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GUARDIANSHIP

I
INTRODUCTION

The history of the law of guardianship as it pertains to children, reveals a struggle to maintain a balance between the autonomy of the natural parents and the authority of the Crown as *parens patriae* to interfere with those rights.

Under Roman law, the head of the family as *patria potestus* had full authority over his children, including the power to put them to death, to sell them into slavery, or to marry them off. A similar concept was recognized under the Germanic law, whereunder a child was under the *munt* of the father which entailed the power of life and death.[1] In England in the 7th century even the church was compelled to allow that in a case of necessity an English father might sell into slavery a son who was not yet seven years old.[2]

The parental authority over children is derived from or is in consideration for their duty; this authority being given them partly to enable the parent more effectually to perform his duty and partly as a recognition for his care and trouble in the faithful discharge of it.[3]

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[1]Spiro, *Law of Parent and Child*, 2 (3rd ed. 1971).

[2]Pollock and Maitland, *History of English Law*, Vol. II, 2nd ed., p. 436.

[3]Sir William Blackstone, *Commentaries on the laws of England*, Bk. I, pp. 459-466.

Gradually the concept of the parental authority has been softened. Blackstone in his commentaries tells us of a father being banished by the Emperor Hadrian for killing his son upon the maxim that "*patria potestas in pietate debet, non in atrocitate, consistere.*"[4]

The parental authority concept in England is referred to as the natural guardianship of children. Pollock and Maitland point to the fact that no part of our old law was more disjointed and incomplete than that which dealt with the guardianship of infants.[5] Under the old law there were ten different forms of guardianship[6]

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[4] "Parental authority should consist in kindness, not in cruelty."

[5] Pollock and Maitland, *supra*, fn. 2, p. 443.

[6] The ten forms of guardianship that emerged from the Middle Ages:

(1) Guardian in chivalry existed only when the infant inherited lands held by knight's service. The guardian had the custody of the person and lands of the infant until his full age of twenty-one. This tenure was abolished by the statute 12 Can. II, c. 24.

(2) Guardianship in socage arose when the infant inherited lands held to socage. It continued only until the infant attained the age of fourteen. The guardian in socage must be the next of kin to whom the lands of the infant cannot by any possibility descend.

(3) Guardianship by nature, intended only over the person of the heir apparent of the

[Continued on next page.]

most of which were concerned with various forms of feudal guardianship and most of which were abolished by statute in 1660.[7] The same statute extended to the father of a child under the age of twenty-one years absolute authority to appoint a testamentary guardian

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[Continued from page 2.]

father. This form of guardianship continued until the infant attained the full age of twenty-one. This guardianship did not extend to younger children. This guardian had no right to the custody of the infant's estate.

(4) Guardianship for nurture extended only to the custody of the person of those infants who were not heirs apparent and continued only until they attained the age of fourteen years.

(5) Guardianship by special custom as of orphans by the custom of the City of London and of other cities and buroughs.

(6) Guardianship by election of the infant himself where he finds himself without a guardian.

(7) Guardianship by prerogative which applies only to the royal family.

(8) Next friend and guardian *ad litem*.

(9) Testamentary or statutory guardians.

(10) Chancery guardians.

Clarke, *Social Lgislation*, 262 (2nd ed.). *Mauro* v.*Ritchie* 16 Fed. Cas., p. 1171, Case No. 9, 312.

[7] 12 Cas. 2, c. 24, ss. 8, 9 and 10.

upon his death. It is from this time that the concept of natural guardianship began to more clearly emerge.

Corpus juris in discussing "guardianship" equates natural guardianship with a combination of guardianship by nature, which is the guardianship of the eldest son as heir to the father, and guardianship for nurture which is the guardianship of infant children up to the age of fourteen, and American case law generally assimilates these two forms of guardianship.[8] However, Halsbury makes a distinction between these forms of guardianship and refers to a distinct natural guardianship which arises by parental right. Hargraves note to Coke[9] in which he traces the history of guardianship recognizes as well a distinct and separate form of natural guardianship exercised by the father and after his death, the mother of the person of an infant child up to the age of twenty-one.[10]

> Further, some modern books do not confine guardianship by nature to heirs apparent, but denominate the father and mother the natural guardians of all their children; and sometimes even the parents of illegitimate issue seem to have been treated as their natural guardians. . . . This various and indefinite manner of expression concerning guardianship by nature must create the most distressing confusion in the

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[8] *Mauro* v. *Ritchie*, *supra* fn. 6.

[9] Co. Litt b, Hargraves note 66.

[10] *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles* (1883) 24 Ch. D. 317.

> minds of students. . . . According to the strict language of our law, only an heir apparent can be the subject of guardianship by nature. . . . Therefore when *guardianship by nature* is extended to children *in general*, or to any besides such as are heirs apparent, it is not conformable to the legal sense of the term amongst us, but must be understood to have reference to some rule independent of the common law. Thus when in chancery the father and mother are styled the *natural* guardians of *all* their children born in marriage, or any of their illegitimate issue, we should suppose those who express themselves so generally, to refer to that sort of guardianship, which the order and course of nature, as far as we are able to collect it by the light of reason, seem to point out, and to mean, that it is a good rule to regulate the guardianship by, where positive law is silent, and it is in the discretion of the Lord Chancellor to settle the guardianship. So too when Lord Coke says, that the custody of a female child under sixteen, to which the father, and after his death the mother, is entitled by the provisions of the Statute of the 4. & 5. Philip and Mary, is *jure naturae*, we should understand him to mean, not that such a custody was a guardianship by nature recognized by our common law, but merely that it was a statutory guardianship adopted by the legislature in conformity to the dictates of nature, and upon principles of general reasoning. . . . The direct object of the 4. & 5. Ph. & M. was to prevent the taking away of marrying maidens under sixteen against the consent of their parents. But the statute prohibited it in terms which implied, that the custody and education of such females should belong

> to the father and mother, or the person appointed by the former.[11]

The present law generally recognizes parental authority over children in the form of natural guardianship. The parent of a child is vested with this guardianship during the infancy of the child and guardianship is only divested and transferred to some other person when the parent dies, and a testamentary guardian is appointed in his stead, or in the case a court order declaring the infant to be in need of the protection of the court in the exercise of its powers as *parens patriae*, or more recently, in the form of the order of adoption or when the infant attains his majority when guardianship terminates.

The study prepared by the Family Law Project of the Ontario Law Reform Commission suggests that in modern English law guardianship is little more than a historical remnant and has been displaced by custody. This would seem to be true in England where courts, in wrestling with the division of parental authority in custody disputes, have granted custody to one parent and the actual care and control of the infant to the other. The English statute however recognizes that quite apart from the custody of minors there exists a

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[11] Co. Litt, with notes of Hargrave and Bulter London, 1817, Note 66.

[12] *Re W (J.C.)* 3 All E.R. 459.

broader parental guardianship which survives the death of one parent and which may be transferred upon the death of a parent to a third person.[13] In attempting to divide custody of an infant between the parents, it is submitted that the court is overlooking the fact that notwithstanding an order for custody both parents still retain natural parental guardianship of the infant, and that this guardianship enables the parent who is deprived of custody to retain some degree of control over the infant by:

(1) applying to vary the terms of the custody order,[14]

(2) by exercising rights of access,

(3) by retaining the right to be advised of adoption proceedings,[15]

(4) by retaining the right to be kept advised of any neglect proceedings,[16] and

(5) by being obliged to provide maintenance for the support of the child.

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[13] *Guardianship of Minors Act*, 1971, c. 3, s. 3.

[14] *Divorce Act*, S.C. 1967-68, c. 24, s. 11(21). *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 46(3). *Family Court Act*, R.S.A. 1970, c. 133, s. 10(71).

[15] *Child Welfare Act*, R.S.A. 1970, c. 45, s. 54.

[16] *Supra*, fn. 14, also s. 19.

These controls in the form of rights and obligations are dependent upon some vested parental authority which is not affected by an order of custody and is founded upon the natural parental guardianship of the infant.

A biological parent of a child remains the biological parent regardless of any court order. However he may cease to be a "legal" parent of the child only when divested of his natural guardianship.

The concept of guardianship of infants has been described as feudal and archaic and there is no doubt that it does have its origins in feudal times.

However, the modern concept of natural guardianship rests on two premises: firstly, that our society is concerned to preserve the family unit; and secondly, that a child is a legally incapacitated person because he is dependent upon a parental authority to attend to his custody , maintenance, education and protection. If we are to preserve the concept of family life as we now know it, this parental authority must vest in the biological or substitutional parent in preference to the state.

The term "natural guardian" may be feudal and archaic, but nevertheless it well describes the parental authority and it does have historical importance.

There is a growing movement in support of children's rights which may parallel the women's lib. movement. It is suggested that a reapplication of the theory of natural guardianship does not conflict with the theory

of children's rights but is supportive of it. Although simple logic dictates that children are by nature dependent upon their parents, nevertheless the law can and should provide that the parental responsibility and authority, which for the sake of clarity is referred to as "guardianship", is not an inalienable right. Even apart from neglect proceedings, and apart from custody proceedings, an inquiry should be possible whenever the best interest of the child requires, to determine whether the guardianship should be controlled, extended, transferred or terminated.

It is submitted that a reorientation of legal theory towards the concept of natural guardianship would serve to clarify custody disputes. In addition it might provide the means of extending parental powers to the putative father of the illegitimate child and of enabling step-parents and foster parents to assume parental authority over an infant child without disturbing the natural relationship which exists between the child and its biological parent.

RECOMMENDATION #1

> *IT IS RECOMMENDED THAT THE CONCEPT OF NATURAL GUARDIANSHIP SHOULD BE STRENGTHENED AND EXTENDED.*

This step has been accomplished in New Zealand where the legislators have striven to distinguish

between the concepts of "guardianship" and "custody".[17] Inglis in his text on Family Law in New Zealand states:

> Guardianship was usually thought to be concerned with matters affecting an infant's property; but at the same time it seems to have been widely assumed (probably wrongly) that a custody order conferred on the custodian the right to determine such matters as the child's education and religious upbringing--matters which are, historically, within the province of guardianship. The resulting difficulty in defining the precise ambit of a custody order was made even more severe by the growing tendency in England to make orders relating to the "care and control" of a child as distinct from a custody order, and it might therefore have been assumed that a custody order conferred rights rather more substantial than the right to look after the child and deal with his needs on a day-to-day basis.[18]

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[17] *Guardianship Act*, S.N.Z. 1968, No. 63, s. 3:

> "Custody" means the right to possession and care of a child: "Guardianship" means the custody of a child (except in the case of a testamentary guardian and subject to any custody order made by the court) and the right of control over the upbringing of a child and includes all rights, powers, and duties in respect of the person and upbringing of a child that were at the commencement of this Act vested by any enactment or rule of law in the sole guardian of a child; and "guardian" has a corresponding meaning.

[18] Inglis, *Family Law*, vol. 2, 2nd ed., p. 479.

There has been a growing trend in courts everywhere to recognize and emphasize the paramountcy of the welfare of the infant in cases involving the care and control of the infant and there is an assumption that this theory undermines the natural parental authority. But as Rand, J. has stated in *Hepton* v. *Maat*[19] the welfare of the child can never be determined as an isolated fact, that is as if the child were free from natural parental bonds entailing moral responsibility. It is quite clear that in custody disputes between natural parents the welfare of the child is the only concern of the court and that all other matters are relevant only in so far as they affect the welfare of the child. But in cases involving some infringement of the parents natural rights by some third party, the court is invariably concerned with the extent to which it can interfere with the natural parental guardianship and this concern is often a major issue before the court. Although the court may not go so far as to declare the parent unfit before interfering with these rights,[20] the court nevertheless satisfies itself that there is some grave and important reason for so doing. In two Supreme Court of Canada decisions[21] the court held that custody may be awarded to persons other than the parents of the child if its happiness and welfare

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[19] 1957, S.C.R. 606.

[20] *McGee* v. *Waldern and Cunningham*, 5 R.F.L.

[21] *Price* v. *Cargin and Cargin* (1956) 4 D.L.R., p. 652 (upheld on appeal); *Tallin and Donaldson* v. *Donaldson* [1953] 2 S.C.A. 257.

would be ensured by so doing to a greater degree than by awarding custody to one or other of its parents. It was held that all other considerations must yield to that which is paramount in determining the custody of an infant.

However in both those cases the court had first determined that the parents' conduct had been such as to demonstrate a lack of *bona fide* on the part of the parents of the infant, and in one case the court had declared the parents to be unfit.

It is submitted that in any contest between a natural guardian and a stranger, before the test of the paramountcy of the welfare of the child arises, the court must first make a determination as to whether cause exists to justify the court, as supreme guardian, to interfere with the rights of the natural guardian.

RECOMMENDATION #2

> *IT IS RECOMMENDED THAT FOR THE SAKE OF GREATER CLARITY IN THE LAW THIS DETERMINATION BY THE COURT AS TO WHETHER CAUSE EXISTS TO WARRANT THE COURT'S INTERFERENCE WITH THE NATURAL PARENTAL GUARDIANSHIP SHOULD BE THE SUBJECT OF A SEPARATE AND DISTINCT APPLICATION TO THE COURT IN THE FORM OF A GUARDIANSHIP APPLICATION.*

This application would be one wherein the court would determine whether these grounds do exist to warrant a third party being named as guardian of the infant with rights and obligations equal to those of the natural

guardians and whether the rights of the natural guardian should be suspended temporarily, or whether the new guardians and the natural guardians are to exercise their authority jointly over the infant in the same way as do natural guardians who are separated or divorced.

This form of application would be distinct from neglect proceedings, which are undertaken by the Director of Child Welfare, which have a certain stigma attached to them, and would enable persons who stand in *loco parentis* to a child to obtain legal parental authority over the child in situations when adoption proceedings may not be warranted.

Once the court had satisfied itself that circumstances do justify the appointment of a new guardian the court could turn its attention to the question of custody wherein the paramount and only concern would be the welfare of the child. Since the rights of all guardians would be equal with one another, the court at that point need not be concerned with the rights of the natural parents.

A guardianship application may be preferrable in situations in which a step-parent wishes to gain legal rights to a child equal with its natural guardians or in situations in which relatives have *de facto* custody of a child but no legal rights over the child.

"The Report of the Departmental Committee for the Adoption of Children" in England which was presented

to Parliament in October 1972 recommends that the law of guardianship should be extended for this purpose and stresses that in many situations guardianship would, in the best interests of the child, be preferrable to adoption.

The advantages to guardianship proceedings are that:

1. A guardian would be in a similar position to a parent having custody of his child. He would be able to make all decisions about the child's upbringing except that he alone would not be able to consent to adoption.

2. A guardianship order would not be irrevocable and would not permanently extinguish parental rights.

3. It would not alter the child's relationship to the members of his natural family or extinguish his rights to inherit from them.

4. The natural parent would still be entitled to full parental rights over the child except as altered by court order and his obligations toward the child would remain the same.

Guardianship proceedings might also include applications by fathers of illegitimate children to be named

as natural guardians which would have the effect of legitimizing the child for all purposes and which would extend to the father full rights and duties towards the child.

In New Zealand the court may declare a father to be the natural guardian of a child if he has been married to the mother of the child or if he and the mother of the child were living together at the time the child was born.[22] *The Status of Children Act* of New Zealand[23] provides for procedure for recognition of paternity. That *Act* which is designed to remove the legal disabilities of children born out of wedlock, provides certain criteria for establishing the relationship between a child and its father. Those criteria are established if:

(1) the father and mother of the child were married at the time of its conception or at some subsequent time,

(2) if a birth certificate has been entered in the Register of Births naming the father of the child,

(3) if the mother has signed a written acknowledgement naming the father of the child,

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[22] *Guardianship Act*, 1968, S.N.Z., No. 63, s. 6. *Guardianship Amendment Act*, 1969, S.N.Z., No. 80, s. 2.

[23] *Status of Children Act*, 1969, S.N.Z., No. 18.

(4) if a paternity order has been granted naming the father of the child,

(5) if a court order has been granted declaring the person to be the father of the child.

It is suggested that the concept of guardianship may be taken one step further and that upon a presumption of paternity arising the father shall become the natural guardian of the infant with full rights and obligations towards the infant for all purposes, and that the infant whether legitimate or illegitimate would have equal status with all other children of the natural guardians.

One of the immediate effects would be to curtail paternity suits because such actions would involve not only the creation of obligations but creation of rights as well. It is suggested that this would be in line with other current thinking regarding the rights of the putative father.[24]

Another extension of the theory of guardianship might enable a child or his parents to make application to the court for a termination of the parental authority or for directions from the court to settle disputes between parent and child. Such an application may be of the

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[24] D. A. Cruikshank, *Forgotten Fathers: The Rights of the Putative Father in Canada*, 7 R.F.L., p. 1.

same nature as judicial separation proceedings. These applications would be warranted in situations in which the parent is attempting to exert control over the child to the detriment of his best interests. In conjunction with such an application the court should be empowered to suspend the *Age of Majority Act* and order that upon any termination of guardionship, in which no new guardian is appointed, the child shall thereupon attain his majority.

