LAW REFORM COMMISSION
OF BRITISH COLUMBIA

REPORT ON
THE AUTHORITY OF A GUARDIAN

LRC 78 January 1985

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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Canadian Cataloguing in Publication Data

Law Reform Commission of British Columbia. Report on the authority of a guardian

Includes bibliographical references.

"LRC 78". ISBN O-7718-81466-4

1. Guardian and ward - British Columbia. I. Title.

KEB2O8.A72L38*1985* 346.7l1Ol*8 C85—092063—9

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To the Honourable Brian R. D. Smith, Q.C.,
Attorney General of the Province of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON THE AUTHORITY OF A GUARDIAN

Section 25 of the *Family Relations Act* defines the powers and duties of a guardian by reference to the provisions of the English *Tenures Abolition Act, 1660.* The Commission recommends that legislation be enacted to provide a modem restatement of a guardian∗s authority.

CHAPTER I INTRODUCTION

A. Section 25 of the Family Relations Act

Under the British Columbia *Family Relations Act* 4 S..B.C. 1917, C. 27. parents are joint guardians of their children. When parents are unable or unfit to care for a child, someone else must serve in their place. A non-parental guardian may be appointed by will or by order of the court as a substitute for the parents.

There are two kinds of guardianship. Someone may be guardian of the person of the child or guardian of the estate of the child. Usually, the same person acts as guardian of both the person and the estate of the child.

The *Family Relations Act* provides in some detail rules governing the appointment of a guardian. Curiously, the Act pays little attention to the incidents of guardianship. What rights, duties and powers does a guardian possess? Only section 25 of the *Family Relations Act* provides any guidance:

Authority of Guardian

25. (I) A guardian is both guardian of the person of the child and guardian of the estate of the child.

(2) Subject to this Act, a guardian of the estate of a child has all powers over the estate of a child as a guardian appointed by will or otherwise had on May 19, 1917 in England under Acts 12, Charles the Second, chapter 24, and 49 and 50 Victoria, chapter 27, section 4.

(3) Subject to this Act, a guardian of the person of a child has all powers over the person of the child as a guardian appointed by will or otherwise had on May 19, 1917 in England under Acts 12 Charles the Second, chapter 24, and 49 and 50 Victoria, chapter 27, section 4.

The date for determining the authority of a guardian, May 19, 1917, refers not to some time when a state of perfection in the governing law had been achieved. It is the date royal assent was given to section 25∗s predecessor, section 3 of the British Columbia *Equal Guardianship of Infants Act.*

Reference to section 4 of Act 49 and 50 Victoria, chapter 27 (the English *Guardianship of Infants Act, 1886)* does not significantly further an appreciation of the powers of guardians. That section merely continued the provisions of Act 12, Charles the Second, chapter 24 (the *Tenures Abolition Act, 1660):*

> 4. Every guardian in England and Ireland under this Act shall have all such powers over the estate and the person, or over the estate (as the case may be), of an infant as any guardian appointed by will or otherwise now has in England under the Act twelve Charles the Second, chapter twenty-four, or in Ireland under the Act of the Irish Parliament fourteen and fifteen Charles the Second, chapter nineteen, or otherwise.

The *Tenures Abolition Act, 1660* itself provides some guidance on the authority that may be exercised by a guardian:

> 8.... where any person hath or shall have any child or children under the age of twenty-one years and not married at the time of his death, it shall and may be lawful to and for the father of such child or children. whether born at the time of the decease of the father or at the time *en ventre sa mere* or whether such father be within the age of twenty-one years or of full age by deed executed in his lifetime or by his last will and testament in writing in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remain under the age of twenty-one years or any lesser time to any person or persons in possession or remainder other than Popish recusants; and that such disposition of the custody of such child or children shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise; and that such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid shall and may maintain an action of ravishment of ward or trespass against any person or persons which shall wrongfully take away or detain such child or children for the recovery of such child or children; and shall and may recover damages for the same in the said action for the use and benefit of such child or children.
>
> 9....that such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, the profits of all land. tenements and hereditaments of such child or children: and also the custody. tuition and management of the goods, chattels and personal estate of such child or children till their respective age of twenty-one years. or any lesser time, according to such disposition aforesaid, and may bring such action or actions in relation thereunto as by law a guardian in common socage might do.

