

# Guardianship and Parental Relations: Connections and Departures in Jeremy Bentham's Account

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## Introduction

Central to Jeremy Bentham's writings on guardianship are discrete sections on *Guardian and Ward* and *Parent and Child*.<sup>1</sup> The present writer's appraisal of Bentham's views on guardianship<sup>2</sup> drew heavily on these and other of his major works<sup>3</sup> to identify the characteristics of guardian-ward relations as Bentham perceived them. The resulting profile, judged to be Bentham's legacy in this sphere, forms the key reference for the present work. This paper seeks to address a subject not covered in the previous study namely the relationship between Bentham's views on guardianship and on parent-offspring relations. It reviews those aspects of Bentham's account that suggest a connection or connections between the two sets of relations as against others that shed doubt on whether such connection(s) exist.

A commentator on contemporary child law has claimed that the Children Act (1989) clarified the distinction between guardians and parents once and for all. This legislation '[...] rendered the concepts of parenthood and guardianship legally distinct: parents are no longer regarded as guardians and, apart from exceptional cases [...] no guardian will be parents (sic)'.<sup>4</sup> The present paper argues, firstly, that it is questionable whether parenthood and guardianship have ever been purely *legal* concepts; and, secondly, that despite overlaps and some similarities, the distinction between guardianship and parenthood is (and historically has always been) fundamental, both at a conceptual and at

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<sup>1</sup> *Principles of the Civil Code*, in *The Works of Jeremy Bentham*, now first collected; under the Superintendence of his Executor, John Bowring, 11 vols., Edinburgh and London, 1838-1843 (Henceforth, 'Code', Bowring), i. p. 348.

<sup>2</sup> B. E. Cox, 'Bentham on Guardianship: A Special Relation for Protection and Representation', *Journal of Bentham Studies*, vol. 11 (2009),. Accessed at <http://ojs.lib.ucl.ac.uk/index.php/jbs/article/view/56>.

<sup>3</sup> *An Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart, Oxford, 1996 (CW), p. 244. Henceforth *IPML* (CW).

a practical level. Comparing the relations involved – those of parent-offspring and guardian-ward – will hopefully support this assertion.

An initial response to the first question offers an alternative formulation, namely that guardianship and parenthood are concepts that have legal counterparts or expressions but which are extra-legal in having sociological, social psychological and ethical significance. This standpoint was most notably articulated by Jeremy Bentham whose perspective on the function of guardianship as a necessary institution<sup>5</sup> was to uphold ethical principles as well as legal obligations, supported by a range of penalties for failures and defaults. It was from this perspective that Bentham viewed the relation of guardian and ward as guardianship's core component.

As to the second question, it will hopefully be shown that despite notable problems with the way Bentham expressed his position, the net result clearly reveals why and how the two institutions differed as well having some characteristics in common. The profile of guardian-ward relations, summarised below, might have served as the basis upon which to argue that these relations had distinct credentials and characteristics distinguishing them from those of parent-offspring had Bentham not also said that parents were guardians.<sup>6</sup> Much of the following therefore seeks to understand what this meant, firstly acknowledging possible ambiguities in the term 'guardian'.

It should not surprise us to learn that Bentham, like many before and since, used the term 'guardian' in more than one sense as it was no doubt commonly deployed (as it is now) to convey related functions. For instance, persons with *de facto* charge or control of a youngster are sometimes called guardians<sup>7</sup> as are persons acting as custodians.<sup>8</sup> However, at least so far the parental role is conveyed, Bentham was consistent in maintaining that parents possessed '[...] all the rights and all the obligations of [guardians]'.<sup>9</sup> Much of the following discussion turns on the significance of this

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<sup>4</sup> N. Lowe and G. Douglas, *Bromley's Family Law*, Oxford, 2006, p. 45.

<sup>5</sup> *IPML (CW)*, p. 266 (marginal heading).

<sup>6</sup> *Ibid.*, p. 275

<sup>7</sup> Interdepartmental Working Party, *Review of Child Care Law*, London, 1985, p. 94. '“Guardian” for the purposes of care proceedings means anyone who for the time being has charge or control of the child [...]'.

<sup>8</sup> A. D. Buti, *Separated*, Sydney, 2004, pp. 19-23.

<sup>9</sup> *IPML (CW)*, p. 248.

statement. Notably for later reference, the word ‘guardians’ is not here qualified by the adjectives ‘natural’ or ‘parental’.

### **Profile of Guardian–Ward relations**

Arguably one of Bentham’s main achievements was to identify the special characteristics of guardian-ward relations, namely its essential trust and agency bases and its fiduciary nature applicable well beyond the family nexus in which he initially portrayed it, i.e. as ‘a trust of a private nature’<sup>10</sup> and as ‘domestic magistracy’.<sup>11</sup> The following offers a distillation of these characteristics, referred to throughout the rest of this paper as *The Profile*, judged to be sufficiently robust to serve as a template upon which to assess how parent-offspring relations compare.

Guardians and wards are correlatively connected by their respective roles and statuses within the institution of guardianship. The relation is essentially fiduciary, combining the ethical and legal characteristics of trustee-beneficiary and agent-principal relations. Guardians are thereby empowered to provide protective and representational functions on behalf of persons – certain youngsters and mentally disordered persons – unable to achieve or maintain their own wellbeing unaided until they become self-governing where such a goal is possible. Bentham did not set out to appraise the different kinds of ‘legal guardian’ in force at the time, as had Blackstone,<sup>12</sup> or to look to prevailing guardianship law(s) to safeguard wards’ interests. His was a wider perspective on how law and ethics combine to shape the function and purpose of guardian-ward relations in meeting particular needs.

