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# AGE AT WHICH PARENTAL CONTROL EXPIRES

It is evident that the law has never finally determined the age at which parent's control over his child should cease. It is often presumed that the age of majority represents determination of the parent's control over his child. However it is suggested that both case law and statute law refer to different ages for different purposes. For purposes of determining the control of the child, no particular age can be singled out which can be construed for all purposes to be the age at which effective parental control exists.

Hargraves note 2, Coke[1] discusses the history of natural guardianship and states that this guardianship continues until an infant attains the age of 21. Thus natural guardianship differed from guardianship by nurture or guardianship in socage, both of which extended to the age of 14.

The age of 21 was applied as a limit to the guardianship in knighthood. The development of common law witnessed an extension of the age of guardianship in socage and by nurture to the age of 21 in keeping with the more enlightened form of guardianship in knighthood.

The *Tenures Abolition Act* 12 Cha. 2, c. 24, enabled a father to appoint by will or deed a guardian of his children

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[1] Co. Litt 17th ed. with notes of Hargrave and Butler, London, 1817.

after his decease with power applied to all of his children under the age of 21. This *Act* represents the first statutory recognition of the parental control over a child.

Pollock and Maitland tell us that thereafter 21 became the age of majority for ordinary purposes. This rule is, as Maitland points out, an instance of the process by which the law of the higher classes of society become the law for all.[2]

Coke refers to the seven ages of a woman which are regarded as the lines of demarcation for various purposes:

> . . . seven years for the Lord to have aid *pur file marrier*; nine years to deserve dower; twelve years to consent to marriage; until 14 to be in ward; fourteen years to be out of ward if she attained thereunto in the life of her ancestor; sixteen years for to tender her marriage if she were under the age of fourteen at the death of her ancestor; and twenty-one years to alienate her lands, goods and chattels.[3]

It is apparent that some of these ages represent the lower limits of "majority" such as with regard to capacity to marry and that choice was not dealing with the upper limits of "majority" in regard to the parents control over the child. It is interesting to note however that no less than 6 ages considered critical for various purposes.

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[2]P. and M., ii, 436.

[3]Co. Litt, 78b.

Pollock and Maitland state that our law knows no such thing as emancipation. It merely knows the attainment of full age and there is more than one full age. However the only line of general importance is drawn at the age of 21. Pollock and Maitland discuss the fact that an infant has capacity or status quite independent from that of his father. For example, the infant sues and in doing so he sues in his own proper person, notwithstanding that some friend of the infant sues in his name. In the same manner an infant can be sued and very often the infant might have been sued in his own name. Pollock and Maitland generally recognize the fact that the infant's guardian that can neither bind the infant nor help the infant to bind himself. It may follow from this that in terms of the infant's legal capacity the parental guardian exercises no control over or on behalf of the infant.

Holdsworth[4] asserts at page 43:

> In the absence, then, of a comprehensive law of guardianship the common law attempts to define the capacity of the infant. It allows him to act in certain cases; and, at the end of this period, it is arriving at some tentative conclusion as to the legal results of the acts. It was not until feudal wardship was abolished and the equitable conception of trusteeship was so extended as to embrace the guardian that the guardian was able in any way to supplement the imperfect capacity of the infant. Even then the powers of the guardian, unless expressly conferred upon him was someone who

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[4]History of English Law, vol. 3.

> was settling property on the infant, was very limited. It was not until these last days, and by expressed statutory provision, that the guardian of the infant who owns land has been empowered to act on the infant's behalf.

It is apparent that concern over the extent of the guardian's control over his infant is related to the capacity of the guardian to control the infant's estate. It is suggested that in the context of parental control over a child, the control of the child's estate is relevant in that by controlling the estate the parent or surrogate parent may also control to a very large extent the person of the infant. If the infant is dependent upon his parent for his maintenance or support either from his own estate or from the estate of the parent, he will to a large extent be controlled in his personal life.

Blackstone thought that the power of parents over their children is derived from their duties toward their children and that this authority was given to parents partly to enable the parent more effectively to perform his duty and partly for a recompense for his care and trouble in the discharge of it.

