

State relating to sentences and imprisonment which empowers the court to sentence conditionally, the effect of which is to terminate the sentence upon the happening of a contingency.

R. S. 2:192-4 provides that all sentences to the State Prison shall be for a maximum and minimum term except sentences for life. R. S. 2:190-15 permits the court, within 30 days after imposition of sentence, to open and vacate the judgment and resentence as right and justice may require. R. S. 2:190-16 permits the court on its own motion, within six months from date of conviction, to open and vacate the conviction, discharge the defendant from custody and grant him a new trial.

The law provides for no other controls by the court upon its sentence after same is imposed upon the prisoner.

There appears to be no warrant in the law for the inclusion of the condition in the commitment you speak of and you should, therefore, disregard it and consider the prisoner as having been sentenced for a minimum of two years and a maximum of three years.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

MARCH 17, 1949.

HONORABLE SANFORD BATES, *Commissioner,*
Department Institutions and Agencies
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 10.

MY DEAR COMMISSIONER:

You advise that in connection with the administration of the work of the State Board of Child Welfare, an agency under the jurisdiction of your department, attention must be given to the matter of requiring legally responsible and financially able persons to support their children. In connection with this matter you have had several situations wherein you are required to proceed against a stepfather to require support of him for one or more stepchildren.

You desire to be advised whether, under our law, a stepfather can be required to contribute to the support of a stepchild.

In my opinion, there is no provision in the law of this State which will permit a court to require a stepfather to contribute financially or otherwise to the support of a stepchild.

Advisory Master Van Winkle in the case of *Schneider vs. Schneider*, 25 N. J. Misc. 180, dealt with this matter rather thoroughly in a matrimonial case wherein this question was not directly in issue but where it had a significant bearing on the eventual decision of the court.

In that case, the Advisory Master, speaking for the former Court of Chancery, said:

"A stepfather, as such, is under no obligation by the English common law, to maintain a child of his wife by a former marriage (*Cooper vs. Martin*, 4 East 76; 102 Reprint 759; *Stone vs. Carr*, 3 Esp. 1; 170 Reprint 517; *Tuff vs. Harrison*, 4 T. R. 118; 100 Reprint 926).

"Other state decisions on the subject, a number of which are collected in the foot-note in Corp. Jur. title 'Parent and Child' par. 182, show that the American common law is to the same effect. The law allows a stepfather to refuse to provide for a stepchild or to take it into his family. (*Chicago M. School vs. Scott*, 157 Ill. App. 350.) If a stepfather voluntarily accepts into his family a child of his wife by a former husband and assumes the obligation of a parent for maintenance, the obligation continues only as long as he permits the child to be in the home. (*Copek vs. Kropick*, 21 N. E. Rep. 836; 129 Ill. 509.)"

The foregoing enunciation of the state of the law is clear and unambiguous. The court went on further to discuss the definition of a person in loco parentis and, referring to *Brinkerhoff vs. Merselis*, 24 N. J. L. 680, said:

"The proper definition of a person in loco parentis of a child is, a person who means to put himself in the situation of a lawful father of the child, with reference to the father's office and duty of making provision for the child."

It was further disclosed that this definition was adopted in our courts in the case of *Mott vs. Iossa*, 119 N. J. Eq. 185.

It is to be concluded from the language of the *Schneider* case that, while a stepfather may voluntarily assume the responsibilities of providing for his stepchild, it cannot be thrust upon him nor can he be forced into the relationship against his will, and such relationship, under the cited cases, will only exist so long as the person means or intends that he be in such situation. In fact, the court at page 184 said:

"Assuming that the relationship once existed * * *, it has not continued to exist and it may not again exist without the husband meaning that it shall exist. Loco parentis has to do with custody, liability to support, and the like, and is temporary in character and is not to be likened to that of adoption. The one is temporary in character, the other permanent and abiding. (*In re McCardles Estate*, 35 Pac. Rep. 2nd 850.)"

The rule has been uniformly adopted both in England and on the Continent that when a woman remarries, although she acquires the domicile of her second husband, into whose family she passes, this domicile of her second husband will not be that of her infant children, who do not pass, as she does, into the family of their stepfather (Keenan; "Residence and Domicile," p. 313).

Keenan further discloses that this rule has been followed in a majority of the states in the early leading cases in this country and states that, while it leaves the minor in a somewhat anomalous position, there is nevertheless logical basis for the rule.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.