1980
Prof. R. Hopp

THE GUARDIANSHIP OF INFANTS' ESTATES

The subject of this working paper is the guardianship of infants' estates. It was suggested by Messrs. LaValley and Lisevich of the Office of the Public Trustee. Each of these gentlemen expressed the concern that our legislation and practice do not provide adequate safeguards for the infants who are affected by it. Given the nature of their work, this concern is perhaps understandable. Much of this paper will be devoted to a discussion of whether the concern is justified.

The paper will be divided into two parts. Part I will contain the relevant legislation and rules. Part II will contain certain modest recommendations for change.

The writer is aware of the dangers inherent in studying the question of infants' estates without also considering the related areas of trusts and the administration of estates generally.

PART I

Both the Court of Queen's Bench of Alberta and the Surrogate Court of Alberta have jurisdiction over all matters touching or relating to the estates of infants.

The Judicature Act (R.S.A. 1970, c. 193)

15. (1) For the administration of the laws for the time being in force within the Province, the Court possesses within the Province, in addition to any other jurisdiction, rights, powers, incidents, privileges and authorities that immediately before its organization were vested in or capable of being exercised within the Province by the Supreme Court of the North-West Territories, the jurisdiction that on the 15th day of July, 1870, was in England vested in

(a) the High Court of Chancery, as a Common Law Court, as well as a Court of Equity, including the jurisdiction of the Master of the Rolls, as a judge or master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court,

16. For the purpose of removing any doubt, but not so as to restrict the generality of section 15, it is declared that the Court has the like jurisdiction and powers that by the laws of England were, on the 15th day of July in the year 1870, possessed and exercised by the

Court of Chancery in England in respect of

(b) all matters relating to trusts, executors and administrators, partnerships and accounts, mortgages and awards, or to infants, idiots or lunatics and to the estate of infants, idiots or lunatics,

The Surrogate Courts Act (R.S.A. 1970, c. 357)

13. (1) In all matters or applications touching or relating to the appointment, control or removal of guardians, the security to be given, the custody, control of or right of access to an infant and otherwise, the surrogate court has the same powers, jurisdiction and authority as are given by The Judicature Act to the Supreme Court or a judge thereof.

(2) Letters of guardianship granted by a surrogate court have the same force and effect as if issued by the Supreme Court or a judge thereof, and an official certificate of the grant may be obtained as in the case of letters of administration.

(3) This sections shall not be construed as depriving the Supreme Court of jurisdiction in such cases.

(4) In matters of guardianship, a court has jurisdiction in respect of the person or property, or both, of an infant if the infant resides or has property within the territorial limits of the court.

21. (1) A judge of the Supreme Court or of the surrogate court may order that any business in a surrogate court be removed to the Supreme Court for determination if

(a) he considers it of such a nature and of such importance as to render it propert that it should be determined by the Supreme Court, and

(b) the amount in issue or value of the property in issue exceeds $3,500 in value.

(2) The judge making the order may impose such terms as to payment of or security for costs or otherwise as he considers just.

(3) The Supreme Court may determine and otherwise deal with the cause or proceeding in the same manner as any cause or proceeding originally commenced before it.

(4) The final order or judgment of the Supreme Court shall be transmitted together with all papers to the clerk in the judicial district from which the cause or proceeding was removed and upon being entered also becomes the judgment or order of the surrogate court.

For the purpose of this paper, it is not necessary to discuss appeal procedure or the changes made subsequent to 1970 by the consolidation of the district court and the abolition of the district and supreme courts.

In carrying out their functions, the Court of Queen's Bench of

Alberta and the Surrogate Court of Alberta are governed by the provisions in certain Acts and by certain rules of practice. The writer will discuss the acts and the rules under separate headings.

The Domestic Relations Act (R.S.A. 1970, c. 113)

Part 7 of The Domestic Relations Act provides for the constitution and appointment of guardians and for their removal under certain circumstances.

Under this Act, parents are the only persons constituted as guardians:

39. Unless otherwise ordered by the Court the father and mother of an infant are the joint guardians of their infant, and the mother of an illegitimate infant is the sole guardian of the illegitimate infant.

All other persons must be appointed as guardians in some way--either by the deed or will of a deceased parent or by the court:

40. (1) A parent of an infant may by deed or will appoint a person to be guardian of the infant after the death of such parent.

(2) The person appointed guardian of an infant shall act jointly with the other parent or with the guardian appointed by the other parent.

41. The Court may from time to time appoint a guardian of an infant to act jointly with the father or mother of the infant or with the guardian appointed by the deceased father or mother of the infant.

42. If upon the application of an infant, or of anyone on behalf of the infant, it appears.

(a) that the infant has no parent or lawful guardian, or

(b) that the parent or lawful guardian is not a fit and proper person to have the guardianship of the infant,

the Court may appoint a guardian or guardians of the infant.

There is no attempt in the Act to describe all of the circumstances in which a court may appoint a guardian, nor is there anything in the Act to require a testamentary guardian, one appointed by the deed or will of a deceased parent, to have his appointment confirmed by the court. In In re Infants Act; In re Pritchard [1930] 2 W.W.R. 112 (Sask. K.B.), it was held that the appointment of a testamentary guardian is effective

without probate of the will. For a similar case, see Gilliat v. Gilliat (1820) 3 Phill. Ecc. 222, 161 E.R. 1307. There are provisions governing the removal and resignation of testamentary guardians, however:

43. (1) Testamentary guardians and guardians appointed by order or letters of guardianship are removable by the Court for the same causes for which trustees are removable.

(2) A guardian referred to in subsection (1) by leave of the Court may resign his office on such terms and conditions as the Court deems just.

These provisions provide at least a limited protection for the infant.

Most of the provisions in Part 7 of the Act would seem to apply to guardians of all types: guardians of the person, guardians of the estate, and guardians of both the person and the estate. Indeed, there is only one section in which the difference between a guardian of the person and a guardian of the estate is recognized:

52. (1) Unless otherwise ordered by the Court, each guardian of the estate of an infant except where the guardian is the Public Trustee shall furnish such security, if any, as may be ordered by the Court.

(2) Except where the authority of a guardian appointed or constituted by virtue of this Act is otherwise limited, each guardian during the continuance of his guardianship

(a) may act for and on behalf of the infant,

(b) may appear in Court and prosecute or defend an action or proceedings in the name of the infant,

(c) after furnishing such security as the Court under this section requires, shall have the care and management of the estate of the infant, whether real or personal, and may receive any moneys due and payable to the infant and give a release in respect thereof, and

(d) shall have the custody of the person of the infant and the care of his education.

It would seem that, for the purposes of this Act at least, every guardian whether constituted or appointed by an individual or the court may serve as both guardian of the person and guardian of the estate of an infant unless his authority is otherwise limited or unless he neglects or refuses to provide the security required by the Court.

Such was plainly the intention of the legislature when it enacted The Domestic Relations Act, 1927. These sections appeared in that Act:

59. In this part [Part IX. Guardianship], unless the context otherwise requires--

(b) "Guardian" shall mean the guardian of the estate and person of an infant.

74. Subject to the provisions of this Act in respect thereto and except where the authority of a guardian appointed or constituted by virtue of this Act is otherwise limited, the guardian so appointed or constituted during the continuance of his guardianship shall be entitled to--

(a) the custody and control of the infant;

(b) control his education;

(c) the possession and control of the lands of the infant and the receipt of the rents and profits thereof;

(d) the management of the goods, chattels and personal estate of such infant;

(e) act for and on behalf of the infant;

(f) appear in any Court and prosecute and defend any action or proceedings in the infant's name.

There was no mention in The Domestic Relations Act, 1927 of any requirement on the part of the guardian to provide security. This situation was described, with some horror, by Clarke, J. A. in In re The Domestic Relations Act, 1927; In re Pulkabrek [1928] 3 W.W.R. 323 at 327:

> I am unable to find in the Act or elsewhere any provision authorizing the Court to require a parent who is constituted a guardian by virtue of the Act to give security for the proper management of the infant's estate, no such condition is imposed by the Act, the discovery of which omission must come as a decided shock to the Courts which have always been extremely zealous to safeguard the property of the infants against improvident or dishonest guardians and the many risks which attend the management of such property. It is a most serious and dangerous alteration of the law which hitherto existed.
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> But the Legislature is supreme and the Court can only give effect to the law as it finds it.