> The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age was also directed by our ancient law to be obtained; but now it is absolutely necessary, so without it the contract is void. And this is also another means which the law has put

> into the parent's hands, in order to better discharge its duties; first in protecting his children from the snares of artful and designing persons; and next settling them properly in life, by preventing the ill-consequences of too early and precipitate marriages. A father has no other power over his son's estate than as his trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he becomes of age. He may indeed have the benefit of his children's labour while they live with him, and are maintained by him, but this is no more than he is entitled to from apprentices or servants. The legal power of a father--or mother, as such, is entitled to no power but only to reverence and respect; the power of a father over the persons of his children ceases at the age of 21; for they are then enfranchised by arriving at years of discretion or that point which the law has established as some must necessarily be established, when the empire of the father or other guardian is placed to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian of the children.[5]

However Blackstone, like Coke, also suggests that there are different ages that are relevant for different purposes and that these ages differ between males and females, and are not contingent upon the parental áuthority at common law:

> A male at 12 years old may take the oath of allegiance; at 14 is at the years of discretion, and therefore may consent or disagree to marriage, may choose a guardian, and, if his discretion be

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[5]Blackstone Commentary Book I, Lewis edition, 1898, p. 452.

> actually proved, may make his testament of his personal estate; at 17 may be an executor; and at 21 is at his own disposal and may align his goods, land and chattels. A female also at 7 years of age may be betrothed or given in marriage; at 9 is entitled to dower; at 12 is at years for maturity and therefore may consent or disagree to marriage, and if proved to have sufficient discretion may bequeath her personal estate; at 14 is at years of legal discretion, and may choose a guardian; at 17 may be executrix; and at 21 may dispose of herself and her lands.

The common law early recognized the age of 21 as the age below which a person was to be regarded as of immature intellect and imperfect discretion and whose interests required careful protection.[6] However, Halsbury's relates that an infant can by Act of Parliament be declared to be of full age before he attains the age of 21 years.[7]

The age of majority was most often applied in early case law in determining the infant's liability in actions based on contracts entered into by him before that age. Much of the early case law was designed to protect the child's indiscretion in his dealings with his own property. This same age was not applied in the determination of the infant's liability for criminal

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[6]Basset's case (1557) 2 Dyre 136a, 137a.

[7]Co. Inst. 6.

action. It was early established that a child above the age of seven years was not to be protected from the consequences of his own criminal fraud.[8] A child has long been held to be responsible for his own torts notwithstanding his minority.[9] One might conclude that the infant's incapacity up to the age of 21 related only to his contractual capacity.

Blackstone thought that the parental authority is contingent upon the parental responsibility--which responsibility is threefold: the responsibility to maintain, to protect and to educate.

Since at common law these obligations were wholly moral and not legal an examination of the statute law may determine the present extent of this duty and consequently the extent of the parental authority.

In Alberta, the duty to maintain an infant child extends to the age of 16 pursuant to the provisions of the *Maintenance Orders Act*.[10] Thus we might conclude that the parental authority over a child extends only to age 16.

However, under the provisions of the *Child Welfare Act*[11] the parental responsibility to protect his child

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[8] *Watts* v. *Creswell* (1714) 9 Vin. Avr. 415.

[9] *Donaldson* v. *McNiven* (1962) 2 All E.R. 691.

[10] R.S.A. 1970, c. 222, s. 3(2).

[11] R.S.A. 1970, c. 45, Part 2.

extends to age 18 and thus the parental authority may be said to extend this far as well.

But again, under the provisions of the *School Act*[12] the parental responsibility may be construed as ceasing at age 16 and thus parental authority as well.

In equity however, the courts have often extended parental responsibility beyond any statutory requirements.

In *Agar-Ellis* v. *Lascelles* (1883) 24 Ch. D. 317 the court held that a father had a natural jurisdiction over and a right to the custody of his legitimate child during infancy, quite independent of any parental responsibility. In *Re Thomasset* v. *Thomasset* [1891-1894] All E.R. Rep. 308, Lindley L.J. held that the peculiar jurisdiction exercised by the Divorce Courts could be exercised during the whole period of infancy, that is up to the age of 21 with regard to custody, education and maintenance. Reliance for that decision was placed on the *Tenures Abolition Act*, 1660, which enabled a father to appoint a guardian by deed or will up to the age of 21. It was acknowledged in the *Thomasset* case that the right of the father to the custody of his children up to the age of 21 was taken for granted in that statute and was nowhere expressly stated.

Lindley L.J. held that the unique jurisdiction of the Court of Chancery enabled it to aid fathers and guardians of children over the age of discretion to compel

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[12] R.S.A. 1970, c. 329, Parts 8 and 9.

them to attend schools selected by the guardians. It would thus appear that the real authority over children over the age of discretion rests not with the parent or guardian, whose authority may rely on his responsibility which is limited by statute for certain purposes, but with the Court of Chancery as *parens patriae*.

