

Opinion No. 467.**Parent and Child—Stepfather—Custody of Children.**

Held: A stepfather of children whose mother is deceased, has, by reason of the relation merely, no right to the custody of the children but he may be entitled to the custody if he stands in loco parentis to such children.

A person standing in loco parentis to a child is entitled to the custody of such child as against third persons.

February 19, 1934.

You have asked my opinion on the following facts: "A., the father of two children, died, his widow later marry-

ing B., who provided support for the children but did not legally adopt them. The mother died and the question has arisen as to who has the right of custody of the children, the stepfather or the mother's sister. Please advise us."

Neither the stepfather nor the aunt of the children, merely by reason of such relationship, has the right to the legal custody of the children in the absence of adoption or guardianship proceedings. In *State ex rel. Sheedy v. District Court*, 66 Mont. 427, 213 Pac. 802, where the Court permitted the aunt to adopt children whose parents were deceased, upon petition for adoption being presented by her, it was held that since the statute did not require that notice be given to the stepfather, that no notice to him was required.

We are not advised of the facts from which it may be determined whether either, or some other person stands in loco parentis to these children. Assuming, however, that the stepfather now has the children in his custody, and has been supporting them in his family, I call your attention to the following general principles of law:

"A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent, * * *." (46 C. J. 1334, Sec. 174.)

"A person standing in loco parentis is entitled to the custody of the child, as against third persons, unless his conduct renders him unfit for such custody, * * *." (Id. Sec. 175.)

"A stepparent does not, merely by reason of the relation, stand in loco parentis to the stepchild * * *, but a stepparent who voluntarily receives the stepchild into the family and treats it as a member thereof stands in the place of the natural parent, and the reciprocal rights, duties and obligations of parent and child continue as long as such relation continues." (Id. Sec. 181.)

In this connection see also Section 5846, Revised Codes of Montana, 1921.

"A stepparent has, by reason of the relation merely, no right to the custody of his stepchildren, but he may be entitled to the custody if he stands in loco parentis to the children." (Id. Sec. 182.) (See also in re Flynn, 87 N. J. Eq., 413, 100 Atl. 861.)