II
RIGHTS AND DUTIES OF GUARDIANSHIP

The right and duties of the parental authority are subordinate always to the protective guardianship of the Crown as *parens patriae*.

The authority of the Crown as the ultimate guardian of infants within its jurisdiction was originally exercised by the Chancellor, later by the courts of Chancery, and in Alberta is now specifically reserved to the Supreme Court of Alberta by section 16 of the *Judicature Act*.[25] If the natural guardian fails to perform any of his duties to his infant child the court in the exercise of its inherent jurisdiction may suspend or terminate natural guardianship.

The rights and duties arising under natural guardianship are so interwoven that what may in one instance be a right may in another context become a duty.

Duties

Blackstone discusses three basic duties of parents which were originally moral duties and have only recently become legal duties.

(1) The first duty of parents is to maintain the infant:

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[25] R.S.A. 1970, c. 193.

> The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world. . . . By begetting them, therefore they have entered into a voluntary obligation to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right of receiving maintenance from their parents.[26]

This moral obligation became a legal obligation by virtue of the old *Poor Laws of England*[27] which provided that a father and after his death, the mother of an infant must maintain that infant up to the age of sixteen.

The jurisdiction of the Supreme Court to control and enforce that duty is evident in matrimonial proceedings in which the court may order the parent to provide maintenance for an infant child as was explained by Lindley, L.J. in *Thomasset* v. *Thomasset*.[28]

In cases in which the parent is construed to have allowed his infant to be brought up by another person at the expense of that other person, or where he has failed in his duty to maintain his child, the court in the

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[26]Sir William Blackstone, *Commentaries on the Laws of England*, *supra*.

[27]Stat. 43, Eliz., c. 2

[28][1891-4] All E.R. Rep. 308.

exercise of its power may refuse to allow such parent the right to exercise his parental authority.[29]

(2) The second duty of parents is to protect his infant child. If the parent fails in his duty to protect the court will exercise its jurisdiction by making the child a ward of the court and thereby place the child under the protection of the court. In Alberta this jurisdiction is exercised by the Juvenile Court in temporary wardship proceedings and by the District Court in permanent wardship proceedings.

(3) The third duty to which Blackstone referred is the duty to educate, which was wholly a moral duty. In the exercise of its jurisdiction as *parens patriae* the courts are able to order a father in divorce proceedings to contribute to the education of his children, even beyond the usual statutory requirements.[30] It would appear that this jurisdiction only arises in divorce proceedings either because the divorce legislation creates a new obligation upon the parents as Johnson, J.A. held in *Crump* v. *Crump*[31] or because in divorce the court is exercising its inherent equitable jurisdiction as *parens patriae*, which enables it to control the exercise of the natural parental authority and in so doing is not fettered by statute law respecting custody, maintenance or education of infants.

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[29] *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 49.

[30] *School Act*, R.S.A. 1970, c. 329, s. 171.

[31] [1971] 1 W.W.R. p. 449.

The Rights

The rights of guardianship are chiefly those of custody, and the right to direct the religious training and education of the child. Since the custody of the child also involves the maintenance and protection of the child, and since the right to direct the education of the child also involves the obligation to educate, it is evident that the rights and duties of guardianship are interdependent.

The rights of guardianship are also subordinate to the ultimate guardianship of the Crown. The Crown has the right to interfere with the parents right to custody if the welfare of the child demands it. Lord Thurlow in 1790 stated that the court had arms long enough to reach out and prevent a parent from prejudicing the health or future prospects of the child and that it would not allow a child to be sacrificed to the views of the father.[32]

However, as broad and flexible as this power may appear, the courts were reluctant to interfere with the parent's natural rights of guardianship. In *DeMannevi11e* v. *DeMannevi11e*,[33] the court while expressing the principle that it would do what was for the benefit of the child, nevertheless permitted the father of an infant of very tender years to remove it from the custody of its mother,

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[32]*Creuze* v. *Sunster*, 2 Con. 242.

[33](1804) 10 Ves. 52.

because the father as guardian was entitled to its custody unless very grave reasons dictated against it. This parental right has been referred to as a second right.[34]

Re Agar-Ellis[35] is generally recognized as a leading decision on the rights of the natural guardian (although Lord Upjohn has recently described it as a dreadful decision).[36] James L.J. stated in *Re Agar-Ellis:*

> The right of the father to the custody and control of his children is one of the most sacred rights. No doubt the law may take it away from him or may interfere with his liberty, but it must be for some sufficient cause known to the law. He must have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to have unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the court has never yet interfered with the father's legal rights.[37]

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[34] *Re Plomley; Vidler* v. *Collyer* (1882) 4 L.J. 284.

[35] (1878) 10 Ch. D., p. 44.

[36] *J. and another* v. *C. and others* [1969] 1 All E.R. 788.

[37] *Re Agar-Ellis, supra* fn. 35, p. 71-72.

The effect of the decision in *Re Agar-Ellis* was considerably softened by the case of *R.* v. *Gyngall*[38] wherein Lord Esher held that the jurisdiction of the court to interfere with the parental rights is not confined to cases where there has been misconduct on the part of the parent, but extends as well to those cases in which it is clearly right for the welfare of the child in some very serious and important respects that the parent's rights should be suspended or superseded. However, just as Rand J. in *Hepton* v. *Maat* held that the welfare of children in these cases can never be treated as an isolated fact so too Lord Esher stated in the *Gyngall case*

> *Prima facie* it would not be for the welfare of the child to be taken away from its natural parents and given over to other people who have not that natural relationship to it.

Recent case law favours the approach of the court in the *Gyngall* case and the courts, in considering the paramountcy of the welfare of the child, are less reluctant to deprive the parent of his rights. It would not appear, however, that any court has gone so far as to ignore the fundamental parental rights entirely. On the contrary, case law reveals a struggle to maintain the balance between the autonomy of the natural guardian and the authority of the court as *parens patriae* both of whom are ultimately presumed to be concerned with the welfare of the child.

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[38] 1893 Q.B., p. 232.

The struggle is not difficult when parents have obviously failed in their obligation towards the infant which failure usually results in neglect proceedings. But the struggle is far more difficult when there has been no obvious failure on the part of the parents, but the court is nevertheless asked to consider an infringement of the parental rights and seeks to justify such infringement by the test that the welfare of the child demands it. It would seem that even in those cases in which there has been no failure to maintain or to protect or to educate the infant the courts will nevertheless endeavour to establish that some event has occurred either in the life of the child or the parent which prompts the court to question the parental rights to custody.

III

HISTORY OF GUARDIANSHIP LEGISLATION IN ENGLAND

Historically the father of the infant was its only natural guardian and only upon his death did the mother's right to guardianship arise. The right of the mother to the custody of her daughter after the father's death received statutory recognition by an Act of 1557 entitled "An Act for Punishment of Such as Shall take away Maidens that be Inheritors being within the age of 16 Years of that Marry them without the Consent of their parents."[39] Her powers were undermined however by the abolition of *Tenures Act* of 1660[40] which enabled the father to appoint a testamentary guardian of his infant children up to the age of 21, after his death, to the exclusion of the mother. After the passing of that *Act* the mother was on an unequal footing with the father with regard to the custody of their children which inequality was illustrated in the *DeMannevi11e* case.[41] Lord Eldon held in that case that the court had no jurisdiction to give custody of the child to the mother, she having withdrawn from the husband.

At common law the court could not interfere with the rights of the father unless there had been ill-treatment of the child by the father.[42]

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[39] 4 and 5 Philip and Mary, c. 8, s. 4, (1557).

[40] 12 Car. II, c. 24, s. 8.

[41] *supra*, fn. 33.

[42] *Ex parte Skinner*, 9 Moore 289 (1824).

However the equitable principle was established in *Eyre* v. *Staftsbury*[43] that the care of all infants is lodged in King as *pater patriae*, and by the King this care is delegated to his Court of Chancery. The King is bound, of common rights, and by the laws to defend his subjects. Every loyal subject is taken to be within the King's protection for which reason it is, idiots and lunatics, who are incapable to take care of themselves are provided for by the King as *pater patriae* and there is the same reason to extend this care to infants.

Although Chancery in the exercise of this power would interfere with the father's common law right to custody in any action brought by the father on a writ of *habeas corpus* to obtain custody, the courts were nevertheless reluctant to deprive a father of his common law right without sufficient cause.[44]

Efforts were made in the early 19th century to equalize the rights of fathers and mothers to the custody of their children and in 1839 Parliament passed an *Act* extending to the mother the right of access to and the protection of her children under the age of seven.[45]

In 1873 this right was further extended by an *Act* entitled the *Custody of Infants Act*.[46] That statute

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[43] *Eyre* v. *Staftsbury*, 2 P. Wms. 103.

[44] *Ball* v. *Ball*, 2 Sim. 35.

[45] 36 and 37 Vict., c. 12.

[46] *Ibid.*

removed the impediment which had previously prevented a father from yielding up custody of an infant to its mother by way of a separation deed. The mother was not given any status under that *Act* but was only given the right to enforce a custody agreement against the father. Prior to this *Act* the presumption that the natural guardianship of the infant vested in the father was so strong that any agreement on his part to give up custody to the mother was recognized as being against public policy unless he had been proven to be unfit for guardianship.[47]

In 1886 the *Guardianship of Infants Act*[48] extended further rights to the mother by enabling her to make application for custody. Section 6 of the *Act* enabled the court to remove any testamentary guardian or guardian appointed under that *Act* where it was deemed to be for the welfare of the infant. But there was no provision for removing the guardianship from the father.

The *Custody of Children Act of 1891*[49] provides that the court may refuse an application of *habeas corpus* to a parent who has abandoned or deserted his child or allowed the child to be brought up at another person's expense to the extent that he was unmindful of his parental duties. Although the effect of that *Act*

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[47] *Swift* v. *Swift* (1865) 34 Beav. 266.

[48] 49 and 50 Vict., c. 27.

[49] 54 and 55 Vict., c. 3.

is to give the court almost unlimited discretion in refusing an order for custody it does not enable the court to deprive the parent of guardianship of the infant. The *Act* recognizes that a parent retains some legal rights in respect to a child even though deprived of custody because section 6 of the *Act* provides that the court may order that the child be brought up in the religion in which the parent has a "legal right" to require that the child should be brought up.

The *Guardianship of Infants Act of 1925*[50] establishes that the right of the mother with regard to questions of guardianship should be equal to that of the father and that the welfare of the infant should be the paramount consideration. (This *Act* does not contain a provision specifically acknowledging the mother as a guardian of her infant children but does extend to her the like powers as are possessed by the father which can be presumed to have the same effect as section 39 of our *Domestic Relations Act*, R.S.A. 1970, c. 113.)

The *Administration of Justice Act of 1928*[51] extends to the father the same right to apply for custody as was previously extended to the mother.

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[50] 15 and 16 Geo. 5, c. 45.

[51] 18 and 19 Geo. 5, c. 26.

The Guardianship of Minors Act of 1971[52] consolidates enactments relating to guardianship and custody of minors principally the *Guardianship of Infants Act of 1886* and *1925* and the *Guardianship and Maintenance of Infants Act of 1951*.

The 1971 *Act* provides that in any proceeding involving the custody or upbringing of a minor or the administration of any property belonging to a minor, the court shall regard the welfare of the minor as the first and paramount consideration and shall not regard the right of the father as being superior from any point of view to that of the mother.

The *Act* enables both father and mother of a minor to appoint testamentary guardians and enables the court to appoint a guardian for a minor who has no parent or guardian of the person.

The court may also remove any guardian appointed or acting by virtue of the *Act* and appoint another guardian in place of the guardian so removed.

Section 9 provides that either the father or mother of the minor may apply for an order of custody or access and it would appear that this section is limited to either the mother or father and does not extend to third parties. The *Act* also provides for orders for maintenance of minors (which in England is a child under

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[52] *Guardianship of Minors Act, 1971*, c. 3.

the age of 18) and in addition provides for orders of maintenance of persons between the ages of 18 and 21.

Section 14 of the *Act* provides that the *Act* shall apply to minors who are illegitimate with regard to custody applications only but does not extend the *Act* to illegitimate children with regard to applications for maintenance. The father of the illegitimate child is not construed to be guardian of the child by virtue of this *Act*. Prior to this *Act* the father's right to apply for custody was found in the *Legitimacy Act* of 1959, s. 3, although until this latter *Act* had been passed the father of the illegitimate child had no rights to apply for custody.

The *Guardianship of Minors Act of 1971* makes no change with regard to the procedure for application for maintenance of an illegitimate child which proceedings are still to be found under the *Affiliation of Proceedings Act 1957*.

The *Act* interprets the word "maintenance" to include education.

The procedure in England whereby a third party may obtain custody of an infant is to have a local authority institute proceedings to assume parental right and thereafter to commit the child to the custody of that third party pursuant to the provisions of the *Children Act*, 1948, [53] and the *Children and Young Persons*

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[53] 11 and 12 Geo. 6, c. 43.

Act of 1963.[54] These proceedings are similar to our neglect proceedings under the *Child Welfare Act*[55] and it was this procedure which was followed in the leading decision of *J.* v. *C.*[56] That case held that in custody matters the first and paramount consideration was the welfare of the infant and that the *Guardianship of Infants Act* of 1925 was not limited in its application to disputes between parents. The court seemed to have overlooked the fact that the child had been committed to the care of the local authority some time before these custody proceedings were launched. It is apparent that a form of guardianship proceedings had preceded the custody proceeding which warranted the court in its conclusion that the first and paramount consideration in that situation between stranger and parent was the welfare of the infant, because the natural parental rights had previously been dealt with. Had the court approached the case from this point of view it is submitted that the court would not have had such difficulty in dealing the *prima facie* rights of a natural parent.

In view of the procedure which is followed in England in cases in which a step parent or foster parent wishes to obtain custody of an infant to whom he stands *in loco parentis* it may be questioned whether or not the same procedure could be followed in Alberta by utilizing the provisions of the *Child Welfare Act* and obtaining

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[54] *The Children and Young Persons Act 1963*, c. 37.

[55] R.S.A. 1970, c. 45.

[56] [1969] 1 All E.R. 788.

an order of committal to the Director of Child Welfare. However, in view of the difficulties in obtaining an order of committal because the *Child Welfare Act* requires evidence of a failure of parental responsibility, and because of the stigma which attaches to neglect proceedings it is recommended that an independent proceeding be provided for whereby the step parent or foster parent may obtain legal rights to the child without invoking any government agency.

IV
GUARDIANSHIP LEGISLATION IN ALBERTA

The guardianship of infants in Alberta is governed by the provisions of Part 7 of the *Domestic Relations Act*.[57] These provisions evolved from the *Infants Act*[58] which, in a provision similar to the *Custody of Infants Act of 1873*, enabled the mother to make application for the custody of her infant children. An amendment to that *Act* entitled an *Act to Amend an Act Respecting Infants and to Provide for Equal Parental Rights* of 1920[59] provided that the father and mother of an infant shall be joint guardians of such a child. The same *Act* also enabled the father to make application for custody.

These provisions were incorporated into the *Domestic Relations Act*[60] which *Act* also provided that both parents were guardians of their infants' estates. The present provisions of the *Domestic Relations Act* are substantially the same as those of the 1927 *Act* with the exception that parents are no longer deemed to be guardians of their infants' estates.

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[57] R.S.A. 1970, c. 113.

[58] S.A. 1913, 2nd session, c. 13.

[59] S.A. 1920, c. 10, s. 1b.

[60] R.S.A. 1927, c. 5, s. 61.

THE DOMESTIC RELATIONS ACT, Part 7

Jurisdiction in matters of guardianship is vested in the Supreme Court or in the Surrogate Court.

Section 38

Guardianship in socage, which was the feudal guardianship of lands inherited by infants, guardianship by nature, which was the guardianship of the eldest son for the purposes of heredity of title and guardianship for nurture of an infant up to the age of 14 are abolished in section 38 of the *Act*.

Section 39

Section 39 of the *Act* deems the father and mother of an infant to be joint guardians and the mother of an illegitimate infant to be the sole guardian of her illegitimate infant. This section goes further than the English section which provides that in questions relating to custody and upbringing of infants the mother's right shall be equal with the father. The Alberta statute also goes further than the English position in providing that the mother of the illegitimate child shall be the sole legal guardian of that child.

At common law in England the illegitimate child was *nullius filius* and this extended even to its relationship with his mother. Maule, J. in *Re Lloyd*[61] asked

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[61](1841) 3 Mon. & G. 547.

rhetorically whether the mother of an illegitimate child was anything but a stranger to it. This statement was criticized by Sir George Jessel M.R. in *R.* v. *Nash re Cary*[62] wherein he states that Maule J. must have intended the question as a joke. He states

> At any rate, if he did not mean to make a joke, he could only have been speaking of a strict legal right to the guardianship of an illegitimate child. But even at common law there were many cases in which the right of the mother to the custody of her illegitimate child was recognized . . . her rights are also recognized by the Poor Law which imposes on her the liability to maintain her illegitimate child. But now the courts are Courts of Equity, as well as of the law, and the question is not to be decided with reference only to the legal rights which were formally considered in granting writs of *habeas corpus* where equity does consider the natural relationship not only of of the mother of an illegitimate child but of the putative father and the relations on the mother's side.

