CASE COMMENTS AND NOTES

JURISDICTION OVER GUARDIANSHIP AND CUSTODY OF CHILDREN IN CANADA AND IN ENGLAND

The present situation in Canada with regard to jurisdiction to make orders for the guardianship and/or custody of minors presents a number of anomalies, which are accentuated by contrast with the jurisdictional situation in England and Wales. The most recent case, *Hilborn* v. *Hilborn*,[1] gives a stark illustration of the fact that, whatever other ends may be served by the present situation, the best interests of the children concerned can only by the most exceptional coincidence be attained. In this particular case, Miller J., of the Alberta Supreme Court, seemed fairly confident that the order he felt constrained to make could not be considered in the best interests of the three children concerned.[2] Here a husband and wife had been living in Nova Scotia for some six years when in February, 1975, the wife left the husband, taking with her the three children, a boy born in 1964 and girls born in 1970 and 1972. Some negotiations took place between the parties but no settlement had been achieved when, in the middle of April, 1975, the mother decided to move with the children to Alberta. In that same month the father started an action in the Supreme Court of Nova Scotia for divorce and applied for custody of the three children. A copy of the petition was served on the mother, but "she never defended the petition nor did she put in an official appearance".

In May, 1975, the mother issued a statement of claim in the Supreme Court of Alberta seeking custody of the three children and, as at that time the children had been present in Alberta for only one month, an interim order was granted giving her custody of the children and providing that the father could move on 48 hours' notice to vary or set aside the interim custody order. The statement of claim and interim custody order in Alberta were served on the father in Nova Scotia in May, 1975. He neither defended the statement of claim nor moved to vary the interim order, but in June, 1975, he applied for and was granted interim custody of the three children by the Supreme Court of Nova Scotia in his divorce action before the court. By that time, however, the mother had already obtained from the Alberta courts an order for permanent custody of the three children. It was found that there was nothing to indicate that the Alberta judge was aware of the orders made in Nova Scotia.

Pausing there, it is clear that what these two parents were doing, presumably on legal advice, was to try and obtain in their own favour an order for custody of their children from the court of the province in which it suited each parent to reside, whilst refraining from making any attempt to defend the proceedings instituted by the other or making available to the court, the jurisdiction of which had been invoked by the other parent, any of

1. [1977] 4 Alta. L.R. (2d) 52; [1978] A.R. 62; [1978] 2 R.F.L. (2d) 5.
2. "It would be hard to find any logical reason in the best interests of the three children, why they should be uprooted after the passage of approximately 2½ years" per Miller J. *Id.* [1977] 4 Alta. L.R. (2d) 52, 54; 2 R.F.L. (2d) 5, 7.

the information that the court needed to possess before it could attempt to decide what was in the best interest of the children concerned. It seems extraordinary that in the proceedings in Nova Scotia, the Supreme Court of that province should apparently have made no attempt either to have the interests of the children separately represented, or to receive a proper report about the circumstances in which the children were actually living in Alberta, or to consult a teenage boy about his preferences before disposing of his 'custody' as if he and his younger sisters were so many paper parcels. Any order made for the custody of children in the absence of basic and elementary knowledge of their situation cannot be made with the best interests of the children concerned as the first and paramount consideration. In Alberta, on the other hand, it seems that, although the court was informed of divorce proceedings and a custody application proceeding in Nova Scotia, and the mother's application for custody was originally supported on the ground that she feared the father would forcibly remove the children from her care in Alberta, the court appears not to have been advised that the court of Nova Scotia had already made an order allocating custody of the chidren to the father in that province. When finally the father made an application in Alberta for the custody order made there to be set aside, this was done, quite irrespective of the welfare of the children, which had never been properly considered by any court.

The grounds for setting aside the Alberta order were that the Nova Scotia Supreme Court had jurisdiction to make the order affecting the three children as an incident of divorce, and if the order by the Alberta court had been made under a provincial statute, the Nova Scotia decision prevailed over it under the consitutional doctrine of paramountcy, since even incidental or corallary judgements made under federal legislation (concerning divorce) prevail over those made under provincial legislation. If, on the other hand, the Alberta court had exercised its inherent jurisdiction as *parens patriae,* to act for the protection of children in an emergency, the emergency had now passsed and the order made in the emergency should be vacated. On the husband's further application it was held that the Supreme Court of Alberta had no jurisdiction to order the mother to apply to the court of Nova Scotia to vary the order it had already made.

