

INTERPLAY BETWEEN AGING, DEATH AND DIVORCE
PAPER 4.2

Planning for Children: The Public Guardian and Trustee of BC's Role in Guardianship Matters and the Protection of Minors' Property Interests

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PLANNING FOR CHILDREN: THE PUBLIC GUARDIAN AND TRUSTEE OF BC'S ROLE IN GUARDIANSHIP MATTERS AND THE PROTECTION OF MINORS' PROPERTY INTERESTS

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I. Introduction

In the absence of proper planning, a minor's guardian or prospective guardian in British Columbia will likely have some dealings with the Public Guardian and Trustee of BC (the "PGT") in ensuring that the minor's property interests are protected. The PGT may, for example, become a minor's property guardian by default. Additionally, there are various instances where, by legislation, the PGT is appointed trustee of a minor's property. The function of such legislative provisions is to ensure that a minor's property is protected, especially in the absence of a properly appointed successor guardian or properly appointed trustee.

Children have property rights that are separate and distinct from those of their parents or guardians. With respect to property belonging to a minor, it is not uncommon for the parents or guardians of a minor to misunderstand what legal restrictions they have in the receipt and administration of their child's property. Generally speaking, even in cases where the parents are presumptively the child's guardian, they have restrictive authority to deal with a child's property. Additionally, when a guardian steps into the role of a trustee, he or she may not fully appreciate all of the duties and responsibilities that come with that role.

This paper reviews circumstances in which the PGT will play a role in guardianship matters and in protecting a minor's property interests, either through her role as property guardian or trustee of minors' funds.

II. Guardianship—Legislative Overview

Guardianship is primarily governed by the *Family Law Act*, SBC 2001 c.25 (“FLA”). Under section 39 of the FLA, parents are generally a child’s guardians, although an agreement or an order can provide that a parent is not the minor’s guardian (s.39(2)). Otherwise, guardians may be appointed by the court (s.51). Other types of guardians under the FLA are testamentary guardians (s.53) and standby guardians (s.55).

Under the old *Family Relations Act*, R.S.B.C.1996, c.128, terms such as “guardian of the person” and “guardian of the estate” were used and defined (section 25). The new legislation does not use those terms, but incorporates similar language in making a distinction between a guardian of person and a guardian of property.

In certain circumstances, the PGT may become a child’s property guardian by default. Under section 51(1) of the *Infant’s Act*, the PGT is property guardian of every minor who has no legal guardian. This applies when the minor’s guardian has died without appointing a successor guardian or when the guardian refuses or is incompetent at law to act. This circumstance can arise, for example, when a minor’s parents or guardians have died in a common accident, or if a sole guardian has died, without leaving a successor guardian.

In those circumstances, by operation of section 51 of the *Infants Act*, the PGT is the minor’s property guardian and responsible for all of the minor’s legal and financial affairs. In many cases, there are others, such as grandparents or other family members, who may wish to step in and act as the minor’s guardian. Those prospective guardians must make a court application under s. 51 of the FLA, with notice to the PGT (see s.52 of the FLA).

In making such an application, the proposed guardian or guardians must be prepared to properly identify and protect the minor’s legal and financial interests. The child may, for example, have a claim under the *Family Compensation Act*, RSBC 1996, c. 126 or may be a beneficiary of a deceased parent’s estate. Additionally, the proposed guardians may have to address a potential wills variation claim on behalf of the child under the *Wills Estates and Succession Act*, SBC 2009 c. 13 (“WESA”). If the infant has such a claim, the Notice of Civil Claim must be filed within 180 days of the representation grant is issued to preserve the right of action. In such circumstances, the prospective guardians must be prepared to advance the minor’s viable legal claim and protect the minor’s estate interests.

Of note, applications for full guardianship (that is, guardianship of person and of property) may now be brought in either Provincial Court or Supreme Court. In the past, the Provincial Court did not have jurisdiction to grant an order for guardianship of estate (as defined under the former *Family Relations Act*). Section 193 of the FLA grants the Provincial Court jurisdiction over all matters, with the exception of those matters specifically excluded under that section.

III. The Powers of Guardians to Receive and Manage Minors’ Property

Under our legislative regime, guardians have restrictive authority to deal with a child’s property, and there are few circumstances in which the guardians can receive and deal with a child’s property without a court order or trust deed. Section 176 of FLA confirms that, except as set out in section 178 of the FLA, a child’s guardian is not automatically a trustee of the child’s property.

