THE JERSEY LAW COMMISSION

REPORT

THE LAW OF TUTELLES

To be laid before the States by the President of the Legislation Committee pursuant to the Proposition to establish the Commission approved by the States on 30th July 1996.

JERSEY LAW COMMISSION
TOPIC REPORT No. 3 **July 2002**

THE JERSEY LAW COMMISSION

The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

The Commissioners are:

Mr David Moon, Solicitor, *Chairman*

Mr David Lyons, English Solicitor

Advocate Alan Binnington

Mr Clive Chaplin, Solicitor

Advocate John Wheeler

The address of the Jersey Law Commission is PO Box 87, St Helier, Jersey, JE4 8PX and its internet pages are within the Jersey government's web site: www.lawcomm.gov.je

CONTENTS OF THIS REPORT

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To the President of the Legislation Committee of the States of Jersey

PART I Introduction

1. The law of Tutelles forms part of the customary law of the Island and was last updated in 1862 by the Loi (1862) Sur Les Tuteurs which imposed certain obligations on the tuteur with regard to preparation of accounts.

2. Essentially, a tutelle is constituted by seven electeurs, one of whom can be but does not have to be the tuteur, together with the tuteur if not one of the electeurs, swearing an oath of office before the Royal Court. The tuteur then has the care of the property of the minor and is required to produce accounts annually and agree them with the electeurs.

3. Traditionally, four electeurs are represented by the father's side and three by the mother's. The income from the property comprised in the tutelle can be paid to the minor but no greater income should be paid out; otherwise the tuteur is liable unless the need of the minor is evident or there is urgent necessity.

4. According to medieval commentators, a tutelle must be formed on the acquisition by a minor of property, whether by will, gift or otherwise and it is difficult to see how an executor could obtain a good discharge in respect of assets passing by will to a minor without a tutelle having been created.

5. The tuteur has the care of his pupille as well as of the pupille's property, unless the tuteur is neither the father nor the mother, in which case the parents would normally have the care of the pupille if they were still living.

6. Finally, it is worth noting that the electeurs are the guarantors of the tuteur and jointly and severally liable with the tuteur.

PART II Background

An informal survey of the incidence of tutelles in the Island was carried out in 2000 with the help of Advocates Marian Whittaker and Rose Colley. There were 24 tutelles in existence in 1998, 14 in 1999 and, at the time of the survey in 2000, over 20 then in existence. Since 1995, there have been 99 children subject to tutelles and, although very difficult to get a proper understanding of the average value of tutelles, it would appear that the vast majority are valued at less than £150,000.

Anecdotal evidence would suggest that there are sums of money or other assets belonging to children which are not the subject of tutelles but, for instance, held by parents in trust accounts. It is probable that the current law of tutelles is often more honoured in the breach than in the observance.

Current problems which have been encountered in relation to the present law on tutelles include the following:-

1. The electeurs are jointly and severally liable for any defaults of the tuteur yet the electeurs have no real power or influence over the acts of the tuteur. The tuteur is required to agree the accounts of the tutelle annually with the electeurs (Article 4 of the 1862 Law) and can be fined (not more than £100) if he fails to do so (Article 5 of the 1862 Law).

2. There is anecdotal evidence to suggest that electeurs do not understand the extent of their potential liability in accepting the office of electeur and research would suggest an electeur is rarely advised of his duties or responsibilities.

3. There is an inconsistency in treatment of moveable and immoveable property: the consent of the Royal Court is only required where the tuteur is dealing in real estate owned by the minor.

4. There is no investigation into the suitability of a person to be either tuteur or an electeur. This can become particularly relevant in circumstances such as the payment of damages to a minor resulting from a medical negligence claim where the father or mother might be the tuteur and is financially unsophisticated or might have a criminal record for fraud or similar financial crime.

5. A relative of the minor can be forced by the Courts to take on the role of tuteur or electeur, if volunteers from the family are not forthcoming.

6. There is no clear mechanism for a tuteur or electeur to resign his office during the currency of a

tutelle, although it is assumed that on application to the Royal Court by virtue of its inherent jurisdiction over a tutelle, an appropriate Order could be made provided the replacement electeur/tuteur could be found.

7. Customary law favouring the paternal over the maternal side of the family is potentially a breach of human rights legislation.

8. Banks customarily allow children to operate accounts in their own name and, indeed, as a matter of practice allow children to have cheque books from the age of 16. Technically, by virtue of the law of Jersey relating to tutelles, a child cannot have a bank account.

9. The mere fact of having seven electeurs is unnecessarily cumbersome.

PART III Proposal

The Commission proposes that a complete overhaul of the law of tutelles is required and that, as there is essentially no difference between the role of a curator in respect of a person under a curatelle and that of tuteur in respect of a minor under a tutelle, the 1862 law should be repealed and legislation similar to that proposed in Part VIII of the draft Mental Health Law be enacted. Essentially such a proposal would

(i) abolish the office of electeur;

(ii) provide for the appointment of a tuteur alone who would be a person most suitable to the circumstances of the case, (perhaps a professional where large sums are involved);

(iii) recognise the establishment of a tutelle should become voluntary below certain financial limits but ensure, even if a tutelle is not established, that an executor can obtain a good discharge in respect of assets to be inherited by a minor;

(iv) give power to a broad range of potentially interested parties, including the Court of its own volition, to call for the establishment of a tutelle. The role of the Attorney General in establishing a curatelle under Part VIII of the draft Mental Health Law could be replicated for tutelles;

(v) give broad powers to the tuteur to apply capital or income of the tutelle as the circumstances demanded whilst adopting the proposed curatelle rules (see Article 103 of the draft Mental Health Law) relating to sale or acquisition of property with the consent of the Court;

(vi) require accounts to be submitted annually to the Judicial Greffe

(vii) require the maintenance of a register of tutelles by the Judicial Greffe;

(viii) remove any distinction in treatment between moveables and immoveables;

(ix) limit the responsibility of the tuteur to the care of the property of the pupille and exclude any responsibility for the person;

(x) limit the liability of a tuteur so that he is not liable for the acts of his pupille; and

(xi) involves the Viscount, at the request of the Court, in the selection of a lay person as tuteur, giving

opportunity to the Viscount to interview a candidate and advise her or him of their responsibilities under the law, and enabling the Viscount to assist in the management of the tutelle.

PART IV CONCLUSIONS AND RECOMMENDATIONS

The present law is out-dated and results in a cumbersome and inflexible arrangement for the management of a minor's property. In particular, it is ill-suited to present day family arrangements and it fails to recognise adequately the need for appropriate supervision of the management of the minor's wealth and flexibility in its application during the minority. Where small sums are concerned, the structure of the tutelle is wholly out of proportion to the benefit obtained. A new law, repealing the 1862 law and introducing provisions as outlined above is therefore recommended.

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APPENDIX A

PERSONS WHO COMMENTED ON THE CONSULTATION PAPER

The Bailiff

Advocate A P Roscouet

Advocate Christopher Lakeman

Mrs R M Roberts-Mapp

Sir Philip Bailhache

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APPENDIX B

ACKNOWLEDGEMENTS

The Topic Commissioner for this case was Mr Clive Chaplin, Solicitor, and he joins with the other Commissioners in thanking Advocates Marian Whittaker and Rose Colley for acting as Topic Practitioners.

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