This statement was approved in *Barnardo* v. *McHugh*[63] in which Lord Herschel states that regardless of the fact that the mother may not have been entitled as a legal guardian under common law the court in the exercise of its equitable jurisdiction will consider her rights as being superior to all others unless it would be detrimental to the interests of the child.

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[62](1883) 10 Q.B.D. 454.

[63][1891] A.C. 388.

It is apparent therefore that the Alberta statute has gone further than either the common law or the English statute law in specifically enacting that rights of guardianship be extended to the mother of both legitimate and illegitimate children.

The New Zealand legislation has gone even further in extending the rights of guardianship to the father of an illegitimate infant if he was living with the mother at the time of the birth of the child. The New Zealand *Act* contemplates the situation in which the father and mother have lived together in a normal, stable and permanent family unit up to and including the birth of the child. In situations in which the position of the father of the illegitimate child is doubtful, the father is entitled to apply for declaration as to his guardian ship.[64]

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[64] *Guardianship Amendment Act*, 1969, S. N-2, s. 6A.

V

THE GUARDIANSHIP OF THE ILLEGITIMATE CHILD

The introduction to this paper discussed the possibility of extending natural guardianship to the father of an illegitimate child in certain circumstances which would have the effect of legitimizing the child. Any such amendment would fall within the provisions of the present section 39 of the *Domestic Relations Act*.

Such an amendment would obviously involve a major policy decision.

Both the English common law and the continental law make a distinction between those children born into the family and those born outside it. Blackstone tells us that the influence of the church changed the illegitimate's lot for the worse and that the illegitimate was subject to harsher treatment under the continental law as a result.

> . . . it may well be that the divergence of English from continental law is due to no deeper cause than the subjection of England to kings who proudly traced their descent from a mighty bastard.[65]

English common law was therefore relatively liberal towards the illegitimate child and Pollock and Maitland state that there was a very strong presumption of legitimacy and a strong repugnance of any inquiries

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[65]Pollock & Maitland, *History of English Law* 397 (2nd ed.) reissued by J. Milsom 1968.

into the paternity of a child.

Blackstone was critical of any distinction between the legitimate and illegitimate child other than the disability to inhert, and it may safely be said that at the time of his writing there was little other distinction felt by the illegitimate child. As indicated previously, at the time Blackstone was writing the duties of the parent towards even his legitimate children were moral duties only, and thus even the legitimate child had few rights against his parents. It is only with the development of the substantive law that the divergence between the rights of the legitimate child and the illegitimate has occurred. The law with regard to the illegitimate child has simply not kept pace to the law relating to the legitimate. Progressive legislation has alleviated only some of the legal disadvantages of illegitimacy.[66]

The recent English legislation, while extending the right of the father of the illegitimate child to apply for custody, does not go so far as to extend to the father the guardianship of the infant illegitimate with all the rights and obligations attendant thereto. The procedure for application for maintenance is still distinct from the procedure involved for maintenance of legitimate children. Although the father of the illegitimate

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[66] *Illegitimacy, Law and Social Policy*, Harry D. Krause, 1971.

child may make application for custody under the provisions of the *Guardianship of Minors Act*, 1971,[67] the mother of the illegitimate child must still make application for maintenance against the putative father under the procedures set out in the *Affiliation Proceedings Act* of 1957.[68]

Under the English statute a person who, being the father of the illegitimate child and entitled to the child's custody by virtue of a custody order, shall be treated as if he were the lawful father of the child.[69] However if the father is unsuccessful in his application for custody, or, if having custody he later loses custody, he also loses his status as the lawful father of the infant. It would appear therefore that this *Act* would not have an effect upon the *Adoption Act* of 1958[70] in that his consent to an adoption is still not required, nor would he be entitled to notice of wardship proceedings. The possibility of the illegitimate child in those circumstances of attaining full status as a legitimate child is also seriously diminished.

The *Family Law Reform Act*, 1969, of England[71] provides that on intestacy the illegitimate child and

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[67] *Guardianship of Minors Act*, 1971, s. 20(2).

[68] *Affiliation Proceedings Act*, 1957, s. 6.

[69] *Supra*, s. 14(3).

[70] 7 & 8 Eliz. 2, c. 5.

[71] 1969, c. 46.

his parents are entitled to succeed to the estates of each other as if the child had been legitimate. This provision revokes the impediment in the law with respect to the illegitimate child which Blackstone described as being the only real distinction between legitimacy and illegitimacy. Having gone this far there would seem to be little reason for not extending the law even further by recognizing both parents as the natural guardians of their children whether legitimate or illegitimate for all purposes.

The first problem which such an extension of the law would present is that of the identification of the father of the illegitimate child which of itself occupies sufficient concern to be worthy of independent studies.[72]

A second problem is whether as a matter of policy the extension of full parental powers to the father of the illegitimate child might have the effect of undermining the institution of marriage, although the idea of preserving this sanctity of marriage by sacrificing the rights of the illegitimate child has received much criticism.

New Zealand legislation has attempted to abolish the status of illegitimacy although as Inglis states in his text book *Family Law*,[73] the *Status of Children Act*,

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[72]The Law Commission. *Blood Tests and the Proof of Paternity in Civil Proceedings*, 1968, England.

[73]*Supra*, fn. 18.

1969, will be judged in later years as to whether the equation of the legal position of illegitimate and legitimate children does tend to devalue marriage and the orthodox family structure as institutions.

The Soviets when building their ideal state sought to do away with such distinctions, but in 1944 they were forced to recognize by law certain differences between children whose parents were married by legal standards, that is, had registered their marriage, and those whose parents were not recognized by the state as legally married because of failure to register.

In a leading work on *Illegitimacy*, Henry Krause[74] discusses a survey which was conducted in Illinois to measure the popular willingness to accept basic change in the law of illegitimacy. The results of his survey indicated that the current law on illegitimacy is out of step with our times and provided the following statistics:

> Seventy-eight per cent of the persons surveyed would give the illegitimate equality in terms of support rights. Sixty-four per cent would give the illegitimate equality in terms of inheritance rights. Ninety-five per cent would provide support for the child beyond the father's death. When in the interest of the child, eighty-two per cent would grant the father visitation rights or custody, even over the mother's objection. Eighty-seven per cent would grant equality

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[74] *Supra*, fn. 66.

> under welfare statutes, such as Workmen Compensation Acts. Eighty-six per cent favour a substantial involvement of public authorities in terms of safeguarding a child's interest against the conflicting interest of its mother and father. Seventy-nine per cent favour welfare approach that would allow the illegitimate mother to rear her child in decent financial circumstances. Only twenty per cent believed that laws which discriminated against the illegitimate are a sector to discourage promiscuity and seventy-five per cent believed that promiscuity would be checked more effectively if a substantial responsibility would be placed on illegitimate fathers. Ninety-six per cent felt that the laws should not disadvantage a child by reason of its illegitimate birth and twenty per cent would punish illegitimate parents for the crime of "bastardy".[75]

A subcommittee of the Commission of Human Rights of the United Nations adopted a statement on "General Principles of Equality and Nondiscrimination in Respect of Persons born out of Wedlock" which demands that "every person, once his affiliation has been established, shall have the same legal status as a person borne in wedlock".[76] Many countries have already granted

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[75] *Supra*, Fn. 66, p. 174.

[76] Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, United Nations Economic and Social Council, Study of Discrimination Against Persons Born out of Wedlock; General Principles on Equality and Non-Discrimination in Respect of Persons Born out of Wedlock, U.N. Doc. E/CN 4 Sub 2/L 453 (Jan. 13, 1967).

substantially equal rights to the illegitimate. Both Norway and Denmark have legislation which substantially abolishes all remaining distinctions between legitimate and illegitimate children and further reforms are pending in Sweden in this regard. The constitution of Germany demands equality for the illegitimate and the Austrian government has proposed a Bill that would realize substantial equality. In addition many countries of Latin America have provisions for legal equality of legitimate and illegitimate children. This trend towards equality also extends to eastern Europe where a number of eastern European countries have constitutional and statutory provisions which grant equal or nearly equal rights to the child borne out of wedlock.[77]

The result of this equality is that both parents are equally obligated to provide maintenance and education for their infant child and this obligation is divided between the two parents in proportion to their financial means. The illegitimate child is equally entitled to inherit from both parents and is therefore on an equal status with legitimate children of the parents.

The third problem which an extension of the law in this area would encounter is the presumption which the courts have adopted that the unmarried mother has a *prima facie* right to the custody of her child. Legal recognition of the fact that the mother and father of both illegitimate and legitimate children are equal

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[77]Krause, *supra*, fn. 66, p. 179.

joint guardians would seriously undermine this presumption in favour of the mother.

Krause in his text *Illegitimacy: Law and Social Policy* states that the unwed mother has primary rights to the child's custody although both parents share a legal obligation to rear the child and give it education.

According to Krause it would appear that in the rights of the mother to the custody of an illegitimate child are a little more equal than those of the father.

It is submitted that by extending the theory of natural guardianship to the father of the illegitimate child, the mother's right to custody need not be abrogated except in those circumstances in which the test of the welfare of the child clearly demands that the custody be granted to the father.

If we are to accept the test of the welfare of the child as being the paramount consideration in any custody proceeding the question must arise as to the reason the courts are inclined to extend a stronger right of custody to the mother of the illegitimate child. The answer surely is not related to the welfare of the child.

If we accept the theory that in the case of divorced parents of the legitimate child, their rights, in the absence of misconduct, are equal with respect to the care, nurture, education and welfare of the child, with the exception that one of them has legal custody and the other merely visitation rights, can we not apply

this same theory to unmarried parents.[78] The difficulty is that while some jurisdictions accept the theory that an order of custody does not curtail all parental rights,[79] others hold that an order of custody represents the sum total of all "rights" to the child. It is submitted that this latter theory equates an order of custody with an order of adoption. If this latter theory is accepted it would be extremely difficult to implement legislation whereby the rights of the father of the illegitimate would be given effective recognition. However, by accepting the former theory, and recognizing a broader parental authority in the form of natural guardianship, of which the right to custody is only one facet, it is submitted that effective legislation could be implemented which would extend a certain status to the father and would include a bundle of rights and responsibilities.

In the recent case of *Re Lou* before the Nova Scotia Supreme Court[80] Gillis J. states that a court in the exercise of equity can and should recognize some right in the father of an illegitimate child to custody and if in the welfare of the child it may award custody of it to him. That *right* may best be referred to as natural guardianship.

In view of the underlying presumption in custody disputes that the welfare of the child shall be the

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[78] *Angel* v. *Angel* 149 N.E. 2nd 541.

[79] In *Re Downo Estate*, 284 N.Y.S. 270; in *Re Daniels Estate*, 83 N.Y.S. 2nd 752.

[80] (1972) 6 R.F.L., p. 287.

paramount consideration for the court, it is ubmitted that there should be little hesitancy in implementing legislation which would give equal status to both parents. Taking this step would be very similar to the step that was taken in England one hundred years ago when legislation was enacted equating the rights of the mother of the legitimate child with those of the father.

Case law in Canada indicates that the natural mother of the illegitimate presently stands in a different and higher position in respect of custody than does the father. In *Logue* v. *Burrell*[81] in the Ontario Court of Appeal, Schroeder J.A. stated that

> . . . to abrogate the law which gives the mother of an illegitimate child *prima facie* rights to its custody, legislation designed to achieve this end would have to be coached in language which leaves no doubt as to the legislative intent to interfere with well-settled principles governing that right.

It is submitted the legislation could be enacted which would achieve this end and which would have the effect not only of extending to the natural father of the illegitimate child equal rights to its custody but would as well be a means of securing equal status for the illegitimate child with legitimate children of the father and thereby give full rights and obligations between father and child.

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[81] 3 R.F.L. 63.

A recent study by Professor Cruikshank of the University of British Columbia[82] argues in favour of the extension of the putative father's rights to his illegitimate child.

> There can be no doubt that legislation which encourages the father to accept responsibilities should contain corresponding rights. But beyond the narrowness of legalities, there are human reasons for giving the putative father a chance to know his child. The increasing acceptability of non-marital unions, communal life styles, and the role-consciousness of women are all contributing to an expanding concept of the unwed father as a child rearing figure. Casework studies in the United States show that the father and mother of an illegitimate child often have a meaningful relationship. The father's interest and concern for his child is substantial and his participation in decision making is worthy of consideration. Rather than have the law impose a shot-gun marriage upon the concerned putative father, our legislation should be providing him rights which need not be inalienable, but which would at least accord him a fair opportunity to care for his child.

Cruikshank points to the fact that by removing the status of illegitimacy from the child, the child's disabilities as an illegitimate would also vanish as would the disabilities of the putative father.

Conversely, by removing the disabilities between the illegitimate child and his father would he not

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[82] *Forgotten Fathers: The Rights of the Putative Father in Canada*, 7 R.F.L., p. 1.

thereby attain the same status as the legitimate child? And could not these disabilities be removed by vesting the father with full rights and duties of natural guardianship, or parental authority?

Cruikshank urges a reform of the law to enable a putative father to apply for custody. He dismisses the idea that the putative father might attain legal rights to his illegitimate infant by way of guardianship proceedings because he feels there is little likelihood of the father succeeding on a guardianship application and he refers to the New Zealand statutes as introducing a "unique concept of guardianship".

However Cruickshank urges repeatedly advancement of the putative father's rights particularly with regard to the right to be notified of adoption proceedings, neglect proceedings and custody proceedings and the opportunity to be heard at all of these proceedings. An extension of the right to apply for custody to the putative father does not, it is submitted, entail the more extensive powers of guardianship in respect to the right to be kept advised of the welfare of the child. In order for the father of the illegitimate to assume the cloak of parental authority to its fullest extent he must be vested with some specific authority. The father of the legitimate child assumes this cloak by marrying the mother; the mother assumes it by bearing the child; the putative father must also assume it by some overt act and it is suggested that a declaration of natural guardianship would be the most logical act.

The assumption of natural guardianship would of course always be subject to the ultimate control of the court as *parens patriae*.

Krause, in his text on illegitimacy, discusses the father-child relationship in an attempt to determine whether there is a fundamental distinction between that relationship and the mother-child relationship with regard to the illegitimate. The argument had been posed in *Levy* v. *Louisiana*[83] which viewed the father-child relationship as being more vitally involved with the legislative purpose of protecting the family unit than that of the mother-child relationship, the assumption being that by denying the illegitimate child the right to a legal relationship with its father the institute of the family will be protected because it will discourage bringing children into the world out of wedlock. Krause however dismisses that argument and states that "it is most doubt

> . . . it is most doubtful that there is an effective connection between the legislative stigma of illegitimacy and the state's purpose of encouraging marriage and discouraging promiscuity.[84]

Concern is expressed as to the effect the granting of a full legal relationship to an illegitimate child

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[83] 391 U.S. 68.

[84] Krause, *supra*, fn. 66.

with its father would have on the legitimate family of the father. This argument can be met with the question of whether there is any distinction between the legitimate family of the father sharing on an equal footing with his illegitimate offspring and their sharing with his children from a previous marriage in the obligations of the father to them.

Another question that is raised is whether the father should be given some choice as to the child's status and its consequent relationship with him. The concept that one person may determine the status of another in terms of his own convenience is repugnant. The argument might also be advanced that the ability of the father to exercise this choice may be contrary to both federal and provincial Bill of Rights.[85]

One might argue that by extending full obligations to the natural father of the illegitimate child the effect may be to encourage more responsible fathering if a prospective father were aware that any progeny he may procreate will be identified with him, not only through the form of a secretive paternity suit but through the imposition of full paternal responsibility.

It is submitted that the major problem to be overcome in any attempt to equate the status of the illegitimate with the legitimate is the ascertainment of the father; it must be accepted that it will not be

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[85] *Canadian Bill of Rights*, 8-9 Elizabeth II, c. 44, (Canada). Alberta *Bill of Rights*, R.S.A. 1972, c. 1.

possible in every situation to ascertain the father and there will be cases in which it may not be desirable to ascertain the paternity of a child as, for example, in incest or rape cases.

This problem of identification may be a valid argument against extending to the putative father the simple right to apply for custody or access to his illegitimate child. What standard of proof of paternity is the custody court to accept and what form does the inquiry into paternity take? Does the court always have jurisdiction to make a declaration of paternity as in the case of an application for custody before the Family Court? Are we going to accept the position of the English courts in extending to the father the right to apply for custody in one forum but insisting that the mother take maintenance proceedings to another?

It is submitted that the better solution would be to provide for either a preliminary proceeding or for a preliminary presumption to arise which would determine for all purposes that the father is the lawful father of the child, which finding would enable him to apply for custody and the mother to apply for maintenance and the child to be given an equal status with his legitimate children and all parts of equal rights of inheritance.

RECOMMENDATION #3

IT IS RECOMMENDED THAT THE FOLLOWING TYPE OF LEGISLATION[86] MIGHT BE IMPLEMENTED TO

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[86]Credit must be given to Krause and the New Zealand legislature from whom these ideas originated.

