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# DEVELOPMENTS IN CANADIAN ADULT GUARDIANSHIP AND CO-DECISION-MAKING LAW

SARAH BURNINGHAM<sup>†</sup>

*Guardianship was originally developed as a social and legal tool meant to protect vulnerable persons. It is now evolving as a mechanism to promote autonomy. This paper examines the Canadian law of guardianship, including its historical evolution, the social and legal catalysts for its reform and related constitutional issues.*

*Guardianship law has a long history in Western society, and has traditionally been paternalistic and property-focused. Early Canadian guardianship laws were largely based on English lunacy acts, and continued unchanged into the second half of the twentieth century. Reformation in Canadian guardianship law began in the 1970s and 80s, with criticism that the current law intruded unjustifiably into an individual's personal sphere of autonomy. This criticism arose from an increased understanding of human capacity and the recognition of autonomy as a foundational human right.*

*In 2000, Saskatchewan introduced comprehensive guardianship legislation: The Adult Guardianship and Co-decision-making Act. This Act authorizes the appointment of co-decision-makers as an alternative to the traditional court-appointed guardian. This alternative provides Saskatchewan courts the ability to effectively address the need and capacity of the adult in question. The co-decision-making provisions of the Act are unique in Canadian guardianship law: the co-decision-maker shares legal authority with the adult, must acquiesce to an adult's reasonable decision and is statutorily required to minimally interfere in the adult's life and decision-making process. The co-decision-maker is further required to act in a manner that protects the adult's civil and human rights.*

*The Saskatchewan Act represents an important attempt to rethink guardianship concepts in Canada, and should form the model for future guardianship legislation in this country.*

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## I. INTRODUCTION

Guardianship was originally developed as a social and legal tool meant to protect vulnerable persons. Now, in some jurisdictions, guardianship is evolving as a mechanism to promote autonomy. Guardianship regimes will become increasingly important as the Canadian population ages and awareness of elder legal issues grows.<sup>1</sup> In this paper I examine Canadian guardianship law, including its historical evolution, the social and legal catalysts prompting its reform, related constitutional issues and how these laws reflect social values and understandings. Through this examination of guardianship regimes and historical developments, I argue that, despite some serious concerns, Saskatchewan's *The Adult Guardianship and Co-decision-making Act*<sup>2</sup> and its co-decision-making provisions represent the most important attempt to rethink guardianship concepts in Canada and should form the model for future guardianship legislation in this country.

## II. DEFINITION AND EXPLANATION OF ADULT GUARDIANSHIP

Adult guardianship is “the legal relationship whereby the legal rights, possessions, and decision-making power of one person (the ward)<sup>3</sup> are

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1 See e.g. Dorothy Lipovenko, “Lawyers find more work among seniors: ‘Elder law’ is being driven by an aging population not only anticipating its needs but responding to changes in legislation” *The Globe and Mail* (2 December 1996) A1; Mark Andrews, “The Elderly in Guardianship: A Crisis of Constitutional Proportions” (1997) 5 *Elder L.J.* 75 at 76. Guardianship is particularly relevant in Canada, as estimates suggest that as much as 25 % of the population will be over 65 by 2041: Marla Fletcher, “The Abuse Stops Here” (2000) 96 *The Canadian Nurse* 18.

2 *The Adult Guardianship and Co-decision-making Act*, S.S. 2000 c. A-5.3 [Sask. Act 2000].

3 I will refer to the “ward” as the adult throughout this paper, using the language employed in Saskatchewan’s Act. References to archaic language, such as “lunatic,” will be made in quotation marks to identify it as such. Language is particularly important because it affects the images we have about people with disabilities: See e.g. Joan Blaska, “Speak

transferred to another (the guardian) once the court or any other legal authority has made a determination that the ward is incompetent to handle his or her own affairs.”<sup>4</sup> Though academics have traditionally identified four categories of people subject to guardianship,<sup>5</sup> these distinctions are superfluous and unnecessary. Essentially, anyone without capacity, whose decision-making ability is impaired, regardless of reason, can be made the subject of a guardianship order.<sup>6</sup>

Guardianship can be divided into property and personal guardianship. A property guardian has authority over the adult’s personal and real property, while a personal guardian can make decisions regarding the adult’s person. Generally, a court can make separate orders regarding the appointment of property and personal guardians and, for example, appoint only a property guardian if the adult’s decision-making ability regarding personal matters is not impaired.

Personal guardianship can take many forms. The traditional form is full or plenary guardianship, under which the guardian is given full authority to make decisions for the adult, who loses legal capacity. Under a partial or limited guardianship order, the court lists the specific powers over which the guardian has authority. This limitation on the guardian’s authority is an attempt to respect the adult’s autonomy, encourage independent decision-making and potentially aid the adult in regaining functional capacity.<sup>7</sup> In

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and Write Using ‘Person First’” in Mark Nagler ed., *Perspectives on disability: texts and readings on disability* (Palo Alto: Health Markets Research, 1990) 25 at 25.

4 Israel Doron, “Mental Incapacity, Guardianship, and the Elderly: An Exploratory Study of Ontario’s Consent and Capacity Board” (2003) 18 *Can. J.L. & Soc.* 131 at 131 [Doron, “Capacity Board”].

5 Frolik identifies these categories as (1) the old and demented, (2) the mentally ill, (3) the mentally retarded and (4) the unconscious: Lawrence Frolik, “Promoting Judicial Acceptance and Use of Limited Guardianship” (2001-2002) 31 *Stetson L. Rev.* 735 at 745 [Frolik, “Judicial Acceptance”]. One reason to avoid these categories is to avoid the offensive and stigmatizing language that accompanies such classifications.

6 Geneva Richardson, “Autonomy, Guardianship and Mental Disorder: One Problem, Two Solutions” (2002) 65 *Mod. L. Rev.* 702 at 702.

7 Christy Holmes, “Surrogate Decisionmaking in the 90s: Learning to Respect Our Elders” (1996-1997) 28 *U. Tol. L. Rev.* 605 at 619. I do not believe partial guardianship is the best method to obtain these objectives; co-decision-making, as discussed below, is preferable.

1976, Alberta was the first province to pass legislation allowing for partial guardianship.<sup>8</sup> Most English Canadian provinces have since followed suit and now allow for some type of partial personal guardianship, including Manitoba,<sup>9</sup> Ontario,<sup>10</sup> Saskatchewan,<sup>11</sup> British Columbia,<sup>12</sup> Prince Edward Island,<sup>13</sup> the Yukon<sup>14</sup> and the Northwest Territories.<sup>15</sup> The acts in New Brunswick,<sup>16</sup> Nova Scotia,<sup>17</sup> and Newfoundland<sup>18</sup> do not provide for partial guardianship.

The third model is co-decision-making (also known as supported or assisted decision-making), in which a co-decision-maker assists the adult in making decisions, rather than making decisions for him. Unlike traditional guardianship, which strips the adult of legal authority, adults and co-decision-makers share authority. Co-decision-making recognizes the informal support systems characteristic of every decision-making process and provides a legal framework which attempts to benefit adults who need such assistance. Professor Doug Surtees suggests we think about co-decision-making as a process we would go through when making a major decision.<sup>19</sup> First we may consult our spouses and other family members who may be affected by the decision, which is equivalent to the information gathering stage of decision-making.<sup>20</sup> Spouses and friends may also help with the process of decision-making by helping us focus on our values and preferences.<sup>21</sup> This is a common approach every

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8 *Dependent Adults Act*, S.A. 1976, c. 63, s. 6(1) [Alta. Act 1976].

9 *Vulnerable Persons Living with a Mental Disability Act*, S.M. 1993, c. 29, C.C.S.M., c. V-90, s. 57(1).

10 *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, s. 60(1) [Ont. Act].

11 Sask. Act 2000, *supra* note 2, s. 14(1)(b).

12 *Adult Guardianship Act*, R.S.B.C. 1996 (Supp.), c. 6, s. 19 [not yet in force] [B.C. Act].

13 *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 16(2) [P.E.I. *Protection Act*].

14 *Adult Protection and Decision Making Act*, S.Y. 2003, c. 21, Sched. A, s. 38 [Y.K. Act].

15 *Guardianship and Trusteeship Act*, S.N.W.T. 1994, c. 29, s. 11(2) [N.W.T. Act].

16 *Infirm Persons Act*, R.S.N.B. 1973, c. I-8 [N.B. Act].

17 *Incompetent Persons Act*, R.S.N.S. 1989, c. 218 [N.S. Act].

18 *Mentally Disabled Persons' Estates Act*, R.S.N. 1990, c. M-10 [Nfld. Act].

19 Doug Surtees, *Co-Decision Making: Making Assumptions and Making Decisions* (Vancouver: Canadian Conference on Elder Law, 2005) at 9 [Surtees, *Co-Decision Making*].

20 *Ibid.*

21 *Ibid.* at 10.

individual takes when making major decisions and is similar to a formal co-decision-making regime.<sup>22</sup> In preserving the adult's legal capacity, co-decision-making legislation recognizes that individuals engage daily in "interdependent decision-making," and "this interdependence is not seen as indicative of mental incapability."<sup>23</sup> By providing a formalized version of informal support systems, this legislation abandons the stigmatizing labels of "capable" and "incapable," which have coloured other acts. Rather, such legislation simply recognizes "[s]ome people require more in the way of support and assistance than others, and with respect to more areas of decision-making than others; it is a matter of degree, rather than a case of absolutes."<sup>24</sup>

Co-decision-making attracts its share of criticism. First, there is concern that statutorily instituted co-decision-making will undermine informal decision-making regimes, which arise from intimate and trusting relationships. Formal regimes "cannot compensate for the absence of the bonds that link the individuals in an adult's network of family and friends[...]" Supported decision-making is more than a formal legal status granted by a court; it is a process that occurs over time and that will invariably require more than a short-term commitment to address a particular and temporary need.<sup>25</sup> Second, there is a risk that co-decision-making may morph into *de facto* substitute decision-making if the co-decision-maker makes decisions for the adult without considering the adult's input.<sup>26</sup> This may be especially worrisome when the adult has difficulty communicating her decision and the co-decision-maker finds it easier to make the decision for her.<sup>27</sup>

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22 *Ibid.*

23 Robert Gordon, "The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making" (2000) 23 *Int'l J. L. Psychiatry* 61 at 65 [Gordon, "Assisted"].

