

Another example is *Osburn v. Roberts*.⁹ In *Osburn*, the mother died giving birth to the couple's daughter. The father gave the child to her maternal aunt two days after she was born, who raised her. He visited the child approximately once every other month and provided minimal financial support for her. Approximately three years later, he filed a habeas corpus action for his daughter's custody when the aunt refused to relinquish her.

The trial court denied his petition. The Oklahoma Supreme Court affirmed.¹⁰ It held that "there are three rights or interests that are to be given consideration in the following order of importance: 1) that of the child, 2) that of the parent and 3) that of those who have for years discharged all the obligations of parents."¹¹ It found the child's emotional bond with her maternal aunt and uncle to be a significant factor, holding "when asked to take the custody from those who have for a considerable period of time nurtured and cared for the child and to restore it to the parent, it is proper for the courts to consider the ties of love and confidence that have grown up between the child and its foster parents and whether it is best for the child not to disturb that relationship."¹²

The *Osburn* court also found significant the father's relinquishment of physical custody to the maternal aunt. It held that "children are not, like chattels, subject to an irrevocable gift, barter or sale, though the fact that a parent has relinquished custody of his child to others should be given due consideration."¹³

The standard for custody disputes between nonparents was the child's best interests. In *In re Borcharding's Custody*,¹⁴ the mother was awarded custody of the parties' child in their divorce. She moved in with her parents for a short time. She left the child in their care when she moved.

The 12-year-old lived with his maternal grandparents, rural tenant farmers, for most of his life, although he had initially lived with the paternal grandparents for a short period, continuing to visit them. Neither parent was overly involved in the child's life.¹⁵

The trial court awarded custody to the paternal grandparents, citing the opportunity for the child to attend city schools. The Oklahoma Supreme Court reversed.¹⁶ It recited a number of factors, including the child's intelligent, articulate responses to the trial judge and his clear preference to remain with his maternal grandparents.¹⁷ It held that it was in the child's best interests to remain with his historical caregivers and maintain continuity in his life.¹⁸

Subsequent appellate decisions relating to custody disputes between a parent and non-parent generally used the same standards until 1984. If the parent was unfit, and refused or failed to fulfill his parental obligations, the appellate court focused primarily on the child's best interests. If the parent was fit and substantially fulfilled his parental obligations, the appellate court focused on the parent's right to the custody, care and control of his child.

In 1972, the Oklahoma Supreme Court established the two-prong test for a parent to terminate the nonparent's guardianship of her child in *In re Guardianship of Hatfield*.¹⁹ The parent was entitled to present evidence of 1) her changed conditions in life that qualified her as a fit person, and 2) placing the children in her custody was in the children's best interests.²⁰ The two-part test was a slight shift from the original language, found in *Grose v. Romero*,²¹ which required a finding that returning the child to the parent was not inimical to the child's welfare.²²

POLICY SHIFTS IN OKLAHOMA LAW

In 1984, the Oklahoma Supreme Court decided Application of Grover.²³ Grover involved maternal grandparents attempting to adopt their granddaughter over the father's objection. The mother was awarded custody in the divorce, and the father had no contact with her or the child afterward. The mother moved in with her parents and died three months later. The grandparents were the child's sole caregivers and providers for two years before filing for adoption.

The father became aware of the adoption, objected and filed a petition for habeas corpus. The trial court found that either home was a fit environment for the child, but denied the father's petition, finding that other factors supported leaving the child with her grandparents.

The Oklahoma Supreme Court reversed. It held that the law required the child to be returned to her father's custody if there was no specific finding that he was unfit, because a grandparent had no rights to custody or visitation with a child except by statute.²⁴ It did not reference or acknowledge the "abuse of parental authority" statute in its decision.

The Grover court cited to the "three rights" standard²⁵ and reiterated the principle that the overriding consideration is the child's best interests.²⁶ However, it found that the father's fundamental right to the custody of his child outweighed all other factors if he was deemed a "fit" person.²⁷ It noted that the record was silent regarding the child's preference, but then held that a child's "whims, wants and desires" regarding where she should reside should be disregarded.²⁸ The court clearly did not find the father's failure to fulfill his parental duties to be of any significance, and minimized the issue of the child's emotional bond with her grandparents.

