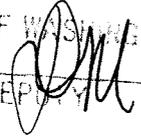


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

NO. 36749-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

LEONARD SIMPSON  
Appellant

v

SHIRLEY SIMPSON  
Respondent

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BRIEF OF STATE'S ATTORNEY

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## I. STATEMENT OF CASE

Years before this divorce action, Shirley Simpson had been granted nonparental custody of great-grandchild Kimberly Downing in 1996 and later granted nonparental custody of great-grandchild Breanna Simpson in 1998. Leonard Simpson was never a party to either nonparental custody action although he allowed the great grandchildren to reside in their home.

The biological father of Breanna (Bernardo Cruz Chavez) is ordered to pay child support of \$235.00 per month. The biological mother of Breanna (Kimberly Ann Simpson) is ordered to pay child support of \$185.00 per month. The biological father of Kimberly is an unknown man so support for him cannot be set at this time. The biological mother of Kimberly (Lisa Marie Downing) is ordered to pay child support of \$128.00 per month. There was never any termination of parental rights, nor any formal adoption of the great grandchildren.

In the divorce action, the Superior court granted custody of the great-grandchildren to Shirley Simpson and entered an Order of Child Support on August 6, 2007 setting a child support obligation for Leonard L Simpson for the great grandchildren. The State then joined this dissolution action to vacate the Order of Child Support entered on August 6, 2007 based on concerns regarding the legality and also the unwise policy of ordering a nonparent to pay child support.

The Superior court vacated the Order of Child Support on November 26, 2007 based on the fact that the State did not receive notice regarding entry of that order but did not address the substantive issue of whether an order of child support was or was not appropriate for a nonparent.

Since both the appellant and appellee have included the issue of child support in their appellate briefs, the State believes it is necessary to address this issue and has submitted this brief solely on this issue. The State is not involved in the other issues of the parties.

## II. ISSUE

Should the court order a nonparent to pay child support for a child in nonparental custody?

No.

## III. ARGUMENT

### No Statutory Basis to Set Child Support for a Nonparent:

Child support is the statutory duty of parents, not extended relatives or nonparental custodians. RCW 26 et sequence includes

numerous provisions requiring parents to pay child support in dissolution cases, nonparental custody cases, paternity cases and in adoption cases. But in each instance, it is the parents of the child who will be paying the child support.

For example, RCW 26.09.100 provides that

In a proceeding for dissolution of marriage . . . the court shall order either or both *parents owing a duty of support to any child of the marriage* dependent upon either or both spouses to pay an amount determined under chapter 26.19 RCW.

(Emphasis added).

This statute specifically recognizes that it is the parents who owe the duty to their child. It does not say a spouse owing a duty to any child of the marriage. It says “parents”. This distinction is important. There may be children of the marriage who are not the children of one or both of the spouses. Some outsider to the marriage (for example, a prior ex-husband or ex-wife, or even a paramour) may be the parent who owes the duty of support for a specific child rather than one of the parties to the marriage now being dissolved.

Applying this to our case, it is outsiders to this marriage who owe the duty of support for Kimberly and Breanna. These children have biological parents who owe a duty for them, and there are orders specifying the amount the biological parents are to pay. The only exception is Kimberly’s father who is an unknown man, but in the event

proper information is provided, that man might also be located, DNA testing done and his child support duty set.

The statutes covering nonparental custody, RCW 26.10 et. seq., are also instructive. It allows a nonparent to file an action for custody of a child against the parents and any other custodian or guardian per RCW 26.10.030(2), but includes provisions regarding child support owed by the "parents" for their child per RC W 26.10.050 and provisions regarding "parents" providing and maintaining medical insurance for their child per RCW 26.10.060.

This is significant. A person can bring a nonparental custody action against not only a child's parents but against the child's present nonparental custodian, allowing custody to shift from one nonparental custodian to another nonparental custodian when it is in the child's best interests. See In re the Custody of S.H.B., 118 Wn.App. 71(2003)(paternal grandmother who had child for six years lost nonparental custody to maternal grandmother).