24 *Ibid.*

25 *Ibid.* at 73. Saskatchewan's Act recognizes and addresses this problem by providing that "where practicable, the court shall appoint a property co-decision-maker or property guardian who has a long-standing caring relationship with the adult": Sask. Act 2000, *supra* note 2, s. 40(3)(b).

26 Gordon, "Assisted," *ibid.* at 74.

27 In an attempt to remedy this problem, Saskatchewan's Act provides that "adults who have difficulty communicating because of physical or mental disabilities are entitled to

I note that these criticisms are not directed at co-decision-making itself or the principles behind it. Rather, they are focused on the challenges that may emerge in implementing a formal co-decision-making regime. Therefore, such criticisms are not a valid reason to avoid co-decision-making legislation. Rather, courts and lawyers must consider and address these potential problems when determining what is appropriate for a particular adult. These concerns can be further remedied by educating lawyers and co-decision-makers on their roles and responsibilities.

### A. CANADIAN CO-DECISION-MAKING LEGISLATION

In Canada, currently only Saskatchewan,<sup>28</sup> Manitoba<sup>29</sup> and the Yukon<sup>30</sup> have co-decision-making legislation. Both Prince Edward Island<sup>31</sup> and British Columbia<sup>32</sup> have guardianship legislation that would provide for co-decision-making, but the legislation in both provinces is not in force. Saskatchewan's Act is the most comprehensive legislation, allowing the court to issue a co-decision-making order in both property and personal matters.<sup>33</sup> The Yukon's legislation does not allow courts to make co-decision-making orders, but does allow adults to enter into co-decision-making agreements if the adult understands the nature and effect of such an agreement.<sup>34</sup> Manitoba's Act is similarly narrowed, applying only to "vulnerable persons", defined as adults with mental disabilities that manifested prior to 18 years of age, whose intellectual functioning and adaptive behaviour is impaired.<sup>35</sup> Such a distinction is arbitrary and unnecessarily excludes adults with mental disabilities manifested after 18

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communicate by any means that enables them to be understood": Sask. Act 2000, *supra* note 2, s. 3(e).

28 Sask. Act 2000, *supra* note 2, s. 14.

29 *The Vulnerable Persons Living With a Mental Disability Act*, S.M. 1993, c. 29, s. 9 [Man. Act].

30 Y.K. Act, *supra* note 14, s. 38.

31 *Supported Decision Making and Adult Guardianship Act*, S.P.E.I. 1997, c. 49.

32 B.C. Act, *supra* note 12.

33 Sask. Act 2000, *supra* note 2, s. 14.

34 Y.K. Act, *supra* note 14, s. 6.

35 Man. Act, *supra* note 29, ss. 1(1), 3.

years, elderly people with dementia and people whose mental disabilities are attributable to accidents.

I would suggest that a combination of Saskatchewan and the Yukon's legislation may be indicative of future guardianship legislation, which will allow adults to enter co-decision-making agreements or courts to make co-decision-making orders. Allowing both alternatives ensures a flexible co-decision-making regime. The alternative ultimately chosen should reflect an adult's particular capabilities. Some adults may be fully capable in all areas and able to enter co-decision-making agreements, while other adults may be capable in particular areas and well served by a court order that provides for co-decision-making in these areas and guardianship in other areas. At present, however, Saskatchewan's Act is the most comprehensive and inclusive and, accordingly, should form the basis for future legislation across Canada. In adopting from Saskatchewan's Act, other provincial legislatures should consider including the above provision from the Yukon's Act. Adopting such provisions recognizes the weaknesses of Saskatchewan's Act, but allows other provinces to improve the regime by developing solutions and embracing new ideas recognized since the passage of Saskatchewan's legislation.

While most provinces do not provide for co-decision-making, many statutes mandate consultation between the guardian and the adult and require the guardian to encourage the adult to participate in decisions. For example, the Ontario Act provides that "[t]he guardian shall encourage the person to participate, to the best of his or her abilities, in the guardian's decisions on his or her behalf."<sup>36</sup> However, I would argue that statutorily mandated consultation or encouragement is not equivalent to co-decision-making. Despite consultation, an adult under guardianship still loses legal capacity. The depth and scope of consultation is not defined. Because the guardian is not required to share authority with the adult, consultation may be only cursory, without the meaningful exchange required under a co-decision-making order.

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<sup>36</sup> Ont. Act, *supra* note 10, s. 66(5). This is essentially identical to the Northwest Territories' act: N.W.T. Act, *supra* note 15, s. 12(8).



### III. HISTORY OF GUARDIANSHIP LEGISLATION

Below, I will examine the historical evolution of guardianship legislation in Western Europe traditions, followed by an examination of Canadian legislation.

#### B. WESTERN EUROPE AND ENGLAND

Guardianship law has a long history in Western society. Indeed, “[f]or over 500 years, the societal response to adult mental incapacity has been guardianship.”<sup>37</sup> Prior to guardianship, ancient societies’ taboos and tribal customs dictated responses to mental and physical disabilities and often included the popular belief that these disabilities were “punishments” to be cured by “magic.”<sup>38</sup> The advancement of medical knowledge in Ancient Greece resulted in the first organized guardianship-type system used to protect property.<sup>39</sup>

The first written guardianship laws can be traced back to 449 B.C. in Rome, which had an elaborate system of guardianship.<sup>40</sup> Roman law provided: “If a person is a fool, let this person and his goods be under the protection of his family or his paternal relatives, if he is not under the care of anyone.”<sup>41</sup>

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37 Lawrence Frolik, “Guardianship Reform: When the Best is the Enemy of the Good” (1998) 9 *Stan. L. & Pol’y Rev.* 347 at 347 [Frolik, “Enemy”].

38 Frank Johns, “Guardianship Folly: The Misgovernment of *Parrens Patriae* and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century” (1997-1998) 27 *Stetson L. Rev.* 1 at 8.

39 *Ibid.* at 10.

40 *Ibid.* at 10, 14.

41 *Ibid.* at 10. “This law applied only to the head of a family, since all other persons were ‘under the care’ of the heads of their families, who automatically had authority over their persons and affairs”: Paul McLaughlin, *Guardianship of the Person* (Downsview, Ont.: National Institute on Mental Retardation, 1979) at 37.

England's guardianship laws originated sometime between 1255 and 1290 A.D., with the enactment of the *de Praerogativa Regis*, which vested in the King power over his subjects and their lands, including custodial authority over "lunatics" and their property.<sup>42</sup> Over time, this jurisdiction was delegated to the Court of Chancery.<sup>43</sup>

In the nineteenth century, a series of amendments were enacted to facilitate the disposal of land and allow incompetency to be found on affidavit evidence.<sup>44</sup> These laws were consolidated into *The Lunacy Act, 1890*,<sup>45</sup> which gave the courts "power to allow a relation or friend to take charge of a lunatic"<sup>46</sup> and to make orders for the commitment of the adult's estate.<sup>47</sup> The Act also allowed judges to commit adults to workhouses<sup>48</sup> or asylums<sup>49</sup> without notice. As examined below, this Act formed the basis of early Canadian guardianship law.

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42 Johns, *supra* note 38 at 15; Law Reform Commission of Saskatchewan, Proposals for a Guardianship Act, Part I: Personal Guardianship: Report to the Attorney General (Saskatoon: Law Reform Commission, 1983) at 77 [Sask. LRC Proposal]. Whereas the King had a duty to maintain the "lunatic" and his property until he recovered, the King had no corresponding duty to the "idiot" or his family, and his lands would be seized without him having any rights over it: McLaughlin, *supra* note 41 at 38-39. Note the difference between "idiots" and "lunatics"—"the lunatic, who has been sane, and may become sane again; and the idiot or fool natural, who never has been and never will be *compos mentis*": T. Raleigh, "Lunacy Laws" (1885) 1 L. Q. Rev. 150 at 150. Given the significant consequences attached to a finding of "idiocy," judges began substituting verdicts of "lunacy," and the distinction ceased to be important when the Crown stopped seizing the lands of "idiots": McLaughlin, *ibid.* at 40; Raleigh, *ibid.* at 150.

43 Melinda Munro, "Guardianship of Adults: Good Faith and the Philosophy of Mental Disability in British Columbia" (1997) 14 Can. J. Fam. L. 217 at 218.

44 McLaughlin, *supra* note 41 at 40.

45 53 Vict. c. 5 [*Lunacy Act, 1890*]. See generally Peter Bartlett, *The Poor Law of Lunacy: the Administration of Pauper Lunatics in Mid-Nineteenth Century England* (New York: Leicester University Press, 1999) at 41-4 for an examination of English lunacy law.

46 *Lunacy Act, 1890, ibid.*, s. 22.

47 *Ibid.*, s. 108(3). Under the Act, the adult's interest in property was not to be altered: *ibid.*, s. 123.

48 *Ibid.*, s. 20. The Act also provided that the "lunatic" was not to remain in the workhouse "[u]nless the accommodation in the workhouse [was] sufficient for his proper care and treatment": *ibid.*, s. 24(1)(c). The Act is not clear as to how the workhouse was to provide proper care and treatment.