The legislative formula adopted in the *Family Relations Act* to govern guardianship is needlessly confusing. Few guardians have a copy of the *Tenures Abolition Act, 1660* readily to hand.

CHAPTER II AUTHORITY OF A PARENT OR GUARDIAN

A. Guardianship of the Person of a Child

The *Tenures Abolition Act, 1660* provided that a guardian had the responsibility to educate his ward and could maintain an action of ravishment or trespass for interference with the child. In *Report on Intentional Interference With Domestic Relations* (LRC 68), the Commission recommended that the actions of enticement, harbouring and seduction of a child be abolished. It was the Commission∗s conclusion that it was inappropriate to award damages to the child∗s parents for the loss of the child∗s services (the basis of these actions) and that the policy of deterrence was already well served by the criminal law. This aspect of a guardian∗s authority consequently will have no contemporary importance when the Commission∗s recommendations are implemented. The importance of the *Tenures Abolition Act, 1660* lies in its provision for the management and use of a child∗s property or profits from such property.

In British Columbia, apart from the provisions of the *Tenures Abolition Act, 1660,* particular rights and duties of guardians have been left mainly to the common law for definition; no provincial statute has codified them. Blackstone identified three principal duties a parent or guardian owed to a child: maintenance, protection and education; and three powers parents or guardians may exercise: correction, consent to marriage and (for the parent only) delegation of parental authority.

Historically, distinctions have been drawn between the authority that a father, mother or guardian may exercise. Today, a mother and father enjoy the same authority over their children. Minor differences in the authority which may be exercised by a parent or a guardian exist, but for the most part they have little contemporary significance. These distinctions were drawn by courts according to the circumstances of earlier times. For example, a guardian was

under a duty to educate his ward according to the ward∗s expectations and rank in life.[2] A parent was under no similar duty. A distinction, consequently, exists but has it any substance? "Rank in life" has little meaning in British Columbia, where class distinctions are not usually drawn. The universality of public education has further reduced the significance of this duty.

Moreover, the court enjoys a continuing jurisdiction over children as *parens patriae.* Consequently, any controversial decision of significance is open to review.

B. Guardianship of the Estate of the Child

The powers of a guardian of property under the *Guardianship of Infants Act, 1886* have been described as follows:[3]

> It would seem that the statutory (surviving parent) or testamentary guardian of the estate of an infant has some powers which he can exercise without authorization of, approval by or accounting to a court. These appear to include the collection, by suit if necessary, of personal property of the ward which is subject to guardianship, including sums of money due under trusts which the trustees have not applied directly for the infant's benefit. He may apply so much of the income as may be needed to the support and education of the ward and is under a duty to Invest and reinvest funds not so needed.
> It seems to be thought that the Trustee Investments Act, 1961, regulates permissible
> investments. There is doubt as to
> his power to sell property, other than investments, without court authorization. He may not convert personal property into real, invade principal or operate an active business without court authorization, and the court∗s power to authorize operation of a business is doubtful. He is not entitled to compensation for his services. Such a guardian may apply to the court for advice and the court may supervise him and require him to account. If the Chancery Division makes an infant a ward of court, the powers of his statutory or testamentary guardian may be exercised only with court authorization. The court may supersede such a guardian as to the infant∗s property by appointing a receiver of the estate.

In British Columbia, permissible investments would be governed by the *Trustee Act,* which also entitles a testamentary or court-appointed guardian to compensation for services.[4]

Section 17 of the *Infants Act* provides that generally all contracts entered into by infants, other than contracts for necessaries, are absolutely void. A number of problems arise in the law governing infants contracts, and these were addressed by the Commission in *Report on Minors∗ Contracts* (LRC 26).

Consequently, by law, an infant is generally incapable of dealing with his or her property. Someone else must act on the infant∗s behalf. Ostensibly that is the child's parent or guardian. A guardian, however, is seldom in a position to exercise control over an infant's property.

First, a donor or testator who desires to leave personal or real property to infants may use a trust rather than a direct gift to accomplish his purpose. In this way trustees, governed by the *Trustee Act*[5] and the general law of trusts, control the property.

