

STEP-PARENT AS FIDUCIARY

by
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Does a step-parent have any obligations toward the non-resident legal parent of the child? To date, the law has been silent on this point, and the scholarship has paid little, if any, attention to it. This Article argues that the conceptual framework of fiduciary enables us to recognize, both conceptually and legally, the relationship between the step-parent and the non-resident legal parent (who, generally speaking, spends less time with the child on a day-to-day basis). The aim of this fiduciary duty is to protect the more vulnerable party (in this specific context, the non-resident legal parent) from the more powerful one (the step-parent) and to safeguard important social and familial interests, including cooperation between family members and mutual respect between them. Up until now, efforts have been made to give proper acknowledgment to the standing of the emotional and meaningful relations forged between children and their step-parents, but almost no attention has been given to the relations between the step-parent and the non-resident legal parent. This Article joins a strand of scholarship that brings fiduciary to the field of family law, adding, for the first time, a new dimension by dealing with the special relationship between the step-parent and the non-resident legal parent.

In Part I of the Article, I present the relationship between the step-parent and the non-resident legal parent, reveal the lack of its consistent regulation, and analyze the difficulties caused by this lacuna by highlighting the shortcomings of potential approaches currently found in case law. In Part II, I lay out the conceptual infrastructure that I am proposing as a fit-for-purpose response to the complexities of this relationship. I broadly explain the notion of fiduciary in private law and consider the role it has, or may have, in the family context, especially vis-à-vis the step-parent–non-resident parent relationship. In Part

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III, I present two case studies and discuss them in the context of the conceptual infrastructure offered by fiduciary law. Part IV demonstrates the application of the conceptual infrastructure offered by fiduciary law and provides the preliminary doctrinal output of my proposed framework.

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INTRODUCTION

Several years ago, a student of mine—a divorced young man with an eight-year-old daughter—told me he felt like the vulnerable party in his broken family. He was not talking about being apart from his daughter, seeing her for only a limited time each week, or having to pay the lion's share of child support. He was talking about his vulnerability vis-à-vis his ex-wife's new live-in partner—his daughter's step-father. His strong feelings about the new situation he was facing made me think, for the first time, about the relationship between legal fathers and step-fathers—a relationship that is not only unregulated by the law but that also flies completely under the radar of family law.

In a world where step-parents are so prevalent, where the composition of family units is increasingly varied, where family relations extend beyond full-blood ties or marital ties, and where families are increasingly becoming blended and complex, the time is right to question the capacity of family law to adequately address these variations and the particular protections they require. In recent years, family law scholars have indeed made attempts to address this question. Lengthier articles have dealt with parental recognition in different families; others have examined the issue of spousal recognition in the absence of formal marriage; and some have even discussed

the legal regulation of the relationship between step-parents and step-children. Yet no scholar to date, as far as I know, has dealt with the relationship between step-parents and legal non-resident parents. This Article is intended to fill this lacuna by offering an alternative normative paradigm with which family law may address the pressing complexities of 21st-century blended families: the fiduciary concept.

The concept of fiduciary can usefully contribute to a much-needed elaboration of family law and equips it to adapt to changing realities.¹ The notion of fiduciary was first explored in the context of family law in the writings of Elizabeth Scott (with others).² Building on this work, I propose that fiduciary, in the unique meaning that it may carry in family law—as distinct from the commonly-understood meaning attached to it in corporate or professional contexts³—can form legal obligations among parties that have unrecognized (but *de facto*) familial relations, such as that between legal fathers and step-fathers. In making the case for the fiduciary model in the family law context, I will examine the affinity between the step-parent and the non-resident parent, with the child “in the middle.” Typically, since even

¹ This move speaks to the call for better alignment between family law and the variety of family configurations that exist in today’s society, expressed by Clare Huntington. Although Huntington does not discuss the regulation of the specific relationship between the step-parent and the non-resident parent, her fundamental position is compatible with my 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*, at xv (2014).

² Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); Hanoch Dagan & Elizabeth S. Scott, *Reinterpreting the Status–Contract Divide: The Case of Fiduciaries*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 51 (Paul B. Miller & Andrew S. Gold eds., 2016); Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW* 227 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

³ When referring to the professional context, I mean the role of fiduciary law in regulating relations between the professional or expert (such as the lawyer, doctor, financial advisor, and the like) and the clients benefiting from their services. The corporate context refers to relationships such as trustee–beneficiary, agent–principal, corporate director–corporation, and partner–partnership. For more on the range of recognized fiduciary relationships, see Susan Dorr Goold & Mack Lipkin, Jr., *The Doctor–Patient Relationship: Challenges, Opportunities, and Strategies*, 14 J. GEN. INTERN. MED., Supplement 1, S26 (1999); Michele Goodwin, *A Few Thoughts on Assisted Reproductive Technology*, 27 L. & INEQ. 465, 475–77 (2009); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1046–47 (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).

today in most cases the primary caretaking parent is the mother,⁴ this affinity is between the mother's live-in partner—the step-father—and the child's father, who no longer lives under the same roof. It is important to note that the discussion here is equally applicable to circumstances in which the resident parent is the father and the step-parent is the step-mother and also in cases of same-sex parents. But, to simplify our exploration, I will use the example of the *father* as the non-resident parent,⁵ while the mother's live-in partner will hereafter be called “step-parent” or “step-father.”⁶

At the heart of this Article is the complex dynamic arising when parents separate and subsequently meet new partners, creating “second families.”⁷ The new partner, who is referred to in this Article as the step-parent, becomes a de-facto “third parent” to the child, albeit this parental role is not necessarily recognized. This parental figure has a significant potential influence over the child and, indirectly, over the child's relationship with the non-resident parent.⁸ At a time when so many children are raised in households with a step-parent, it is crucial, in my view, to grasp that a new legal regulation needs to be formulated—one that is appropriate to the indirect yet highly significant relationship between the non-resident parent, on the one hand, and the step-parent, on the other. As the former's relationship with his child is mediated and influenced, to a greater or lesser degree, by the latter, I contend that, in this three-way dynamic, regulation is vital for supporting the relationship between father and child, to the benefit of both.

⁴ *Table C2. Household Relationship and Living Arrangements of Children Under 18 Years, By Age and Sex: 2017*, U.S. CENSUS BUREAU: DATA (Mar. 22, 2019), <https://www2.census.gov/programs-surveys/demo/tables/families/2017/cps-2017/tabc2-all.xls>; Nicholas Zill, *More Than 60% of U.S. Kids Live with Two Biological Parents*, INST. FOR FAM. STUD.: BLOG (Feb. 3, 2015), <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).”).

⁵ It is important to emphasize that being the non-resident parent does not render the father a “second-best” parent. He is still a legal parent, with equal guardianship, and often shares significant physical custody with the other parent.

⁶ On the choice to use the term “step-parent,” and the meaning of “step-parent” in the context of this Article, see text accompanying note 17.

⁷ As I shall explain in the next Section, identification as a step-parent does not necessarily entail remarriage, but simply a relationship that features cohabitation. Furthermore, this Article will 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 different scenarios addressed in this Article, see text accompanying note 15.

⁸ See Part I.

No formal legal relationship exists between the step-parent and the non-resident parent, according to present-day conventional legal categories. Furthermore, we must remember that the non-resident parent did not choose to have the step-parent in his life. Hence, in this sense, there are no contractual relations between the two parties.⁹ Nor does their relationship constitute an identifiable “status.”¹⁰ However, the introduction of the step-parent into the family creates, in practice, an affinity between them, since the influence of the step-parent over the child’s life can be far-reaching; crucially, it can extend to the child’s relationship with the non-resident parent, who is de facto affected by the behavior and actions of the step-parent.¹¹ This Article will address this scenario through two examples. The first concerns behavior on the part of the step-parent that results in turning the child against the non-resident parent. The second refers to the behavior and lifestyle of the step-parent—a lifestyle to which the child is exposed and, by implication, in which he or she participates—when this constitutes an affront to the religious beliefs of the non-resident parent. The contribution of the present Article is that it focuses on the role of the step-parent—now such a ubiquitous figure in present-day families—as a party to these common conflicts.

Since the law does not recognize the legal affinity between the step-father and the non-resident legal parent (the father) and, therefore, does not impose upon the former any obligations toward the latter, I propose that a fiduciary approach is well placed to address this lacuna. To illustrate this, I will apply the fiduciary framework to the two case studies I examine, where it sets the obligation (1) not to incite the child against the non-resident parent (in the context of the first case) and (2) to avoid behavior that violates the religious principles of the non-resident parent (the second case).

The present Article does not argue that existing law cannot address such scenarios. Existing law can indeed provide some remedies through alternative legal grounds, such as parental rights, on the one hand, and the best interests of the child,

⁹ It may be argued, on the contrary, that when the couple breaks up (willingly or not), the legal father is aware that his former partner (the resident parent) may well become involved in a new relationship at some point. One may further argue that the separation in itself constitutes an implied agreement to this situation. These arguments may not be sufficiently compelling. Similarly, and here the argument has greater force, entry into a relationship with a person known to be a resident parent implies agreement with the said situation, including the roles it entails.

¹⁰ For the classical definition of legal status, see *Dunham v. Dunham*, 57 Ill. App. 475, 496–99 (1895); R. H. GRAVESON, *STATUS IN THE COMMON LAW* 2 (1953). For a more up-to-date definition, see Geoffrey MacCormack, *Status: Problems of Definition and Use*, 43 CAMBRIDGE L.J. 361 (1984).

¹¹ For a fascinating observation that sees fiduciary as an alternative to contract and status, and as a more highly-developed social and legal option, see Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983). Naturally, this has little to do with the question of what constitutes the basis of fiduciary relations—whether contract-based or status-based.

on the other. Furthermore, an additional remedy might be based on the obligations of the resident parent toward their former partner (the non-resident parent). However, I will demonstrate why these legal foundations are far from optimal and how the proposed fiduciary concept, in the sense presented here, may be developed into a more appropriate model for responding to the issues described, as well as to other issues beyond the step-parent–non-resident parent relationship that characterizes so many families (and family law) today.

Part I of the Article examines the relationship between the step-father and the non-resident legal parent. I discuss the potential impact of the step-father's attitudes and behaviors on the non-resident parent and present their complex relationship in the context of the blended family. This Part introduces possible alternatives for regulating the relationship between them, including parental rights, on the one hand, and the child's best interest standard, on the other. Both of these avenues are recognized in the law in other contexts, but in this context, I argue that they are less suitable than a fiduciary approach.

