

# Youth Agency and the Culture of Law

## Guardianship



## Guardianship

### What does it Mean to be the Guardian of a Minor?

A guardian of a minor is responsible for protecting that minor by making decisions that are in the minor's **best interests**. In Canada, a minor is a person who is under the **age of majority**, which is the age at which the law considers someone to have reached adulthood and is therefore a full legal citizen whose decisions no longer require the oversight of a parent or guardian (for more on the age of majority, see the Age of Majority Handout). Like laws on the age of majority, laws that refer to guardianship over minors are determined individually by each province and territory.

Why do minors require guardians? Before examining in detail the rules and rationales behind guardianship in Canada (and Ontario in particular), it may be useful to look at how guardianship has been applied and conceptualized throughout history in some parts of the world. As you read about the history of guardianship in ancient Rome and how guardianship applies to minors today, consider what the rationales justifying guardianship imply about children, teenagers, and adults. What do the laws and legal decisions suggest about the way the law “sees” youth in your age category?

## History of Guardianship in Ancient Rome: Tutorship and Curatorship

The reasons for why the law requires guardians for minors is evident from legal traditions throughout history, such as in ancient Rome (753 BC – AD 476). Moreover, Roman law from this period has influenced many state legal systems today.

In ancient Rome guardianship over minors and their property varied depending on the age and gender of the child. The type of guardianship varied depending on which of the following groups a particular minor fit into:

- Children below the age of puberty, which was set at 14 for boys, and 12 for girls
- Children who reached puberty but did not yet reach the age of 25, the age of majority under Roman law

Guardianship during this period did not only apply to minors. Two additional groups of individuals could be subject to a form of guardianship, even as adults

- Women who were older than the age of puberty (12), and who for specific reasons needed special guardianship (see below, Women in Ancient Rome)
- Adults who were viewed as mentally incapable

## Children Below the Age of Puberty

For children under the age of puberty in ancient Rome the male head of the family had complete legal authority over their affairs, and was called the *paterfamilias*. For these children, the *paterfamilias* was likely to be their father or their paternal grandfather, if he were still alive.

The legal power held by the *paterfamilias* was extensive, and could even include the legal authority to put a ward, including an adult ward, to death. The *paterfamilias* also had control of all of the child's property and possessions.

Women were never able to become a *paterfamilias*: if the father of a child died, the mother would continue to care for the child but did not have the authority to make legal decisions for the child. The mother was required to apply to a government official, such as a magistrate or governor, to have a male guardian appointed for the child. This court-appointed male guardian was known as a tutor, and he would be responsible for overseeing the child's affairs, including controlling the child's property and making legal decisions on the child's behalf.

If the child's mother also died, then the government would appoint a tutor on its own. In any case, the tutor could be someone suggested by the father in his will, or could be the closest male relative on the father's side. Otherwise, the government would select a tutor of its choosing. Minors without a *paterfamilias* required a tutor until they reached the

age of puberty, set at 14 for boys and 12 for girls.

### Children Between Puberty and the Age of Majority

After reaching puberty, minors no longer required a tutor. Although they had not yet reached the age of majority (25), after reaching puberty they nonetheless gained some legal capacity. This second category of youth had the legal capacity to marry if they so desired. They were also deemed sufficiently capable that the government could draft them into military service. The law still recognized, though, that while these youth could make a wide range of decisions on their own, they still needed someone to oversee their affairs and ensure they weren't being taken advantage of. If a *paterfamilias* was still alive, that person would assume this modified responsibility. If not, then a guardian known as a curator was appointed by a government official to protect the best interests of children in this category, and oversee their legal matters. Curators performed a role similar to tutors, but generally had fewer responsibilities.

