepparent-nonresidential parent relationship is compatible with established models of fiduciary trust in familiar fields (commercial and professional), as well as in family relationships, as proposed by Scott and others, will be accompanied by two insights: The first is by Ethan Leib (who conceives of friendship as a fiduciary system),[[74]](#footnote-74) whereby "[n]o typology of the fiduciary could be complete without recognizing a few central features: the concept is self-consciously open, flexible, and adaptable to new kinds of relationships."

And the second, by Hanoch Dagan, mentioned at the end of the previous section, whereby the analogy between one fiduciary system and another should not be based on the assumption that there is an "archetypal" fiduciary system from which one can derive the others; and particularly, one should not view it as a category of decision-making, but rather as a category of thinking. In Dagan's words, in response to criticism regarding the extension of the application of fiduciary law to family and public contexts:

"Commentators rightly highlight these differences when criticizing what they read as hasty extensions of rules from the familiar private law fiduciary-types … to the contexts of family law or public law. These moves are indeed problematic since they mistakenly assume that the former represent the core of fiduciary law, and thus offer the analogy to these fiduciary-types as a justification for concrete decisions, results, or reforms... Proper appreciation of the nature of plural legal categories, however, implies that these differences need not refute the characterization of parents or sovereigns as fiduciaries. Some of these accounts, at least if read charitably, implicitly treat the category of fiduciary as a **category of thinking**. They do not imply that the more familiar fiduciary-types should be treated as the core of fiduciary law or that their constitutive rules are necessary features of all fiduciary-types."[[75]](#footnote-75)

Before I delve into the stepparent-nonresidential parent relationship, I would like to pause with Elizabeth Scott, since her proposal to expand fiduciary trust into the family arena is an important inspiration for the move I propose here.[[76]](#footnote-76) Scott (along with others) has established in several articles a move whereby there is and should be a place for fiduciary trust in family law. In an article co-written with Robert Scott, she presents fiduciary trust from the perspective of the unique relationship between parent and child. According to Scott (in a recent article written with Ben Chen),[[77]](#footnote-77) the model can also be further extended to other family relationships - between spouses, when their relationship becomes dependent, and relationships with older family members whose capacity is substantially impaired and are dependent physically and/or mentally on their relatives.

My focus on Scott’s model serves our purposes here on two levels: First, despite the profound and substantial differences between the family systems treated by Scott (and in particular, the parent-child relationship) and the stepparent-nonresidential parent relationship, the common arena - the family arena - constitutes an important common denominator and should, to my understanding, engender a similar basic approach to these relationships. In this sense, the very move proposed by Elizabeth and Robert Scott twenty-five years ago, to break down the boundaries of fiduciary law that had up to that point been confined to private law in economic or professional contexts, was revolutionary and created the conceptual infrastructure for application in our context as well. Second, as I have already pointed out,[[78]](#footnote-78) the role relationship within which fiduciary trust is intended to apply, is not merely the fiduciary responsibility of the stepparent towards the nonresidential parent per se, but also the parent-child relationship, which requires protection within context of the stepparent-nonresidential parent relationship. In this sense, the outline proposed by Elizabeth and Robert Scott in relation to parent-child relationships, including the relationship between the nonresidential parent and the child,[[79]](#footnote-79) also has an indirect conceptual relevance in our context.

Indeed, Scott and Chen write the following regarding the suitability of the family arena to fiduciary relations:

"Family members bear primary responsibility for the care of dependent and vulnerable individuals in our society, and therefore family relationships are infused with fiduciary obligation. Most importantly, the legal relationship between parents and their minor children is best understood as one that is regulated by fiduciary principles. Husbands and wives relate to one another as equals under contemporary law, but this relationship as well is subject to duties of care and loyalty when either spouse is in a condition of dependency".[[80]](#footnote-80)

For them, the parent-child relationship is highly similar to the fiduciary relationship:

"Indeed, the parent-child relationship shares much in common with other fiduciary relationships, such as guardianships, trusts, and relationships between corporate directors and shareholders. Like other fiduciaries, parents are agents who hold asymmetric power and wield substantial discretionary authority in a relationship that aims to benefit the principal. And like other principals, children are vulnerable and not in a position to supervise or control parental performance. Here, as in other fiduciary contexts, the goal of legal regulation is to encourage the parent to serve the child’s interest, and to do so under conditions in which monitoring is difficult".[[81]](#footnote-81)

Alongside identifying the common ground between Scott's writings and this article - the family arena - which clearly begs a conceptualization that embodies the mutual responsibility between family members and correlates with the fundamental fiduciary approach, the relationship between a stepparent and a nonresidential parent requires distinguishing as well. The two parents (the nonresidential parent and the stepparent) are not part of the same nuclear family unit, and the interactions between them may be indirect and very limited. In this sense, viewing the stepparent and the nonresidential parent as members of the same family is not self-evident. They do fit conventional definitions of relatives, since there are no blood or marriage ties between them and the expectation of identifying caring in their relationship is not a given. However, precisely because of the uniqueness of this relationship, and because it is not a "natural" element of the family arena, the appeal to fiduciary trust is crucial. They each play a significant “role” in the life of the child, the very same child. Each of them fulfills, at least potentially, a role that entails care and responsibility toward the child, and each independent relationship (child-nonresidential parent and child-step parent) has an indirect effect on the other. Additionally, in at least some cases, the stepparent fulfills parental roles, inter alia, in place of the nonresidential parent.

In a broader conceptualization, and in accordance with the approach that identifies fiduciary trust with the promotion of important social values,[[82]](#footnote-82) we are dealing with a very central value - protecting family relations in general and parent-child relations in particular. Cultivating the parent-child relationship requires maintaining the status of each parent separately and protecting his/her interests in relation to the child, even if that parent plays a smaller role (such as the nonresidential parent) in caring for the child. The broader social value of cooperation and the maintenance of basic trust is also present in this case, perhaps even more crucially. After all, this arena is ideally supposed to embody, at the very least, proper communication and mutual respect between the parties; if not in a manner derived from mutual respect for relatives belonging to the same family (including in bi-nuclear and extended families), then at least instrumentally, derived from their role as common parents or semi-parents. This consideration is related to the view that "fiduciary statuses are role based."[[83]](#footnote-83)

Another example of a fiduciary relationship that diverges from the conventional commercial-professional context is offered by Ethan J. Leib.[[84]](#footnote-84) According to Leib, it is possible and necessary to think of friends as fiduciaries. This example is enlightening because it boosts the proposal offered by this article, but also challenges it. Unlike friends, whose relationship is based entirely on free choice and embodies an affinity based on affection or love, the parent-stepparent relationship is not voluntary and is almost certainly is not grounded in love. In our context, there is no closeness and possibly no trust; perhaps even the opposite. The uniqueness of the stepparent-nonresidential parent relationship in the family arena is characterized, as explained above,[[85]](#footnote-85) by its being an involuntary relationship. Unlike other fiduciary systems, the relations between the parties are not based on mutual consent and willingness, such as those between a company manager and a shareholder or between a professional service provider and the recipient of that service (doctor-patient, lawyer-client) and certainly between close friends. Here at least one of the parties (the nonresidential parent) is forced into the said situation by the actions of others (the relationship between the stepparent and the residential parent). In fact, it can be assumed that the stepparent "did not choose" the nonresidential parent, who is merely "excess baggage" to his or her (otherwise desirable) relationship with the residential parent, even if he or she chose to enter into the relationship cognizant of the existence of the child and the other parent. It is precisely the nature of this unique family relationship, a relationship that is not inherently one of affection, or mutual trust; a relationship that is often not desirable at all, which beg for the application of fiduciary trust. In fact, the need for a fiduciary framework in this case is all the more significant because the relationship is not ”naturally” imbued with caring and concern, as is usually the case between a parent and child or between partners (at least when there is love between them). The child, by being positioned in the middle between the nonresidential parent and the stepparent, creates the unique family bond between the two and establishes the motive for the family-oriented fiduciary model. Here the norms are intended to artificially or externally impose trust; to enable it; to create it. Friends, among whom trust exists, according to Leib,[[86]](#footnote-86) will not usually need fiduciary law because trust characterizes their relationship anyway. In our case, however, similar to most typical fiduciary relationships, the purpose is to establish trust where its existence it is difficult to ensure.[[87]](#footnote-87) It should also be noted that the level of trust we aspire to in this context is considerable. The parent entrusts (even if not willingly) that which is most dear – his or her child – as well as more specifically, his or her relationship with that child, to the hands of the stepparent.