49 *Ibid.*, s. 27. See Bartlett, *supra* note 45 at 8-26 for a socio-legal examination of the history of asylums and asylum law.

### C. FEATURES OF TRADITIONAL GUARDIANSHIP LAWS

There are several distinctive features that have historically characterized guardianship legislation. First, guardianship law has traditionally focused on the protection of the adult's estate,<sup>50</sup> underscoring the primacy given to property rights in both the common law and Western society. For example, there is a long tradition requiring the guardian to take accounts of the adult's property and ensure its proper management.<sup>51</sup> Often, given the time and costs of such applications, an applicant would not bother to apply for guardianship unless there was substantial property to be managed.<sup>52</sup> This was likely due, at least partially, to the structure of early acts, which did not allow for separate property and personal guardianship orders. This "all or nothing" approach ensured that, if a guardian was appointed, he would be given full authority over both the adult's person and property, regardless of the adult's actual needs. An order granting guardianship over the person was likely superfluous, as an informal care arrangement was typically already in place.

Second, guardianship laws historically have been exceedingly paternalistic. In the past, guardianship laws have been justified on the grounds that they are necessary to protect people who are unable to protect themselves.<sup>53</sup> Traditionally, guardianship's primary goal has been to protect the adult and the adult's estate, not promote autonomy or assist in decision-making. Given this paternalistic goal and the extreme intrusion into the adult's sphere of self-determination, there is great potential for conflict between competing values as legislators attempt to manufacture statutes that both respect the adult's autonomy and protect the adult from harm. This tension recurs throughout guardianship's history.

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50 McLaughlin, *supra* note 41 at 35. The duties and responsibilities of the property guardian were often stated specifically and concisely, whereas the duty of the personal guardian was broadly stated as caring for the general welfare of the adult: Amie Bruggeman, "Guardianship of Adults with Mental Retardation: Towards a Presumption of Competence" (1980-1981) 14 Akron L. Rev. 321 at 327.

51 See e.g. *Lunacy Act*, 1890, *supra* note 45, s. 50(1).

52 McLaughlin, *supra* note 41 at 36.

53 For example, in elucidating the purpose of guardianship, Frolik writes: "Guardianship may have conflicting interests, but it has one primary goal: the *protection* and advancement of the life and property of the incapacitated person": Frolik, "Judicial Acceptance," *supra* note 5 at 745 [emphasis added].

## D. CANADA

Early Canadian guardianship laws were largely based on English lunacy acts, particularly the 1890 *Lunacy Act*.<sup>54</sup> These laws continued essentially unchanged for well over the first half of the twentieth century, varying only slightly in form and terminology, but not in substance. Below, I will explore guardianship laws in Canada, focusing on Alberta and Saskatchewan, with particular emphasis on developments in partial guardianship and co-decision making.

I selected the Saskatchewan and Alberta acts for in-depth study for several reasons. First, both provinces have been leaders in the Canadian guardianship field and accordingly offer a broader scope for study than acts which have not been reformed. Second, both acts have distinctive features that provide an opportunity to compare and contrast the effectiveness of various guardianship tools, as well as demonstrate how the development of one act has advanced the evolution of the other. Third, both acts are indicative of the more general trends of development in Canadian guardianship legislation.

### I. Alberta

The first Alberta acts to address guardianship were a collection of insanity acts<sup>55</sup> based on the English *Lunacy Act*. These were “updated” in 1922 by *The Lunatics’ Estates Act*,<sup>56</sup> which applied to “lunatics”<sup>57</sup> and allowed the Lieutenant Governor to appoint an Administrator of Lunatics’ Estates who

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54 Robert Gordon, Simon Verdun-Jones & Donald MacDougall, “Reforms in the Field of Adult Guardianship Law: A Comment on Recent Developments” (1987) 6 Can. J. Fam. L. 149 at 151 [Gordon *et al.*, “Comment”]. In some provinces, provisions in more general acts gave courts power to appoint committees. These early acts were: *Lunacy Act*, R.S.O. 1887, c. 54 (Ontario); *Lunacy Act*, R.S.B.C. 1897, c. 126 (British Columbia); *An Act respecting Lunatics*, S.M. 1877, c. 23 (Manitoba); *The Supreme Court in Equity Act*, C.S.N.B. 1903, c. 112, s. 231 (New Brunswick); *Of Wills and Testaments*, C.S.N.L. 1872, c. 13, s. 13 (Newfoundland); *Of the Custody and Estates of Lunatics*, R.S.N.S. 1851, c. 152 (Nova Scotia); and *The Chancery Act*, S.P.E.I. 1910, c. 8, s. 94 (Prince Edward Island).

55 *The Insanity Act*, S.A. 1907, c. 7; *An Act to Appoint an Administrator of Lunatics’ Estates*, S.A. 1916, c. 11.

56 R.S.A. 1922, c. 225.

57 “Lunatic” shall include an idiot or other person of unsound mind”: *ibid.*, s. 2(b).

would take control of the real and personal property of the “lunatic”<sup>58</sup> and become guardian of any “lunatic” detained in an asylum or institution.<sup>59</sup>

This Act was replaced in 1937 by *The Estates of the Mentally Incompetent Act*,<sup>60</sup> which allowed the court to appoint a committee of estate to take control of the adult’s property.<sup>61</sup> The Act did not allow for separate orders to be made for personal and property guardians; if an adult was found to be in need of a property guardian, an order would also be made appointing a guardian of the person. Given the absence of personal guardian provisions, personal guardians were consequently provided with no guidance as to their duties and responsibilities. Despite the seeming turn to more sensitive language, any progress was illusory as a “person of unsound mind” in the Act was defined to be “a lunatic or a mental defective.”<sup>62</sup> There were no further significant changes to the law until 1976.

In 1976, Alberta passed *The Dependent Adults Act*, which was praised as innovative and cutting-edge.<sup>63</sup> This Act was studied and adopted by numerous jurisdictions including Victoria and Queensland in Australia.<sup>64</sup> *The Dependent Adults Act* represented “one of the most significant attempts to re-think guardianship of the person.”<sup>65</sup>

58 *Ibid.*, s. 3.

59 *Ibid.*, s. 4.

60 S.A. 1937, c. 33.

61 *Ibid.*, s. 12(1). This was in contrast to the earlier act which provided that the Administrator would be appointed property guardian. Under this Act, the responsibility fell not to a government body, but anyone—typically a friend or family member—who applied to the court for guardianship.

62 *Ibid.*, s. 2(c). The Act was revised in 1955, but a “person of unsound mind” was still defined as “a lunatic, a mentally incapacitated person or a mental defective”: *The Mentally Incapacitated Persons Act*, R.S.A. 1955, c. 201, s. 2(e). Such stigmatizing and offensive language has plagued guardianship laws historically, and, in some provinces, continues to do so. For example, Nova Scotia’s act referred to “lunatics” (N.S. Act, *supra* note 17, s. 2(b)) until 2007’s *An Act to Amend Chapter 218 of the Revised Statutes, 1989, the Incompetent Persons Act, and Certain Other Statutes*, S.N.S. 2007, c. 17, ss. 2, 5, 7.

63 Gordon et al., “Comment,” *supra* note 54 at 152.

64 *Ibid.* at 152; Terry Carney, “The Limits and the Social Legacy of Guardianship in Australia” (1988-1989) 18 Fed. L. Rev. 231 at 231.

65 McLaughlin, *supra* note 41 at 49.

The 1976 Act represented a bold change in the direction of guardianship law and was important for several reasons. First, it was “built around the notion of functional disability, rather than, ‘mental incompetency.’”<sup>66</sup> The Act sought to avoid identifying adults as “lunatics” or “incapable,” moving away from the stigmatizing labels that had coloured old acts. Rather, it relied on a functional test, defining a “dependent adult” as a person who had a guardianship or trusteeship<sup>67</sup> order.<sup>68</sup>

Second, it “endorse[d] the principle of limited, tailormade, guardianship.”<sup>69</sup> Changing understandings of capacity prompted the development of partial guardianship, as human functioning was seen as a spectrum of abilities rather than absolutes. By enabling the adult to make decisions in areas in which she had capacity, her autonomy would be respected as much as possible given her particular abilities. In embracing this less intrusive approach, the statute mandated that the court not appoint a plenary guardian unless “satisfied that a partial guardianship order would be insufficient to meet the needs of the person.”<sup>70</sup>

Third, the Act was novel in that it required the adult to be served with a copy of the guardianship application.<sup>71</sup> In the past, there was no such requirement, and a guardianship application could be made without the adult receiving notice.

Finally, the Act established the Public Guardian and Trustee, which would apply to be guardian or trustee when no one else was willing or able to

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66 Gordon *et al.*, “Comment,” *supra* note 54 at 152.

67 Trusteeship is the term used for property guardianship in *The Dependent Adults Act*.

68 Alta. Act 1976, *supra* note 8, s. 1(d).

69 Gordon *et al.*, “Comment,” *supra* note 54 at 152. Section 6 allows the Court to appoint a plenary or partial personal guardian: Alta. Act 1976, *ibid.*, s. 6(1). The statute included a list of matters over which the court could grant authority to the guardian, including living arrangements, social activities, nature and type of work, training and education, applications for licences or permits, legal proceedings not involving the estate and day to day decisions including diet and dress: *ibid.*, s. 10(2). This list has since been imported into most reformed guardianship statutes.

70 Alta. Act 1976, *ibid.*, s. 6(3).

71 *Ibid.*, s. 3(2)(a).

serve.<sup>72</sup> Presumably the purpose of such a provision was to ensure that no one would fall through the cracks because they lacked family or friends willing or able to be appointed guardian.