The exception set out in section 178 of the FLA speaks to the delivery of small property. Under section 178, a person having a duty to deliver property to a child may deliver the property either to the child (if the child has a duty to support another person) or to the guardian who has parental

responsibilities with respect to the child. However, property delivered pursuant to section 178 must not exceed the amount prescribed by the section 24 of the Regulations. At present, the prescribed amount is \$10,000. Additionally, there are certain circumstances where the property cannot be delivered pursuant to this section, such as when a trustee has authority to receive or hold the property for the child or where the property is within a prescribed class of property.¹

A guardian holding funds under s.178 is a trustee and subject to the *Trustee Act*, RSBC 1996 c.464. In order to receive the minor's property, the guardian is prompted to acknowledge their duties and responsibilities as a trustee of that property by completing a Form 3 (included in the FLA Regulations). In this Form, the guardian acknowledges, among other things, that they hold the money in trust for the child, will keep the money separate from his or her money, will expend the money for the sole benefit of the child and will account to the child at age 19 and transfer the balance plus interest to the child at age 19.

The person having a duty to deliver the property to a child is not necessarily obliged to deliver it to the child's guardian. That person may, instead, deliver the property to the Public Guardian and Trustee in trust for the child, if the Public Guardian and Trustee is willing to accept it.

If the amount is over \$10,000, and the guardian wishes to hold the minor's funds as trustee, he or she may make a court application under s. 179 of the FLA to be appointed as trustee of the funds. Applications under s.179 will be discussed in more detail later in this paper.

IV. The PGT as Trustee of a Minor's Property

A. Estate Funds Where no Trustee is Named

Under s. 75 of the now repealed *Estate Administration Act*, R.S.B.C. 1996, c. 122, ("EAA"), if a minor was entitled to a share of the assets of an estate consisting of "money", and there was no trustee for the minor's interest in the estate, the executor or administrator of the estate was obliged to pay the minor's share to the PGT in trust for the minor.

Similar wording has been incorporated into what is now s. 153 of the WESA. Section 153 of the WESA states:

- 153** (1) Subject to subsections (2) and (3), if
- (a) a minor is a beneficiary or an intestate successor, and
 - (b) there is no trustee or no trust created for the minor's interest in the estate, the personal representative, on distribution of the estate, must pay or transfer the minor's interest in the estate to the Public Guardian and Trustee in trust for the minor.
- (2) If a minor's interest in an estate consists, in whole or in part, of property other than money, the Public Guardian and Trustee may
- (a) convert the minor's interest in the estate to money,
 - (b) transfer the minor's interest in the estate to the minor, or
 - (c) decline to accept the transfer of the minor's interest in the estate and recommend to the court that a trustee be appointed to hold and administer the minor's interest in the estate until the minor reaches 19 years of age.

¹ "Prescribed class of property" is not specifically defined in the Regulations. However, it likely includes any money that is required to be paid to the PGT pursuant to legislation.

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(3) Subsection (1) does not apply if, before distribution of the assets of the estate, the court, on application and with notice to the Public Guardian and Trustee, appoints a trustee to hold and administer the minor's interest in the estate until the minor reaches 19 years of age.

The wording in section 153 of WESA is broad enough to encompass the whole of the "minor's interest in the estate" and is not restricted to assets of an estate consisting of "money", thus filling a gap in the previous legislation. Under the old legislative regime, if the minor beneficiary's interest in the estate was something other than money, there was no requirement to transfer that property to the PGT. In those circumstances, and due to some ambiguity in the definition of "money", the administrator or executor would be left with some uncertainty as to how to properly distribute the minor beneficiary's interest in the estate.

Like s. 75 of the EAA, s. 153(1)(b) of the WESA requires that the minor's portion of the estate be paid to the PGT in trust. This section applies whether there is a will or intestacy. However, where there is a will that contains trust provisions or permits property to be distributed to the minor beneficiary's guardian, s. 153 does not come into play.

Subsection 153(3) is new and did not exist under section 75 of the EAA. Under this section, the minor's interest in the estate may be delivered to a trustee other than the PGT if, before the distribution of the estate assets, there is a court order appointing a trustee to hold and administer the minor's interest. This is a new provision and to the writer's knowledge, has not yet been judicially considered. Although the wording is relatively straight forward, there is often some confusion regarding the interplay between this section and section 179 of the FLA, which deals with the appointment of a trustee by the Supreme Court. Although s.153 of WESA does not make specific reference to section 179 of the FLA, it is a logical conclusion that an application referred to in section 153(3) should proceed as an application for trusteeship under s. 179.