The cost of this lack of trust between the parties can be quite high and, therefore, reinforces the need to establish a fiduciary relationship:

"If we think these relationships have social value—and that the law should contribute to helping produce and sustain that value—the law must help facilitate trust and mitigate the high costs of distrust."[[88]](#footnote-88)

The costs of monitoring these relations are also high:[[89]](#footnote-89) "… intimate family relationships require privacy to flourish to a greater extent than do other fiduciary relationships. Thus, formal monitoring of parental performance can be costly".[[90]](#footnote-90)

As reiterated by Ethan J. Leib: "Most importantly, they evidence special concern with policing opportunism and discretion in contexts where monitoring costs are very high and bonding is exceedingly important to the functioning of the relationship."[[91]](#footnote-91)

In other words, similarly to other family systems discussed by Scott and others, the sensitive nature of the familial relationship between the stepparent and the nonresidential parent (in addition to the sensitive relationship between the two legal parents, the former couple) and the need to maintain the relationship without external interference, justify the application of fiduciary law.

As we have already noted, a fiduciary system is established between two people whose relationship is characterized by unequal power. The vulnerability of one side as opposed to the other side's power in managing one's interests establishes (among others) the duties of the other. We must explore the particular characteristics of the stepparent-nonresidential parent relationship from this perspective as well: In the case typical to this article, the stepparent, the spouse of the residential parent, is present in the child's life for significant periods of time that are substantially greater than those of the nonresidential parent. Given this presence, and to the extent that their relationship is significant (especially at an early age), it may be characterized by a great influence over the child, his or her way of life, behavior, and feelings. Consequently, the stepparent is in a position of power over the nonresidential parent. This position of power is indirect, but may be very significant. However, the weakness of the nonresidential parent (in relation to the superiority of the stepparent) is a situational weakness and its vulnerability is not predetermined. His or her mental and physical abilities are not impaired (in contrast to the weaker parties in other family-based fiduciary relationships). Moreover, precisely because the nonresidential parent is recognized as a legal parent (sometimes while rejecting the stepparent's formal status and refusing his rights as a parent), this legal position is, in certain situations, preferable. The fact that he "was there first" and that he is the "real parent" may give him precedence from the child's perspective.[[92]](#footnote-92) However, the fact that this is not an inherent and permanent weakness does not negate the possibility, or need, of protecting it through fiduciary law. Like the system of friendship, which according to Ethan Leib is an arena for the implementation fiduciary law, here too, the vulnerable side may change. From a broader perspective, as part of an understanding of the relationship between the stepparent and the nonresidential parent as "co-parents,"[[93]](#footnote-93) one can imagine mutual fiduciary obligations between the parties, similar to Leib's understanding of friendship.[[94]](#footnote-94)

Before I conclude this section and turn to discussing two cases that will enable us to think pragmatically about the meaning of fiduciary relations between the stepparent and the nonresidential parent, I would like to briefly comment on the obligations derived from the fiduciary relationship. As Licht notes, it is customary to categorize the obligation derived from "classical" corporate fiduciary trust as a strict standard of conduct, in the sense of "man to man is an angel".[[95]](#footnote-95) The fiduciary obligations that arise from it are of the most stringent type, and require "absolute devotion to the beneficiary's interest."[[96]](#footnote-96) It includes, among others, a prohibition of conflict of interests, the duty to maintain confidentiality (towards third parties) and the duty of disclosure (to the other party). This strict standard does not automatically suit the type of relationship dealt with in this article. The nature of the obligations - the prohibition on a conflict of interests and a duty of disclosure - are generally less relevant to our case. As we saw in the analysis of the obligations characteristic of the parent-child fiduciary relationship by Scott et al., the obligations that must be derived from the fiduciary relationship between the stepparent and the nonresidential parent are also different. Unlike the parental context, in which the parent owes the child positive obligations, the obligations derived here are negative in nature and are aimed at certain aspects of the child's life and his or her relationship with the parent. These aspects will be elucidated in the following section, which moves from a theoretical outline to a proposal for application.

1. **Fiduciary relations between the stepparent and the nonresidential legal parent: Two issues for discussion**

For the purposes of this article, it is important to reiterate that the stepparent has one relevant characteristic: as the spouse of the residential parent who lives with that parent and the child in the same household, the stepparent spends a considerable amount of time with the child, sometimes more than that spent by the nonresidential parent.[[97]](#footnote-97) The length of time they spend together, the intensity of the relationship and its family characteristics, create opportunities for the child's exposure to the stepparent's lifestyle, habits and behaviors, and thus, can potentially have a significant impact on the child. In addition, in order to simplify the facts, let us further assume that there is no authentic claim against the nonresidential parent's functioning or ability, and that, in principle, his or her relationship with the child is healthy and beneficial.

With these assumptions set forth, we now turn to the two issues that are the focus of this discussion.[[98]](#footnote-98) The first is the possible harm to the relationship between the nonresidential parent and the child through the influence of the stepparent; and the second is a violation of the faith or lifestyle of the nonresidential parent as a result of the influence of the stepparent. It should be noted that these issues were chosen for discussion for two reasons: One is that the potential for disputes is undoubtedly considerable in both. This type of conflict between separated parents (regardless of role played by the stepparent) is common and it is recognized in case law, literature, and life experience. The contribution of the present article is that it focuses on the role of the stepparent as a party to these common conflicts. The second reason is related to the limited influence of the nonresidential parent (even if he or she has joint legal custody) over this type of matters. Unlike the "big" decisions concerning, for example, children's education, such as determining the educational institution the child shall attend, or medical treatment, where legal parents have joint legal authority,[[99]](#footnote-99), in routine matters, and through exposure to the stepparent’s statements and actions, the nonresidential parent’s degree of influence over the child is limited. We now turn to an examination of the said test cases.

**4a. Harm to the relationship between the nonresidential parent and the child through the influence of the stepparent**

The first issue concerns the potential (negative) influence of the stepparent on the child's relationship with the nonresidential parent. It is important to begin by clarifying (even if it is self-evident) that not in every situation in which a stepparent is incorporated into the family, does a conflict arises between the child and the nonresidential parent. Clearly also, if there is such a conflict, it is not necessarily the result of the stepparent's joining the family or a consequence of his behavior or his "fault." This section is concerned with situations in which the stepparent’s behavior does indeed affect the relations between the parties and harms the relationship between the child and the nonresidential parent.

As previously notes, although such conflicts, to the extent that they involve the stepparent directly, have rarely been directly addressed in the case law,[[100]](#footnote-100) indications of this phenomenon were gleaned through conversations with friends and colleagues and, to a certain extent, also from literature. As an introduction, I can refer to the factual data in Stewart's study, which indicates that:

"For children with resident stepparents, stepparents may act as a substitute parent and take over the parenting role, promoting nonresident parents to "back off". A study based on the NSAF indicate that the presence of married and cohabiting step-parents is associated with fewer visits from nonresident mothers and fathers."[[101]](#footnote-101)

Although this does not necessarily mean that it is the stepparent who intentionally directs his actions towards the said result, and although it may be assumed that in some cases the said result indeed is not the product of a deliberate act by the stepparent, the above data is nonetheless disturbing and thought provoking.[[102]](#footnote-102)

In an attempt to understand the root of this phenomenon and try to understand the role of the stepparent in the exclusion of the nonresidential parent, I turned to psychological research. However, reliance on the studies I will present briefly below requires a caveat: some identify the negative affect of the stepparent on the relationship between the child and the parent with what is called “parental alienation syndrome.”[[103]](#footnote-103) Although many (myself included) question the very existence of this syndrome,[[104]](#footnote-104) I believe we may agree that situations in which children refuses to meet their parents and situations of alienation due to children’s refusal, certainly do exist.[[105]](#footnote-105) I suppose we may also agree that, in some cases, the alienation or harm to the relationship is the result of the influence of the adults who take part in raising the child - the residential parent, family members or the stepparent. These adults provoke feelings of anger and resentment, bad-mouthing and bashing the nonresidential parent, as well as other actions that exacerbate the powerful emotions the child has in relation to the nonresidential parent, and sabotage their relationship. The harm caused to children in some of these cases is also certainly beyond question.[[106]](#footnote-106)

Warshak, a clinical psychologist and researcher who deals extensively with the phenomenon of parental alienation, pointed to the influence of the residential parent's new relationship on the child's relationship with the other parent.[[107]](#footnote-107) In his opinion, one of a variety of effects of a new partnership on the relations between a child and the other parent, is the potential direct influence the stepparent can have over that relationship. In some cases, he believes, the stepparent seeks to sabotage the relationship between the child and the nonresidential parent in order to enhance their own status and role in the child's life. To do so, he or she may "instigate, or at least actively support, destructive criticism of the other parent".[[108]](#footnote-108) In other cases, "the new partner joins in a campaign of denigration as a means of ingratiating himself or herself to the spouse. The basic message is, ‘Your battles are my battles.’"[[109]](#footnote-109)

Other researchers[[110]](#footnote-110) have identified additional reasons, rooted in the new spousal relationship, to explain the stepparent's motivation for sabotaging the relationship between the child and the nonresidential parent, including the desire to sever the relations between the spouse and his or her ex-spouse.