After the relationship between the step-father and the non-resident legal parent is presented and the shortfalls in its regulation become clear, in Part II I lay out the conceptual infrastructure that I am proposing as a fit-for-purpose response to the complexities of this relationship. I broadly explain the notion of fiduciary in private law and consider the role it has, or may have, in the family context, especially vis-à-vis the step-parent–non-resident parent relationship. To do this, I draw on fiduciary law as formulated in private law generally, and as inspired by the writing of Elizabeth Scott and others in the arena of family law specifically.

In Part III, I present the two selected examples and discuss them in the context of the conceptual infrastructure offered by fiduciary law. Part IV adds the applicable aspect, and the last Part presents two final remarks in lieu of a conclusion.

In short, the purpose of this Article is to conceptualize the relationship between the step-parent and the non-resident parent (a relationship that has not yet been framed in law), and to provide a preliminary infrastructure for thinking about the obligations that apply between them in our context—those of the step-parent (step-father) toward the non-resident parent (legal father). This discussion can only be tentative at this stage and does not claim to resolve the tensions or define the appropriate response. Rather, it is intended to serve as an outline for further studies.

I. MULTIPLE PARENTS AND THE RELATIONSHIP BETWEEN THE STEP-PARENT AND THE NON-RESIDENT FATHER: AN UNREGULATED REALITY

The changing reality of family formation in recent decades has generated a variety of relationships in which children reside with parental figures who are not their

legal parents, usually alongside one of their two legal parents.¹² Despite the growing scope of joint custody arrangements, there remain many cases in which a child lives with one key resident parent¹³ and their partner, whom I denote here the “step-parent.” In addition, there is often another parent involved, living elsewhere, with whom the child has a certain degree of contact. Even where that relationship is considerable, it is nonetheless not as extensive, in the day-to-day sense, as that between the child and his or her resident parent.¹⁴

Such circumstances could be the outcome of two broad situations: the child’s parents (whether they used to be married or were 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 parent and their present partner maintains a relationship with his or her other parent. In light of increasing divorce rates, on the one hand, and the large volume of children born outside of marriage or a recognized relationship, on the other hand, the number of children living in such situations is quite significant,¹⁵ although the precise extent of this phenomenon is difficult to estimate.¹⁶

A preliminary terminological clarification is required at this point regarding the label “step-parent.”¹⁷ This term can have negative connotations, and for this reason,

¹² June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI-KENT L. REV. 9 (2017). For an in-depth discussion of step-families, see MARGARET M. MAHONEY, *STEPFAMILIES AND THE LAW* (1994).

¹³ See *supra* note 6.

¹⁴ Less significantly, yet still relevant, even under circumstances of joint custody (when both the mother and father share the same amount of time with their child), the step-father may nonetheless be in a position of relative power vis-à-vis the father. As long as the two parents are not living together and one of them is involved in a new, stable relationship, the step-parent may spend a significant amount of time with the child and assume a significant and influential role in his or her life. For more on the argument that residence with the child creates a substantial advantage in general, see Pamela Laufer-Ukeles & Shelly Kreiczler-Levy, *Family Formation and the Home*, 104 KY. L.J. 449, 485, 490–92 (2016).

¹⁵ For partial numerical estimates, see *National Stepfamily Day: September 16, 2021*, U.S. CENSUS BUREAU: NEWSROOM, <https://www.census.gov/newsroom/stories/stepfamily-day.html> (Oct. 8, 2021). A broad estimate claims “60% of all Americans will be a part of a stepfamily at some point in their lives.” See Marilyn Coleman, Mark A. Fine, Lawrence H. Ganong, Kimberly J.M. Downs & Nicole Pauk, *When You’re Not the Brady Bunch: Identifying Perceived Conflicts and Resolution Strategies in Stepfamilies*, 8 PERSONAL RELATIONSHIPS 55, 55 (2001).

¹⁶ For more on the difficulties in arriving at a quantitative estimate, see SUSAN D. STEWART, *BRAVE NEW STEPFAMILIES: DIVERSE PATHS TOWARD STEPFAMILY LIVING* 15–16 (2007).

¹⁷ The accepted terminology usually identifies a “step-parent” as the person married to the resident parent. See Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 81–83 (2006).

it would have been preferable to use another expression.¹⁸ However, in view of the term's prevalence, and to avoid the need to define its exact legal status and the distinctions (if any) between a de facto parent, a psychological parent, a functional parent, and a parent who is formally recognized as a parent or not¹⁹ (all distinctions that are actually irrelevant to my argument), I will preserve the term "step-parent." In fact, for the purposes of this Article, the step-parent may not be recognized as having any formal legal relationship with the child. In the case of a step-father, this definition, as employed here, simply describes the fact that he is the partner of the resident legal parent, living with her and with the child in the same household, helping to raise the child, and maintaining a meaningful relationship with that child.²⁰ Furthermore, although it is customary to identify as step-parents only those who are married to the legal parent,²¹ for our purposes and in light of the demographic changes that characterize our time,²² "step-parent" will refer to the partner of the parent with custody, even if they are not married.²³ The fact that the co-parent lives in the same household and takes part in raising the child is the relevant factor for our purposes. After all, it is not the formal definition that is important, but the potential influence that the step-parent has on the child and his or her behavior and way of life. Given that this figure (even if not legally recognized as a formal parent or guardian) will be defined here as a "step-parent," in practice a variety of parental figures, whose legal definitions may be quite different, fall under

¹⁸ For the negative stigmas attached to the term "step-parent," 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. RELS. 315, 317 (1993).

¹⁹ For different definition of parenthood, see Lindsay 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 UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017). See also Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J.F. 589 (2018); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419 (2013).

²⁰ The decisive factor is not the romantic relationship between the mother and her new partner, but rather the fact that this person plays a major part in the child's upbringing. There are other people who could arguably fulfill the same role, such as grandparents who live with the custodial parent. They may operate in many ways like the step-parent described here. I chose in this Article to focus on the step-parent in light of the high prevalence of the phenomenon.

²¹ Susan Maidment, *The Step-Relationship and Its Legal Status*, 5 ANGLO-AM. L. REV. 259, 259–60 (1976); MAHONEY, *supra* note 12, at 2–3, 7.

²² Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 55–56 (2007).

²³ In this context, see the model proposed by Stewart, which would also include under the definition children born to unmarried parents and those living with parents whose new partnership does not entail marriage, STEWART, *supra* note 16, at 14–20.

the umbrella term “step-parent” used in this Article. This variety extends the boundaries of the phenomenon and makes it difficult to assess its exact scope.²⁴

Substantively, too, there may be variation in the nature of the relationship between the step-parent and the child, regardless of the formal legal status of the former. The precise type of step-family out of the wide range that exists,²⁵ the age of the child in question, the stage at which the step-father joins the family, the length of time he has been a step-parent to the child, and the non-resident parent’s degree of direct involvement in the child’s life can all dictate differences in the extent of the step-father’s influence over the child and his relationship with the non-resident legal parent.²⁶

The scholarly literature is divided over the extent of the influence that step-parents have on children in general.²⁷ A dominant traditional position argued that a step-father living with the resident mother and her child has *no* significant effect on child outcomes.²⁸ However, other scholars reject this belief: “[W]e 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,”²⁹ and offer as examples the range of roles played by the step-father and the influences he exerts over the child and the entire family.³⁰

It seems that the difficulty in defining the step-parent’s place in a child’s life stems not only from the great variation in types of step-parenting roles but also from the absence of norms concerning the role they are *expected* to perform.³¹ Furthermore, it may be assumed that traditional attitudes toward the limited role of *fathers*

²⁴ This complex phenomenon is difficult to measure as it is. See *id.*; *supra* text accompanying notes 16–17.

²⁵ At least fifteen types of step-families have been identified. See Coleman et al., *supra* note 15, at 55.

²⁶ Belcher-Prigat 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 MISHPATIM—HEBREW U. L. REV. 5 (2010) [Hebrew]. See also Mahoney, *supra* note 17, at 97–98; Mary Ann Mason, Sydney Harrison-Jay, Gloria Messick Svare & Nicholas H. Wolfinger, *Stepparents: De Facto Parents or Legal Strangers?*, 23 J. FAM. ISSUES 507, 508–509 (2002); LAWRENCE H. GANONG & MARILYN COLEMAN, *The Dynamics of Parenting and Stepparenting*, in STEPFAMILY RELATIONSHIPS: DEVELOPMENT, DYNAMICS, AND INTERVENTIONS 109, 121 (2004); Pasley et al., *supra* note 18, at 317.

²⁷ See, e.g., Charity Perry-Fraser & Rick Fraser, *A Qualitative Analysis of the Stepparent Role on Transition Days in Blended Families*, 6 OPEN J. SOC. SCI. 240, 241–42 (2018).

²⁸ “The empirical literature generally has concluded that stepfathers have little or no effect on child outcome.” GANONG & COLEMAN, *supra* note 26, at 123 (quoting Lynn White & Joan G. Gilbreth, *When Children Have Two Fathers: Effects of Relationships with Stepfathers and Noncustodial Fathers on Adolescent Outcomes*, 63 J. MARRIAGE & FAM. 155, 156 (2001)).

²⁹ *Id.*

³⁰ *E.g., id.* at 128–34.

³¹ *Id.* at 123–24.

as caregivers, in general, have influenced how the image of *step-fathers* has been shaped. It can also be assumed that the role has changed with the passage of time and with the evolution of the role of fathers in the family, toward today's common model of fathers who are markedly more "hands-on" and emotionally involved with their children than in previous generations.³²

This phenomenon—the large number of children with a step-parent in their lives in addition to their legal parents, all of whom influence the child in different ways—gives rise to a potentially complex reality. This phenomenon has not, to date, benefited from an exhaustive legal discussion, and, critically, nor has the parents' relationship 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.³³ 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 step-parent takes an active part in the conflict.³⁴ The limited attention it has received does not testify to the absence of this reality from our lives—far from it. Each time I presented early drafts of this Article in professional forums, the audience flooded me with real-life examples of the complexity of the relationship between the step-parent and the non-resident parent and of the conflicts to which they were exposed in this context, all of which related to the phenomenon I 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 step-families:

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.³⁵

³² It is interesting that step-mothers are characterized differently from step-fathers, both because the latter usually live separately from the children, and also because of the different social roles of men and women and society's different expectations of them. For more on step-mothers, see Patrycja Sosnowska-Buxton, *The Complex Dynamics of Step-mothering: A Qualitative Study* (May 2014) (Ph.D. thesis, University of York) (on file with author).

³³ See *infra* text accompanying notes 34–45.