In some limited cases, a child who fell in this category (post-puberty but under 25 years of age), could avoid having a curator if he or she displayed high maturity and intelligence. In such a case, the child could be granted the special privilege of being deemed to have reached the age of majority. In other words, though they were not yet 25, they would be treated under the law as if they were 25, and thereby would have full legal capacity. This privilege was referred to as *venia aetatis*. Generally, only males over 20 years of age and

females over 18 years of age were granted this privilege. To gain this special capacity, young men and women had to appear before a public assembly, provide proof of their age, and have reputable and high-ranking men attest to their high maturity and intelligence to the satisfaction of those in attendance.

### **Women in Ancient Rome**

In earlier periods of ancient Rome, women whose fathers had died could be subject to another form of guardianship known as *tutela mulierum* – the guardianship of women. Under this form of guardianship, a specific type of tutor would be appointed to a young woman after she reached puberty at 12 years of age. This special type of guardian would continue in that role, protecting a woman's interests even after she married – including after she reached the age of majority. This tutor did not live with the woman and had limited control over her decisions and her property; but this special tutor would oversee some of her legal and business affairs. The reason for appointing this tutor was to protect a woman's property, such as an inheritance, from people who were not part of the woman's birth family, including her husband. As curators were increasingly appointed to women older than 12 and younger than 25, however, the *tutela mulierum* gradually became rare.

### **Mentally Incapable Adults**

In ancient Rome, a category of adults were viewed as being,

like infants, completely incapable of making their own decisions. These adults were often (rather unfavourably) referred to as “lunatics”, and the reason for their incapacity was viewed as arising from a mental illness or disability. There was no specific process for determining whether someone was mentally incapable. A curator, often the closest male paternal relative or someone chosen by the government, would be appointed to manage their affairs and make personal decisions on their behalf. Guardianship over these individuals lasted for their entire lives.

## QUESTIONS TO CONSIDER:

1. Describe the different forms of guardianship that existed in ancient Rome.
2. What was the rationale for the different categories of guardianship?
3. Do you agree that guardians were necessary for all four groups (minors under puberty, minors who had reached puberty but were under the age of majority, women in general, and mentally incapable adults)?

## QUESTIONS TO CONSIDER:

4. Why do you think there was only one age of majority (25) but two ages for puberty depending on if the child is a boy or a girl? What does the age difference imply about how boys and girls mature? Should that matter for purposes of law?

5. What does *tutela mulierum* imply about how women were viewed in ancient Rome?

## Guardianship in Canada

As in ancient Rome, the idea that guardians must make decisions on a child's behalf reflects an understanding that minors lack the *capacity or maturity* to make decisions that are in their best interests. Guardians are therefore responsible for making decisions that are in the best interests of the child.

In Ontario, there can be two types of guardians for minors:

1. A “guardian of the person” makes decisions related to the well-being of a minor, including decisions related to health-care and education. In Ontario, parents are automatically the “guardian of the person” of their children, unless someone else has been specifically appointed by a court. This type of guardianship is referred to as “custody” in Ontario laws.
2. A “guardian of property” is responsible for managing any property the child may own, such as an inheritance. In Ontario, parents are not automatically the “guardian of property” of their children but can be granted this authority based on a statute, court order, or other document such as a will.

In Ontario, laws on custody and guardianship of property are determined by the *Children's Law Reform Act (CLRA)*. The CLRA provides rules related to establishing paternity and maternity, custody, access (the right of a parent to spend

time with their child, and be given information about the child's health, education, and well being), and guardianship of children's property.

In particular, part III of the CLRA covers custody, access, and guardianship. Its central purpose is to ensure that decisions made by the court about custody, access, and guardianship are determined according to the *best interests of the children*.

**Case Study:** Tyler, 13, and Faria, 15, are brother and sister. They live with their mother and father. When they were born, their parents automatically became their “guardian of the person” and thus had custody over Tyler and Faria. This meant that while raising Tyler and Faria, their parents were both responsible for making decisions on their behalf – for example, choosing which school to send Tyler and Faria to, and deciding what immunizations to give them at the doctor's.

