Carignan v. Carignan[1]: When is a Father not a Father? Another Historical Perspective

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I. INTRODUCTION

IN 1989 THE MANITOBA COURT OF APPEAL issued a decision that appears to radically alter the position of parents ending second or subsequent marriages. While there was some uncertainty regarding the ongoing liability of stepparents to support biological children of their spouses, the Appeal Court ended speculation in the *Carignan v. Carignan* decision. Both federal and provincial legislators believed, as a matter of policy, that husbands and wives who accept a step child as their own by standing in the place of the child's parent ought to bear some responsibility toward the financial support of that child. Both *The Family Maintenance Act*[2] and the *Divorce Act, 1985*[3] provide for people in the place of a parent to be charged with supporting a child.[4] The question arose, however, as to the length of that obligation. Was it the case that once the relationship was established, one was forever in that position? Could one ever end the "parental" relationship? Canadian case law was indeterminative. While some

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[1] (1989), 19 R.F.L. (3d) 65 (Man. QB): aff'd (1989), 22 R.F.L. (3d) 379 (Man. C.A.).

[2] R.S.M. 1987, c. F20.

[3] R.S.C. 1985, c.3 (2nd Supp.).

[4] See the definitions of child in section (2) of the *Divorce Act, 1985* (*supra*, note 3) and section 1 of the *Family Maintenance Act* (*supra*, note 2). Section 36(4) of *The Family Maintenance Act* provides that the obligation of one who stands *in loco parentis* to a child is secondary to that of the child's parents, and exists only to the extent that those parents fail to provide reasonably for the child. Sections 36(2) and 36(3) of the Act further provide that persons have a duty to support children of spouses or common law spouses while they are cohabiting.

courts felt that the relationship was not interminable, few decided it was capable of termination at the unilateral decision of the parent. Such unilateral withdrawal was, however, fully endorsed by the court in *Carignan*. As a result of this decision, it seems that the possible answer to the question posed in the title of this paper is, "Whenever he decides that he no longer wants to be."

In coming to its conclusion, the Manitoba Court of Appeal reviewed the issue from an historical perspective and found that the traditional common law doctrine of "in loco parentis" required a specific interpretation of the relevant section of the *Divorce Act*. Additionally, both its method of analysis and its choice of language implied that, because of these historical roots, that specific interpretation was the one "true" interpretation. This approach, it is submitted, ignores the contingency of history and the relevance of the time and place from which one digs the roots. Further, by approaching the issue in this formalistic way, the Court avoided looking at broader policy issues surrounding the obligations of members on breakup of reconstituted families.

A. The Facts

Mr. and Mrs. Carignan married in July, 1978 after cohabiting for four years previously. Both had been married before; Mrs. Carignan having been divorced and Mr. Carignan widowed. Mrs. Carignan had one child, born in 1972, and Mr. Carignan had two. They lived together as a family for some years, and separated in 1981. At that time Mr. Carignan's children were approximately 14 and 19 years old, and Mrs. Carignan's child was about 8 years old.

In 1982 the parties filed a consent order in the Provincial Court, providing, inter alia, that Mrs. Carignan would have custody of the child.[5] The order was silent as to child support.

Mrs. Carignan petitioned for divorce in 1987, and sought child support from Mr. Carignan. She argued that he took the place of the child's father, and was therefore bound to contribute toward the child's support. Care or support of Mr. Carignan's two children was not in issue as, due to their ages, they were not "children of the marriage" within the meaning of the *Divorce Act*.[6]

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[5] Despite the fact that a consent was ultimately reached, Mr. Carignan did file an Answer to Mrs. Carignan's *Family Maintenance Act* application before the Provincial Court, in which he denied liability for child support.

[6] Per Schwartz, J., *supra*, note 1, at 66.

Mrs. Carignan had been divorced from her first husband in 1977, and was awarded child support in the amount of $150.00 per month. Two Variation Orders were made. The first, in November of 1978 reduced the amount payable to $75.00 per month, and the second, in January, 1988, increased that amount to $250.00. The child's father made most of his support payments from 1980 to 1987, but only two payments were made pursuant to the second Variation Order before he left his job and the jurisdiction. He had had only one visit with the child since his separation from Mrs. Carignan and was not able to be located at the time of the trial.

II. IN THE QUEEN'S BENCH

THE CARIGNANS' MATTER came before Schwartz J. in the Court of Queen's Bench. The issue, he said, "is whether or not the respondent stood in the place of the child's father at any time during their marriage."[7] On the evidence, he had no hesitation in so finding. Schwartz J. continued, however, and suggested that while that finding would, according to some authorities, determine the issue as to financial responsibility, there were opposing lines of authority which acknowledged that due to changed circumstances, one may cease to be in the place of a father at a later date. The court then identified the issues as follows: "Once a person stands *in loco parentis* to a child, must that relationship subsist until the child is no longer a child of the marriage?"[8], and, "Can one terminate the relationship by withdrawing from that status? If so, can the withdrawal be unilateral?".[9]

Schwartz J. reviewed recent Canadian case law on these points and found that there did not appear to be any general consensus of opinion. Parliament, in both the *Divorce Act*, 1968[10] and the *Divorce Act, 1985*, provided that someone other than a biological parent could be charged with the responsibility of financially supporting that child

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[7] *Ibid.*, at 67.

[8] *Ibid.*, at 68, quoting J. McLeod, "Annotation", (1985) 47 R.F.L. (2d) 188.

[9] *Ibid.*, at 69.