### **Basic Assumptions**

The central argument of this paper, upon which the comparison between parent-offspring and guardian-ward relations is based, is that ‘being a parent’ and ‘being a guardian’ have different kinds of meaning. A person qualifies as a parent through procreation and this

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<sup>10</sup> *Ibid.*, p. 248.

<sup>11</sup> ‘Code’, Bowring, i. p. 348.

<sup>12</sup> William Blackstone, *Commentaries on the Laws of England*, 4 vols. Oxford, 1765 - 69, i. pp. 461-66.

confers inalienable parental status.<sup>13</sup> The biological reality of progeny stays with the parties responsible; it cannot transfer to others and the parental relation only ceases on first death of either party.<sup>14</sup> Most of what follows from the biological facts, ranging from immediate ‘survival care’ of the infant to providing a physical, emotional and intellectually caring relationship into adulthood and beyond, are social (and a few legal) expectations of parents that vary in acceptable quantity and quality historically and between cultures. A terminological distinction between biological (blood tied) parenting and functional parenting may suffice to convey this for present purposes.

By contrast, and with an apparent exception to be discussed, becoming a guardian does not stem from biological qualification: neither status nor function depend on the existence of a blood tie between guardian and ward. Most usually, being a guardian means ‘voluntarily’<sup>15</sup> assuming particular responsibilities towards another person determined by that other person’s need for protection and representation. The assumption of responsibilities is via a relation that is sanctioned legally, ethically and socially; guardians’ status derives from this, not from ‘nature’ or natural contingency. The guardian’s responsibilities cease when the need is met or if, for whatever reason, it is necessary for another person to assume the guardianship mantle in his/her place. Thus responsibility within guardianship is transferable in this sense.

The exception to these distinct criteria is a category designation termed ‘parental guardianship’ that, in brief, is taken to embody Bentham’s contention that parents are guardians of their own offspring. This he maintained alongside the assertion that parents were their offspring’s ‘masters’, i.e. their employers, viz.: the father is ‘[...] in certain respects the master of his child and in others the guardian’.<sup>16</sup> An initial response to the idea that parents are both guardians *and* masters might be to ask whether this was perhaps an overstated rendition of the truism that parents have both responsibilities and rights vis-

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<sup>13</sup> This statement clearly does not take into account complex issues raised by Assisted Reproductive Technologies, including questions bearing on the nature of parenthood. *Parenthood and Procreation*, *Stanford Encyclopedia of Philosophy*, 2006, accessed 2 February 2009 at [www.plato.stanford.edu/entries/parenthood/](http://www.plato.stanford.edu/entries/parenthood/).

<sup>14</sup> This does not, of course, invalidate personal experience confirming that our parents remain our parents psychologically and emotionally after they die.

<sup>15</sup> Bentham gives few clues as to how guardians were appointed, but we may presume that whatever legal or social processes were entailed did not involve coercion or routine conscription.

à-vis their offspring. That Bentham clearly sought to convey more than this is shown by the way in which he counter-balanced parents' responsibilities with *rights* embodied in the role of master. The rationale for this assertion no doubt stemmed from the fact that he was advancing his argument in a socio-economic climate in which parents needed to gain income from their offspring's labour.

Under such conditions, it is particularly noteworthy that Bentham saw it as essential to affirm that being a master did not necessarily detract from parents being their offspring's guardians, even if in so doing he added fuel to an ongoing and still unresolved debate about the balance of rights and responsibilities of parents. The import of Bentham's contention for present purposes is that it calls for two additional appraisals: of parents as masters; and of parents' capacity to deal with competing demands (see *Parents as Masters* and *Competing Demands on Parents*). Fortunately it was found that these additional appraisals did not divert focus from the main question to be addressed, namely whether Bentham's contention that parents are their offspring's guardians clarifies or obscures the distinctions or connections between parents and guardians.

### **Bases for Comparing Relations**

The approach to comparing the key sets of relations adopted in this paper differs in two main ways from the more common pattern. Firstly, it departs from the approach exemplified by Blackstone whose thinking was based on the notion that guardian-ward relations are 'plainly derived' from those of parent-child,<sup>17</sup> a view he advanced without clarification or evidential support. Modern versions of this basis for comparison can be found in the idea of a 'parental model' of guardianship, i.e. implying that guardian-ward relations are or should be 'modelled on' ideal standards and attributes supposedly upheld by parents.<sup>18</sup> Arguably, Bentham's innovative vision of relations within guardianship did not need to draw upon an analogy with parent-child relations even had he thought it appropriate.

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<sup>16</sup> 'Code', Bowring, i. p. 348

<sup>17</sup> Blackstone, *Commentaries*, i. p. 460.

<sup>18</sup> L. A. Frolik, 'Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform', *Arizona Law Review*, xxiii (1981), pp. 599-660.

The second way the present work departs from most discussions of these relations, including that of Blackstone, is that it focuses on parent-*offspring* relations, thereby including ‘adult children’. The term ‘offspring’ is the preferred alternative to Bentham’s ‘filiality’,<sup>19</sup> which was intended to convey the same meaning. Burns’ understanding of Bentham’s position was ‘that the duration of parental authority is not to be defined absolutely by the [limited period over which children are relatively powerless] and that the relationship may be prolonged into adult life [...]’.<sup>20</sup> The departure from exclusive attention to youngsters that this perspective affords serves two purposes. It underlines that parental relations are not confined within arguably artificial age-related limits. Secondly, it provides a ‘level playing field’ upon which to make the comparison with guardianship. As indicated in *The Profile*, the term ‘guardian-ward relations’ is generic in being applicable both to youngsters and to mentally disordered persons of any age. Bentham’s attitude to age-related termination of guardianship for youngsters is discussed later (see particularly *Guardians and Parents Compared – Purpose and Duration*).