The Alberta Act has been revised twice since 1976,<sup>73</sup> but the substance of the Act has remained the same. One major change was the structuring of the partial guardianship provisions. The 2000 revision did away with the distinction between plenary and partial guardianship, providing only a list of powers and instructing the court to specify the matters within the guardian's authority.<sup>74</sup> Other changes were mostly procedural in nature.<sup>75</sup>

There have been no significant changes to the Alberta Act since it was revised in 2000. However, a new act is currently under consideration by the Alberta Legislature. Bill 24,<sup>76</sup> the proposed *Adult Guardianship and Trusteeship Act*, was introduced on June 2, 2008 and passed its third reading November 6, 2008.<sup>77</sup> While the Bill allows for personal co-

72 *Ibid.*, ss. 12, 13, 33.

73 The first revision occurred in 1980: *Dependent Adults Act*, R.S.A. 1980, c. D-32 [Alta. Act 1980]. The second revision occurred in 2000: *Dependent Adults Act*, R.S.A. 2000, c. D-11 [Alta. Act 2000]. One noteworthy change involved the nature of the judge's inquiry before appointing a personal guardian. The 1976 Act provided that the court would make an order when the adult was in need of a guardian and unable "(i) to care for himself, and (ii) to make reasonable judgment in respect of all or any of the matters relating to his person": Alta. Act 1976, *supra* note 8, s. 6(1). The 2000 Act required that the adult be "repeatedly or continuously unable" to do (i) and (ii): Alta. Act 2000, *supra* note 73, s. 7(1) (b). Presumably, the applicant would have to demonstrate that the adult's inability to care for herself had a history, rather than one or two incidents.

74 Alta. Act 2000, *ibid.*, s. 10(3). The 2000 Act also did not include a similar provision to s. 6(3) of the 1976 Act, which required that the court appoint a plenary guardian only if satisfied a partial guardian would be insufficient. While one may worry that the lack of such a provision could result in increased plenary orders, s. 19(1) of the 2000 Act provides that the guardian is to exercise her authority in the least restrictive way possible, suggesting that the guardian's powers will still be strictly limited.

75 For example, the 1980 Act removed the provision that allowed incapacity to be found on the evidence of a therapist: compare Alta. Act 1976, *supra* note 8, s. 2 with Alta Act 1980, *supra* note 73, s. 2.

76 Bill 24, *Adult Guardianship and Trusteeship Act*, 1st Sess., 27th Leg., Alberta, 2008 [Bill 24].

77 Legislative Assembly of Alberta, *Bill 24: Status of Bills*, online: <[www.assembly.ab.ca/net/index.aspx?p=bills\\_status&selectbill=024](http://www.assembly.ab.ca/net/index.aspx?p=bills_status&selectbill=024)>; "Alberta Hansard Excerpts" Alberta Justice, online: <[www.justice.gov.ab.ca/hansard/default.aspx?id=5584](http://www.justice.gov.ab.ca/hansard/default.aspx?id=5584)>.

decision-making, it does not provide for property co-decision-making. This omission suggests that property considerations still dominate guardianship law.

Bill 24 would allow for personal co-decision-making in two ways. First, it would allow an adult, who understands the nature and effect of an authorization, to make a supported decision-making authorization,<sup>78</sup> in which the adult authorizes a supporter to help “access, collect or obtain or assist the adult in accessing, collecting or obtaining from any person any information that is relevant to the decision and to assist the adult in understanding that information [and] to assist the adult in making the decision.”<sup>79</sup> In addition, an adult or interested person could apply to the court for an order appointing a co-decision-maker.<sup>80</sup> This is similar to the merger of the Yukon and Saskatchewan co-decision-making provisions that I advocated above.

Despite Alberta’s innovative advances in the 1970s, I would suggest that Alberta is falling behind in the guardianship field, particularly given the emergence of supported decision-making in Saskatchewan and other provinces. The proposed Bill would ensure that Alberta remains in line with current developments in the adult guardianship field.

## 2. Saskatchewan

Saskatchewan enacted its first guardianship legislation in 1919 in the form of *The Lunacy Act*,<sup>81</sup> modeled on the English *Lunacy Act*.<sup>82</sup> The Act gave courts the power to make orders “for committing the custody of lunatics and the management of their estates.”<sup>83</sup> Similar to the early Alberta acts, it did not allow for separate personal guardian and property guardian orders and there were no provisions giving guidance

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78 Bill 24, *supra* note 76, cl. 4(1).

79 *Ibid.*, cl. 4(2).

80 *Ibid.*, cl. 13(1).

81 S.S. 1918-1919, c. 58 [Sask. Act 1919].

82 Sask. LRC Proposal, *supra* note 42 at 77.

83 Sask. Act 1919, *supra* note 81, s. 3. “Lunatic” was defined as an “idiot and a person of unsound mind”: *ibid.*, s. 2(5).



to personal guardians. Interestingly, an application could be brought by essentially any person, including an adult's creditor.<sup>84</sup> This broad group of potential applicants could be open to abuse and was narrowed in subsequent acts, which required the applicant to have "a sufficient interest in the personal affairs of the person."<sup>85</sup> The Act also preserved the adult's right to have the issue of "lunacy" tried by jury,<sup>86</sup> which was not included in subsequent acts.<sup>87</sup>

Saskatchewan's guardianship legislation remained virtually unchanged until 1989.<sup>88</sup> In 1978, *The Mentally Disordered Persons Act*<sup>89</sup> was enacted, but, despite the new name, the substance of the old Act remained. For example, "mentally disordered person" was defined as "an idiot and a person of unsound mind,"<sup>90</sup> identical to the definition in the 1919 Act. In other sections, the same archaic, cumbersome language remained. For example, the 1919 Act provided that the Act extended to a person who was not an "idiot," but "whom it is proved to the satisfaction of the court, that he is, through mental infirmity, arising from disease, age, or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs."<sup>91</sup> Remarkably, nearly sixty years later, the 1978 Act read: "whom it is proved to the satisfaction of the court that he is, through mental infirmity, arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs."<sup>92</sup> Apparently, in

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84 *Ibid.*, s. 6(2).

85 *The Dependent Adults Act*, S.S. 1989-1990, c. D-25.1, s. 3(1)(a) [Sask. Act 1989].

86 Sask. Act 1919, *supra* note 81, s. 8.

87 As early as the beginning of the twentieth century, academics recognized the problems associated with juries deciding issues of competency. In 1909, for example, F. Fenning wrote that competency questions were inquiries, not trials, and "[t]he abolition of the trial by jury in lunacy matters is but an application of modern humanitarian views to the original conception of a lunatic": Frederick Fenning, "The Lunatic, A Ward of the Court" (1909) 43 Am. L. Rev. 527 at 529.

88 Sask. LRC Proposal, *supra* note 42 at 77.

89 R.S.S. 1978, c. M-14 [Sask. Act 1978].

90 *Ibid.*, s. 2(e).

91 Sask. Act 1919, *supra* note 81, s. 37.

92 Sask. Act 1978, *supra* note 89, s. 42. An issue remains about whether "drunkards" or drug addicts should be made the subject of guardianship orders. In her 2005 book, Mary Quinn seems to contemplate it: Mary Joy Quinn, *Guardianship of Adults: Achieving Justice*,

a time span of over half a century, the only thing the Legislature found the need to change was a comma.

In 1983, likely in response to Alberta's *The Dependent Adults Act*, the Saskatchewan Law Reform Commission released its proposal for a new guardianship act. The Commission was extremely critical of the existing Act, noting the absence of guidance for courts in appointing a personal guardian and for guardians in exercising their authority, and concluding that "the existing Saskatchewan law is inadequate."<sup>93</sup> In its proposal, the Commission advocated for partial guardianship to "protect the protected from being over-protected."<sup>94</sup>

In 1989, the Province passed the *Dependent Adults Act*, modeled on the 1976 Alberta Act. Distinguishing itself from its Saskatchewan predecessors and adopting from its Albertan precursor, the new Act did away with stigmatizing labels, opting instead for the functional tests laid out in the Alberta Act.<sup>95</sup> The Act was divided into personal and property guardianship and allowed for partial guardianship, which required the court to specify the powers over which the guardian would have authority.<sup>96</sup> Section 7(2) of the Act further required that the court not make a plenary guardianship order unless satisfied a partial guardianship "would be insufficient to meet the needs of the dependent adult."<sup>97</sup> The Act also

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*Autonomy, and Safety* (New York: Springer Publishing Company, 2005) at 49. Additionally, Nova Scotia's *Inebriates' Guardianship Act*, R.S.N.C. 1989, c. 227, c. 17 allows a judge to find a habitual drunkard (defined as "any person who in the neighbourhood in which he resides has the reputation of being a drunkard": *ibid.*, s. 2(a)) incapable of managing his property affairs, if he squanders or mismanages his property, places his family in distress or transacts his business prejudicially to the interests of his family: *ibid.*, s. 3. If alcoholism and drug addiction are seen as disabilities and impair decision-making ability, they appear similar to the situations of other adults under guardianship orders. If this view is correct, a court must inquire whether the adult, despite his addiction, retains capacity to make decisions. However, fundamental values of autonomy and self-determination may suggest otherwise, given that such a broad definition as found in the Nova Scotia *Inebriates' Guardianship Act* may be subject to abuse.

93 Sask. LRC Proposal, *supra* note 42 at 78.

94 *Ibid.* at 71.