The parental moral responsibilities may extend beyond any statutory obligations. It has been held that the parental responsibility does not cease when a child attains his majority, although the enforcement of the parent's responsibility may be difficult or impossible. Apart from the enforceability, the duty of a parent is not confined to infancy and the parent cannot divest himself of those duties.[13]

Although the parent cannot divest himself of his legal obligations, it is apparent that the child can become emancipated from his parent if he marries or if he enlists in the armed services.[14]

In the case of *Lough* v. *Ward*[15] which involved a 16 year old girl who was enticed away from her parents' home by adherents to a religious order, the court held that it had no power to order the child to return to her

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[13] *Waterhouse* v. *Waterhouse* (1905) 94 L.T. 133; *Stevens* v. *Stevens* (1907) 24 T.L.R. 20.

[14] *R.* v. *Lytchet Matravene* (1827) 7 B. & C. 226; *R.* v. *Oulton* (1834) 5 B. & Ad. 958; *Lough* v. *Ward* [1945] 2 All E.R. 338.

[15] *Supra*, fn. 14.

parents' home. However the court held that because of a father's rights as head of the family to the control over his children, their education and their conduct, until they are 21 years of age or marry, he was entitled to damages against the defendants for his loss of the services of his daughter.

Parental control over an infant not actually under the physical care of the parent can only be exercised with the assistance of the court. A child under the physical care of the parent however, may presumably be coerced or corrected by minimal bodily punishment which receives sanction both from the common law and the Criminal Code. Thus a father has the right to restrain and control the acts and conduct of his infant child and to inflict correction on the child for disobedience to his orders by personal and other chastisements to a reasonable extent,[16] and a parent or person standing in the parent's place is protected from criminal action for using such physical force to correct a child as may be necessary in the circumstances.[17] Since the Criminal Code of Canada sanctions bodily discipline only with respect to a child in the care of the parent, the parent is not justified in using physical coercion over a child who has emancipated himself from his parent. It is arguable that in Alberta, the provisions of the *Child Welfare Act* oblige the parent to protect his child up to the age of eighteen and that this responsibility effectively extends the parental care

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[16] *R.* v. *Hopley* (1860) 2 F. & F. 202; *R.* v. *Griffin* (1869) 11 Con. C.C. 402; *Halliwell* v. *Counsell* (1878) 38 L.T. 176.

[17] Criminal Code 1953-54, c. 51, s. 43.

and control to that age, thus justifying the parent in using physical force to coerce or discipline a child up to 18 notwithstanding the child's own wish to emancipate himself from parental control.

Is it possible that even apart from the provisions of the *Child Welfare Act*, the court can in exercising its equitable jurisdiction, invoke the equitable rule that a parent's right to custody extends to the age of 21 in view of recent cases which hold that the *Age of Majority Act* does not restrict or limit the authority of the Supreme Court in its jurisdiction over infants?[18]

Lord Denning would think not. In the case of *Hewer* v. *Bryant* (1969) 3 All E.R. 578, he states that a parent's control over his child is diminishing and that the old common law principle enunciated in *Re Agar-Ellis* should be got rid of. He states at p. 582:

> I utterly reject the notion that an infant is, by law, in the custody of his father until he is 21. These words 'in the custody of a parent' were first used in *The Limitation Act*, 1939. During the next year youngsters of 18 or 19 fought the Battle of Britain. Was each of them at that time still in the custody of his father? The next use of the words was in *The Law Reform Act*, 1954. Since that time pop singers of 19 have made thousands a week, and revolutionaries of 18 have broken up universities. Is each of them in the custody of his father? Of course not. Neither in law nor in fact. Counsel for the defendant realized

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[18] *Petty* v. *Petty* [1973] 1 W.W.R. 1 and *Jackson* v. *Jackson*.

> the absurdity and sought to graft exceptions onto the rule in *Re Agar-Ellis* but he failed to provide any satisfactory definition of these exceptions. By the time he finished, it looked to me as if the exceptions would swallow up the rule. I would get rid of the rule in *Re Agar-Ellis* and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of the Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed him his father would cut him off with one shilling. If his daughter had an illegitimate child, he would turn her out of the house. His power only ceased when a child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare, in conformity with the recent report on the age of majority, that the legal right of a parent to the custody of a child ends at the 18th birthday; and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of a child, the older he is. It starts with a right of control and ends with little more than advice.