Blogs that deal with post-divorce parenting and guidance books for divorced parents[[111]](#footnote-111) also highlight the role of the stepparent in damaging this relationship (again, sometimes as part of the discussion of parental alienation or parental alienation syndrome): "At times, the stepparent may join in with their spouse to insult or lie about the other parent or become involved with blocking contact".[[112]](#footnote-112)

Some of these studies emphasize that that the harm caused to the parent-child relationship may be unintentional and is a by-product of the stepparent joining the family, especially when the child is particularly young,[[113]](#footnote-113) and the relationship he or she forges with the stepparent is positive and meaningful.[[114]](#footnote-114) A complex emotional response by the nonresidential parent to the new relationship of his former spouse can lead to his or her own distancing and exacerbate the damage to the relationship.[[115]](#footnote-115) As noted, we are concerned only with situations in which the stepparent deliberately and actively sabotages the relationship.

**4b. Injury to the beliefs or lifestyle of the nonresidential parent through the influence of the stepparent**

Through living with a stepparent, a child may be exposed to behaviors, acts, or rituals that simply by the fact of participation in them or being influenced by them, may cause harm to the nonresidential parent.

Such harm may be the outcome of the different religious faiths of the nonresidential parent and the stepparent,[[116]](#footnote-116) or the result of discrepancies in the extent of their faiths or in the manner in which they are carried out.[[117]](#footnote-117) The more important the issue is for the nonresidential parent, and especially if he or she is the more strictly observant side religiously, the more profoundly do the actions or influence of the stepparent injur his or her feelings and, indeed, his or her relationship with the child.[[118]](#footnote-118)

A study that attempted to pinpoint the influence of parents over intergenerational transmission of behaviors, found that the parents who raise the child, including the stepparent, have a significant influence, for example, on the child’s church attendance.[[119]](#footnote-119) In contrast to education, where the genetic link has a significant effect,[[120]](#footnote-120) the situation is apparently different in the case of religious socialization, where the influence of the person directly raising the child is greater.

There are many types of behaviors and rituals that are liable to cause controversy, and they are dependent, as noted, on the religious affiliation of the parties and the manner in which they fulfill their faith and observe its commandments. When the stepparent is Christian and the other parent is of another religion, conflict can arise primarily around going to church on Sundays and holidays, prayers at home, or the display of religious symbols in the home environment. If the stepparent is a Muslim, for example, disputes may arise around mosque attendance, praying at home or in public, and celebrating Muslim holidays. Eating meat that is forbidden to Jews or Muslims - such as pork - in the household raising the child may injure the feelings of the nonresidential parent, assuming that he or she is observant. Likewise, conversations about heresy (or faith), including reading from religious texts,[[121]](#footnote-121) certainly if they take place in the context of "brainwashing," may injure the nonresidential parent. Bringing the stepparent into the picture complicates the situation by adding another adult with his or her own unique lifestyle and faith, as does any other significant adult who shares the residential parent's lifestyle and faith, sometimes more piously.

Having briefly presented the two types of situations in which the involvement of the stepparent has the potential to harm the nonresidential parent and his or her relationship with the child, I now turn to presenting the proposed conceptual framework for analyzing these situations, using the fiduciary perspective. It should be emphasized that the purpose of this article is to conceptualize the relationship between the nonresidential parent and the stepparent (a relationship that has not yet been framed in law) and to provide an infrastructure for preliminary thinking about the obligations that apply between them and specifically, in this context, those of the stepparent towards the nonresidential parent. This discussion is preliminary in nature and does not claim to exhaust the subject by resolving the conflict or formulating the appropriate response, but rather it is meant to serve as a blueprint for further studies.

1. **The case studies in light of fiduciary duties**

The above descriptions of the two types of conflict, one dealing with incitement against the nonresidential parent and the other with exposure to lifestyles that are detrimental to the religious beliefs of the nonresidential parent, clearly demonstrate the complexity inherent in them and attests to their suitability to the application of fiduciary responsibilities.

The relationship between a stepparent and a nonresidential parent as conceptualized here embodies several characteristics that apply to the fiduciary relationship: one side, the stepparent, is at an advantage over the other, at least in the contexts addressed by this article; This party is in a convenient position to prefer its own interests over the interests of the other, and the ability to monitor its behavior (by the other party) is limited. The position of the other party, the nonresidential legal parent, is a mirror image of the first: he or she is in a position of weakness stemming from their marital status; from their limited presence in the child's life, from their limited ability to control or interfere in the day-to-day management of their child's life, lacking even direct information about it to a great extent; he or she entrust that which is most dear to them in the hands of the stepparent. The relationship between the stepparent and the nonresidential parent embodies a reliance that requires inherent trust, but also the difficulty in ensuring trust. Hanging in the balance, for the vulnerable side, in an important interest: his or her relationship with their child. This interest may not necessarily coincide with the narrower interests of the stepparent, but by virtue of playing a significant role in the child's life, and the assumption that he or she will act in the child's best interests, he or she should be expected to ensure the child’s interests even when they contradict their own narrower personal interests. This view is also consistent with the role that this article seeks to conceptualize: the stepparent’s role vis-a-vis the nonresidential parent, as someone assuming part of the role of the nonresidential parent and as someone who is entrusted with the relationship between the nonresidential parent and the child.

The fiduciary conceptual framework allows us to recognize the relationship between the stepparent and the nonresidential parent both socially and legally; it enables us to imbue it with substance through duties of behavior;[[122]](#footnote-122) it protects the weaker party (in these circumstances) against the advantages of the stronger party; and defends important family and social interests, cooperation and mutual respect among family members and, above all, it protects the parent-child relationship.

It is important to note that this does not mean that the stepparent must subordinate his or her entire conduct with respect to the child to the interests of the nonresidential parent. With regard to the first issue, fiduciary trust gives rise to duties, the limited responsibility to protect the interests of the nonresidential parent (and child) to have a normal relationship. With regard to the second issue, fiduciary trust generates duties aimed at protecting the deep religious sentiments of the nonresidential parent, which also have an effect on the relationship with the child, as will be explained below. Similarly, the remedies that are accordingly required must be narrowly and cautiously defined. These remedies specify mainly negative obligations: the obligation not to incite against the nonresidential parent, the obligation not to violate the principles of his faith. These obligations may not be inconsequential, but the harm to freedom they cause is relatively limited in scope. It can be said that, in any case, a stepparent's freedom does not include the freedom to incite against the nonresidential parent.

I should emphasize that these obligations are not only legal. Conceptualizing the relationship between the stepparent and the nonresidential parent for the first time here, from the perspective of the fiduciary model, creates a preliminary foundation for the shaping of social expectations regarding the significance of these relations. These expectations can construct norms accompanied by social sanctions. Social norms are not foreign to other familial contexts in which fiduciary relations were identified. In those contexts, fiduciary trust is also (and perhaps primarily) known through a framework of social expectations and non-legal remedies. As Scott and Scott write in the context of parent-child relationships:

"The utility of parents' affective bonds and informal social norms in promoting desirable behavior reduces substantially the role for formal legal incentives in mitigating conflicts of interest. Moreover, extralegal norms impose much lower costs on both the state's and parents' interests in procreation and child-rearing. These norms are low-cost/high-benefit instruments for reducing the incidence of self-interested behavior by parents and thus function as substitutes for more intrusive and costly legal constraints."[[123]](#footnote-123)

Unlike the parent-child relationship, at this point there are clearly no social norms for the stepparent - nonresidential parent relationship that can guide us in how the fiduciary should act. The aim of introducing fiduciary responsibility here is precisely to imbue it with content.

It should be noted that the second test case, which deals with injury to religious sentiments, raises a more complex dilemma than the first: Firstly, unlike incitement and offensive behavior (as in the first case), which is unacceptable in itself, expressions of religious belief (or behavior that contradicts another person’s religious imperative) are not inherently wrong. For example, going to church on Sundays, observing religious customs on holidays or eating pork are not in themselves forbidden or problematic.