[10] *Divorce Act* S.C. 1967-68, c.24

on marriage breakdown, if that person *stood in the place of a parent.*[11] In such a case, that person would be as responsible to the child as a natural parent would be.[12] At what point, however, if any, did that relationship end? According to some authority, it ended only upon the child ceasing to be a "child of the marriage" by, for example, attaining the age of majority. Other decisions reflected the view that the parent could end the *in loco parentis* relationship by unilaterally withdrawing from it. Manitoba jurisprudence opposed that latter suggestion, and Helper J. exemplified courts' positions in this regard by declaring that a stepparent

> cannot avoid responsibility to the child by presenting a petition to this court after terminating regular visitation with the child and asking the court to make a finding that his status *in loco parentis* has terminated. That reasoning cannot and will not be adopted.[13]

Faced with conflicting Canadian case law, Schwartz, J. found that although Mr. Carignan took the place of the child's father during his cohabitation with Mrs. Carignan, he was neither *in loco parentis* at the time the application for support was made, nor at the trial, and consequently, he was not responsible to contribute to the child's support.

The factual circumstances upon which the decision was based were important. Approximately seven years elapsed after they separated before Mrs. Carignan first made application to any court for support from Mr. Carignan. He did not visit the child at all during the intervening six years, and made no voluntary payments of support. Further, as discussed earlier, the child's biological father made regular contributions to his support, and *all* concerned, including the child and the mother, accepted Mr. Carignan's withdrawal from the child's life.[14]

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[11] This wording is used in the *Divorce Act 1985*. See *supra*, note 2. In the *Divorce Act 1968*, section 2(a) was worded slightly differently: "(a) "child" of a husband and wife includes any person to whom the husband and wife stand *in loco parentis* and any person of whom either of the husband and wife is a parent and to whom the other of them stands *in loco parentis*".

[12] *Supra*, note 1, at 71.

[13] *Pickup v. Pickup*; *Pickup v. Heerah* (1985), 47 R.F.L. (2d) 188 at 196 (Man. Q.B.).

[14] *Supra*, note 1, at 73.

Schwartz, J. considered the policy and goals reflected in the legislation, and found that in the case before him, a support order was not warranted.

III. IN THE COURT OF APPEAL

MRS. CARIGNAN APPEALED THE DECISION. The Manitoba Court of Appeal (O'Sullivan, Huband and Lyon JJ.A.) heard the matter in June of 1989 and issued its reasons and decision in November of that same year.[15] The Court took the opportunity to conduct an historical and cross-jurisdictional review of the concept of *in loco parentis*, referring to 19th century English doctrine and 20th century American jurisprudence in addition to recent Canadian case law on point. The court dismissed Mrs. Carignan's appeal. It found that Mr. Carignan did not stand *in loco parentis* to the child at the time of the hearing, and therefore was not responsible to contribute to the child's support. It found further, that Mr. Carignan, or any person who stands *in loco parentis* to a child, could withdraw from that relationship unilaterally, merely by evidencing an intention to do so. On what basis was this decision reached?

Huband J.A. (O'Sullivan J.A. concurring and Lyon J.A. concurring in the result), first approached the issue by reference to application of the doctrine from 19th century English cases respecting pre-testamentary gifts and double portions. He stated, "The rule, in broad terms, is that a gift by deed made by a testator after he had executed a will represents an advance as against what the child is to receive by will."[16] "Child" in the cases referred to, included a child to whom the testator stood *in loco parentis*. These early cases were therefore concerned with whether or not "strangers" to the testator ought to retain both an *inter vivos* gift and a testamentary disposition made to them. If the testator stood *in loco parentis* to the donee, the presumption would be against receipt of a double portion. Testators, Huband J.A. pointed out, were said to be *in loco parentis* if they *meant* to put themselves in that state, that is, "in the situation of the person described as the lawful father of the child".[17]

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[15] (1989), 22 R.F.L. (3d) 377.

[16] *Supra*, note 15, at 378.

[17] *Ex Parte Pye* (1811), 18 Ves. 140, at 154, per Lord Eldon.

Huband J.A. then referred to trust law, and the case of *Bennet v. Bennet*[18], where it was stated that the presumption of advancement, applicable between a child and father, also arises as between a child and a person who stands *in loco parentis* to that child. Following previous authority, Jessel M.R. stated in the *Bennet* matter, "So that a person *in loco parentis* means a person taking upon himself the duty of a father of a child to make provision for that child."[19]

Huband J.A. found that in both of the above contexts, it made sense that, "the relationship *in loco parentis* arises only when the adult voluntarily assumes the burden of providing for the child, and it is equally reasonable that the relationship might be unilaterally terminated by the adult."[20]

Huband J.A. next considered Canadian jurisprudence under fatal accidents legislation, and found that in tort law as well, a person may place him or herself *in loco parentis* by evidencing an intention to occupy a place ordinarily occupied by the child's father for the provision of the child's pecuniary wants.[21]

It is at this point in his decision that Huband J.A. turns to litigation in the area of family law. He refers firstly to four United States cases, each of which supports a broad statement made in *Corpus Juris Secundum*:

> The status assumed by one *in loco parentis* is temporary, and since the relationship exists at the will of the party assuming the obligations of a parent it may be abrogated by such party at any time.[22]

Based upon those decisions, Huband J.A. states, "If American case law is to be taken into account, there is abundant and decisive authority that the relationship *in loco parentis* can be ended by the unilateral decision of the adult."[23]

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[18] (1879), 10 Ch. Div. 474.

[19] *Ibid.*, at 477.

[20] *Supra*, note 15, at 380.

[21] See, for example, *Shtitz v. CNR* (1926-7), 21 Sask L.R. 345, [1927] 1 W.W.R. 193, [1927] 1 D.L.R. 951 (C.A.).

[22] 67A C.J.S. 551, para 54.

[23] *Supra*, note 15, at 382.