PRECEDE OR REPLACE SECTION 39 OF THE DOMESTIC RELATIONS ACT:

STATUS OF CHILDREN

(1) FOR ALL PURPOSES OF THE LAW OF ALBERTA THE RELATIONSHIP BETWEEN EVERY PERSON AND HIS MOTHER AND FATHER SHALL BE DETERMINED IRRESPECTIVE OF WHETHER THE FATHER AND MOTHER ARE OR HAVE BEEN MARRIED TO EACH OTHER AND ALL OTHER RELATIONSHIPS SHALL BE DETERMINED ACCORDINGLY.

(2) A CHILD'S RELATIONSHIP TO ITS MOTHER IS ESTABLISHED BY ITS BIRTH TO HER.

(3) A MAN IS PRESUMED TO BE THE FATHER OF A CHILD,

(a) IF HE AND THE MOTHER OF THE CHILD WERE MARRIED TO EACH OTHER AT THE TIME OF ITS CONCEPTION OR AT A SUBSEQUENT TIME; OR

(b) IF HE AND THE MOTHER OF THE CHILD HAVE ACKNOWLEDGED THAT HE IS THE FATHER OF THE CHILD; OR

(c) IF THE COURT HAS DECLARED THAT HE IS THE FATHER OF THE CHILD PURSUANT TO AN APPLICATION UNDER THE PROVISIONS OF SECTION 4 OF THIS ACT; OR

(d) IF ANY COURT OUTSIDE THE PROVINCE OF ALBERTA HAS DECLARED HIM TO BE THE FATHER OF THE CHILD.

(4) AN APPLICATION FOR A DECLARATION OF PATERNITY PURSUANT TO SECTION 2(c) MAY BE MADE BY,

(a) THE PERSON CLAIMING TO BE THE FATHER OF THE CHILD;

(b) THE MOTHER OF THE CHILD; OR

(c) THE CHILD, OR WITH THE LEAVE OF THE COURT, ANYONE ON THE CHILD'S BEHALF.

(5) A PRESUMPTION ARISING UNDER SECTION 3 AS TO THE PATERNITY OF THE CHILD MAY IN ANY CIVIL PROCEEDINGS BE REBUTTED BY EVIDENCE WHICH SHOWS THAT IT IS MORE PROBABLE THAN NOT THAT THAT PERSON IS NOT THE FATHER OF THE CHILD, AND IT SHALL NOT BE NECESSARY TO PROVE THAT FACT BEYOND REASONABLE DOUBT IN ORDER TO REBUT THE PRESUMPTION.

(This section was borrowed from the *Family Law Reform Act* of England 1969.)

Provisions relating to the procuring of blood samples and other forms of evidence be accepted as proof of paternity could be inserted at this point.

RECOMMENDATION #4

GUARDIANSHIP

UNLESS OTHERWISE ORDERED BY THE COURT THE MOTHER AND FATHER OF A MINOR CHILD SHALL BE JOINT GUARDIANS OF THE CHILD, AND IF NO PRESUMPTION OF PATERNITY ARISES PURSUANT TO SECTION 3, THE MOTHER OF THE CHILD SHALL BE THE SOLE GUARDIAN OF THE CHILD.

Section 40

Section 40 of the *Domestic Relations Act* is a re-enactment of the *Abolition of the Old Tenures Act*,

1660.[87] That *Act* enabled a father of an infant under the age of 21 years to appoint a guardian of the child after his death and that appointment was effective even against the claim of the mother of the infant for the custody of the child. Section 40 of our *Act* permits either the mother or father to appoint a guardian of the infant after the death of the parent and the guardian appointed is deemed to be a joint guardian with the surviving parent. A guardian appointed pursuant to this provision is deemed at common law to be guardian of both the person and the estate of the infant.[88] The result was that the testamentary guardian stood in a peculiar position to the natural parent of the child, in that the parent of the child was not deemed to be guardian of the estate of his infant. This section must however be read in conjunction with section 52 of the *Domestic Relations Act* which requires a guardian of the estate of an infant to furnish security as may be ordered by the court.

It has been held recently that in New Brunswick, which has no statutory provisions similar to section 40, the *Abolition of Old Tenures Act* of 1660 is not in force and therefore the appointment of a testamentary guardian has no legal effect.[89]

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[87] 12 Can. II, c. 24.

[88] In *Re Andrews*, 8 Q.B. 153. *Talbot* v. *The Earl of Shrewsbury*, 4 My. & Cr. 673. *Arnott* v. *Bleasdale*, 4 Rm. 387.

[89] *Scott* v. *Scott*, 15 D.L.R. (3d) 374.

The studies prepared by the Family Law Project of the Ontario Law Reform Commission recommended that the office of testamentary guardian be restored by statute in Ontario so that either or both parents may appoint a guardian of their infant children by deed or will. Authority to appoint a testamentary guardian in Ontario was repealed in 1923 although other legislation in Ontario left the law in some doubt.[90]

A recent Saskatchewan case[91] held that notwithstanding the appointment by the wife of a testamentary guardian upon her death that the right of the natural father to the custody of this child was not to be lightly interfered with when the child's welfare would not be endangered by granting custody to the father. The Queen's Bench in that case did not appear to consider the provision of section 23 of the *Infants Act* of Saskatchewan[92] wherein it is provided that a testamentary guardian shall act jointly with the surviving parent. The court only considered the natural rights of the father as being paramount to all others unless very serious and important reasons required that his rights be disregarded. The effect of this decision may seriously undermine the power to appoint testamentary guardians particularly in those cases in which the parent

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[90]Compare *Re Doyle* [1943] O.W.N. 119 and *Re McPherson Estate* [1945] O.W.N. 533.

[91]*Loewen* v. *Rau et ux.* [1972] 3 W.W.R. 8.

[92]T.D.D. 1965, c. 342.

are separated or divorced prior to the death of the spouse. If the court were to consider the testamentary guardian as standing in the shoes of the deceased parent it should not be necessary for the court to give the rights of the natural parent any priority but rather should be concerned only with the welfare of the child. If the provisions of section 40 are to be given any weight in that the person appointed guardian of the infant shall act jointly with the other parent, there should be no distinction between an application for custody between testamentary guardians and parent and an application for custody between parents, both of whom are equal joint guardians of the infant.

Of major concern to the provisions of Part 7 of the *Domestic Relations Act* is the interpretation of the word "parent".

If we are to accept the judgment of Justice Sinclair in the recent unreported decision of *White* v. *Barrett* it would appear that notwithstanding the present provisions of section 39 of the *Domestic Relations Act* the father of the illegitimate child may appoint a testamentary guardian. It is incongruous that although the father of the illegitimate child cannot presently become guardian of the infant during his lifetime he should be entitled to appoint a guardian to act upon his death.

It is submitted that this is a major argument against interpreting the term "parent" throughout the provisions of the *Domestic Relations Act* to include the father of the illegitimate child.

However, in light of the recommendations that have been made in this paper that the provisions of the *Domestic Relations Act* be extended to enable the father of the illegitimate child to assume the functions of guardian it is considered that it would be appropriate to enable such a father to make a testamentary appointment under the provisions of section 40.

It would appear that an appointment pursuant to section 40 would be a valid appointment notwithstanding an order of temporary wardship under the provisions of the *Child Welfare Act*.

The British Columbia Supreme Court recently held[93] that a temporary guardianship order under the *Protection of Children Act* of British Columbia did not prevent the father from appointing the maternal grandparents as guardians of the infant by deed. The *Equal Guardianship of Infants Act* of British Columbia enables a parent to appoint by indenture another person to be guardian of the infant and to assume the duty of a parent towards the infant and in the case in point the father, who was not deceased, had made the appointment subsequent to temporary order of guardianship under the *Protection of Children Act*. However Dohm M.J. of the British Columbia Supreme Court held in that case that equity would nevertheless prevail and he directed that the child be delivered to the grandparents as legal guardians.

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[93] *Re Wood* R.F.L., vol. 5, 25.

Our *Child Welfare Act*[94] provides in section 31 that notwithstanding the *Domestic Relations Act* an infant who is a temporary ward of the Crown is under the guardianship of the Director of the Child Welfare to the exclusion of any other guardian. Although this section would preclude the testamentary guardian from assuming the rights and obligations of a guardian, it does not preclude the appointment of the guardian as such and upon the completion of the temporary wardship the Director may return the child to the testamentary guardian.

One of the major concerns arising under this section is the appointment of testamentary guardian by a parent who does not have lawful custody of the child at the time of his death.

It is submitted that in a case where parents were separated or divorced and a custody order has deprived one parent of the custody of the infant, the order in itself should not deprive that parent of the power to make a testamentary appointment of guardianship. The custody order did not deprive the parent of guardianship but merely of the physical custody of the child with the right to supervise to a certain extent the upbringing of the child. It is submitted that in those circumstances it may be preferable to enable the parent to make a testamentary appointment to ensure the supervision of the child after his death.

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[94]R.S.A. 1970, c. 45, s. 31.

However, in those situations in which the parent has been deprived of his parental authority as in cases of permanent wardship orders or in cases of adoption or in cases in which he has been declared to be an unfit parent and his natural guardianship thereby divested, that he should no longer have the power to make this appointment.

RECOMMENDATION #5

> *IT IS THEREFORE RECOMMENDED THAT SECTION 40 BE AMENDED BY REPLACING THE TERM "PARENT" WITH THE PHRASE "PERSON HAVING LAWFUL GUARDIANSHIP".*

Such an amendment would also permit other persons who have been awarded guardianship of a child to make testamentary appointments of guardians.

RECOMMENDATION #6

> *IT IS SUGGESTED THAT THE LEGISLATION MIGHT TAKE THE FOLLOWING FORM:*
>
> *TESTAMENTARY GUARDIAN*
>
> *(1) ANY PERSON HAVING LEGAL GUARDIANSHIP OF AN INFANT MAY BY WILL APPOINT ANOTHER PERSON TO BE GUARDIAN OF THE INFANT AFTER THE DEATH OF THE AFORE-MENTIONED GUARDIAN.*
>
> *(2) THE PERSON SO APPOINTED GUARDIAN OF THE INFANT SHALL BE REFERRED TO AS A TESTAMENTARY GUARDIAN AND SHALL ACT JOINTLY WITH ANY OTHER GUARDIAN OF THE INFANT.*

It has been held that an appointment of a testamentary guardian renders it unnecessary to make application for letters of guardianship pursuant to the *Surrogate Courts Act*[95] although Fullerton J.A. in a dissenting judgment in the Manitoba Court of Appeal stated by way of orbitar that a guardian appointed by a will does not become the guardian by the mere act of appointment and the appointment must be given effect to by the Surrogate Court and until this is done has no binding effect. However it must be noted that the Manitoba *Act* states that the Surrogate Court may give effect to a testamentary appointment which provision is not found in the Alberta *Surrogate Court Act*.[96] The majority of the court in that case held that an order of the court granting the mother custody of her infant child would not deprive the father of the right to appoint a testamentary guardian.

The *Guardianship of Minors Act*, 1971, of England gives power to both mother and father to appoint a testamentary guardian who shall act jointly with the surviving parent unless that parent objects to his so acting. Provision is also made for either the surviving parent or testamentary guardian, who considers the surviving parent to be unfit to have custody of the minor, to apply to the court and in either case the court may refuse to make an order, in which case the parent shall remain the sole

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[95] In *Re Pritchard* [1930] 2 W.W.R. 112.

[96] In *Re Shaleski* [1927] 1 W.W.R. 355.

guardian or shall make an order that the guardian so appointed shall act jointly with the parent or shall be the sole guardian of the minor. The Alberta statutes merely provides in section 43 that the testamentary guardian is removable for the same causes for which trustees are removable. It is submitted that the Alberta *Act* does not contemplate situations in which the surviving parent and the duly appointed testamentary guardian may be involved in disputes regarding their respective legal capacity, but is limited to those situations in which the guardian is alleged to be an unfit person.

RECOMMENDATION #7

> *IT IS SUBMITTED THAT PROVISIONS SHOULD BE ENACTED TO ENABLE DISPUTES BETWEEN GUARDIANS TO BE SETTLED WHICH WOULD BE QUITE DISTINCT PROCEEDINGS FROM CUSTODY PROCEEDINGS.*

The New Zealand *Act* has provision for removal of the guardian on application by the other parent or by a guardian or near relative or with the leave of the court and any other person. That *Act* also provides for application to be made to the court for the settlement of disputes between guardians.

Section 41

Section 41 of the *Domestic Relations Act* enables the court to appoint a guardian to act either jointly with the father or mother of the infant or with the

testamentary guardian appointed by the father or mother of the infant. This section is apparently intended to be read in context with section 40 and is limited to testamentary situations in that it refers to the father *or* mother of the infant. It apparently considers the type of situation where one of the natural guardians has survived and there has been no appointment of testamentary guardian by the deceased parent. The section is ambiguously worded however and might better be enacted to contain provisions similar to the English statute which contemplates those cases where there has been a dispute between the surviving parent and the testamentary guardian appointed by the deceased parent or where there has been no testamentary guardian appointed by the deceased guardian but it appears that the surviving parent is unfit or unwilling to carry on as the sole guardian of the infant.

Section 42

Section 42 of the *Act* is also ambiguous although it has potentially very broad scope and might be re-enacted to provide a better remedy in the law.

Initially the section contemplates a situation where there has been a lapse of guardianship and the infant finds himself with no legal guardian. That situation in itself would be an unusual one and it may be one which is provided for in the *Child Welfare Act*[97]

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[97]R.S.A. 1970, c. 45.

where under an infant who is without proper parental control or who is not under proper guardianship, or who is an orphan may be deemed to be a neglected child and may be committed to a temporary care and control of the Director of Child Welfare. The Public Trustee may act as guardian of the estate of the infant in circumstances in which the infant finds himself without a proper guardian but is not entitled to act as guardian of the person of the infant by nature of his office and it is probably preferable that he not become guardian of the person by the mere fact that there may exist a conflict between the two offices.

The usual procedure for the appointment of a statutory guardian is by way of application to the Surrogate Court for a grant of letters of guardianship.

The *Surrogate Courts Act*[98] provides in section 13 that the jurisdiction of the Surrogate Court is the same as given by the *Judicature Act* of the Supreme Court in all matters relating to the appointment, control or removal of guardians and the custody, control of and right of access to the infant. It is quite clear then that the Surrogate Court in any application for guardianship is acting as *parens patriae* and as such will have as its paramount concern the welfare of the child.

Section 42, in addition to giving the court jurisdiction to appoint a guardian for an infant whenever

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[98]R.S.A. 1970, c. 357.

there is a lapse of natural guardianship, gives the court jurisdiction to remove an existing guardian and appoint another in its place. In Alberta this jurisdiction enables the court to appoint a guardian in addition to the natural guardian if it appears that the natural guardian is not a fit and proper person. However the *Act* does not enable the court to remove natural guardianship from a parent. The New Zealand statute goes further in that it enables the court to deprive a parent of the guardianship of his child if the court is satisfied that the parent is for some grave reason unfit to be a guardian of the child or is unwilling to exercise the responsibilities of a guardian.[99]

In Alberta the natural guardianship is only removed from a parent in the event of an order for adoption or in the event of an order for temporary wardship in which the guardianship is merely suspended and in the case of a permanent order for wardship in which guardianship is permanently transferred to the Director of Child Welfare.

The New Zealand *Guardianship Act* contemplates those situations which might fall within our *Child Welfare Act* in which a child may be declared to be neglected and a parent thereby deemed to be unfit to be the guardian of the child and the test applied by the New Zealand statute is very similar to the test applied by the Alberta courts in dispensing with parental consent to an order of an adoption which have generally followed the principles

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[99] *Guardianship Act*, 1968, No. 63.

applied where the English Court of Appeal in *Re Agar-Ellis*.[100] The headnote of that case digests that decision as follows:

> A father has a legal right to control and direct the education and bringing up of his children until they attain the age of 21 years, even although they are wards of the court and the court will not interfere with him in the exercise of his paternal authority, except
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> (1) whereby his gross moral terpituity he forfeits his rights, or
>
> (2) where he has by his conduct abdicated his paternal authority, or
>
> (3) where he seeks to remove his children, being wards of court, out of the jurisdiction without the consent of the court.

If the concept of guardianship is to be retained in Alberta law it is suggested that in addition to expanding the concept of natural guardianship there must also be an expansion of the concept of statutory guardianship. Applications for guardianship may well provide remedies which have not previously existed or may provide a better form of a remedy than that which is presently pursued.

In particular, an application for guardianship may include applications by foster parents to obtain legal control of the infant in their charge, applications by step-parents to obtain equal legal rights with the natural

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[100] *Re Agar-Ellis, Agar-Ellis* v. *Lascelles* (1883) 24 Ch.D. 317.

guardians of a child to whom the step-parent stands *in loco parentis*, and may provide remedies for relatives who have been caring for the children but have been unable or unwilling to pursue the only remedy presently available to them, which is that of adoption. The extension of this concept of guardianship would be in line with the report of the Departmental Committee on the Adoption of Children which was presented to Parliament in England in October, 1972, wherein it was recommended that the right to apply for custody under the *Guardianship of Minors Act*, 1971, (which, for convenience, was referred to as guardianship) should be extended for this purpose to relatives caring for a child (which includes a step-parent and foster parents) which order would give the guardian parental powers and obligations but would not deprive a natural parent of all his rights of natural guardianship. The effect would be to place the statutory guardian on an equal footing with the natural guardian and would enable any court in determining a custody dispute to concern itself with the sole question of the welfare of the child.