Therefore, although payment to the PGT is mandatory under s.153, this provision provides an opportunity to have a private trustee appointed in the appropriate circumstances. Details of applications under s.179 of the FLA are discussed later in this paper.

B. Life Insurance Proceeds

Section 88 of the *Insurance Act*, R.S.B.C. 2012, c. 1, places restrictions on who may receive and manage a minor's insurance monies. If a minor is named as a beneficiary to a life insurance policy, and there is no trustee appointed to administer the funds, then the proceeds must be paid to the Public Guardian and Trustee in trust for the minor. Section 88 states:

- 88** (1) If an insurer admits liability for insurance money payable to a minor or for insurance money payable to a trustee for a beneficiary who is a minor, the insurer must, within 30 days after receiving the evidence referred to in section 73,
- (a) in the case of money payable to a minor, other than a minor referred to in paragraph (b), pay the money in trust for the minor to
 - (i) a trustee for the minor appointed in relation to that money by the insured or group life insured in a contract or by a declaration, or
 - (ii) if no trustee is appointed for the minor in relation to that money, the Public Guardian and Trustee,
 - (b) in the case of money payable to a minor referred to in subsection (4), pay the money to the minor, and
 - (c) in the case of money payable to a trustee for a beneficiary who is a minor, pay the money to the trustee.

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(2) An insurer who makes a payment under subsection (1) (a) (i) or (c) must, within 30 days after the date of payment, give written notice to the Public Guardian and Trustee stating the name and address of the minor, the name and address of the trustee and the amount of the payment.

(3) Payment of the insurance money referred to in subsection (1) discharges the insurer if the payment is made in accordance with subsection (1).

(4) A beneficiary who has reached the age of 18 years has the capacity of a person who has reached the age of 19 years for the purposes of receiving insurance money payable to the minor and giving a discharge for it.

Upon the PGT's receipt of the funds under section 88, the disposition of that property is governed by the *Infants Act* (as will be discussed further).

Notably, section 88 gives statutory authority for the minor to give a discharge for and receive the insurance proceeds if the minor has reached the age of 18, rather than 19. The insurer has an obligation to notify the PGT (within 30 days) of a payment made to the trustee, stating the name and address of the minor, the name and address of the trustee, in the amount of payment.

The PGT may take steps necessary to protect a minor's interest in life insurance policy proceeds if the life insurance has not been remitted as required by statute.

C. Proceeds from an RRSP or Pension Plan

Some retirement plan contracts direct that funds payable to a minor on the death of the contributor are payable to the PGT if there is no other trustee appointed. Counsel should review the terms of the plan for any RRSP, RRIF or pension benefit. The plan may state that the PGT is the default trustee.

If there is no trustee named for the funds and there is no default trustee, there are ways in which a trustee may be established under the FLA, as discussed above. If the value of the funds is \$10,000 or under, the funds may be paid to the minor's guardian or to the minor, pursuant to s.178 of the FLA. If the amount is over \$10,000, an application may be made under s.179 of the FLA to appoint a private trustee.

D. Real Property

The PGT may have a limited role to play *vis a vis* a child's interest in real property. A child may have an interest in a matrimonial home after the death of one parent on intestacy (see s.21 of WESA). The interest may be shared with the surviving parent. If liquidating that asset is not advisable, the child may be registered as an owner on title. A minor can hold legal title to real property and there are no statutory restrictions with respect to registration of a minor on title.

The PGT has a clear role in assisting the court with respect to disposition of the minor's interest in real property. There is a restriction in the child's ability to deal with real property over which they hold title. Section 2 of the *Infants Act* allows for an application to court on behalf of the minor for an order to dispose of the property. Although, section 2 of the *Infants Act* provides that the PGT may petition the Court on behalf of the infants to dispose of all or part of the land, in practice, it is generally the guardian or another private person who brings the application, with notice to the PGT. The PGT then provides recommendations to the court on the application.