It is in this context that the court goes on to review the Canadian cases regarding support for "children of the family" under Canadian divorce legislation. Accepting first of all that one cannot be *in loco parentis* unless one *intends* to assume that position (ie. simply being pleasant or financially generous without the intention to be assume "parental" responsibilities is not sufficient), it then recounts that line of authorities which declared that one who had assumed parental obligations within the marriage could unilaterally withdraw from them, provided the withdrawal occurred before a certain date - usually stated to be the date that the proceedings for support were commenced.[24] Another line of cases, however, suggested that there could be no such unilateral withdrawal.[25]

The court followed the *Hock* line of decisions, and indeed implied that the withdrawal may be made even after support was ordered, although it was not necessary to decide that issue as there was no order in the Carignans' case.[26] Mr. Carignan was, in any event, "entitled to make a unilateral withdrawal, certainly up to the time the court considers an application for maintenance."[27]

In a very significant passage, Huband J.A. further states that prior to cases dealing with *in loco parentis* in a family law context, it would be entirely clear that a father could terminate visits with a child and then ask a court to determine that his status *in loco parentis* had ended.[28] The significance of this statement rests, it is submitted, in the potential for the court to have acknowledged the ill-fit of this doctrine to contemporary family law, and in yet choosing to disregard such a possibility.

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[24] See, for example, *Hock v. Hock* (1971), 3 R.F.L. 353, [1971] 4 W.W.R. 262, 20 D.L.R. (3d) 190 (B.C.C.A.)

[25] See, for example, *Pickup v. Pickup*; *Pickup v. Heerah*, *supra*, note 13.

[26] *Supra*, note 15, at 390. Huband JA added that, "there is an argument to be made that, once an order is given, liability for maintenance is based on the order rather than on the relationship of *in loco parentis*." This leaves open the question of whether or not a father unilaterally withdrawing after an order was made could be successful in arguing a change of circumstances so as entitle him to a variation order.

[27] *Ibid.*, at 391.

[28] *Ibid.*, at 390. This would be, as his Lordship noted, exactly what Mr. Pickup proposed and was rejected by Helper J., *supra*, note 13.

IV. ANALYSIS OF THE DECISION

AS PREVIOUSLY STATED, the Court of Appeal embarked upon an historical review of the doctrine of *in loco parentis*. Such an approach can be instructive in providing for contemporary practitioners a view of the genesis and original contexts of the doctrine, and is a part of the common law tradition. One must always be careful, however, that one does not lose sight of those historical contexts. One cannot simply import 19th century concepts into 20th century society, without some consideration of their relevance to contemporary values.[29]

Historical analyses are also fraught with the uncertainty that is inherent in attempting to interpret historical "facts" through eyes focused with modern biases, influences and beliefs. Some writers go so far as to suggest that there is no objectively identifiable historic fact, and that "all historical descriptions are interpretations."[30] Relativist epistemology notwithstanding, it is clear that the answers one receives depend as much upon the questions one chooses to ask, as upon where one chooses to focus the investigation.[31] The Manitoba Court of Appeal chose to focus its investigation upon the doctrine of *in loco parentis* as it developed in trust law and tort law, and then to declare that it was problematic if that concept did not also apply to divorce laws.[32] By simply declaring the existence of such a problem, the court foreclosed any potential discussion of the issue. Further, both the appellate and trial courts assumed that the words "in the

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[29] See, for example, Twaddle J.A.'s decision in *Aime v. Aime* (1990), 27 R.F.L. (3d) 1, at 6. He reviews the birth and development of the "one year rule" in enforcement of maintenance arrears, and while recognizing the practice of ecclesiastical courts not to enforce arrears of maintenance beyond those that accrued in the preceding year, states that that rule was not due to any canon of ecclesiastical law, but rather to "the status of married women in England prior to 1857".

[30] See discussion of this point in B. Trigger, "Hyperrelativism, Responsibility and the Social Sciences" (1989), 26 C.R.S.A. 776.

[31] This point is fully developed in W. Pue, "An Introduction to Canadian Law in History," in *Canadian Perspectives in Law and Society: Issues in Legal History*, W. Pue and B. Wright eds., (Ottawa: Carleton University Press, 1988).

[32] *Supra*, note 15, at 392.

place of a parent" found in the *Divorce Act 1985*, were "intended to have the same meaning as one would attribute to *in loco parentis*".[33]

It is submitted that both of the above assumptions were based on unsupported conclusions and need not have been treated by the court as axiomatic. For example, could one not argue that Parliament, by rephrasing the legislation, rejected the common law notion of *in loco parentis*, in favour of a 20th century concept of family and family responsibilities? Secondly, even if "in the place of a parent" *is* merely a translation from the Latin with no intended change in meaning, does it necessarily follow that it is to be applied in 20th century divorce situations in the same way Chancery courts applied it to testamentary and other trust situations? I will attempt to discuss these issues by reference to the specific authorities considered by the Court of Appeal.

A. The English Authorities

Notwithstanding the language of the *Divorce Act 1985*, the court accepted that its task was to define the phrase *"in loco parentis"*. In reflecting upon English roots, the court limited its definitional search to testamentary or trust situations, notwithstanding that the *in loco parentis* doctrine arose in diverse contexts, including the master/apprentice relationship[34] and the schoolmaster/pupil relationship.[35] Moreover, the court did not engage in any study of the general law and equity regarding a parent's obligation to maintain his or her children, but was prepared to assume that a father was under a duty to provide for the financial needs of his child.[36] I will return to these points later.

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[33] *Ibid.*, at 382.

[34] See (1975), 6 Corpus Juris Secundum 7 at 115 et ff., where the incidents of the traditional contract of apprenticeship are outlined, and the contract is described as one which placed the master *in loco parentis* to the apprentice.

[35] "The father may also delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child; who is then *in loco parentis* and has such a portion of the power of the parent committed to his charge, viz that of restraint and correction, as may be necessary to answer the purposes for which he is employed." *Blackstone, Commentaries of the Law of England*, W. Lewis ed. (Philadelphia: Rees, Welch & Co., 1897), Book 1 at 427-28.

[36] *Supra*, note 15, at 378.