Several matters arise for consideration from this case. First as to conflicts of jurisdiction: it must surely be apparent that, when there is any possibility of conflicting orders being made by different courts in different provinces of the same country in respect of the same children, in the absence of legislation,there should be the clearest possible rules about disclosure of proceedings elsewhere and strong judicial steps are called for to discourage parties, and their legal advisers, from "forum shopping" within the federation and misusing the facilities available to them, whilst deliberately preventing any court from obtaining sufficient information to make a proper decision.

There is also good authority for the proposition that, in case of conflicting jurisdictions and conflicting orders, it is the duty of every court to regard the welfare of the children as paramount and to form its own independent judgement of what that welfare requires,[3] but the Court of Appeal of British Columbia declined to take such a course in *Re Hall.*[4]

3. *McKee* v. *McKee* [1951] A.C. 352 (P.C.)
4. (1976) 24 R.F.L. 6.

Such techniques of forum shopping and withholding or failing to supply evidence in other courts are ever-present everywhere, and only comity amongst judges and rules to ensure that comity is observed can keep them under control.

In England a somewhat analogous situation exists. The magistrates' courts may grant orders for separation and maintenance and make orders in respect of the custody of children but may not grant divorce, whereas since 1967 the divorce county courts have had jurisdiction in most cases of divorce and other matrimonial causes and may also make orders in respect of the custody, maintenance and education of children and for financial provision. Before 1935 it was established that, as a matter of discretion rather than jurisdiction, justices should not proceed with what were originally envisaged as their interim remedies when they know that the same issues are about to be determined in divorce proceedings in a higher court. Complaints are endemic that the husband and father who seeks to avoid his obligations to his wife and children will frequently, on legal advice, apply for adjournment(s) of proceedings initiated before the magistrates by the wife for as long as possible and then start proceedings in the divorce court, so that those in the magistrates' court must be discontinued. The divorce proceedings are in turn likely to be pursued with something less than maximum possible despatch, particularly if the *status quo* is especially convenient for the petitioner. In *Lanitis* v. *Lanitis*[5] the Divisional Court of the Family Division of the High Court addressed the problem in a case where the wife had in April 1969 complained of persistent cruelty and wilful neglect to provide reasonable maintenance for herself and two young children of the family. The proceedings were adjourned from April until May 28, and on the preceding day, May 27, the husband filed a petition for divorce. On the following day his counsel asked the justices not to proceed with the hearing of the wife's complaint on the ground that divorce proceedings were pending, but the magistrates refused to comply with this request, and finding the wife's complaints proved, committed the custody of the children to the wife and ordered the husband to pay £4 a week for maintenance of the wife and £4 for each of the two children. On the husband's appeal the Divisional Court held that the magistrates had been right to act as they did, and while accepting that this was not a case in which delaying tactics had been deliberately adopted by the husband, Ormrod J. said:[6]

> It is my experience . . . that it is recognised as good tactics on the part of husbands who are summoned to appear before magistrates in matrimonial matters to file a petition at the last minute (or at any rate before the hearing before the justices) with the prime object of blocking the hearing in the magistrates' court, for all kinds of motives — some may be good, some may be bad. But there are many cases in which, I am quite satisfied, this is a tactical manoeuvre designed to give the husband either a real or supposed advantage in the subsequent proceedings. The effect, of course, is that the wife is then precluded from obtaining from the magistrates — if she were entitled to it on the facts — an order for maintenance or for custody or for both . . . . In my judgment, the magistrates in this class of case should be wary and on the look out for this tactical manoeuvring . . . and they should be alert to see that they are not used, and do not permit themselves to be used in this fashion by parties filing petitions in the High Court at the last minute with the major object of frustrating the magistrates' jurisdiction . . . .

5. [1970] 1 W.L.R. 503.
6. *Id.*, at 505, 506 and 510. The Decision was confirmed and extended by the Court of Appeal in *Jones (E.G.)* v. *Jones (E.F.)* [1974] 1 W.L.R. 1471, in which magistrates were urged to make at least interim orders for custody.