RECOMMENDATION #8

> *IT IS RECOMMENDED THAT LEGISLATION BE ENACTED CLEARLY ENABLING THIRD PARTIES TO MAKE APPLICATION FOR GUARDIANSHIP.*

It is suggested that circumstances which would justify a court in granting an order of guardianship should be the following:

(1) Where the proposed guardian stands *in loco parentis* to the child and the court deems it to be in the best interest of the child to grant a proposed guardian full parental rights and obligations.

(2) Where the child is without a parent or lawful guardian as a result of the death of his parents and the court deems it to be in the best interests of the child.

(3) Where the court is satisfied that the parent is for some grave reason unfit to be guardian of a child or is unwilling to exercise responsibilities of a guardian.

It is suggested that the court in determining an application for guardianship may appoint a guardian to act jointly with the father or mother of the infant or may suspend the natural guardianship of the father or mother if satisfied that the welfare of the child commends that for some grave reason this natural right should be suspended.

An application for guardianship would be distinct from an application for custody in that it would involve an extension of full parental rights and obligations. It would be distinct from adoption proceedings in that the natural parents' obligations would continue regardless of a custody order in favour of another guardian which

would mean that either parent may be made responsible for the continuing support of the child. It would be distinct from an adoption order in that the natural relationship between the parent and child would not be altered and the child would still be entitled to full inheritance from its natural parent. The application would be distinct from a custody application in that the applicant would be attempting to achieve a *locus standi* before the court and that once achieving this *locus* he would be entitled to apply for custody. It appears that at present a third party is not entitled to commence custody proceedings for the purpose of divesting a natural parent of custody.

The application for guardianship, which would be determined prior to any adjudication on the custody of the child, would leave the court determining the custody issue entirely free of concern regarding the natural relationship of the child with its parents and would enable the court to determine the custody issue using as its sole criteria the best interests of the infant.

It is submitted that the courts do purport to concern themselves only with the best interests of the child but in fact frequently become entangled with the concern over the *locus standi* of the parties before the court. In any custody proceedings involving a third party the court must deal with the two issues of the rights of the natural parents and the best interest of the infant. It is suggested that by making legislative distinction between these two proceedings the courts would be better enabled to dispose of each issue.

It is submitted that the Alberta courts have long recognized the distinction between an application for custody and guardianship and that this distinction was approved in the Alberta Court of Appeal in *Re M.*[101] In that case the father had sent the infant in question to live with his sister in the province of Ontario. The mother of the infant obtained an *ex parte* order restraining the father from removing the infant from the province where he then was and a summons was issued to show cause why the custody of the infant should not be given to the mother. In 1918 the mother of an infant was not construed to be the natural guardian of the infant and the court held that her application was essentially an application for guardianship. Stewart J. states at page 586:

> The present application was not made by the mother on the ground that she had a legal right to the custody of the child. Her application was made to this court as possessing all the jurisdiction of the Court of Chancery in England on July 15, 1870, and under the *Infants Act*, c. 13, 1913, 2nd session, which in no way restricted the former jurisdiction and was intended to obtain the declaration from the court that the father as natural and legal guardian shall be set aside and the custody of the infant given to her. She applied to the court as the tribunal in this province exercising the King's prorogative as *parens patriae* in superintending the question of the care and protection of infants

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[101] [1918] 1 W.W.R. 579.

> and *her application was in effect an application to be appointed by the court guardian of the person of the infant. The appointment of a guardian other than the natural and legal guardian is the only way . . . in which the Court of Chancery can give its care and protection to an infant if it decides that the case is a proper one to set the natural guardian aside.* It is true that there was, in keeping with the present tendencies, little formality in the initiation of the proceedings and in the manner of the application to the court. But although the request was not in terms a direct one to be named as guardian that was certainly the the substance of the application which was made.

It is submitted that the courts have continued to recognize the theory that natural guardianship does confer legal rights upon the natural parent which will ultimately prevail over the rights of a third party unless there are serious allegations of unfitness against the natural parents. The heavy emphasis on the *prima facie* rights of the natural parent was demonstrated in the Appellate Division of the Alberta Supreme Court in the decision *Meikle* v. *Authenac*[102] in which the court held that upon the death of the mother who had been awarded custody under a divorce decree, the rights of the natural father to the custody of the infant child prevailed over the step-father who was without any legal rights to the custody of the child. It is suggested that had the step-father been entitled to apply for guardianship of the child, prior to the application for custody

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[102](1970) 74 W.W.R. 699.

by the father, that his rights to custody should then have been viewed on an equal footing with the rights of the natural father and the court could then have directed its sole attention to the welfare of the child. The guardianship proceedings would have previously determined the question of whether circumstances justified the court's interference with the natural parental authority.

Although emphasis has been made in this paper as to the distinction between the two types of proceedings it is suggested that in actual practice the proceedings may be disposed of jointly with the exception that the court must first make an adjudication upon the issue of guardianship before proceeding to dispose of the custody of the infant.

RECOMMENDATION #9

IT IS SUGGESTED THAT THE LEGISLATION MIGHT PROVIDE THE FOLLOWING:

STATUTORY GUARDIANSHIP

(1) THE COURT MAY UPON AN APPLICATION APPOINT A GUARDIAN OF THE INFANT TO ACT JOINTLY WITH ANY OTHER GUARDIAN OF THE INFANT OR TO ACT AS THE SOLE GUARDIAN OF THE INFANT.

(2) AN APPLICATION FOR THE APPOINTMENT OF A GUARDIAN MAY BE MADE BY

(a) A PERSON STANDING in loco parentis TO THE INFANT; OR

(b) A RELATIVE OF THE INFANT; OR

(c) A STEP PARENT OF THE INFANT; OR

(d) WITH THE LEAVE OF THE COURT, ANY PERSON ON BEHALF OF THE INFANT.

(3) THE COURT MAY UPON THE APPLICATION FOR GUARDIANSHIP APPOINT A GUARDIAN TO ACT JOINTLY WITH ANY OTHER GUARDIAN OF THE INFANT IF THE COURT IS SATISFIED THAT THE WELFARE OF THE INFANTS DEMANDS IT.

(4) THE COURT UPON AN APPLICATION FOR GUARDIANSHIP MAY SUSPEND THE RIGHTS AND OBLIGATIONS OF A NATURAL GUARDIAN IF THE COURT IS SATISFIED THAT FOR SOME GRAVE REASON THE NATURAL GUARDIAN IS UNFIT OR IS UNWILLING TO EXERCISE THE RESPONSIBILITY OF A GUARDIAN.

(5) THE COURT MAY AT ANY TIME ON APPLICATION BY ANY OTHER GUARDIAN REMOVE FROM HIS OFFICE ANY TESTAMENTARY GUARDIAN OR STATUTORY GUARDIAN APPOINTED BY THE COURT.

Section 44

Section 44 of the *Domestic Relations Act* is on the one hand an archaic version of the law in that it is based on the fault concept in divorce and judicial separation proceedings but on the other hand may be a provision well worth preserving in the law in that it may be expanded to enable a court determining divorce and judicial separation proceedings to determine guardianship at the same time.

The provision was enacted at the time when adultery was the main ground for divorce and presumably was intended to deprive an adulteror parent of the right to custody of an infant upon the death of the parent who

had legal custody. The punitive aspects of the section are not in keeping with the trend away from the fault concept in divorce proceedings.

Presumably a declaration under that section would ensure that the rights of the parent who was awarded custody would not be lightly interfered with by the court after the death of that parent. It is suggested however that if we are to extend the concept of guardianship and consider the rights of all guardians as being equal that this provision may not be necessary in that the parent having custody of the infant may by will appoint a guardian in his place whose rights to the custody of the child would be equal with the surviving parent, the paramount consideration in any custody proceedings being the welfare of the child.

RECOMMENDATION #10

> *HOWEVER IT IS SUGGESTED THAT THERE MAY BE CIRCUMSTANCES IN WHICH IT WOULD BE PREFERABLE TO HAVE THE ISSUE OF GUARDIANSHIP DETERMINED AT THE SAME TIME AS THE DIVORCE PROCEEDINGS AND IT IS FOR THIS REASON THAT IT IS RECOMMENDED THAT THE PROVISIONS IN THIS SECTION NOT BE ENTIRELY REMOVED FROM THE LEGISLATION.*

In the vast confusion of the law relating to the guardianship or custody of children, it has been sometimes stated that guardianship follows custody.[103]

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[103] *Jordon* v. *Jordon* 23 S.W. 531.

However it is submitted that if this were so the parent deprived of custody would not be entitled to the right of access to the child nor to be advised of adoption proceedings nor to appoint a testamentary guardian upon his death. Most authorities recognize that notwithstanding an order of custody the parent deprived of custody retains some degree of control over his infant. In recognition of this principle it has also been held that the court may award legal custody jointly to the husband and wife with physical custody to remain in one of the parties.[104] It is the use of the term 'custody' to describe the full extent of the parental authority which has resulted in general confusion. If it can be generally assumed that the rights of both divorced or separated parents are in the absence of misconduct equal with respect to the care, nurture, education and welfare of the children of the marriage regardless of the fact that one of them has legal custody and the other merely visitation rights, then it might conversely be assumed that in a case of misconduct on the part of one of the parent, their rights may not be equal. There may be situations in which the welfare of the child demands that the parental rights be suspended, not only when one parent has been shown to be unfit, but when it is not possible for both parents to exercise the powers of guardianship, for example where that parent is living in a foreign country and it appears unlikely that he has any intention of returning to reside in the province of Alberta, or, for example, where the parent is not willing to exercise the authority of a guardian.

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[104] *Winn* v. *Winn* 299 P. 2nd 721.

RECOMMENDATION #11

IT IS SUGGESTED THAT IN THOSE CASES IN WHICH GUARDIANSHIP IS REMOVED FROM THE PARENT THAT THE COURT SHOULD NOT BE EMPOWERED TO MAKE AN ORDER OF MAINTENANCE AGAINST THAT PARENT.

The South African law provides in its *Matrimonial Affairs Act*, 1953, in section 5 that the court in divorce or judicial separation proceedings may make an order of either sole guardianship or sole custody of a minor infant. The courts are therefore not confined to awarding only custody or access to the parent but it is in their jurisdiction, if in the interests of the minor child there is no alternative, to award all the incidents of guardianship to either parent. The New Zealand *Guardianship Act*, 1968, also provides in section 12 that in any proceedings where nullity, separation, restitution of conjugal rights, dissolution of a voidable marriage or divorce the court may make such order as it thinks fit with respect to the custody or upbringing of any child of the marriage and in such cases the court may, if it thinks appropriate, make a guardianship order vesting the sole guardianship of a child in one of the parents or may make such order with respect to the guardianship of the child as it thinks fit. Unless an order is made respecting the guardianship of the child the person who was a guardian of the child continues to be guardian of the child notwithstanding an order of custody. In that *Act* the court is not restricted to situations in which the one parent has been shown to be unfit or unwilling to assume the responsibility of guardianship but is governed only by the test of the welfare of the

child. Inglis in his text on Family Law[105] indicates that as the effect of an order pursuant to that section regarding the guardianship of the child would deprive the parent of his full parental rights to that child that the court must proceed with great caution in making such order.

The concern with any provincial legislation involving divorce proceedings is the constitutional question. It is suggested that any provision in provincial legislation which would enable the Supreme Court, concurrent with the exercise of its jurisdiction under the *Divorce Act* to make an order of guardianship would not be an infringement on the federal jurisdiction.

The Manitoba *Child Welfare Act*[106] provides that where the marriage of any person has been dissolved by the decree of a court of competent jurisdiction or by the *Act* of Parliament of Canada, if the custody of a child of the marriage has been awarded to either parent by the order of the court making the decree or any other court having jurisdiction and that parent remarries, the person to whom the custody of the child has been awarded by the order shall, unless the order otherwise provides, be deemed to be the guardian of the person of the child for the purpose of adoption by himself and his spouse under Part 6.

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[105] Inglis, *Family Law*, vol. 2, 2nd ed., (1970) p. 484.

[106] R.S.M., c. 80, s. 103.

This provision is in line with the Manitoba case laws on the adoption of children by step parents[107] which decisions are at variance with the Alberta case law[108] and for this reason it is not recommended that a similar deeming provision be enacted in our provincial legislation. The section is, however, indicative of the fact that other provinces are concerned with the question of the legal guardianship of an infant subsequent to divorce proceedings.

The *Family Relations Act* of British Columbia[109] repealed a provision in the *Equal Guardianship of Infants Act*[110] which was almost identical to section 44 of our *Domestic Relations Act* and no similar provision was re-enacted in the new *Act*. However the *Equal Guardianship of Infants Act* provides in section 5 that if the husband and wife are living together they shall be joint guardians of the infant children with equal powers, rights and duties thereto and there shall be no paramount right to either. Since the mother's rights to guardianship of the infant is dependent upon her residing with her husband, it appears that in British Columbia upon the granting of a divorce decree the mother loses her rights

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[107] *Sobering* v. *Sergeant* 6 R.F.L. 51. *Goldstein* v. *Browntone* 3 R.F.L. 4.

[108] *Hawkins* v. *Addison* 3 W.W.R. 1; *Re Adoption Applications Nos. 22025-22028* (unreported).

[109] *Family Relations Act*, 1972, R.S.B.C.

[110] R.S.B.C. 1960, c. 130.

to guardianship of the infant and if she is deprived of custody in a divorce decree all her future rights to the infant have been seriously limited. Even if she is awarded custody of the infant her parental authority over the infant may nevertheless be limited and the most obvious limitation which springs to mind is that under the British Columbia *Marriage Act*; the mother in that situation would not be able to consent to the marriage of a minor of her minor infant. Section 29 of that *Act* provides that no marriage of a minor shall be solemnized unless consent in writing to the marriage is given by both parents of that minor if both are living and are joint guardians or by the parent having sole guardianship if they are not joint guardians.

If we are to recognize the principle that the rights of both divorced parents are in the absence of some misconduct equal with respect to the care and nurture, education and welfare of the children of the marriage regardless of the fact that one of them had legal custody of the children[111] then it is suggested that the legislation should retain the provision enacting that those parents of a child are joint equal guardians of the child. Because the federal legislation purports to deal only with the custody of children of the marriage it may be deemed that the parent deprived of custody retains his legal guardianship of his children notwithstanding the order of custody. However it is

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[111] *Supra*, fn. 78.

submitted that it must at the same time be recognized that there will be situations in which the parental guardianship of the children should be terminated upon the granting of the divorce decree.

It is notable that in those jurisdictions where it it provided that the consent of a parent to adoption is not necessary when he has been deprived of custody by divorce proceedings, the courts have striven to minimize the effect of those statutory provisions and have held that, notwithstanding statutory enactments to the contrary, consent of a parent can only be dispensed with in adoption proceedings when there has been abandonment or where there has been conduct on his part which would justify dispensing with his consent under the usual adoption provisions.[112]

It is suggested that the legislation should contain no reference to the parent's misconduct which resulted in a decree, so as to deprive him of the right to the guardianship of his children as this concept is not in keeping with a more enlightened approach to custody issues which will often award custody to the parent who may have been responsible for the breakup of the marriage.[113]

RECOMMENDATION #12

> *IT IS SUGGESTED THAT THE PROVISIONS RELATING TO THE PRESENT SECTION 44 OF THE Domestic Relations Act MIGHT BE AMENDED AS FOLLOWS:*

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[112] *Re Adoption of Anonymous*, 13 A.D. 2d 885; In *Re Adoption of Smith*, 306 P 2d 875.

[113] *Voghell* v. *Voghell* (1962) 38 W.W.R. 368; *Kramer* v. *Kramer* (1966) 56 W.W.R. 303; *Daves* v. *Daves* (1963) 42 W.W.R.257.

(1) THE COURT PRONOUNCING A JUDGMENT FOR JUDICIAL SEPARATION OR A DECREE OF DIVORCE MAY IF IT DEEMS IT APPROPRIATE MAKE A DECLARATION THAT A PARENT WHO IS A PARTY TO THE ACTION IS UNFIT TO HAVE GUARDIANSHIP OF THE CHILDREN OF THE MARRIAGE AND MAY MAKE AN ORDER VESTING THE SOLE GUARDIANSHIP OF THE CHILDREN OF A MARRIAGE IN ONE OF THE PARENTS OR MAY MAKE SUCH OTHER ORDER WITH RESPECT TO THE GUARDIANSHIP OF THE CHILDREN OF THE MARRIAGE AS IT THINKS FIT.

(2) UNLESS THE COURT MAKES A GUARDIANSHIP ORDER EVERY PERSON WHO WAS A GUARDIAN OF THE CHILD SHALL CONTINUE TO BE A GUARDIAN OF THE CHILD.