Clarke, J. A. was quite correct when he said that The Domestic Relations Act, 1927 changed the law which had hitherto existed. By section 26 of The Infants Act, R.S.A. 1922, c. 216, it was provided that the guardian would have the charge and management of the infant's estate when he had given such security, if any, as might be ordered by the court. What is important for present purposes, however, is to note that a guardian constituted by the Act was entitled as of right to become guardian of the estate.

In any event, the requirement of security was reintroduced in 1941 and has existed from that time until the present.

The only topic left to consider in this section is the question of how the authority of a guardian constituted or appointed under The Domestic Relations Act might be "otherwise limited". Apart from the requirement that he deposit security if he wishes to act as guardian of the estate, there is no limitation on the authority of the guardian imposed by The Domestic Relations Act. It is obvious that a limitation could be imposed on the testatmentary guardian's authority by the terms of the document appointing him. His authority might well be limited to acting as a guardian of the person. Similarly, a court might well appoint someone as guardian of the person without making him also guardian of the estate. However, for limitations on the authority of parents and on the authority of testamentary guardians appointed guardians of the estate only by the deeds or wills of deceased parents, we must look to a number of other Acts.

The Child Welfare Act (R.S.A. 1970, c. 45)

Section 31 of The Child Welfare Act certainly limits the authority of some guardians constituted or appointed under The Domestic Relations Act. It constitutes the Director of Child Welfare the sole guardian of the person or of the person and estate of an infant in certain circumstances.

31. (1) Notwithstanding The Domestic Relations Act, while an infant is a temporary ward of the Crown the Director is also a guardian of the person of the infant and may, to the exclusion of any other guardian, exercise all the rights of a guardian of the infant, except those that relate to adoption proceedings under Part 3.

(2) Notwithstanding The Domestic Relations Act, while an infant is a permanent ward of the Crown the Director is the sole legal guardian of the person and estate of the infant.

(3) Subsection (2) shall not be construed as affecting in any way any rights, duties or responsibilities of the Public Trustee with respect to any property held by him for or on behalf of an infant who is made a permanent ward of the Crown.

This section applies only to neglected children, as defined in 14. (e) of this Act. A neglected child may not be a temporary ward of the Crown for more than thirty-six continuous months (section 25. (2)). Thereafter, if it is in the interests of the child, the court has power to make him a permanent ward of the Crown until he attains the age of majority, until the order of wardship is terminated, or until he dies (sections 26 and 33).

One need not spend too much time considering The Child Welfare Act. It would affect relatively few cases, and the need for such provisions in those cases is obvious.

The Public Trustee Act (R.S.A. 1970, c. 301)

The same cannot be said with respect to certain of the provisions in The Public Trustee Act. One of them, section 7, would seem to affect the rights of every guardian constituted or appointed by an individual under The Domestic Relations Act. The relevant sections are as follows:

5. The Public Trustee may

(a) act as guardian ad litem of the estate of an infant,

(f) act as ~~guardian~~ trustee of the estate of an infant made a ward of the Crown under the provisions of The Child Welfare Act,

(h) where no person has been appointed guardian by the issue of letters of guardianship, act as guardian or custodian of the estate of an infant

(i) who has property vested in him, or

(ii) who is entitled either immediately or after an interval either

certainly or contingently to property under an intestacy or under a will, settlement, trust deed or in any other manner whatsoever;

6. (1) The Public Trustee shall be served with notice of each application made to a court in respect of the property or estate of an infant, missing person or convict.

(2) Such service on the Public Trustee may be made by delivering to the Public Trustee a copy of the statement of claim, originating notice, petition or other process originating the matter in which the application is made, together with copies of all affidavits and other material to be used on the application.

(3) The Public Trustee when served is guardian ad litem of the estate of the infant or trustee of the property of the missing person or convict, as the case may be, until the court otherwise orders.

(4) The Public Trustee or any other guardians appointed by the court for an infant shall take such proceedings as he deems necessary for the protection of the interests affected and shall attend actively to the interests affected and for that purpose shall communicate with the proper parties.

(5) No application referred to in subsection (1) shall be proceeded with until the Public Trustee is represented on the application or has expressed his intention of not being represented.

. . .

7. (1) Notwithstanding anything contained in any other Act, any money other than wages or salary and any property to which an infant is entitled under an intestacy or under a will, settlement, trust deed, or in any other manner whatsoever, and for whose estate no person has been appointed guardian by the issue of letters of guardianship, shall be paid or transferred to the Public Trustee.

(2) The Public Trustee shall account to the infant according to the provisions of the law, will or trust instrument, as the case may be.

The provisions in section 5 of The Public Trustee Act are clearly permissive. They simply allow the Public Trustee to act as guardian ad litem or as guardian of the estate of an infant for whom no person has been appointed guardian by issue of letters of guardianship without constituting the Public Trustee either guardian ad litem of the estate in all cases or guardian of the estates of all infants for whom no guardian has been appointed by the court.

Section 6, however, makes the Public Trustee guardian ad litem of the estate of the infant unless the court otherwise orders. How can section 6 be rationalized with these provisions from The Domestic

Relations Act which have been quoted above:

52. (1) Except where the authority of a guardian appointed or constituted by virtue of this Act is otherwise limited, each guardian during the continuance of his guardianship

(a) may act for and on behalf of the infant,

(b) may appear in Court and prosecute or defend an action or proceedings in the name of the infant . . .?

The answer may lie in the tentative (if that is the correct word) nature of the rights given in 52. (1) (a) and (b) of The Domestic Relations Act. The guardian constituted or appointed under The Domestic Relations Act may act for the infant if the court so orders. Otherwise, the Public Trustee shall be the guardian ad litem. The Public Trustee shall act as guardian ad litem pursuant to section 6. (3) of The Public Trustee Act unless the court otherwise orders. While the various provisions concerning guardians ad litem can be understood if read together, it is somewhat disconcerting to be required to refer to two Acts to determine the law on a simple point.

No discussion of guardians ad litem would be complete without mention of two of the Rules of Court. They are included here merely for the sake of completeness:

59. (1) An infant may defend by his guardian unless he has a guardian ad litem, in which case he may defend by the guardian ad litem.

(2) The court may appoint a guardian ad litem whenever it appears to be in the interests of an infant.

63. Where an infant or person of unsound mind has been served with notice of a judgment or order and is not represented the court may appoint a guardian ad litem for him.

Neither of these rules requires the court to appoint a guardian ad litem in all cases or to appoint the infant's guardian or the Public Trustee guardian ad litem in any particular case. The court would seem empowered to appoint anyone it chooses, having regard to the interests of the infant.

Section 7 of The Public Trustee Act causes more problems than sections five and six together. It requires every person to pay all

money (except wages and salary) and all other property to which the infant is presently entitled to be paid or transferred to The Public Trustee unless the court has appointed a guardian of the estate. Section 7 does not refer to money or to property which will vest at some future time or upon the happening of some contingent event but section 5. (h) (ii) authorizes the Public Trustee to act as guardian of the estate of an infant entitled to such property unless some person has been appointed guardian of the infant's estate by the issue of letters of guardianship. There are cases in which such property must be paid or transferred to the Public Trustee.

Section 7 of The Public Trustee Act undoubtedly prevails over section 52. (2) (c) of The Domestic Relations Act which has been quoted above because of these words: "Notwithstanding anything contained in any other Act". Section 7 and to a lesser extent section 5. (h) (ii) take from every guardian constituted or appointed by an individual under The Domestic Relations Act the right to act as guardian of an estate of an infant. This being the case, one can only wonder why the legislature has failed to amend The Domestic Relations Act. The reality in Alberta would seem to be that only the Public Trustee or a guardian appointed by the court can serve as a guardian of an infant's estate.

To this point, we have considered only those provisions which take from some guardians constituted or appointed under The Domestic Relations Act the right to act as guardians of the estate of an infant. There are also a number of general provisions in other Acts which dictate what a guardian of an estate may do. These will be discussed under certain general headings.

The Provision of Security

As we have seen, section 52. (2) of The Domestic Relations Act requires every guardian except the Public Trustee to furnish such

security as the court requires before assuming the care and management of an infant's estate. The Domestic Relations Act, however, does not tell us anything about the nature of the security which is usually required.