95 See e.g. Sask. Act 1989, *supra* note 85, s. 2(1)(d).

96 Sask. Act 1989, *ibid.*, s. 7(1).

97 *Ibid.*, s. 7(2).

reflected the guardianship acts' fundamental tension between autonomy and protection. For example, while some sections seemed to favour protection, the Act also provided a list of situations in which the guardian could not consent,<sup>98</sup> suggesting the Legislature recognized the inherently personal and fundamental nature of some decisions and attempted to respect this individual realm of autonomy. The Act also required that personal guardians exercise their powers so as to "encourage the dependent adult to: (A) participate to the maximum extent in all decisions affecting the dependent adult; and (B) act independently in all matters in which the dependent adult is able."<sup>99</sup>

In 1994, the Provincial Steering Committee on Abuse of Adults in Vulnerable Circumstances was appointed.<sup>100</sup> In their 1997 report, most members of the Committee accepted the need for the continuation of guardianship, but criticized weaknesses in administration of the Act, including the plethora of applications for guardianship made without notice to the adult and the under-use of partial guardianship.<sup>101</sup> The Committee commented on the benefit of supported decision-making, noting that "[f]or some adults, the appointment of a personal guardian under The Dependent Adults Act is more than they need. They may be able to make their own decisions with a little help."<sup>102</sup>

### **a. The Adult Guardianship and Co-decision-making Act**

In 2000, Saskatchewan passed *The Adult Guardianship and Co-decision-making Act*, which came into effect on July 15, 2001 and allowed for co-decision-making orders to be issued. In introducing this Act, the

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98 *Ibid.*, s. 7(6), which provided that guardians could not consent to: (1) withdrawal of life-support systems; (2) procedures with the sole purpose of sterilization; (3) donation of organs; (4) abortion (except if continuing the pregnancy would likely cause imminent danger to life and health); (5) termination of parental rights; (6) commencement of divorce proceedings; and (7) interference with the adult's exercise of religious practices (except to the extent the practices threatened the adult's health or safety).

99 *Ibid.*, s. 11(d)(ii).

100 Steering Committee on the Abuse of Adults in Vulnerable Circumstances, "Report and Recommendations" (December 1997), online: <<http://www.justice.gov.sk.ca/vasc>> at 1.

101 *Ibid.* at 29.

102 *Ibid.*

Legislature recognized that “[a]s our society and any society begins to understand more and more about the needs of vulnerable adults, we need to understand that not all vulnerable adults require the same level of support.”<sup>103</sup> The Act provides a unique opportunity for courts to tailor orders to reflect the abilities and circumstances of individual adults.

Under the Act, a court must appoint a co-decision-maker where it believes that such an appointment is in the best interests of the adult, the adult is in need of a co-decision-maker and the court is satisfied the adult’s capacity is impaired such that decision-making assistance is required to make reasonable decisions about the adult’s estate<sup>104</sup> or person.<sup>105</sup> On the other hand, a court should appoint a guardian when it is satisfied that such an appointment is in the best interests of the adult, the adult is in need of a personal or property guardian and the adult’s “capacity is impaired to the extent that the adult is unable to make reasonable decisions with respect to matters relating to his or her estate”<sup>106</sup> or person.<sup>107</sup> However, a court must not appoint a guardian or a co-decision-maker unless “alternative ways to assist the adult...including less intrusive forms of support or assistance in decision-making, have been tried or carefully considered.”<sup>108</sup> Such provisions encourage minimal intrusion into the adult’s sphere of autonomy and reflect a new understanding of guardianship as a last resort.

The co-decision-making provisions are unique. First, under the Act, the co-decision-maker shares legal authority with the adult.<sup>109</sup> Second, the co-decision-maker must acquiesce to the adult’s decision if a reasonable person could have made the impugned decision and no harm is likely to result to the adult or the adult’s estate as a result of the decision.<sup>110</sup> Third, the co-decision-maker is statutorily required to exercise her duties in a way that limits her

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103 Saskatchewan, Legislative Assembly, Hansard, No. 24 (29 May 2000) at 1395 (Rod Gantefor).

104 Sask. Act 2000, *supra* note 2, s. 40(1)(a).

105 *Ibid.*, s. 14(1)(a).

106 *Ibid.*, s. 40(1)(b).

107 *Ibid.*, s. 14(1)(b).

108 *Ibid.*, ss. 14(2)(a), 40(2)(a).

109 *Ibid.*, ss. 17(1), 42(1).

110 *Ibid.*, ss. 17(2), 42(2).

interference in the life of the adult as much as possible and encourages the adult to participate to his maximum extent in decisions and act independently when he is able to do so.<sup>111</sup> The co-decision-maker is further required to act in a way that protects the adult's civil and human rights.<sup>112</sup>

Under the new Act, the responsibilities given to both courts and co-decision-makers are significant. For example, when deciding whether to appoint a co-decision-maker or a guardian, the court must consider the types of decisions the adult needs to make, the resources available to assist the adult in making these decisions including less intrusive forms of assistance, the wishes of the adult and the suitability of the decision-maker.<sup>113</sup> This intensive inquiry is a far cry from the early guardianship acts, which required little consideration beyond a finding of incapacity. Saskatchewan's Act represents the next major wave of reform and has been a model for similar legislation, such as the Bill currently under consideration in Alberta.

#### IV. REFORM

Canada is currently in its third wave of guardianship reform.<sup>114</sup> The first wave occurred in the 1970s and was concentrated in Alberta and Saskatchewan, as discussed above.<sup>115</sup> The second wave was concentrated in the Atlantic Provinces and focused on adult protection.<sup>116</sup> Consequently, many Atlantic Provinces have thorough adult protection schemes

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111 *Ibid.*, ss. 25(b), 25(c), 50(b), 50(c).

112 *Ibid.*, ss. 25(a), 50(a).

113 Sask. Act 2000, *supra* note 2, s. 13(1).

114 Gordon, "Assisted," *supra* note 23 at 61.

115 *Ibid.*

116 *Ibid.* The 1980s in particular saw a surge of media attention focused on elder abuse, which may have precipitated this wave of reform. See e.g. Ann Silversides, "The golden years can be a tarnished horror," *The Globe and Mail* (22 July 1989) 6; Judy Creighton, "National survey to probe abuse of seniors," *The Ottawa Citizen* (15 May 1989) D7; "Caregiver stress linked to abuse of the elderly," *The Vancouver Sun* (13 January 1987) C2.

not available elsewhere in the country.<sup>117</sup> Below, I will briefly examine criticisms of old acts, as well as reasons for, and examples of, guardianship reform.

### A. CRITICISMS OF OLD ACTS

Criticism of then-existing guardianship laws emerged in the 1970s and 1980s.<sup>118</sup> Originally seen as a benevolent act of the State, the perception shifted to a view of guardianship as “a massive intrusion upon the autonomy and independence of those adjudicated incompetent and in need of a guardian. In the eyes of some, guardianship ceased to be a solution and became the problem.”<sup>119</sup> Members of the legal community began to question whether guardianship was serving its intended purpose of protecting the elderly and people with mental disabilities or whether it actually further infringed their fundamental rights.<sup>120</sup>

Many flaws of the older acts were critically observed in the above examination of Saskatchewan and Alberta legislation. Some of the worst features of these acts included lack of notice to the adult, inability to separate property and personal guardianship orders, lack of partial guardianship and statutory language that was “epithetical, anachronistic and stigmatizing.”<sup>121</sup> Critics particularly disapproved of the intrusive “all

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117 See e.g. Prince Edward Island’s *Protection Act*, *supra* note 13; Nova Scotia’s *Adult Protection Act*, R.S.N.S. 1989, c. 2. In designing a guardianship regime based on Saskatchewan’s Act, provinces should consider integrating elements of these protection regimes. However, such integration must be done carefully, given that the broad terms characteristic of protection regimes may conflict with co-decision-making orders. For an examination of adult protection regimes in the American context, see Mike Hatch, “Great Expectations—Flawed Implementation: The Dilemma Surrounding Vulnerable Adult Protection” (2002-2003) 29 Wm. Mitchell L. Rev. 9.

118 Prior to this, criticisms of guardianship laws can be traced back to as early as 1837 (such as Isaac Ray’s severe criticism of guardianship in *The Medical Jurisprudence of Insanity*), but for the most part criticism was few and far between: McLaughlin, *supra* note 41 at 47.

119 Frolik, “Judicial Acceptance,” *supra* note 5 at 739.

120 Israel Doron, “Elder Guardianship Kaleidoscope—A Comparative Perspective” (2002) 16 Int’l J. of Law, Policy and the Family 368 at 369 [Doron, “Kaleidoscope”].

121 McLaughlin, *supra* note 41 at 50.

or nothing” approach characteristic of existing legislation, which was devastating to personal autonomy.<sup>122</sup>

## B. REASONS FOR REFORM

Early Canadian guardianship legislation continued essentially unchanged for over half a century. However, in 1969 the International League of Societies for the Mentally Handicapped held a watershed conference and called for the inclusion of personal guardianship in guardianship legislation.<sup>123</sup> Following this conference Canadian academics, lawyers, and civil rights groups urged legislatures to undertake fundamental reform of existing guardianship laws and create a new framework that would promote both protection and self-determination.<sup>124</sup>

Another major catalyst prompting legislative reform was the plethora of media attention in the 1970s and 1980s highlighting the outdated, archaic laws. Media reports focused heavily on individual stories of mental, physical and sexual abuse and exploitation of the guardian system. Perhaps the most famous of these media reports is the Associated Press report on guardianship, a series of articles published in numerous newspapers throughout the United States in 1987.<sup>125</sup> These reports drew the public spotlight to the existing system’s problems and incited policy debate and legislative changes in the United States. These reports were picked up in Canada and similar articles were featured in the *Globe and Mail*.<sup>126</sup>

However, this series of reports, while very influential in the United States, was less so in Canada, because change in Canada had already started with Alberta’s 1976 *Dependent Adults Act*. Still, the Canadian media did play a role in bringing the problems of the guardianship system to the forefront of Canadian consciousness. This was particularly true in Saskatchewan,

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122 Frolik, “Enemy,” *supra* note 37 at 347.