Section 45

Section 45 of the *Domestic Relations Act* is a re-enactment of the *English Custody of Infants Act*, 1873[114] which provided for the first time that an agreement in a deed of separation that the father should give up custody to the mother was not void as being contrary to public policy. Prior to that statute any such agreement would have been void[115] unless the father had been proven to be unfit to be a guardian.[116]

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[114] 36 and 37 Vict., c. 12.

[115] *Lord St. John* v. *Lady St. John* (1803) 11 Ves. 526; *Hope* v. *Hope* (1857) 8 DeG.M. & G. 731.

[116] *Swift* v. *Swift* (1865) 34 Beav. 266.

However just as the courts will not consider themselves bound by agreements between the parents regarding the support of children, so the courts will not consider themselves bound by agreements between parties regarding the custody of the children and will refuse to enforce such agreements if it is deemed to be not in the best interests of the children. If the court finds that the custody arrangements provided for in the separation agreement or minutes of settlement do not accord with its view of the child's welfare, the court is free to disregard the agreement.[117] The Alberta Supreme Court has held that a provision in the separation agreement by which the parties agree that a child of theirs shall be given as a custody to a certain third person is not binding on the court, the paramount consideration being the welfare of the child.[118] The Supreme Court of Canada has also held that the express power given to parents to enter into such an agreement regarding the custody of their infant children is not abrogated by the fact that an order of the court dealing with the custody is in effect.[119] Thus where parties to divorce proceeding in which there has been an order of custody granted subsequently enter into a further agreement with provisions which alter an undertaking given to the court by one of the parties, the court will

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[117] *Miller* v. *Miller* 189 S.W. 2d 371.

[118] *W.* v. *W.* [1943] 1 W.W.R. 502.

[119] *Kruger* v. *Booker* [1961] S.C.A. 231.

respect that agreement so long as it is in the best interests of the children.

The concern with a consent arrangement regarding the custody of the children of the marriage is that the agreement is not readily enforceable and that the parent deprived of custody by the terms of the agreement may consider himself quite free to remove the child from the other parent at any time. In an Ontario case in which the father of the infant signed a separation agreement yielding custody to the mother subsequently abducted the child from the mother and removed the child to the State of California. Although the court in that case described the father's actions as amounting to heinous and reprehensible conduct it is submitted that the mother would have little remedy available to her in that situation in terms of actually enforcing the agreement against her husband. An order of custody might have entitled her to prevent the removal of the child from her custody by requesting the assistance of the police.

RECOMMENDATION #13

> *IT IS RECOMMENDED THAT THE PROVISIONS OF SECTION 45 BE RETAINED WHICH NO DOUBT ENCOURAGE AMICABLE SETTLEMENT OF PROCEEDINGS WHICH MIGHT OTHERWISE BECOME EMBITTERED COURT CONTESTS.*

Section 46

Section 46 of the *Act* incorporates the provisions which were first enacted in legislation in the English

Guardianship of Infants Act of 1886 which extended the right to the mother to make application for custody of her infant and the *Administration of Justice Act* of 1928 which extended that same right to the father. Since at common law the father was the sole legal guardian of his infant children and thus solely entitled to their custody; an application to remove custody from a parent was unknown. However as equity gradually softened the common law approach to custody the first inroads that were made upon the father's natural right to custody was to extend to the mother the status to apply to remove custody from the father. Later when the mother's status relating to the custody of the infant was equated with that of the father by virtue of the *Guardianship of Infants Act* of 1925 it became necessary to extend to the father the equal right to apply to remove custody of the infant from the mother. It is notable that in both cases the necessity of making application for custody arose only when both parents had been extended equal rights of guardianship.

Under both the *Guardianship of Infants Act* of 1886 and the *Administration of Justice Act* of 1928 the right to apply for custody was limited specifically to the mother and father of the infant.

Under the *Domestic Relations Act* of Alberta 1927[120] the application for custody was also limited to either the father or mother of an infant.

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[120]R.S.A. 1927, c. 89.

The *Guardianship of Minors Act*, 1971, of England also limits the application for custody to either the mother or father of the infant. It has been established in an American case that apart from divorce and separation proceedings it is possible for a third party to obtain an adjudication of custody by means of an ordinary equity suit. Cardosa J. held in that case[121] that the remedy is based on the inherent jurisdiction in Chancery over infants and that in such proceedings the court acts as *parens patriae* to do whatever is best for the interest of the child. The court is to put itself in the position of the wise, affectionate and careful parent and make provisions for the child accordingly. The court may act on the motion of a kinsman but equally he may act on the instance of anyone else. In that decision Cardosa J. relied heavily on the *R.* v. *Gyngall*[122] wherein Lord Esher M.R. stated that the jurisdiction of the Court of Chancery was not a jurisdiction to determine rights as between a parent and a stranger or as between a parent and a child but was a paternal jurisdiction, a judicial administrated jurisdiction in virtue of which the Chancery Court acting on behalf of the Crown was guardian of all infants in place of the parent as if it were the parent of the child, thus superseding the natural guardianship of the parent. However, in spite of this very broad jurisdiction it should not be overlooked that Kay L.J., in the *Gyngall* case, stated that it would be a different matter altogether where the attempt is to take the child away

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[121] *Finlay* v. *Finlay* 148 N.E. 624.

[122] [1893] 2 Q.B. 232.

from the custody of the father or mother and a very strong case would have to be made in order to deprive the parent of the custody of a child which had up to that time been in the custody of the parent. He went on to state that the case before the court was very different in that the mother was seeking the assistance of the court in having the child returned to her custody.

In a recent case before the Ontario Supreme Court[123] the court held that proceedings for custody of infants in the Court of Chancery could be initiated by persons other than parents of the child. Again the court relied heavily on the judgment of Lord Esher in the *R.* v. *Gyngall* but overlooked the judgment of Kay L.J. in which he stated that the situation would be quite different if a third party were attempting to remove custody of a child from the custody of its parents.

If legislation is to be extended to enable a third party to apply directly for custody, or, if our present legislation can be interpreted as already providing that right, the question arises whether the circumstances which would warrant the court in granting an order of custody to a third party would vary to any degree from those circumstances in which there has been neglect proceedings instituted by the Department of Child Welfare of section 14 of the *Child Welfare Act* in which case the onus is on the Director of Child Welfare to prove that a state of

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[123] *McMaster* v. *Smith* 6 R.F.L. 143

neglect exists. It is suggested that Kay L.J. in the *Gyngall* case was referring to the neglect situation when he stated that a very strong case would have to be made out to deprive the parent of the custody of the child which had up to that time been in the custody of the parent.

If the Director of Child Welfare must satisfy the court that a state of neglect exists before the court will remove a child from the custody of its parents should the situation be any different when a third party wishes to institute proceedings to remove the custody of a child from its parents?

Milvain J., in a recent Alberta decision[124] held that a parent is privileged in having a right to be considered in custody disputes to the extent that such consideration is the best interest of the child from the point of view of its welfare and happiness. He went on to state that the so-called rights of a parent under the common law must give way to the merciful thinking which equity permits. Milvain in that case relied heavily on the House of Lords decision in *J.* v. *C.*[125] That decision, which is an exhaustive review of the cases involving the development of the equitable concepts relating to the custody of infants, is cited as the authority for the proposition that the first and paramount consideration in custody matters was the welfare

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[124] *McGee* v. *Waldern & Cunningham*, 4 R.F.L. 17.

[125] *Supra*, fn. 56.

of the infant and that principle was not constricted or limited in any sense to disputes between parents but applied as well to disputes between parents and third parties. It should be noted that the infant in that case had been made a ward of the court as a result of proceedings commenced by the local authority. The child in that case had been taken into care under section 1 of the *Children Act 1948* which contains provisions similar to section 14 of our *Child Welfare Act*. The third parties who had raised the child since infancy had applied to be appointed foster parents within the meaning of the *Children Act 1958*.

Subsequently the infant had been discharged from the care of the local authority and had returned to live with his parents but seventeen months later the parents returned the infant to the foster parent and the infant was again taken into care by the local authority. When it later appeared that the parents were seeking the return of the infant the foster parents applied to the Chancery Division to have the infant made a ward of the court which order was granted by Ungoed-Thomas J. in 1965. Two years later the parents initiated an application requesting the return of the care and control of the infant and at the same time an application was made by the foster parents that the infant be brought up in the Protestant faith. It was the appeal from both of these applications which was before the House of Lords in 1969. It should be noted that the application by the foster parents was not an application for custody and that the parental authority over the child had been assumed by the court in the order of wardship though it might have

been argued that this was not necessary in view of the fact that the child had previously been committed to the care of the local authority. The resulting conclusion is that the parent's application was essentially no different then *habeas corpus* proceedings for the custody of their infant in which case there is no doubt that the principle ennunciated by Lord Esher in *R.* v. *Gyngall* is applicable. However in spite of the very enlightened judgment of the House of Lords it is still questionable whether a third party is entitled *ab initio* to commence proceedings for custody of an infant which would have the effect of removing the infant from the custody of the parents in whose custody the child had been up to that time. Lord Upjohn in his judgment stressed the distinction between an order of custody and an order of adoption. He states:

> How different is an order relating to custody? There is nothing permanent about such an order; it can be varied at any time. There is no severance of the infant's ties with the true parents to remain the parents for all purposes. If an order is made giving custody to a third party the only parental duty thereby assumed (subject, of course, to the terms of the order) is to bring up the infant as a good parent would while in his order of care. At any time the custody of the infant may be recommitted by the court in the exercise of its discretion to the parents, and in the meantime the court may give directions as to access by the parents . . . at a later stage too when the infant is of age to express an opinion to which the judge would give sympathetic consideration, the judge might, if he thought fit, and

> the infant so desired, order his return to his parents. At the same time the judge may bring the wardship proceedings to an end.

It might be queried at this stage whether the better remedy, if it had been available, might not have been for the foster parents to apply for an order of guardianship of the infant and a subsequent order of custody rather than an application to have the child made a ward of the court. The foster parents in that case had indicated their strong interests in applying for an order for adoption of the infant which would have the effect of forever severing the natural parental bond. It is suggested that the report of the Departmental Committee on the Adoption of Children envisaged this very situation in their recommendations that the law of guardianship be extended to permit foster parents in the situation to apply for an order of guardianship in preference to an order of adoption.

The question to be determined is whether in those situations in which it might be desirable for a third party to institute proceedings relating to the custody of an infant, the application should be under our *Child Welfare Act* in which case the child is committed to the Director of Child Welfare who would then commit the child to the applicants as foster parents or whether there might not be situations in which it is preferable to avoid this circuitous route and enable a third party to make direct application for parental authority over a child.

RECOMMENDATION #14

IT IS SUGGESTED THAT ANY EXTENSION OF AUTHORITY TO A THIRD PARTY TO INITIATE PROCEEDINGS SHOULD BE LIMITED TO APPLICATIONS FOR GUARDIANSHIP AND CONSEQUENT ORDERS OF CUSTODY THEREUNDER RATHER THAN TO ENABLE A THIRD PARTY TO INITIATE PROCEEDINGS OF CUSTODY WITHOUT SOME PRIOR HEARING TO DETERMINE THE STATUS OF THE PARTIES AND THE NECESSITY TO INTERFERE WITH THE NATURAL PARENTAL RIGHT.

It is suggested that had this remedy been pursued in the *McGee* v. *Waldern* case that the court would have had no difficulty in coming to the conclusion that the best interests of the child demanded that the child's aunt be named a guardian jointly with the mother and father of the infant and the custody of the child be committed to her.

It is sometimes assumed that section 46 (1)(b), whereby an infant may make an application for its own custody, would enable a third party to make an application for the infant's custody through the application of the infant itself. It should be noted that this provision is unique in Canada and in England and was only introduced into the Alberta legislation in 1942.

Under the common law an infant has long been able to make application for its own guardianship[126] but

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[126] *Ex parte Edwards* (1747) 3 Atk. 519; *Re Brown's Will, Re Brown's Settlement* (1881) 18 Ch. D. 61 (C.A.)

Halsbury states that even this power is ill defined and very rarely exercised.

Since both the right to custody and the right to access to an infant must by their very nature reside in some person other than that infant, it is difficult to comprehend why the Legislature enacted a provision enabling the infant to apply for an order regarding its own custody. Since the infant himself is not bound by the custody order or the order of access he not being a party to the order, it is suggested that even in such situations in which the infant finds the parent's right of access is onerous to the infant that the infant has the right to simply refuse to abide by the provisions of the order. Subsection (3) of section 46 provides that the order may be varied, altered or discharged on application of either parent only or by testamentary guardian so that an infant applying for an order of custody under subsection (1) apparently is not entitled to make application for variation of the order.

If the provision was meant to provide for those situations in which the infant is in the custody of a third party, it is suggested that the better remedy would be to enable that third party to make application for guardianship.

Section 46(1) also is sometimes construed to permit the father of the illegitimate child to make application for custody and access of the child and the authority relied on is the Saskatchewan Queen's Bench decision in

Re Alderman.[127] It is submitted however that there is a serious distinction between the Saskatchewan *Infants Act* and the Alberta *Domestic Relations Act* which may lead one to conclude that the *Alderman* case does not apply under the present provisions of the Alberta statute.

The Alberta statute appoints the mother of the illegitimate child to be the sole legal guardian of a child but the Saskatchewan *Act* is silent at that point. The Alberta *Act* after appointing the mother of the illegitimate to be sole legal guardian continues in section 40 to permit the parent of an infant to appoint a testamentary guardian. Again applying the argument that if the father of the illegitimate child comes within the definition of "parent" in this part of the *Domestic Relations Act* it would follow that the father of the illegitimate child while not being legal guardian of the child during his lifetime is nevertheless permitted to appoint a testamentary guardian upon his death.

A second argument that may be raised against the application of the *Alderman* case under the provisions of the Alberta *Act* is that although the Saskatchewan *Queen's Bench Act*[128] provides that the *Rules of Equity* shall prevail in all questions relating to the custody of

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[127] *Re Alderman: Alderman* v. *Gegner* (1962) 32 D.L.R. 71.

[128] 1960, R.S.S., c. 35.

infants, the Alberta *Domestic Relations Act* provides in section 51 that the *Rules of Equity* prevail only when they do not conflict with the *Act*. Since it would appear that the father of the illegitimate child was not intended to fall within the term "parent", it appears that there may in this case be a conflict with the *Rules of Equity*.

Perhaps the most important provision in section 46(1) is that which enables the court to make such orders as it sees fit regarding the custody of the infant and the right of access to the infant by either parent. Apparently it is only the right of access to the infant that is limited to either parent and this interpretation would be consistent with the English *Guardianship of Minors Act 1971*.[129]

There is a distinction between these provisions of the *Domestic Relations Act* and the provisions of the *Family Court Act*[130] which enables the court to make an order regarding the right of access to a child by either

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[129]That *Act* states in section 9 that

> (1) The court may on the application of the mother or father of a minor (who may apply without new friend), make such order regarding
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> (a) the custody of the minor; and
> (b) the right of access to the minor of his mother or father,
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> as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the mother and father.

[130]R.S.A. 1970, c. 133.

parent or any other person having regard to the best interests of the child. Generally the rule seems to have been that one who is not a parent is not entitled to visit the child even though this rule may be rather harsh[131] and even though this rule seems to be at odds with the equitable rule relating to the custody of a child which enables the court in custody disputes to award custody to persons other than the parents of the child. One might conclude that the *Family Court Act* and the *Domestic Relations Act* are divergent in this regard, in that the *Family Court Act* might be interpreted as enabling the court to make the award of custody only to either parent of the infant because the Family Court does not exercise the equitable jurisdiction which would permit it to award custody to third parties,[132] but that the Family Court might make an order of access to a third party, whereas the *Domestic Relations Act* would enable the court to make an order of custody to a third party but not an order of access. Even accepting the proposition that inherent equitable jurisdiction exercised by the Supreme Court would entitle the court to make any orders which it deems to be in the best interests of the child, it is questionable whether section 51 of the *Domestic Relations Act* would not restrict that jurisdiction in view of the conflict in section 46 which appears to limit the right of access to the parent of the infant.

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[131] *Ex Parte People ex rel.* Con. N.Y.S., 2nd, 511; *Re Graham, Graham* v. *Graham* (1924) 27 O.W.N. 109.

[132] *Holdsworth* v. *Holdsworth* (unreported) March 20, 1972, Edmonton Family Court.

In view of what might be a conflict between the provisions of the *Family Court Act* and the *Domestic Relations Act* regarding the jurisdiction of the respective courts to make orders of access it is recommended that amendments be considered to both section 10 of the *Family Court Act* and section 46 of the *Domestic Relations Act* to clarify this situation.