Certain provisions in The Administration of Estates Act are more helpful in this regard:

2. In this Act,

(e) "grant" means

(iv) a grant of letters of guardianship of the person or estate, or both, of an infant,

6. (1) Except where otherwise provided by this or any other Act, or by the Rules, no grant shall issue unless the applicant has given a bond in accordance with the Rules with at least two sureties in double the aggregate value of the estat.

(3) Before the issue of a grant a judge may, subject to the Rules, dispense with a bond, reduce the amount of the bond, permit a bond to be given with one surety or accept other security in lieu of a bond.

(4) No clerk and no solicitor for an applicant shall become a surety of a bond given under this Act.

The Rules are the Surrogate Court Rules. They prescribe the form of the bond, the requirements which a surety must fulfill, and the circumstances in which a court may dispense with the giving of a bond.

23. (1) The bond to be given pursuant to section 6 of The Administration of Estates Act shall be in one of Forms 22 to 24 as may be appropriate or to like effect with affidavits of execution and justification to the satisfaction of the court, which may require the personal attendance of the sureties before it for examination.

(2) In lieu of a personal bond with two sureties, the court may accept the bond of an insurer licenced under The Alberta Insurance Act to undertake guarantee insurance as defined in that Act, in which case the amount of the bond need be only for the aggregate value of the estate and no affidavit of justification is required.

(3) In an affidavit of justification the value of the property of which any surety claims to be possessed shall be determined after deducting debts he may owe, the value of his statutory exemptions from seizure and any other sum for which he is already surety.

(4) A personal surety shall

(a) be 18 years of age,

(b) be resident in Alberta, and

(c) have real or personal property in Alberta exigible to the amount of the bond.

24. (1) On an application to dispense with giving a bond as provided by section 6 of The Administration of Estates Act, the person applying may file an affidavit either by himself or by some person having knowledge of the affairs of the deceased, stating

(a) that so far as can be ascertained there are no debts for which the estate is, or may be, liable, or

(b) that adequate provision has been made for the payment of any unpaid debts for which the estate is, or may be, liable

and setting out clearly the sources of information available to the deponent and the inquiries which have been made to ascertain the fact.

(2) The judge hearing the application may require the applicant to provide such further and other conditions upon the applicant as to the judge seems necessary or appropriate in the circumstances.

(3) Notwithstanding the provisions of subrules (1) and (2) hereof, the judge hearing the application may, in his discretion, with or without conditions, dispense with the giving of a bond.

One should also look at section 34 of The Administration of Estates Act which allows a court to alter the security after a guardian has been appointed.

34. After the issue of a grant, a judge may, subject to the Rules, permit a bond to be given in a reduced amount or with one surety, accept other security in lieu of the bond give, require the furnishing of other or additional security, cancel a bond and discharge sureties or order the return of any security.

The same Act permits any person interested in the estate of an infant with leave of the court to institute proceedings in his own name on the bond.

35. (1) Any person interested in the estate of a deceased person or an infant may with leave of the court institute proceedings in his own name on a bond without an assignment thereof to him.

(2) The proceedings on the bond shall be made by originating notice of motion and if the judge hearing the motion is satisfied that the condition of the bond has been broken, the person who instituted the proceedings shall recover thereon as trustee for all persons interested in the full amount recoverable in respect of any breach of the condition of the bond.

From the point of view of safeguarding the infant's estate against loss, the provisions quoted in this section have certain defects.

In the first place, it may be very difficult to find responsible men of substance willing to act as sureties. If satisfactory sureties can be found, their suitability must of necessity be judged as at the time letters of guardianship are issued. The really crucial time, however, is the time at which they must make good their undertaking, and by that time they and their property may no longer be in the jurisdiction. The problem may be solved to some degree by permitting the bond to be given by an insurer but this would seem to be an alternative form of security only and one which is used in the exceptional rather than the normal case. Further, in a time of rampant inflation, a bond given by an insurer in the aggregate value of the estate may be inadequate at the time the loss is discovered.

There are two points which are perhaps of even greater concern. First, the court has the power to dispense with a bond either unconditionally or upon conditions. One would think that it could seldom, if ever, be in the interest of an infant for the court to waive the requirement of a bond. A possible exception would occur in a case where the estate is very small. Second, even where a bond with or without sureties is required, there is no guarantee in the event of a loss that either the bondsman or the sureties will be called upon to make good his or their undertakings. That will depend on whether there is a person with knowledge willing to take action on behalf of the infant. There is every possibility that no such person will be available.

The Duty to Account

There is a duty imposed on the guardian of an estate to account to the court whenever he is ordered to do so either at the instance of the court or on the application of some person interested in the estate including a surety. This requirement appears in several places in the legislation and in the Rules.

These sections appear in The Administration of Estates Act:

2. In this Act,

(g) "legal representative" means an executor, an administrator, a judicial trustee of the estate of a deceased person or a guardian of the person or estate, or both, of an infant;

47. (1) The legal representative shall make an accounting before the court of his administration of the estate whenever he is ordered to do so by the court, either at the instance of the court or on the application of a person interested in the estate, a creditor or a surety for the due administration of the estate.

(2) A legal representative may at any time apply to the court to make an accounting of his administration of the estate before the court.

49. (1) The court, on passing the accounts of the legal representative of an estate, may

(a) enter into and make full inquiry and accounting of and concernint the whole property that the deceased or infant was or is possessed of or entitled to, and the administration and disbursement thereof, including the calling in of creditors and adjudicating upon their claims, and for that purpose may take evidence and decide all disputed matters arising in the accounting, and

(b) inquire into and adjudicate upon a complaint or claim by a person interested in the taking of the accounts, of misconduct, neglect or default on the part of the legal representative, and the court, on proof of the claim, may order that the legal representative be charged with such sum by way of damages or otherwise as it considers just, in the same manner as if he had received the sum

(2) The court may order the trial of an issue of any complaint or claim under subsection (1), clause (b), and may make all necessary directions therefor.

(3) Where accounts submitted to the court are intricate or complicated and, in the opinion of the court, require expert investigation, the court may appoint an accountant or other skilled person to investigate and to assist it in auditing the accounts, and the costs thereof shall be borne by the estate or by such person as the court directs.

50. Upon the final passing of accounts, the court may order any bond to be cancelled and the sureties discharged or order the return of any security, and may

(a) order that an administrator or guardian be discharged,

These sections appear in The Trustee Act (R.S.A. 1970, c. 373):

2. In this Act, "trustee" includes

(a) an executor, an administrator, or a guardian of the estate of any person,

14. (2) Where a trustee after having commenced to act and before having

fully discharged and performed the trusts and powers reposed in him desires to be discharged from such trusts and powers reposed in him,

(a) the trustee may make application to the Supreme Court [now the Court of Queen's Bench of Alberta] or a surrogate court or a judge thereof for an order passing the accounts of the trust to the date of the application and discharging him from his trust and appointing a new trustee in his stead, and

(b) the court or judge on the hearing of such application and after the passing of the accounts, may make an order discharging the applicant, and

(i) appointing as trustee any fit and proper person nominated for the purpose in the application, or

(ii) if not satisfied of the fitness of the person so nominated, appointing an official of the court or other competent person as trustee,

whereup the trustee desiring to be discharged shall be discharged from the trust

(2) Where on such an application it appears to the satisfaction of the court or judge that it is fit and proper to do so, the court of judge may order that the trustee be discharged from the trust without any new trustee being appointed in his place, but the court or judge may in any such case require the passing of accounts.

These provisions appear in the Surrogate Rules:

35. (1) Every application for the passing of accounts shall be commenced by filing with the clerk of the court in the judicial district where the grant was made a statement and account of his administration and exhibit an inventory verified under oath in Form 31.

(2) The inventory and accounts may as nearly as is expedient, reasonable and applicable comprise the following particulars:

(a) a schedule showing in detail all assets;

(b) a schedule showing in detail all liabilities;

(c) an account of all money received

(i) on account of capital, and

(ii) on account of revenue;

(d) an account of all money disbursed or property disposed of

(i) on account of capital, and

(ii) on account of revenue;

(e) a schedule showing all real and personal property remaining on hand;

(f) a schedule showing any liabilities unpaid;

(g) a reconciliation account (where necessary) showing in a summarized form the items necessary to ballance the net value of the estate at the commencement of the period with the net value at the end;

(h) a statement of compensation claimed by the applicant having regard to the care, pains, trouble and time expended;

(i) such other accounts as the circumstances may require or as the judge may direct.

