

Atlantic County Orphans' Court.

In the matter of the application of Francisco Pagano for letters of guardianship of Kate and Phillip Notts and also his appeal from the order of the surrogate appointing Rosario Notts guardian.

Opinion of the Orphans' Court.

By E. C. Hague, Judge.

Statement of Facts.

About the twenty-fourth day of August, A.D. nineteen hundred and five, the Father of Kate and Phillip Notts was killed at the town of Hammonton, County of Atlantic and State of New Jersey, while crossing a railroad track, having been struck by a locomotive. They were then and now are both minors under the age of fourteen years.

On or about the eighth day of September, A.D. nineteen hundred and five, Rosario Notts, third Uncle and Brother to their Father, made application to the Surrogate of Atlantic County for letters of guardianship. In his petition for these letters he swore that he was next of kin and was therefore appointed by the surrogate. Later on Francisco Pagano, the maternal Grandfather of the children applied to the surrogate to revoke the letters granted to Notts on the ground that he was next of kin and first entitled to letters of guardianship; that he had no notice of the application on the part of Notts. The surrogate issued a rule to show cause on the guardian which he had appointed, why the letters should not be revoked; after hearing had, the rule was discharged. Pagano then took an appeal from the dismissal of said rule to the Orphans' Court and at the time set for hearing, it was stipulated and agreed between counsel for Pagano and counsel for Notts, guardian, that the Court should not only hear the question of appeal but consider their relative fitness and rights to appointment. And it was agreed that each of them were to be considered as making application to the Orphans' Court for letters of guardianship. The whole matter was argued into at considerable length; numerous witnesses were sworn and testified in regards to every possible feature, and certain facts are undisputed, namely, that shortly after Rosario Notts had been appointed guardian, to wit, December fourth, nineteen hundred and five, he placed his two wards in the St. Michael's Orphans Asylum and Industrial School at Hopewell, New Jersey. They were placed there to be cared for by the institution, without compensation. That while they were there, they were visited by their maternal Grandmother, the wife of Francisco Pagano, who took them out of the institution November twenty-third, nineteen hundred and six. Some litigation was had between the said Pagano and the said Notts in the Court of Chancery concerning the custody of these children.

Pagano has finally compelled to surrender them to the guardian appointed by the Orphans' Court, the Court recognizing the right to their custody until his appointment was regularly set aside. It also appears by evidence introduced that Rosario Notts the Father of these children

was married twice. That his last wife was killed the same time he was; that his first wife, the Mother of the children in controversy, had died some years before and at her death these children were taken by Francisco Pagano and his wife, their maternal Grandparents, and cared for until the re-marriage of their Father. The applicant Pagano as appears from the testimony, is a man in comfortable circumstances for an Italian, owning two farms at Elm near the town of Hammonton, and had as a part of his household beside his wife, two children, and an unmarried son, twenty odd years of age, and a daughter about fifteen. He has some money invested on mortgage and some money in a Savings Bank. There appears to be nothing in the testimony to show but that he is fit to bring up the children in question. His reputation and character according to the evidence, is good; he is industrious and a good liver for an Italian. The applicant Rosario Notts, the present guardian has a large family living with him at home, and is not so well circumstanced financially as Pagano, but so far as the evidence shows, and the Court believes, (so far as his character is concerned) is well qualified to care for the children.

Pagano claims contends and produces witnesses to show that the appointment of Notts as guardian was without his notice or consent. And that ever since he learned of his appointment he has been taking steps to depose him and be appointed himself. Notts contends and produces some evidence to substantiate his contention, that Pagano knew of his application and had consented to it. I am satisfied, however, from the evidence that the appointment of Notts was without the knowledge or consent of Pagano and there is no claim that he was ever given written notice. The evidence shows and is undisputed that immediately after the appointment of Notts, guardian, Pagano engaged an attorney to represent him and some effort was made on his part but without success concerning the matter; that Pagano then engaged another attorney and nothing having been successfully accomplished by him, he still engaged another who obtained the rule to show cause, to set the surrogate's appointment aside. After that he engaged his present attorney or counsel. These facts together with the testimony of Pagano and other witnesses, and the action of Pagano through his wife in taking these children from the home prove to me conclusively that he has always desired the custody of them. He being the maternal grandparent and standing in closer degree of kinship than the present guardian whose appointment was without notice to him, it therefore follows that under the cases the order heretofore made by the surrogate appointing Rosario Notts, must be set aside, vacated and for nothing holden.

The applicant Pagano, being as already said, nearer of kin than the other applicant, and in fact next of kin to the minor children, it becomes the duty of the Court to appoint him unless some other reason should be presented to the Court showing that the children would be better cared for in the hands of the other applicant.