### **Methodological Implications**

The approach to evaluation in this article was conditioned by the fact that Bentham did not set out to provide factual evidence in support of his contentions. Likewise, this paper makes no attempt to ascertain what evidence was available to him nor to review or update the factual basis of his views. We know neither how effective guardians were in fulfilling their obligations to wards nor of parents in fulfilling obligations to their offspring. Bentham might well have qualified the assertion that guardians’ powers were for the benefit of their wards<sup>21</sup> by adding that he was not making an unsubstantiated generalisation about the behaviour of guardians, but was expressing confidence in how the right principles and ethical standards implicit in guardianship applied in practice. The

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<sup>19</sup> *IPML (CW)*, p. 276. Bentham sought an alternative to the word ‘child’ ‘[...] that will serve to express [...] the person who bears the relation opposed to that of parent [...] The word *child* is ambiguous [because it also conveys that the individual is other than] *a person of full age*’.

<sup>20</sup> J. H. Burns, ‘Nature and Natural Authority in Bentham’, *Utilitas*, v (1993), p. 214.

<sup>21</sup> *IPML (CW)*, p. 266. ‘A guardian is one who is invested with power over another [...] the power being exercised for the benefit of the ward’.

aforementioned review<sup>22</sup> found that overall this contention appeared justified on the basis of reasonable expectation.

Regarding parents' effectiveness, as parents or as guardians, Bentham's awareness of the socio-economic conditions that impinged on families would no doubt have caused him to reflect on those that would affect their relationship with individual offspring. We are nevertheless left to conjecture about the impact on these relations of major differences in family circumstances: levels of income; class and social conditions; roles of mothers and fathers; and variations in family size. However, Bentham did recognise the cost of parenting and that parents had the right to be given 'an indemnity for the trouble and expense of the education of their children'.<sup>23</sup>

### **Parents as Masters**

Because of the way Bentham assigned the dual role to parents it was judged a necessary preliminary to establish what Bentham meant by saying that parents were their offspring's 'masters', i.e. that their offspring were their servants. What seemed initially to be an unwarranted digression from the main body of the study revealed some interesting issues and common factors within the relations considered.

In maintaining that the power of parents *qua* masters over offspring *qua* servants served the interests of the former, Bentham was in tune with contemporary master-servant law that, unlike its modern counterpart, employer-employee law, gave almost unlimited rights to masters. If, as has already been suggested, Bentham ascribed the role of masters to parents because of prevailing social conditions and economic pressures on families, it appears contradictory to maintain that parents could put their offspring's interests before their own (as masters). This issue is taken forward later where Bentham's claim that parents can 'reconcile' these conflicting demands is discussed. Meanwhile it is noted that Bentham did not disregard masters' responsibility towards servants' welfare. He advocated masters providing 'guardianship-type' care for apprentices<sup>24</sup> and conceded that it would be within the scope of the law to impose obligations on masters, namely 'that of

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<sup>22</sup> Cox, 'Bentham's Guardianship', pp. 22-23.

<sup>23</sup> 'Code', Bowring, i. p. 348

<sup>24</sup> *IPML (CW)*, p. 240n.

affording maintenance, or giving wages'.<sup>25</sup> Presumably Bentham thought such concessions were insufficient to affect the balance of interests in favour of servants and would have perceived it as an unacceptable part of a master's 'burthen' to assume responsibility for servants' personal, social or circumstantial vulnerabilities.

Before leaving the contentious issue of the connection between master-servant relations and parenting, reference is made to a different view of master-servant relations, i.e. one that questions historically whether these did in fact always give preference to masters' interests. Goodin analysed how master-servant law was actually implemented during the period in question and found that Courts looked much more to the vulnerability of servants and their dependence on masters to reduce or remove causes of harmful or potentially harmful dangers than was popularly portrayed.<sup>26</sup>

On the strength of these findings, Goodin subjected masters' responsibility for the vulnerability of servants to further scrutiny. He discounted 'voluntary' and 'self assumed' positions, e.g. that servants 'choose' their conditions of employment and that masters may benignly and perhaps arbitrarily decide to better them, as well as the more formal obligations derived from the laws of contract or tort. Instead he favoured a much broader formula, arguing that responsibility for servants' vulnerability to threatened harms, i.e. to their welfare or interests,<sup>27</sup> rests with whoever is in a position to discharge it. In other words, vulnerability is the key concept and is relational in character in two respects: in addition to a person's situational or circumstantial vulnerability is his/her vulnerability towards a party or parties in a position to affect the situation one way or another.

Goodin's arguments concerning overall obligations towards vulnerable persons are referred to again in the *Summary and Conclusions*. The following comments therefore look only at the logistical and ethical applications of Goodin's theses to the matter in hand. The impact of his argument suggests that the additional designation 'masters' does not itself provide parents with a valid claim to have interests divergent from those of their offspring. This is because their actual presence and proximity identifies them as the parties with *de facto* responsibility to confront the vulnerability of their offspring-servants

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<sup>25</sup> *Ibid.*, p. 261.

<sup>26</sup> R. E. Goodin, *Protecting the Vulnerable*, London, 1985, pp. 53-56.

<sup>27</sup> *Ibid.*, p. 111.