(3) Where the principal and income are dealt with separately by the will or instrument creating any trust estate, the accounts shall be divided so as to show separately receipts and disbursements in respect of principal and income, and in every other case the amounts may be so divided if the accounts or principal and income have been kept separate.

(4) Items in the accounts shall be numbered consecutiviely and items of receipts of money or property shall show:

(a) the date of the receipt;

(b) the name of the person from whom received;

(c) on what account received; and

(d) the amount or value thereof.

(5) Items of disbursement or disposition of money or property shall show:

(a) the date thereof;

(b) to whom paid or disposed of;

(c) on what account disbursed;

(d) the amount or value thereof; and

(e) the disposition made of the particular asset, with a cross-reference to the entry in the account.

36. (1) The accounting party having deposited the inventory and accounts stated shall within a reasonable time apply either to the judge of the district from which the grant issued or to the clerk of that district or to such other person to whom the judge may have referred the accounts for audit for

(a) an appointment of a time and place at which to proceed with the examination, consideration and audit of the accounts, and

(b) directions respecting the parties to be served with the appointment and with a copy of the accounts.

(2) In all cases in which an infant is interested a copy of the inventory and accounts and of the appointment shall be served upon the guardian of the estate of the infant if one has been appointed by grant of guardianship,

otherwise upon the Public Trustee and on any committee representing the person.

(3) In all cases in which a missing person or a mentally incompetent person is interested a copy of the inventory and accounts and of the appointment shall be served on the Public Trustee and on any committee representing the person.

(4) Persons interested in the passing or audit of such accounts shall if resident within Alberta be entitled to not less than seven days' notice thereof and if resident out of Alberta to such notice as the judge, clerk of the court or auditing officer directs.

(5) Directions respecting the vouching of receipts and disbursements or respecting any other matter arising during the audit shall be given by the judge, clerk of the court or auditing officer from time to time as required, but vouchers for items $10 or under or for items presumably of a usual or routine or similar character may be dispensed with.

38. (1) Upon the completion of the audit, if before the clerk of the court or before any other designated person other than the judge, the clerk of the court or other person shall in writing report to the judge and thereupon in such cases and in all cases in which the audit has been made by the judge himself the accounting party or any party interested may after notice (satisfactory to the judge) to all interested parties apply to the judge for an order allowing and passing the accounts in whole or in part.

(2) The judge may

(a) confirm in whole or in part or vary or amend or refer back the report to the clerk of the court or other auditing officer, giving such further directions as appear necessary;

(b) decide any matters still in dispute or direct any issue respecting them;

(c) fix and give directions respecting remuneration and compensation to any executor, administrator, guardian or tustee;

(d) direct payment of debts or charges, determine beneficiaries and their several interests and direct distribution;

(e) direct the substitution for or reduction of any bond;

(f) direct payment to the Public Trustee of any moneys to which an infant, missing person or person outside Alberta is entitled;

(g) direct payment to the Public Trustee or to a committee of any moneys to which a mentally incompetent person is entitled;

(h) allow and direct payment of costs and generally dispose of all matters incidental to the administration down to a date to be stated in the order.

39. (1) A judge may order the dispensing of an accounting with a view to saving expense to the estate in any case where the judge is satisfied that an accounting would not advance the interests of the estate or of any

person interested therein and is generally regarded by the judge as unnecessary.

(2) Wen an accounting is dispensed with the judge may fix the remuneration of the executor, administrator, trustee or guardian and may make any order or give any direction which he could make or give upon the hearing of an application to pass accounts.

(3) Any party interested in an estate or administration thereof as beneficiary or creditor or as surety under any administration, guardianship or executor's bond may apply to a judge on seven days' clear notice to the executor, administrator, guardian or trustee (or on such notice and to such person as the judge may direct) for an order calling upon the executor, administrator, guardian or trustee to exhibit and deposit with the clerk of the court an inventory of the estate under administration and an account under oath of the administration by the executor, administrator, guardian or trustee and to proceed to have it audited, passed and allowed.

(4) The judge hearing the application may grant or refuse it in whole or in part, with or without costs or with or without conditions and in his discretion

(a) may direct the payment of costs of any party of and incidental to the application and accounting either in whole or in part by the applicant or by the executor, administrator, guardian or trustee personally, or

(b) may direct payment of the costs of any or all the parties out of the estate

and may in any case fix the amount of the costs or any part of them and may direct taxation and payment thereof.

All of the provisions quoted in this section have to do with the guardian's duty to account before he is discharged from the responsibilities and trusts imposed upon him. They are calculated to protect the infant's estate from loss and to assure that any irregularity is discovered. The sections apply to all executors, administrators, trustees and guardians.

It is interesting to note that a judge may appoint an official of the court or other competent person as trustee to replace a trustee who is retiring and is not required to appoint that person's nominee; that the Public Trustee is entitled to receive notice of all applications to account with respect to estates in which infants are interested; and that a judge may direct moneys to which an infant is entitled to be paid to the Public Trustee. All of these provisions would seem to afford protection to the infant, and the last two are in accord with sections 6

and 7 of The Public Trustee Act.

However, there is nothing in the provisions quoted to assure that an accounting will be made in all cases. Our courts are not self-activating. It is unlikely that a court would on its own initiative order a guardian to account. It will, of course, do so if there is an application made by an interested party, but it is not difficult to conceive of circumstances in which the only interested party--the infant--is ignorant of the existence of the estate or reluctant because of his relationship to the guardian to bring an application. This state of affairs is especially apt to exist when the sureties are private individuals who are related to or friendly with the guardian. There is also the other problem mentioned in the section dealing with bonds. The guardian, the sureties, the infant, and the infant's estate may not remain in the jurisdiction of the court before which any accounting has to be made.

Some of these problems could be avoided if the legislature were to give some public official the responsibility of supervising the administration of all guardians appointed by the court and the right to require all such guardians to account to him at regualar intervals. If a guardian refused or neglected to account or if his account were unsatisfactory, the public official could refer the matter to the court on behalf of the infant. The existence of such a public official would also assure that an infant became aware of the fact that he is entitled to an estate. Even this recommendation would not solve the problems created by the absconding guardian.

Limitation on Investments

There are provisions in The Trustee Act intended to assure that an estate will not be reduced or lost because of foolish or unwise investment by a guardian. All guardians (although not all trustees) are bound by these provisions. It is beyond the scope of this paper to consider whether

the list of permitted investments should be altered, expanded or abridged. It is also beyond the scope of this paper to consider whether, in an age of rampant inflation, it is in the interest of an infant to limit his guardian, however talented he may be, to investments which produce a relatively low income.

The relevant sections in The Trustee Act are as follows:

2. In this Act, "trustee" includes

(a) an executor, an administrator, or a guardian of the estate of any person

5. A trustee may invest any trust money in his hands, if the investment is in all other respects reasonable and proper, in any of the following:

(a) securities of the Government of Canada, the government of any province of Canada, any municipal corporation in any province of Canada, the Government of the United Kingdom or the Government of the United States of America;

(b) securities, the payment of the principal and interest of which is guaranteed by the Government of Canada, the government of any province of Canada, any municipal corporation in any province of Canada, the Government of the United Kingdom or the Government of the United States of America;

(c) debentures issued by a school division, school district or hospital district in the Province that are secured by or payable out of rates or taxes;

(d) bonds, debentures or other evidences of indebtedness of a corporation that are secured by the assignment to a trustee of payments that the Government of Canada or the government of any province of Canada has agreed to make, if such payments are sufficient

(i) to meet the interest on all such bonds, debentures or other evidences of indebtedness outstanding as it falls due, and

(ii) to meet the principal amount of all such bonds, debentures or other evidences of indebtedness upon maturity;

(e) bonds, debentures or other evidences of indebtedness

(i) of a corporation incorporated under the laws of Canada or any province of Canada that has earned and paid

(A) a dividend in each of the five years immediately preceding the date of investment at least equal to the specified annual rate upon all of its preferred shares, or

(B) a dividend in each year of a period of five years ended less than one year before the date of investment upon its common

shares of at least 4 per cent of the average value at which the shares were carried in the capital stock account of the corporation during the year in which the dividend was paid,

and

(ii) that are fully secured by a first mortgage, charge or hypothec to a trustee upon any, or upon any combination of the following assets,

(A) improved real estate, or

(B) the plant or equipment of a corporation that is used in the transaction of its business, or