The earliest case referred to by the Court of Appeal is *Ex Parte Pye; Ex Parte Dubost*,[37] an 1811 decision of the formidable Lord Eldon. The question in that case was whether the testator intended to provide a "bounty" for his illegitimate daughter by a legacy in his will additional to a sum given to her as an *inter vivos* gift upon her marriage, or whether the "artificial notion" that the father is paying a "debt of nature" ought to be applied, so as to require the court to treat the gift as an ademption of the legacy.[38] This "artificial notion" could also be applied, said Lord Eldon, if it could be shown that this stranger-testator meant to give the portion as a parent, in other words was "meaning to put himself *in loco parentis*, in the situation of a person, described as the lawful father of the child".[39] On the facts he could not so find, but the foundation for future interpretation was laid, and much was subsequently made of Lord Eldon's choice of words.

In *Powys v. Mansfield*[40] facts similar to the *Pye* case were at issue. Lord Cottenham adopted Lord Eldon's words, emphasizing that which he considered to be the "principle value" of the phrase, the *intention* of the testator, as evidenced by the words "*meaning* to put himself *in loco parentis*".[41] Did the person intend to put himself in the office of parent, with all of its attendant responsibilities and obligations, or did he merely mean to act as a friendly and generous uncle? In this case, the testator had treated his niece and her sisters as his own children and the court therefore found that he stood *in loco parentis* to them at the time the gifts were made. Young Miss Powys did not, therefore, receive a double portion.

In trust law as well, courts relied upon Lord Eldon's formulation of a person *in loco parentis*. *Bennet v. Bennet*[42] concerned the applicability of the presumption of advancement to a loan given by a mother to her son. The son subsequently died, and the mother attempted to recover the loan as a debt of his estate. As a mother bore no legal or

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[37] *Supra*, note 17.

[38] The "debt of nature" applied only to legitimate children.

[39] *Supra*, note 17, at 276.

[40] (1837), 3 My. & Cr. 359 at 367, 40 E.R. 964

[41] *Ibid.*, at 967.

[42] *Supra*, note 18.

equitable responsibility to her children, the court was forced to find that she stood *in loco parentis* to her son if it wished to apply the presumption of gift to the sum. That presumption arises from a moral obligation to give, which obligation exists in the case of a father, as well as in the case of one who intends to assume it by putting him or herself in the place of the father. While the facts disclosed a clear intention on the part of the mother to make a loan to her son, the court accepted once more the *Pye* and *Powys* formulation of the rule.

Each of these authorities was accepted at face value by the Manitoba Court. No mention was made of the common law and social context in which these cases were decided. In 1811 when Lord Eldon considered *Ex Parte Pye*, the common law gave fathers an almost exclusive right of possession of their legitimate children as against third parties, including mothers.[43] Children were often considered more as chattels of their fathers than as autonomous individuals, and in discussing post-1800 family types generally, the historian Lawrence Stone saw the period as one of "patriarchal power of husband over wife and father over children."[44] In that socio-legal context, courts recognized a father's *moral* obligation to provide for his children, as in the above examples of testamentary dispositions. That obligation was imperfect, however, and neither directly nor easily enforceable.[45]

Given this context, it does seem clear that if a stranger chose to make provision for the child, he or she was choosing to undertake a legally unenforceable responsibility. Volunteering to take the place of a father did, however, imply undertaking the moral responsibility to provide, and therefore intention to undertake it was important. It was crucial to determine whether the "patron" considered him or herself as being paternal, or merely as being kind. Clearly then, creation of any moral responsibility was at the option of the patron, and unilateral withdrawal from that responsibility was acceptable. It was inconceivable that the child or his or her caregiver would have any

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[43] See, for example, *R. v. de Manneville* (1802), 5 East. 221; *de Manneville v. de Manneville* (1804), 10 Ves. 52.

[44] L. Stone, *The Family, Sex and Marriage in England 1500 - 1800*, Abridged Edition (New York: Harper, 1979) p. 423. At page 422, Stone further identifies the period as one of "moral regeneration" and "repression".

[45] A. Simpson, *A Treatise on the Law and Practice Relating to Infants*, (London: Stevens and Haynes, 1875) pp. 156 and 161.

action against a withdrawing patron. In general, a father's liability to maintain was stated in 1868:

> It is now well established that, except under the operation of the *Poor Law*, there is no legal obligation on the part of the father to maintain his child, unless indeed the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation.[46]

If no civil method existed to compel biological fathers to maintain their children, there certainly could be none for persons who chose to stand in the father's place.

Even in 1839 when the *Custody of Infants Act*[47] first permitted courts to award custody of children under seven years of age to their mothers, they were not given jurisdiction to order that fathers pay support for the children. It was not, in fact, until the *Divorce and Matrimonial Causes Act* of 1857[48] that a legal obligation to provide for one's children, *on divorce*, was fashioned out of the moral duty.

The exception was, of course, the Poor Laws. From Tudor times, the Poor Law created a duty on people lineally related by blood to support a relative who was unable to work. Husbands who left their families dependent upon the parish were liable to punishment.[49] It was the Poor Law (the "family law" of a bulk of the population[50]) which first imposed a legal duty on able-bodied family members to support their dependents. In many respects, however, this law was intended to relieve parish coffers, as much as to promulgate any notion of family interdependence or collectivity. We see in it for the first time,

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[46] *Bazeley v. Forder* (1861-68), 3 Q.B. 559 at 565.

[47] 2 & 3 Vict. c.54.

[48] 20 & 21 Vict. c.85.

[49] See *An Act For The Relief Of The Poor*, 43 Eliz. c.2, ss.7(a): "The Father and Grandfather, and the Mother and Grandmother and the Children of every poor, old, blind, lame, and impotent Person, or other Person not able to work, being of sufficient Ability shall at their own Charges relieve and maintain every such poor Person in the Manner and according to the Rate set by the Justices of the Peace, ... upon Pain that every one of them shall forfeit twenty Shillings for every Month, which they shall fail to therein."

