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Appointment of Guardian of Infant Over Fourteen Years of Age--Appointment of Person Other Than Father or Mother--Surrogate's Court Act (In the Matter of John W. Stuart, 280 N.Y. 245 (1939))

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RECENT DECISIONS

APPOINTMENT OF GUARDIAN OF INFANT OVER FOURTEEN YEARS OF AGE—APPOINTMENT OF PERSON OTHER THAN FATHER OR MOTHER—SURROGATE'S COURT ACT.—Respondent, father of the petitioner, was divorced from his wife in 1929 and custody of the petitioner, John W. Stuart, and his sister was awarded to the parents jointly. Respondent's business required him to travel extensively, and he saw very little of his children. The mother remarried, and from 1933 until her death in 1936, she supported petitioner. The residence of herself and her new husband in Albany County was exclusively that of John W. Stuart during that period. After his mother's death, the son, an infant seventeen years of age, petitioned the Surrogate to name his stepfather the guardian of his person.[1] The Surrogate complied with this petition, believing it to be to the best interests of the boy. The Appellate Division modified the order by crossing out the name of Frank A. McNamee, Jr. (stepfather) as guardian, and replacing it with Charles M. Stuart (respondent). On appeal, *held,* the order of the Appellate Division reversed and that of the Surrogate reinstated. The New York Surrogate's Court Act[2] gives the Surrogate wide discretion in selecting the guardian of a minor, his paramount guide being the child's welfare. A higher court has no authority to review the decision of a lower tribunal in guardian cases similar to the one in question, unless the facts reveal an abuse of discretion on the part of the latter.[3] There was no such abuse of discretion in this case.[4] *In the Matter of John W. Stuart,* 280 N. Y. 245 (1939).

The Appellate Division based its decision on Section 81 of the Domestic Relations Law,[5] the friendly relations of father and son, and

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[1] N. Y. SURROGATE'S COURT ACT § 175.

[2] N. Y. SURROGATE'S COURT ACT § 173. *"Power of court to appoint guardians.* The surrogate's court has the like power and authority to appoint a general guardian of the person or of the property, or both, of an infant, which the chancellor had, on the thirty-first of December, eighteen hundred and forty-six. It has also power and authority to appoint a general guardian, of the person or of the property, or both, of an infant whose father or mother is living, and to appoint a general guardian of the property only, of an infant married woman. Such power and authority must be exercised in like manner as they were exercised by the court of chancery, subject to the provisions of this act."

[3] Matter of Welch, 74 N. Y. 299 (1818); People *ex rel.* Riesner v. N. Y. N. & C. Hospital, 230 N. Y. 119, 125, 129 N. E. 341, 343 (1920).

[4] Matter of Stuart, 280 N. Y. 245 (1939).

[5] N. Y. DOMESTIC RELATIONS LAW § 81. *"Appointment of guardians by parent.* A married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them. Upon the death of either father or mother, the surviving parent, whether of full age or a minor, of a child likely to be born, or of any living child under the age of twenty-one years and unmarried, may, by deed or last will, duly executed, dispose of the custody and tuition of such child during its minority or for any less time, to any person or persons. Either the father or mother may in the lifetime of

the lack of evidence showing that the former was not a proper and fit guardian. However, Section 81 of the Domestic Relations Law, read in conjunction with Section 179 of the Surrogate's Court Act,[6] can be interpeted as applying to the respective rights of both parents,[7] and not being absolutely binding on the Surrogate, but being subject to certain limitations, the most important being the dictates of the welfare of the child, the controlling factor in guardian cases. In the instant case, there were several facts presented which indicated that it would be better for the infant if he remained in Albany County with his step-father, for (1), there he desired to live among his friends; (2), there he could remain under the beneficial influence of his sister; and (3), there was the location of his estate.

