

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant] (ESTATE OF [the Deceased])
AICAC File No.: AC-07-145**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Wilf DeGraves
Dr. Sheldon Claman

APPEARANCES: The Appellant, [text deleted] (Estate of [the Deceased]),
appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Dianne Pemkowski
The Public Trustee of Manitoba was represented by [text
deleted].

HEARING DATE: May 25, 2010

ISSUE(S): Entitlement to Death Benefits

RELEVANT SECTIONS: Sections 121(2), 122 and 123 of The Manitoba Public
Insurance Corporation Act ('MPIC Act')

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH
INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER
IDENTIFYING INFORMATION.**

Reasons For Decision

In 2004, [Appellant's child #1] and [Appellant's child #2] became permanent wards of the [text
deleted] Child and Family Services ("x CFS") since neither their mother, [Appellant's children's
mother] nor their father, [the Appellant] could care for them. [The Deceased], the children's
grandmother lived in [text deleted].

The Deceased was approved by xCFS as a foster parent in November 2002 and subsequently the children were placed with the Deceased as a foster parent. As a foster parent, the Deceased received funds on behalf of the children for their support.

On October 27, 2006, the Deceased was killed in a single vehicle rollover accident on [text deleted].

The Appellant who is the son of the Deceased made application for compensation with MPIC under Section 123 of the MPIC Act. The Appellant claimed that the Deceased had no dependents on the day of her death and as a child of the Deceased, although not dependant on her, he was entitled to receive a lump sum indemnity of \$5,000.

If the Deceased was not *in loco parentis* to the Appellant's two children, the Deceased's adult children, including the Appellant, would be entitled to a death benefit pursuant to Section 123 of the MPIC Act and the Appellant's children would receive no indemnity benefits pursuant to Section 121(2) and 122 of the MPIC Act.

MPIC commenced an investigation to determine whether pursuant to Sections 121(2) and 123 of the MPIC Act, the Appellant's children, [Appellant's child #1] and [Appellant's child #2], would be entitled to benefits if the Deceased stood *in loco parentis* to them.

The relevant provisions of the MPIC Act are:

Lump sum indemnity to other dependant

121(2) A dependant, other than the spouse or common-law partner, of a deceased victim is entitled to

(a) a lump sum indemnity in the amount opposite the age of the dependant in Schedule 3; and

(b) if the dependant is disabled on the day the deceased victim dies, an additional lump sum indemnity of \$17,500.

Dependant child of deceased victim with no spouse or common-law partner

122 If on the day he or she dies the deceased victim has no spouse or common-law partner but has a child who is a dependant, the child is entitled, in addition to a lump sum indemnity under section 121, to a lump sum indemnity under section 120 and, where there is more than one child, the lump sum indemnity shall be divided equally among them.

Entitlement of child and parent of deceased victim

123 Where a deceased victim has no dependant on the day he or she dies, each child and parent of the deceased victim, although not a dependant of the deceased victim, is entitled to a lump sum indemnity of \$5,000.

In the course of her investigation the case manager interviewed the Appellant, [text deleted], the principal of the [text deleted] School as well as [text deleted], the aunt and uncle of the Appellant's children. These interviews took place on January 26, 2007 and the case manager reported discussions as follows:

1. the Appellant advised her:

“[The Appellant] said that when his children were first apprehended, he agreed that they be handed to his mother through a court order. He says that their biological mother wasn't providing adequate care for them and he could not care for his children, and therefore they ended up in xCFS' care. [The Appellant] said that there would often times when he would take the kids for visits and have sleepovers with them in order to maintain his relationship with them and with his mom. [The Appellant] said his mother treated his children as if they were her own. He said after she passed away, the kids were very, very, hurt. At this point in the conversation [the Appellant] said that he was also experiencing a lot of pain and hurtfulness and became very upset.” (underlining added)

[Text deleted], the school principal, advised her:

“[The school principal] says he knows [the Deceased] dropped of (sic) the kids at school on a daily basis. He remembers this because on the date of her accident the school was uncertain as to whether or not the children were with her. They remember

this because the accident occurred in the morning and the children had not yet arrived to school ([the Deceased] was alone in this motor vehicle accident and she had no passengers with her).