[50] See generally on this, J. Ten Broek, "California's Dual System of Family Law: Its Origin, Development and Present Status" (1963-4), 16 Stanford L.R., 257.

however, a notion of what Eekelaar calls the family as "a contemporaneous economic entity".[51]

This is particularly so after the definition of familial dependents expanded in 1834 with the *Poor Law Amendment Act*.[52] It provided for the first time that a husband was to be placed under an obligation to support his wife's children from previous marriages. He was "liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children."[53]

In the realm of this "family law", then, becoming a stepfather created an obligation to support, or at least to reimburse the state for supporting one's step-children. The notion of being *in loco parentis* was absent from this policy; intention was unimportant. Duty was implied from the creation of the family unit.

As can be seen therefore, familial duties in early 19th century English law, were either exclusively paternal, moral, and not directly enforceable, or they were created by statute by virtue of one's being financially dependent upon the state. Ten Broek, referring to Blackstone, notes that only "Providence", augmented by the Poor Law existed to fulfil the "natural" duty of child support.[54] Generally

> Neither by judicial decision nor indeed by statute was any general liability created in parents to support their minor children... The courts continued to find that parents were under a natural duty and a moral responsibility but not a legal obligation. The Elizabethan poor laws stood alone as the only legal provision upon the topic.[55]

It is submitted that these policies ought not to be the bases upon which contemporary family law decisions are made.

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[51] Eekelaar, "Family Law and Social Control", in *Oxford Essays in Jurisprudence, Third Series*, J. Eekelaar and J. Ball eds. (Oxford: Clarendon Press, 1987) at 130.

[52] 4 & 5 W. c.76, s. 57.

[53] MacPherson, *A Treatise on the Law Relating to Infants.* (London: Maxwell and Son, 1842) at 210.

[54] *Supra*, note 50, at 290.

[55] *Ibid.*

Further, historical[56] as well as sociological studies of the family have emphasized a movement from father-centred to child-centred policy. McKee and O'Brien identify contemporary families as valuing notions of "parental love, motherly and fatherly love; child centredness and self-conscious parenthood; and shared parenting"[57] among others. Contrast this with Blackstone's description of the parent-child relationship: "The legal power of a father - for a mother, as such, is entitled to no power, but only to reverence and respect; the power of a father, I say, over the persons of his children ceases at the age of twenty-one..."[58]

Aside from the issue of the duties created by an *in loco parentis* relationship, is the question of how one enters into it. In the cases above, status was created by intention of the donor or testator, but it is difficult to ignore the acceptance of the financial offerings by the child and his or her natural parents. For example, if Miss Powys or her father had rejected Sir John Barrington's overtures of money and "paternity," one wonders if he could have placed himself in that position, even with the strongest of intentions to do so.

Similarly, in other areas of the law, someone other than a lawful father could stand *in loco parentis* to a child. Masters, for example, stood in a type of *in loco parentis* relationship to their apprentices; they were obliged to provide medical and financial necessaries. This relationship arose as a result of the *contract* of apprenticeship, entered into between the master and the infant's father with the infant's consent.[59] While the master certainly required an intention to accept his apprentice, that intention was also required by each of the other contracting parties. Similarly, fathers would delegate certain of their offices to school masters, who then stood, for certain purposes, *in loco parentis* to students. As a result they were able to lawfully discipline and educate infants in their care. Once again however, the school-

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[56] See, for example, L. Stone, *supra*, note 44.

[57] L. McKee and M. O'Brien, "The Father figure: Some current orientations and historical perspectives," in L.McKee and M. O'Brien, eds., *The Father Figure*, (New York: Tavistock, 1982) at 21.

[58] *Supra*, note 35, at 453.

[59] Under the Poor Laws, parishes themselves could apprentice "poor" children to masters as well. See section 3, *An Act For The Relief Of The Poor*, *supra*, note 49.

master's intention alone was not sufficient to create or sustain the relationship.

B. The American Jurisprudence

The Appeal Court also found support for the principle of unilateral withdrawal in 20th century jurisprudence emanating from the United States. It considered decisions from Iowa,[60] New Jersey,[61] the District of Columbia[62] and Colorado,[63] all of which expressed agreement with the general idea: "Generally, one standing *in loco parentis* may at his election be relieved of that status and the attendant obligations at any time."[64] In what context, however, were these decisions made?

In only two of those cases were courts concerned with the support of step children, and it does not appear that there was any statutory authority imposing a duty to support upon divorced step or psychological parents. In *Fuller v. Fuller*[65] the mother argued, among other things, that acceptance of her child by the Respondent was tantamount to adoption and thus created an obligation to support the child. The court differentiated between formal adoptive status and status *in loco parentis*, which was "nebulous" and "temporary".[66] In *D. v. D.*[67] the court found that while the Respondent-Defendant's two biological children were "children of the marriage", the middle one was not even though he stood *in loco parentis* to that child during cohabitation. These courts were forced to rely upon the common law if they wished to impose any liability whatsoever.

The other two cases considered the relationship *in loco parentis* in somewhat different contexts. In *G. v. G.* the court considered whether

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[60] *Iowa v. Bacon*, 91 N.W. 2d 395 (Iowa S.C., 1958).

[61] *D. v. D.*, 153 A. 2d 332 (N.J.C.A., 1959).

[62] *Fuller v. Fuller*, 247 A. 2d 767 (D.C.C.A. 1968).

[63] *G. v. G.* 580 P. 2d 836 (Colo. C.A. 1978).

[64] *Ibid.*, at 837-38.

[65] *Supra*, note 62.

[66] *Ibid.*, at 770.