³⁴ See, for example, the case descriptions in the following verdicts, reflecting different types of conflicts between parents and the involvement of step-parents: *Gilliam v. Jones*, No. 01A01-9801-CH-00031, 1998 WL 888931 (Tenn. Ct. App. Dec. 22, 1998); *In re the Marriage of Beverly Robin Rosenfeld and Martin Sanford Rosenfeld*, 524 N.W.2d 212 (Iowa Ct. App. 1994); *Schroedel v. Bumgarner*, No. E2009-02299-COA-R3-CV, 2010 WL 4024931 (Tenn. Ct. App. Oct. 13, 2010); *Sanders v. Rosenberg*, 930 P.2d. 1144 (N.M. 1996).

³⁵ Coleman et al., *supra* note 15, at 57 (internal citation omitted).

While the law, in its present form, does have some tools at its disposal for dealing with such potential conflicts between the step-parent and the non-resident parent, these are far from optimal. Broadly speaking, the three types of tools are: (1) the doctrine of parental rights, under family law; (2) the doctrine of the child's "best interests," again under family law; and (3) regulation of the relationship between the legal parents, with the onus on the resident parent to protect the child's relationship with his or her non-resident parent. I contend that each of these alternatives falls short in one way or another.

According to the first alternative, the legal parent and his or her rights are the focus of family law. In the case that interests us, then, if the behavior of the step-father is deemed to infringe the legal (non-resident) father's rights vis-à-vis the child, this should be dealt with accordingly, using the appropriate legal measures. However, the doctrine of parental rights, which was deeply enshrined in American law,³⁶ has been undermined in recent years, partly because of its (conceptual and practical) harm to children and *their* rights.³⁷ The reasoning behind critiquing the implementation of parental rights as the basic infrastructure in our context is compound. One aspect of this critique is that, in the context of the relationship between the step-parent and the non-resident parent, a legal solution that is based on parental rights—as shaped by the spirit of the liberal and adversarial legal discourse—tends to exacerbate the conflictual and polarizing components, and thus further 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 a duty of the step-parent, and the outcome from the step-parent's perspective is damaging. Thus, a "victory" for one is experienced as a "defeat" for the other.³⁸ This conceptualization often misrepresents reality—or at least undermines the normative aspiration to shape reality—as an arena of shared interests and responsibility rather than of conflict. Another, perhaps more powerful, critique 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.³⁹ According to this critique,

³⁶ Denise A. Skinner & Julie K. Kohler, *Parental Rights in Diverse Family Contexts: Current Legal Developments*, 51 FAM. RELS. 293, 293–94 (2002); Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 655–56 (2002). Also, see case law from *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

³⁷ For an exhaustive review of these critiques, see Scott & Scott, *supra* note 2, at 2405–14. See also Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1471 (2018).

³⁸ See Scott & Scott, *supra* note 2, at 2401 (noting, in the context of the interests of parents and children, conflicting interests often result in "greater recognition of one interest [which] means diminished importance to the other.").

³⁹ Dailey & Rosenbury, *supra* note 37, at 1471; Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 8, 19 (2015).

even when the child is not a formal party to the conflict, the formulation of the existing violation as an infringement of the legal parent's rights (who, in our context, does not live with his child) actually means an infringement of the "parent's rights *in the child*." In other words, the infringement is framed in terms perfectly suited to assets or property. Upholding the concept of parental rights in this way therefore actually diminishes the child, reducing him or her to an object *owned by* the parents. My proposed focus on fiduciary relations as an alternative would be a successful means of assuaging concerns about the emphasis being on the parent and parental rights.⁴⁰

The second alternative, aligned with current trends in placing the child at the center of family disputes, tackles the potential conflict between the step-parent and the non-resident parent from the perspective of the child's best interest. This approach can be used to attempt to establish a standard of behavior between these two parental figures that is acceptable *from the child's perspective* and based on protecting his or her wellbeing. 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 non-resident parent (such as insulting or demeaning comments by the step-father that defame the legal father, including comments based on untruths and fabrications). The child should also be allowed to maintain a healthy and meaningful relationship with the legal father. 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 standard in family law.⁴¹

However, this infrastructure is also problematic for several reasons. First, and fundamentally, relying on the best interests of the child does not produce a clear and definitive normative standard.⁴² The principle of the child's best interests is non-specific, and its deployment, as has been argued in the literature, may even be manipulative.⁴³ Second, even if we can evaluate the child's best interest, it would appear to be necessary to separate the parental interest—the interest of the non-

⁴⁰ See Dagan & Scott, *supra* note 2, at 62–64.

⁴¹ For an alternative approach that places the emphasis on the child's rights, see Barbara Bennett Woodhouse, "Out of Children's Needs, Children's Rights": *The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 321–22, 328–29 (1994); Barbara Bennett Woodhouse, *Children's Rights*, in HANDBOOK OF YOUTH AND JUSTICE 377, 399–400 (Susan O. White ed., 2001) [hereinafter Woodhouse, *Children's Rights*]; Ruth Zafran, *Children's Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER SOC. POL'Y & L. 163, 181–85 (2010). For a critique of this approach, see Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 281–85 (1995); Zafran, *supra* note 41, at 185–92.

⁴² Emily Buss, *Children's Associational Rights?: Why Less Is More*, 11 WM. & MARY BILL RTS. J. 1101, 1102 (2003); Zafran, *supra* note 41, at 178–79.

⁴³ Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 370–71, 373 (2008); Zafran, *supra* note 41, at 180.

resident parent to protect his relationship with the child, in and of itself—from the child’s interests. This is important, 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. And third, combining these reasons, putting the child and his or her interests and rights in the middle of the dispute may place him or her in conflict with the resident-parent—or, no less problematic, at the center of an adult battlefield, in which each side attempts to “recruit” the child to support their stand. But it is a mistake to conceive of this conflict as a conflict between the child (and his interests and rights) and the parent. Rather, the level of relationship that is relevant to legal arrangements is that between the step-parent and the non-resident 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 step-parent to the obligations of his partner, the resident parent, and to impose upon her (rather than on him) the obligation to maintain and protect the relationship between the non-resident parent and the child. Although we can identify a legal relationship between the separated parents and impose mutual obligations between them (even years after their separation), certainly as far as their relationship with their child is concerned, and as is indeed the case when appropriate,⁴⁴ it is unacceptable to allow the step-parent to “hide” behind the resident parent. Such a conceptualization diminishes the role of the step-parent in the child’s life and his significance as an individual with a separate and distinct relationship with the child and, indirectly, with the non-resident parent. Only recognition of the direct relationship between the step-parent and the non-resident parent will allow for a full and exhaustive resolution of the consequences of the former’s behavior and provide the legal redress appropriate to meet the needs of a complex family configuration.

The fiduciary alternative I offer in this Article successfully integrates the interests of the parties more appropriately. As Hanoch Dagan and Elizabeth Scott explain, in a different family context:

[T]he 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

⁴⁴ At least to a certain extent. See Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 *FORDHAM L. REV.* 539, 558 (1990); Scott & Chen, *supra* note 2, at 227–28, 235–36.

parenthood is grounded not in parents' rights, but rather in parents' obligation to serve the child's best interest.⁴⁵

If our judicial systems were to adopt the fiduciary framework, this would convey a critical message signaling the need to take special care to protect relations in more complex family contexts or configurations. This framework would specifically ascribe a high degree of importance to cooperation between the parents (be they the formal parents or additional significant figures in the child's life that fulfill parental functions). It would also provide a legal space better suited to accommodating today's myriad varieties of family forms and different parental figures in the child's life, while protecting the child's relationship with these figures and treating family relationships with due respect. To better understand how I arrive at this conclusion, we will now look more closely at the fiduciary concept and the fiduciary infrastructure upon which the relationship between the step-parent and a non-resident parent can be established.

II. THE POTENTIAL ROLE OF FIDUCIARY IN FAMILY LAW

Having examined something of the social reality that gives rise to families in which there are indirect but significant relationships between non-resident parents and step-parents, and noting that the existing legal tools are ill-equipped to regulate these relations and the potential conflict they embody, let us now turn to the proposed new model for regulation: the fiduciary model. In the first Section of this Part, I will present the characteristics of fiduciary in general and as recognized in private and commercial law, and introduce the possibility of extending the conceptual boundaries of fiduciary to the legal regulation of family relations. In the second Section of this Part, I will scrutinize more closely the implications of applying fiduciary law to the unique realm of family law.

A. Fiduciary: Different Realms, Common Values

While fiduciary has no universally accepted definition, there are certain features and nuances to which we can point as characteristic of all fiduciary relationships. As Sealy notes in his 1962 article, *Fiduciary Relationships*:

The word "fiduciary," we find, is not definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied.⁴⁶

⁴⁵ Dagan & Scott, *supra* note 2, at 63 (quoting Scott & Scott *supra* note 2, at 2406).

⁴⁶ L.S. Sealy, *Fiduciary Relationships*, 20 CAMBRIDGE L.J. 69, 73 (1962).

Given the absence of a single accepted definition, perhaps it is more helpful to talk about the purpose of the fiduciary obligation, the framework of its application, and its requirements, preferably in a specific context. Several different scholars throughout the Anglo-American law system, in North America, England, and Israel alike, have pointed to the connection between power and trust (as a somewhat equivalent concept to fiduciary). Sealy stated that the principle of trust is applicable to every situation where someone has power and control over another.⁴⁷ Referring both to Sealy and to Frankel,⁴⁸ Justice Barak argued:

[T]he power [should] 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.⁴⁹

While they were dealing with corporate and commercial contexts, they mentioned, “The list of situations to which trust relationships pertain is not a closed list, and they pertain ‘to a wide range of legal relationships.’”⁵⁰

The purpose of protecting the “vulnerable” party is repeated in a variety of definitions of the commercial or professional fiduciary role. Thus, for example, 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.”⁵¹ Similarly, Paul Miller identifies the fiduciary’s discretionary power as the central element in the definition of fiduciary: “[A] fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary).”⁵² Miller further highlights the principles derived from fiduciary law in the context of relationships, enabling coordination and social and

⁴⁷ L.S. Sealy, *The Director as Trustee*, 25 CAMBRIDGE L.J. 83 (1967).

⁴⁸ Frankel, *supra* note 11, at 798–99.

⁴⁹ CA 817/79 Kossoy v. Bank Y.L. Feuchtwanger Ltd., 38(3) PD 253, sec. 48 (1984) (Isr.), <https://versa.cardozo.yu.edu/opinions/kossoy-and-filco-v-bank-feuchtwanger-ltd> (English translation).

⁵⁰ *Id.* (citation omitted).

⁵¹ Hanoach Dagan, *Fiduciary Law and Pluralism*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 833 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019). On relations of authority, see more generally, Galia Schneebaum, *Making Abuse Offenses in the Modern Criminal Law*, 4 CRITICAL ANALYSIS L. 42, 47–48, 52 (2017).