Second, the uncertainty of the powers of a guardian of property often prompts judicial intervention. In *Gardner* v. *Blane,*[6] for example, the court appointed a receiver of the rents and profits of an infant∗s real estate instead of permitting the testamentary guardians to act in that capacity:

The statute enabled the father to give to the testamentary guardian certain powers, but the precise extent of those powers over the property of the infant was by no means certain. The testamentary guardian had no estate, and was frequently unable to act effectually without the assistance of this Court.

Other provisions in the *Infants Act,*[7] also limit a guardian∗s discretion. The Public Trustee may, for example, petition the Supreme Court "on behalf of infants possessed of or entitled to land in the Province, for an order to dispose of all or part of the land."[8] The court may assent to the plan if the disposition is "expedient, necessary, or proper in the interests of the infant or for his maintenance or education" or where the land is wasting. The Public Trustee may also file a caveat against land in which an infant has an interest when he has grounds to believe any disposition will prejudice the infant.[9] Money held in court for an infant may be paid out at the Public Trustee∗s direction for the maintenance, education or benefit of the infant. The infant or any person on his behalf may challenge such a direction or a refusal to make a direction.[11]

A guardian may enter into an agreement on behalf of an infant. The agreement, however, must be approved by either the Public Trustee, if the consideration for the agreement is under ten thousand dollars, or the court. If the agreement is to compromise an unliquidated claim for damages or a claim for damages for injury to the infant∗s person or property, notice of the compromise must be given to the Public Trustee in addition to obtaining his or the court∗s approval. Section 35 of the *Family Relations Act* is also worth noting, as it requires a guardian of the estate to give security in order to better discharge his powers, rights and duties — a feature of guardianship dating back to Roman law.

The provisions of the *Land (Settled Estate) Act* also govern transactions relating to an infant∗s real property. Section 4 of that Act provides that any land owned by an infant is deemed to be a settled estate. The *Land (Settled Estate) Act* governs leasing, encumbering and the disposition of land. There seems little point in having two distinct Acts governing essentially the same questions of law, and we are not satisfied that this aspect of the law should remain unchanged. Nevertheless, reported cases do not indicate that problems arise in this context. It is, in any event, outside of the terms of our present inquiry.

It appears that a guardian may enjoy some authority over a child∗s estate. The significance of the guardian∗s role, however, is diminished by the present reluctance to leave anything to infants directly. Moreover, legislation has restricted the authority of a guardian. The exercise of a guardian∗s authority is usually subject to supervision, by either the Public Trustee or the court.

CHAPTER III REFORM

A. Should Section 25 of the Family Relations Act be Revised?

The single most potent criticism that can be leveled at section 25 is that it is unhelpful. It does not reveal anything about the incidents of guardianship. Instead, it provides only a clue for the commencement of research. Moreover, it presents problems of interpretation. To what extent has the law respecting guardianship been modified by subsequent legislation? To what extent is it possible to modify section 25 through ancillary legislation governing trustees or infants? How appropriate is the law as it stood on May 19, 1917, based as it is on 17th century legislation. While problems concerning the law of guardianship do not often arise, there is good reason for replacing section 25 with a more modern statement.

B. Options for Reform

Some commonwealth jurisdictions — England, Australia, Ontario for example — define powers of guardians in general terms. In the United States, on the other hand, most states define powers of guardians with some precision.

An example of the general approach is Ontario∗s recent legislation on custody, guardianship and access. A person entitled to custody enjoys "the rights and responsibilities of a parent in respect of the person of the child."[2] The rights and responsibilities of a parent are not defined. The term guardianship is limited to guardianship of property.[3] Primarily a guardian∗s authority is derived from section 49(4) which provides that the guardian has care and management of the infant∗s property. When appointing a guardian of a child∗s estate, the court must consider the ability of the applicant to manage the property and the merit of any plans for the property proposed by the applicant.[4]

An example of the detailed approach to defining a guardian∗s authority is the Texas legislation.[5] It specifically lists the powers and duties of parents,[6] and those of a guardian.[7]

1. GUARDIANSHIP OF THE PERSON OF A CHILD

It is our conclusion that detailed legislation defining the powers and duties of a guardian of the person of a child is both unnecessary and undesirable. First, practical problems concerning this aspect of the authority of guardians seldom emerge. Second, in British Columbia the lack of rigorous definition of parental powers and duties has not caused problems. The care and control of a child is usually a matter of common sense.

On balance, we prefer defining the authority of a guardian of the person of a child by a general statement of principle. Since a guardian is a substitute for a parent, there is no obvious reason why a guardian should not exercise the same authority and responsibility as a parent.