The [text deleted] School had a breakfast program and it had volunteers. [The school principal] could not confirm whether or not [the Deceased] was a part of this, but did confirm she was a part of the [text deleted] organization and involvement with her grandkids. [The Deceased] was involved in Christmas concerts that [the Appellant's children] were involved in and tried to help out where she could.

[The school principal] said that [the Appellant's children] were well taken care of by their grandmother. He said that the children were well behaved, well dressed, and had good manners. He said that there was never ever a concern with regards to their behaviour or academics. He said that they were always provided with lunches, they were well groomed, and that is how he knows that these kids were very well taken care of. He said when their grandmother passed away, the children were devastated. He said "it was very hard for those kids, and for the whole community." He is certain that [the Deceased] was responsible for registering the kids in school on a yearly basis."

[Appellant's children's uncle] advised her:

1. that he and his wife ([Appellant's children's aunt]) lived directly north of the Deceased's home, across [text deleted] and that:

"...She treated her grandchildren like her own. When [the Deceased] couldn't pick up the kids from school, I, [text deleted] would. [The Deceased] brought the kids over to our house daily. She would discipline the kids, but they never fought with each other... [the Deceased] was a good influence on [the Appellant's children].. She made sure they were clean, well feed (sic), and had a house to live in (her house). [The Deceased] bought high speed internet (tower) and a computer for the kids..." (underlining added)

The Appellant's legal counsel wrote to MPIC's case manager on April 26, 2007 and stated:

"When we spoke, you advised that the grandchildren might be entitled to receive her death benefits on the basis that [the Deceased] stood in loco parentis to those children at the date of her death.

However, we have been researching this matter and have not been able to locate any case where a Foster Parent has been determined to be standing in loco parentis. The issue of *loco parentis* most often arises in situations where there is a man and a woman and one of them has children from a prior relationship. After a period of time the natural non-parent may be determined to be standing in *loco parentis* to those children and thus assume certain financial responsibilities as well as assuming certain custodial or visitation rights at law.

We have not been able to find any case where a finding of *loco parentis* was made against a Foster Parent. [The Deceased] was a qualified Foster Parent and the two grand children were in here (sic) care pursuant to her capacity as a Foster Parent and she was being paid compensation as the Foster Parent.

It is our position, that at law, this would preclude a finding of her standing in *loco parentis* and, as indicated above, we have not been able to locate any case where a Foster Parent (paid or unpaid) was found to be standing in *loco parentis*.

When we spoke, you advised that you're of the position that [the Deceased] was standing in *loco parentis*. Having regards to the above and the attached, we would accordingly request that you justify your position and advise as to how such a determination was made." (underlining added)

Case Manager's Decision:

On July 19, 2007, the case manager wrote to the Appellant c/o of his law firm and stated:

"Our investigation has concluded that [the Deceased] stood in *Loco Parentis* of both [the Appellant's children], and therefore, each child is entitled to PIPP benefits. At the time of her death, [the Deceased] was the guardian of [the Appellant's children]. This arrangement was facilitated by [text deleted] Child & Family Services in about the year 2004, until the date of [the Deceased's] death. Therefore, under PIPP, [the Appellant's children] are entitled to receive death benefit payments, which are payable "in trust" care of the Office of The Public Trustee of Manitoba. (underlining added)

Spousal Death Payment Indemnity

At the time of her death, [the Deceased] did not have a spouse. Given this, the minimum spousal death payment indemnity of \$51,224.00 will be split between [the Appellant's children]. The minimum spousal indemnity death payment applies as [the Deceased] was not employed at the time of her Motor Vehicle Accident (MVA).