⁵² Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. (SPECIAL ISSUE) 969, 1011 (2013) [hereinafter Miller, *Justifying*] (quoting Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 262 (2011) [hereinafter Miller, *A Theory*]).

economic cooperation.⁵³ In this sense, the value of fiduciary transcends a single concrete relationship and is intended to promote valuable social ends:

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 generated. 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.⁵⁴

These goods are also relevant—perhaps even more so—in the realm 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 [sic] reigns, might better remember that freedom should not include what fiduciary law prohibits.⁵⁵

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 Frankel's writing, unlimited power leads to tyranny. And tyranny, after all, is the very contradiction of liberty.

The infrastructure of trust and cooperation of which Frankel speaks, which helps sustain what could be a highly problematic relationship—that is, one in which asymmetrical power exists—offers us a helpful preliminary conceptual foundation

⁵³ Paul B. Miller, *New Frontiers in Private Fiduciary Law*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW* 891 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

⁵⁴ *Id.* at 899. Eli Bukspan, who deals at length with the role of trust as a social and legal norm, emphasizes its importance as a means of achieving “universal goals of cooperation, risk-taking, and fulfillment of reasonable expectations.” 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) (emphasis omitted).

⁵⁵ Tamar Frankel, *The Rise of Fiduciary Law* 11 (B.U. Sch. L., Pub. L. Research Paper No. 18-18, 2018), https://scholarship.law.bu.edu/faculty_scholarship/345.

for the fiduciary relationship between the step-parent and the non-residential parent. Through the role the step-parent plays in the child's life, he has discretionary power in relation to the non-residential parent. In comparison, the non-resident parent, in the context addressed by this Article, is the vulnerable party. We can also see, taking Frankel's perspective, that 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.⁵⁶

In light of the aforementioned characteristics of the step-parent-non-resident parent relationship and its power dynamics, a casuistic approach may enable this relationship to be recognized as fiduciary in nature. The casuistic approach allows for the recognition of new and different affinities as fiduciary relations, in an evolutionary development by way of analogy from fiduciaries that are already established.⁵⁷ A "jurisprudence of analogy," as DeMott terms it,⁵⁸ is an approach that offers flexibility in formulating or establishing the fiduciary dyads that will be subjected to the duties of trust 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, including in the case of relationships with family members such as former spouses. The key test in such identification is the power resting with the fiduciary party and the vulnerability of the other. In this sense, "the requirement of trust is an essential legal response to situations of power."⁵⁹

But let us consider for a moment some possible critiques of this move. Amir Licht,⁶⁰ for example, contends that⁶¹ the casuistic stance—which was supported by Canadian Supreme Court rulings⁶² but has since (according to Licht's interpretations) been rejected—is overly vague and may lead to the dilution of the institution and the obligations derived from it.⁶³ Licht therefore supports the *conceptual* approach, which is more restrictive.

⁵⁶ See *infra* text accompanying notes 91–107.

⁵⁷ Amir N. Licht, *Fiduciary Relations in the Corporation: Duty of Loyalty*, 18 L. & BUS. (I.D.C. L. REV.) 237, 243 (2014) [Hebrew].

⁵⁸ Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879 (1988).

⁵⁹ *Id.* at Licht, *supra* note 57, at 250–51 (translation provided by author). However, Licht reiterates that power (which creates the accompanying vulnerability) is not in itself enough to establish fiduciary duty.

⁶⁰ See generally AMIR N. LICHT, *FIDUCIARY LAW: THE DUTY OF LOYALTY IN THE CORPORATION AND IN THE GENERAL LAW* (2013) [Hebrew].

⁶¹ Licht, *supra* note 57, at 243, 246.

⁶² "It is the nature of the relationship, not the specific category of actor involved, that gives rise to the fiduciary duty." *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 384 (Can.).

⁶³ Licht, *supra* note 57, at 250–51.

According to Licht, Miller,⁶⁴ Edelman,⁶⁵ and Conaglen,⁶⁶ in order to recognize a fiduciary relationship, the conceptual approach requires an *undertaking* to be identified. In contrast to a contract, which requires agreement between the two parties, the undertaking approach asserts only the fiduciary obligation toward the beneficiary, including implicit undertaking. In our context, the entry of the step-parent into the family does not derive from the consent and wishes of the non-resident parent, and therefore, under these circumstances, it is not possible to recognize a contractual relationship between them, but the step-parent does decide to join a family system consciously and of his free will—and in so doing takes it upon himself to perform special obligations. He is entering into a spousal-family relationship with a partner who has children from a previous relationship, with all that this entails. In other words, he acquires obligations toward his partner's children, and toward their other (non-resident) parent.

However, the understanding of the conceptual approach as being based on the premise of an undertaking is not the only known approach in the context of fiduciary law.⁶⁷ Lionel Smith, for example, emphasizes that fiduciary relationships may be based on a *status*, rather than on the existence of a contract or voluntary unilateral consent. Accordingly, as Miller observes regarding Smith's position, fiduciary status "may be founded irrespective of mutual consent, and that status prefigures judicial construction of fiduciary relationships."⁶⁸ Or, as Smith himself states explicitly: "[I]t is *not* the case that all fiduciary obligations can be understood as arising voluntarily."⁶⁹

Dagan and Scott propose a solution to the debate over the legal relationship between the trustee (fiduciary) and the beneficiary, 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 the two can be found a range of legal institutions whose diversity may be a combination of contract *and* status. After all, contracts include relational contracts,⁷⁰ and on the spectrum between contracts and statuses, "offices" (office-holders)⁷¹ can be located toward the

⁶⁴ Miller, *A Theory*, *supra* note 52.

⁶⁵ James Edelman, *When Do Fiduciary Duties Arise?*, 126 L.Q. REV. 302 (2010).

⁶⁶ MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 33–36 (Thomas Bull & Lars Pehrson eds., 2010).

⁶⁷ In a different context, see Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513 (2015).

⁶⁸ Miller, *supra* note 53, at 895.

⁶⁹ Lionel D. Smith, *Contract, Consent, and Fiduciary Relationships*, in CONTRACT, STATUS AND FIDUCIARY LAW 117, 128 (Paul B. Miller & Andrew S. Gold eds., 2016).

⁷⁰ Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1230–31 (1998).

⁷¹ "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.

status end. Thus, the contract–status dichotomy is already blurred, as Miller notes: “[F]iduciary relationships vacillate between poles of contract and status, occupying the mediating terrain of offices and relational contracts.”⁷²

Therefore, a formal contractual relationship is not necessarily required for the application of fiduciary law; such associations can be recognized in the context of relationships and under the patronage of offices.⁷³ Or, in the words of Dagan and Scott: “Within fiduciary law we can find both offices and contract types, as well as intermediate configurations between these ideal types.”⁷⁴

To state my position, while it may be possible to expand the fiduciary step-parent–non-resident parent relationship on the basis of the *casuistic* approach, I propose the move of expansion according to the *conceptual* approach. One possible conceptual basis is that of the *undertaking*, recognizing, as mentioned above, the step-parent as a fiduciary based on his implicit undertaking of responsibility toward the non-resident parent. Another is the *status* approach—that is, recognizing the step-parent as fiduciary according to his or her status. I am mindful, however, of another difficulty raised by the approach that calls for status in order to recognize the fiduciary relationship. The issue here is that the relationship between a step-parent and a non-resident parent is not even a recognized status and has not yet been acknowledged as a legal relationship of any sort. This legal recognition therefore constitutes the threshold that I call us to cross. In an analogy to Amnon Reichman’s approach,⁷⁵ it is possible to conceptualize this relationship as a status in the functional sense.⁷⁶ In an article dealing with the right to dignity as membership in the moral community, Reichman writes:

Membership of the community of moral agents, and the resulting demand to refrain from infringing the expressions of this membership, is not merely an abstract matter to be discussed theoretically as if a person were detached from the empirical existence of her life or exists in a vacuum Civil society, in which the community of moral agents is realized, enables its members to act through (but not only through) various roles (or statuses) Thus, in civil

The nature of that office will then accent and shape all the relevant duties of the officeholder” Dagan & Scott, *supra* note 2, at 57 (quoting Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 39, 42–43 (Andrew S. Gold & Paul B. Miller eds., 2014)).

⁷² For an evaluation of Dagan & Scott’s interpretation, see Miller, *supra* note 53, at 895.

⁷³ Paul B. Miller & Andrew S. Gold, *Introduction*, in CONTRACT, STATUS, AND FIDUCIARY LAW 1, 8 (Paul B. Miller & Andrew S. Gold eds., 2016) (discussing Dagan & Scott, *supra* note 2).

⁷⁴ Dagan & Scott, *supra* note 2, at 62.

⁷⁵ See Amnon Reichman, *Omnipresent Dignity: The Right to Human Dignity as Membership in the Community of Moral Agents*, 7 MISHPAT UMIMSHAL 469 (2005) [Hebrew].

⁷⁶ In this sense, the approach is similar to that proposed by Dagan. See Dagan, *supra* note 51, at 844–45.

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. By virtue of these statuses—roles or “hats”—members of society can relate to one another and society as a whole, claim rights, and be subjected to obligations toward those in contact with them (or those in their “proximity”) and toward society as a whole. These social roles—statuses—define and are defined by the relationships in which the holder of the role participates when acting within the framework of his role.⁷⁷

Furthermore, he observes:

When we form a relationship 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 rationale underlying the relationships between the status and another status Treatment of another in a manner inconsistent with the respective roles people assume toward one another means, in practice, that one person deprives another of the status that this person inhabits Such treatment violates the right to human dignity⁷⁸

It is possible for one of two roles to be harmed in this context. The first is direct harm to the role–relation between a step-parent and a non-resident parent—the role–relation that is presented as an innovation in this Article; and the second is harm, provoked indirectly by the behavior of the step-parent, to the relationship between the non-resident parent and the child, which is a role–relation well-established in the law (parent–child). It is important to note that this parent–child relation was identified by Elizabeth Scott and Robert Scott as a fiduciary status.⁷⁹

⁷⁷ Reichman, *supra* note 75, at 495 (translation provided by author).

⁷⁸ *Id.* at 497 (translation provided by author).

⁷⁹ Scott & Scott, *supra* note 2, at 2401. Somewhat parallel ideas can be found in a comment published in 1978. Connie K. Beck, Greta Glavis, Susan A. Glover Mary Barnes Jenkins & Richard A. Nardi, Comment, *The Rights of Children: A Trust Model*, 46 *FORDHAM L. REV.* 669, 751–52 (1978). For a more recent example, see Lionel Smith, *Parenthood Is a Fiduciary Relationship*, 70 *U. TORONTO L.J.* 395, 420 (2020). Another possible approach, which could overcome the difficulty of deriving a direct fiduciary obligation between the step-parent and the non-resident parent, argues that these relations are relations of “derivative fiduciary.” In other words, the relationship of each parent (and certainly the legal parent, as noted by Scott & Scott) can be identified as containing a fiduciary duty toward the child. Together, the step-parent and the non-resident parent are joint fiduciaries, and their horizontal relationship may be perceived as a derivative fiduciary to one another. In a different context, see Asaf Eckstein & Gideon Parchomovsky, *Toward a Horizontal Fiduciary Duty in Corporate Law*, 104 *CORNELL L. REV.* 803, 844–45 (2019).

