Washington Law Review

Volume 28
Number 3 *Washington Legislation—1953*

8-1-1953

Domestic Relations—Natural Guardianship in Grandparents

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or trial court discretion, and such was the rule at common law. See *Hayes v. Sears, Roebuck & Co.*, 34 Wn. 2d 666, 673, 209 P.2d 468, 472 (1949).

The instant case indicates that the trial court's assertion that the order is based upon matters outside the record is not a sufficient reason under Rule 16, and even a reference to the demeanor of witnesses, though admittedly not a consideration based on the record is, in itself, too general.

That the result of the instant case is proper cannot be questioned, since as the opinion points out, no particular significance was attached to the demeanor of any witness at the time the testimony was taken, and so the reasons in the trial court decision which were not a part of the record seemed to come as an afterthought. However, a requirement that the trial judge specify with particularity the prejudicial effect of such factors that are outside the record would seem to be an unreasonable encroachment upon the sound discretion of the trial court.

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Domestic Relations—Natural Guardianship in Grandparents. The superior court of Washington for King County deprived the parents of *X*, a minor, of any and all parental rights in or to the child and directed that he be a ward of the court. *Y*, the maternal grandmother, petitioned for custody of the child. After complete and extended inquiry into *Y's* ability to care for the child the superior court (called the juvenile court in this type of proceeding), denied the request for custody due primarily to *Y's* tubercular condition. *Held* Reversed and remanded. When the parents were permanently deprived of custody the grandmother became the natural guardian and was entitled to custody if she were found to be a proper person. The majority opinion expressly states that the record presented supports the finding that the grandmother was unfit. The case, however, is remanded for further proceedings because *Y's* claim that the court below did not regard her as having a "preference right" to the child by virtue of her natural guardianship and also due to her assertion that she would be able to submit evidence of an improved physical condition. Four judges dissented. *State* ex rel. *Michelson v. Superior Court*, 41 Wn.2d 718, 251 P.2d 603 (1952).

This case introduces into Washington the concept of natural guardianship passing from the parents, upon death or permanent deprivation of their parental rights, to the grandparents. The court declares that this is its first occasion to pass upon the legal status of a blood relative of a child whose parents have either died or been permanently deprived of custody. It is true that this is the first case in Washington wherein the court has had to deal directly with this contention. There are cases, which the court in the instant case distinguished, in which language used suggested that grandparents have no legal right to custody of any child prior to an award of custody to them by the court. See *Morin v. Morin*, 66 Wash. 312, 119 pac. 745 (1911) and In re *Stuart*, 138 Wash.59, 244 Pac. 116 (1926).

The code provisions governing dependent and delinquent children and juvenile courts would appear to be an obstacle to the result reached here. RCW 13.04 [RRS §1987] governs juvenile courts and the awarding of custody of a "dependent child" as defined (in the subsections pertinent here) by RCW 13.04.010 (5), (6), and (8) [RRS §1987-1]. The code makes no mention of any rights residing in anyone to the custody of a dependent child and seems to indicate that the juvenile court has discretion to award custody of a dependent child to the person or institution it considers to be most desireable for the welfare of the child. The Supreme Court agrees that the child in

this case was a "dependent child" under the statute. Yet a right to custody stemming from natural guardianship is recognized in the grandmother.

Aside from the technical argument that this is judicial legislation, the holding is subject to attack because it creates problems which must be faced by juvenile courts in future dealings with dependent children. The court expressly refused to decide whether the grandparent was a "guardian" as that word is used throughout the statute, or whether a grandparent not present was entitled to notice of custody proceedings governing a dependent child. The majority expressly limits its holding to custody proceedings in which the grandparent voluntarily appears. In such situations, the juvenile court must consider the grandparent as possessing a right to custody if the grandparent is a fit person.

This holding leaves many questions unanswered. Does the natural guardianship relationship between the grandparents and the child involve the same consequences as are attached to the natural guardianship relationship existing between the parents and the child, i.e., would a change of domicile by the grandparents change the domicile of the child? Do the grandparents have a right to the earnings of the child? Are the grandparents liable for support of the child? Are the grandparents, as natural guardians, entitled to notice of adoption proceedings? Are the grandparents capable of giving consent to the marriage of an underage child? If the only incident of this natural guardianship is a preference right to custody then it would appear that the juvenile court committed no error because the grandparent's ability to care for the child was carefully considered.

The dissent points out other unresolved problems. When is this preference right to custody terminated? One of the stated grounds for reversal was that the relator claimed an ability to prove an improved physical condition. The question then remains as to when the right to custody is finally ended. This question is crucial since delay in determining the disposition of the child is particularly damaging to the child's placement chances in adoptive homes because of the desire to adopt at the earliest age. Another question is, how is this right terminated? A custody proceeding of which the grandparents were not notified might not meet the due process requirements of the federal constitution. The desire manifested by the supreme court that the juvenile court consider grandparents as natural guardians is not open to attack; but to remand a case in which that very thing was done creates doubt as to the necessity of the doctrine which is adopted. There would seem to be no need for insistence on this right since juvenile courts are faced with a shortage of fit persons, related or not, seeking custody. The juvenile court was granted discretion in this area by the legislature and that discretion seems to have been abridged by this case.

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