123 Kathryn Wissel & Maureen Sanders, “Limited Guardianship for the Mentally Retarded” (1977-1978) 8 N.M. L. Rev. 231 at 235.

124 Frolik, “Enemy,” *supra* note 37 at 347; Gordon *et al.*, “Comment,” *supra* note 54 at 149.

125 Doron, “Kaleidoscope,” *supra* note 120 at 369.

126 See e.g. “Abuse of the elderly painful problem” *The Globe and Mail* (3 January 1987) 1.

where local newspapers ran headlines in the 1970s proclaiming “Province’s guardianship laws said grossly outdated”<sup>127</sup> and “Guardianship laws for dependants archaic.”<sup>128</sup>

Additionally, the civil rights movement in the 1960s had a profound effect on guardianship laws. Prior to this, “the civil rights of people in guardianship proceedings were not a consideration.”<sup>129</sup> The civil rights movement promoted the rights of marginalized people, including the elderly and people with disabilities, and recognized the right of people with disabilities to citizenship.<sup>130</sup>

During this time, “normalization” emerged as a defining disability rights principle. This principle saw the segregation of people with disabilities as a major stigmatizing process.<sup>131</sup> Around this time, there was an “increased recognition that people who had traditionally been isolated from the community could live more independently within the community if

127 “Province’s guardianship laws said grossly outdated” *The [Saskatoon] StarPhoenix* (6 December 1977) 9.

128 “Guardianship laws for dependants archaic” *Western Producer* (15 December 1977) 18.

129 Quinn, *supra* note 92 at 13.

130 See e.g. Amie Bruggeman’s comment, in the American context, but equally applicable in Canada:

During the past twenty years, society has become more aware of the capabilities of people with mental retardation and their entitlement to basic human and legal rights. With the growth of knowledge in the field of mental retardation and the development of advocacy groups, the public awakened to the fact that people with mental retardation have long been denied full citizenship status guaranteed them by the Constitution.

Bruggeman, *supra* note 50 at 321.

131 McLaughlin, *supra* note 41 at 28. This principle of normalization stands in stark contrast to previous attitudes toward people with disabilities, which had usually involved segregation and separation. See e.g. the description of Marshall J. of the United States Supreme Court in *Alexander v. Choate* (1985), 469 U.S. 287 at 461-64:

[T]he mentally retarded have been subject to a “lengthy and tragic history” of segregation and discrimination that can only be called grotesque....Massive custodial institutions were built to warehouse the retarded for life...Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the “basic civil rights of man”—the right to marry and procreate.



proper supports were in place.”<sup>132</sup> This idea of integration stems in large part from the work of disability rights advocate Jacobus tenBroek<sup>133</sup> who outlined two opposing ways in which society treats people with disabilities—custodialism or integration.<sup>134</sup> He concluded that integration was the most equitable, practicable option, emphasizing the potential of people with disabilities for full participation as social and economic equals in the community.<sup>135</sup> This principle of normalization was particularly important in the development of partial guardianship, as plenary guardianship was recognized as being at odds with the goal of integrating people into the community.<sup>136</sup>

### C. EXAMPLES OF CHANGING VIEWS AND RESULTANT CHANGES TO ACTS

The above-examined catalysts both provided an impetus for reform and also, perhaps more importantly, represented a shift in ideas about guardianship, including its foundational principles and justifications, which guided the reform of legislation.<sup>137</sup> This reform movement

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132 Surtees, *Co-Decision Making*, *supra* note 19 at 5.

133 tenBroek was a blind lawyer who advocated for the rights of people with disabilities to live in their communities. See particularly Jacobus tenBroek & Floyd Matson, “The Disabled and the Law of Welfare” (1966) 54 Cal. L. Rev. 809.

134 Robert Burgdorf, “‘Substantially Limited’ Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability” (1997) 42 Vill. L. Rev. 409 at 513.

135 *Ibid.* at 514.

136 Frolik, “Judicial Acceptance,” *supra* note 5 at 746. However, despite recent reform, partial guardianship is still rarely employed because plenary guardianship is viewed as easier and more efficient: *ibid.* at 741.

137 On the other hand, there may be an argument that these reforms did not represent a shift in attitudes, but rather represented merely illusory surface changes. Frolik notes that reforms in the 1990s continued “to exhibit many of the flaws of the previous regime”: Frolik, “Judicial Acceptance,” *supra* note 5 at 740. Perhaps this is because there was no fundamental shift in our understanding of guardianship itself; the reasons, basis and purpose of it were still viewed in the same paternalistic, protection-promoting light. Language associated with guardianship and adults retained some elements of paternity and condescension. For example, Frolik, in describing reforms such as mandatory counsel, writes that they were instituted to “protect the liberty interests of persons *accused* of being mentally incapacitated”: *ibid.* at 349 [emphasis added]. Note the offensive language—*accused*—as though people with disabilities did something wrong

“interjected new values into guardianship.”<sup>138</sup>

One such example is the change in societal understandings of capacity. An increased understanding of human functioning led to the recognition that humans have a range of functioning, rather than simplistic classifications of “disabled” and “not disabled.”<sup>139</sup> Indeed, “for each human function, some individuals excel, some perform minimally or not at all and others perform at all levels and gradations in between.”<sup>140</sup> This change in understanding of capacity led to the development of partial guardianship, which allowed “tailor-made” orders to be designed according to each adult’s particular needs and abilities. Partial guardianship recognized a range of human functioning and acknowledged that adults may have

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or there is something wrong with them. Such attitudes seem more in line with previous attitudes of guardianship, not the new understandings discussed above. As another example, in 1995, the Nova Scotia Law Reform Commission released a proposal for a new guardianship law, with a goal that the law be “accessible and affordable while giving the *necessary protection* to those subject to adult guardianship”: Law Reform Commission of Nova Scotia, Final Report: Reform of Laws Dealing with Adult Guardianship and Personal Health Care Decision (Halifax, Law Reform Commission, 1995) at 17 [emphasis added] [N.S. LRC Report]. Such views still identify protection as the main purpose of guardianship acts, rather than focusing on enhancing the adult’s decision-making abilities. Indeed, as Frolik noted:

Reformers have been disappointed that the reforms have not noticeably changed the climate of values that drive the guardianship system.

Protection of the person and property of the ward still seem to be the main goal of guardianship, rather than assisting individuals with reduced capacity to retain control of their lives

Frolik, “Enemy,” *supra* note 37 at 349.

138 Frolik, “Judicial Acceptance,” *supra* note 5 at 739.

139 Quinn, *supra* note 92 at 49.

140 Burgdorf, *supra* note 133 at 522. In the context of disability discrimination, Burgdorf also notes that:

The first prerequisite for addressing disability discrimination is to come to grips with the underlying reality of human abilities and disabilities. Though we are conditioned to think otherwise, human beings do not really exist in two sharply distinct groups, people with disabilities and those without disabilities. The “spectrum of abilities” concept seeks to describe how things really are and recognizes that some arbitrariness inheres in the determination that a certain degree of impairment of particular functions constitutes disability...instead of two separate and distinct classes, “there are spectrums of physical and mental abilities that range from superlative to minimal or non-functional.”

*Ibid.* at 519 [footnotes omitted].

capacity in some areas and not others. Before this development, adults with mental disabilities tended to lose their individual identity to the generalizations of the condition: once they were identified as having a mental disability, incompetency was assumed.<sup>141</sup> Plenary orders epitomized this generalization, as they ignored an adult's individual abilities. Partial guardianship was developed to rectify this problem.

In Western societies, the recognition of autonomy as a foundational human right also changed guardianship systems. Legislation from the last three decades is marked by "the desire to legally intrude as little as possible in the lives of people with diminished capacity,"<sup>142</sup> reflecting the fact that "[r]espect for autonomy is now well established as one of the fundamental principles of bioethics."<sup>143</sup> Many statutes have mirrored these changing values, and many provinces now statutorily mandate that courts order the least intrusive measure possible and consult with the adult to ascertain her wishes as much as possible.<sup>144</sup> Additionally, this recognition of autonomy as a fundamental value also led to the recognition that adults have a right to receive notice of proceedings.<sup>145</sup>

## V. CONSTITUTIONAL CONSIDERATIONS

Given the intrusion on individual autonomy, the issue arises of whether guardianship violates s. 7 of the *Canadian Charter of Rights and*

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141 Bruggeman, *supra* note 50 at 321.

142 Quinn, *supra* note 92 at 49.

143 Richardson, *supra* note 6 at 703.

144 See e.g. Sask. Act 2000, *supra* note 2, ss. 3(d), 3(f); Alta. Act 2000, *supra* note 73, s. 19(1)(c); Ont. Act, *supra* note 10, ss. 66(9), 66(5); Man. Act, *supra* note 29, ss. 75, 76(1)(a); N.W.T. Act, *supra* note 15, ss. 12(12), 12(8); Y.K. Act, *supra* note 14, ss. 2(c), 2(b).

145 Frolik, "Judicial Acceptance," *supra* note 5 at 740. "It is now generally acknowledged by those practitioners involved in guardianships that the person who is the subject of a proposed guardianship has a right to know that the petition is pending and to know what her legal rights are in relation to this legal proceeding": Quinn, *supra* note 92 at 13.