B. Fiduciary Relations and the Blended Family

Although fiduciary trust is well established in two major realms—the commercial—economic (including corporate law and the law of agency) and the professional (such as between lawyer and client and between doctor and patient)—in some of her works written with others since 1995, Elizabeth Scott has proposed that the fiduciary framework be expanded to include close family relationships.⁸⁰ Although the relationship between a step-parent and a non-resident parent is inherently different from the family dyads described by Scott, I believe it may be conceptually suited to the fiduciary framework and benefit from it, as I shall argue in this Section.

My examination here—of the extent to which established models of fiduciary from other common contexts (including in family relationships, as proposed by Scott and others) are compatible with the specific case of the step-parent–non-resident parent relationship—is illuminated by the work of Ethan J. Leib. Leib claimed, “[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”⁸¹ My proposal also draws on insights from Dagan, who argues that 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 that it is impossible to speak of “fiduciary law” as a whole. And although, even before being expanded to the unique realm that is the focus of this Article, the fiduciary model is expressed differently in each of the contexts in which it is applied, it nevertheless functions under the same conceptual umbrella.⁸² In particular, Dagan asserts that 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

⁸⁰ Scott & Scott, *supra* note 2, at 2401; Dagan & Scott, *supra* note 2, at 52, 63; Scott & Chen, *supra* note 2, at 245, 248.

⁸¹ Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 672 (2009).

⁸² See, e.g., Frankel, *supra* note 11.

of fiduciary as a category of thinking. They do not imply that the more familial fiduciary types should be treated as the core of fiduciary law or that their constitutive rules are necessary features of all fiduciary types.⁸³

Here, Elizabeth Scott's proposal to expand fiduciary into the family arena is an important inspiration for the move I propose.⁸⁴ Scott (along with others) has established in several articles a move whereby there is, and should be, a place for fiduciary in family law.⁸⁵ In an article co-written with Robert Scott, she presents fiduciary in the context of the unique relationship between parent and child. According to Elizabeth Scott (in a recent article written with Ben Chen), 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 who are dependent on their relatives.⁸⁶

My focus on Scott's model serves our purposes here on two levels. First, despite the profound differences between the familial context written-about by Elizabeth and Robert Scott (in particular, the parent-child relationship) and the step-parent-non-resident parent relationship, the arena of the family constitutes an important common denominator and should, to my understanding, engender a similar basic approach to these relationships. In this sense, the move proposed by Scott and Scott 25 years ago to break down the boundaries of fiduciary law that had, up to that point, been confined to commercial or professional contexts, was revolutionary for its time and created the conceptual infrastructure for application in our context as well. Second, as I have noted, the role-relation within which fiduciary is intended to apply is not merely the fiduciary responsibility of the step-parent toward the non-resident parent as an individual, but also toward the non-resident parent's relationship with his child, which requires protection within the context of this three-way dynamic.⁸⁷ In this sense, the outline proposed by Elizabeth and Robert Scott dealing

⁸³ Dagan, *supra* note 51, at 847–48 (emphasis added).

⁸⁴ 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. Scott & Scott, *supra* note 2. In other words, the approach of Elizabeth and Robert Scott is descriptive-analytic, while my approach is not. The relations between step-parent and non-resident parent are not regulated by law, and the turn to fiduciary law in this sense is aimed at creating and formulating such legal regulation. In other words, what I propose here is an inherently normative process.

⁸⁵ It is important to note that the idea of absorbing the concept of fiduciary into the family was first born in a Supreme Court case in Canada, when Justice Wilson (dissenting) characterized the relationship between the resident and non-resident parents as fiduciary, given the vulnerability of the non-resident parent. *See* *Frame v. Smith*, [1987] 2 S.C.R. 99, 102 (Can.) (Wilson, J., dissenting).

⁸⁶ Scott & Chen, *supra* note 2, at 227, 228.

⁸⁷ *See supra* note 79.

with parent–child relationships, including the relationship between the non-resident parent and his child,⁸⁸ also has conceptual relevance to our context.

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

Family members bear primary responsibility for the care of dependent and vulnerable individuals in our society, and therefore fiduciary principles shape many family relationships. Most importantly, the legal relationship between parents and their minor children is best understood as one that is regulated by obligations of care and protection. 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.⁸⁹

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.⁹⁰

Alongside identifying the common ground—the family arena—between Scott's writings and my proposal in this Article, which clearly begs a conceptualization that embodies the mutual responsibility between family members and correlates with the fundamental fiduciary approach, the relationship between a step-parent and a non-resident parent requires distinguishing as well. The two parties 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 step-parent and the non-resident parent as members of the same family is not self-evident. They do not fit conventional definitions of relatives, since there are no blood or marriage ties between them, and the expectation of 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. Each party plays a significant role in the life of the child. Each of them fulfills, at least potentially, a role that entails care and responsibility toward that child, and each independent relationship

⁸⁸ Scott & Scott, *supra* note 2, at 2443–46.

⁸⁹ Scott & Chen, *supra* note 2, at 227.

⁹⁰ *Id.* at 229.

(child–non-resident parent and child–step-parent) has an indirect effect on the other. Additionally, in at least some cases, the step-parent fulfills parental roles, *inter alia*, in place of the non-resident parent.

In a broader conceptualization, and in accordance with the approach that identifies fiduciary trust with the promotion of important social values,⁹¹ we are indeed dealing with a central value: protecting family relations in general and parent–child relations in particular. Cultivating the parent–child relationship requires the status of each paternal figure to be maintained and his interests to be protected *vis-à-vis* the child, even if he plays a smaller role (such as the non-resident parent, compared to the resident parent) in caring for him or her. The broader social value of cooperation and the maintenance of basic trust is also an important feature 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 parental figures. This consideration is related to the view that “fiduciary statuses are role-based.”⁹²

Returning to Leib, he offers another important example of a fiduciary relationship that diverges from the conventional commercial-professional context. According to Leib, it is possible and necessary to think of friends as fiduciaries.⁹³ This example is enlightening because it lends weight to 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 and even love, the parent–step-parent relationship is not voluntarily chosen and is almost certainly not grounded in love. In our context, there is likely to be no closeness and possibly no trust—perhaps even the opposite. The uniqueness of the step-parent–non-resident parent relationship in the family arena is characterized precisely, we have seen,⁹⁴ by its being involuntary. Unlike other fiduciary systems, the relations between the parties are not based on mutual consent, 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 non-resident parent) is forced into the said situation by the actions of others (the relationship between the step-parent and the resident par-

⁹¹ See Frankel, *supra* note 55; Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1149 (2014).

⁹² Paul B. Miller, *The Idea of Status in Fiduciary Law*, in *CONTRACT, STATUS, AND FIDUCIARY LAW*, 25, 42–44 (Paul B. Miller & Andrew S. Gold eds., 2016) (discussing the view, but ultimately finding it “implausible”).

⁹³ Leib, *supra* note 81, at 670–72.

⁹⁴ See *supra* note 10.

ent). In fact, it can be assumed that the step-parent “did not choose” the non-resident parent either, who is merely “excess baggage” to his (otherwise desirable) relationship with the resident parent, but it is important to stress that he chose to enter into the relationship knowing 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, which begs for the application of fiduciary trust. Indeed, the need for a fiduciary framework in this case is all the more significant because the relationship is not “naturally” imbued with caring, as is usually the case between a parent and child or between partners themselves. The child, by being positioned in the middle between the step-parent and the non-resident parent, creates a unique family bond between the two and establishes the motive for the family-oriented fiduciary model. Here the norms are intended to act as external enablers that foster trust by articulating a series of social expectations that help create conditions conducive to trust-building. Friends, between whom trust exists, according to Leib, will not usually need fiduciary law because trust characterizes their relationship anyway.⁹⁵ In our case, however, similar to most typical fiduciary relationships, the purpose is to establish trust where its existence is difficult to ensure.⁹⁶ It should also be noted that the level of trust we aspire to in this context is considerable. The non-resident parent entrusts (even if not willingly) that which is most dear—his child—as well as, more specifically, his relationship with that child, to the hands of the step-parent. The cost of a *lack* of trust between the parties can be extremely high, reinforcing the value of establishing a fiduciary relationship. In the words of Leib: “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.”⁹⁷ The cost of monitoring these relationships, as stressed by Leib, is also high.⁹⁸ Moreover, Elizabeth Scott and Chen write: “[I]ntimate family relationships require privacy to flourish to a greater extent than do other fiduciary relationships. Thus, formal monitoring of parental performance can be costly.”⁹⁹ Furthermore, Leib writes: “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.”¹⁰⁰

In other words, similar to other familial relations discussed by Scott and others, the vulnerable nature of the familial relationship between the step-parent and

⁹⁵ Leib, *supra* note 81, at 687.

⁹⁶ For an interesting analogy from the realm of corporate law, see Bukspan, *supra* note 54, at 235–37.

⁹⁷ Leib, *supra* note 81, at 691.

⁹⁸ *Id.* at 695.

⁹⁹ Scott & Chen, *supra* note 2, at 229.

¹⁰⁰ Leib, *supra* note 81, at 683.

the non-resident parent (in addition to the vulnerable relationship between the two legal parents, the former couple) and, critically, the need to maintain the relationship without external interference, justify the application of fiduciary law. The value of legally setting out social norms and expectations in recognition of the importance of these familial bonds and associations cannot be overstated.

As we have already noted, a fiduciary relationship is established between two people whose relationship is characterized by unequal power. This is also true under the conceptual approach that requires the existence of *undertaking*.¹⁰¹ The vulnerability of one side versus the other side's power establishes the duties of the latter when managing one's interests. We must explore the particular characteristics of the step-parent–non-resident parent power-relation from this perspective further. In the case featured in this Article, the step-parent is present in the child's life for greater periods of time than the non-resident parent. Given this marked presence, and to the extent that their relationship is significant (especially if the relationship with the step-parent started when the child was at an early age), it may be characterized by the step-parent's significant influence over the child—his or her way of life, behavior, and feelings. Consequently, the step-parent is in a position of indirect power over the non-resident parent. However, the relative weakness of the non-resident parent's position is situational—that is, his vulnerability is not inherent. Moreover, precisely because the non-resident parent is recognized as a legal parent (sometimes while rejecting the step-parent's formal status and refusing his rights as a parent), his legal position is, in certain situations, preferable. The fact that he “was there first” and that he is the “real parent” may also give him emotional preference from the child's perspective.¹⁰²

Yet, the fact that this is not an inherent or permanent weakness does not negate the possibility of, or need for, protection of the relationship through fiduciary law. Not unlike the system of friendship, which according to Leib is an arena for the implementation of fiduciary law, here, too, the vulnerable party may change or alternate. From a broader perspective, as part of an understanding of the relationship between the step-parent and the non-resident parent as “co-parents,”¹⁰³ one can

¹⁰¹ Miller, *A Theory*, *supra* note 52, at 265–66, 277 n.126 (quoting *Galambos v. Perez*, [2009] 3 S.C.R. 247, 276, 280 (Can.) (Cromwell, J.)).