– both as to any hazards involved in the assigned tasks and in being dependent on them to set reasonable quantifiable and quality standards. This further suggests that some safeguards would or should be in place to ensure that the relation served the interests of both parties, in which case his verdict departs from Bentham’s position to this extent.

### **Competing Demands on Parents**

An uncontentious argument pursued in this paper is that parents fulfil different roles, and that these compete to varying degrees with parents’ own interests as well as with those of offspring. Because parents inevitably experience conflict in satisfying their own needs as against those of offspring, Bentham was assuredly right that parents’ capacity to deal with conflicting demands is at the very heart of parenting. If the sources of tension were not directly related to the demands on parents that Bentham described, or if the divergence between them was less sharply defined than he conveyed, the basis of his standpoint is judged to be at least as valid as other contenders and deserves to be treated seriously.

In maintaining that parents fulfil two quite different roles, those of guardians and of masters, the *prima facie* implication is that these impose competing demands on parents to pursue different interests. This is confirmed by Bentham’s treatment of divergent interests as pursued by guardians and masters in their respective relations. Master-servant relations are primarily for the gain of masters exercising power beneficial to their own interests. In guardian-ward relations, on the other hand, wards are the primary benefit gainers; guardians exercise a fiduciary power that gives priority to serving their interests.<sup>28</sup>

The critically important argument that Bentham pursued in applying these considerations to parents is that, despite their dual role, parents can give preference to the interests of their offspring. In other words, Bentham is claiming that rather than master-servant and guardian-ward relations persistently running counter to each other, parents are able to prioritise their responsibilities in the interests of their offspring. Parents’ ‘natural affection’ for their offspring enables them to ‘easily reconcile’ the conflicting demands; a

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<sup>28</sup> Cox, ‘Bentham’s Guardianship’, pp. 16-17

father's natural affection for his offspring 'leads him rather to make sacrifices for his children than to make use of his rights for his own advantage'.<sup>29</sup>

Much of the following discussion turns on what Bentham meant by 'natural affection' as the predominant and persistent sentiment between parents and their offspring. 'Natural affection' was (and is) an expression in common currency, and it would obviously be unwise to infer philosophical or ethical standpoints or to speculate as to whether Bentham was venturing, perhaps unwittingly, to pronounce on the essential qualities of parent-offspring relations. To have assessed Bentham's statements within a comprehensive overview of parent-offspring relations would in any case have been beyond the scope of this article. Instead, we focus on Bentham's actual argument alongside commonly held views on what constitutes bonds between parents and offspring as well as some consideration of his own personal perspective.

Having portrayed what might seem to be a somewhat idealised view of parents' dispositions it is necessary to weigh these against another of Bentham's statements. In a different context, a discussion of pauper education and the role of 'appointed Father' within the Public Guardianship system, Bentham considered the pros and cons of natural parenting and, while recognising the natural affection of parents to be unique and laudable, also emphasised its negative aspects. These included inconstancy and lack of accountability but, most tellingly for the present discussion, was his assertion that 'The natural parent would have an interest of his own, *distinct from and oftentimes opposite* to that of the child'.<sup>30</sup> (Emphasis added).

The more balanced picture emerging from the above suggests that Bentham was not fixed in an idealised view of parents and probably perceived them generally as normal persons capably undertaking normal responsibilities. This corresponds to a three-dimensional view of persons that Bentham conveyed indirectly through his description of wards' impediments to self-government and happiness that lay principally in the areas of 'knowledge, inclination and physical power'.<sup>31</sup> In other words, those able to achieve self-determination and to fulfil capable roles in society, of which being a parent is of prime

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<sup>29</sup> 'Code', Bowring, i. p. 349

<sup>30</sup> *Writings on the Poor Laws: II*, ed. M. Quinn, Oxford, 2010 (CW), p. 170. Hereafter *Poor Laws II* (CW).

<sup>31</sup> *IPML* (CW), p. 244

importance, were likely to be those who show skills and qualities in these three spheres. The question then to be addressed is whether parents defined as capable in these terms can or do fulfil Bentham's expectations.

This view of capable parenting needs to be set against a basic profile of what might be regarded as the core component of parent-offspring relations, namely the bonding process and obstacles that can stand in the way of achieving and maintaining it. Conventional wisdom and some aspects of attachment theory suggest a typical bonding pattern between parents and child of high intensity towards infants, gradually reducing in intensity through childhood and adolescence into adulthood. Even as an obvious generalisation, the statement raises further questions, namely: is 'natural affection' the driving force within the bonding process? Is the picture of intense bonding by parents, particularly in the way mothers' care for their babies, an idealised view of what actually happens? Of special relevance to the present discussion is a further question: however capable parents may be, can this variable bonding pattern consistently sustain the 'natural affection' that Bentham appears to have assumed to be peculiarly evident in their roles as putative guardians?

Whatever approach is adopted in answering these questions, some light may be shed on the issues by considering aspects of Bentham's personal life that were likely to have influenced his views. Although very little is known about his relation with his mother, who died when he was ten years old, available evidence suggests that his father's relation with him lacked affection.<sup>32</sup> The missing link is whether Bentham experienced or observed natural affection first-hand or, if not, whether he might (like anyone else so deprived) have been prone to mistake spurious semblances for the genuine article. What we do know is that Bentham was a life long bachelor, who actively proclaimed himself 'as a reclusive celibate scholar',<sup>33</sup> and may have been unable or unwilling to become a parent. If the latter pertained, we may speculate that he was concerned as to the emotional/intellectual demands entailed in being a parent or, more pertinent to the present

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<sup>32</sup> Bentham, then aged twenty-seven, wrote to his brother thus: 'He certainly does love you and me next to his money', Bentham to Samuel Bentham, 18 May 1775, in *The Correspondence of Jeremy Bentham*, vol. i, ed. T. L. S. Sprigge, London, 1968 (CW), p. 235.