[67] *Supra*, note 61.

a man who voluntarily sought legal "custody" of a child during neglect proceedings must continue to serve as a legal custodian against his will. A legal custodian, said the court, stands *in loco parentis* to a child, and in some respects is similar to a step parent. Notwithstanding these analogies, the issue before the court was whether or not to impose the continuing obligations of legal custody upon an unwilling person. The court decided this in the negative and granted the petitioner's request to terminate his legal custody of the child. The Colorado court found its interpretation of the law in a 1968 text:

> *In the absence of statute*, the common law refused to impose any liability of support upon stepparents, except where the stepparent voluntarily takes the child into the family and assumes the duty of support. Even in this latter case, however, the stepparent may end his obligation of support at will.[68] [emphasis added]

Finally, in *Iowa v. Bacon* the defendant Bacon wished to take a child for whom he had been caring for six years out of the jurisdiction of the court. The family had been the subject of a number of neglect proceedings, conferences and informal hearings, and the court refused to allow Bacon to remove the child. Bacon argued that he stood *in loco parentis* to the child and ought therefore to have had the right to remove the child to wherever he wished. The court noted the difference between a relationship *in loco parentis* and a natural or adoptive one, and found that Bacon could disavow his relationship *in loco parentis* at any time. In order to protect the child, the court deprived Bacon of custody of the child.

In each of these decisions then, courts were concerned with strict common law doctrine. None of them dealt with interpretation of a statute imposing a duty to support upon psychological parents, as does the *Divorce Act, 1985*. Such recourse to this doctrine can be problematic, however, as the common law regarding reconstituted relationships often ignores the very real economic, psychological and emotional bonds created within that unit.[69] Indeed, notwithstanding the

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[68] *Supra*, note 63, at 838.

[69] Indeed, the law may encourage one to create such bonds by implying that the best interests of a child are met by the stability such a union can provide. Possible implications for women of this implicit encouragement are explored in Thery, "The Interest of the Child and the Regulation of the Post-Divorce Family", in *Child Custody and the Politics of Gender*, C. Smart and S. Sevenhuijsen eds. (New York: Routledge, 1989).

above decisions, some American courts have tried to ameliorate their effects.

Knaub in a 1986 Note outlines how the rights of step-children to receive support from step-parents evolved slowly over the years.[70] She confirms the common law rule that one was not bound to support unless there was a voluntary assumption of that responsibility but that the responsibility ended with the end of the marriage. She then goes on to describe the first inroad made to this idea, when courts acknowledged that the *in loco parentis* relationship need not automatically end upon divorce from the natural parent,[71] such that termination of the marital relationship was not deemed to be termination of responsibility for children.[72]

Finally, as courts were increasingly faced with the growing reality and frequency of second marriages and family breakdown, and often saw harsh consequences resulting from application of the traditional *in loco parentis* doctrine, they began to develop more intricate ways to deal with them. One method was to use the notion of equitable estoppel to prevent a step-father from disclaiming his child support obligations.[73] In *AS v. BS*, the court estopped Mr. S. from disclaiming his support duties, and emphasized "that the child relied on Mr. and Mrs. S. to provide for him, and he would suffer 'irreparable harm' if Mr. S were permitted to repudiate the duties of a natural father."[74]

Other means were used by courts in the United States to find some obligation to continue support as well. Duties could be formulated

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[70] Knaub, (1986), 16 Seton Hall L.R. 127.

[71] *Ibid.*, at 133-34.

[72] The court in *D. v. D.*, *supra*, note 61 recognized this, but found that the court should not order a non-biological father to support without evidence that he consented or meant to continue to stand *in loco parentis*. This reasoning seems to contradict other authority which presumes the status to continue without clear evidence to the contrary. See, for example, cases cited at (1975) 67A C.J.S. 154, para 151.

[73] See, for example, *Ross v. Ross* 126 N.J. Super. 394, 314 A. 2d 623, aff'd. 135 N.J. Super. 35, 342 A. 2d 566 (1975), *AS v. BS* 139 N.J. Super. 366, 372, 354 A. 2d 100, 103 aff'd. 150 N.J. Super. 122, 374 A. 2d 1259 (1976); *Miller v. Miller*, 478 A. 2d 351 (1984). The court in *Fuller v. Fuller*, *supra*, note 62, dismissed such an argument as well as one based upon contractual principles, *infra*, note 75.

[74] *Supra*, note 73, at 102-03.

based upon contractual principles,[75] or a court could order support indirectly by awarding use and possession of the marital home to a wife and her child of a former marriage.[76]

It is indeed unfortunate that the Manitoba court returned to the rigidity of the common law in the face of legislation potentially able to release it from those bounds, at the same time as United States courts were formulating equitable escape hatches for themselves.

It is at this point that I wish to return briefly to the law of the United Kingdom. I stated earlier that the Court of Appeal did not examine the *family* law of the U.K. in considering the origins of the *in loco parentis* doctrine. It was further implied that a "family law" as we know it today did not really exist outside of such areas as the law of property, and testamentary gifts, and the Poor Laws, as they each related to the family.

Modern English family law has not remained in this fragmented state. There is, most definitely, a body of family law in the U.K. today, and in 1965, the Law Commission found itself concerned with the question of obligations of support among members of reconstituted families. In considering the definition of "child of the family" in that context, the Commission stated:

> Our consultations reveal general agreement with the view that the residual reliance on a blood tie should be done away with. In other words, if a child has been accepted as one of the family, he should be a child of the family whether or not he was the natural child of one or other party to the marriage in question.[77]

In its Working Paper, the Commission characterized the developments toward this end as a "humanisation of the law protecting children."[78]

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[75] See, for example, *L. v. L.*, 497 S.W. 2d 840.

[76] *Strawhorn v. Strawhorn*, 435 A. 2d 466 (Md. App. 1981). The husband argued on appeal that although he had no legal duty to support the appellee's son of a former marriage, the use and possession award nevertheless imposed such a duty. The Court of Appeal upheld the award based upon the implied policy in the legislation toward concern for children.

[77] L.C. p. 11 para. 24.

[78] Working Paper para. 168.

Both in the United States[79] and the U.K. then, one can identify a trend toward recognizing the emotional and psychological bonds within reconstituted families, as well as the reality of the family as a whole accepting such a situation, and moving outside of strict application of traditional doctrine.

