What Custody and Guardianship Really Mean

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It's difficult to tell the difference between the rights and duties custody involves from the rights and duties associated with guardianship. This confusion is aggravated because the *Divorce Act* only talks about custody, but the *Family Relations Act* talks about both custody and guardianship, and because we get a lot of misleading information about these issues from the media. The explanation, however, involves a history lesson.

The first law on divorce was the UK *Divorce and Matrimonial Causes Act*, passed in 1857, which became part of the laws of British Columbia as a result of the proclamation of governor Sir James Douglas on 19 November 1858. The *Divorce and Matrimonial Causes Act* disposed of the whole issue about children in one sentence, and gave the court the authority to make an order about custody at the time it was making an order about divorce, if it thought the custody order was appropriate.

So far, we're still talking about a concept everyone will understand. Custody, within the meaning of the first *Divorce Act*, describes the *right* of a parent to direct his or her child's life and make decisions about education, health care, moral instruction, sports activities and so forth, as well as the *duty* of a parent to provide his or her child with the necessities of life and an education.

Guardianship was first discussed in legislation in British Columbia's *Apprentices and Minors Act*, passed at some point in the late 1880s. This law discussed the *duty* of masters to provide the apprenticed children in their care with the necessities of life and an education, and the *right* of masters to benefit from the child's labour and make decisions about the child's education, health care and so on. Later on, these basic provisions about guardianship were moved into the *Infants Act* and, by 1930, into the *Equal Guardianship of Infants Act*.

Guardianship under these laws concerns the rights and duties people have in respect of the children who are in their care. These rights and duties are exactly the rights and duties that parents have; the difference is that these rights and duties are being exercised by someone who isn't a parent. In other words, guardianship is about the parental rights and duties exercised by non-parents.

So far, this still makes a lot of sense, especially when you think about the sort of people who might be guardians today: the person you might ask to care for your children in the event of your death, or the people with whom children are placed when they have been seized from their parents by the government.

Problems started cropping up in 1972 when the provincial government decided to dump all of the laws about separated families into a single piece of legislation,

the *Family Relations Act*. In this new law, custody and guardianship were discussed side by side, and the law now said that "any person" (not just parents) could apply for custody, and that "any person" (not just non-parents) could apply for guardianship. Since parents could now apply for both custody and guardianship, parents did apply for both custody and guardianship and it became difficult to differentiate between the rights and duties included in "custody" and the rights and duties included in "guardianship."

The best that could be said was that "guardianship" now contained the nuts and bolts of *parenting*: the right to say where the child went to school, the right to direct the course of the child's medical treatment, the right to say where the child would live, the right to say what the child would wear to school and the right to get information from the child's doctors, teachers and coaches. "Custody" suggested a bundle of rights sort of like *ownership*, in the sense of having the right to possess the child by having the child's primary home.

Things got even worse as time went on, however, because the courts began to award joint custody without requiring parents to share their children's time equally or even near-equally. I, for example, represent parents who live all over the world but have joint custody of children who live here in British Columbia. None of these parents see their children more frequently than once or twice per month, and most see their children only once or twice per year, yet they all have joint custody of their children.

As a result of this evolution in the law, there is no connection at all between the amount of time a parent has with a child and the likelihood of that parent having joint custody or sole custody of the child, or no custodial rights at all. "Joint custody" now really only means that a parent is at least an okay sort of parent, and that he or she gets along relatively well with the other parent. That's about it.

Since so much significance was now lost in the distinction between sole custody and joint custody, the courts began to award joint custody in almost all cases where both parents were good enough parents and got along well enough with each other. At the same time, the courts began to award joint guardianship more and more commonly, and joint guardianship would be awarded with even less reluctance than joint custody... as long as both parents were involved in the child's life and were capable of maintaining the bare amount of communications necessary to discuss things from time to time.

To summarize, sole custody versus joint custody doesn't mean very much any more. In fact, *custody* doesn't mean much at all compared to guardianship; *guardianship* is what's most important because guardianship is all about the practical parenting and raising of a child. As well, sole custody doesn't give a parent any more authority than the other parent, as long as the parents have joint guardianship, and joint guardianship is now the rule rather than the exception.