In the same case Sachs L.J. discusses the term custody. He states at p. 584:

> Before proceeding further it is essential to note that amongst the various meanings of the word "custody" there are two in common use in relation to infants which are relevant that need to be carefully distinguished. One is wide--the word being used in practice as almost the equivalent of guardianship; the other is limited and refers to the power physically to control the infant's movements. In its limited meaning it has that connotation of an ability to restrict the liberty of the person concerned, which Donaldson J. referred

in Duncan's case (1968) 1 All E.R. 92. This power of physical control over an infant by a father in his own right qua guardian by nature and the similar power of a guardian of an infant's person by testamentary disposition was and is recognized in common law; but that strict power (which may be termed his "personal power") in practice ceases on their reaching the years of discretion. When that age is reached *habeas corpus* will not normally issue against the wishes of the infant. Although children are thought to have matured far less quickly--compared with today--in the era when the common law first developed, that age of discretion which limits the father to practical authority (see *R.* v. *Howes* (1860) 3 E. & E. 332) was originally fixed at 14 for boys and 16 for girls (per Lindley L.J. and *Thomasset* v. *Thomasset* (1891-94) All E.R. Rep. 307).

This strict personal power of a parent or guardian physically to control infants, which is one part of the rights conferred by custody in its wider meaning, is something different to that power over an infant's liberty up to the age of 21, which has come to be exercised by the courts "on behalf of the Crown as *parens patriae*" to use the phraseology at page 68 of A Century of Family Law in the contribution by P. H. Pettitt, Parental Control and Guardianship. It is true that in the second half of last century that power was so unquestioningly used in aid of the wishes of a father that it was referred to as if its resultant exercise was a right of the father. Indeed, in the superbly Victorian judgments in *Re Agar-Ellis* it seems thus to be treated: for the purpose, however, of the present issues, it is sufficient to observe that if those judgments are to be interpreted as stating as a fact that fathers in practice personally had in 1883 strict and enforceable power physically to control their sons up to the age of 21, then--as Lord Denning M.R. has already indicated--they assert a state of affairs that simply does not obtain today.

> In truth any powers exercised by way of physical control in the later years of infancy were not the father's personal power but the more extensive ones of the Crown (compare Lindley L.J. in *Thomasset* v. *Thomasset*) and hence the father's right was really no more than that of applying to the courts for the aid he required as guardian. . . .
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> In its wider meaning the word "custody" is used as if it were almost the equivalent of "guardianship" in its fullest sense, whether the guardianship is by nature, by nurture, by testament or disposition or by order of a court. (I used the words "fullest sense" because guardianship may be limited to give control over the person or only over the administration of the assets of the infant.) Adapting the convenient phraseology of counsel, such guardianship embraces a "bundle of rights" or to be more exact, a "bundle of powers" which continue until a male infant attains 21 or a female if it marries. These include power to control education, the choice of religion, and the administration of the infant's property. They include entitlement to veto the issue of a passport and to withhold consent to marriage. They include, also both the personal power physically to control the infant until the years of discretion and the right (originally only if some property was concerned) to apply to the courts to exercise the powers of the Crown as *parens patriae*. It is thus clear somewhat confusingly one of the powers conferred by custody in its wide meaning is custody in its limited meaning, i.e., such personal power of physical control as a parent or guardian may have. . . .
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> The trouble is that whilst the legislature distinguished between guardianship and custody, the court tends often to use the latter word as if it were substantially the equivalent of the former thus leading to some confusion of thought. This confusion is abetted by the language of the *Matrimonial Causes Act*. . . . Whatever may have been the intention of the legislature when first using that word when in Section 35 of the *Matrimonial Causes Act*, 1857, it referred to 'custody,

> maintenance and education'. The courts have come to give more than one meaning to it in orders. An unqualified order giving custody to a parent appears nowadays to have been interpreted as having the wide meaning but if at the same time 'care and control' is given to the other parent, then one of the powers, custody in the limited meaning of physical control, is taken out of 'custody' in the wide meaning. It would be a happier situation if by future legislation courts were enabled to use the word "guardianship" in orders in appropriate cases. . . . I have concluded that the parent referred to . . . must be someone who factually has and is effectively exercising those personal powers which a father (or other guardian) has over an infant under the age of 14.

Karminski L.J. concluded in the same case that custody is not a state which continued until a child attains 21, but can come to an end long before the infant attains his or her majority, or upon a parent ceasing to exercise control.

The dictum of Lord Denning in that case was approved in *Todd* v. *Dawson* [1971] 1 All E.R. 994 in the House of Lords. In the case of *Mills* v. *I.R.C.* [1972] 3 All E.R. 977 Lord Denning referred to the age of discretion which under the common law was 14 for boys (the age at which guardianship for nurture ceased) and 16 for girls (as a result of the *Statute of Philip and Mary* ) as the age below which a child has no contractual capacity and above which a child has limited contractual capacity. The court concluded in that case that because

the young actress was below the age of discretion the contract entered into on her behalf by her father, her natural guardian, was not binding on her thus adhering to the principle that a parent or guardian has no control over his child's property.