(C) bonds, debentures or other evidence of indebtedness or shares of a class or classes authorized by this section;

(f) guaranteed investment certificates or receipts of an approved corporation registered as a trust company under The Trust Companies Act;

(g) investment contracts within the meaning of The Investment Contracts Act issued by an approved corporation that is registered as an issuer under that Act;

(h) bonds or debentures of an approved corporation;

(i) preferred shares of any corporation incorporated under the laws of Canada or of a province of Canada that has earned and paid

(i) a dividend in each of the five years immediatedly preceding the date of investment at least equal to the specified annual rate upon all of its preferred shares, or

(ii) a dividend in each year of a period of five years ended less than one year before the date of investment upon its common shares of at least 4 per cent of the average value at which the shares were carried in the capital stock account of the corporation during the year in which the dividend was paid;

(j) fully paid common shares of a corporation incorporated in Canada or the United States of America that during a period of five years that ended less than one year before the date of investment has either

(i) paid a dividend in each such year upon its common shares, or

(ii) had earnings in each such year available for the payment of a dividend upon its common shares,

of at least 4 per cent of the average value at which the shares were carried in the capital stock account of the corporation during the year in which the dividend was paid or in which the corporation had earnings available for the payment of dividends, as the case may be;

(k) notes or deposit receipts of chartered banks;

(l) securities issued or guaranteed by the International Bank for

Reconstruction and Development established by the Agreement for an International Bank for Reconstruction and Development, approved by the Bretton Woods Agreements Act, 1945 (Canada), but only if the bonds, debentures or other securities are payable in the currency of Canada, the United Kingdom, any member of the British Commonwealth or the United States of America;

(m) first mortgages, charges or hypothecs upon improved real estate in Canada, but only if

(i) the loan does not exceed three-quarters of the value of the property at the time of the loan as established by a report as to the value of the property made by a person whom the trustee reasonably believed to be a competent valuator, instructed and employed independently of any owner of the property, or

(ii) the loan is an insured loan under the National Housing Act, 1954 (Canada).

6. (1) In determining market values of securities a trustee may rely upon published market quotations of a recognized stock exchange in Canada or the United States of America.

(2) No corporation that is a trustee shall invest trust money in its own securities or lend money on the security of its own securities.

(3) In the case of an investment under section 5, clause (3), the inclusion, as additional security under the mortgages, charges or hypothecs, of any ther assets not of a class authorized by this Act as investments does not render the bonds, debentures or other evidences of indebtedness ineligible as an investment.

(4) No investment may be made under section 5, clause (e), (h) or (i) that would at the time of making the investment cause the aggregate market value of the investments made under those clauses to exceed 35 per cent of the market value at that time of the whole trust estate.

(5) Investments made by the testator or settlor and retained by the trustee under the authority of the trust instrument and that come within any of the classes authorized by section 5, clause (e), (h) or (i) may, notwithstanding subsection (4), be retained by hin under the authority of the trust instrument.

(6) No sale or other liquidation of any investment made under section 5, clause (e), (h) or (i) is required solely because of any change in the ration between the market value of such investments and the market value of the whole trust estate.

(7) In case of investment under section 5, clause (i) or (j), not more than 30 per cent of the total issue of shares of any corporation may be purchased for any trust.

(8) No investment shall be made under section 5, clause (j) that, at the time of making the investment, would cause the aggregate market value of the common shares held for any particular trust fund to exceed 15 per cent of the market value of that trust fund at that time.

(9) No sale or other liquidation of common shares is required under this section solely because of any change in the ratio between the market value of those shares and the market value of the whole trust fund.

7. In addition the investments authorized by section 5 or by the trust instrument (except where that instrument expressly prohibits such investment), a trustee may invest funds in such other securities as the Supreme Court of Alberta or a judge thereof upon application in any particular case approves as fit and proper, but nothing in this section relieves the trustee of his duty to take reasonable and proper care with respect to the investments so authorized.

8. A trustee may, pending the investment of any trust money, deposit it during such time as is reasonable in the circumstances in any bank or treasury branch or in any approved corporation expressly empowered by statute to accept moneys for deposit.

9. (1) Except in the case of a security that cannot be registered, a trustee who invests in securities shall require the securities to be registered in his name as the trustee for the particular trust for which the securities are held, and the securities may be transferred only on the books of the corporation in his name as trustee for such trust estate.

(2) This section does not apply where the trustee is a trust company registered under The Trust Companies Act.

10. (1) The powers conferred by this Act relating to trustee investments are in addition to the powers conferred by the instrument, if any, creating the trust.

(2) Nothing in this Act relating to trustee investments authorizes a trustee to do any thing that he is in express terms forbidden to do or to omit to do any thing that he is in express terms directed to do by the instrument creating the trust.

11. (1) A trustee in his discretion may

(a) call in any trust funds invested in securities other than those authorized by this Act and invest the same in securities authorized by this Act, and

(b) vary any investments authorized by this Act.

(2) No trustee is liable for any breach of trust by reason only of his continuing to hold an investment that since the acquisition thereof by the trustee has ceased to be one authorized by the instrument of trust or by this Act.

(3) Where a trustee has improperly advanced trust money on a mortgage that would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced, the security shall be deemed to be an authorized investment for such less sum and the trustee is only liable to make good the amount advanced in excess thereof with interest.

12. (1) Where a trustee holds securities of a corporation in which he has properly invested money under this Act, he may concur in any compromise, scheme or arrangement

(a) for the reconstruction of the corporation or for the winding-up or sale or distribution of its assets, or

(b) for the sale of all or any part of the property and undertaking of the corporation to another corporation, or

(c) for the amalgamation of the corporation with another corporation, or

(d) for the release, modification or variation of any rights, privileges or liabilities attached to the securities or any of them, or

(e) whereby

(i) all or a majority of the shares, stock, bonds, debentures an other securities of the corporation, or of any class thereof, are to be exchanged for shares, stock, bond debentures or other securities of another corporation, and

(ii) the trustee is to accept the shares, stock, bonds, debentures or other securities of the other corporation allotted to him pursuant to the compromise, scheme or arrangement,

in like manner as if he were entitled to the securities beneficially, and may, if the securities are in all other respects reasonable and proper investments, accept any securities of any denomination or description of the reconstructed or purchasing or new corporation in lieu of or in exchange for all or any of the original securities.

(2) A trustee is not responsible for any loss occasioned by any act or thing done in good faith under subsection (1), and he may, if the securities accepted thereunder are in all other respects reasonable and proper investments, retain them for any period for which he could have properly retained the original securities.

13. (1) Where any conditional or preferential right to subscribe for any securities in any company is offered to trustees in respect of any holding in the company, they may, as to all or any of the securities,

(a) exercise such right and apply capital money subject to the trust in payment of the consideration, or renounce the right, or

(b) assign for the best consideration that can be reasonably obtained the benefit of such right, or the title thereto, to any person, including any beneficiary under the trust,

without being responsible for any loss occasioned by any act or thing so done by them in good faith.

(2) Notwithstanding subsection (1), the consideration for any such assignment shall be held as capital money of the trust.

(3) The powers conferred by this section may only be exercised with the consent of any person whose consent to a change of investment is required by law, or by the instrument, if any, creating the trust.

It has been mentioned that all guardians are required to invest in the type of investments specified in The Trustee Act. This statement deserves some further explanation in view of the fact that some testamentary guardians may have been given broader powers by the deed or will appointing them. These guardians, as we have seen, are not entitled to receive money or property to which investments are entitled unless they have been appointed guardians by issue of letters of guardianship. If they do not obtain such appointments, section 7 of The Public Trustee Act requires the money or property to be paid or transferred to the Public Trustee. If they do obtain letters of guardianship, their authority flows from these documents and not from the deeds or wills of deceased parents. While the court is authorized to approve other types of investment upon the application of a trustee if it deems it fit and proper to do so, the authority given in section 7 of The Trustee Act would seem limited to approving specific investments.

There is one other comment which should be made with respect to the guardian's powers to invest. The provisions in The Trustee Act would certainly govern the conduct of the honest knowledgeable guardian. But there is nothing in the Act to assure that the improper investments made by a dishonest or incompetent trustee will ever come to the attention of the court. There is certainly no provision for the periodic review of the guardian's investments. There is no guarantee that anyone, including the infant concerned, will ever learn about such investments.