A payment in the amount of \$25,612.00 will be issued to [Appellant's Child #1], and a payment of the same amount to [Appellant's Child #2], "in trust," care of The Office of The Public Trustee.

Lump Sum Dependent Death Benefit Indemnities

Furthermore, as both children are deemed dependents of [the Deceased], each child will receive a lump sum indemnity which is calculated as part of Schedule 3 of the Manitoba Public Insurance Corporation Legislation. The amount of indemnity payable is opposite the age of each child at the time of the MVA.

[Appellant's Child #1] date of birth [text deleted] age [text deleted] on October 27, 2006, will receive a payment of \$29,454.00, payable "in trust" care of The Office of The Public Trustee.

[Appellant's Child #2], date of birth [text deleted], age [text deleted] on October 27, 2006, will receive a payment of \$30,734.00 payable "in trust" care of the Office of The Public Trustee.

You are aware that we require medical confirmation of [Appellant's Child #2's] [text deleted], and that he was a disabled dependent of [the Deceased]. Should this information be received, he may be entitled to an additional death payment indemnity of \$22,409.00.

Total Payments

Based on the information available at this time, total payments are calculated as follows;

- *[Appellant's Child #1] will receive a payment, "in trust", care of The Office of The Public Trustee for \$55,066*
- *[Appellant's Child #2] will receive payment, "in trust," care of The Office of The Public Trustee for \$56,346.*

Funeral Costs

A payment for \$6,976.00 was issued to [text deleted] Funeral Home on January 8, 2007 to cover the funeral costs."

On August 28, 2007, the case manager wrote to the Appellant's legal counsel and stated:

"[The Deceased] was first a grandparent to her grandchildren, then a foster parent. She provided the essentials of daily living to her grandchildren, formed a new family unit with the children, made financial provisions for the children from both the money received from xCFS as well as her own money, she disciplined the children, was involved in their schooling, and stood in the place of a parent. As such, we determined that she stood in *loco parentis* of both [the Appellant's children].

The collateral information that we have gathered supports our decision that [the Deceased] stood in *loco parentis* of her grandchildren, and on the face of all available evidence we have confirmed this relationship did exist. Our definition of *loco parentis* was affixed as Appendix #3 to our July 19, 2007 decision letter, for your reference."

The Commission notes that the definition referred to by the case manager stated:

In Loco Parentis "A person related to a victim by blood or adoption OR who stands in *loco parentis* to a victim at the time of the accident"

An Application for Review was made by the Appellant on September 6, 2007.

In response to the Case Manager's decision, the Appellant's legal counsel, [text deleted], wrote to the case manager on September 7, 2007 and stated:

"An individual who stands in *loco parentis* assumes certain responsibilities. For example, a person who marries someone who has children may eventually end up standing in *loco parentis*. As a consequence, even after those Parties separate, that individual is still obligated to provide financial support to the ex-spouse for his or her children notwithstanding the fact that they are not the natural children of that individual and they were not adopted.

Certain obligations flow from a determination of an individual being in *loco parentis*. In this case, it would appear that [the Deceased] was simply the foster parent of the children. It would have been a situation whereby [the Deceased] could have changed her mind and requested that they be placed with a different foster parent (or XCFS could have done the same). Had this happened, there would have been no obligations upon [the Deceased] as no such obligations flow upon an individual who is simply the foster parent of the children."

In response the case manager sent a fax to [text deleted] on September 10, 2007 and stated:

"At the time of her motor vehicle accident (mva), [the Deceased] was caring for her grandchildren in her home, who were placed there through an xCFS order. Our decision letter of July 19, 2007 was based on [the Deceased's] situation at the time of her accident. As the paternal grandmother, she was chosen/or requested that her grandchildren be placed under her care, in her home. She did receive funds from XCFS, and did fit our definition of standing in *loco parentis* to [the Appellant's children].