Second, their very existence may even, arguably, be constitutionally protected by the first amendment. However, the case law has made clear that such restrictions on religious expression in the family context do not constitute a violation of freedom of expression:

..."Court orders prohibiting a parent from reading the Bible to his children or infringing on a parent's choice of religious education for her children appear repugnant to the first amendment and to the traditional freedom from state intervention enjoyed by the parent-child relationship. Nevertheless, courts find such intervention permissible where the family unit is dissolved and where the irreconcilable religious dispute is of such magnitude as to be harmful to the children's welfare."[[124]](#footnote-124)

Thirdly, a review of case law and literature reveals that considerations relating to religion and belief have over the years been a factor in decisions over questions of custody and contact arrangements, but from a completely different perspective.[[125]](#footnote-125) Under certain circumstances, these considerations played a role in determining who would be the primary residential parent.[[126]](#footnote-126) In other cases, they were a factor in determining how contact arrangements would be designed to impose conditions for meetings and prohibitions on the nonresidential parent, prohibitions related to his or her religious way of life, aimed at protecting the way of life and faith of the residential parent and the child in her or his custody. In extreme cases, religious considerations led to the separation of the child from the nonresidential parent. However, unlike in the past, where the faith and religious way of life of the resident parent were given clear preference, the current era and the tool proposed here in the form of the fiduciary relationship guide us toward a different perspective. Respect for the nonresidential parent's lifestyle and faith, and protection of his or her separate and independent relationship with the child, may dictate imposing obligations on the stepparent (together and separately from the residential parent)[[127]](#footnote-127) in order to protect and respect the core beliefs of the nonresidential parent.

This seemingly extraordinary move is the product of previous development and is not based solely on the fiduciary model or scheme. The legal approach which limited the nonresidential parent is characteristic of the previous era, in which the residential parent had exclusive legal custody of the child. The default today is different, and physical custody by one of the parents usually involves the **joint** legal custody of both parents.[[128]](#footnote-128) The fundamental position of family law, which has been shaped in recent decades by changes in psychological research and by the recognition of children’s rights, now favors maintaining contact with both parents.[[129]](#footnote-129) Even where parents do not share care of a child equally, the tendency is to maintain a meaningful relationship with the nonresidential parent. This position can dictate not only the prevention of incitement against the nonresidential parent, but also the prevention of injury to the core of his or her faith, in a manner that will enable him or her to maintain a respectful, positive and inclusive relationship with his or her child.[[130]](#footnote-130)

In this sense, there is a significant point of interface between the two types of conflict (incitement against the nonresidential parent and injury to religious sentiments) and they point jointly to a substantive conclusion. In other words, the protection of the stepparent’s religious sentiments is derived both from freedom of religion and from the protection of his or her relationship with the child, and both may lead to obligations incurred by the stepparent.

1. **In lieu of a conclusion: Two final remarks**

**6a. Fiduciary law as a conceptual exercise on the legal regulation of unrecognized family relations**

It may be assumed that the proposal to expand the boundaries of fiduciary trust and apply it to the relationship between stepparents and nonresidential parents will encounter some resistance. The expansion of fiduciary laws into this arena is not trivial, nor is it free from faults. It contradicts the basic position that regards fiduciary law as an unsound legal foundation.[[131]](#footnote-131) It is certainly not a "natural" extension of areas where fiduciary law has thus far been established. As we learned from the criticism of the revolutionary move proposed by Elizabeth and Robert Scott in the 1990s, the critiques may originate both from within the field and without it. Family law practitioners may argue that introducing fiduciary trust into family relations can damage the delicate fabric of family relationships[[132]](#footnote-132); and proponents of fiduciary law, for their part, might view this as a move that can transform fiduciary trust into a sweeping concept, a "wild horse" of sorts, with unforeseeable trajectory and outcomes.[[133]](#footnote-133) Alternatively, they might claim that it diminishes the institution or empties it of real content, thereby arguing that its application in the unique arenas for which it was designed has been impaired.[[134]](#footnote-134)
Even if the aforesaid criticism in all its variations is justified (and this is not my position, of course), it does not refute the course of the argument presented here. The reader is asked to view what was presented here as an "exercise in thinking," the first ever, for examining relations between members of complex families, relations that have yet to be recognized and regulated by law. In this article, I have chosen to discuss the relationship between nonresidential parents and stepparents, a relationship that has not been officially recognized in case law, even though the actual extent of such relationships is increasing. Even if one were to reject the application of fiduciary law in this context, the normative message that I wish to leave with the reader is the following: This juxta positioning of the nonresidential parent‒stepparent relationship with fiduciary law is intended to signal the importance of these relationships. As relationships that are vital to parents, children and society as a whole, they require legal attention, care and protection. Fiduciary law is one means of achieving this result.

In this sense, even if the reader rejects the proposed path of fiduciary law, this article will serve as a preliminary foundation for considering the nature of the relationship between stepparents and nonresidential parents: its complexity, its importance to parents and the children caught in the middle, and to the realm of the family as a whole; as the basis for recognizing the legal "role" of the stepparent vis-a-vis the nonresidential parent; and as a basis for legal recognition of this unique connection as a family relationship (or "family role") and a first attempt to regulate it. For its conceptualization as a family relationship deserving of legal recognition has an important symbolic value: Beyond one type of arrangement or another, to be determined by law, this recognition signals the social expectations from the connection. As Merle Weiner writes, inspired by the ideas of sociologist Sheldon Stryker:

"The law has an important part to play in creating, defining, and reinforcing the social role, although adjudication would not be the primary method for conveying the normative framework. “Identity theory,” a sociological concept, explains how the new legal status could affect behavior on a grand scale. People define, perform, and prioritize a social role in large part based on their interactions with others and how others see that role." [[135]](#footnote-135)

In this sense, the article offers another possible contribution to the shaping of the behavioral norms expected from members of complex families, norms that have, to date, not received their due attention.[[136]](#footnote-136)

On the other hand, to the extent that the reader is convinced by the arguments and the analysis regarding the extension of fiduciary law, the glimpse provided by this article into the nonresidential parent‒stepparent relationship is but one example of the possible use of the theoretical foundation provided by fiduciary law in the development of family law. Other relationships, some of which are familiar to one degree or another in classical family law, such as relations between former spouses, and unrecognized relationships, such as those between donor siblings or between donor offspring and donor parents,[[137]](#footnote-137) may also, I believe, benefit from the theoretical basis embodied in fiduciary law. The second remark, below, constitutes a step in this direction.

**5b. Stepparent – residential parent – nonresidential parent: Co-parents**

Before concluding, I propose thinking about the parent-stepparent relationship in a somewhat broader context. As Ayelet Blecher-Prigat[[138]](#footnote-138) and Merle Weiner[[139]](#footnote-139) suggest in separate essays, the emphasis in family law should be shifted away from romantic partnerships towards co-parenting, which should be situated as "the central family bond between adults."[[140]](#footnote-140) While Blecher-Prigat and Weiner both emphasize achieving economic justice between co-parents, a more expansive, holistic reading of their arguments can point to a broader process that touches upon the current agenda: Family law must recognize the horizontal relationships between co-parents, including parents who were a couple and separated, parents who brought a child into the world without ever being a couple, and other adults who play a parental role in jointly raise a child (including stepparents), even if some of them are not formally recognized as parents. To the extent that Blecher-Prigat and Weiner are correct, the creation of an ongoing legal relationship, separate from the binary relationship between the adults based on the fact of their joint parenthood, should apply not only to the economic aspects of the relationship, that is, to their economic obligations towards one another, but also to other obligations that are aimed at protecting the emotional bond of each of them with their common child. In Blecher-Prigat's words: "The law must recognize that co-parenting is the basis for the imposition of mutual obligations between adults who share parenthood, including obligations of an economic nature."[[141]](#footnote-141) In my understanding, contrary to Weiner, "adults who share parenthood" may also include stepparents in the broad sense employed in this article.[[142]](#footnote-142)

Given the high rate of divorce in recent decades and the fact that a significant proportion of children are from the outset born to parents who do not have a permanent relationship, the likelihood of a child growing up with a stepparent (in the sense of a caregiver who is not a formal legal parent) is high. This reality necessitates a change in family law so as to include the range of actual existing family relationships and to enable them to thrive.[[143]](#footnote-143) I believe that the introduction of the concept of fiduciary trust to the family in general, and to the relationship between stepparents and nonresidential parents, as an example, is an important step in this direction.