However, these statutes do not allow the new nonparental custodian to get child support out of the old nonparental custodian. The new custodian still has to go after the parents for the duty of support.

Thus, applying the statutes to our case, Shirley Simpson who is the nonparental custodian cannot get child support out of Leonard Simpson who was once a kind of co-custodian. She has to look to the

biological parents.

Case law confirms that child support obligations are owed by parents and not nonparents. In State ex rel DRM and Wood and McDonald, 109 Wn.App. 182 (2001), the court specifically stated that

Child support is statutory . . . The Legislature also intends that the child support obligations should be equitably apportioned between the *parents*. . . . Only *parents* are referred to in the calculation and payment of support. Nowhere is there any hint of a provision for application of this chapter to a non-parent.

(DRM at 192-193, emphasis original).

Step-parent liability does not apply in our case. First, the parties are not parents nor even step-parents, but great-grandparents and/or step-great grandparents. There is no statute requiring grandparents of any kind to provide support for grandchildren. Any support grandparents provide is voluntary.

However, even if step-parent liability could be inferred in this case, such an obligation stops when the decree of dissolution is entered per RCW 26.16.205.

#### Limits to the Doctrine of *In Loco Parentis*

Counsel for Shirley Simpson claims the doctrine of *in loco parentis* requires the court to set a support obligation by Leonard Simpson, and points to In Ex Rel Gilroy v. Superior Court for King

County, 37 Wn.2d 926(1951) for a generalized definition of *in loco parentis*. But Gilroy, supra, is not helpful because the court found *in loco parentis* never existed, so the court never addressed issues of when an *in loco parentis* relationship ends.

What is pertinent to our case is not whether there ever was an *in loco parentis* relationship but when an *in loco parentis* relationship ends.

At common law the status of one standing *in loco parentis* is voluntary and temporary and may be abrogated at will by either the person standing *in loco parentis* or by the child.

Harmon vs DSHS, 134 Wn.2d 523, 535 (1998).

While it is true that statute sets some additional responsibility for stepparents who are *in loco parentis*, statute also included provisions for the termination of those duties. And Harmon, supra, held that the statutory methods for terminating the stepparent relationship are not the only ones but that the obligation of a step-father married to the child's mother ended when the child went to live with the child's biological father. Harmon, supra, at 542-543. So even when statute expands the duties of *in loco parentis*, the termination of the in-home relationship can end the *in loco parentis* relationships.

But step-parents are the only ones with statutorily expanded *in loco parentis* duties. No statute requires other types of nonparental custodians who have been acting *in loco parentis* to ever pay support

for a child after the child has left his or her home.

For example, while a foster parent keeps a child in a foster home, the foster parent has a duty to provide for the child. But if the child leaves the foster home, the duty terminates. The foster parent does not owe child support.

Likewise, if the aunt keeps a child in the aunt's home, the aunt has a duty to provide for the child. But if the child leaves the aunt's home, the duty terminates. The aunt does not owe child support.

Such is the case we have here. These grandparents allowed the grandchildren to come live in their home. Nonparental custody statutes empowered them to do it but did not mandate it. The grandparents acted *in loco parentis*, but at common law, *in loco parentis* status is voluntary and ends when the children are no longer in one's home.

There is no provision among the nonparental custody statutes which is the equivalent of the step-parent liability statute. Nothing mandates nonparental custodians to provide support for the children who previously lived with them. Perhaps the legislature understood nonparental custody to be an essential stop-gap to the problem of unfit parents and the legislature wanted to encourage volunteers.

Ms. Simpson's attorney claims the fact that Mr. and Ms. Simpson have taken care of the children for a long time without the help of the biological parents is a reason to treat them as the "parents". But

no matter how long it has been, nonparental custody won't turn a nonparental custodian in a parent.

In re the Custody of S.H. B., 118 Wn. App. 71 (2003) held that although the child had lived with the paternal grandmother for six years, the paternal grandmother was not the "parent" under any statutory definition and did not thereby gain the right to be treated as a "parent".

The court said,

At common law, a parent was either the biological mother or biological father of a child. Nonparents - including adoptive parents, legal guardians, grandparents and persons act in an *in loco parentis* capacity - do not have the same constitutional rights of a parent absent legislative action.