*What would happen if Tyler and Faria's parents were to separate or divorce? One parent could have sole custody, or both parents could have joint custody. Custody refers solely to the ability to make decisions on behalf of the children, and doesn't necessarily determine who Tyler and Faria would live with or how they would split their time between their parents. Their mother, for example, could have sole custody of Tyler and Faria, even if they spent an equal amount of time with their father.*

*What would happen if one or both of their parents passed away?* According to the CLRA, if one parent passed away, the surviving parent in most cases would have sole custody over Tyler and Faria. If both parents passed away, we examine whether in their wills they appointed an individual to have custody. The appointed person must agree to be a guardian, and must apply to the court to finalize the appointment within 90 days of the parents' deaths. If both parents die, the parents must also have appointed the same person in their wills to have custody. If each parent requested different people, both candidates would be invalid appointees as guardian. If the parents die, but did not prepare wills or did not choose a guardian in their wills, anyone could technically apply to the court to be Faria and Tyler's guardian. The court will decide based on the best interests of the children.

The CLRA provides a list of considerations that the court must review to determine the best interests of the child in decisions related to custody and access:

- a) The love, affection and emotional ties between the child and,
  - i. Each person entitled to or claiming custody of or access to the child,
  - ii. Other members of the child's family who reside with the child, and
  - iii. Persons involved in the child's care and up-bringing

- b) The child's views and preferences, if they can be reasonably ascertained
- c) The length of time the child has lived in a stable home environment
- d) The ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child
- e) The plan proposed by each person applying for custody of or access to the child for the child's care and upbringing
- f) The permanence and stability of the family unit with which it is proposed that the child will live
- g) The ability of each person applying for custody of or access to the child to act as a parent
- h) The relationship by blood or through an adoption order between the child and each person who is a party to the application

For example, suppose that Faria and Tyler's grandmother applies to the court for custody of the children. The court, in assessing the best interests of the children, would likely look at the current relationship that Faria and Tyler have with their grandmother, what Faria and Tyler's own preferences are,

and the living circumstances of their grandmother, among other things.

#### QUESTIONS TO CONSIDER:

1. What else should a court consider in determining whether or not to award custody to Tyler and Faria's grandmother?

*Guardianship over property: What if Faria and Tyler had an inheritance?* Similar rules apply to guardianship over Tyler and Faria's property. Suppose Tyler and Faria's grandfather passed away and left them a large inheritance. The management of Tyler and Faria's inheritance could depend on what Grandpa specified in his will. For example, Grandpa could request in his will that Tyler and Faria's parents (if they are still alive) are responsible for managing the inheritance. If Grandpa did not request in his will that the parents would manage their property, the parents could still apply to a court and request to be appointed guardians of Faria and Tyler's property. As with decisions related to custody and access, the court will make a decision based on what the best interests of the children are. In most cases, they will prefer that parents be appointed as guardians of property.

If Grandpa does not specify who will manage the property in his will, and the parents (or anyone else, for that matter) do not apply to be appointed guardians of the property, Faria and Tyler's inheritance will be managed by the government – in Ontario, the money would be held by the Accountant of the Superior Court of Justice for as long as Faria and Tyler are minors.



## How do the Guardian's Responsibilities Change as a Child Gets Older?

As children in Canada become older and therefore begin to display a greater capacity to make decisions that are important to their well-being, the need for a guardian decreases, and thus so too does the scope of a guardian's responsibility and authority to protect the minor's best interests. Although young people gain many rights and responsibilities when they reach the age of majority in their respective province or territory (18 or 19), in some circumstances they gain certain rights and responsibilities at an earlier age.

In many cases, children in Canada gain certain rights and responsibilities when they turn 16. For example, Ontario's Substitute Decisions Act defines adulthood as 16 or older.

However, children even younger than 16 may sometimes be able to influence or even wholly determine the outcome of decisions made on their behalf.