*Freedoms*,<sup>146</sup> which guarantees “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>147</sup>

Determining the constitutionality of guardianship legislation under s. 7 involves three stages. First, we must first determine whether the legislation engages the life, liberty or security interests protected by s. 7.<sup>148</sup> Second, we must determine whether those interests, if engaged, are engaged in a way that conforms to the principles of fundamental justice. If not, the final step is to examine whether the impugned legislation can be saved under s. 1 of the *Charter*.

With respect to the security interest, the Supreme Court has noted that this interest encompasses both physical and emotional integrity,<sup>149</sup> basic human dignity<sup>150</sup> and some element of personal autonomy, including “the right to make choices concerning one’s own body.”<sup>151</sup> Given the broad scope of the security interest, it is likely that an adult’s security interests are engaged

146 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

147 *Ibid.*, s. 7. This issue was extensively addressed in the somewhat dated article Robert Gordon & Simon Verdun-Jones, “The Implications of the *Canadian Charter of Rights and Freedoms* for the law relating to guardianship and trusteeship” (1987) 10 *Int’l J.L. & Psychiatry* 21. See also Gordon *et al.*, “Comment,” *supra* note 54 at 150.

148 In *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)* [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289 [*Re BCMVA*], the Supreme Court recognized that life, liberty and security in s. 7 encompass three distinct, independent interests that should be addressed individually.

149 *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 at para. 28. In *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124 at para. 60, the Supreme Court further delineated the scope of emotional integrity:

For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person’s psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

150 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 107 D.L.R. (4th) 342 at para. 21.

151 *Ibid.*

by a guardianship order. Clearly, by granting legal decision-making power to another person, the order affects the adult's ability to make choices for herself, including the choices within the realm of personal autonomy protected by the *Charter*. For example, under the Saskatchewan Act, guardians can be given authority to determine the adult's living arrangements, social activities, health care, diet, dress and hygiene.<sup>152</sup> Surely these extremely private and personal decisions are included within the *Charter*-protected choices concerning one's body. Moreover, one could also argue that guardianship legislation strips adults of their personal dignity by removing their decision-making capacity. In Germany, for example, guardianship was rejected on the basis that a declaration of "legal incompetence" was derogatory and implied the loss of basic rights of the adult.<sup>153</sup> This would also engage the security interest.

With respect to the liberty interest, the Supreme Court has recognized that this interest encompasses the right to be free from "imprisonment, detention, or any form of control or of constraint on freedom of movement."<sup>154</sup> While initially it seems that this interest is not engaged, the Saskatchewan Act does allow guardians to make decisions with respect to an adult's restraint.<sup>155</sup> I would therefore suggest that this interest is also engaged. The adult's lack of capacity is not an obstacle to engaging these interests, as the adult's constitutional rights are not diminished or expunged by a finding of incapacity.<sup>156</sup>

Given that the security and liberty interests of an adult under a guardianship order are engaged, we must next consider whether the impingement is consistent with the principles of fundamental justice. In

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152 Sask. Act 2000, *supra* note 2, s. 15.

153 D. Gove & J. Georges, "Perspective on Legislation Relating to the Rights and Protection of People with Dementia in Europe" (2001) 5 *Aging & Mental Health* 316 at 317.

154 *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1 at para. 33 [*B.(R.)*].

155 Sask. Act 2000, *supra* note 2, s. 15(i).

156 See e.g. *Re Weisgerber*, 2003 ABQB 619, 2 E.T.R. (3d) 253 at para. 30, where the judge affirmed that the rights of an adult under the *Charter* do not disappear with a guardianship order.

*Re BCMVA*, the Supreme Court affirmed that these principles are both substantive and procedural and “found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.”<sup>157</sup>

The Nova Scotia Supreme Court Family Division addressed this particular issue in *Nova Scotia (Minister of Health) v. J.(J.)*<sup>158</sup> on an application to review a wardship order made under the *Adult Protection Act*.<sup>159</sup> Despite being somewhat dated, and a lower court case, this judgment is important because it thoroughly addresses the related constitutional issues, which many courts in guardianship proceedings do only superficially. The Court noted that the “real task comes [in] defining, in this context, the principles of fundamental justice”<sup>160</sup> and identified numerous procedural principles of fundamental justice, including reasonable notice with particulars, a neutral arbitrator and an opportunity to present one’s case effectively (which may include the right to counsel).<sup>161</sup> Gordon and Verdun-Jones also identify procedural fairness protections that are likely constitutionally protected, including the right to be heard, the right to be treated impartially, the right to be notified of

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157 *Re BCMVA*, *supra* note 148 at para. 72. In *R. v. Malmo-Levine*, the Court set out the requirements for a rule to constitute a principle of fundamental justice:

In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, 179 C.C.C. (3d) 417 at para. 113.

158 *Nova Scotia (Minister of Health) v. J.(J.)*, 2001 NSSF 12, 193 N.S.R. (2d) 13, 602 A.P.R. 13 [J.(J.)].

159 Note that this was a review for a wardship order, not a guardianship order. Note also that this case was one of a series of cases determining J.(J.)’s rights: See also *Re J.(J.)*, 2002 NSSF 19, 202 N.S.R. (2d) 362; *Nova Scotia (Minister of Health) v. J.J.*, [2005] 1 S.C.R. 177, 2005 SCC 12. Unfortunately, the other decisions did not address the *Charter* implications of wardship and are therefore not relevant to the following discussion. The 2001 lower court decision is particularly important because it does address these important *Charter* issues.

160 *J.(J.)*, *supra* note 158 at para. 88.

161 *Ibid.* at para. 91.

a hearing and the right to reasons.<sup>162</sup>

If we use these foundations as a starting point, we should be able to paint a tentative picture of whether guardianship orders are carried out in a manner consistent with the principles of fundamental justice. In order to pass constitutional muster, I suggest that guardianship legislation must provide for the above procedural safeguards.

One such procedural safeguard is the requirement of notice. The Court in *J.(J.)* noted that procedural protections include the right to “have a ‘meaningful’ opportunity to be heard.”<sup>163</sup> Surely, in order for the adult to have a meaningful opportunity to be heard, the adult must have notice of the proceedings. Most guardianship statutes require notice to be served on the adult,<sup>164</sup> but courts can also dispense with notice. Clearly, dispensing with notice should not occur without serious reflection on the constitutional ramifications. Additionally, merely giving notice may not be sufficient, because “[i]f the allegations in the petition for guardianship have merit, the proposed ward may have trouble deciphering, understanding, or following the directions of the summons.”<sup>165</sup> Accordingly, the adult may not understand the nature of the documents served, and “service” may not be sufficient to allow the adult to participate.

Further, in regards to substantive protection, the Court in *J.(J.)* found that, in order for the constitutional standard to be met, the court must have the power to limit intervention and access after wardship and that the use of permanent wardship orders should be limited.<sup>166</sup> While most guardianship legislation has been reformed since the advent of the *Charter* to allow for partial guardianship, the holding in *J.(J.)* suggests that courts may be willing to read into a statute the power to grant partial guardianship, in order to

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162 Gordon & Verdun-Jones, *supra* note 147 at 26-27.

163 *J.(J.)*, *supra* note 158 at para. 118.

164 See e.g. Alta. Act 2000, *supra* note 73, s. 3(2)(a); Sask. Act 2000, *supra* note 2, s. 31(1)(a), Ont. Act, *supra* note 10, s. 27(4); N.W.T. Act, *supra* note 15, s. 4(2)(a); N.S. Act, *supra* note 17, s. 3(2); Y.K. Act, *supra* note 14, s. 30(5)(a); Man. Act, *supra* note 29, s. 63(3)(a).

165 Andrews, *supra* note 1 at 88.

166 *J.(J.)*, *supra* note 158 at paras. 20, 91.

ensure the act passes constitutional muster. Courts may be more willing to read in this provision than to strike down legislation, as courts are generally cautious when striking down protective, social policy legislation.<sup>167</sup>

There is very little case law addressing the constitutionality of guardianship, suggesting that the majority of guardianship orders are not challenged. Even when guardianship orders are in dispute, courts seem hesitant to address constitutional issues. For example, in *Re C.M.D.*,<sup>168</sup> the adult sought review and termination of an order under Alberta's *Dependent Adults Act* appointing the adult's daughter property and personal guardian. The adult argued that *Charter* rights must be considered in determining whether the order would continue.<sup>169</sup> The Court addressed the matter very superficially, noting that the Legislature had included reasons, restrictions and terminology in the Act that placed obligations on the Court before issuing an order, and that these statutory obligations flowed out of the respect for *Charter* rights.<sup>170</sup> The Court seemed to assume that the legislation was *prima facie* constitutional without delving into a deeper *Charter* analysis.

However, in *Fleming v. Reid*,<sup>171</sup> the Ontario Court of Appeal found sections of the *Mental Health Act*,<sup>172</sup> which allowed a board to compel involuntary incompetent patients to take drugs contrary to the instructions of substitute decision-makers, unconstitutional.<sup>173</sup> In making their decisions, the substitute decision-makers had relied on the prior competent wishes of the patients.<sup>174</sup> The Court found the impugned provisions denied the adult's right to security guaranteed under s. 7 of the *Charter* and could not be saved under s. 1.<sup>175</sup> In doing so, the Court delineated the scope of the common law right to bodily integrity and personal autonomy, including

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167 *Ibid.* at para. 93.

168 2001 ABQB 883; [2001] A.J. No. 1364.

169 *Ibid.* at paras. 1-3, 25.

170 *Ibid.* at para. 26. For example, the Court noted that the Act required "the Order or its continuation must 'substantially benefit' and 'be in the best interests of' the adult": *ibid.*; Alta. Act 1980, *supra* note 73, s. 4.

171 (1991), 48 O.A.C. 46, 82 D.L.R. (4th) 298 [*Reid*].