It is suggested that the superior courts of the various Canadian Provinces might wish to be similarly aware of tactical manoeuvring by adults, and similarly alert to see that they are not used, and do not permit themselves to be used, in this fashion by parties with the result, whatever the intention, of making it impossible to ascertain what provisions in respect of the custody of children will be in the best interests of those children.

It is noteworthy that in England, since the Matrimonial Causes Act 1965,[7] orders made in the course of matrimonial proceedings with regard to the custody, maintenance and education of children are no longer referred to as *"ancillary"* orders[8] whereas in Canada, under the Federal Divorce Act 1967[9] ss. 10 and 11, orders for the maintenance, custody, care and upbringing of children are still lumped together with orders for the payment of money as *corollary*[10] relief. The term does not have quite the implications of subservience of the term *ancillary*, but in *Jackson* v. *Jackson*[11] Ritchie J., delivering judgment in the Supreme Court of Canada, declared himself satisfied that power to order maintenance for the children of the marriage was necessarily ancillary to jurisdiction in divorce and therefore within the competence of the federal legislature under the British North America Act, 1867,[12] s. 91 (26), and in *Zacks* v. *Zacks*,[13] Martland J. in the Supreme Court adopted the statement and declared the principle equally applicable to matters of custody, care and upbringing of children of the marriage, and to interim orders.

It now appears to be generally agreed in the Canadian jurisdictions that as a result of the wording of s. 11 (2) of the Divorce Act,[14] orders for the maintenance, custody, care and upbringing of the children of the marriage made as a result of matrimonial litigation between their parents may now, except in emergency, or for temporary protection of children within the jurisdiction invoked, be varied or rescinded only by the court which made the original order as a corollary of its jurisdiction in matrimonial causes.[15] It is further suggested, and here it seems the serious difficulties may arise, that custody orders made under the corollary to the divorce jurisdiction override all other custody orders made under other, provincial, jurisdictions.

Throughout the British North America Act, 1867[16] I cannot trace any reference to jurisdiction over or legislative power regarding children, minors or infants as such, or to parents and children. This is not surprising. The

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7. 1965, c. 72.
8. The derivation is from *ancilla*, a female slave or house servant.
9. R.S.C. 1970, c. D-8.
10. Defined in Webster's Dictionary as "a proposition that follows from another that has been proved. An inference or deduction. Anything that follows as a normal result".
11. [1973] S.C.R. 205, 211.
12. 30-31 Vict. (U.K.), c. 3.
13. [1973] S.C.R. 891, at 901.
14. "An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to . . ."
15. *Cochrane* v. *Cochrane* (1975) 20 R.F.L. 264, a decision of the Ontario Court of Appeal, somewhat strengthened and extended by the decision of the British Columbia Court of Appeal in *Re Hall* [1976] 4 W.W.R. 634, 70 D.L.R. (3d) 493, 24 R.F.L. 6. See Also Eric Colvin in *"Custody Orders under the Constitution"*. (1978) 56 *Can. Rev.* 1.
16. *Supra* n. 12

jurisdiction of secular judges to make orders relating to the maintenance, custody and upbringing of children of marriages that were dissolved had been introduced, and the powers of the former church courts to make such orders relating to the children of parents whose marriages were annulled or whose parents were judicially separated had been transferred to the secular judges only ten years earlier, by the Matrimonial Causes Act, 1857 s. 35.[17]

The only other jurisdictions at private law, viz., excluding the poor laws, exercisable in respect of children in 1867 were vested exclusively in the High Court of Chancery, and consisted of:

(i) The first beginning of the statutory jurisdiction under what later became the Guardianship of Minors Acts, which had been introduced by the Custody of Children Act 1839.[18] By s. 1 of this Act the Lord Chancellor and Master of the Rolls in England and in Ireland (and no others) were for the first time permitted in their discretion to make orders granting the mother of an infant access (or visiting rights) to the infant in the custody of the father or any person acting on his authority or any testamentary guardian he had appointed, and might grant her custody of any child under the age of seven years.