<sup>33</sup> M. Sokol, 'Blackstone and Bentham on the Law of Marriage' in *Blackstone and his Commentaries*, ed. W. Prest, Oxford, 2009, p. 74.

discussion, sensed that the reality was a good deal more complex than feelings of natural affection.

At the opposite extreme to manifestations of natural affection, there is evidence that mothers' disposition towards their babies can be one of hatred.<sup>34</sup> A now generally accepted 'middle ground' viewpoint is that bonds between parents and offspring contain a range of emotions and that parents have ambivalent feelings towards their offspring, demonstrated when the demands that offspring make upon them conflict with their own desires, aspirations and interests. In short, just as parents' affection in the relation could be said to 'come naturally', so also could their hostile feelings towards their offspring in certain circumstances.

Because of ambiguities in the word 'natural', of which Bentham would have been well aware, we need to ask what he sought to convey. The term 'natural' as applied to human attributes has two commonly used meanings. The first refers to a person's *endowment*, i.e. what is intrinsic or inherent or what a person is born with, qualities or features that people inevitably carry with them. The second meaning is almost synonymous with '*normal*', used interchangeably with 'usual', 'expected' or 'commonly found'. Bentham does not define 'natural' in positive terms<sup>35</sup> but associates the meaning of 'unnatural' with 'unfrequent': 'the frequency of [unnatural practices such as infanticide] is perhaps the greatest complaint',<sup>36</sup> the corollary to which is the view that 'natural' means usual or normal. This may have been Bentham's predominant stance but it would seem that both options require consideration.

If, on the other hand, it was the 'endowment' meaning of 'natural' that Bentham had in mind, this translates as a view that parents' propensity to afford their offspring affection is instinctive or in-built, part of the inherent make-up of being a parent. A concomitant of this view is that it is the biological facts of parenting that 'kick-starts' and sustains the bonding process. It seems possible that Bentham believed that the existence of the blood tie alone not only ensures that affectionate bonds would be formed but that

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<sup>34</sup> D. W. Winnicott, *Through Paediatrics to Psycho-Analysis*, London, 1975, pp. 194-197.

<sup>35</sup> However, Bentham does offer a negatively phrased definition: 'What does natural mean when it means neither original, nor usual nor yet proper? It means nothing: to use it is to talk nonsense'. Bentham Papers, University College London Library, Box xx. fo. 176.

<sup>36</sup> *IPML (CW)*, p. 27 n.

these would remain strong enough to withstand conflicting pressures on parents to resist putting their own interests before those of their offspring. Some support of this view is offered at the conclusion of the section on *Parental Guardianship*.

Knowing which of these perspectives most influenced Bentham's thinking could provide valuable insight into how he would have viewed the more obvious and troublesome departures from persistently demonstrated parental affection, given evidence of relations in which parents manifestly fail their offspring in this respect. Whether through personal knowledge or social intelligence, Bentham would have known of instances in which lack of affectionate relations between parents and offspring produced socially unacceptable consequences. Possibly such failures, depending on their nature and seriousness, were what he had in mind as rationale for initiating formal guardianship, i.e. the 'trigger points' that called for intervention and change. As the previous review noted, however, Bentham gives no indication of the ways in which formal guardianship was initiated or of the procedures involved.

### **Parental Guardianship**

Bentham's argument that parents are the guardians of their offspring is problematic because although his initial focus on guardianship in the family context suggests an overlap in status and function between parent-offspring and guardian-ward relations, he did not substantiate the connection. We cannot therefore be sure whether he was considering two different species (the basic assumption in this article being that this was the case) or a single species in which the two are the same relation under a different title. Both possibilities as meanings of 'parental guardianship' are considered.

The latter possibility implies that when persons become parents they simultaneously become their offspring's guardians, so rendering the two titles interchangeable. This seems to be the legal presumption, discussed below. A quite different implication relates to assumptions apropos functions, i.e. that these 'parental guardians'<sup>37</sup> would perform the same functions as guardians. Examining the latter assumption takes the form of comparisons between parents and guardians in the following section.

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<sup>37</sup> *IPML (CW)*, p. 276

The legal basis for the idea that the status of guardian and that of parent are interchangeable requires brief reference to guardianship law history for which the 1985 Law Commission study of Guardianship<sup>38</sup> is used as a benchmark. The Commissioners looked to the origin of guardianship law within the feudal system of land tenure and to different forms of guardianship linked to the property of the child heir and land holdings. They then reviewed thirteen of these old or obsolete guardianship laws, some of which Blackstone discussed,<sup>39</sup> concluding that those in force following the passing of Statute 12 Car. II. c. 24.<sup>40</sup> could effectively be brought together under three heads: testamentary, court appointed or ‘natural or parental’ guardianships. Bentham makes reference to each of these categories of law in the extracts offered below and may have looked upon them as expressions of parental wishes, either directly or via other parties, and possibly being what he meant by ‘parental guardianship’.