RECOMMENDATION #15

> *ALTHOUGH IT IS RECOMMENDED THAT THE APPLICATION FOR CUSTODY BE LIMITED TO EITHER THE MOTHER OR FATHER OR OTHER LEGAL GUARDIAN OF THE INFANT, IT IS SUGGESTED THAT UPON AN APPLICATION FOR CUSTODY BEING MADE THE COURT BE GIVEN JURISDICTION TO MAKE SUCH ORDER AS IT SEES FIT HAVING REGARD TO THE WELFARE OF THE INFANT REGARDING THE CUSTODY AND RIGHT OF ACCESS TO THE INFANT, AND THAT THE COURT NOT BE RESTRICTED IN ITS ORDERS TO GRANTING EITHER CUSTODY OR ACCESS TO THE PARENT OF THE INFANT.*

It is submitted that in fact this practice has been adopted by the courts and the legislation should reflect this practice. In *Re Fulford and Townsend*[133] the Ontario Court of Appeal in discussing the provisions of the Ontario *Infants Act* which are very similar to the provisions of section 46 of the *Domestic Relations Act* held that there was nothing in that *Act* which limited the court to awarding custody to only the father or mother.

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[133] 5 R.F.L. 63.

The court however did not discuss whether the court is limited in its jurisdiction in awarding access to third parties.

In a recent Nova Scotia case[134] Dubinsky J. held that upon the application for custody by the mother of the infant that the court had jurisdiction to make an order of custody in favour of the grandparents of the infant and this decision was based upon the principle ennunciated by the Privy Council in *McGee* v. *McKee*[135] where it was held that the welfare of the infant is paramount consideration in questions of custody to which all other considerations must yield.

If this principle is to apply to the jurisdiction of the court in awards of custody it would be incongruous that the same principle would not apply in awards of access. Similarly if the Family Court is to be given jurisdiction to make awards of access as it sees fit it would seem only reasonable that the court should be empowered to make awards of custody on the same principle as the Supreme Court in the exercise of its equitable jurisdiction.

Subsection (2) of section 46 deals with the considerations to which the court must direct its intention in any custody dispute.

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[134] *Humphreys* v. *Humphreys* 4 R.F.L. 64.

[135] [1951] 2 D.L.R. 657.

The manner in which these considerations are set out in the *Act* would seem to imply that each of the considerations is to be given equal weight. There is no doubt, however, that the development of the law relating to custody has established that the welfare of the infant is the paramount consideration before the court.

The English *Guardianship of Minors Act of 1971* enacts that in any proceeding before any court relating to a custody or upbringing of the minor the court shall regard the welfare of the minor as the first and paramount consideration. Section 9 of that *Act* provides that on an application of the mother or father of the minor the court may make such order regarding the custody and access of the minor as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the mother and father which again would seem to imply that the welfare of the minor is superior to the conduct and wishes of the mother and father.

The New Zealand *Guardianship Act* in sections dealing with custody orders does not refer to any considerations to which the court must direct its attention but simply states that the court may make such order as it thinks fit. However, section 23 of that *Act* provides that in any matter relating to custody or guardianship or access or the administration of any property belonging to or held in trust for a child the court shall regard the welfare of the child as the first and paramount consideration and the conduct of any parent is relevant only to the extent that such conduct relates to the

welfare of the child. It is submitted that the New Zealand provision reflects the attitude of the courts in recent custody disputes such as the case of *McGee* v. *Waldern and Cunningham* in which Milvain C.J.T.D. held that the paramount concern is the child's welfare and the claims of parents are subservient to that concept.

If we accept the position that the application for custody of an infant should be limited to either the father or mother or other guardian of an infant and acknowledge the right of the Supreme Court, in the exercise of its equitable jurisdiction, to make such order as it sees fit, which would enable the court to award custody to persons other than the parties to the proceedings, it follows that the only concern before the court in custody proceedings is the welfare of the infant and that the conduct of the parents and the wishes of the mother and father are relevant only insofar as they relate to the welfare of the infant.

Section 46(3) limits the application to vary or discharge the order to the parents of the infant or upon the death of a parent, the guardian. It is interesting to note that although the *Act* permits the infant to make an application for custody or access the same right is not extended with regard to an application to vary or discharge the order.

RECOMMENDATION #16

IT IS RECOMMENDED THAT SECTION 46(3) BE AMENDED TO PERMIT ANY GUARDIAN OF AN INFANT TO APPLY TO VARY OR DISCHARGE AN ORDER.

Section 46(5) is interesting in that it enables the court to order the mother to make payments of maintenance for the support of the infant, although the same liability is not imposed upon the wife under the provisions of Part 4 of the *Domestic Relations Act*. In keeping with the recommendations in the research paper prepared by Professor Payne on the *Domestic Relations Act*, that reciprocal rights and obligations shall be imposed on husband and wife, it is suggested that this section should be retained but it is questionable whether the provision regarding maintenance should be contained within the section dealing with custody.

Section 47

Section 47 of the *Act* is a re-enactment of the *Custody of Childrens Act 1891*[136] which *Act* gave almost unlimited discretion to the court in refusing an order for the custody of a child. That *Act* was concerned with issues of custody not as between the parents but as between parents and a third party. Prior to the enactment of the *Custody of Childrens Act* of 1891, a parent or other person who had the legal right to the custody of a child could obtain possession by means of an application for *habeas corpus* or by petition to the Court of Chancery.[137] Under that procedure the court had power to refuse the

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[136] 54 and 55 Vict., c. 3.

[137] *Re Spence* (1847) 2 Ph. 247.

application but only on grounds of gross immorality.[138] Section 47 is an exact reproduction of section 1 of the *Custody of Children Act* of 1891, section 48 of the *Domestic Relations Act* is similar to although not the exact wording of section 2 of the *Custody of Children Act* of 1891, and section 49 of the *Domestic Relations Act* is re-enactment of section 4 of the *Custody of Childrens Act* of 1891.

Habeas corpus procedure was employed in both the case of *Re Agar-Ellis*[139] and in *R.* v. *Gyngall*[140] but in those cases the courts came to opposite conclusions. In the case of *Re Agar-Ellis* the court held that it would not interfere with the father in the exercise of his paternal authority except where by his gross moral turpitude he forfeits his rights or by his conduct he is shown to have abdicated his paternal authority or when he seeks to remove his children who are wards of the court out of the jurisdiction without the consent of the court. In *R.* v. *Gyngall* on the other hand, the Court of Appeal held that although the mother had not been guilty of any misconduct which disentitled her to the custody of the child the court would, if satisfied that it was essential for the welfare of the child, refuse to give the mother custody. The case of *Re Agar-Ellis* arose before the enactment of the *Custody of Children Act* of 1891 and the case of *R.* v. *Gyngall* arose

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[138] *R.* v. *Clarke, Re Race* (1857) 7 C & B 186.

[139] (1883) 24 Ch. D. 317.

[140] [1893] 2 Q.D. 232.

two years subsequent to the enactment of that statute. Lord Esher M.R. dealt with the statute in a very cursory fashion and held that the statute does not affect the jurisdiction formally exercised by the Court of Chancery in that it simply gives the court discretion to refuse to issue a *habeas corpus* in certain cases and deprives the court of the discretion to order the child to be delivered up to the parent in other cases. The effect of Lord Esher's judgment may be construed to have seriously undermined the effectiveness of this statute in that he in effect held that notwithstanding that enactment the equitable jurisdiction of the Court of Chancery prevailed in custody cases.

Since the time of the *Gyngall* case there has been a vast discrepancy in the case law relating to actions of custody between parents and third parties and the test to be applied by the court in determining whether to interfere with the rights of the natural guardian.

In a decision of the Irish Court of Appeal[141] the court enunciated what has been referred to as the welfare test[142] which was derived from the *Gyngall* case and which essentially held that in exercising the jurisdiction to control or ignore the parental rights the court must act cautiously not as though it were a private person acting with regard to his own child and acting in opposition to

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[141] [1900] 2 I.R. 232.

[142] *J.* v. *C.* [1969] 1 All E.R. 817.

the parent only when judicially satisfied that the welfare of the child requires that the parental rights shall be suspended or superseded.

In opposition to the "welfare test" is the test based upon the case of *Re Fynn*[143] and approved in *Re Agar-Ellis* wherein the court held that it had no right to interfere with the sacred right of a father over his own children unless he has shown by his conduct that he is extremely unfit in any respect to exercise his parental authority and duties as a father.

In *Re Thain; Thain* v. *Taylor*[144] the court accepted the principle of *Re Agar-Ellis* and Eve J. states

> . . . I am satisfied that the child will be as happy and well cared for in the one home as the other and inasmuch as the rule laid down for my guidance in the exercise of this responsible jurisdiction does not state that the welfare of the infant is to be the sole consideration but the paramount consideration it necessarily contemplates the existence of other conditions and amongst these the wishes of an unimpeachable parent undoubtedly stand first. It is my duty therefore to order the delivery of this child to her father.

This principle was also approved in the case of *Re Carroll (No. 2)*.[145] Scrutton L.J. relied on the

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[143](1848) 2 De G & Im. 457.

[144][1926] All E.R. Rep. 384.

[145][1930] All E.R. Rep. 192.

Custody of Children Act of 1891, and held that unless the parent is of so bad a character that her wishes as to religion and education may be disregarded, the mother had a legal right to require that the child shall be brought up in her religion.

Slesser L.J. held that as a parent had, at common law, an absolute right to the custody of his or her child of tender years unless he or she had forfeited it by certain misconducts and having regard to the Chancery jurisdiction which was not affected by the *Custody of Infants Act of 1891*, that the wishes of the natural parent are still to be primarily considered.

The decision in *Re Carroll (No. 2)* was criticized in *J.* v. *C.* in the House of Lords because the Court of Appeal appeared to have considered that the mother had a prevailing right to custody against strangers which was not affected by the provisions of section 1 of the *Guardianship of Infants Act* of 1925 which states that the welfare of the child should be the paramount consideration. In *J.* v. *C.* the court held that section 1 of the *Act* of 1925 applies to disputes not only between parents but between parents and strangers and strangers and strangers and that in applying that section the rights and wishes of parents whether unimpeachable or otherwise must be assessed and weighed in relation to the welfare of the child in conjunction with all other factors relevant to that issue. This is the position adopted by Milvain C.J.T.D. in *McGee* v. *Waldern and Cunningham*. It is still questionable however whether this principle, which, in its original intention, was directed to disputes between

strangers and parents or whether the courts do not in fact consider the *prima facie* rights of the parents before proceeding to dispose of the case on the basis of the welfare of the child.

It is suggested in fact that even the House of Lords in *J.* v. *C.* did inquire into the conduct of the parents and reached the conclusion that the parents had so conducted themselves so that the court was justified in refusing to enforce their right to custody to the infant before coming to the conclusion that the welfare of the child demanded that the child remain in the custody of the foster parents.

It is suggested that the provisions of section 47 and the provisions of the *Custody of Infants Act* of 1891 are in fact still very much in evidence in any court proceedings involving a custody dispute between a parent and third party and that the only time in which the court truly disregards the rights of the natural parents is in those situations in which the parties are construed to be of equal status, i.e., equal guardians of the child.

> By canon law, by common law and by statute the natural parents are entitled to the custody of their minor children except where they are unsuitable persons to be entrusted with their care, control and education or where some special circumstances appear to render such custody inimical to the welfare of the infant only the most unusual circumstances does justify a court in refusing a parent custody of his child in favor of the third party, no matter how unselfish the

> latter's motives may be. It is one thing to determine sole custody *inter parentes* but to grant custody of a child to a person other than a parent presents a different problem.[146]

It is suggested that the decision of Rand J. in *Hepton* v. *Maat* is still applicable today and that notwithstanding serious inroads into the natural rights of the parents by the application of the test of the welfare of the child, the welfare of the child can never be determined as an isolated fact as if the child were free from natural parental bonds entailing moral responsibilities.

RECOMMENDATION #17

> *IT IS RECOMMENDED THAT THE PROVISIONS OF SECTION 47 SHOULD BE RETAINED IN OUR LEGISLATION TO ENSURE THAT THE RIGHTS OF THE NATURAL PARENT TO THE CUSTODY OF THE CHILD SHOULD BE RESPECTED UNLESS FOR GRAVE REASONS RESPECTING THE WELFARE OF THE CHILD THE COURT SEES FIT NOT TO GIVE EFFECT TO THE PARENT'S WISHES,[147] OR UNLESS GUARDIANSHIP PROCEEDINGS HAVE EXTENDED TO SOME THIRD PARTY EQUAL STATUS WITH THE PARENT.*

Section 47 in its present form places the onus on the third party to prove that the parent or other responsible person has either abandoned or deserted the infant

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[146](1936) 5 Wordham Law Review 618.

[147]*Re Mugford* [1970] 1 O.R. 601 at 609.

or has otherwise so connected himself that the court should refuse his right to custody.

The test still appears to be that misconduct or unmindfulness of parental duty or inability to provide for the welfare of the child must be shown before the natural right can be displaced. Where a parent is of blameless life and is willing and able to provide the child material and moral necessities in the rank and position to which the child by birth belongs, that is the rank and position of the parent, the court is judicially bound to act on what is equally a law of nature and of society and to hold (in the words of Lord Esher in *R.* v. *Gyngall*) that "the best place for a child is with its parent". The right is displaced in exceptional cases. Gibbons L.J. in the leading decision of *Re O'Hara*,[148] which has been described by the House of Lords as an enlightened case, held that situations such as those in the *Gyngall* case were exceptional situations which did justify the court in refusing to enforce the natural parental rights. It is suggested that had the mother in the recent case of *McGee* v. *Waldern and Cunningham* taken proceedings under section 47 of the *Domestic Relations Act* that the court in that case would have been satisfied that the situation was an exceptional case that would justify the court in refusing to enforce the natural parental rights.

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[148] [1900] 2 I.R. 232.

Section 48

Section 48 enables the court to order the parent to reimburse the third party for the costs incurred in bringing up the infant.

It is an acknowledged fact that in practice a third party who has any intention of retaining custody of a child and proceeding with an application for adoption is advised not to pursue the parent for maintenance of that child with the intention of subsequently proving that the parent had been unmindful of its parental responsibility in failing to support. There is no doubt that in many divorce situations in which the mother is awarded custody and has intentions of remarrying and applying with her new husband for the adoption of her infant children that she will choose not to request a maintenance order for that purpose. These same parents may choose not to make application to the Department of Health and Social Development under the *Social Development Act* for a social allowance on behalf of the child although according to the provisions of section 8 of that *Act*[149] they would be entitled to allowance regardless of their own financial means.

It must also be considered that if the court is to order a child to be returned to the custody of its natural parent and if the court is to make an order under section 48 of the *Act*, that the effect may well

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[149]R.S.A. 1970, c. 345.

be to jeopardise the welfare of the infant in that any payment which the parents were forced to make might diminish their powers of providing for the children.[150]

RECOMMENDATION #18

> *IN VIEW OF THE PRESENT WELFARE LEGISLATION AND POLICY ENABLING A THIRD PARTY WHO IS CARING FOR THE CHILD TO BE REIMBURSED OUT OF PUBLIC FUNDS AND IN VIEW OF THE FACT THAT THE THIRD PARTY MAY CHOOSE NOT TO SEEK FINANCIAL ASSISTANCE FOR THE SOLE PURPOSE OF PROVING ABANDONMENT OR DESERTION ON THE PART OF THE PARENT AND IN VIEW OF THE FACT THAT ANY ORDER UNDER THAT SECTION MAY SERIOUSLY INTERFERE WITH THE NATURAL PARENT'S ABILITY THEREAFTER TO PROVIDE FOR THE CHILD, IT IS RECOMMENDED THAT THIS SECTION BE REPEALED.*

RECOMMENDATION #19

> *THE SAME ARGUMENT MIGHT BE APPLIED TO SECTION 49(b) OF THE ACT. THAT SECTION SHOULD BE REPLACED BY THE SAME TEST WHICH IS APPLIED IN SECTION 47(b) OF THE ACT,*
>
> > *WHERE A PARENT OR OTHER RESPONSIBLE PERSON HAS OTHERWISE SO CONDUCTED THEMSELVES THAT THE COURT IS SATISFIED THAT THE PARENT OR OTHER RESPONSIBLE PERSON WAS UNMINDFUL OF HIS PARENTAL DUTIES.*
>
> *IT IS SUGGESTED THAT SUCH AN AMENDMENT WOULD ALLOW THE COURT TO CONSTRUE THAT*

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[150] *Re O'Hara, supra,* fn. 148 at p. 245.

THE PARENT'S FINANCIAL DESERTION OF HIS INFANT MAY AMOUNT TO SUCH CONDUCT AS WOULD JUSTIFY THE COURT IN REFUSING AN ORDER UNLESS SATISFIED THAT IT WOULD BE FOR THE WELFARE OF THE INFANT.

RECOMMENDATION #20

IN KEEPING WITH EARLIER RECOMMENDATIONS THAT ANY APPLICATION BY A THIRD PARTY TO OBTAIN CUSTODY OF THE INFANT SHOULD BE BY WAY OF GUARDIANSHIP PROCEEDINGS TO ENSURE THAT THE THIRD PARTY WOULD HAVE FULL LEGAL CONTROL OF THE CHILD AND WOULD BE ON AN EQUAL FOOTING WITH THE PARENT, IT IS RECOMMENDED THAT IN ANY SITUATION IN WHICH THE COURT IS SATISFIED THAT CIRCUM-STANCES WARRANT THE COURT'S REFUSAL OF AN APPLICATION BY A PARENT FOR THE CUSTODY OF A CHILD THE COURT SHOULD CONSIDER AN ORDER OF GUARDIANSHIP.

