

Custody and Guardianship

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At one spot in my website, I say this:

"Because of certain complicated legal principles involving things like the doctrine of paramountcy, the following combinations of custody and guardianship are available:

1. joint custody and joint guardianship;
2. sole custody and joint guardianship; and,
3. sole custody and sole guardianship.

It is not possible for the parties to have joint custody while one parent is the child's sole guardian."

My off-hand reference to "complicated legal principles" has proven unsatisfactory to many, including a lot of lawyers. Let me explain.

Custody

At one point, in 1857 to be exact, the law only talked about the children of separated parents in terms of custody and access. The first law on divorce, the English *Divorce and Matrimonial Causes Act*, disposed of the care and control of children in one short paragraph about custody and access... unlike today's *Divorce Act* and *Family Relations Act*, which seem to spend pages on the subject.

The *Divorce and Matrimonial Causes Act* was just one of the English laws that were brought into the Colony of British Columbia in 1858 by the proclamation of Governor Sir James Douglas. Since British Columbia didn't join Canada until after Confederation in 1867, British Columbia managed to keep its own *Divorce and Matrimonial Causes Act* on the books for another hundred years, despite the division of powers in ss. 91 and 92 of the *Constitution Act* which assigns the power to legislate on divorce exclusively to the federal government.

Canada received the English law as well of course, and it remains on the books today, although much amended, as the *Divorce Act*. The *Divorce Act* still only talks about custody and access.

Guardianship

British Columbia first passed a law on guardianship in the late 1880s, in the *Apprentices and Minors Act*. That law dealt with the obligations masters had to provide the necessities of life to the apprentices in their charge. Essentially, it

talked about the parent-like rights and obligations masters had in respect of the minor children who were their apprentices.

(To be clear, guardianship had been known to the common law for hundreds of years. This was the first piece of legislation on the subject.)

If the clock was stopped here, things would've been fairly clear. Custody would mean the parental rights and obligations exercised by *parents* and guardianship would mean the parent-like rights and obligations exercised by *people who aren't parents*.

Guardianship crept into the family law arena however when the provisions of the *Apprentices and Minors Act* were moved into the *Infants Act*, which mostly had to do with children's ability to enter into binding contracts, and later into the *Equal Guardianship of Infants Act*. (The "equal" in the title of this last act meant that women could apply for guardianship as well as men.)

The Family Relations Act

Things got a bit confused in British Columbia when the provincial government passed the *Family Relations Act* in 1972. The new act bundled together a bunch of provincial legislation on different family law issues in one convenient package, repealing the provincial *Divorce and Matrimonial Causes Act* along the way, and stuck the rules about custody right beside the rules about guardianship. The problem, from a lawyer's perspective at least, is that the new law didn't distinguish between custody and guardianship, much less explain them, and said that "any person," not just parents, could apply for custody and that "any person," not just non-parents, could apply for guardianship.

In order to accommodate the *Divorce Act*, s. 27(4) of the *Family Relations Act* provides that a *Divorce Act* order for custody is deemed to include an order for guardianship.

(Interestingly, BC is one of the few provinces to talk about both custody, guardianship and access in its family law legislation; most provinces just talk about custody and access.)

The Doctrine of Paramountcy

The doctrine of paramountcy is a constitutional principle which says that where the federal government and a provincial government have both passed a law on the same subject, the federal government's law takes priority and the provincial law is invalid to the extent that it is inconsistent with the federal law. This comes into our discussion because both the federal government and the provincial government have passed laws about custody, although only the province has a law about guardianship.

The federal government has the authority to pass laws about children and divorce because of its authority under s. 91 of the *Constitution Act, 1867* to make laws about divorce and matters corollary to divorce.

The provincial government has the authority to pass laws about children and separation because of its authority under s. 92 of the *Constitution Act, 1867* to make laws about property, civil rights and other matters of a private nature.

Conclusion

The meaning of "custody" under the *Divorce Act* contains everything that has to do with the care and control of children following separation. This must be the case because the *Divorce Act* only talks about custody, and "custody" must therefore be exhaustive of parents' rights and obligations in respect of their children following separation. A *Divorce Act* order for custody must include whatever a *Family Relations Act* order about guardianship means; to put it another way, guardianship and custody under the *Family Relations Act* cannot together mean anything more than what is meant by custody under the *Divorce Act*.

The provincial government might decide to divide parental rights and obligations into custody and guardianship if it wishes, but however the province chooses to divide these rights and obligations, an order for custody under the federal *Divorce Act* says it all... and it says it all ultimately because of the doctrine of paramountcy. The *Divorce Act* wins. Whatever guardianship might mean, it *must* be included within the *Divorce Act's* idea of custody.

As a result of all this, you can't have an order for joint custody along with an order that gives sole guardianship to one of those parents; joint custody must include joint guardianship, and even if it didn't, assigning sole guardianship to one parent would violate the paramountcy doctrine by allowing a provincial law, the law that talks about guardianship, to take precedence over a federal law, the law that only talks about custody. Things might be better if the orders were made only under the *Family Relations Act* since the paramountcy doctrine wouldn't be invoked, but you'd still run into the problem of guardianship's subordination within the larger concept of custody.