[The Deceased];

- provided the essentials of daily living to her grandchildren
- formed a new family unit with the children
- integrated her grandchildren into her family with her siblings
- was financially responsible for the children
- took the children on trips out of province to visit family
- disciplined the children
- was involved in their schooling
- was responsible for their well being
- according to your client and found in our investigation, treated the children *like they were her own children*

Given the above information, and in our opinion that she stood in place of a parent, we determined that [the Deceased] stood in *loco parentis* for both [the Appellant's children].

In reply, [Appellant's legal counsel] wrote to the case manager and stated:

“We have also repeatedly pointed out that a foster parent cannot be standing in *loco parentis* because a foster parent does not assume any of the obligations that result from a finding of *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**”. Please note the reference to rights, duties and responsibilities. A foster parent has certain duties and obligations as a foster parent, but those duties and obligations do not carry on after the placement of the child with the foster parent has ended. Indeed, the obligations of the foster parent are just that, to perform the required duties as a registered foster parent.”

Internal Review Officer's Decision:

On October 15, 2007 the Internal Review Officer wrote to the Appellant c/o [Appellant's legal counsel] and stated:

“My research does not support the suggestion of .S.. In *Monkman v. Beaulieu* (2002) 170 Man.R. (2d) 182 (Court of Appeal), the Manitoba Court of Appeal commented in a case discussing in *loco parentis*, “it seems to me that foster parents, for example, would follow under the common-law understanding of being in *loco parentis* to a child in their care, even in the absence of a loving relationship.

While this clearly was not dealing directly with the point at issue here it certainly suggests that foster parents can be in *loco parentis*. I could not find cases in Canada dealing with this issue but there is ample authority in the United States that suggests that foster parents can be in *loco parentis*. See for example, *D'auria v. Liposky* (1962) 177 A. (2d) 133 (Pa. Super); *In re Adoption of Crystal D.R.* (1984) 480 A. (2d) 1146 (Pa. Super); *Nichol v. Stass* (2000) 735 N.E. (2d) 582 (Ill.); *Andrews v. Otsego County* (1982) 446 N.Y.S. (2d) 169 (N.Y. Sup.); *Sheikh v. Choe* (2006) 128 P. (3d) 574 (Wash.); *Mayberry v. Pryor* (1985) 374 N.W. (2d) 683 (Mich.); *In the matter of B.C.* (1988) 749 P. (2d) 542 (Okla.); *State Farm Mutual Automobile Ins. Co. v. Clyde* (1996) 920 P. (2d) 1183 (Utah); *In re R.A.* (2005) 891 A. (2d) 564 (N.H).

The law seems to be that whether or not a *loco parentis* relationship exists is a question of fact based on an evaluation of all the circumstances.

Based on all the circumstances in this case, there is strong evidence and a strong basis to find that D.D. stood in *loco parentis* to these two children. The evidence shows she treated the children like they were her own children. Accordingly, the case manager's decision of July 19, 2007 is confirmed.” (underlining added)

Appeal:

The Appellant filed a Notice of Appeal to the Commission dated December 11, 2007 (“appeal”).

The Commission notes that the payments of indemnity benefits are adjusted for inflation.

The issue for determination is whether:

1. the Deceased, as a foster parent to the Appellant's two children, was also in a position of *in loco parentis* in respect of these children.

The Appellant, who attended the hearing without legal counsel, testified that:

1. Neither he nor the biological mother of the two children was capable of looking after the children after their separation. As a result the children became wards of the local Children's Aid Society who placed the children in the care of the Deceased.
2. The death of his mother had caused him a great deal of pain and hurtfulness and he had been struggling with her death. It had been very tough and he was often upset and stressed out following his mother's death.
3. Being the biological child of the Deceased he was entitled to receive a lump sum indemnity payment provided by Section 123 of the MPIC Act.
4. His mother had treated his children as if they were her own and further confirmed that his mother had been responsible for providing food, clothing, shelter and necessities of life while they were under her care.