C. The Canadian Cases[80]

Huband J.A. stated that there was a "plethora of case law dealing with the relationship *in loco parentis* under divorce legislation."[81] Those cases all accepted that the relationship must be created knowingly, or, as is argued by McLeod, "that the spouse not only undertook the objective role of parent, but also accepted its implications in a legal sense,"[82] and further that "the nature of the spousal relationship and responsibilities requires a pleasant interaction between spouses and child, which is unlikely to be looked on by anyone concerned as a true parental role."[83] Becoming a person *in loco parentis* then, required assuming a "true parental" role, and this was discovered by examining the conduct and behaviour of all of the parties concerned. For example, how did the child address the step parent?; did the step parent provide financially?; did the step parent participate in discipline, education and recreational activities with the child? and so on. This concept was applied quite broadly within step families, particularly when biological parents ceased their involvement. The case law diverged on the issue of termination of the role once it was knowingly created.

McCarthy v. McCarthy[84] and *Tucker v. Tucker*,[85] both 1984 deci-

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[79] Recent scholarship in the U.S. has identified this trend. See, for example, 1990 *Child Support Reference Manual*, prepared by the Child Support Project, Centre on Children and the Law and the American Bar Association, Chap. 4 and the Related Readings attached thereto.

[80] See K. Farquhar, "Termination of the *In Loco Parentis* Obligation of Child Support" (1990), 9 C.J.F.L. 99 for a complete examination of the relevant Canadian legislation and case law.

[81] *Supra*, note 15, at 383.

[82] J. McLeod, "Annotation", *Pickup v. Pickup*, *supra*, note 10 at 190.

[83] *Ibid.*

[84] (1984), 49 O.R. (2d) 37, 44 R.F.L. (2d) 92 (U.F.C.).

sions from Ontario, adopted one view, and are cited as authority that the status, once established, continues so long as the child remains a dependent child of the marriage.

Other decisions, however, recognized that the relationship could change, but none went so far as to declare that it could change solely upon the decision of the parent to withdraw at any time before an order was made (and perhaps even after).

In *Hock v. Hock* two members of the B.C.C.A. found that the husband, *at all material times*, acted only as a "decent, kind and considerate stepfather" and that the biological father continued to "exercise all of his paternal rights."[86] Impliedly then, the court acknowledged that one's status could change from time to time, and the material time for the purpose of assessing support liability was at the time the petition was filed. Further, Robertson J.A. of that court stated in separate reasons that by the action of the wife contacting him and telling Mr. Hock that her first husband offered to support her and the children, he ceased to stand *in loco parentis* to the children. Mr. Hock dropped the amount of maintenance he had been paying and by this action, "made it clear that he withdrew from his position *in loco parentis*."[87]

While stating that these reasons support the "right" of unilateral withdrawal, the Manitoba Court rejected the contingency of this "right" upon the time it is exercised.[88]

The Manitoba court then referred to other cases which accepted that the status *in loco parentis* does not necessarily last forever, but finds that none of them went quite far enough. As the court rejected the relevance of the timing of the withdrawal, it also rejected the relevance of the actions of the other parties in the relationship. Schwartz, J. in the trial court suggested that identifying the status of a parental figure was a question of fact in each case and that the court ought to look to whether or not there was some agreement or acquiescence on the part of the mother and perhaps the child,[89] but

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[85] (1984), 49 O.R. (2d) 328, 43 R.F.L. (2d) 199 (H.C.).

[86] *Supra*, note 24, at 362.

[87] *Ibid.*, at 364.

[88] *Supra*, note 15, at 385.

[89] *Supra*, note 1.

the Appeal Court did not accept this. "Until fairly recent years, the case law indicated that the relationship *in loco parentis* was purely voluntary. No one was obliged by law to continue their generosity."[90]

Given the frequency of marriage breakdown and subsequent formation of new families, it was certainly incumbent upon the court to articulate clear rules respecting ongoing support obligations. Given also the reality of people moving through multiple relationships, it would be reasonable to hold that "parental" statuses, once created are not immutable. As McLeod states, "Relationships, be they spousal, parent-child or otherwise, no longer exist indefinitely... It is setting the burden too high to keep adding parents and children onto each other through the *in loco parentis* doctrine."[91] It is submitted that in light of such modern family trends, the trial court's formulation of the obligation was a reasonable one.

In both *Carignan* and in *Hock* courts were faced with biological fathers who maintained some financial and other ties with the family, and a mother who accepted either continuation or reinstatement of those ties. At trial in the former, Schwartz, J. found evidence that Mrs. Carignan (and perhaps the child) agreed or acquiesced to Mr. Carignan's withdrawal from their lives, and the court in *Hock* found that Mrs. Hock telephoned Mr. Hock to inform him of her first husband's offer of support. In these circumstances to hold the stepfathers continuously liable for child support would not have reflected the reality of the existing familial relationships. In each case it would have been possible to relieve the stepfathers of a duty to support, by accepting the common sense approach expressed by McLeod further, "the *in loco parentis* status arises through the consent and conduct of all concerned, it should be able to be extinguished in the same way".[92] It is perhaps unfortunate that the Manitoba court went as far as it did to enunciate a policy which goes so much further and has such broad ideological and social implications.

V. IMPLICATIONS OF THE DECISION

IN HIS ANNOTATION to the *Pickup* case, McLeod suggested that:

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[90] *Supra*, note 15, at 392.

[91] *Supra*, note 8, at 190.