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I would like to thank… for their useful insights, and to …for their research assistance. [↑](#footnote-ref-1)
2. When referring to the professional context, I mean the role of fiduciary law in regulating relations between the professional or expert, such as lawyer, doctor, financial advisor and the like, and the customers benefiting from their services. The corporate context refers to relationships such as trustee-beneficiary, agent-principal, corporate director/officer-corporation, and partner- partnership. For an more on the range of recognized fiduciary relationships, see: Susan Dorr Goold & Mack Lipkin, *The Doctor–Patient Relationship: Challenges, Opportunities, and Strategies*, 14 J. Gen. Intern. Med. 26 (1999); Michele Goodwin, A Few Thoughts on Assisted Reproductive Technology, 27 Law & Ineq. 465, 475 (2009); Robert Cooter; Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045, 1046 (1991); Alice Woolley, *The Lawyer as Fiduciary – Defining Private Law Duties in Public Law Relations*, 65 U. Toronto L.J. 285 (2015); Sande Buhai, *Lawyers as Fiduciaries*, 53 St. Louis U. L.J. 553 (2009). [↑](#footnote-ref-2)
3. [https://www.census.gov/data/tables/2017/demo/families/cps-2017.html?#](https://www.census.gov/data/tables/2017/demo/families/cps-2017.html) table c-2.

<https://ifstudies.org/blog/more-than-60-of-u-s-kids-live-with-two-biological-parents/>

“Twenty million of today’s children—more than a quarter—live in single-parent families, and six times as many of them reside with their birth mothers (23 percent) as with their birth fathers (4 percent). Four million children—about 5 percent—reside with one biological parent and a stepparent, following a divorce or nonmarital birth. Three times as many live with a birth mother and stepfather (3 percent) as with a biological father and stepmother (1 percent).” [↑](#footnote-ref-3)
4. See below, in footnote XX. [↑](#footnote-ref-4)
5. On the choice to use the term “stepparent”, and the significance of the “stepparent” in the context of this article, see below XXX [↑](#footnote-ref-5)
6. See below in section XXX [↑](#footnote-ref-6)
7. Although Huntington does not discuss the regulation of the relationship between the nonresidential parent and the stepparent, her fundamental position is compatible with our arguments: "To foster strong, stable, positive relationships… requires a reorientation of the ubiquitous role that the legal system already plays in relationships. To foster strong relationships, structural family law should grant legal recognition to a broader range of families, rather than recognizing only traditional nuclear families. To foster stable relationships, structural family law should encourage long-term commitment between parents – commitment to each other or at least commitment to the shared work of raising children." Clare Huntington, Failure to Flourish: How Law Undermines Family Relationships xv (2014). [↑](#footnote-ref-7)
8. As shall be explained in the next section, identity as a stepparent does not necessarily entail remarriage, but rather simply a relationship as part of cohabitation. Furthermore, this article will also reference children born outside a recognized partnership, where the biological father is nonetheless recognized legally and functions as a parent outside of the nuclear family unit. For the facts of the situation see below. [↑](#footnote-ref-8)
9. This may be argued that, though it may not be sufficiently compelling, since when a couple breaks up, whether willingly or not, they are aware that their former partner, the residential parent, is highly likely to become involved in a new relationship. One may argue that the separation (and distribution of care for the child) in itself constitutes an implied agreement to this situation. Similarly (and here the argument has greater force) the entry into a relationship with a person known to be a residential parent implies agreement with the said situation, including the roles it entails. [↑](#footnote-ref-9)
10. For the classical definition of legal status, see: [Dunham v. Dunham, 57 Ill. App. 475, 1894 Ill. App. LEXIS 323](https://advance-lexis-com.ezprimo1.idc.ac.il/api/document/collection/cases/id/3X40-WWW0-00KR-D2R9-00000-00?cite=57%20Ill.%20App.%20475&context=1000516); R. H. Graveson, Status in the Common Law2 (1953). For a more up-to-date definition, see: Geoffrey MacCormack, *Status: Problems of Definition and Use*, 43 Cambridge L.J. 361 (1984). [↑](#footnote-ref-10)
11. For an in-depth treatment of stepfamilies, see: Margaret M. Mahoney, Stepfamilies & the Law (1994). [↑](#footnote-ref-11)
12. See note 3 above. [↑](#footnote-ref-12)
13. Less significantly, yet still relevant, the stepparent might be in the same position towards the other parent he or she is not in a relationship with, even under circumstances of joint custody. As long as the two parents are not living together and one of them is involved in a new stable relationship, the stepparent may spend a significant amount of time with the child and assume a significant and influential role in his or her life. For further on the argument that residence with the child creates a substantial advantage in general, see: Pamela Laufer-Ukeles & Shelly Kreiczer-Levy, Family Formation and the Home, 104 Ky. L.J. (2016) 449, 485, 490-492. [↑](#footnote-ref-13)
14. For partial numerical estimates, see: National Stepfamily Day: September 16, 2018. <https://www.census.gov/newsroom/stories/2018/stepfamily.html>. A broad estimate claims that “60% of all Americans will be a part of a stepfamily at some point in their lives." See [Marilyn Coleman](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=COLEMAN%2C+MARILYN), et al., *When You're Not the Brady Bunch: Identifying Perceived Conflicts and Resolution Strategies in Stepfamilies*, 8 Personnel Relationship 55, (2001).[**MARILYN COLEMAN**](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=COLEMAN%2C+MARILYN)[**MARK A. FINE**](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=FINE%2C+MARK+A)[**LAWRENCE H. GANONG**](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=GANONG%2C+LAWRENCE+H)[**KIMBERLY J. M. DOWNS**](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=DOWNS%2C+KIMBERLY+J+M)[**NICOLE PAUK**](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=PAUK%2C+NICOLE) [↑](#footnote-ref-14)
15. For more on the difficulties in arriving at a quantitate estimate, see: Susan D. Stewart, Brave New Stepfamilies : Diverse Paths Toward Stepfamily Living 15-16 (2007). [↑](#footnote-ref-15)
16. The accepted terminology usually identified a “stepparent” as the person married to the residential parent. See: Margaret M. Mahoney, *Stepparents as a Third Parties in Relation to Their Stepchild*, 40 Fam. L. Q. 81, 81-83 (2006). [↑](#footnote-ref-16)
17. Fro the negative stigmas attached to the term "stepparent", see: Kay Pasley, David C. Dollahite & Marilyn Ihinger-Tallman, *Bridging the Gap: Clinical Applications of Research Findings on the Spouse and Stepparent Roles in Remarriage*, 42 Fam. Rel. 315, 317 (1993). [↑](#footnote-ref-17)
18. For different definition of parenthood, see: Lindsy J. Rohlf, *The Psychological-Parent and De Facto Parent Doctrines: How Should the Uniform Parentage Act Define Parent*, 94 Iowa L. Rev. 691 (2009). For the *Uniform Parentage Act* proposal, see: Uniform Parentage Act 2017. Also see: Courtney G. Joslin Nurturing Parenthood through the UPA, The Yale Law Journal Forum (2018) 589; Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 Geo. Mason L. Rev. 419 (2013). [↑](#footnote-ref-18)
19. Susan Maidment, *The Step-Relationship and its Legal Status*, 5 Anglo-Am. L. Rev. 259 (1976) 259-260; Margaret M. Mahoney, Stepfamilies & the Law (1994) p. 2, 3, 7. [↑](#footnote-ref-19)
20. In this context, see the model proposed by Stewart, that would include under the definition and in the research also children born to unmarried parents and those living with parents whose new partnership did not entail marriage: Susan D. Stewart, Brave New Stepfamilies: Diverse Paths Toward Stepfamily Living 15-16/16-20 (2007). [↑](#footnote-ref-20)
21. This complex phenomenon is difficult to measure as it is. See above XXXX [↑](#footnote-ref-21)
22. Some fifteen types of step-families, or even more, have been identified. See: [Marilyn Coleman](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=COLEMAN%2C+MARILYN), et al., *When You're Not the Brady Bunch: Identifying Perceived Conflicts and Resolution Strategies in Stepfamilies*, 8 Personnel Relationship 55 (2001). [↑](#footnote-ref-22)
23. Belcher and Hacker have discussed this variety in their article: Ayelet Belcher-Prigat & Daphna Hacker, *Strangers or Parents: The Current and the Desirable Legal Status of Parents' Spouses*, 40 Hebrew University L. Rev 5 (2010) [Hebrew]. Also see: Margaret M. Mahoney, *Stepparents as a Third Parties in Relation to Their Stepchild*, 40 Fam. L. Q. 81 (2006).; Mary Ann Mason et al., *Stepparents: De Facto Parents or legal Strangers* 23 J. Fam. Issues 507, 508-509 (2002);Lawrence Ganong, Marilyn Coleman, The Dynamics of Parenting in Stepfamilies in Stepfamily Relationships 109, 121 (2004); Kay Pasley, David C. Dollahite and Marilyn Ihinger-Tallman, *Bridging the Gap: Clinical Applications of Research Findings on the Spouse and Stepparent Roles in Remarriage,* 42 Fam. Rel. 315 (1993). [↑](#footnote-ref-23)
24. See for example, Charity Perry-Fraser, Rick Fraser, *A Qualitative Analysis of the Stepparent Role on Transition Days in Blended Families*, 6 Open J. Soc. Sci. 240 (2018). [↑](#footnote-ref-24)
25. "The empirical literature generally has concluded that stepfathers have little