The age of discretion was also referred to in the *Matter of Eva Coram*[19] in which the court held that the father had an absolute right to the custody of his daughter until she reaches age 16 unless there are surrounding circumstances which deprive him of that right. The child in question did not wish to return to her father and thus the court was concerned with the extent to which the father could control his daughter. While admitting that a Court of Chancery might have decided otherwise, the court did grant the father a writ of *habeas corpus*.

In a subsequent case the British Columbia court held that once the daughter had attained the age of 16 she was capable of consenting or not consenting to the place where she is to reside and then refused the parent's application of *habeas corpus*.

The Report on the Age of Majority and Related Matters prepared by the Ontario Law Reform Commission prepared in 1969 concluded that a child under the age of discretion can be compelled to live with its parents by *habeas corpus* would be of no avail since that writ is necessarily directed to a third party. At that

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[19](1886), 25 N.D.R. 404.

point, the provisions of our *Child Welfare Act* making it mandatory for the parent to provide proper parental control might require the parent to use physical force to compel the child to return to him or failing that the Director of Child Welfare in the province may be obliged to apprehend the child.

If however the child is over the age of discretion the parent could not at common law compel the child to live with him by *habeas corpus* proceedings. Should he then be obliged or entitled to exercise control over his child between the age of discretion and the age of majority?

The Ontario Report concluded that the provisions of the *Child Welfare Act* should be extended to define a child as a boy or girl under the age of eighteen as it was then and still is sixteen in Ontario.

Since this is already the situation in Alberta we might assume that the age of majority and the age at which parental control expires are synonymous. We have, apparently excluded the common law age of discretion. It is questionable whether this is a wise accomplishment. Should there not be some provision for terminating the parental authority on application by the child or in given circumstances when the emancipation of the child might be in the child's best interests?

A child can leave school and obtain employment at 16. It is suggested that in these circumstances the child should be permitted to emancipate himself from parental control. It is suggested that this emancipation could be accomplished by an application to terminate the guardianship.

In Israel, "The Individual and the Family Bill" introduced in 1955 provides in section 4:

> The court may declare a minor who has reached the age of fourteen to be an adult if it appears justified by the minor's best interest and by the other circumstances of the case.

This section has been criticized[20] because the age is too low and because it does not limit the transactions for which this declaration of capacity shall be given.

The New Zealand *Guardianship Act* provides[21] that a child over 18 who is affected by a refusal of consent by a parent or guardian in an important matter may apply to a magistrate who may review the decision and make such order as he thinks fit. The age of majority in New Zealand is 21. (This section cannot be used to obtain consent to infant's marriage.) This section has also been criticized both by Inglis[22] and Lunford and Webb[23] as to the lack of definition of the types of decision to be reviewed by the courts. Lunford and Webb conclude that the word "importance" is likely to be strictly construed and that a sharp line of demarcation will be drawn between something which is inconsequential or

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[20] Studies in Israel Private Law, Guado Tedeschi, Institute for Legislative Research and Comparative Law, 1966.

[21] 1968, section 14.

[22] p. 490.

[23] *Domestic Proceedings*, 2nd ed. 1970, p. 227.

or frivolous and something which materially affects the child's social and economic welfare.

In France, where the age of majority is also 21, a child who has reached the age of 18 may be emancipated if his parents make a joint declaration before a guardianship judge who may pronounce the emancipation of that minor if there are good reasons for doing so.[24]

It is suggested that even though provision in legislation to enable emancipation might be conservatively interpreted or strictly applied it could well provide a remedy for those cases in which the relationship between parent and child had broken down to the point that to continue the guardianship would mean serious hardship for the child. Such a provision could recognize the common law age of discretion as being the minimum age which a child must attain before the court would accept any application to terminate parental control and it is suggested that for the sake of complying with the Bill of Rights, that age should be 16 for both boys and girls. Legislation in this area could clearly provide that at the age of 16 the child is deemed to have capacity for certain purposes. Such a provision is clearly required now with regard to a child's capacity to consent to medical treatment. similar to the English *Family Law Reform Act*[25] which provides that the consent of a minor who has reached 16 to any

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[24]Parental Rights and Duties: United Nations, 1968 - Civil Code of France Arts, 476 and 477.

[25]1969, section 8.

"surgical, medical or dental treatment" which requires consent "shall be as effective as . . . if he were of full age."

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