¹⁰² In certain instances, it maybe the father who damages the relationship between the child and the step-parent. For examples of such scenarios, see GANONG & COLEMAN, *supra* note 26, at 126–27. Some studies have found that children tend to side with their biological parents over their step-parents, albeit 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 PSYCH. 223 (2005).

¹⁰³ See *infra* Section V.B.

imagine mutual fiduciary obligations between the parties, similar to Leib's understanding of fiduciary in the context of friendship.¹⁰⁴

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 step-parent and the non-resident parent, I would like to briefly comment on the obligations derived from the fiduciary relationship. It is customary to categorize the obligation derived from "classical" corporate fiduciary as a strict standard of conduct, as the most impeccable level of loyalty, as phrased by one court: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."¹⁰⁵ Fiduciary obligations are of the most stringent kind and require "absolute devotion to the beneficiary's interest,"¹⁰⁶ including a prohibition of conflict of interests, the duty to maintain confidentiality (toward third parties), and the duty of disclosure (to the beneficiary). These strict standards and obligations do not suit the type of relationship dealt with in this Article. Unlike the parental context, in which the parent owes the child positive obligations of care and support, the obligations derived here are negative in nature and are aimed only at certain aspects of the child's life and his or her relationship with the non-resident parent. This stand fits Smith's view: "Even though we frequently speak of fiduciaries as being obliged or required to act in the best interests of their beneficiaries, this does not mean that they have an unlimited or open-ended duty to take positive action to try to improve the positions of their beneficiaries."¹⁰⁷ These aspects will be elucidated in the following Part, which moves from a theoretical outline to a proposal for application.

III. FIDUCIARY RELATIONS BETWEEN THE STEP-PARENT AND THE NON-RESIDENT LEGAL PARENT: TWO CASE STUDIES FOR DISCUSSION

As we have seen, the considerable length of time the step-parent and the child spend together, the intensity of the relationship, and its familial characteristics, create repeated opportunities for the child's exposure to the step-parent's lifestyle, habits, and behaviors. Therefore, these behaviors can potentially have a significant impact on the child, and, in the worst scenario, can cause profound harms to the child's relationship with his or her non-resident parent. In the two cases I set out next, which exemplify such harms, let us assume that there is no authentic claim against

¹⁰⁴ Leib, *supra* note 81, at 722.

¹⁰⁵ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

¹⁰⁶ Licht, *supra* note 57, at 252 (translation provided by author).

¹⁰⁷ Smith, *supra* note 79, at 400–01. However, from his negative standing regarding the possibility of recognizing fiduciary between two parents, the custodial and the non-custodial, it is reasonable to conclude that he probably would not support recognizing it in our case.

the non-resident parent's functioning or ability, and that, in principle, his relationship with the child is healthy and beneficial.¹⁰⁸

The first case deals with the possible harm to the relationship between the non-resident parent and the child through the influence of the step-parent, and the second deals with a harm to the religious beliefs or lifestyle of the non-resident parent as a result of the influence of the step-parent. It should be noted that these issues were chosen for discussion for two reasons, the first being that they both hold considerable potential for disputes. This type of conflict between separated parents (regardless of the role played by the step-parent) is well known in case law, literature, and life experience. The second reason is related to the restricted influence of the non-resident parent (even if he has joint legal custody) over this type of matter. Unlike the "big" decisions concerning, for example, children's education or medical treatment, where legal parents have joint legal authority,¹⁰⁹ in more mundane matters, and due to the child's routine exposure to the step-parent's being and actions, the non-resident parent's degree of influence over the child is limited.

A. Harm to the Relationship Between the Non-Resident Parent and the Child Through the Influence of the Step-Parent

It is important to begin by clarifying (even if it is self-evident) that not every situation in which a step-parent is incorporated into the family causes a conflict to arise between the child and the non-resident parent. Nor is such a conflict necessarily the result of the step-parent's behavior or his "fault." But this Section is concerned with situations in which the step-parent's behavior does indeed negatively affect relations between the parties.¹¹⁰

As previously noted, although such conflicts, to the extent that they involve the step-parent directly, have rarely been directly addressed in case law,¹¹¹ indications of this phenomenon can be gleaned from the research. By way of introduction, the factual data in Stewart's study indicate that:

For children with resident stepparents, stepparents may act as a substitute parent and take over the parenting role, prompting nonresident parents to

¹⁰⁸ For additional challenges, including those related to financial support of children, allocation of visitation times, and requests to spend more time together, see Sosnowska-Buxton, *supra* note 32, at 132, 144.

¹⁰⁹ Parents who have separated, nonetheless, usually remain joint guardians of their children.

¹¹⁰ To clarify: it is not enough that the harm was a result of the mere fact of the step-father joining the family. In order to establish breach of fiduciary duty, the step-father should be shown to have harmed the relationship through comments made against the father and/or actions that directly sabotage the relationship.

¹¹¹ On the role of step-parents in such conflicts, see *supra* note 34. Case law may avoid discussing their status or assigning direct responsibility to them in the context of such disputes, but the background of these cases reveals their active participation in conflicts.

“back off.” A study based on the [National Survey of America’s Families] indicates that the presence of married and cohabiting step-parents is associated with fewer visits from nonresident mothers and fathers.¹¹²

While this does not necessarily mean that it is the step-parent who intentionally directs his actions toward this result, the above-mentioned data is nonetheless disturbing and thought-provoking.¹¹³ In an attempt to understand the root of this phenomenon and better understand the role of the step-parent in the exclusion of the non-resident parent, I turned to psychological research. However, reference to the studies I will present briefly here requires a caveat: some identify the negative effect of the step-parent on the relationship between the child and the parent with what is known as “parental alienation syndrome.”¹¹⁴ Although many (myself included) reject the very existence of such a syndrome per se,¹¹⁵ I believe we may agree that situations can arise in which children refuse to meet up with their non-resident parent or where there is an emotional disconnection on the part of the child.¹¹⁶ Perhaps we can also agree that, in some cases, difficulties in the relationship are the result of the multiple and overlapping influences of the different adults who take part in raising the child: the resident parent, other family members, or the step-parent. These adults may provoke feelings of anger and resentment in the child by criticizing the non-resident parent and painting them in a negative light, as well as other actions that exacerbate painful emotions the child may feel in relation to the non-resident parent. The harm caused to children in some of these cases is also evident.¹¹⁷

Clinical psychologist Richard Warshak noted the influence of the resident parent’s new relationship on the child’s relationship with the legal parent.¹¹⁸ In his

¹¹² STEWART, *supra* note 16, at 131 (citation omitted).

¹¹³ Data regarding a decrease in meetings between the child and the non-resident parent in families where there is also a step-parent 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. RELS. 141, 147 (1996).

¹¹⁴ On the syndrome itself, see Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249 (2001).

¹¹⁵ E.g., Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757, 759–61 (2005); Miguel Clemente & Dolores Padilla-Racero, *When Courts Accept What Science Rejects: Custody Issues Concerning the Alleged “Parental Alienation Syndrome”*, 13 J. CHILD CUSTODY 126 (2016).

¹¹⁶ For more on this phenomenon, see Philip Marcus, *Parental Alienation, Contact Refusal and Maladaptive Gatekeeping: A Multidisciplinary Approach to Prevention of Contact Failure*, in FAMILY LAW AND FAMILY REALITIES: 16TH ISFL WORLD CONFERENCE BOOK 349 (Carol Rogerson, Masha Antokolskaia, Joanna Miles, Patrick Parkinson & Machteld Vonk eds., 2019).

¹¹⁷ *Id.* at 356–57.

¹¹⁸ Richard A. Warshak, *Remarriage as a Trigger of Parental Alienation Syndrome*, 28 AM. J. FAM. THERAPY 229 (2000).

opinion, one of a variety of effects of the new partnership is the potential direct influence the step-parent can have. In some cases, he claims, the step-parent seeks to sabotage the relationship between the child and the non-resident parent to enhance his own status and role in the child's life. To do so, he may "instigate, or at least actively support, destructive criticism of the other parent."¹¹⁹ 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 [to the resident parent] is, 'Your battles are my battles.'"¹²⁰ Other researchers, too,¹²¹ have identified additional reasons, rooted in the new spousal relationship, to explain the step-parent's motivation for undermining the relationship between the child and the non-resident parent, including the desire to sever the relations between his new partner and her ex.

Online blogs that deal with post-divorce parenting and self-help books for divorced parents¹²² also highlight the potential role of the step-parent in damaging this relationship (again, sometimes as part of the discussion of what they define, parental alienation): "At times, the stepparent may join in with their spouse to insult or lie about the other parent, or become involved with blocking contact."¹²³ Some studies emphasize that the harm caused to the parent-child relationship may be unintentional and is merely a by-product of the step-parent joining the family, especially when the child is particularly young¹²⁴ and the relationship he or she forges with the step-parent is positive and meaningful.¹²⁵ A complex emotional response by a non-resident father, for instance, to the new relationship of his former spouse can lead to his own distancing and can exacerbate the damage to the relationship. Here, though, we are concerned only with situations in which the step-parent actively sabotages the relationship by interfering in it.

¹¹⁹ *Id.* at 234.

¹²⁰ *Id.* at 238.

¹²¹ *E.g.*, Anthony E. Atwell, Ursula S. Moore & Carla S. Nowell, *The Role of Stepparents in Child Custody Disputes*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 211, 212–14 (1982).

¹²² *See generally* 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); RON L. DEAL, *THE SMART STEPDAAD: STEPS TO HELP YOU SUCCEED* (2011); LAURA PETHERBRIDGE, *101 TIPS FOR THE SMART STEPMOM: EXPERT ADVICE FROM ONE STEPMOM TO ANOTHER* (2014); WEDNESDAY MARTIN, *STEPMONSTER: A NEW LOOK AT WHY REAL STEPMOTHERS THINK, FEEL, AND ACT THE WAY WE DO* (2015).