or no effect on child outcome", Lawrence Ganong, Marilyn Coleman, The Dynamics of Parenting in Stepfamilies in Stepfamily Relationships 109, 121 (2004). [↑](#footnote-ref-25)
26. Lawrence Ganong, Marilyn Coleman, The Dynamics of Parenting in Stepfamilies in Stepfamily Relationships 109, 121 (2004). [↑](#footnote-ref-26)
27. Ibid, p. 124. [↑](#footnote-ref-27)
28. It is interesting that stepmothers are characterized differently from stepfathers, both because they are usually outside the family and live separately from the children, and because of their social roles and different expectations of them. For more on stepmothers, see: Patrycja Sosnowska-Buxton, The Complex Dynamics of Step-m-othering: A Qualitative Study (May 2014) (Unpublished Ph.D. dissertation, University of York) (on file with author). [↑](#footnote-ref-28)
29. See below, XXXX [↑](#footnote-ref-29)
30. See for example, the case descriptions in the following verdicts, reflecting different types of conflicts between parents and involvements of stepparents: Gilliam v. Jones, 1998 Tenn. App. LEXIS 865; In re the MARRIAGE OF Beverly Robin ROSENFELD and Martin Sanford Rosenfeld 524 N.W.2d 212 (1994); Bethany (BUMGARNER) SCHROEDEL, v. TIMOTHY ADAM BUMGARNER. [No. E2009-02299-COA-R3-CV.](https://scholar.google.co.il/scholar?scidkt=1506308621046469895&as_sdt=2&hl=en) Court of Appeals of Tennessee, at Knoxville. (2010); Merle Applebaum Snaders v. Michael Rosenberg 930 P. 2d. 1144 (1996) 122 N.M. 692. [↑](#footnote-ref-30)
31. Marilyn Coleman et al., *When You’re Not The Brady Bunch: Identifying Perceived Conflicts and Resolution Strategies in Stepfamilies*, 8 Pers. Relationships 55, 57 (2001). [↑](#footnote-ref-31)
32. Denise A. Skinner & Julie K. Kohler, Parental Rights in Diverse Family Contexts: Current Legal Developments, *Family Relations*, vol. 51, no. 4, 2002, pp. 293–300; Emily Buss, *Parental Rights*, 88 Va. L. Rev. 635, 656 (2002). Also see case law, from *Meyer v. Nebraska* to Troxel: *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) p. 400-401; *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) p. 535; *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) page 66. [↑](#footnote-ref-32)
33. For a comprehensive and exhaustive review of the above critiques, see: Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401, 2405-2414 (1995). And also see: Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 Yale L. J. 1448, 1471 (2018). [↑](#footnote-ref-33)
34. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401, 2401 (1995). [↑](#footnote-ref-34)
35. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 Yale L. J. 1448, 1471 (2018); Goodwin, S. *Against Parental Rights,* 41 Columbia Human Rights Law Review, (2015) 1, 8,19. [↑](#footnote-ref-35)
36. Cf. Hanoch Dagan, Elizabeth S Scott. Reinterpreting the Status–Contract Divide:The Case of Fiduciaries. In Paul B. Miller and Andrew S. Gold, [Contract, Status, and Fiduciary Law](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780198779193.001.0001/acprof-9780198779193), 62-64. [↑](#footnote-ref-36)
37. An alternative approach which focuses on the child, places the emphasis on the child’s rights. See: XXXX. For a critique of this approach, see: XXXX [↑](#footnote-ref-37)
38. Emily Buss, *Children's Associational Rights? Why Less Is More*, 11 Wm. & Mary Rts. J. 1101, 1102 (2003); Ruth Zafran, *Children's Rights as Relational Rights: The Case of Relocation*, 18 Am. U. J. Gender Soc. Pol'y & L. 163, 178-179 (2010). [↑](#footnote-ref-38)
39. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & Fam. Stud. 337, 370-371, 373 (2008); Ruth Zafran, *Children's Rights as Relational Rights: The Case of Relocation*, 18 Am. U. J. Gender Soc. Pol'y & L. 163, 180 (2010). [↑](#footnote-ref-39)
40. XXXXXXXXXX [↑](#footnote-ref-40)
41. Apparently only to a certain limited extent. See: Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 Fordham L. Rev. 539, 558 (1990); Scott, Elizabeth S. and Chen, Ben, *Fiduciary Principles in Family Law* (February 2, 2018). Oxford Handbook of Fiduciary Law (Evan Criddle, Paul Miller and Robert Sitkoff, editors), Oxford University Press, Forthcoming; Columbia Public Law Research Paper No. 14-577 p. 2, 8-9. [↑](#footnote-ref-41)
42. Hanoch Dagan, Elizabeth S Scott. Reinterpreting the Status–Contract Divide: The Case of Fiduciaries. In Paul B. Miller and Andrew S. Gold, [Contract, Status, and Fiduciary Law](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780198779193.001.0001/acprof-9780198779193), p. 2401. [↑](#footnote-ref-42)
43. CA 817/79 Kossoy v. Bank Y.L Feuchtwanger LTD. 38(3) PD 253, 278 (1984) (Isr.),