One year later, the Oklahoma Supreme Court discussed the importance of a child's emotional development, but within the context of a contested adoption. It held:

The Constitution protects only parent-child relationships of biological parents who have actually committed themselves to their children and have exercised responsibility for rearing their children. . . Children are not static objects. They grow and develop, and their growth and development requires more than day-to-day satisfaction of their physical needs. Their growth and development also require day-to-day satisfaction of their emotional needs, and a primary emotional need is for permanence and stability. Only when their emotional needs are satisfied can children develop the emotional attachments that have independent constitutional significance. This court recognizes that a child's need for permanence and stability, like his or her other needs, cannot be postponed. It must be provided early.²⁹

In 1994, the Oklahoma Supreme Court decided McDonald v. Wrigley.³⁰ McDonald involved a grandmother's attempt to intervene in her daughter's divorce, seeking custody of her grandchild. The trial court dismissed the grandmother's request to intervene.

The McDonald court reversed. It held that the grandmother had standing to intervene in her daughter's divorce because a grandparent is listed in the preferences statute as an eligible guardian or custodian of a child.³¹

However, the McDonald court continued beyond the issue of intervention. It first held that all grandparent custody orders were temporary in nature, due to the parent's fundamental right to the companionship, care, custody and management of his child.³² Second, it held that there had to be a compelling interest before the trial court could sever the parent-child relationship, because the parent's right was protected by both the U.S. and Oklahoma Constitutions.³³ McDonald was devoid of any language regarding the "three rights" test or the child's best interests.

The McDonald court cited to the U.S. Supreme Court decision, Lehr v. Robertson,³⁴ as the basis for its holding. The Lehr decision involved a parental rights termination hearing. Nevertheless, the McDonald court likened the grandmother's quest for custody, which it had held was temporary in

TRENDS IN OTHER JURISDICTIONS

The Oklahoma Supreme Court's requirement that a nonparty show "clear and convincing evidence" of a parent's "unfitness" to acquire custody or guardianship of a child was consistent with the majority of jurisdictions through approximately 1980. The terms "parental unfitness," "abandonment" or "compelling reasons" were used to describe a parent's inability or unwillingness to assume parental responsibility for his child justifying a custody or guardianship award to a nonparent.⁴⁹

Beginning in 1980, however, legislatures and the judiciary became aware that traditional legal standards regarding child custody and access were inadequate to effectively respond to significant changes in the family structure. The trial court's authority was expanded to include the child's psychological well-being and emotional attachments as relevant factors in custody and access decisions.

Two legislative examples are Hawaii and Oregon. In 1995, the Hawaii Legislature revised its custody statutes to allow the trial court the authority to award custody of a child to a nonparent, contrary to the normal parental preference, if it is in the child's best interests.⁵⁰ The statute includes a preference for a nonparent who has had de facto custody of the child in a stable home, over a noncustodial parent.⁵¹

In 2001, the Oregon Legislature revised its custody statutes to expand the scope of persons eligible to seek custody to include a "psychological parent." A "psychological parent" is someone who has "established emotional ties creating a parent-child relationship."⁵²

The trial court is tasked with making two determinations in awarding the child to the "psychological parent" over the biological parents: 1) the individual has a parent-child relationship with the child, and 2) the custody award is in the child's best interests.⁵³ The nonparent does not have to prove either of the biological parents unfit.⁵⁴

The parent-child relationship is defined as "a person having physical custody of a child or residing in the same household as the child; supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, with interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent

as well as the child's physical needs."⁵⁵ The parent-child relationship must exist or have existed within six months of filing.⁵⁶

Other states adopted a similar definition, by statute and decisional law.⁵⁷ Some jurisdictions adopted the terms "equitable parent"⁵⁸ and "person acting in loco parentis"⁵⁹ to incorporate the child's psychological welfare into the "best interests" standard to support a nonparent custody award.⁶⁰ Forensic mental health evaluations and evaluator testimony gave trial courts the opportunity to include empirical evidence of the child's psychological status as part of the "best interests" inquiry.⁶¹

In 2005, the Washington Supreme Court held that a de facto parent had standing to seek custody of a child who was neither adoptive nor biologically related.⁶² It defined a de facto parent as one whom: 1) the natural or legal parent consented to and had fostered the parent-like relationship, 2) the individual and the child lived together in the same household, 3) the individual assumed obligations of parenthood without expecting financial compensation, and 4) the individual had been in a parental role for a sufficient length of time that the child and the individual had formed a bonded, dependent relationship, like a parent-child relationship.⁶³ Its response to the legal parent's argument that there was no legislative provision that created or allowed an individual to become a de facto parent was:

We cannot read the legislature's pronouncements on this subject to preclude any potential redress to [the partner of the child's mother]. In fact, to do so would be antagonistic to the clear legislative intent that permeates this field of law - - - to effectuate the best interests of the child in the face of differing notions of family and to provide certain and needed economical and psychological support and nurturing to the children of our state.⁶⁴