¹²³ Audrey Cade, *Parental Alienation Is Also a Stepparent Issue*, STEPPARENT MAGAZINE (Sept. 5, 2017), <https://web.archive.org/web/20210303081722/http://stepparentmagazine.com/parental-alienation-is-also-a-stepparent-issue/>.

¹²⁴ Shamna, *How Step-Parents Cause Parental Alienation*, MACCABLO (Aug. 6, 2017), <https://maccablo.com/step-parents-cause-parental-alienation>.

¹²⁵ Pasley et al., *supra* note 18, at 320–21.

B. Negative Influence of the Step-Parent: Injury to the Religious Beliefs or Lifestyle of the Non-Resident Parent

Through cohabiting with a step-parent, a child may be exposed to, and influenced by, behaviors, acts, or rituals that prove offensive or harmful to the non-resident parent's religious beliefs. Here the bar of behavior, in order to be considered harmful, is lower than in the previous case study. We do not necessarily require behavior aimed at harming the legal father's religious beliefs; the mere exposure of the child to religious rituals that are substantially different from those of the father and that are harmful to him is sufficient.¹²⁶

Such harm may be the outcome of incompatible religious faiths¹²⁷ or the result of discrepancies in the depth of their respective faiths or in the manner in which they are lived-out.¹²⁸ The more important the issue is for the non-resident parent (especially if he observes his religious principles fervently), the more profoundly the actions or influence of the step-parent may injure his feelings and, in turn, his relationship with the child.¹²⁹ A study that attempted to pinpoint the influence of parents over the intergenerational transmission of behaviors found that the parents who raise the child on a day-to-day basis, including step-parents, have a significant influence, for example, on the minor's church attendance.¹³⁰ In contrast to education,

¹²⁶ I think it is impossible (and even if possible, somehow inadvisable) to demand that ill-intention be proved in order to establish a breach of duty on the part of the trustee. This demand would only increase the conflict and its adversarial character and contradict my intention here to strive for a less adversarial model.

¹²⁷ Such gaps may already exist in the relationship between the legal parents, as a consequence of increasing numbers of interfaith or mixed marriages. On the growth in interfaith marriage, see Caryle Murphy, *Interfaith Marriage is Common in U.S., Particularly Among the Recently Wed*, PEW RSCH. CTR. (June 2, 2015), <https://www.pewresearch.org/fact-tank/2015/06/02/interfaith-marriage/>; *Chapter 2: Religious Switching and Interfaith Marriage*, PEW RSCH. CTR. (May 12, 2015), <https://www.pewforum.org/2015/05/12/chapter-2-religious-switching-and-intermarriage/#interfaith-marriage-commonplace>; Megan Gray, *Interfaith Relationships on the Rise in the U.S.*, PORTLAND PRESS HERALD (Dec. 24, 2016), <https://www.pressherald.com/2016/12/24/with-religious-intermarriage-on-the-rise-in-the-united-states-more-people-are-thoughtfully-weaving-traditions-together>.

¹²⁸ These differences are sometimes found between the legal parents themselves, and at other times characterize only the differences between the step-parent and the non-resident parent.

¹²⁹ For more on the complexity of such conflicts in various contexts, see Ido Shahaar, *When "Mixed" Marriages Fall Apart: A Socio-Legal Perspective*, 36 J. ISRAELI HIST. 313 (2018); Jocelyn E. Strauber, Note, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 DUKE L.J. 971 (1998); Kevin S. Smith, *Religious Visitation Constraints on the Noncustodial Parent: The Need for National Application of a Uniform Compelling Interest Test*, 71 IND. L.J. 815 (1996); Steven M. Zarowny, *The Religious Upbringing of Children After Divorce*, 56 NOTRE DAME L. REV. 160 (1980).

¹³⁰ Matthijs Kalmijn, *Family Disruption and Intergenerational Reproduction: Comparing the Influences of Married Parents, Divorced Parents, and Stepparents*, 52 DEMOGRAPHY 811 (2015).

where research shows that the *genetic* link has a significant effect,¹³¹ apparently in the case of religious socialization the influence of the person directly raising the child is greater.

There are many types of behaviors and rituals that are liable to cause disagreements, 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 step-parent 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 step-parent is a Muslim, 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 insult the non-resident parent, if he is observant. Likewise, conversations about heresy (or faith), including reading from religious texts,¹³² certainly if they reach the level of “brain-washing,” may injure the non-resident parent.

Having presented the two brief case studies in which the involvement of the step-parent has the potential to harm the non-resident parent and his relationship with the child, I now turn to presenting the proposed conceptual framework for analyzing these situations, using the fiduciary perspective.

IV. THE CASE STUDIES IN LIGHT OF FIDUCIARY DUTIES

The above descriptions of the two types of harm (caused by negative influence against the non-resident parent and by the child’s exposure to lifestyles detrimental to the religious beliefs of the non-resident parent) exemplify the degree of subtle complexity at play in such family relations and attest to the suitability of applying fiduciary responsibilities to them.

The relationship between a step-parent and a non-resident parent as conceptualized here embodies several characteristics that apply to the fiduciary relationship. One party, the step-parent, is at a situational advantage over the other, as he is in a convenient position, co-habiting with the child, to act from his own preferences and interests rather than those of the other. Meanwhile, the other party, the non-resident legal parent, has limited scope to monitor such behaviors. His relative vulnerability stems from his limited ability to control, intervene, or simply be present in the day-to-day routine of his child’s life, lacking even direct information about it to a great

¹³¹ A birth parent has influence over the educational aspects of a child’s upbringing for two main reasons: first, genetics affect the child’s IQ level, which in turn will contribute to educational outcomes; 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 non-resident parent. *Id.* at 828.

¹³² See, e.g., Zarowny, *supra* note 129, at 160.

extent; he entrusts that which is most dear to him into the hands of the step-parent. The relationship between the step-parent and the non-resident parent therefore embodies a reliance on inherent trust, but also the difficulty of ensuring trust. Hanging in the balance, for the vulnerable party, is an interest of incalculable value: his relationship with his child. This interest may not necessarily coincide with the narrower interests of the step-parent, but by virtue of the significant role the step-parent plays in the child's life, and the assumption that he will act in the child's best interests, he should be expected to ensure the non-resident parent's interests even when they contradict his own personal interests. This view is also consistent with the fiduciary role that this Article seeks to conceptualize: the step-parent's place in assuming part of the role of the non-resident parent and as someone also entrusted with the relationship between the non-resident parent and the child.

The fiduciary conceptual framework allows us to recognize the relationship between the step-parent and the non-resident parent both socially and legally; it enables us to imbue it with substance through duties of behavior;¹³³ it protects the more vulnerable 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 step-parent must subordinate his *entire* conduct with respect to the child to the preferences of the non-resident parent. In the case of the first type of potential harm, outlined earlier, the fiduciary model places certain duties with the step-parent, such as the responsibility—limited in scope—to protect the interests of the non-resident parent (and child) in having an uninterrupted relationship. In the case of the second type of potential harm, the fiduciary model generates duties aimed at protecting the deep religious sentiments of the non-resident parent, which also have an effect on the relationship with his child. The remedies that are accordingly required must be narrowly and cautiously defined, and comprise mainly negative obligations: the obligation not to incite against the non-resident parent, and the obligation not to categorically violate the principles of the non-resident parent's faith and deep religious feelings in rituals or ceremonies in which the step-parent involves the child.¹³⁴ These obligations, while far from trivial, curb the step-parent's freedom only in a relatively limited sense.

¹³³ In the present context, this refers to the duties of the step-parent toward the non-resident parent; but in other contexts this could also include duties of the non-resident parent toward the step-parent.

¹³⁴ This standard is not so different from that which some scholars support as the right standard for legal parents in general. See Joanne Ross Wilder, *Resolving Religious Disputes in Custody Cases: It's Really Not About Best Interests*, 22 J. AM. ACAD. MATRIM. LAWS. 411, 417–18 (2009).

I should emphasize that these obligations are not only legal obligations (and not even mostly legal). To reiterate, conceptualizing the relationship between the step-parent and the non-resident 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 meaning 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 is also (and perhaps primarily) known through a framework of social expectations and non-legal remedies.¹³⁵ 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.¹³⁶

Unlike the parent-child relationship, in the present day there are no social norms for the step-parent-non-resident parent relationship that can guide us in how the step-parent (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 harm to religious sentiments, raises a more complex dynamic than the first. Unlike incitement and offensive behavior, 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. Furthermore, their very existence may even, arguably, be constitutionally protected in some countries, such as by the First Amendment of the U.S. Constitution. However, 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

¹³⁵ The exact legal remedies and legal consequences, and especially the sanctions that may follow the infringement of the fiduciary, will have to be discussed and developed in future research.

¹³⁶ Scott & Scott, *supra* note 2, at 2436-37.

where the irreconcilable religious dispute is of such magnitude as to be harmful to the children's welfare.¹³⁷

What is more, a review of case law and literature reveals that considerations relating to religion and belief have, over the years, been a factor in decisions regarding questions of custody and contact arrangements, but from a completely different perspective.¹³⁸ Under certain circumstances, these considerations played a role in determining who the primary resident parent would be.¹³⁹ In other cases, they were a factor in determining how contact arrangements would be designed to impose conditions for contact meetings and prohibitions on the non-resident parent—prohibitions related to his religious way of life, to protect the way of life and faith of the resident parent and the child in her custody.¹⁴⁰ In extreme cases, religious considerations have led to the separation of the child from the non-resident parent. However, unlike in the past, where the religious way of life of the resident parent was given clear preference, in the current era, the greater weight given to the religious beliefs of the non-resident parent and the tool proposed here in the form of the fiduciary framework guide us toward a different perspective.¹⁴¹ Respect for the non-resident parent's faith, and protection of his distinct and independent relationship with the child, may dictate placing obligations with the step-parent (together and separately from the resident parent)¹⁴² so as to protect and respect the core beliefs of the non-resident parent.

¹³⁷ Zarowny, *supra* note 129, at 161.

¹³⁸ 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); Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702 (1984) [hereinafter *Establishment Clause and Religion*]; Zarowny, *supra* note 129, at 165; Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 397–98 (1989).

¹³⁹ E.g., *Establishment Clause and Religion*, *supra* note 138, at 1703–05; Carolyn R. Wah, *Religion in Child Custody and Visitation Cases: Presenting the Advantage of Religious Participation*, 28 FAM. L.Q. 269 (1994); R. Collin Mangrum, *Exclusive Reliance on Best Interest May Be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 CREIGHTON L. REV. 25, 25–30 (1981).