The Need to Secure the Infant's Consent

Certain provisions in the law require an infant to consent to conduct by his guardian or by the court. In the first place, an infant of 14 years of age or more must consent before the court will appoint a guardian for him. This requirement is found is found in 34. (1) of the Surrogate Rules:

34. (1) Every application for letters of guardianship shall be accompanied by the consent of such of the infants as are 14 years of age or over. . .

In terms, this rule applies to all persons wishing to become guardians of the person, guardians of the estate, or guardians of the person and estate of the infant. The rules do not say what will happen if no consent is given. Presumably, no guardian will be appointed and, insofar as the infant's estate is concerned, all property and money will be transferred or paid to the Public Trustee pursuant to section 7 of The Public Trustee Act.

The Infants Act (R.S.A. 1970, c.185)

Section 3 of The Infants Act requires the infant to consent to the sale of an interest in real estate if he is of the age of fourteen years of age or upwards unless the court otherwise directs or allows.

It has been suggested that changes in the law and changes in the rate of maturation of young people ~~has~~ have made the age of fourteen unrealistic and that the approval of much younger children should be sought before appointing a guardian or permitting the disposal of an interest in real estate. On the one hand, the age of majority has been reduced to eighteen from twenty-one years of age; on the other, young people seem to remain with their parents and others for longer today than before because of the educational opportunities available to them today. If pressed for an answer to this problem, the writer would prefer that no change be made in the present law.

The Need for Securing the Approval of the Court or Public Trustee

There are at least three Acts which require the person charged with the management of an infant's property to secure the approval of the court or Public Trustee before disposing of certain assets. The first of these Acts is The Devolution of Real Property Act (R.S.A. 1970, c. 109):

2. In this Act,

(c) "personal representative" means the executor, original or by representa-

tion, or administrator for the time being of a deceased person.

12. (1) No sale [of an interest in real property], where an infant is valid without the written consent or approval of the Public Trustee, or, in the absence of that consent or approval, without an order of the Court.

(2) A sale of real property made with the consent or approval of the Public Trustee or the Court under this section is binding on the infant interested therein.

13. (1) Subject to the provisions of this section, the personal representative may grant an option to purchase real property in any case where he is empowered to sell that real property, if the period within which the option may be xercised is not longer than one year from the date on which the instrument granting the option is executed.

(2) A grant by the personal representative of an option to purchase real property is invalid unless he obtains

(b) any order of the Court under section 11, subsection (2) or section 12, or

(c) any consent of the Public Trustee under section 12,

that he would be required to obtain if the granting of the option to purchase the real property were instead the sale of that real property.

(3) A concurrence, order, consent or approval to the granting of an option to purchase real property referred to in subsection (2) when made or given extends also to any sale of that property made upon the exercise of the option and in accordance with the instrument granting the option.

(4) Where a grant by a personal representative of an option to purchase real property is approved by an order of the Court, the grant is valid as respects the contingent interests and interests not yet vested, and is binding upon the mentally incompetent person, non-concurring persons and beneficiaries not yet ascertained and infants.

. . .

14. The personal representative may,

(a) with the concurrence of the adult persons beneficially interested, and

(b) if any infant or dependent adult is beneficially interested then, with the approval of the Public Trustee or the trustee of the estate of the dependent adult under The Dependent Adults Act, as the case may be,

divide or partition and convey the real property of the deceased person, or any part thereof, to or among the persons beneficially interested.

It is extremely doubtful whether the sections quoted from The Devolution of Real Property Act apply directly to guardians at all--having regard to the title of the Act and the definition of a personal representative as the executor or administrator of a deceased person. They are of indirect

relevance, however. It is to be noted that the consents must come from the Public Trustee or court, and the guardian, if any, of the infant's estate is not mentioned at all. This omission is one which we would not expect to find after reading the provisions of The Domestic Relations Act.

The Trustee Act

The Trustee Act requires a trustee to secure the approval of the court if he wishes to sell trust property, real or personal, to provide maintenance for an infant beneficiary:

33. (1) Where

(a) any property either real or personal is held by trustees in trust for an infant either absolutely or contingently on his attaining the age of 21 years or on the occurrence of any event prior to his attaining that age, and

(b) the income arising from the property is insufficient for the maintenance and education of the infant,

the trustees by leave of a judge of the Supreme Court, to be obtained in a summary manner, may sell and dispose of any portion of such real or personal property and pay the whole or any part of the money arising from the sale to the guardians, if any, of the infant or otherwise apply it for or towards the maintenance or education of the infant.

(2) Where the whole of the money arising from the sale of the real or personal property is not immediately required for the maintenance and education of the infant then the trustees

(a) shall invest the surplus moneys and the resulting income therefrom from time to time in proper securities,

(b) shall apply such moneys and the proceeds thereof from time to time for the education and maintenance of the infant, and

(c) shall hold all the residue of the moneys and interest thereon not required for the education and maintenance of the infant for the benefit of the person who ultimately becomes entitled to the property from which such moneys and interest arise.

This section of The Trustee Act does not apply specifically to guardians of the estates of infants. Indeed, it seems to contemplate a situation in which there may be guardians to which part or all of the proceeds of the sale may be paid. These guardians, it is submitted, could be guardians of the person, estate or both. What is important for our purposes is that the trustee and the court are not required to consult

with or secure the approval of the guardians of the estates of infants in the event that there are such guardians. Further, if the trustee described in section 33. (1) of The Trustee Act is holding property in trust for the infant absolutely, it would seem that he should pay or transfer this property to the Public Trustee pursuant to the provisions contained in section 7 of The Public Trustee Act:

7. (1) Notwithstanding anything contained in any other Act, any money other than wages or salary and any property to which an infant is entitled under an intestacy or under a will, settlement, trust deed, or in any other manner whatsoever, and for whose estate no person has been appointed guardian by the issue of letters of guardianship, shall be paid or transferred to the Public Trustee.

(2) The Public Trustee shall account to the infant according to the provisions of the law, will or trust instrument, as the case may be.

(Emphasis added.)

If the writer is correct, there is a conflict between The Trustee Act and The Public Trustee Act which should be resolved.

The Public Trustee Act

Even the Public Trustee is required by section 8 of The Public Trustee Act to secure the approval of the court to the disposition of property in certain circumstances.

8. (1) Where an infant is entitled to share in the estate of an intestate and the share has been paid to the Public Trustee as guardian of the estate of the infant or for the benefit of the infant, or where the property is held by the Public Trustee as trustee for an infant and such property is not subject to the terms of a will, trust deed or other instrument governing the trust, the Public Trustee, may

(a) if the share or property of the infant does not exceed in value the sum of $10,000,

(i) from time to time expend, or advance to a person who has the lawful custody of the infant, such sum or sums as the Public Trustee deems necessary for or towards the maintenance and education of the infant, and

(ii) for the purpose of subclause (i) resort to capital and sell or convert any of the real or personal property held on behalf of the infant,

or

(b) if the share or property of the infant exceeds in value the

sum of $10,000,

(i) apply the income from the share or property for the maintenance or education of the infant, and

(ii) from time to time apply to a judge of the Supreme Court on summary application for an order authorizing him to expend, or to advance to a person having the lawful custody of the infant, so much of the share or property for the maintenance and education of the infant as the judge deems proper.

(2) Upon the making of an order under subsection (1), clause (b), subclause (ii) the court, for the purpose of making the payments or advances authorized by the order, may authorize the sale or conversion of any of the real or personal property held by the Public Trustee on behalf of the infant.

The power of the Public Trustee to sell certain property without judge's order is not simply limited by the dollar value of that property. The Public Trustee, like all trustees, must abide by the terms of the document creating that trust unless he has those terms varied or revoked by the court. Section 37 of The Trustee Act empowers the court to vary or revoke trusts upon application.

37. (1) Where property, real or personal, is held on trusts arising before or after the coming into force of this section under an will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of,

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancey or other incapacity is incapable of assenting, or

(b) any person, whether ascertained or not, who may become entitled, directly or indirctly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, or

(c) any person unborn, or

(d) any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined,

any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

(2) The court shall not approve an arrangement on behalf of any person coming within subsection (1), clause (a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person.

One cannot take exception to the safeguards provided to protect infants and others from the foolish sale of valuable assets. But there are times when it is necessary to sell to provide for the maintenance and education of the infant. It is only right that his resources be used for that purpose. His protection lies in the fact that in almost all cases the court must approve the sale or the variation of the trusts governing the guardian or other trustee.