Other jurisdictions began to recognize the state's interest in protecting children's psychological welfare as similar to its interest in protecting their physical welfare. An example is the Maine Supreme Court, which held:

The cessation of contact with a grandparent whom the child views as a parent may have a dramatic, and even traumatic, effect upon the child's well-being. The State, therefore, has an urgent, or compelling, interest in providing a forum for those grandparents having such a 'sufficient existing relationship' with their grandchildren.⁶⁵

The Maine Supreme Court used the "compelling" interest to ensure that the grandchildren who had lived with their grandparents for the majority of their lives had consistent, regular visitation with their historical caregivers. The Maine Court imposed the visitation schedule on the parents who qualified as an "intact nuclear family" under *Troxel v. Granville*.⁶⁶

EMERGING POLICIES IN OKLAHOMA LAW

In 2003, the Oklahoma Supreme Court accepted an appeal regarding a termination of a guardianship. In *In re Guardianship of A.G.S.*,⁶⁷ the maternal grandmother was appointed the child's guardian a few months after his birth. The trial court did not find the mother unfit and did not attach conditions to the guardianship's termination.

Approximately four years later, the maternal grandmother filed a request for child support. The mother filed a motion to terminate the guardianship in response. The trial court terminated the guardianship, holding that the law required its termination because the mother had not been found unfit and there were no conditions to her regaining custody.⁶⁸ The Oklahoma Supreme Court reversed.

The A.G.S. court held that a natural parent must satisfy two requirements before the trial court could terminate a guardianship: 1) the conditions that required the guardianship no longer exist, and 2) termination of the guardianship is not inimical to the child's welfare.⁶⁹ It revived the second prong of the guardianship termination test as the basis to keep the guardianship in place.

The A.G.S. court held that termination of the guardianship would be inimical to the child's welfare under the circumstances.⁷⁰ It identified several factors for its decision: 1) the length of the guardianship, 2) the relationship between the child and his guardian, 3) the mother's failure to have meaningful contact with her son, 4) her failure to provide any financial support to the guardian for her son, 5) her election to leave the child with the guardian until she received the notice of child support collection, and 6) the original condition for the guardianship (her possible imprisonment) had been removed years ago.⁷¹

The A.G.S. court found that the mother could not satisfy her statutory duty to her child, to provide the support and education suitable to her circumstances.⁷² Although there was no evidence that the child had been abused while in the mother's care, her failure to protect her elder daughter from abuse (resulting in her death) and evidence of ongoing domestic violence in her home provided the basis for a finding that terminating the guardianship would be "inimical" to the child's welfare.⁷³

In 2009, the Oklahoma Legislature made legislative changes to make it easier for third parties to formalize their psychological relationship with a child and afford more stability in the child's family structure. It recodified Section 21.1 of Title 10 as Section 112.5 of Title 43, and amended it to allow a grandparent or other individual identified in the statute to assume custody of a child under certain circumstances.⁷⁴ In its previous form, the individual could only seek custody if the custodial parent died or lost custody.

The same year, it also enacted provisions for a permanent kinship guardianship within the context of a deprived proceeding. In 2010, the appellate court discussed the respective rights of a child and his parent in *In re C.L.D.*,⁷⁵ a kinship guardianship connected to a juvenile deprived action. In *C.L.D.*, the father appealed the order appointing the maternal grandparents as guardians of his son. The appellate court affirmed the guardianship.⁷⁶

The father raised his constitutional rights as a father as part of his appeal.⁷⁷ The C.L.D. court responded, holding that "the parent's constitutional interests, however, are not the only constitutional rights at stake."⁷⁸ It further held:

The interest of children in a wholesome environment has a constitutional dimension no less compelling than that the parents have in the preservation of family integrity. In the hierarchy of constitutionally protected values both interests rank as fundamental and hence be shielded with equal vigor and solicitude.⁷⁹

The welfare specialist's testimony that the child would "likely face emotional harm if removed from the long-term foster placement with Grandparents"⁸⁰ was a significant factor in the court's analysis. The father's failure to regularly pay child support, his long working hours and a lack of transportation were also important factors.⁸¹

Other than the above decisions, Oklahoma decisional law in guardianship and third-party custody cases has remained substantially the same: the parent's biological relationship to the child has priority over all other factors, unless the parent can be found "unfit" under the "clear and convincing" standard.⁸²

In 2010, the Oklahoma Legislature amended the guardianship statutes to include a grandparent