### *Manitoba (Director of Child & Family Services) v C(A)*

Under Manitoba's *Child and Family Services Act* (CFSA), minors who are 16 years or older can consent to their own medical treatment, unless they are unable to understand the relevant facts and consequences of the decision. For children under 16 years of age, however, a court can make a decision about medical treatment that it decides is in the best interests of

the child. In *Manitoba (Director of Child & Family Services) v C(A), A.C.*, a “mature” 14-year-old girl from Manitoba who identified as a Jehovah’s Witness, tried to challenge this law based on her religious beliefs.

A.C. was a 14-year-old girl in Manitoba who was admitted to a hospital after suffering from internal bleeding due to Crohn’s disease. The doctors at the hospital wanted to give A.C. a blood transfusion: without the blood transfusion, they believed that A.C. could potentially lose her life, and at the very least would suffer from serious long-term health consequences. As a devout Jehovah’s Witness, however, A.C. chose not to consent to the blood transfusion. As part of her faith, A.C. believed that the Bible prohibited blood transfusions. A.C.’s parents supported her decision, stating that she “treasures her relationship with God and does not want to jeopardize it” and that she “understands her disease and what is happening”.

Despite A.C.’s religious beliefs and findings by multiple psychiatrists that she was fully aware of the significance of the decision, the trial court ordered A.C. to undergo a blood transfusion against her will. Although at the time of trial she had already received the blood transfusion, A.C. and her parents challenged the decision to order a blood transfusion in court. They argued that the sections of the CFSA that denied her the ability to give consent violated sections 2(a), 7, and 15 of the *Charter of Rights and Freedoms*.

The court ruled that the act was constitutional, and did not

violate these sections (see Age of Majority handout for a detailed review of the case). A.C. didn't completely lose her case, however. She managed to convince the court that the act should be interpreted in a way that allows an adolescent under 16 to provide evidence of her maturity, such as a psychiatrist's report like the one A.C. had submitted. *If a young person under 16 can persuade a court that she is mature enough to make her own medical decisions, then her views must be respected.* According to Justice Rosalie Abella, who wrote the decision:

The more a court is satisfied that a child is capable of making a mature, independent decision on his or her own behalf, the greater the weight that will be given to his or her views when a court is exercising its discretion under s. 25(8) [of the CFSA]. In some cases, courts will inevitably be so convinced of a child's maturity that the principles of welfare and autonomy will collapse altogether and the child's wishes will become the controlling factor. If, after a careful and sophisticated analysis of the young person's ability to exercise mature, independent judgment, the court is persuaded that the necessary level of maturity exists, it seems to me necessarily to follow that the adolescent's views ought to be respected. Such an approach clarifies that in the context of medical treatment, young people under 16 should be permitted to attempt to demonstrate that their views about a particular medical treatment decision reflect a sufficient degree of independence of thought and maturity.



## Ontario

In Ontario, medical decisions are covered by the *Health Care Consent Act* (HCCA). Unlike in Manitoba, there is *no minimum age of consent* for medical treatment under the HCCA. For consent to medical treatment to be valid, the patient must be determined by the physician to be *capable* of giving consent. Furthermore, the consent must be *informed* (meaning that the physician has provided enough information about the treatment) and *voluntary* (meaning that the patient cannot be coerced into giving consent).

Because there is no minimum age of consent, a person of any age could technically consent to treatment if they are determined to be capable of making the decision, and if consent is informed and voluntary. According to the College of Physicians and Surgeons of Ontario, “The Act does not identify an age at which minors may exercise independent consent for health care because the capacity to exercise independent judgment for health care decisions varies according to the individual and the complexity of the decision at hand. Physicians must make a determination of capacity to consent for a child just as they would for an adult.”

The HCCA states that an individual is capable of making a medical decision if:

“... the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as

the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”

#### QUESTIONS TO CONSIDER:

1. Why is the law concerned about consent being “voluntary”? Who might pressure minors to make decisions that are not “voluntary”? Is this ever an issue in your life or family?

