GUARDIANS: Parents of minor children under fourteen years of age may waive their rights as natural guardians, and a guardian of the person and estates of such children may be appointed by the Probate Court.

April 26, 1943.

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Miss Hope Wray
3rd Officer, WAAC
Army Recruiting Station
Post Office Building
Cape Girardeau, Missouri

Dear Miss Wray:

The Attorney-General wishes to acknowledge receipt of your letter of April 23, 1943, requesting an opinion of this Department. Your letter reads as follows:

> "A problem has come up in the WAAC on which I would like your opinion.
>
> "One of the qualifications for joining the Womens Army Auxiliary Corps is that if a girl has a child under the age of 14, she must give legal custody of the child to someone else. We are wondering if there is a distinction between legal custody and adoption. Most girls do not want to let someone else adopt their child, but they are willing to give the custody of the child while they are in the Corps or for the period of the duration of the war plus not to exceed six months.
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> "In order to swear the girl into the Corps we must have a court order showing that legal custody of the child has been granted to someone else. Would it be possible to obtain a court order giving legal custody for an indefinite period of time?

> "Any information you are able to give us on the above would be greatly appreciated by this office, and you will be doing the recruiting service a great favor."

We interpret your inquiry as a request for this Department to suggest or recommend some manner in which the problem set out in your letter may be met. Under the statutes applicable to probate matters in this State, the parents are the natural guardians of their minor children and without any court proceeding or other action whatever they have legal custody over the person of such children and also have control of the estates, if any, of these children. Such relationship is provided for in Section 375, Revised Statutes of Missouri for 1939, which prescribes the following:

> "In all cases not otherwise provided for by law, the father and mother, with equal powers, rights and duties, while living, and in case of the death of either parent, the survivor, or when there shall be no lawful father, then the mother, if living, shall be the natural guardian and curator of their children, and have the custody and care of their persons, education and estates; and when such estate is not derived from the parents acting as guardian and curator, such parents shall give security and account as other guardians and curators, and if such parents shall refuse or neglect to give such bond the probate court, or judge in vacation, shall appoint some competent person as curator to take charge of and manage such property. The parents of such minor child or children acting as such natural guardian and curator shall be entitled to receive and collect the earnings of such minors, until they reach their majority, and be liable for their support to the extent of such earnings: Provided, that this law shall not be so construed as to exempt the father of such minors from liability for the support of his children."

There are other statutes in this State which provide for the appointment of guardians for minors under the age of fourteen years, where it is shown that such child's parents or parent is incompetent or unfit for the duties of guardianship. Such procedure is specified in Section 378, R. S. Mo. 1939, which provides as follows:

> "If a minor have no parent living, or the parents be adjudged incompetent or unfit for the duties of guardianship, the probate court, or judge or clerk thereof in vacation, subject to the confirmation or rejection of said court of the county of the minor's domicile, or if the minor have no domicile in this state, then the probate court, or judge thereof in vacation, of the county where the minor may at the time be actually residing, shall appoint guardians to such minors under the age of fourteen years, and admit those above that age to choose guardians for themselves, subject to the approval of the court at its next term thereafter. Unfitness or incompetency of parents, after ten days' notice to the parents, shall be decided in the probate court by the judge thereof, or by a jury, if one be demanded."

As can be seen from this section of the statute, the machinery is set up for the appointment of a guardian for minors in certain instances, but we feel that the status of "natural guardian" on the part of the parents of minors is a "right or privilege." In other words, they not only have the right or privilege to act as the natural guardians of their minor children, but we think they further have the right or privilege to waive such relationship, if they so desire. This construction of the law is borne out by a statement found in 28 Corpus Juris, page 1065, Section 22, which is as follows:

> "A general guardian cannot be appointed for an infant whose natural protector is living, unless such natural protector consent to such appointment."

Should our position be correct, and if the parents waive their right to act as natural guardians, the Probate Court then has the power and authority to appoint a guardian for the minor children. It is apparent, we think, that Section 378, cited supra, should apply where the parent or parents of the minors contend they should remain as natural guardians but through their unfitness or incompetency are not capable of so acting. Following such reasoning, it is our opinion that parents may waive their right or privilege to act as the natural guardian of their minor children.

If the applicants for your branch of service are required to waive their natural right of guardianship over their children under the age of fourteen, then it appears to us that they probably will also be compelled to waive any rights to control the estate, and education of such children. Therefore, the procedure as outlined in Section 393, R. S. Mo. 1939, must be followed. This section and also the succeeding Section 394, provide the following:

> (393)
> "Every appointment of a guardian or curator shall specify whether it be of the person of his ward or of his estate, or of his person and estate; and a copy of the order of such appointment, duly certified under the seal of the probate court, shall be prima facie evidence of the facts therein stated in all courts of law in this state."
>
> (394)
> "The guardian of the person, whether natural or legal, shall be entitled to the charge, custody and control of the person of his ward, and the care of his education, support and maintenance; the curator shall have the care and management of the estate of the minor, subject to the superintending control of the court; and the guardian of the person and estate of the minor shall have all the powers and perform all the duties both of a guardian of the person and a curator."

Consequently, if a parent waives the right to act as natural guardian and the Probate Court contemplates and intends to appoint a guardian for any children of such parent, then when application for guardianship is requested, it should be specified that guardianship of the "person and of the estate" of the minor is desired. Thus, the guardian appointed is then placed in the same position as was the parent or natural guardian.

Referring again to Section 378, R. S. Mo. 1939, supra, we find that the Probate Court has authority to appoint a guardian in certain instances. We also feel that such court has power to appoint such guardian where the parents waive their right as natural guardians. Section 397, R. S. Mo. 1939, speaks of an applicant for appointment as guardian and what such applicant must do. As we have said before, the statutes, in our opinion, are meant to apply where the parent or parents are contesting their removal as natural guardians. However, since our theory is that parents have the right to waive their natural right of guardianship, it necessarily follows that if such is done, the appointment must conform to the statutes referring to the removal by the parents for cause. Therefore, if an applicant for entrance to the WAAC appears in court and waives her right as natural guardian of her children under the age of fourteen, there are two ways in which to proceed. The court on its own volition may then appoint a guardian or there may be filed an application similar to the one referred to in Section 377, R. S. Mo. 1939, cited above. When the order is made by the Probate Court, which is a court of record, the legal custody of the person and also control of the estate is then vested in the guardian appointed by the court. Thus, the parent, and in this case your applicant, is no longer vested with the legal custody of her children.

There is a provision, the same being Section 437, R. S. Mo. 1939, which provides that the public administrators in the various counties shall be ex officio "public guardians," but only in the sense that they shall have control over the estates of minors, under order of the Probate Court. This obviously will not allow the public guardian to act in this instance, since he does not have custody of the person. Therefore, it is necessary that some other person be appointed.

It might be well to mention the fact that minor children over the age of fourteen years have the privilege of choosing their own guardian, subject to the approval of the Probate Court. However, in the case of your applicants, your requirements only have reference to minors under fourteen and thus this provision is of no consequence.

Conclusion

Therefore, it is the opinion of this Department that the parents or parent of minor children under the age of fourteen, may waive their right to act as the natural guardian thereof and the Probate Court may appoint a guardian of the person and the estate of such minor that has the same powers relative thereto as the parents or natural guardian.

It is further the opinion of this Department that, at least in this particular instance, the waiver should be in the form of a written pleading or affidavit in the Probate Court, setting out the waiver and the reasons therefor.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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