¹⁴⁰ For a critique of this approach, see J. Michael Fitzgerald, *An Overview of Religious Considerations in Child Custody Disputes*, 32 CATH. LAW. 129, 135–36 (1988); R. Collin Mangrum, *Religious Constraints During Visitation: Under What Circumstances Are They Constitutional?*, 24 CREIGHTON L. REV. 445 (1991); *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990); *Munoz v. Munoz*, 489 P.2d 1133 (Wash. 1971).

¹⁴¹ Smith, *supra* note 129, at 815–17.

¹⁴² Possible contradictions between different fiduciary duties are beyond the scope of this Article. These include duties related to joint parenthood, such as the step-parent's duties toward their partner (the resident parent) as opposed to duties toward the non-resident parent, or conflict between fiduciary obligations toward the child and fiduciary duties toward one of his or her

This seemingly extraordinary move is the product of previous developments and is not based solely on the fiduciary model.¹⁴³ The legal approach that limited the non-resident parent is characteristic of a previous era, in which the resident 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.¹⁴⁴ 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. Even where parents do not share the care of a child equally, the tendency is to maintain a meaningful relationship with the non-resident parent. This position can dictate not only the prevention of incitement against the non-resident parent, but also the prevention of injury to the core of his faith in a manner that will enable him to maintain a respectful, positive, and inclusive relationship with his child.¹⁴⁵

In this sense, there is a significant point of interface between the two types of harm (incitement against the non-resident parent and harm to religious sentiments) and they point jointly to a substantive conclusion. The protection of the step-parent's religious sentiments is derived both from freedom of religion and from the protection of his relationship with the child; and both of these factors may lead to obligations incurred by the step-parent.¹⁴⁶

parents. An interesting approach to these potential conflicts can be found in Smith's article, *Parenthood is a Fiduciary Relationship*. Smith defines "parenthood [as] a plurality of roles," and encompasses these conflicts as part of the different roles a parent plays in the family—as being not only the parent of a certain child but also to his or her siblings; being a partner to the other parent; and being a part of the entire family. Smith, *supra* note 79, at 450. For potential conflicts between fiduciary duties in a different 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, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim & Paul B. Miller eds., 2018).

¹⁴³ Jocelyn E. Strauber, Note, *A Deal is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 DUKE L.J. 971, 976–80 (1998).

¹⁴⁴ Catherine R. Albiston, Eleanor E. Maccoby & Robert R. Mnookin, *Does Joint Legal Custody Matter?*, 2 STAN. L. & POL'Y REV. 167 (1990); Anne Marie Delorey, *Joint Legal Custody: A Reversion to Patriarchal Power*, 3 CAN. J. WOMEN & L. 33, 44 (1989); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 701–02 (1985); John G. Taussig, Jr. & John T. Carpenter IV, *Joint Custody*, 56 N.D. L. REV. 223, 230–31 (1980).

¹⁴⁵ 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).

¹⁴⁶ Of course, it is important to mention that all these conflicts should also (and first of all) take into consideration the best interest of the child. It is not easy to determine what the child's best interest is, and sometimes the determination is "trendy," subjective, and even political; but still the child and their wellbeing should always be the first priority, and no decision should harm them.

V. IN LIEU OF A CONCLUSION: TWO FINAL REMARKS

A. Fiduciary Law as a Thought Experiment on the Legal Regulation of Unrecognized Family Relations

It may be assumed that the proposal to expand the boundaries of fiduciary law and apply it to the relationship between step-parents and non-resident parents will encounter criticism. The expansion of fiduciary laws into this arena is not trivial, nor is it without its faults. It contradicts the basic position that regards fiduciary law as an unsound legal foundation;¹⁴⁷ and it is certainly not an “organic” 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 mid-1990s, such critiques may originate both from within the field¹⁴⁸ and beyond.¹⁴⁹ Family law practitioners may argue that introducing fiduciary into family relations can damage the delicate fabric of family relationships;¹⁵⁰ or even intensify conflicts by introducing new obligations into the family. 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 an unforeseeable trajectory and outcomes. Alternatively, they might claim that it diminishes the institution or dilutes it of real content, arguing that its application in the unique arenas for which it was designed will be impaired.¹⁵¹

Even if the aforementioned 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 I have presented here as a “thought experiment,” the first of its kind for examining relations between members of complex families through the fiduciary lens—relations that have yet to be recognized and regulated by law. Even if one were to reject the application of fiduciary law in the context I use here, between non-resident parents and step-parents, the normative message that I wish to leave with the reader is this: the juxtaposing of the step-parent–non-resident parent relationship and fiduciary law is intended to spotlight the importance of these relationships. Being vital to parents, children, and society

¹⁴⁷ Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Law Duty*, 36 J.L. & ECON. 425, 427, 438 (1993).

¹⁴⁸ E.g., Margaret F. Brinig, *Parents: Trusted but not Trustees or (Foster) Parents as Fiduciaries*, 91 B.U. L. REV. 1231, 1232–33 (2011); Carl E. Schneider, *Commentary, On the Duties and Rights of Parents*, 81 VA. L. REV. 2477 (1995); Barbara Bennett Woodhouse, *Commentary, Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493, 2494 (1995).

¹⁴⁹ E.g., Davis, *supra* note 91, at 1158–60.

¹⁵⁰ Bennett Woodhouse, *supra* note 148, at 2495, 2497.

¹⁵¹ Licht, *supra* note 57, at 245; Deborah A. DeMott, *Fiduciary Obligation Under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal*, 30 OSGOODE HALL L.J. 471, 497 (1992).

as a whole, I contend that these relationships require, and are entitled to, legal attention, care, and protection. And fiduciary law is one hitherto unexplored means of achieving this result.

In this sense, even if the reader rejects the proposed path of fiduciary law, it is my hope that this Article will serve as a preliminary foundation for considering the nature of the relationship between step-parents and non-resident parents: in light of the relationship's complexity and its importance to parents and children and to the realm of the family as a whole; as the basis for recognizing the legal "role" of the step-parent vis-à-vis the non-resident parent; and as a basis for legal recognition of this unique connection as a family relationship (or "relational role") and a first attempt to regulate it. The conceptualization of the relationship between the step-parent and the non-resident parent as a family relationship deserving of legal recognition has an important symbolic value; beyond any specific arrangement determined for it by law, this recognition signals a set of social expectations from the relation. 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.¹⁵²

In this sense, I offer here 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.¹⁵³

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 step-parent–non-resident parent 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 donors and offspring)¹⁵⁴ may also, I believe, benefit from the theoretical basis embodied in fiduciary law. My second closing remark constitutes a step in this direction.

¹⁵² Merle H. Weiner, *Family Law for the Future: An Introduction to Merle H. Weiner's A Parent-Partner Status for American Family Law* (Cambridge University Press 2015), 50 FAM. L.Q. 327, 333 (2016) [hereinafter Weiner, *Family Law*]. See more extensively MERLE H. WEINER, A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW 224–26 (2015).

¹⁵³ Stewart pointed to this lack. STEWART, *supra* note 16, at xiv.

¹⁵⁴ Ruth Zafran, *Reconceiving Legal Siblinghood*, 71 HASTINGS L.J. 749, 776–77 (2020).

B. Step-Parent–Resident Parent–Non-Resident Parent: Co-Parents

Before ending, I propose we think about the step-parent–resident parent relationship in a somewhat broader context. As Ayelet Blecher-Prigat¹⁵⁵ and Merle Weiner¹⁵⁶ suggest in separate essays, the emphasis in family law should be shifted away from romantic partnerships and toward co-parenting, which should be situated as “the central family bond between adults.”¹⁵⁷ While these authors both emphasize achieving economic justice between co-parents, a more expansive, holistic reading of their arguments can point to a broader process that touches on the essence of my proposal: family law must recognize the horizontal relationships between co-parents, including parents who were a couple and are now separated, parents who brought a child into the world without ever being a couple, and other adults who play a parental role in jointly raising a child (including step-parents), 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, distinct from the binary relationship between adults based on the fact of their joint parenthood, should apply not only to the economic aspects of the relationship (that is, to their financial obligations of the parties toward one another) but also to other obligations intended to protect the emotional bond of each of them to the child they have in common. 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.”¹⁵⁸

In my understanding, contrary to Weiner, “adults who share parenthood” may also include step-parents in the broad sense employed in this Article.¹⁵⁹ This is not to say that all of them share the same obligations to one another, especially not in

¹⁵⁵ Ayelet Blecher-Prigat, *From Partnership to Joint-Parenthood: The Financial Implications of the Joint Parenthood Relationship*, 19 L. & BUS. (I.D.C. L. REV.) 821 (2016) [Hebrew]; Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents*, 13 THEOR. INQUIRIES L. 179, 187–88 (2012); Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J.L. & GENDER 119, 126–28 (2018).

¹⁵⁶ Weiner, *Family Law*, *supra* note 152, at 332–34.

¹⁵⁷ Blecher-Prigat, *supra* note 155, at 842–43 (translation provided by author).

¹⁵⁸ *Id.* at 849 (translation provided by author). 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 resident parent ensure a functioning relationship with the other parent.

¹⁵⁹ 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.” Weiner, *Family Law*, *supra* note 152, at 339. This argument, in my opinion, is applicable only when economic obligations are at stake, and not when caretaking–emotional obligations are at stake, as proposed here.

the financial aspect. It is probably the case that the obligations between the two parents (a mother and a father) are more comprehensive and intensive than those between the step-father and the legal father, and probably also between the mother and the step-father. In that sense, a scaled spectrum of obligations is called for.¹⁶⁰

Given the high rate of divorce in many countries and the fact that a significant proportion of children are born to parents who do not have a permanent relationship, the likelihood of a child growing up with a step-parent (in the sense of a caregiver who is not a formal legal parent) is higher than ever. This reality necessitates a step change in family law, to acknowledge the range of *actual* family relationships and to enable them to thrive.¹⁶¹ The introduction of the concept of fiduciary to the family in general, and to the relationship between step-parents and non-resident parents, as an example, is an important normative step in this direction.

¹⁶⁰ This is another aspect that should be developed in a future research. Deeper thought should also be devoted to the hierarchical order between co-parents. Although there is (and possibly should be) some order of “rank” between parents in blended families, in general or in specific contexts, the models of Blecher-Prigat and Weiner, along with my own, seek to soften this hierarchy. Designing new obligations (socially and legally) via fiduciary is aimed at empowering the more vulnerable party. It is therefore a possible answer to a criticism that may be raised by masculinity studies. For the perspective of masculinity studies in the familial context, see generally, Dara E. Purvis, *The Sexual Orientation of Fatherhood*, 2013 MICH. ST. L. REV. 983, 991–97 (2013); Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 418–19 (2010); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC’Y 201, 239 (2008).

¹⁶¹ HUNTINGTON, *supra* note 1, at xv. For other important reasons to recognize these relationships, see Kessler, *supra* note 22.