MPIC and the Public Trustee did not call any witnesses.

Discussion:

The Commission finds that the Deceased was both the foster parent of [the Appellant's children] and was in a position of *in loco parentis* to the Appellant's children.

The Commission agrees with the submission of [text deleted], the Appellant's legal counsel when he stated in his letter dated September 28, 2007 to the Internal Review Officer that:

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**".

This definition is consistent with the determination by the case manager that the Deceased was *in loco parentis* to the two children on the following grounds which were set out in his fax to [Appellant's legal counsel] dated September 10, 2007. In this fax the case manager stated that the Deceased:

- provided the essentials of daily living to her grandchildren
- formed a new family unit with the children
- integrated her grandchildren into her family with her siblings
- was financially responsible for the children
- took the children on trips out of province to visit family
- disciplined the children
- was involved in their schooling
- was responsible for their well being
- according to your client and found in our investigation, treated the children *like they were her own children*

The Commission notes that the Appellant did not challenge these findings by the case manager.

On the contrary, the Appellant:

1. Told the case manager that his mother (the Deceased) had treated his children as if there (sic) were her own and that his mother had been responsible for providing the food, clothing, shelter and necessities of life while under her care.
2. Testified at the appeal hearing that the Deceased treated the two children as her own.

The Commission finds that the Appellant's testimony and his statements to the case manager corroborate the case manager's findings that the two children were dependents of the Deceased at the time of her death.

The Commission rejects [Appellant's legal counsel's] submission that a foster parent cannot be standing *in loco parentis* because a foster parent could not assume any of the obligations of a person *in loco parentis*.

In her submission, MPIC's legal counsel referred to the investigation of the case manager that determined the Deceased had treated the two children as if they were her own and stated that this finding is consistent with Black's Law Dictionary definition of *in loco parentis*. MPIC's legal counsel therefore submitted that the Appellant's appeal should be dismissed.

Legal counsel for the Public Trustee, in his submission, stated that the Deceased was both the foster parent and *in loco parentis* to the two children. In support of his position he cited three American authorities as follows:

In the matter of B.C. (1988) 749 P.2d 542 (Okla.):

At page 4 of the Supreme Court of Oklahoma decision:

In Oklahoma we have defined the term "in **locoparentis**" as follows:
"The term 'in **locoparentis**' means in place of a parent, and a 'person in **locoparentis**' may be defined as one who has assumed the status and obligations of a **parent** without a formal adoption."

They have cared for and treated the child as a member of their own family since that date, and are without doubt "persons in **locoparentis**".

D'auria v. Liposky (1962) 197 Pa.Super. 271, 177 A.2d 133

A decision of the Superior Court of Pennsylvania stated:

In *Moritz v. Garnhart*, 7 Watts 302 (1838) Chief Justice Gibson held that a grandfather, who cared for and maintained the illegitimate minor child of his daughter, could maintain an action in **locoparentis** for the loss of her services. This ruling was cited with approval by President Judge Keller in the *Renovich* case, *supra*.

While it does not appear that any of our decisions expressly sanction finding a relationship in **locoparentis** between **fosterparent** and **foster** child, there is nothing in our cases which indicates that such a relationship*279 could not arise, particularly in a case where the **fosterparent** has assumed or incurred substantial financial obligations in raising the child.