(ii) The inherent jurisdiction of the Lord Chancellor acting under the prerogative of the Crown as *parens patriae*.

This is still the only jurisdiction that is properly described in England as the *parens patriae* jurisdiction.

The statutory guardianship jurisdiction was extended to allow the mother to be awarded custody of her legitimate children up to the age of 16 years by the Custody of Children Act, 1873,[19] and the discretionary power of the Court of Chancery was transferred to the judges of the Supreme Court by the Supreme Court of Judicature Act 1873.[20] Only when the discretion of the judges of the Supreme Court gave place to actual, though limited, legal rights for the mothers of legitimate children under the Guardianship of Infants 1886,[21] was jurisdiction extended downwards to the County Courts, and only

17. 20 & 21 Vict. c. LXXXV s. 35: "In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceedings to be taken for placing such children under the protection of the Court of Chancery." By the Act of 1859, 22 & 23 Vict. c. LX1, s. IV, the court's power to make custody orders was extended to become applicable also after the final decree.

18. 2 & 3 Vict. c. L1V, otherwise known as Talfourd's Act, to the immortal memory of Serjeant Talfourd, who was so horrified at his success in *R. v. Greenhill* (1836) 4 Ad. & E. 624, when he recovered custody of three children aged 5½, 4½, and 2 years for a dissolute and worthless father, that three years later, as a Member of Parliament, he sought to ensure that the feat could not in similar circumstances be repeated. He initiated a long line of beneficcent legislation.

19. 36 & 37 Vict. c. 12. The Act also for the first time allowed the father to make an agreement granting custody of his minor children to some other person (usually the mother) which might be enforceable instead of, as previously, not only itself void, but considered so contrary to public policy as to invalidate all other terms of an agreement of which it formed part.

20. 36 & 37 Vict., c. 66.

21. 49 & 50 Vict., c. 27, passed as the result of the 'strong' decision in *Re Agar-Ellis* (1883) 24 Ch. D. 317, in which the Chancery judges refused to exercise their inherent jurisdiction to interfere with the unreasonable conditions laid down by the father of a sixteen-year old daughter, refusing her any direct relationship with her mother.

when the 1886 Act was replaced by the Guardianship of Infants Act, 1925[22] was a specifically limited jurisdiction extended to the magistrates courts. Both of these are inferior courts without inherent jurisdiction, whose jurisdiction must be founded on and is strictly limited by statute.

Magistrates were first awarded power in England to make orders in respect of the custody of children under the age of ten years when they were empowered to make separation orders upon being satisfied that the husband had been convicted of an aggravated assault on his wife and that her future safety was in peril. The power was first granted by the Matrimonial Causes Act, 1878[23] s. 4 (2), and this statutory jurisdiction of magistrates has remained distinct from their statutory jurisdiction under the Guardianship of Minors Acts.[24]

The inherent jurisdiction of the Crown as *parens patriae* in England was transferred from the High Court of Chancery to the Supreme Court of Judicature by the Supreme Court of Judicature Act, 1873,[25] and was exercised exclusively by the judges of the Chancery Division of that Court until transferred to the judges of the newly-created Family Division of that Court by the Administration of Justice Act 1970, s. 1 and Schedule 1.[26] It has always been and remains the supreme, the ultimate jurisdiction in respect of the guardianship of minors, the origin, extent and practice concerning which have been described by Lord Cross of Chelsea.[27] When it was exercised by the judges of the Chancery Division it was clear that it overrode all orders made in the Divorce Division of the Supreme Court.[28] It may be used in case of need to override any legislative jurisdiction[29] but as a desirable, if not a necessary,corollary of such overriding power, it is exercised with the utmost caution and restraint. The procedure is still expensive. It is frequently dilatory. Before exercising it the judges normally require to be satisfied that there is no other appropriate procedure by which relief may be sought. For more than ten years the judges of the Supreme Court were reluctant to use these powers in the area of public law covered by the Children and Young