<https://supreme.court.gov.il/Pages/fullsearch.aspx> [↑](#footnote-ref-43)
44. Hanoch Dagan, *Fiduciary Law and Pluralism, in* Oxford Handbook of Fiduciary Law (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., forthcoming 2019). [↑](#footnote-ref-44)
45. Paul B. Miller, *Justifying Fiduciary Duties*, 58 McGill L.J. 969, 1101 (2013). [↑](#footnote-ref-45)
46. Paul B. Miller, *New Frontiers in Private Fiduciary Law, in* THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle, Paul B. Miller, & Robert H. Sitkoff, eds., forthcoming 2019). [↑](#footnote-ref-46)
47. Paul B. Miller, *New Frontiers in Private Fiduciary Law*, *in* The Oxford Handbook of Fiduciary Law (Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff, eds., 2019) p. 14. [↑](#footnote-ref-47)
48. Eli Bukspan, *The Notion of Trust as a Comprehensive Theory of Contract and Corporate Law: A New Approach to the Conception that the Corporation is a Nexus of Contract*, 2 Hastings Bus. L.J. 229, 258 (2006). [↑](#footnote-ref-48)
49. Tamar Frankel, *The Rise of Fiduciary Law*, 18-18 (Boston U. Sch. L., Public Law Research Paper 2018), https://scholarship.law.bu.edu/faculty\_scholarship/345 [↑](#footnote-ref-49)
50. Uriel Procaccia, *Winding-up at the Suit of Minority Shareholders*, 8 Mishpatim 13, 17 (1977). [↑](#footnote-ref-50)
51. See below…. XXXXX [↑](#footnote-ref-51)
52. See Licht's book: Amir N. Licht, Fiduciary Law: The Duty of Loyalty in the Corporation and in the General Law (2013). [↑](#footnote-ref-52)
53. Amir N. Licht, *Fiduciary Relations in the Corporation: Duty of Loyalty*, 18 Israel J. L. & Bus. 237, 243, 246 (2014). [↑](#footnote-ref-53)
54. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty". *Guerin v. Canada*, 1984 S.C.R.2 335, 384 (1984). [↑](#footnote-ref-54)
55. Amir N. Licht, *Fiduciary Relations in the Corporation: Duty of Loyalty*, 18 Israel J. L. & Bus. 237, 250-251(2014). [↑](#footnote-ref-55)
56. Amir N. Licht, *Fiduciary Relations in the Corporation: Duty of Loyalty*, 18 Israel J. L. & Bus. 237, 251 (2014). However, Licht reiterates that power (which creates the accompanying vulnerability), is not in itself to establish fiduciary duty, pp, 250-251. [↑](#footnote-ref-56)
57. XXXXXXXXX [↑](#footnote-ref-57)
58. A stepparent does decide to join a family system consciously and of his or her free will, nonetheless, they are entering into a spousal-family relationship with a partner who has children from previous relationships, with all that this entails. [↑](#footnote-ref-58)
59. Ina different context, see: Paul B. Miller and Andrew S. Gold, Fiduciary Governance, 57 Wm. & Mary L. Rev. 513 (2015). [↑](#footnote-ref-59)
60. Paul B. Miller, *New Frontiers in Private Fiduciary law, in* THE OXFORD HANDBOOK OF FIDUCIARY LAW page…. (Evan J. Criddle, Paul B. Miller, & Robert H. Sitkoff, eds., forthcoming 2019). [↑](#footnote-ref-60)
61. Lionel D. Smith, *Contract,* *Consent, and Fiduciary Relationships, in* Contract, Status and Fiduciary Law 117, 128 (Paul B. Miller & Andrew S. Gold, eds., 2016). [↑](#footnote-ref-61)
62. Elizabeth S. Scott & Robert E. Scott, Marriage as Relational Contract, 84 Va. L. Rev. 1225 (1998). [↑](#footnote-ref-62)
63. "The idea of an office, Joshua Getzler noted, 'comes from the classical Roman concept of an officium, a standard set of primary duties pertaining to a person with recognized responsibilities. The nature of that office will then accent and shape all the relevant duties of the officeholder…" Hanoch Dagan and Elizabeth S. Scott, *Reinterpreting the Status-Contract Divide: The Case of Fiduciaries, in* Contract, Status, and Fiduciary Law 51, 57 (Paul B. Miller & Andrew S. Gold, eds., 2016). [↑](#footnote-ref-63)
64. For an evaluation of Dagan and Scott’s interpretation, see: Paul B. Miller, *New Frontiers in Private Fiduciary Law, in* THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle, Paul B. Miller, & Robert H. Sitkoff, eds., forthcoming 2019). [↑](#footnote-ref-64)
65. Paul B. Miller and Andrew S. Gold, *Introduction, in* Contract, Status, and Fiduciary Law 1, 8 (Paul B. Miller & Andrew S. Gold, eds., 2016). [↑](#footnote-ref-65)
66. Hanoch Dagan and Elizabeth S. Scott, *Reinterpreting the Status-Contract Divide: The Case of Fiduciaries, in* Contract, Status, and Fiduciary Law 51,62 (Paul B. Miller & Andrew S. Gold, eds., 2016). [↑](#footnote-ref-66)
67. In this sense the approach is similar to that proposed by Dagan in: Hanoch Dagan, *Fiduciary Law and Pluralism, in* Oxford Handbook of Fiduciary Law (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., forthcoming 2019). [↑](#footnote-ref-67)
68. Amnon Reichman, *Omnipresent Dignity: The Right for Human Dignity as Membership in the Community of Moral Agents, 7* MISHPAT UMIMSHAL 469 (2005). [Hebrew]. [↑](#footnote-ref-68)
69. *Id*. at 495. [↑](#footnote-ref-69)
70. *Id at 497* [↑](#footnote-ref-70)
71. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401 (1995). Another possible approach, which could overcome the difficulty of deriving a direct fiduciary obligation between the stepparent and the nonresidential parent, argues that these relations are relations of "derived fiduciary trust". In other words, the relationship of each parent (and certainly the legal parent, as noted the article by Scott Scott. See note XXX above) can be identified as containing a fiduciary duty toward the child. Together, the nonresidential parent and the stepparent are joint fiduciaries. [↑](#footnote-ref-71)
72. XXXXXXXXXXX [↑](#footnote-ref-72)
73. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401 (1995); Scott, Elizabeth S. and Chen, Ben, *Fiduciary Principles in Family Law* (February 2, 2018). Oxford Handbook of Fiduciary Law (Evan Criddle, Paul Miller and Robert Sitkoff, editors), Oxford University Press, Forthcoming; Dagan, Elizabeth S Scott. Reinterpreting the Status–Contract Divide: The Case of Fiduciaries. In Paul B. Miller and Andrew S. Gold, [Contract, Status, and Fiduciary Law](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780198779193.001.0001/acprof-9780198779193). [↑](#footnote-ref-73)
74. Ethan J. Leib, *Friends as Fiduciaries*, 86 Wash. U. L. Rev. 665, 672 (2009). [↑](#footnote-ref-74)
75. Hanoch Dagan, *Fiduciary Law and Pluralism, in* Oxford Handbook of Fiduciary Law (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., forthcoming 2019) [↑](#footnote-ref-75)
76. There is a key distinction between Scott’s proposed move and the move presented here: In her seminal paper with Robert Scott, Elizabeth Scott established the argument that the existing law already reflects the fiduciary aspects of parental relations. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401 (1995). In other words, Scott’s approach is descriptive-analytic, while our approach is not. The relations between stepparent and nonresidential parent are not regulated by law and the turn to fiduciary trust in this sense is aimed at creating and formulating such law. In other words, this is an inherently normative process. [↑](#footnote-ref-76)
77. Scott, Elizabeth S. and Chen, Ben, *Fiduciary Principles in Family Law* (February 2, 2018). Oxford Handbook of Fiduciary Law (Evan Criddle, Paul Miller and Robert Sitkoff, editors), Oxford University Press, Forthcoming. [↑](#footnote-ref-77)
78. See above, at footnote XXXXX [↑](#footnote-ref-78)
79. Scott, Elizabeth S. & Scott, Robert E., [*Parents as fiduciaries*.](https://tau-primo.hosted.exlibrisgroup.com/primo-explore/fulldisplay?docid=TN_gale_legal18159496&context=PC&vid=TAU&lang=iw_IL&search_scope=TAU_Blended&adaptor=primo_central_multiple_fe&tab=default_tab&query=any,contains,Parents%20as%20Fiduciaries&sortby=rank&mode=Basic) 81 Virginia L. Rev. 2401, 2443-2446 (1995). [↑](#footnote-ref-79)
80. Elizabeth S. Scott and Ben Chen, Fiduciary Principle in Family Law, p. 1. [↑](#footnote-ref-80)
81. *Id*. at 4. [↑](#footnote-ref-81)
82. See, Tamar Frankel, *The Rise of Fiduciary Law*, 18-18 (Boston U. Sch. L., Public Law Research Paper 2018), https://scholarship.law.bu.edu/faculty\_scholarship/345. [↑](#footnote-ref-82)
83. Paul B. Miller, *The idea of statues in fiduciary law, in* Contract, Status, and Fiduciary Law 26, 42 (Paul B. Miller & Andrew S. Gold, eds., 2016). [↑](#footnote-ref-83)
84. Ethan J. Leib, Friends as Fiduciaries, 86 Wash. U. L. Rev. 665, (2008-2009). [↑](#footnote-ref-84)
85. See at note XXXXX [↑](#footnote-ref-85)
86. *Id*. at 687. [↑](#footnote-ref-86)
87. For an interesting analogy from the realm of corporate law, see: Eli Bukspan, *The Notion of Trust as a Comprehensive Theory of Contract and Corporate Law: A new Approach to the Conception that the Corporation is a Nexus of Contract*, 2 Hastings Bus. L.J. 229, 235-236 (2006). [↑](#footnote-ref-87)
88. Ethan J. Leib, Friends as Fiduciaries, 86 Wash. U. L. Rev. 665, 691 (2008-2009). [↑](#footnote-ref-88)
89. *Id*. at 695. [↑](#footnote-ref-89)
90. XXXXXXXXX [↑](#footnote-ref-90)
91. Friends as fiduciaries, 683. [↑](#footnote-ref-91)
92. At times, he or she may even sabotage the relationship between the child and the stepparent. For a range of such situations, see: Lawrence Ganong, Marilyn Coleman, The Dynamics of Parenting in Stepfamilies in Stepfamily Relationships 109, 128 2004). Some studies have found that children tend to side with their biological parents over their stepparents, though this was in contexts other than those dealt with here. See, Judy Dunn, Thomas G. O’Connor & Helen Cheng, *Children’s Responses to Conflict Between Their Different Parents: Mothers, Stepfathers, Nonresident Fathers, and Nonresident Stepmothers*, 34 J. Clinical Child & Adolescent Psychology 223 (2005). [↑](#footnote-ref-92)
93. See below, in the section “Concluding Remark,” at note XXXX. [↑](#footnote-ref-93)
94. Ethan J. Leib, Friends as Fiduciaries, 86 Wash. U. L. Rev. 665, 722 (2008-2009). [↑](#footnote-ref-94)
95. xxxxxxxxx [↑](#footnote-ref-95)
96. Amir N. Licht, *Fiduciary Relations in the Corporation: Duty of Loyalty*, 18 Israel J. L. & Bus. 237, 252 (2014). [↑](#footnote-ref-96)
97. In as much as custody is joint and time is shared equally, or at least each side enjoys a significant portion of them, the nature of the relationship dictates a different fiduciary relationship, one that is more reciprocal, similar to Leib’s fiduciary relations between friends. [↑](#footnote-ref-97)
98. For additional dilemmas, including those related to financial support of children and allocation of times for visitations and spending time together, see: Patrycja Sosnowska-Buxton, The Complex Dynamics of Step-m-othering: A Qualitative Study (May 2014), (Unpublished Ph.D. dissertation, University of York) (on file with author). [↑](#footnote-ref-98)
99. Parents who have separated, nonetheless usually remain joint guardians of their children. [↑](#footnote-ref-99)
100. On the role of stepparents in such conflicts, see note 28 above. Case law may avoid discussing their status or assigning direct responsibility to them in the context of such disputes, but the background to these case reveals their active participation in conflicts. [↑](#footnote-ref-100)
101. Susan D. Stewart, Brave New Stepfamilies: Diverse Paths Toward Stepfamily Living, 15-16 (2007). [↑](#footnote-ref-101)
102. Data regarding a decrease in meetings between the child and the nonresidential parent in families where there is also a stepparent is presented in additional studies. See, Thomas L. Hanson, Sara S. McLanahan & Elizabeth Thomson, *Double Jeopardy: Parental Conflict and Stepfamily Outcomes for Children*, 58 J. Marriage & Fam.141, 147 (1996). [↑](#footnote-ref-102)
103. XXXXX [↑](#footnote-ref-103)
104. XXXXX [↑](#footnote-ref-104)
105. For more on this phenomenon, see: PHILIP MARCUS, PARENTAL ALIENATION, CONTACT REFUSAL AND MALADAPTIVE GATEKEEPING: A MULTIDISCIPLINARY APPROACH TO PREVENTION OF CONTACT FAILURE. [↑](#footnote-ref-105)
106. For an in-depth overview, see: XXXXX [↑](#footnote-ref-106)
107. **Richard A. Warshak,** *Remarriage as a Trigger for Parental Alienation Syndrome* 28 AM. J. FaM. Therapy 229 (2000(. [↑](#footnote-ref-107)
108. *Id*.at 233. [↑](#footnote-ref-108)
109. *Id*.at 237 [↑](#footnote-ref-109)
110. Anthony E. Atwell, Ursula S. Moore & Carla S. Nowell, *The Role of Stepparents in Child Custody Disputes*, 10 Bull. AAPL. 211( 1982). [↑](#footnote-ref-110)
111. Generally, see: Lynne Oxhorn-Ringwood, Louise Oxhorn & Marjorie Vego Krausz, Stepwives :10 Steps to Help Ex-Wives and Stepmothers End the Struggle and Put the Kids First (2002); [↑](#footnote-ref-111)
112. Audrey cade, *Parental Alienation is also a stepparent issue*, Stepparent magazine (Sept. 5, 2017)