‘*Natural or Parental*’ guardianship enjoined two feudal guardianship laws – *Guardianship by Nature* and *Guardianship by Nurture*. *Guardianship by Nature* was limited in scope to the heir alone and lasted until he was twenty-one. The Guardian by Nature was first the father, and only upon his death, the mother. A father was not a Guardian by Nature to daughters, younger sons, or other nonpropertied children because they could not inherit from him. The second of these laws, *Guardianship by Nurture*, was unrelated to the child's property-holding status. The father, or after his death the mother, was Guardian by Nurture of all his legitimate children under the age of fourteen, or sixteen for a female child. Upon the death of both parents Guardianship by Nurture ceased entirely. Only the natural parents could be Guardians by Nurture, and younger children and daughters could only have Guardians by Nurture as they had no inheritable estate.<sup>41</sup>

Bentham’s comments on closure of guardianships at age twenty-one (discussed under *Purpose and Duration*) may have been referring to Guardianship by Nature but his non-specific references may have included Guardianship by Nurture apropos younger wards. Overall, because we do not know for certain whether Bentham’s references were

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<sup>38</sup> The Law Commission, *Family Law Review of Child Law: Guardianship*, London, 1985, pp. 30-31.

<sup>39</sup> Blackstone, *Commentaries*, i. p. 449.

<sup>40</sup> This is the formal citation of key legislation popularly known as the Tenures Abolition Act (1660).

to one or both of these laws, the Commission's term ('natural or parental' guardianship) is henceforth adopted.

It is difficult to offer a balanced appraisal of 'natural or parental' guardianships, both because of their feudal resonance and because of the manner in which they are described in the literature. Nevertheless, without underestimating their importance for particular historical purposes, their credentials in terms of the concept of guardianship discussed in this paper raise serious doubts. A tentative assessment is that the legal designations were purely titular, bound up with feudal concepts of entitlements to property and to inheritance, and were discriminatory on grounds of gender, age and legitimacy that now seem inappropriate by any criteria. Absence of explicit reference to them by Bentham suggests that he also questioned their relevance.

Compared with the model of guardianship put forward in *The Profile*, the limitations of 'natural or parental' become apparent. They do not convey a qualitative view of relations between specific parties, i.e. between parent and offspring or between guardian and ward. There is a marked absence of explicit functional components, i.e. to protection and representation, or to the more specific functions Bentham described (education, maintenance, etc.), and the connection between necessary functions and wards' needs is missing. Finally, both laws convey the idea that status of parent (or at least that of father) coincided with that of guardian, a view at odds with the main thrust of this paper. In short, the overall picture conveyed may well have been the one the Commission faced when offering their understated overview that '[...] *there were no general rules as to the rights, powers and responsibilities [...] of guardians of infants*' (emphasis added).<sup>42</sup>

With these views in mind, the difficulty of explaining Bentham's treatment of 'natural or parental' guardianship becomes clearer. The laws were seemingly 'locked in' to Bentham's historical past, possibly obsolete and ineffective, causing us to wonder if he over-estimated their import while downplaying their actual significance. This latter standpoint was conclusively shown in relation to children's upbringing. In this critical test, Bentham does not cite guardianship law as the overriding safeguard to protect

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<sup>41</sup> Law Commission, *Guardianship*, pp. 31-32

offspring's interests vis-à-vis contrary demands implied by parents' role as masters, but looks instead to the natural affection of parents. One would have expected guardianship law of any import or effect to have been the preferred means to impose the necessary safeguards. That it was clearly not perceived in this light probably explains Bentham's apparent dismissal of guardianship law as basis for safeguarding offspring's interests.

Despite this negative appraisal it is still necessary to consider Bentham's specific references to guardianship law and to parents as guardians, and in particular to his observation that parents possessed 'all the rights and all the obligations of guardians'.<sup>43</sup> These are set against more general of his references to 'relations of a legal kind which can be superinduced upon natural relations'<sup>44</sup> and to his admonition that it was important 'to distinguish between the natural relationship and the legal relationship'.<sup>45</sup> Further, Bentham said that the power of 'the parent over that of his child' and that of 'the guardian over the ward' was a 'power of imperation in private dominion'.<sup>46</sup> This seemingly meant that guardians and parents have socially and legally recognised status that gives them authority over their respective charges; and that the powers that flow from this authority are enforceable.

Perhaps the most important of Bentham's comments amplifying these views is as follows:

The father and mother are eminently [the ones] who have the greatest inclination and facility for discharging [...] the office of guardianship [...] natural affection generally more strongly disposes them to it *than the law* [...] *which imposes it on them* (emphasis added).<sup>47</sup>

If we rule out the possibility that Bentham meant that a person becomes a guardian simultaneously on becoming a parent, i.e., whereby the two statuses coincide, we are left

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<sup>42</sup> *Ibid.*, p. 30.

<sup>43</sup> 'Code', *Bowring*, i. p. 348.

<sup>44</sup> *IPML (CW)*, p. 250.

<sup>45</sup> *Ibid.*, p. 274

<sup>46</sup> *Of the Limits of the Penal Branch of Jurisprudence*, ed. P. Schofield, Oxford, 2010 (*CW*), p. 149n.

<sup>47</sup> 'Code', *Bowring*, i. p. 349.



with a view that parents *acquire* the status of guardian, i.e. additionally ('superinduced') to that of parent. The above statement expresses two possibilities, apparently as alternatives: firstly, that parents' natural affection for their offspring meant that they were the obvious first choice to be their guardians; or, secondly, that to be their guardians did not depend on their motivation because 'the law' would if necessary impose it on them. Thus 'becoming' a guardian depends on other contingencies being in place, i.e. parents' motivation or legal sanction. It therefore seems clear that Bentham was alluding to the status of guardian acquired additionally to that of parent but the basis of the acquisition is not clear. Having 'the greatest inclination' through 'natural affection' strongly suggests that it was acquired by choice, whereas an 'imposed law' conveys that it was a legal requirement. Precisely what legal imposition was involved remains unclear.