### **Makayla Sault**

Makayla Sault was a 10 year-old girl from the New Credit First Nation near Caledonia, Ontario. Makayla was diagnosed with leukemia in January 2014, and was told by doctors that she would have a 75 per cent chance of survival if she received chemotherapy, but would likely die if she chose not to receive chemotherapy.

After 11 weeks of chemotherapy, which caused Makayla to suffer severe side effects, Makayla and her parents decided to stop using chemotherapy, and use traditional medicines instead. Makayla stated that she came to this decision after a

spiritual encounter in her hospital room. The hospital referred Makayla's case to the Children's Aid Society, but they chose not to interfere.

**WATCH:** <https://www.youtube.com/watch?v=NrF5wWQ4hIU>

**READ:** First Nations girl chooses traditional medicine over chemo: <http://www.cbc.ca/news/aboriginal/first-nations-girl-chooses-traditional-medicine-over-chemo-1.2644637>

**READ:** Makayla Sault's case raises questions about child welfare laws: <http://www.cbc.ca/news/aboriginal/makayla-sault-s-case-raises-questions-about-child-welfare-laws-1.2658155>

#### QUESTIONS TO CONSIDER:

1. Who do you think should be responsible for making the decision about Makayla's treatment? Makayla, her parents, the physicians, a court, or another individual or group?

## QUESTIONS TO CONSIDER:

2. Should Makayla have been allowed to stop receiving chemotherapy? Why or why not?
3. How would you determine whether Makayla has shown the “capacity” to make this treatment decision?
4. Compare Makayla’s story with the case of A.C. in Manitoba. What are the differences in the two cases that may have led to different outcomes?

## Substitute Decision-Making for Incapable Adults

An important, but perhaps also troubling, comparison to minors has to do with the role of guardians for adults who are mentally incapable. Like minors, adults who are deemed to be mentally incapable, require guardians that can make decisions on their behalf. In Ontario, decision-making on behalf of mentally incapable adults is covered by the *Substitute Decisions Act*. The Act defines adulthood as over the age of 16. The Act presumes that all adults are capable of making decisions in their best interests. For this right to be taken away, it must be proven that an adult does not have the capacity to make these decisions.

According to section 45 of the Act, a person is incapable of personal care if:

“the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”

If the court finds that this test is met, they may appoint a guardian to make decisions on this person’s behalf. Under the *Substitute Decisions Act*, a guardian of a mentally incapable adult has the power to do the following:

- a) make decisions related to the person’s living

arrangements, and provide for his or her shelter and safety

- b) represent the person in legal proceedings, and settle legal proceedings on the person's behalf (except for those related to the person's property or the powers of the guardian)
- c) have access to personal information, including health information and records
- d) make decisions about the person's health care, nutrition and hygiene
- e) make decisions about the person's employment, education, training, clothing and recreation and about any social services provided to the person

For medical decisions, the guardian must follow the *Health Care Consent Act*. For all other decisions, the guardian must take the following into consideration:

- a) the values and beliefs that the guardian knows the person held when capable, and believes the person would still act on if capable
- b) the person's current wishes, if they can be determined
- c) whether the decision will improve or worsen the quality of the person's life
- d) whether the benefit the person will receive from the decision outweighs the harm to the person from an alternative decision

## *E. (Mrs.) v. Eve*

Eve was a mentally disabled adult who suffered from extreme expressive aphasia – a condition that made it extremely difficult to communicate with others. As a child, Eve lived with her mother and went to various schools in her area. After turning twenty-one, Eve’s mother, “Mrs. E.,” sent Eve away to a school for mentally disabled adults in another community. While at this school, Eve developed a close friendship with a male student, who was also mentally handicapped. The two had discussed marriage.

