

Are Child and Spousal Support Obligations Binding upon the Payor's Estate?

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ARE CHILD AND SPOUSAL SUPPORT OBLIGATIONS BINDING UPON THE PAYOR'S ESTATE?

Family law lawyers should, but most often do not, include specific provisions in Separation Agreements and Divorce Judgments expressly stating the child and or spousal support obligations are to remain binding upon the payor's estate, however, the following inurement clause is included in nearly every Separation Agreement:

Binding on Estate

This Agreement shall be binding upon and shall inure to the benefit of the Wife and the Husband, their respective heirs, executors, administrators, successors and assigns.

The Burn's Decision

The leading Alberta authority in this area for 25 years was the 1981 Court of Queen's Bench of Alberta decision of Egbert J. in *Burns v. Burns*.¹

In *Burns* the Minutes of Settlement contained a standard inurement clause while the Decree Nisi expressly provided that spousal support was to be binding upon the payor's estate. As a result of the specific provisions in the Decree Nisi binding the payor's estate spousal support was, not surprisingly, determined to be payable by the payor's estate, however, Egbert J. stated in *obiter* that:

There is no doubt that if the maintenance order or a separation agreement or minutes of settlement is silent with respect to the payee's right to continue to receive maintenance after the death of the payor, then such rights dies with payor.²

Egbert J. did not consider the inurement clause in the Minutes of Settlement as being sufficient in and of itself to bind the payor's estate with respect to the continued payment of support.

Alberta Family Law Act

The *Family Law Act* ³ provides that support orders and agreements made pursuant to the *Family Law Act* do bind the payor's estate:

80. Support order binds estate

(1) Unless the support order provides otherwise, a support order binds the estate of

¹ [1981] A.J. 604 [*Burns*]

² *Burns* at 18.

³ S.A. 2003, c. F-4.5 s.80.1

Am I in Loco Parentis?

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AM I *IN LOCO PARENTIS*?

or

HEY'RE NOT MY KIDS! DO I REALLY HAVE TO PAY CHILD SUPPORT?

While I am seldom asked the first question (at least by clients) I do receive a multitude of very emotional inquiries incorporating differing versions of the later question.

LESA materials prepared by Kevin Hannah in 2009 ¹ and by Jocelyn Innes in 2012 ² provide a detailed history of the origin and evolution of the *in loco parentis* obligation as well a critical analysis of the appropriateness of the concept in general.

This paper does not provide an in depth historical review of the *in loco parentis* obligation and is not intended to provide critical analysis. Rather, it is a short primer which can be used to assist you in advising clients what they should be consider when entering into new relationship in which one of the parties is bringing children from a prior relationship.

Definition of *In Loco Parentis*

Black's Law Dictionary defines *in loco parentis* as

In the place of a parent; instead of a parent; charged factitiously, with a parent's rights duties, and responsibilities.

Turgeon, J.A.. in the 1927 Saskatchewan Court of Appeal decision of *Shititz v. CNR* ³ stated that:

A person *in loco parentis* to a child is one who has acted so as to evidence his intention of placing himself toward the child in the situation which is ordinarily occupied by the father for the provision of the child's pecuniary wants. ⁴

Section 2(2) of the *Divorce Act* provides that "a child of the marriage" includes:

- (a) any child for whom they both stand in the place of parents; and;
- (b) any child for one is the parent and for whom the other **stands in the place of a parent.**
(emphasis added).

In Section 47 of the *Family Law Act* "parent" (for the purpose of Division 1 - Support of Child) is

¹ Child Support, Step-Parents and *In Loco Parentis* - What's Love Got to Do With It. LESA May 2 - 5 2009 [Hannah]

² Sweet Child O'Mine (by Marriage or Court Order) - Step Parents, *In Loco Parentis* and Child Support Obligations. LESA February 7, 2012 [Innes]

³ [1929] 1. WWR 193 [Shititz].

⁴ *Shititz* at 30