The test that would support or refute the first of these possibilities requires reference back to the earlier discussion in *Competing Demands on Parents* which concluded, in brief, that Bentham's evaluation of parents' natural affection was insufficiently weighed against their hostile and ambivalent feelings for their offspring, and that he over-estimated the persistence and strength of parents' natural affection in resisting demands on them that served their own rather than their offsprings' interests.

Turning to another of Bentham's statements, quoted below, he appears to refer (though without use of the term) to a *testamentary* guardian, i.e. a guardian appointed by Deed or bequeathed by Will, effectively taking the place of a parent. In the illustration offered, the situation of a dying father, Bentham considers outcomes dependent upon whether or not the father had made such provision, and explains apropos one option:

If the father have not provided a guardian, this obligation should fall upon a relation [...] In default of a relation, some friend of the orphans<sup>48</sup> should be chosen, who will voluntarily discharge this office; or some public officer should be appointed for this purpose.<sup>49</sup>

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<sup>48</sup> The reference to 'orphans' could mean either that one or that both parents had died, but it is presumed here to be only the father who is deceased. Use of the plural form does not effect the present discussion, but does remind us that family size was of crucial social significance.

As these observations indicate, the role of the testamentary guardian is to fulfil defined functions at the behest of a male parent in the event of his decease. We are not told why the application of testamentary guardianship is discussed without reference to the position of the surviving spouse, i.e. the mother as ‘natural or parental’ guardian. To provide an explanation we need to turn to judicial interpretations of the aforementioned Statute affirming fathers’ exclusive right over that of the mother to appoint testamentary guardians, and giving testamentary guardians’ precedence over all other guardians.<sup>50</sup> That a testamentary guardian would have more ‘clout’ than the offspring’s mother apparently explained the offspring’s need to have two guardians.

The above leaves us with a number of questions, in particular as to whether Bentham perceived testamentary guardianship to be an extension of parental guardianship and, as such, to be an expression of parental wishes vis-à-vis their offspring. His description of the preferred choice of person as being someone with ‘interest to the preservation of the family property and [willing to ensure] the welfare and education of the children’<sup>51</sup> supports this view. The other questions turn on why Bentham did not seem to regard as problematic an apparent deprecation of the effectiveness of the mother as ‘natural or parental’ guardian. Perhaps he judged it to be a self-evident and justifiable confirmation of women’s relative powerlessness at this time, at least in these particular circumstances.

A further point drawn from the illustrations is the reference to the ‘public officer’ who could by default be appointed testamentary guardian, indicating a possible link between the private and public spheres. An official appointment would have been made through the guardianship jurisdiction of the Court of Chancery, and it is surprising that Bentham does not refer directly to Chancery and Court-appointed guardians, especially insofar as he appears to expect them to act in accordance with parental wishes. However, the supervisory oversight of guardianship provided by Chancery, which was only slowly

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<sup>49</sup> ‘Code’, Bowring, i. p. 348.

<sup>50</sup> A. Buti, ‘The Early History of the Law of Children: From Rome to the Tenures Abolition Act 1660’, *University of Western Sydney Law Review*, v (2003), p. 12.

<sup>51</sup> ‘Code’, Bowring, i. p. 348.

to extend to include ensuring that the arrangement met parents' wishes, was at an early stage of development at this time.<sup>52</sup>

Other of Bentham's comments on parents as guardians, albeit in different contexts, illustrate circumstances in which guardianships can be transferred from parents to other persons:

[...] the Father, or in his default the Mother, or in her default the *natural Guardians in the ascending line* [...] the Grand-father or Grand-mother [...] and so on [...].<sup>53</sup> (Emphasis added).

More specifically, in a discussion of husband-wife obligations, Bentham observed that:

A grandfather, perhaps, may be *called by the law* to take upon him the guardianship of his orphan grandson [in which case] the power he has belongs to him not as a grandfather but as a guardian.<sup>54</sup> (Emphasis added).

As has been suggested, the inalienable status of parent arises from actual procreation, unaffected by other parties being authorised, able, willing or actually taking on parental *functions*. These considerations affect our analysis of the examples given above. The first of these raises the question as to whether the appointment of a testamentary guardian is tantamount to parental guardianship being 'handed over' to, or shared between, other persons. Although the father's 'hand-over' would not take place until he died, we are left to wonder if the mother's responsibility has simultaneously been abrogated (further discussed below). In both of the other illustrations guardianship responsibility is clearly transferable, i.e. shifting 'in the ascending [genetic] line',<sup>55</sup> being

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<sup>52</sup> Buti, 'Early Guardianship Law', p. 14.

<sup>53</sup> *Poor Laws II (CW)*, p. 5.

<sup>54</sup> *IPML (CW)*, p. 283.

<sup>55</sup> *Poor Laws II (CW)*, p. 5.

in effect ‘handed-over’ between generations, possibly when parents were absent or unable to fulfil the role.

An alternative possibility apropos the second set of the illustrations, and perhaps more likely, is that they demonstrate parental guardianship extending and being shared across generations. Although this again indicates that natural/parental guardianship could be held concurrently by persons other than the biological parents a liberal interpretation of the ‘blood tie’ as a credential shared by the whole of the family may be the rationale.

It is nevertheless maintained that both sets of illustrations imply acceptance of other parties becoming the offspring’s guardians in place of the parents. Taken overall, they portray parents’ guardianship to be transferable rather than being anchored to the identified procreators. The existence of ‘hand-overs’ to another (albeit to a guardian) or between generations inevitably leads us to conclude that the two ‘offices’, i.e. those entailed in being the biological parent or being a guardian, diverge, and provides clear evidence that the offices are distinct.