The Legislature has supplemented the common law definition of parent through both the Uniform Parentage Act, and the Adoption Act. The Uniform Parentage Act defines who is a parent for all purposes. Under the Act, a parent may be a biological or adoptive parent, or someone who has a surrogate parentage contract under which the mother is an intended parent of the child. The Adoption Act also defines parent, but limits the definition to only those persons who are natural or adoptive parents. Luby [paternal grandmother and nonparental custodian in S.H.B.] does not satisfy the definitions set forth in either of these statutes.

S.H.B. supra at 80.

Likewise in our case, Shirley Simpson and Leonard Simpson do not satisfy the definition of "parent" as set forth in those statutes. The fact that Mr. and Ms. Simpson have had Kimberly and Breanna living with them for 10 years does not transform either Shirley Simpson or Leonard

Simpson into the “parents”.

Just as the passage of time and the biological parents’ neglect do not divest of the biological parents of their duties to support these children, the passage of time, the parents’ neglect and the charitable assumption of *in loco parentis* for a number of years while a child lives in one’s house does not transform the nonparental custody into an adoption. Furthermore, none of these events or circumstances stop the *in loco parentis* status from terminating when physical custody of the children ends.

Public Policy Issues:

It is the unfortunate truth of our times that many children cannot live with either biological parent. Some go into foster care, but many go into nonparental custody with relatives, or even friends or neighbors. Sometimes there is a formal nonparental custody decree. Other times there is not.

But all such nonparental placements are voluntary, not mandatory.

When Shirley Simpson asked the court to order child support from Leonard Simpson she in effect asked the court to turn the voluntary nonparental custody Leonard Simpson had once had for these children into a quasi-adoption.

But should the court use the doctrine of *in loco parentis* to turn a

voluntary nonparental custody into a quasi-adoption? Perhaps the answer to this question will become clear if we looked at a few other scenarios.

If these children went to live with another relative, should Shirley Simpson have to pay child support because she gained *in loco parentis* status when she took these children into her home? What if the children returned to live with their mothers? Should the grandparents have to pay the parents for the support of grandchildren because the grandparents gained *in loco parentis* status when they stepped in to help out? Such outcomes would be absurd.

Consider wise dicta from Matter of Montel, 54 Wn.App 708 (1989). When commenting on whether the court should make a stepfather financially responsible by using *in loco parentis* doctrine against him, the court said,

It is poor public policy because stepparents faced with circumstances similar to those confronting James Montel, would very likely be averse to bringing step-children into their home voluntarily if by doing so they would be subjected to continuing liability for the support of the stepchildren.

Montel, supra at 713.

The same principle applies to any nonparental custody situation. If the court turns a voluntary nonparental custody into a quasi-adoption and orders child support payments from a prior nonparental custodian

because he previously allowed children to live with him, the doors into the homes of many relatives will start slamming shut out of fear that a person's generosity will be transformed by the court into a mandated child support duty.

And it won't just be relatives. Such a ruling could have a chilling effect on any form of nonparental custody, including foster homes, of which there are already too few as it is. Without nonparental custody placements (either from relatives or foster parents), children who cannot live with their parents will have to end up in orphanages or other institutions.

The court needs to think long and hard about these repercussions. It would be truly ironic if, in trying to do these two children a little financial good, the court ended up damaging the interests of numerous neglected and abused children statewide.

#### IV. CONCLUSION

The court should decline to order Leonard Simpson to pay child support in this dissolution action. The court should find that Leonard Simpson is not a parent owing a duty of support to these children and that any *in loco parentis* status he had while the children lived with him terminated when he left the home. The court should also find that it is

against public policy to impose a child support obligation on a nonparent  
when the child no longer lives with the nonparent.

Respectfully submitted:

A handwritten signature in black ink, enclosed within a large, hand-drawn oval. The signature is stylized and appears to read 'Rebecca L. Bernard'. Below the signature is a horizontal line.

Rebecca L. Bernard  
Deputy Prosecuting Attorney  
WSBA #20325