22. 15 & 16 Geo V, c. 45, s. 7(1).
23. 41 Vict. c. 19.
24. Now the Guardianship of Minors Act 1971 (a 'pure' consolidation), as amended by the Guardianship Act 1973.
25. *Supra*, n. 20.
26. 1970 c. 31, Schedule 1: *High Court Business Assigned to Family Division: Business at first instance,* includes: Business in relation to wardship of minors. By the Supreme Court of Judicature Act 1873, s. 25 (10) "In questions relating to the custody and education of infants the Rules of Equity shall prevail", but this refers to Rules and not prerogative jurisdiction, and it was presumably these rules and not the prerogative jurisdiction, to which Milvain C.J.T.D. was referring when he said in *McGee* v. *Waldern* (1972) 4 R.F.L. 17, 24: "all courts, not just those of Chancery, enjoy an equitable jurisdiction."
27. When Mr. Justice Cross, in *Wards of Court* (1967) 83 L.Q.R. 201.
28. See *Andrews* v. *Andrews and Sullivan and Sullivan* [1958] P. 217, in which Wrangham J. of the Probate and Divorce Division of the High Court held that: "since the powers of the Divorce Division were less extensive than those possessed by the Chancery Division over wards of court, the former were superseded by the latter" and Upjohn J. of the Chancery Division, having reached a decision *in camera,* made a statement in open court concurring with that view in *In re Andrews (Infants)* [1958] Ch. 665.
29. See *In re Mohamed Arif* (An Infant) [1968] Ch. 643, and numerous decisions cited by Ormrod L.J. in *In re H.* (A Minor) (Wardship: Jurisdiction), (1978) *Fam.* 65.

Persons Acts 1933-69 and the Children Acts 1948-75, and only recently have they widened the scope of their intervention in these areas. In the most recent decision of the Court of Appeal in *In re H.*[30] Ormrod L.J., giving the judgement of the Courts said:

> The case is the latest of a series which has come before the courts in recent years in which it has been necessary to define the limits beyond which the High Court will not go in the exercise of the wardship jurisdiction . . . . The problem, which is a relatively new one, arises from the co-existence of different, partially co-ordinated, codes of procedure for dealing with the welfare of children . . . .

He then pointed out that the prerogative jurisdiction was until recently highly centralized and more expensive and inconvenient than the alternative procedures, which had been developed on a local basis before local courts, but that many of these inconveniences had been overcome. In particular, the transfer from the Chancery Division to the Family Division of the Supreme Court had enabled the procedure to be made available through all the District Registries throughout the country which handle the work of the Family Division. High Court judges and deputy High Court judges may now hear wardship cases in all the main centres. However, he repeated:[31]

> It has been held repeatedly that this ancient jurisdiction can only be removed or curtailed by express statutory enactment, and there is no such relevant enactment: *In re M.* [1961] Ch. 328, 345, and *In re Baker* [1962] c. 201. The question therefore in each case is whether in Pearson L. J.'s words in *In re Baker* at p. 223 'the scope of the proper exercise of the jurisdiction' has been restricted. He went on to say: 'In the absence of special circumstances, the court ought not to exercise its powers of control in a sphere of activity which has been entrusted by statute to a local authority.'

Ormrod L. J. went on to emphasize that in potential conflicts between the High Court and lower courts, the High Court will not permit the wardship procedure to be used simply as a form of appeal from the lower court, and will not accept jurisdiction unless there are special or good and convincing reasons for doing so. In this, as in other aspects of the matter, he emphasized the principle of comity and the desirability of preventing multiplicity of proceedings.

From the Canadian point of view, there has as yet been no suggestion that a mere custody order, which is all that a federal court has power to make as a corollary to divorce proceedings, automatically supersedes any wider-ranging order made by any court under provincial jurisdiction, including a guardianship order. All the dicta are to the effect that a custody order made under federal jurisdiction supersedes a custody order made under provincial jurisdiction, even though the order under the federal jurisdiction was made *ex parte* and in the absence of necessary evidence deliberately witheld from the court. But it is clear that the right of custody comprehends a major portion of guardianship authority, and if the provincial jurisdiction were to be left with guardianship minus custody, it would retain an empty shell. Similarly, if a guardianship order made under provincial jurisdiction were to be deprived of most of its content by a subsequent custody order made under federal jurisdiction, even after a full and proper hearing and with due regard for the child's welfare as the overriding consideration, the situation would be so untidy and open to anomalies that the provincial jurisdiction would almost certainly be quickly eroded if not abolished.