http://stepparentmagazine.com/parental-alienation-is-also-a-stepparent-issue/ [↑](#footnote-ref-112)
113. Shamna, How Step-parent cause parent alienation, Maccabolo, https://maccablo.com/step-parents-cause-parental-alienation. [↑](#footnote-ref-113)
114. Kay Pasley, David C. Dollahite &Marilyn Ihinger-Tallman, *Bridging the Gap: Clinical Applications of Research Findings on the Spouse and Stepparent Roles in Remarriage* 42 Fam. Rel. (1993) 315,321. [↑](#footnote-ref-114)
115. *Id*. [↑](#footnote-ref-115)
116. Such gaps may already exist in the relationship between the legal parents, as a consequence of increasing rates of interfaith or mixed marriages. [↑](#footnote-ref-116)
117. These differences are sometimes found between the legal parents themselves, and at other times characterize only the differences between the stepparent and the nonresidential parent. [↑](#footnote-ref-117)
118. For more on the complexity of such conflicts in various contexts, see: Ido Shahar, *When “Mixed” Marriages Fall Apart: A Socio-Legal Perspective*, 36 J. Israeli Hist. 313 (2018); Jocelyn E. Strauber, A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable, 47 Duke L.J. 971 (1998). [↑](#footnote-ref-118)
119. Matthijs Kalmijn, *Family Disruption and Intergenerational Reproduction: Comparing the Influences of Married Parents*, *Divorced Parents, and Stepparents*, 52 Demography 811 (2015). [↑](#footnote-ref-119)
120. A birthparent has influence over the educational aspects of a child’s upbringing lies for two main reasons: first, the fact that the child’s IQ level is affected by genetics; and second, decisions about the child’s educational path, such as the institutions in which he or she will study, are usually made in collaboration with the nonresidential parent. [↑](#footnote-ref-120)
121. For an example from this case: Steven M. Zarowny, *Religious Upbringing of Children After Divorce*, 56 Notre Dame L. Rev. 160 (1980). [↑](#footnote-ref-121)
122. In the present context, the duties of the stepparent toward the nonresidential parent, but in other contexts they could also include duties of the nonresidential parent toward the stepparent. [↑](#footnote-ref-122)
123. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401, 2436-2437 (1995). [↑](#footnote-ref-123)
124. Steven M. Zarowny, *Religious Upbringing of Children after Divorce*, 56 Notre Dame L. Rev. 160, 161 (1980). [↑](#footnote-ref-124)
125. Ronald A. White, Divorce: Restricting Religious Activity During Visitation, 38 Okla. L. Rev. 284 (1985); S. E. Mumford, The Judicial Resolution of Disputes Involving Children and Religion, 47 Int'l & Comp. L.Q. 117 (1998)**.** [↑](#footnote-ref-125)
126. For example, XXXXX [↑](#footnote-ref-126)
127. Possible contradictions between different fiduciary duties is one aspect that is beyond the scope of this article: these include duties related to joint parenthood, such as the stepparent’s duties towards their partner (the residential parent) as opposed to duties towards the nonresidential parent; or, conflict between fiduciary obligations towards the child and fiduciary duties towards the other parent. For potential conflicts between fiduciary duties in another context, see: Evan J. Criddle & Evan Fox- Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, *in* Fiduciary Government 67 (Evan J. Criddle et al. eds., 2018). [↑](#footnote-ref-127)
128. XXX [↑](#footnote-ref-128)
129. XXX [↑](#footnote-ref-129)
130. See the position of the Canadian court, as presented in: S. E. Mumford, The Judicial Resolution of Disputes Involving Children and Religion, 47 Int'l & Comp. L.Q. 117, 124 (1998)**.** [↑](#footnote-ref-130)
131. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Law Duty*, 38 J. L. & Econ. 425, 438 (1993). [↑](#footnote-ref-131)
132. XXXX [↑](#footnote-ref-132)
133. XXXX [↑](#footnote-ref-133)
134. XXXX [↑](#footnote-ref-134)
135. Merle H. Weiner, Family Law for the future, p. 333. See more extensively: Merle Weiner, A Parent-Partner Status for American Family Law (Cambridge University Press 2015). p. 224-226. [↑](#footnote-ref-135)
136. Stewart pointed to this lack in, Susan D. Stewart, Brave New Stepfamilies: Diverse Paths toward Stepfamily Living (2007), XIV. [↑](#footnote-ref-136)
137. Ruth Zafran, Reconceiving Legal Siblinghood, to be published Hastings Law Journal (2020). [↑](#footnote-ref-137)
138. Ayelet Blecher-Prigat, *XXXXXXXXXX* [↑](#footnote-ref-138)
139. Merle Weiner, A Parent-Partner Status for American Family Law (Cambridge University Press 2015). [↑](#footnote-ref-139)
140. Blecher-Prigat, p. 842. [↑](#footnote-ref-140)
141. Blecher-Prigat, XXXX, p. 842. In fact, we might understand Blecher-Prigat to mean that at present there are already legal expressions recognizing the emotional aspects of the above commitment: for example, in the shaping of custody arrangements and the demand that the residential parent ensure a functioning relationship with the other parent. Ibid, p. 849. [↑](#footnote-ref-141)
142. Merle Weiner explicitly rules out expanding the joint parenthood model and the new status she has identified – the parent-partner status – to include those who are not formal legal parents. In her view, “[t]he status would only regulate the relationship of the child’s legal parents and not extend to social, functional, or psychological parents (called here “nonlegal parents”). If the law obligated nonlegal parents to a child’s legal parents, then the law might discourage nonlegal parents from caring for a child". Merle H. Weiner, Family Law for the Future, p. 339. This argument, in my opinion, is applicable only when economic obligations are at stake, and not to caretaking-emotional obligations, as proposed here. [↑](#footnote-ref-142)
143. Huntington, supra note 7 [↑](#footnote-ref-143)