After learning about Eve’s friendship, Mrs. E. became worried that Eve might become pregnant, and was concerned about the emotional effect that the pregnancy and birth of a child could have on her daughter. She also worried that since Eve could not take on the responsibilities required of a mother, the responsibility for caring for the child would fall on Mrs. E, who was widowed and almost sixty at the time.

Mrs. E. applied to the Supreme Court of Prince Edward Island for the authority to consent, on Eve’s behalf, to sterilize Eve and thus prevent her from becoming pregnant. Since Eve could not consent to the treatment because of her condition, Mrs. E. sought the authority to give consent on behalf of Eve. Mrs. E sought this authority because she wanted to spare her daughter from the possible trauma of giving birth and the obligations of being a parent – obligations which Eve was incapable of fulfilling.

Justice McQuaid of the Supreme Court of Prince Edward Island found that Eve was not capable of informed consent, and granted Mrs. E. the authority to make decisions on her behalf. However, he also found that sterilization, being a serious surgical procedure that was not medically necessary, could not be consented to by Mrs. E. on behalf of her daughter.

He also considered whether the court could consent, on behalf of Eve, to the sterilization procedure. The ability of courts to make decisions on behalf of individuals who are incapable of doing so is referred to as the ***parens patriae* jurisdiction**. *Parens patriae*, a Latin phrase, literally translates to “father of the country”. The *parens patriae* jurisdiction, though described here in relation to a mentally incapable adult, can also be used by the court to make decisions on behalf of children.

Justice McQuaid recognized that the court could, as part of its *parens patriae* jurisdiction, order a mentally incapable individual to undergo a medical procedure if it was medically necessary or in the public interest. However, since the sterilization procedure in Eve’s case was only requested to prevent pregnancy, and was not necessary for her health, the court could not authorize it. He denied Mrs. E.’s application.

Mrs. E appealed the decision. At the appeal, the court appointed a separate guardian to represent Eve and ensure that her interests were protected. At this court appearance, the majority of judges, although they differed in their

reasoning, reversed Justice McQuaid's decision and used the court's *parens patriae* power to order that Eve undergo sterilization. Eve's court-appointed guardian appealed the decision, and the case went to the Supreme Court of Canada.

The Supreme Court addressed its power under the *parens patriae* jurisdiction. Writing on behalf of the court, Justice La Forest wrote that:

The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The Courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare." ...

Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised... The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases.

Ultimately, the Supreme Court of Canada agreed with Justice McQuaid that they could not order Eve to undergo

sterilization without her consent. They looked at evidence that showed that non-consensual sterilization can have significant negative psychological effects on mentally incapable individuals, and also that these individuals can show the same level of fondness and concern for their children as other people.

They decided that it would be unjust to deprive a woman of the privilege of giving birth purely for social or other non-health related purposes without her consent. Furthermore, since the *parens patriae* jurisdiction should only be used to make decisions that are in the best interests of incapable individuals, how other people – namely Mrs. E. – would be affected by the decision was irrelevant. Justice La Forest wrote:

The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction. ...

The Crown's *parens patriae* jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them.

## QUESTIONS TO CONSIDER:

1. Why did Eve's mother want to have the doctors sterilize Eve without her consent?

2. Why did Justice McQuaid refuse to order the sterilization of Eve?

## QUESTIONS TO CONSIDER:

3. Why did the Supreme Court refuse to order the sterilization? Do you agree with the Supreme Court's decision OR do you agree with Eve's mother that sterilization would be in Eve's best interests? Explain your reasoning. What type of decisions should a court be able to make on behalf of an incapable individual or child under their *parens patriae* jurisdiction?

4. Is there a difference between decision-making on behalf of a minor and on behalf of an incapable adult?

5. What does the comparison between mentally incapable adults and minors imply about youth? Is this a good association? Is this an important association under the law?

## Key Terms

- Guardian
- Tutorship
- Curator
- *Parens patriae*
- *Paterfamilias*
- *Tutera mulierum*
- Magistrate
- Property
- Access
- Custody
- Sole custody
- Joint custody