Writing in 1972 Mr. L. R. Robinson pointed out[32] that the ward of court

30. [1978] *Fam.* 65, 72.

31. *Id.*, at 73.

32. *Studies in Canadian Family Law*, Ed. by D. Mendes da Costa, Vol. 2 Ch. 8, *Custody and Access at 552-3.*

procedure has never been adopted in Canada and "it may be argued that the legislatures, by enacting comprehensive legislation dealing with custody, have precluded the development of this remedy at this time." It is not clear whether he is suggesting that the fact that the ward of court procedure has never been adopted in Canada means that the prerogative power over such wards has been abolished *sub silentio,* but in the English view the prerogative power, which is the ultimate form of, and probably the *fons et origo* of, all judicial discretion, can be curtailed only by express legislation. The widespread references to the *parens patriae* jurisdiction suggest that, if that was what was suggested, the view has not found favour with the judges of either the federal or the provincial jurisdictions. It is thought, however, that the tendency to refer to *'the equitable jurisdiction'* or similar phrases, has clouded the vital distinction between (1) the statutory jurisdiction, which in 1867 and 1870 inhered solely in the High Court of Chancery, (2) the inherent prerogative jurisdiction, which at those dates was also exercised exclusively by the High Court of Chancery and (3) the equitable principles and rules applied in the High Court of Chancery as contrasted with the courts of Common Law, including such principles as:

(a) the fact that equitable remedies are discretionary and may not be claimed as of right,

(b) the fact that equity would, in the exceedingly rare cases in which it would exercise its jurisdiction, intervene even if the child concerned was over the age of discretion at common law (14 years for a boy and 16 for a girl), and

(c) the fact that equity would have regard to the welfare of the child rather than the rights of parents (a term which at least until 1886, during the father's lifetime in the guardianship context meant fathers exclusively).

This last principle was, in England, elevated to a statutory rule applicable to the statutory jurisdiction by the Guardianship of Infants Act 1886, s. 5,[33] and to a rule applicable in all courts, including the inferior courts and including also, it is submitted, the Supreme Court exercising the prerogative jurisdiction,[34] by the Guardianship of Infants Act 1925,[35] s. 1. But the rule has no application to jurisdiction as such; it expresses a principle applicable once jurisdiction exists.

In his illuminating contribution to the problem: *"Custody Orders under the Constitution"*,[36] Mr. Eric Colvin, for example, considers that: "It is well established that jurisdiction over the custody of children lies primarily with

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33. *Supra* n. 21 s. 5: "The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such indant and the right of access thereto of either parent, *having regard to the welfare of the infant,* and to the conduct of the parents, and to the wishes as well of the mother as of the father . . ." (italics supplied).

34. It is thought that the words "any proceeding before any court" are sufficiently express to affect the prerogative jurisdiction if it was desirable to make the principle applicable to the jurisdiction that had first introduced it. The applicability of the principle has been wholeheartedly endorsed and strengthened by the decision of the House of Lords in *J.* v. *C.* [1970] A.C. 668.

35. *Supra* n. 22.

36. *Can. B. Rev.* (1978) 1

the provinces" and that: "it falls squarely within the provincial sphere under s. 92 (of the British North America Act 1867)." Then he says: "The provinces have *thus*[37] inherited the traditional power of Courts of Chancery acting as *parens patriae,* to make orders for the custody of children . . .". With respect, ss. 91 and 92 of the British North American Act, which refer to the legislative jurisdiction of the federal and provincial legislatures respectively, can have no application to the prerogative power of the Crown as *parens patriae*, either as regards jurisdiction or as regards the principles on which discretion will be exercised. It seems probable, however, that the quite separate statutory jurisdiction of the old Court of Chancery falls within the provincial sphere under s. 92, and it is accepted that, as a matter of comity, the source of legislative jurisdiction normally attracts to itself any prerogative jurisdiction pertaining to the same subject matter.