In *Sheikh v. Choe* (2006) 156 Wsh.2d 441, 128 P.3d 574 (Wash.) the Court stated:

23 In the foster care setting it is the foster parent, Daniels in this case, who stands in the parental role, not DSHS. RCW 74.13.330 defines the responsibilities of foster parents as follows: “Foster parents are responsible for the protection, care, supervision, and nurturing of the child in placement.” Congruently, RCW 74.15.020(1)(g) defines “[f]oster-family home” as “an agency which regularly provides care on a twenty-four hour basis to one or more children.” In contrast to Daniels, DSHS was limited to coordinating the foster care services and, in the case of *Pierre*, monitoring the home on an ongoing basis. It was Daniels who took the children into her home and treated them as members of her own family, educating and supporting them. *See Gilroy*, 37 Wash.2d at 934, 226 P.2d 882. DSHS had no analogous relationship. Therefore, the trial court was correct when it concluded as a matter of law that DSHS did not **standinlocoparentis** as to Anderson and Daniels.

The Public Trustee’s legal counsel also referred to a decision of The Manitoba Court of Appeal

in *Monkman v. Beaulieu* [2003] M.J. No. 24, where the Court stated:

16 In the Supreme Court of Canada decision of *Chartier*, Justice Bastarache discussed the meaning of the phrases in loco parentis and “in the place of a parent” and concluded that the two phrases have the same meaning and that once the relationship has been established, it cannot be unilaterally terminated...

60 Becoming a person in loco parentis requires assuming a true parental role, and this is determined by examining the conduct and behaviour of all of the parties concerned. The facts of each individual case and the entire context of the relationship must be examined in a functional and objective manner in order to determine whether a parental role has been assumed.

61 With respect to the necessity of intention, Bastarache J., in Chartier, quotes, with approval, the decision of *Laraque v. Allooloo* (1992), 44 R.F.L. (3d) 10 at para. 33 (N.W.T.S.C.), with respect to the following (at para.23):

At the risk of being repetitious, it is well settled law that it takes a properly informed and deliberate intention to assume parental obligations for support of a child, on an ongoing basis, to bring the in loco parentis status in law into being.

62 In Chartier, Bastarache J. listed some factors which he considered relevant to the determination of whether the relationship has been established. He listed them as follows (at para. 39):

- (1) whether the child participates in the extended family in the same way as would a biological child;
- (2) whether the person provides financially for the child (depending on ability to pay);
- (3) whether the person disciplines the child as a parent;
- (4) whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child;
- (5) the nature or existence of the child's relationship with the absent biological parent;
- (6) the opinion of the child regarding the relationship with the stepparent.

63 The factors mentioned above do not represent an exclusive list nor is it necessary to establish all the listed factors in any one particular case.

Applying these factors in his submission, legal counsel for the Public Trustee of Manitoba further stated:

1. The evidence established that the two children participated in the deceased's extended family the same as would a biological child.
2. The deceased disciplined the two children as a parent.
3. The deceased represented family to the two children and either explicitly or implicitly she was responsible as a parent for the two children.
4. The Appellant acknowledged that neither he nor the children's biological mother had been able to look after the children and that his mother had treated the two children as her own.

5. The evidence indicated that the two children had a loving relationship with the deceased and were extremely saddened at her death.

The Public Trustee's legal counsel therefore submits that the Appellant's appeal should be dismissed.

The Commission agrees with the submission of counsel for MPIC and the Public Trustee that the Deceased was both a foster parent and *in loco parentis* to the two children. The Commission finds that both children were dependent upon the Deceased at the time of her death and therefore entitled to receive the lump sum indemnity of the benefits pursuant to Sections 121(2) and 122 of the MPIC Act. Accordingly, the Commission therefore finds that the Appellant was not entitled to receive a lump sum indemnity pursuant to Section 123 because the Deceased had two dependents, the Appellant's two children, on the day that she died.

It is for these reasons the Commission finds that the Appellant has failed to establish on a balance of probabilities that he is entitled under Section 123 of the MPIC Act to receive a lump sum indemnity. The Commission therefore dismisses the Appellant's appeal and confirms the decision of the Internal Review Officer dated October 15, 2007.

Dated at Winnipeg this 18th day of June, 2010.

MEL MYERS, Q.C.

WILF DEGRAVES

DR. SHELDON CLAMAN