The weight of authority upholds the contention of the appellants. The court in an early case stated: "Whether a general guardian shall be appointed for an infant, and whether he shall be selected outside of the relatives of the infant is a matter of discretion committed to the surrogate, the exercise of which, unless abused, is not reviewable in this court." [8] Subsequently, arose the case of a father applying for a writ of *habeas corpus* to obtain the custody of his infant daughter, who resided with her maternal aunt.[9] The latter had stood in *loco parentis* to the child since the death of her mother. The father had no home of his own. It was held that the welfare of the child required that she remain in the custody of her aunt. In another instance,[10] a father's petition for the custody of his two infant children was denied because he could not duplicate the excellent care provided by the maternal grandparents. The policy of the courts is manifested by the statement taken from a recent case, "that the principal right of a parent to the custody of a child is superior to that of collateral relatives must give way to the rule that *the welfare of the child is superior to the claim of the parent.*[11] The wish of the infant to remain with

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them both, by last will duly executed, appoint the other the guardian of the person and property of such child, during its minority."

[6] N. Y. SURROGATE'S COURT ACT § 179. *"Decree appointing general guardian;* * * * If the surrogate is satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by the appointment of a general guardian, either of his person, or of his property, or of both, he must make a decree accordingly. The same person may be appointed general guardian of both the person and the property of the infant, or the guardianship of the person and of the property may be committed to different persons. *The surrogate may, in his discretion, appoint a person other than the father or mother of the infant* or other than the person nominated by the petitioner." (Italics added.)

[7] Goodman v. Alexander, 165 N. Y. 289, 59 N. E. 145 (1901); Matter of Gustow, 229 N. Y. 373, 115 N. E. 995 (1917); Matter of Wagner, 75 Misc. 419, 427, 135 N. Y. Supp. 678, 685 (1912).

[8] Matter of Vandewater, 115 N. Y. 669, 22 N. E. 174 (1889).

[9] Matter of Wainman, 119 Misc. 363, 196 N. Y. Supp. 262 (1922).

[10] People *ex rel.* Roberts v. Kidder, 137 Misc. 347, 342 N. Y. Supp. 108 (1929).

[11] People *ex rel.* Pascale v. Lanza *et al.*, 166 Misc. 370, 2 N. Y. S. (2d) 401 (1938).

the respondents, may not be ignored." (Italics added.) At common law, where there was no testamentary guardian, an infant, over fourteen years of age, could petition the surrogate or judge of probate to appoint a certain person he had chosen his guardian.[12] Under the New York Statute, the infant retains the right of nomination,[13] subject, however, to judicial approval. Consequently, upon an infant's petition, the Surrogate may, in the interests of the infant, appoint a step-parent rather than a natural parent as guardian, although the latter has not been declared to be an unfit, improper or incompetent custodian.

M. M. S.

CONSTITUTIONAL LAW—ANTI-TRUST LEGISLATION—PRACTICE OF MEDICINE NOT A TRADE WITHIN SECTION 3 OF SHERMAN ACT.—Under Section 3 [1] of the Sherman Anti-Trust Act, defendants [2] were charged with combining and conspiring to restrain the activities of a group health association of government employees engaged in arranging for the provision of medical care and hospitalization for its members, with restraining such members from obtaining adequate medical care from doctors engaged in group medical practice, and with imposing illegal restraints upon physicians serving on the medical staff of the association, upon other doctors in the District of Columbia, and upon Washington hospitals.[3] Defendants demurred on the principal ground that none of the illegal restraints has reference to a trade and that in view of the fact that Section 3 concerns itself with "trade" and not with the professions, the indictment should be dismissed. *Held,* demurrers sustained. The practice of medicine and the businesses of

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[12] 2 KENT'S COMM.* 227; Sherman v. Ballou, 8 Cow. 304 (N. Y. 1828).

[13] N. Y. SURROGATE'S COURT ACT §§ 175, 179; Schouler, *Domestic Relations* (6th ed. 1921) § 844.

[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in * * * or of the District of Columbia * * * is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *." 26 STAT. 209 (1890), 15 U. S. C. § 3 (1934).

[2] American Medical Association, a national organization of physicians; two of its subordinate bodies, the Medical Society of the District of Columbia, and Harris County Medical Society of Houston, Texas; the Washington Academy of Surgery; and twenty-one individual doctors, all members of the national body, some officers thereof, others members and officers of the Medical Society of the District of Columbia.

[3] The indictment, criticized by the Court for lack of facts, and in which "influence, opinion and conjecture were freely indulged", charged that the defendant medical societies had sought to exclude from their membership, doctors connected with the group health association; that they then urged the Washington hospitals to admit to their staffs only those doctors who were members of the societies.