If even this is so, is it certain that orders extending only to custody made under a jurisdiction merely corollary to the federal jurisdiction in divorce must prevail, under the doctrine of paramountcy, over a direct jurisdiction agreed to fall exclusively within the provincial sphere, viz., the statutory jurisdiction over the guardianship of minors (which of course comprehends custody and other authority)? I can find no previous decision supporting such a considerable extension of the doctrine of paramountcy, and the whole tenor of the decision in *Reference as to Constitutionality of The Adoption Act and Others*[38] seems contrary to it.

On the other hand, if the Supreme Courts of the provinces are the repositories not merely of the statutory jurisdiction over minors of the old Court of Chancery, but of the prerogative power of the Crown as *parens patriae*, and *a fortiori* if such a residue of power resides with them to the exclusion of any federal judge, the doctine of paramountcy would seem to have no application, since it is a doctrine elaborated to deal with conflicts between the federal and provincial legislative jurisdictions, and cannot without clear and express statutory provisions trench upon any prerogative power.[39]

In the United States, of course, it is accepted that the ancient jurisdiction of the British Crown has now been parochialised and spread amongst the various family courts exercising State jurisdiction at various levels, and, in particular, that it is exercised by the numerous juvenile courts dealing with child offenders. In *In re Gault*[40] the Supreme Court of the United States said, when faced with an arbitrary and oppressive decision by Judge McGhee of Arizona that seems to lie in the direct line of succession from King John or any of the Stuart Kings:

> These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence. . . .

37. italics supplied.
38. [1938] S.C.R. 398, 3 D.L.R. 497.
39. For a classic statement in the Ontario context of the survival of the prerogative power notwithstanding the conferment of legislative powers see Middleton J. in *Re Maher* (1913) 12 D.L.R. 492, 497.
40. (1967) U.S. 1, 16.

In all cases, however, such powers have been extended to such State Courts by express and direct legislation. There appears to be no such legislation in Canada, and indeed there seems to be no authoritative statement as to the existence or demise of the prerogative jurisdiction of guardianship in this country, or by whom it is exercisable should it survive. If, indeed, it is desirable that there should remain some residue of discretionary power with regard to those under the age of majority, it might be desirable that it should reside in the senior federal judges as well as the judges of the highest provincial court. If there is recognition of the Crown as *parens patriae*, is not the Federation also a *patria*? The highest federal court, the Supreme Court of Canada, is primarily a Court of Appeal, and by s. 44 (1) of the Supreme Court Act[41] no appeal lies to it from a judgment or order made in the exercise of judicial discretion "except in proceedings in the nature of a suit or proceedings in equity originating elsewhere than in the Province of Quebec". It is submitted that the prerogative jurisdiction in guardianship is a proceeding in equity coming within the exception, but it would be most desirable to have a ruling on the subject.

Where the final prerogative power is held to reside, and how it should be exercisable in Canada is, of course, a constitutional and political decision on which it would be an impertinence for any non-Canadian to express a view. What I am venturing to suggest is that whatever decision is reached should be reached deliberately and after due consideration. If it is desired to provincialize the prerogative power and render it subservient to all jurisdictions exercised as collateral to any federal power, so be it, if the decision is consciously made. What would seem undesirable is that, by a failure of precision in considering the over-all situation, it should suddenly appear that an ancient judicial jurisdiction has been atrophied and lost before its loss has been realised. Once lost, it could, of course, never be revived. The situation at present seems to be that:

(i) the prerogative jurisdiction over those under full age has not been adequately differentiated from the statutory jurisdiction over children and from equitable practices once jurisdiction is found, but the majority opinion seems to be that it lies with the provincial courts;

(ii) the federal statutory jurisdiction over child custody collateral to divorce has been held to override all provincial jurisdictions, including the prerogative as well as statutory jurisdictions in respect of the custody aspects of guardianship. This seems doubtful as regards direct statutory power entrusted to the provinces and untenable as regards any prerogative power residing exclusively in the provinces.

(iii) this overriding nature of a collateral federal jurisdiction has been affirmed in the face of federal decisions reached *ex parte*, without full evidence relating to the welfare of the children concerned and where such evidence has been deliberately withheld from the federal court.

Olive M. Stone*

41. R.S.C. 1970, c. S-19.

* Ph.D., LL.B., B.Sc. (Econ.), (London). Author of *Family Law*, MacMillan Press Ltd., 1977.