Perhaps the easiest formulation is to provide that a non-parental guardian shall have all of the authority over the child enjoyed by the child∗s parents, except as to the ability to appoint a guardian of the child. The formulation adopted in Ontario serves as a useful model for legislation.

2. GUARDIANSHIP OF THE ESTATE OF A CHILD

The *Tenures Abolition Act, 1660* provided a guardian with limited powers over his ward∗s estate. He was empowered to manage the estate and to receive and hold the profits from the estate for the benefit of his ward.

An infant can own real and personal property, but his capacity to deal with them is limited by the law. For the most part, approval by the Public Trustee or the court must be obtained for any transaction relating to a child∗s estate, pursuant to the *Infants Act* and the *Land (Settled Estate) Act.*

Usually, infants do not have large estates, and the actions of an infant∗s parents or guardian on his behalf are not subject to objection. The Public Trustee or the courts will not be involved unless property of some value is concerned.

With respect to this issue, it would not be satisfactory to provide that a guardian∗s authority over the estate of his ward parallels that of a parent. At common law, a parent had no authority over the estate of the child. The *Tenures Abolition Act, 1660* provides for the management of a ward∗s property by his guardian. Under the *Family Relations Act,* a parent is a guardian of his or her child and consequently enjoys the powers of a guardian over the child∗s estate. Providing that a guardian possesses a parent∗s authority would deprive both parent and guardian of any ability to manage a child∗s property.

Actually, the policy of the *Tenures Abolition Act, 1660,* as it applies to guardianship of the estate of the child, is still valid today. What is called for is a modern statement of that policy.

Legislation adopted in Ontario, referred to earlier, carries forward the policy of the *Tenure∗s Abolition Act, 1660* in contemporary language. The Ontario Act provides as follows:

48. (2) A guardian of the property of a child has charge of and is responsible for the care and management of the property of the child.

The Ontario legislation also provides that a guardian of property is under certain duties respecting the property. For example, he may be required to account for the consequences of his management in the same manner as a trustee.[9] While there may be some merit to defining the specific duties and responsibilities of a guardian of the estate of a child, the same thing is accomplished by recognizing that a guardian of the estate of a child, while not a trustee, is subject to the rules that govern trustees.

C. Recommendation

It is our conclusion that sections 25(2) and (3) of the *Family Relations Act* should be repealed. A non-parental guardian of the person of a child should be regarded as a substitute for a child∗s parent with all of the parent∗s authority over the child. With respect to guardianship of the estate of a child, there is merit in retaining the current supervisory role of the court (usually at the instance of the Public Trustee). Nevertheless, there will be circumstances where the guardian should have capacity to act without court approval, primarily where small amounts of the child's money are involved. That was the chief significance of the *Tenures Abolition Act, 1660.* In our opinion, however, it is unnecessary to define the specific powers and duties of guardianship of a child∗s estate. A guardian in that case is the child∗s fiduciary. Section *25(3)* should be replaced with a provision to the effect that a guardian of the child∗s estate is subject to the rules that govern trustees.

The Commission recommends that:

1. Sections 25(2) and (3) of the Family Relations Act *be repealed and replaced with legislation that embodies the following principles:*

(a) A non-parental guardian of the person of a child should have the same authority as that of a parent having care and control of a child, except the power to appoint a guardian of the child.

(b) Subject to the Infants Act, *a guardian of the estate of a child should have charge of and responsibility for the care and management of the child∗s estate, with all of the powers, duties and responsibilities he would have if he were a trustee, for the maintenance and education or otherwise for the benefit of the child.*

Usually, guardianship will extend to both the child∗s person and his estate. Sometimes, however, a parent or the court will appoint guardians to exercise these capacities separately. In

the absence of any such direction, however, an appointment of guardianship should embrace both heads. That is the effect of section 25(1) of the *Family Relations Act.*

D. Acknowledgments

The subject of this Report is uncontroversial and for that reason, contrary to the Commission's usual practice, a prior Working Paper soliciting comment was not circulated.

The Commission would like to express its appreciation to Donald Moir, a law student employed by the Commission, who was responsible for the research upon which this Report is based, and to our Counsel, Thomas G. Anderson, who prepared this Report.

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January 25, 1985