172 R.S.O. 1980, c. 262.

173 *Reid*, *supra* note 171 at paras. 31, 47, 60.

174 *Ibid.* at para. 5.

175 *Ibid.* at paras. 31, 60-62.



the right to refuse medical treatment, and concluded that this protection of personal autonomy and self-determination “is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual’s security of the person and must be included in the liberty interests protected by s. 7.”<sup>176</sup> Clearly, the Court was willing to find that the intrusion on the adult’s sphere of autonomy was a violation of s.7, suggesting that other guardianship legislation which intrudes on this sphere is also unconstitutional. However, there are several distinguishing factors which bode well for guardianship legislation. First, the impugned sections allowed the board to act in a way that was contrary to the wishes of substitute decision-makers and the prior expressed wishes of then-competent patients. The result would likely be different if a legally appointed guardian had consented to treatment on behalf of the adult. In such a case, the guardian’s consent would be taken as the adult’s consent, and the issue would not have been about non-consensual treatment. Second, in its s. 1 analysis, the Court notes that the right to be free from non-consensual treatment is not absolute, but safeguards must be in place to protect the adult’s interest.<sup>177</sup> Many guardianship statutes now have safeguards, including review orders, mandatory advocates and notice requirements, and consequently, even if guardianship legislation is found to violate s. 7, it would likely be saved under s. 1.

## VI. ALTERNATIVES TO GUARDIANSHIP

In any discussion of guardianship, it is important to consider the alternatives available. In Saskatchewan, there are various other tools that can be used in addition to or instead of guardianship, including powers of attorney and health care directives. Indeed, often all of these tools will be employed, because mental ability is a continuum; a power of attorney

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<sup>176</sup> *Ibid.* at para. 41.

<sup>177</sup> *Ibid.* at para. 62.

may be appropriate at one time and a guardianship order may be necessary later.<sup>178</sup> In addition to these alternatives, I will also examine guardianship-like assistance regimes that have replaced guardianship in other countries.

### A. ENDURING POWER OF ATTORNEY

A power of attorney (POA) is an agreement where one person appoints another to look after matters specified in the POA.<sup>179</sup> A POA may be conditional or contingent on a future event, such as loss of capacity, or it may be effective from the moment it is signed. An enduring POA is not terminated when the adult loses capacity.<sup>180</sup> Depending on specified powers, enduring POAs can function much like guardianship orders, giving the attorney authority over listed powers. Under a POA, the adult can still do all the things that the attorney has been appointed to do, such as signing cheques; however, this duality does not apply if the adult loses capacity. In Saskatchewan, similar to guardianship legislation, POAs can separate personal and property matters.<sup>181</sup>

POAs provide several advantages over guardianship. First, the scope of a POA “is limited only by the intent of the principal, as set forth in the executing document.”<sup>182</sup> Thus, the adult has the ability to determine the matters over which the attorney will have authority. This approach is more respectful of the adult’s right to self-determination than a guardianship

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178 See Lawrence Frolik, “Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform” (1981) 23 *Ariz. L. Rev.* 599 at 631-32.

179 *The Powers of Attorney Act, 2002*, S.S. 2002, c. P-20.3, s. 14(1) [*The POA Act*]. The Act provides:

A grantor may give an attorney:

- (a) specific authority respecting certain property or financial matters;
- (b) general authority respecting all of the grantor’s property and financial affairs;
- (c) specific authority respecting certain personal matters; or
- (d) general authority respecting all of the grantor’s personal affairs.

*Ibid.*, s. 14(2).

180 *Ibid.*, s. 3.

181 *Ibid.* s. 4.1(1).

182 Holmes, *supra* note 7 at 609.

order, which gives the adult no say in this matter. Further, POAs can be narrowed and tailored in a way that is not possible under plenary guardianship. A POA can address an adult's particular situation and include limitations and restrictions, require accounting to other family members, or provide for other safeguards.<sup>183</sup>

However, there are also problems with POAs. For example, POAs will not work for people who have never had capacity and would be unable to grant a POA under the Act. Accordingly, if POAs were the sole option, a portion of the population would be left without a guardianship-type mechanism. Additionally, many people lose capacity without creating a POA, either because they did not consider it or capacity was suddenly lost. Unfortunately, the forethought required by POAs does not always occur. For these reasons, I would suggest that POAs could not fully replace guardianship regimes.

## **B. HEALTH CARE DIRECTIVES AND PROXIES**

A health care directive gives directions relating to an adult's health care decisions, the appointment of a proxy or both.<sup>184</sup> A directive comes into effect when the adult loses capacity to make health care decisions and remains in effect until the adult recovers capacity.<sup>185</sup> Where a directive anticipates and instructs treatment in a particular circumstance, the decision in the directive is taken as the adult's decision.<sup>186</sup> A directive can also appoint a proxy to make health care decisions according to the adult's known wishes, or the best interests of the adult if wishes are not known.<sup>187</sup>

The most obvious problem with a health care directive is its narrow scope. It applies only to health care decisions, a very narrow range of personal issues, and does not deal with property at all. This factor alone prevents it

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183 See e.g. *The POA Act*, *supra* note 179, s. 17(3)(b)(ii).

184 *Health Care Directives and Substitute Health Care Decision Makers Act*, S.S. 1997, c. H-0.001, s. 2(1)(c).

185 *Ibid.*, s. 4.

186 *Ibid.*, s. 5(1).

187 *Ibid.*, s. 12.

from usurping the role of guardianship legislation.

### C. Assistance Regimes

Some people argue that guardianship should be done away with all together. Critics argue that “guardianship should never be a legal option since it discriminates against people and is a legal tool which takes away the freedom of people who have done nothing wrong.”<sup>188</sup> Critics also argue that “*Charter-proofing*” guardianship laws only results in a facade of acceptability,<sup>189</sup> when the underlying assumptions themselves are what should be challenged.

Germany, for example, has replaced guardianship with “care and assistance” (*Betreuung*). The legislation, enacted in 1992, allows the court to tailor specific tasks for the caretaker to fulfill and requires the caretaker to receive judicial authorization for important decisions, such as high-risk medical treatment.<sup>190</sup> Under the German system, the individual does not lose his legal status or any other legal rights.<sup>191</sup>

Similarly, in 1990, Norway introduced legislation that allows for assisting representatives or support persons.<sup>192</sup> Under an assisting representative order, the adult’s legal capacity is removed only in carefully prescribed circumstances.<sup>193</sup> A support person assists the adult in expressing her interests.<sup>194</sup>

While these regimes are somewhat similar to guardianship, they emphasize needs-based approaches, focusing on the adult’s decision-making and communication abilities. Further, these alternatives do away with the

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188 N.S. LRC Report, *supra* note 137 at 19.

189 *Ibid.*

190 Kees Blankman, “Guardianship Models in the Netherlands and Western Europe” (1997) 20 *Int’l J.L. & Psychiatry* 47 at 54.

191 Yuval Melamed, Israel Doron & Dan Shnitt, “Guardianship of people with mental disorders” (2007) 65 *Social Science & Medicine* 1118 at 1119.

192 Gordon, “Assisted,” *supra* note 23 at 63.

193 *Ibid.*

194 *Ibid.*

stigma associated with guardianship. As demonstrated by Germany's legislation, it is not inevitable that an adult must lose his capacity under guardianship-type orders. Canada should consider this principle in designing new legislation. Importantly, in advocating for co-decision-making regimes, I note that adults under a co-decision-making order in Saskatchewan do not lose legal capacity.

## VII. CONCLUSION

Current guardianship legislation reflects a constant tension between autonomy and protection. Past acts favoured protection, but a recent shift toward autonomy has occurred as legislators struggle to find the appropriate balance. This balance may be unattainable: autonomy and protection may well be diametrically opposed. However, I would suggest that Saskatchewan's Act and its co-decision-making provisions are as near to that balance as is available anywhere in the country. They constitute respect for autonomy and promotion of protection, and form a model for consideration by other provinces. This is not to suggest that Saskatchewan's law has found that elusive balance. Rather, it represents an important attempt to rethink guardianship and weigh competing values.

Given these competing and often conflicting values, it is crucial to recognize that guardianship is just one mechanism that can be employed to encourage autonomy and advance protection.<sup>195</sup> Guardianship has been recognized as:

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195 Indeed, the law itself is just one mechanism that can and should be used to achieve these goals. The law by itself is not enough to achieve these goals, because "society cannot legislate the positive attitudes and human relationships that must underlie effective protection": McLaughlin, *supra* note 41 at 17. We must recognize that "[e]ven a model guardianship law will have little impact if it is unsupported by a number of other non-legal societal developments": *ibid.* Still, legislation that respects the autonomy and dignity of the elderly and people with disabilities is an important step to further these progressive social attitudes.

[T]he most intrusive, non-interest serving, impersonal legal device known and available to us and as such, one which minimizes personal autonomy and respect for the individual, has a high potential for doing harm and raises at best a questionable benefit/burden ratio. As such, it is a device to be studiously avoided.<sup>196</sup>

However, despite the fact that guardianship can be misused, overreaching or abusive, it is not inherently undesirable.<sup>197</sup> The benefit-burden ratio cannot be considered in the abstract alone: guardianship may be desirable simply because no other feasible options are available. Guardianship legislation that respects self-determination and human dignity is essential, and can be accomplished through carefully crafted co-decision-making provisions such as those found in Saskatchewan's Act.

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196 Windsor Schmidt, "The Wingspan of Wingspread: What is known and Not Known about the State of the Guardianship and Public Guardianship System Thirteen Years after the Wingspread National Guardianship Symposium" (2001-2002) 31 *Stetson L. Rev.* 1027 at 1028.

197 Frolik, "Enemy," *supra* note 37 at 350.