The Requirement of Judicial Approval of Settlements

The court must approve certain settlements made by or on behalf of infants. The relevant provisions are found in The Infants Act.

11. (1) Every female infant of the age of 17 years upon or in contemplation of her marriage may, with the sanction of the Supreme Court, make a valid and binding settlement or contract for a settlement, of all or any part of her property over which she has a power of appointment, whether real or personal and whether in possession, reversion, remainder or expectancy.

(2) Every conveyance, appointment and assignment of such property or contract to make a conveyance, appointment or assignment thereof, executed by the infant, with the approbation of the Court, for the purpose of giving effect to the settlement, is as valid and effectual as if the person executing the same were of the full age of eighteen years.

(3) This section does not extend to a power that is expressly declared not to be exercised by an infant.

12. (1) The sanction of the Court to any such settlement or contract for a settlement may without the institution of an action be given upon the application of her guardian.

(4) Where there is no guardian of the infant to make the application, the Court

(a) may, if it thinks fit, require a guardian to be appointed, and

(b) may require that any person interested or appearing to be interested in the property be served with notice of the application.

15. (1) Except where otherwise provided in this Act the surrogate court referred to in this Act is the surrogate court having jurisdiction in the judicial district in which the infants or any or either of them reside.

(2) The powers conferred by this Act on the Supreme Court may be exercised

by a judge of the Supreme Court in Chambers.

16. (1) Where an action is maintainable on behalf of an infant in respect of an injury to the infant and the guardian, parent or next friend of the infant acting on behalf of the infant has, either before or after the commencement of an action, agreed on a settlement of the claim or action with the person against whom the claim is made or action brought, the guardian, parent or next friend of the infant or the person against whom the claim or action is made or brought may, on ten days' notice to the opposite party and to the Public Trustee, apply, by originating notice or notice of motion, as the case may require, to a judge of the Supreme Court sitting in chambers or a judge of the Surrogate Court for an order confirming the settlement.

(2) Notwithstanding subsection (1), where the amount agreed on as settlement of the claim or action is one thousand dollars or less the application may be brought before a judge of the surrogate court.

(3) Where on the application it appears to the judge that the settlement is in the best interests of the infant, the judge may confirm the settlement.

(4) Where a settlement is confirmed, the person against whom the claim is made or action brought is ipso facto discharged from all further claims arising out of or in respect of the injury to the infant.

(5) On the application for a confirmation of a settlement, the judge may order that the money from the settlement be paid to the guardian where letters of guardianship have been issued, or to the public Trustee under The Public Trustee Act.

The wisdom of requiring the court's approval in each of these cases is apparent. A very young girl about to be married may not be in a position to judge the merits of any disposition of her property she proposes to make because of that marriage. Those entrusted with advancing a claim on behalf of an infant who has suffered personal injuries may lack knowledge or may be too eager to settle. Requiring the court to give its approval before there can be a settlement binding on the infant assures to some degree at least that the settlement will be reasonable. It also allows the court to take steps to assure that the settlement money is available for the infant when he attains the age of majority by directing that the money be paid to the Public Trustee or to a guardian appointed by the issue of letters of guardianship. This last requirement is in accord with section 7 of The Public Trustee Act.

There is one further topic which can be handled conveniently under this section. It concerns the payment of insurance moneys to an infant. This section appears in The Alberta Insurance Act (R.S.A. 1970, c. 187):

278. (1) Where an insurer admits liabilty for insurance money payable to a minor and there is no person capable of giving and authorized to give a discharge therefor, who is willing to do so, the insurer may at any time after 30 days from the date of the happening of the event upon which the insurance money becomes payable pay the money, less the applicable costs mentioned in subsection (2), into court to the credit of the minor.

(2) The insurer may retain out of the insurance money for costs incurred upon payment into court under subsection (1) the sum of $10 where the amount does not exceed $1,000,and the sum of $15 in other cases, and payment of the remainder of the money into court discharges the insurer.

(3) No order is necessary for payment into court under subsection (1) but the clerk of the court or other proper officer shall receive the money upon the insurer filing with him an affidavit showing the amount payable and the name, date of birth and residence of the minor, and upon such payment being made the insurer shall forthwith notify the Public Trustee and deliver to him a copy of the Affidavit.

This section applies only to policies of life insurance. Having regard to section 7 of The Public Trustee Act, one would think that the only person who could give the insurer a valid release would be the Public Trustee or a guardian of the estate of the infant appointed by the issue of letters of guardianship. Of these, the only one who should be reluctant to give a discharge would be the guardian with letters of administration. Section 7 also requires any money to which an infant is entitled (including the proceeds from a policy) to be paid to one of these two parties.

The Personal Liability of the Guardian

No review of the legislation concerning guardians would be complete without mentioning some of the sanctions against dishonest or negligent guardians. In one sense, the existence of such sanctions affords some protection to an infant, but before they can have this effect the breach must be discovered.

The sanctions appear in The Trustee Act and in The Criminal Code (R.S.A. 1970, c. C-34).

The Trustee Act

2. In this Act, "trustee" includes

(a) an executor, an administrator, or a guardian of the estate of any person,

25. A trustee is chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and is answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default, and may reimburse himself or pay or discharge out of the trust property all expenses incurred in or about the execution of his trust or powers.

26. Where a trustee has committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary the court may, if it thinks fit, and notwithstanding that the beneficiary is a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

36. If in any proceeding affecting trustees or trust property it appears to the court

(a) that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or might be personally liable for any breach, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but

(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain he directions of the court in the matter in which he committed such breach,

then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

38. (1) Any trustee may apply in court or in chambers in the manner prescribed by rules of court for the opinon, advice or direction of a judge of the Supreme Court or a district court on any question respecting the management or administration of the trust property.

(2) The trustee acting upon the opinion, advice or direction given by the judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in respect of the subject matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or dirction aforesaid if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction.

In Maguire v. Maguire and Toronto Gen.Trusts Corpn., 50 O.L.R. 162, 64 D.L.R. 204, it was held that a guardian is in the position of a trustee, and he is equally and similarly liable for breach of trust. In Alberta, it would seem that a court will, before imposing such liability on a guardian, consider whether he acted honestly and reasonably. In that event and in the event that he has sought and honestly followed the opinion, advice and direction of the court, he will be relieved either wholly or partly from personal liability for any breach of his trust. No civil remedy will avail, however, if the guardian has no means of his own from which to satisfy a judgment against him.

The criminal law may be used to punish one who has acted fraudulently whether or not he has means to satisfy a judgment. These sections appear in The Criminal Code:

2. In this Act

"trustee" means a person who is declared by any Act to be a trustee or is, by the law of the province, a trustee, and without restricting the generality of the foregoing, includes a trustee on an express trust created by dee, will or instrument in writing, or by parol;

296. Every one who, being a trustee of anything for the use or benefit, whether in whole or in part, of another person, or for a public or charitable purpose, converts, with intent to defraud and in violation of his trust, that thing or any part of it to a use that is not authorized by the trust is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Both the severity of the maximum punishment and the decisions in some recent cases indicate just how severely the courts will deal with a person in criminal breach of his trust. Such a breach, however, must come to the attention of the authorities, and it would appear that there is no way provided in our legislation to assure that a guardian who deliberately breaches his trust will be exposed.

Part II

The writer is aware of the manifold pitfalls which await one daring enough to make recommendations for changing an existing area

area of the law. All legislation, at least all good legislation, is presumably the product of an attempt to balance certain conflicting interests present in society at the time. In the area of guardianship of infants' estates, those interests would seem to be (1) the rights of parents and those appointed by parents and (2) the need to protect infants from loss or, more broadly, (1) the freedom of the individual and (2) the duty of the state. Any change may affect a very delicate balance.

A second pitfall always is present for one who would deal with a given area of the law in isolation from all other areas. Today, a guardian of an estate is treated much like other trustees. To change the law with respect to guardians while leaving that regarding ordinary trustees, executors and administrators unchanged is to destroy such symmetry as exists and to introduce more uncertainty and complication into the law.

Notwithstanding these pitfalls and others which have not been mentioned, the writer will make certain recommendations for change.