[92] *Ibid.*

> To date, the courts have adopted a rather simplistic approach to the creation and termination of psychological parental rights. Given the incidence of breakdown and the tendency to form new relationships to the exclusion of the old, it would be appropriate for the courts to approach the problem in a sociological sense and not merely a legalistic one.[93]

It is submitted that the appeal Court in *Carignan* avoided any sociological considerations, and based its decisions on formalistic legal reasoning alone. Such reasoning has in the past been subject to criticism. In an article reviewing the common law standard of care owed by schoolteachers to students, Hoyano argues that "the historical justifications for founding tort liability upon the doctrine of *in loco parentis* have disappeared."[94] She notes in this regard, the difference between students in mandatory daily attendance at public schools and those boarded in traditional English private schools, where the *in loco parentis* justification for a particular standard of care was created. In arguing against schoolteachers' continued liability based upon the *in loco parentis* doctrine, Hoyano declares that simply because a 19th century decision appears to be universally applied, it:

> cannot obviate the fact that a doctrine narrow in conception and wrenched from its historical setting has been unthinkingly applied in a new context in which it retains little if any validity.[95]

The *in loco parentis* doctrine is a creature of 19th century patriarchy. It evolved during a time when it was a morally offensive notion for a man to be held responsible for another man's child. As Mendes da Costa U.F.J. stated in a 1987 decision, it has "its roots deep in history" and "carries with it connotations of times past."[96] Notwithstanding Parliament's choice of similar wording in the *Divorce Act, 1985*, it is arguably open to counsel (or to courts) to suggest that Parliament deliberately chose to reject the common law notion of *in loco parentis*, and that the current statute should be interpreted "free

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[93] *Ibid.*, at 191.

[94] L. Hoyano, "The Prudent Parent: The Elusive Standard of Care" (1984), 18 U.B.C.L.R. 1.

[95] *Ibid.*, at 8.

[96] *Re Spring and Spring* (1987), 61 O.R. (2d) 743 at 748.

from the shadow of earlier authorities."[97] Such an approach is available to the court, and is consistent with both sociological trends and legal trends in other jurisdictions.

In giving priority to historical tradition, the court avoided having to justify its decision in terms of the policy or value considerations inherent in it.[98] If law and society are truly imbricated,[99] what does this decision say about contemporary Canadian society's view of the family?

Family law, as it exists in legislation and in judicial interpretation of legislation, "both reflects and helps create an ideology of the family - a structure of images and understandings of family life."[100] Olsen further states:

> Embedded within the ideology of the family are notions of (1) the kinds of roles that individual members should serve within the family and what they should get out of these roles, (2) the kinds of bonds that hold families together, (3) the actual and proper role of families in society, and (4) what the state or law can and should do to encourage desirable family life.[101]

It is arguable that the *Carignan* decision reinforces and reflects identifiable views of members' roles within a family unit. While the reality exists that women receive sole custody of children in over 70% of divorces,[102] and further, that children with joint custodial arrangements live with their mother more than twice as frequently as they live with their fathers,[103] it is not unreasonable to speak of

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[97] *Ibid.*, at 749. It is submitted that such an approach may be available notwithstanding legislative drafting policy to avoid the use of Latin phrases where ever possible.

[98] See, for example, discussion in P. Goodrich, *Reading the Law*, (Oxford: Basil Blackwell, 1986). At p. 142 Goodrich describes this as an exercise in legal hermeneutics.

[99] E.P. Thompson, *Whigs and Hunters*, (London: Allen Lane, 1975). At page 261 Thompson states that "law was deeply imbricated within the very basis of productive relations."

[100] F. Olsen, "The Politics of Family Law" (1984), 2 Law and Inequality, 1, at 3.

[101] *Ibid.*

[102] Canada Dept. of Justice, Bureau of Review, *Evaluation of the Divorce Act, Phase II Monitor and Evaluation*, (Ottawa: Queen's Printer, 1990) at 133.

[103] *Ibid.*, at 116.

these roles in gendered terms. What role does the *Carignan* decision reflect for fathers? That they are bonded to their children solely by blood? That any other role they *choose* to assume is not really integrated within the new family, but is capable of termination at will? That the choice of whether or not to assume any caregiving or providing role within a family is completely within the private realm of their personal choice, and that the law will not interfere with this realm?

While women remain emotionally and financially attached to their children, approximately two-thirds of them do so living below the poverty line established by Statistics Canada.[104] The *Carignan* decision implies for them that, given the continued "feminization of poverty"[105] their best chance to remain above the poverty level is if they remain in stable nuclear families. Just as the 1834 Poor Law discontinuing state support for women and their illegitimate children was meant to punish "immoral women" and encourage conception within marriage only, this decision, which has the effect of placing the burden of financial responsibility for children upon women first, biological fathers to a lesser extent, and psychological fathers only at their choice, creates state-imposed pressure upon women to stay within a marriage-like relationship.

Finally, the implications of this decision for children are broad as well. It disregards any notions of bonding and attachment between a child and a psychological parent and retreats from contemporary ideas of co-parenting. Family law affecting children has moved ideologically from notions preserving or balancing "parental rights" over children to decisions identifying the best interests of children, or promoting children's welfare.[106] The *Carignan* decision, it is argued, represents more of a return to "parental rights" ideology than a decision truly reflective of the interests of children.

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[104] *Ibid.*, at 95.

[105] *Ibid.* See also E.D. Pask and M. McCall eds., *How Much and Why? Economic Implications of Marriage Breakdown*, (Calgary: Canadian Research Institute For Law and the Family, 1989); L. Weitzman, *The Divorce Revolution*, (New York: Free Press, 1985); and J. Eekelaar and M. MacLean, *Maintenance After Divorce*, (Oxford: Clarendon Press, 1986).

[106] Criticisms of the "best interests" test cannot be ignored, however. See for example, C. Smart and S. Sevenhuijsen, eds., *Child Custody and the Politics of Gender*, *supra*, note 69.

VI. CONCLUSION

THIS PAPER IS NOT AN ATTEMPT to advocate that women and children be forced to continue a traditional dependence upon male breadwinners.

It is, however, an attempt to show that despite legislation and policy purporting to reflect an ideology of the family different from the historic common law one, this decision, neutral on its face, and legitimated by its "thorough historical analysis of the loco parentis concept,"[107] can be seen to have (perhaps unintended) consequences in respect of that ideology.

[107] J. MacLeod, "Annotation", *Leveque v. Leveque* (1990), 25 R.F.L. (3d) 2 at 3.