V. When the PGT Holds the Minor's Funds in Trust: The PGT's Use of the Child's Funds for Maintenance

Funds held in trust by the PGT are invested with the authority granted under the *Public Guardian and Trustee Act*, RSBC 1996 c.383 and the *Trustee Act*. The PGT has legislative authority to make use of the child's funds held in trust by the PGT for the maintenance, education and benefit of that child. Pursuant to section 14 of the *Infants Act*, if the PGT holds money in trust for an infant, the PGT may, subject to the terms of a will or trust deed that establishes the specific terms for the trust, authorize payment of all or part of the money for the maintenance, education or benefit of the infant. In situations where the funds are paid in trust to the PGT by operation of law, the guardian may make requests for payment for those specific purposes. However, it should be remembered that, generally, parents who are guardians must first use their own funds to support and maintain their child. Parents have a legal obligation to do so before they use their child's funds for such purpose. In circumstances where the PGT receives funds under specific provisions of a will or trust deed, the PGT will adhere to the established trust terms.

If the PGT is the minor's property guardian, s. 12 of the *Infants Act* allows the PGT the same powers that a trustee has pursuant to sections 24 and 25 of the *Trustee Act*. Section 12 of the *Infants Act* states:

12 If the Public Guardian and Trustee is the property guardian of an infant, he or she may, for any money or other property of the infant held by him or her or to his or her account, exercise for the benefit of the infant the powers conferred on trustees by section 24 of the *Trustee Act* and, without obtaining leave of the court, by section 25 of that Act.

Pursuant to s.24 and 25 of the Trustee Act, the PGT has authority for the payment of income and the sale of a minor's property. Sections 24 and 25 of the Trustee Act provide:

24 (1) If property is held by trustees in trust for an infant, either absolutely or contingently on the infant reaching 19 years of age or on the occurrence of any event before the infant reaches that age, the trustees may, at their sole discretion, pay to any guardians of the infant or otherwise apply for or toward the infant's maintenance or education, all or part of the income to which the infant may be entitled in respect of the property, whether or not there is a fund applicable to the same purpose or any other person bound by law to provide for the infant's maintenance or education.

25 (1) If any property is held by trustees in trust for an infant, either absolutely or contingently on the infant reaching 19 years of age or on the occurrence of any event before the infant reaches that age, and if the income arising from that property is insufficient for the maintenance and education of the infant, the trustees may, by leave of the court to be obtained in a summary manner, sell and dispose of any portion of the property, and pay any guardians of the infant or otherwise apply for or toward the infant's maintenance or education all or part of the money arising from the sale.

VI. Applications to Appoint a Private Trustee under Section 179 of the Family Law Act

Part 8 of the FLA deals with children's property and it is in this part of the Act that houses s.179, addressing the appointment of a trustee by the Supreme Court. A person or corporation may choose to bring an application under s.179 with respect to a minor's estate funds, personal injury settlement or damage award, or life insurance funds. It is a relatively new provision and there has been little judicial consideration to date. Until recently, there may have been some question as to

whether Part 8 of the FLA applied where a will appoints a trustee with power to administer a child's property. In the recent decision of *Leniuk Estate, Re*, 2016 BCSC 159, the Supreme Court confirmed that the provisions of the FLA do not override trust instruments (para. 13). Thus, where there is an existing trust deed, there is no requirement for an application under s.179 of the FLA.

The purpose of s.179 is to allow for a trustee to be appointed when it is in the best interests of a child. In the past, the court has exercised its discretion to make an order to appoint a trustee under either its *parens patriae* jurisdiction or s.31 of the *Trustee Act*. Section 179 of the FLA clarifies what evidence the court requires to grant such an order and alerts the prospective trustee to some of the restrictions the court may place on the trustee.

Section 179 (1) provides:

- 179 (1) Subject to subsection (2), the Supreme Court on application may appoint one or more persons as trustees over
- (a) particular property to which the child is entitled, including any property derived from the property or from the disposition of the property, or
 - (b) all property to which the child is entitled at the time the order is made and to which the child becomes entitled while the order is in effect, except property
 - (i) identified in the order, or
 - (ii) over which a trustee already has authority.

The enumerated factors that the court will consider are set out in subsection (2). The applicant will only be successful in the application if he or she satisfies that court that it is in the best interests of the child to make the order, on consideration of those factors. Those factors are:

- (2) (a) the apparent ability of the proposed trustee to administer the property;
- (b) the merits of the proposed trustee's plan for administering the property;
- (c) the views of the child, unless it would be inappropriate to consider them;
- (d) the personal relationship between the proposed trustee and the child;
- (e) the wishes of the child's guardians;
- (f) the written comments of the Public Guardian and Trustee;
- (g) the potential benefits and risks of appointing the proposed trustee to administer the property compared to other available options for administering the property;
- (h) if the Supreme Court is considering making an order under subsection (1) (b), that the interests of the child are likely better served by an order made under that subsection than by an order made under subsection (1) (a).