The first of these recommendations is that there should be only one Act or one part of an Act dealing with guardians of all kinds. At the present time, there are at least three Acts which purport to deal with the constitution or appointment of guardians of the estates of infants. The first of these Acts is The Domestic Relations Act. Upon reading part ~~section~~ 7 of this Act, one gets the impression that parents and testamentary guardians appointed by deed or will, along with those persons appointed by the court by issue of letters of guardianship, may serve as guardians of the estate simply by furnishing such security as may be required by the Court. Nothing could be further from the case. They have this right only if it is not otherwise limited. The authority of parents and of testamentary guardians is not only limited but is completely removed by the second of the Acts that have been mentioned. Section 7 of The Public Trustee

Act requires anyone holding money or property to which an infant is presently entitled to pay or transfer that money or property to the Public Trustee unless a guardian of the estate of the infant has been appointed by the court. Section 7 of The Public Trustee Act has effect "notwithstanding anything contained in The Domestic Relations Act". So does The Child Welfare Act which constitutes the Director of Child Welfare guardian of the person and estate of an infant during the period of permanent wardship. This Act specifically does not affect the rights, duties or responsibilities of the Public Trustee with respect to any property held by him for and on behalf of the infant nor, seemingly, the duty of persons with money or property belonging to the infant to pay or transfer that property to the Public Trustee. The provisions in The Child Welfare Act are of obvious advantage to a child who, by definition, is neglected. They also have the somewhat questionable advantage of allowing the Director of Child Welfare to reimburse himself for the cost of maintaining the child out of the estate during the period of wardship. This would seem preferable to simply giving the Director the right to right to recover maintenance expenses out of the infant's estate, but the writer has reached no firm conclusion on this point.

The conflict between the expectations created by the provisions of The Domestic Relations Act and the destruction of those expectations by The Public Trustee could be ended if the legislature chose to limit the authority given parents and testamentary guardians under The Domestic Relations Act to the authority to act as guardians of the person only unless they obtained letters of guardianship from the court. Some further improvement could be made to The Domestic Relations Act if the legislature chose to include a section listing the priorities of the various people with claims to become guardians of the estate. But such changes would, in the opinion of the writer, be of minimal importance.

They would certainly do nothing to end the possibilities of abuse that exist under the present legislation. Our laws are calculated to safeguard the infant and to protect the guardian of his estate. There are a number of provisions which require the furnishing of security and the passing of accounts. There is a very lengthy section in The Trustee Act which describes the type of investments a guardian is allowed to make on behalf of an infant. But nowhere in any of the Acts mentioned in this paper is a single provision which guarantees that the security will be available when needed, that a guardian will in fact account, or that a guardian will limit himself to trustee investments. Honest, competent guardians will, of course, govern themselves accordingly, but for these men no rules are required at all. But what of their dishonest or incompetent fellows? Will the security which they are able to provide, assuming that it is by way of surety or sureties only, be available if needed? Will they account unless called upon to do so in an application brought by an interested party? Will the infant or any other person concerned even know about the existence of an estate and the right to bring an application? What is there to prevent the guardian from making improper investments or even from absconding from the jurisdiction with the infant and the infant's estate? Throughout this paper, the writer has attempted to show how the protection afforded by the court for the infant depends on the honesty of the guardian involved and/or on the existence of people willing to become involved on the infant's behalf. There is simply no way to legislate these conditions into existence.

It follows that any change to the present law has to be radical if, as the writer assumes, the only legitimate interest we may have is the protection of the infant. That radical change can be made in two ways.

The first is the one which the writer prefers. It is also

the one which is least likely to be accepted. This writer would make the Public Trustee or some other public official the guardian of the estates of all infants. This is not the drastic change which it might seem. Indeed, at the present time, the only ones who can act in this capacity are the Public Trustee and those who have applied for and obtained letters of guardianship. Can any legitimate interest be served by allowing the court rather than the legislature to determine who shall act as guardian of the estate of an infant? If the court appoints a guardian, there is always a danger that the infant will suffer an irreparable loss. There is no such danger if the legislature appoints a government official.

It has been said to the writer on many occasions that legislation such as that proposed here not only constitutes an unwarranted interference by the government in the affairs of private citizens but will also weaken or further weaken the ties which bind the family together. The reasons given for this assertion are not altogether convincing. The qualities of a good parent are not necessarily the qualities of a good guardian and trustee. Indeed, one of the persons most vocal in his opposition to the proposal, pointed out the alleged moral duty on the part of the infant not to see his siblings in want. He would allow a parent to use money belonging to one infant for the benefit of others. This is perhaps an understandable reaction on the part of a parent who sees one infant in need and another with resources which could put an end to that need. It is not a reaction that can be understood or forgiven on the part of the trustee. An estate is entrusted to such a one for the purpose of preserving it for the beneficiary.

It has also been said that some parents, especially businessmen or those knowledgeable about finance, are peculiarly fitted to manage their children's estates. The reasons why this should be so are not easy to determine when a guardian by the law presently in force is required to confine himself to making investments of a specified type. Then, it is

said and with more justification that the cost to the estate will be less if parents or those appointed by parents are allowed to act as guardians. Parents are, of course, less apt to charge for their services, but all guardians are entitled to do so, and the charge of the Public Trustee or other official is justified because of the greater protection that will be afforded the infant. There would also be no need to provide security which, in certain forms, is very expensive.

We are now face to face with the difficulties which the writer mentioned at the beginning of the section. There is a need to balance competing claims: those of the child to be protected and those of the parents. If the writer is correct in his assumption that the interests of the child is paramount, then the legislature should complete what it has already begun to do by making a government official the guardian of the estates of all infants save those for whom guardians have been appointed by the court.

The second difficulty must also be confronted. By making the change suggested in the preceding paragraphs, we will make the law concerning the guardianship of infants' estates much different from the law concerning other trusts. This is also a problem when reform is approached on a piece-meal basis. There is a justification for a difference in the law, however. In at least some of the other cases, the trust is in favour of adults who should be more able to look after themselves than infants.

If the change suggested is found unacceptable, there is a possible compromise available. Maintain the present system under which the Public Trustee and persons appointed by the courts may act as guardians of the estates of infants with these changes:

(1) Authorize the Public Trustee to supervise the conduct of the appointed guardian,

(2) Authorize and require the Public Trustee to obtain an accounting at such intervals as he deems fit and to report any neglect or failure

to account or any serious irregularities to the court,

(3) Require every guardian to furnish security in the form of a bond payable to the court provided by an insurer licenced to provide guarantee insurance under The Alberta Insurance Act.

The implementation of these recommendations would assure that the estate of the infant was safeguarded and recognize the claims of parents and those appointed by parents. The writer is not sure whether this system would not be perceived to be a greater interference with the rights of private individuals than the more radical change recommended earlier. Both recommendations would perhaps involve the expenditure of more money than is required to be spent at the present time. The need for periodic accounting would increase the expense. Insurance companies would, it is suspected, require rather healthy premiums before undertaking the risk of guaranteeing fidelity on the part of guardians, especially if they were asked to provide bonds in some multiple of the value of the estates involved as would seem necessary in an age marked by inflation. In some cases, it is conceivable that no insurer would be willing to provide security for a particular guardian but in such cases it might be wise not to appoint such a person at all. The advantages of the alternative proposal--both to the infant and his guardian--would seem, in the writer's opinion at least, to outweigh the disadavantages. If the alternative proposal were accepted, the Public Trustee would continue to act on behalf of those infants for whom no guardian was appointed by the court.

The writer is aware that he has not considered some issues concerning the guardianship of infants' estates. These issues include the following:

(1) The age and the circumstances under which the consent of the infant should be required before a guardian of his property is appointed;

(2) The circumstances under which the consent of the infant should be required before certain property is sold;

(3) The circumstance and the means by which a guardian of an estate should be discharged and a new guardian appointed;

(4) The effect which adoption or change in the custody of an infant should have on an existing guardian of the estate;

(5) The circumstances, if any, in which a guardian of the estate should be permitted to invest estate money in other than the investments approved under The Trustee Act;

(6) The effect, if any, which changes in the law concerning guardianship of estates should have on the administration of estates generally.

Part of the reason for neglecting these issues was the lack on the part of the writer of any settled conviction about them. The other and more significant part is the fact that at least some of them would become irrelevant if the major recommendations contained in this paper were implemented.

Ronald G. Hopp

Note: For convenience, I have used the Revised Statutes of Alberta 1970. Since 1970, certain small amendments have been made to some of the Acts to which I have referred. Where these amendments affected the issues being discussed, I included them in the text. There are places in which they have not been included.