Such an order would ensure that the child would be given some legal security with the third party and would in all likelihood preclude necessity of applying for an order of adoption which is the present practice.

RECOMMENDATION #21

IT IS RECOMMENDED THAT IF THE COURT IS SATISFIED THAT THE PARENT OR OTHER RESPONSIBLE PERSON HAS ABANDONED OR DESERTED THE INFANT OR HA OTHERWISE SO CONDUCTED
SHOULD REFUSE TO ENFORCE HIS RIGHTS TO CUSTODY OF THE INFANT THAT THE COURT SHOULD BE EMPOWERED TO APPOINT THAT THIRD PARTY AS LEGAL GUARDIAN OF THE INFANT AND COMMIT THE CHILD TO THE CUSTODY OF THAT GUARDIAN.

Section 50

Section 50 of the *Act* dealing with the question of religion of the child who is left in the custody of some third party was an issue of grave importance at the time of the enactment of the *Custody of Infants Act* of 1891 and was the basis of decision such as *Re Agar-Ellis* and was recently considered by the House of Lords in the case of *J.* v. *C.* The section is a recognition of the principle that notwithstanding that the parent may not be entitled to exercise its right to custody of the child nevertheless the parent retains the right to control the upbringing of the child to the extent that the parent's wishes regarding the religion of the child will be respected. This provision in the statute may have been enacted in order to satisfy those parents who had proceeded with custody applications for the sole reason that their infant child was being brought up in a different faith than their own and as Lord Upjohn stated in *J.* v. *C.*

> It is a sad commentary on the attitude of some members of the Protestant and Roman Catholic faiths that in so many other reported cases over the last hundred years the real contest has been left to the religious upbringing of the infant and orders have been made with scant regard to the true welfare of the infant.

The question in the case of *J.* v. *C.* which the court had to determine regarding the religious faith of the infant was not based on any doctrinal bias in favour of one faith over the other but on the practical matter

of obtaining suitable general education as well as religious instruction and it was solely for the benefit of its general education that the change was proposed to be made.

It is suggested that in any situation in which the custody of an infant child is committed to someone other than the natural parent that many questions will remain to be determined jointly by the parent and new custodian or guardian as the case may be and that these questions will not be restricted to issues of religion only but will extend into the area of the infant's general education and will include such considerations as to whether consent should be given to the marriage of the infant and other related issues which may be quite distinct from the issue of custody.

If we are to accept the principle that an order of custody either in divorce cases or in cases involving the parent and third parties does not irrevocably deprive the other parent of all rights and duties then it is suggested that there should be provision in the legislation for the determination of other issues which may arise from time to time concerning the upbringing of the infant.

RECOMMENDATION #22

> *IT IS RECOMMENDED THAT THE PROVISIONS OF SECTION 50 SHOULD BE EXTENDED TO ENABLE THE COURT IN CUSTODY AND GUARDIANSHIP PROCEEDINGS, AND IN ORIGINAL APPLICATIONS FOR THAT PURPOSE TO MAKE DIRECTIONS REGARDING ANY MATTERS RELATING TO GUARDIANSHIP.*

At present the only means a parent who has been deprived of custody has of controlling the education or religion of his infant is by means of a custody application which is not the proper remedy in most situations.

The New Zealand *Guardianship Act* of 1968 contains the following provisions.

> 13. When more than one person is a guardian of a child, and they are unable to agree on any matter concerning the exercise of that guardianship, any of them may apply to the court for direction and the court may make such order relating to the matters which seem proper.

There is no doubt that within the terms of any provision of this nature the rules of equity must prevail and that although grave consideration would be given to the natural parents' wishes, if the court were satisfied that those wishes conflicted with the child's own best interests then those wishes must yield to the child's welfare. The Supreme Court of Canada has recognized the proposition enunciated by Lord Justice Fitzgibbon in the *O'Hara* case in that when the welfare of the child requires that the father's rights in respect to the religious faith in which his offspring is to be reared should be suspended or superceded the courts in the exercise of their equitable jurisdiction have powers to override those rights because they have power to override all other parental rights, though in doing so they must act cautiously. It was held in *Re J. M. Carroll*[151] that although the

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[151] [1930] All E.R. Rep. 192.

welfare of the infant was the first and paramount consideration for the court in deciding its question with respect to the custody or upbringing of the infant, nevertheless the court could not in the case of the child too young to have any views of his own disregard the desire of its parent unless that parent had so neglected his or her duty as no longer to deserve consideration. And in the case of *Re E (an infant)*[152] the court held that notwithstanding that wardship of the child was to be continued and the care and the control of the infant was given to third parties, nevertheless the wishes of the mother regarding the religion of the child were to be respected.

RECOMMENDATION #23

> *IT IS SUGGESTED THAT THIS TYPE OF APPLICATION SHOULD BE EXTENDED TO SITUATIONS IN WHICH THE PARENTS ARE NOT SEPARATED OR DIVORCED, BUT ARE NOT ABLE TO AGREE ON MATTERS OF GUARDIANSHIP.*

In Israel, the *Legal Competence and Guardianship Law* provides that in every matter of guardianship both parents have to act in agreement. There is a presumption that one parent has agreed to an act of the other until the contrary has been proven. Should the parents not agree on any matter subject to their guardianship, they may jointly apply to the court, which may, if it cannot get them to agree, either decide the matter itself, or direct which of the parents is to make the decision.

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[152] [1963] 3 All E.R. 874.

RECOMMENDATION #24

> *IT IS FURTHER RECOMMENDED THAT THE RIGHT TO APPLY TO THE COURT FOR SETTLEMENT OF A DISPUTE INVOLVING MATTERS OF GUARDIANSHIP OTHER THAN CUSTODY, SHOULD BE EXTENDED TO THE CHILD ITSELF.*

This procedure would respond to the growing demand that the child should be entitled to apply for judicial directions in its relations with its parents.[153]

Presumably the majority of these applications would originate from older children who may be prevented by their parents from exercising freedom of choice in matters such as their schooling, their right to marry, their right to work, their right to seek medical attention. It is suggested that in addition to any other order the court might make, the court should be given jurisdiction to suspend the *Age of Majority Act*[154] and order that the child shall thereupon attain his majority.

Section 52

Section 52 of the *Domestic Relations Act* presents some difficulty in that it provides that the rules of equity shall prevail only when they do not conflict with

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[153]"Children Have Rights" No. 4 NCCL Children's Committee.

[154]R.S.A. 1971, c. 1.

the provisions of the *Act*. This provision is unique in that other provincial statutes dealing with custody and guardianship simply provide that the rules of equity shall prevail in all matters of custody and education of infants. As has been previously discussed in this paper there is room for conflict between some of the provisions of this *Act* and the rules of equity. Although this provision may not be sufficient to displace the inherent equitable jurisdiction of the Supreme Court regardless of any such statutory provisions to the contrary, this section should be amended.

It might be questioned at this point whether a provision similar to that found in the English *Guardianship of Minors Act*, 1971, should be enacted. That *Act* provides in section 1

> Where in any proceedings before any court (whether or not a court as defined in section 15 of this *Act*)--
>
> (a) the custody or upbringing of a minor; or
>
> (b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof,
>
> is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

The New Zealand *Guardianship Act* of 1968 has gone further in providing in section 23:

> (1) In any proceedings where any matter relating to the custody or guardianship of or access to a child, or the administration of any property belonging to or held in trust for a child, or the application of the income thereof, is in question, the Court shall regard the welfare of the child as the first and paramount consideration. The Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child.
>
> (2) In any such proceedings the Court shall ascertain the wishes of the child, if the child is able to express them, and shall, subject to subsection (9) of section 19 of this Act, take account of them to such extent as the Court thinks fit, having regard to the age and maturity of the child.
>
> (3) Nothing in this section shall limit the provisions of section 64 and 64a of the Trustee Act 1956.

The Privy Council in *McKee* v. *McKee*[155] has established that the welfare and happiness of the infant is the paramount consideration in question for the custody to which all other considerations must yield.

It is suggested that in any custody proceedings between parties of equal status that there is no doubt

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[155] 1 All E.R. 942.

that the welfare of the child is the paramount consideration before the court. In the *McKee* case and *Kruger* v. *Brooker*[156] the court demonstrated that the welfare of the child was essentially the sole consideration before the court and that the conduct of the parties was relevant only insofar that it effected the welfare of the child.

However it is suggested that in guardianship or custody proceedings between a parent and a third party the welfare of the child is not the sole consideration before the court and that to extend the provisions of section 1 of the *Guardianship of Minors Act* to those disputes as was done by the House of Lords in *J.* v. *C.* and has been done by the New Zealand Legislature in the provisions of the *Guardianship Act* of 1968 and as Milvain J. has attempted to do in the case of *McGee* v. *Waldern and Cunningham* might seriously jeopardize the law of nature that the affection which springs from a relation between parent and child is stronger and more potent than any which springs from any other human relation.[157]

It is suggested that any reference to the paramountcy of the welfare of the child should be restricted to applications for custody which, in keeping with previous recommendations in this paper would be restricted to

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[156] 1962, S.C.A.

[157] *Chapsky* v. *Wood*, 1881, 26 Kan. 650.

applications between parties of equal status. But in the preliminary proceedings involving the guardianship of the infant the first, although not the paramount, consideration for the courts shall be the conduct of the parent and of any third party who applies to be appointed guardian. It is recommended that these provisions might take the following form:

RECOMMENDATION #25

> *(1) IN ANY PROCEEDINGS RELATING TO AN APPLICATION FOR THE APPOINTMENT OF OR REMOVAL OF A GUARDIAN OF AN INFANT, THE COURT SHALL DIRECT AN INQUIRY INTO THE CONDUCT OF THE NATURAL PARENTS OR ANY OTHER GUARDIAN OR ANY PROPOSED GUARDIAN TO THE EXTENT THAT SUCH CONDUCT RELATES TO THE WELFARE OF THE CHILD.*
>
> *(2) IN ANY PROCEEDINGS RELATING TO THE CUSTODY OF AN INFANT THE COURT SHALL REGARD THE WELFARE OF THE CHILD AS THE FIRST AND PARAMOUNT CONSIDERATION AND SHALL NOT TAKE INTO CONSIDERATION WHETHER THE CLAIM OF ANY PARTY TO THE PROCEEDINGS IN RESPECT OF THE CUSTODY OF THE INFANT IS SUPERIOR TO ANY OTHER PARTY.*

Section 52

Section 52 of the *Domestic Relations Act* may better be dealt with in either another statute or a separate Part in that this section may cause some confusion between the role of the guardian of the person of the infant and the role of the guardian of the estate. It may even be presumed from that section that each guardian of the person is also guardian of the estate.

The *Domestic Relations Act* of 1927 defined guardian as the guardian of both the estate and of the person of the infant. That provision has been repealed.

At common law a guardian of the person has no authority over the infant's property[158] although a testamentary guardian has been recognized as being guardian of both the person and the estate.[159] However, the natural guardian is guardian only of the person of the infant. The testamentary guardian had a right to receive the rent from profits of and manage the estate of the infant but neither the parent nor the testamentary guardian had any right to use that money or dispose of any property on behalf of the infant without the intervention of the court. Therefore although the testamentary guardian was the custodian of the person of the infant and the property of the estate, when it came to taking any action on the part of the infant, that action had to be expressly ratified by the courts and if not so ratified it was not binding upon the infant.[160]

In an action pursuant to the *Domestic Relations Act* of Alberta of 1927[161] which defined 'guardian' to mean

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[158] *Re Marquis of Salisbury* v. *Ecclesiastical Commissioners* (1876) 2 Ch. D. 28.

[159] *Duke of Beaufort* v. *Berty* (1721) 1 P.Wms. 703, at p. 704.

[160] *Re Shewin; Re Langley* [1927] 2 W.W.R. 609.

[161] R.S.A. 1927, c. 5.

both the guardian of the estate and the person of an infant, the court held that upon the death of the father of the infant the mother who was constituted a guardian by virtue of that *Act* was entitled to the management of the goods, chattels and personal estates of the infant and the authority in that respect was not limited, there there being nothing in the *Act* requiring the guardian to give any security. Clark J.A. of the Alberta Court of Appeal expressed the opinion that the omission in the *Act* requiring a parent who is constituted a guardian to give security for the proper management of the infant's estate was decided shocking to the courts which had always been extremely zealous to safeguard the property of the infant against improvident or dishonest guardians and the many risks which attend the management of such property.[162]

Subsequently, the present provisions of section 52 of the *Domestic Relations Act* were enacted requiring every guardian who purports to act as guardian of the estate, with the exception of the Public Trustee, to furnish such security as may be ordered by the court.

The effect of this provision is that any guardian of the infant must make application either for letters of guardianship under the *Surrogate Courts Act* for appointment as guardian of the estate, in which case he will be required to post a bond, or, by application under section 52 of the *Act* in which case he is also required to post

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[162] *Pulkrabek* v. *Pulkrabek* [1927] 3 W.W.R. 239.

a bond. The ultimate effect is that unless any guardian of the infant makes such an application, the Public Trustee is, for all intents and purposes, the only guardian authorized to deal with the estate of any infant in the province of Alberta. Section 7 of the *Public Trustee Act*[163] provides that any monies or estate to which an infant is entitled other than wages or salaries shall be in trust to the Public Trustee unless a guardian has been appointed by issue of letters of guardianship. The effect of that section clearly overrides the provisions of section 52 of the *Domestic Relations Act* in that section 52 makes no provision for the granting of letters of guardianship. The conclusion is that unless letters of guardianship are issued pursuant to the *Surrogate Court Act* the Public Trustee shall be guardian of the estate of every infant in the province. This provision is circumvented in practice by the appointment of an executor to act as trustee of the estate of the infant children of the testator in which case the trustee is governed by the provisions of the *Trustee Act*.[164] But even in those cases the Public Trustee is entitled to notice of any application made through a court in respect to the property or estate of an infant and when served with notice becomes guardian *ad litem* of the estate of the infant. The Public Trustee has the function of acting as the official or *ex officio* trustee of the property of any infant in the province although it has been held that

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[163] R.S.A. 1970, c. 301.

[164] R.S.A. 1970, c. 373.

the Public Trustee is not *ex officio* guardian of the person of infants nor is he vested with any of the responsibilities or obligations incidental thereto.[165]

It has been suggested that some of the confusion which pervades the theory of guardianship, particularly in relation to testamentary matters, might be alleviated by implementing a change in the terms applied, so as to permit the guardian of the estate to be known as the *trustee of the estate* and retaining the use of the term *guardian* as it pertains to the guardian of the person. This suggestion was made by Mr. Sandy Hogan of the office of the Public Trustee. It is suggested that such a change would clarify the position under wills in which the executor's name as trustee of the estate of the infant and some third party is named as guardian of the infant. In those cases in which the executor is not named as trustee of the estate, the Public Trustee would step in. This change in title would also remove any incongruity arising from the fact that the appointment of the guardian of the person of the infant is effective from the date of the death of the testator whereas the appointment of the guardian of the estate is only effective from the date of the issue of the letters of guardianship under the application under the *Surrogate Court Act*.

It is desirable to separate the two offices in fact if not in name, for the purpose referred to by the Alberta Court of Appeal in *Re Pulkrabek* which is to safeguard the properties of the infants against the

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[165] *Re Wilson Estate* (1955-56) 17 W.W.R. 348.

improvident or dishonest guardian and the many risks which attend the management of the property of the infant, and also for the converse reason that many testamentary guardians in the diligent attention to their duties of the guardian of the person of the infant are unwilling to encroach upon the infant's estate even to the extent of seeking reimbursement for the maintenance of the infant if this estate is under their care and control. However if the monies are being handled by some other party such as the trustee of the estate or the Public Trustee it is easier for the guardian to accept reimbursement in this regard.

RECOMMENDATION #26

> *IT IS SUGGESTED THAT THE RIGHTS AND DUTIES OF THE GUARDIAN AS SET OUT IN SECTION 52(2) OF THE DOMESTIC RELATIONS ACT SHOULD BE REPEALED.*

The Rules of Court make provision for the appointment of the next friend or appointment of guardian *ad litem*. If the provision relating to the guardianship of the estate of the infant is to be removed this subsection (c) would be redundant. Subsection (d), which appears to impose an obligation on the guardian rather than a right to the custody of the person of the infant, is a matter subject to the discretion of the court and is probably redundant.

It is interesting that the British *Mental Health Act*, 1959[166] which attempts to define the rights and

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[166] 7 & 8 Eliz. 2, c. 72.

and responsibilities of guardians appointed under that *Act* confer upon the guardian "all such powers as would be exerciseable by them or him . . . as if he were the father. . . ." The implication of that definition is that the rights and duties of the father or natural guardian are defined by custom and common law.

In conclusion, it is suggested that consideration be given to the enactment of a separate *Act* dealing exclusively with the guardianship of the person of the infant.

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