Essentially, an applicant under s.179 must show the court that it is more to the minor's benefit that the funds be paid to the prospective trustee than the PGT. To do so, the applicant should provide affidavit evidence that addresses the factors outlined in 179(2)(a) to (h). As required by S.179(2)(f), the court must have the written comments of the PGT and these comments will provide an analysis of the factors as well. Guidelines for preparing affidavit materials for review by the PGT or available on the Public Guardian and Trustee website at www.trustee.bc.ca. Follow the links under Protective Services/Minor's Property.

Pursuant to s.179(2)(c), the court will take into account the views of the child, unless it is inappropriate to do so. There is no minimum age specified in this section. Counsel should exercise discretion in evaluating whether it is inappropriate to present the child's views in support of the application. This should likely be decided on a case by case basis and may depend on such factors as the age and maturity level of the minor.

There is some parallel between the factors enumerated in s. 179(2) of the FLA and the factors the court has considered in past (and prior to the FLA) when determining whether, in the context of an award for damages, to appoint a minor's litigation guardian as a trustee in place of paying the child's property into court.

In *Peters v. Squamish Indian Band*, [1990] 43 B.C.L.R. (2d) 102 (County Ct.), for example, a minor's mother sought an order to have the minor's settlement paid to her rather than into court. She argued that she would be able to obtain a better rate of return on the funds than the return that would have been earned if the money were in court. In this case, the mother's application was lacking key information that would have been successful in persuading the court that appointing her as trustee would be advantages to the minor. The applicant in this case did not provide any information showing that she had an investment plan that she intended to follow to obtain a better rate of return, and there was no indication that all of the settlement funds were needed for the infant's education or maintenance.

The court also refused to grant such an order in *McCuaig v. Dinh*, 1999 CarswellBC 800 (S.C.) where settlement funds were payable to a minor. The court noted that the applicant did not appear to have special knowledge of investments or how to handle them. She claimed to be financially responsible, but did not provide evidence in support of this claim. There were no special circumstances to justify an exception to the rule that the funds should be paid into court. In this case, the guardian applicant also declared an interest in controlling the funds in a manner that would have benefited her directly, through reimbursement of funds to her for damage to the guardian's vehicle for which her daughter agreed to pay. Although the court did not question the applicant's motive, it observed that this "underlines the fact that a parent's interest is not always identical to that of the infant." The court found that all of the protections provided to an infant in that type of situation must be maintained until she reached the age of majority.

Where the proposed trustee is a corporate trustee, a number of the concerns noted in the cases above are taken care of. In those cases, however, the administrative costs may be an issue.

Subsection 179(3), is important in that it delineates some limits on the trustee that may be incorporated into the order. It states:

- (3) An order made under this section to appoint a trustee may do one or more of the following:
- (a) require the trustee to deliver the trustee's accounts at specified intervals for the examination and approval of the court;
 - (b) limit the duration of the trusteeship;
 - (c) specify or limit the types of investment in which the trustee may invest the property;
 - (d) provide for compensation of the trustee including, without limitation, setting rates and specifying when the compensation may be taken;
 - (e) require the trustee to give security in any form the court directs;
 - (f) make any other order the court considers appropriate.

The written comments of the PGT will likely make recommendations in contemplation of the possible terms outlined in subsection (3). Generally, the PGT requires that the proposed trustee

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post appropriate security, unless it is a financial institution, or otherwise restrict the proposed trustee in dealing with the minor's funds without the consent of the PGT or further order of the court. The PGT will also typically request that the trustee be required to provide a regular accounting to the PGT or the court. If possible, the trustee should preserve the capital of the trust funds as much as possible while also providing for the minor's needs.

VII. Summary

In summary, there are a number of circumstances in which the PGT is obliged to step in and act as a minor's property guardian or a trustee of the minor's property. These circumstances may arise as a result of poor planning on the part of a minor's parent or guardian or in circumstances where the interests of the minor's parent and guardian does not align with the interests and rights of the minor.

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