Apart from establishing that Bentham did not see ‘natural or parental’ guardianship as of sufficient substance or effect to counterbalance parents’ role as masters, there remain unresolved questions as to how Bentham perceived guardianship law vis-à-vis parents’ normal obligations towards their offspring. One possibility is that he was more influenced in this particular respect by Blackstone’s thinking than at first sight seems likely (or more persuaded by it than he would have admitted). Wright considers that Blackstone’s influential position was founded on his conviction:

that the “natural” parental tie, deriving from the biological connection, was the cornerstone of the parental duties of support, maintenance, and education [from which] confusion appears to have arisen as between the common law concept of the guardian by nature and the natural law concepts of parental duties and rights arising by virtue of the biological tie.<sup>56</sup>

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<sup>56</sup> D. C. Wright, *De Manneville v. De Manneville: ‘Rethinking the Birth of Custody Law under Patriarchy’*, *Law and History Review*, vol. 17, 1999, <http://www.historycooperative.org/journals/lhr/17.2/wright.html>, accessed 14 Aug 2011.

A further comment from Wright supporting this appraisal suggests that:

[Although] the legal constraint of inheritance rules on the guardianship by nature of the father distinguished between the purely legal concept of the guardian by nature and the more general “natural” relation of either parent to his or her offspring, [there was a marked tendency] to disregard the position of the guardian by nature, which was a formal, legalistic term that denoted a particular legal relation of the father to his heir.<sup>57</sup>

Wright supports his argument by reference to court cases in which the distinction between the natural rights of a father to his children and the guardian by nature seems to have become blurred. Conceivably, Bentham’s discussions of parent-offspring and guardian-ward relations were likewise subject to a blurring of this distinction.

### **Parents and Guardians Compared**

This section compares the status and function of parents with those of guardians. This refers, on the one hand, to the normal expectations of parents in their relations with offspring and, on the other, to what we expect from formally appointed guardians in their relations with wards, as outlined in *The Profile*. Bentham’s statement that parents possess ‘all the rights and all the obligations of guardians’<sup>58</sup> is again subject to scrutiny but now as to its validity, tested by enquiring to what extent parental-offspring relations comply with the demands, expectations and standards required by the institution.

#### *Purpose and Duration*

Although we have no single statement from Bentham on the overall purpose of guardianship his account clearly conveys that the institution was not only intended to increase the happiness of wards but to thereby benefit society as a whole. At the risk of imposing a modern perspective, we may further infer that guardianship was regarded as

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<sup>57</sup> *Ibid.*

the most effective and humane way to ensure proper care and, where possible, to help achieve personal fulfilment for society's most vulnerable members. More specific objectives that would contribute to this goal can be deduced from descriptions of the situation of putative wards and the rationale Bentham gave for the duration or timespan over which individual guardianships were expected to last.

Because wards – certain youngsters and mentally disordered persons – are 'deficient' in knowledge, motivation or physical capability, the role of guardians is to provide them with the necessary protection and 'government' (representation) in order for them to become happier, more independent and fulfilled persons. Guardians are empowered to exercise proxy autonomy on behalf of a person not capable of choice until that other person reaches independence where such a goal is achievable.

Attainment of personal autonomy is a cherished human aspiration and may be expressed as a basic need<sup>59</sup> or as a right. Hart asserts that 'the only natural right' is that of 'the equal right of all men to be free', only enjoyed by those 'capable of choice' apropos their freedom from unwarranted coercive actions or restraints by others.<sup>60</sup> Arguably, those not capable of choice also aspire to and have a claim to autonomy; having another to exercise choice on their behalf and protecting them from such hazards is a good 'second best' (albeit a hopefully short-term) alternative.

The functions of the institution of guardianship in facilitating realisation of these goals can be said to be twofold: to replace whatever conditions or arrangements (including unsatisfactory parental relations) that had hitherto failed to protect and represent these groups of vulnerable persons; or to make appropriate arrangements where none previously existed. This is the rationale and logistical basis upon which guardians would be expected to intervene, to engage with wards, to initiate and pursue a relationship with them.

The scope of formal guardians' functions as above outlined provides a marked contrast with those of parent-offspring relations, principally because society does not look to parents to provide a replacement for absent or unsatisfactory care provided by a pre-

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<sup>58</sup> 'Code', Bowring, i. p. 348.

<sup>59</sup> L. Doyal & I. Gough, *A Theory of Human Need*, London, 1991, pp. 59-69.

<sup>60</sup> H. L. A. Hart, 'Are there any Natural Rights?', *The Philosophical Review*, lxiv (1955), p. 175.

existing relation. Only in situations involving alternative parenting, e.g. where parents become foster parents, adoptive parents or are acting *in loco parentis* for specific purposes, are parents expected to fulfil the parental function for others' offspring.

As to the duration of guardianship, Bentham's basic view seemed to be that the relation of guardian and ward should last as long as it was needed, logically following from having necessary functions to fulfil. His concession of an age limit of twenty-one as a necessary closure point is therefore doubly curious. 'Age of discretion' at twenty-one was only an arbitrary point at which guardianship by nature terminated and, (as above discussed) it is by no means certain whether this was Bentham's reference point. Further, any suggestion that Bentham was influenced by a prevailing consensus about how long the maturation process lasts, needs to be balanced against his reservations about its *carte blanche* application. In fact he sought to counter this by commending an alternative measure for those youngsters whose progress towards self-government was clearly failing to proceed at the normal pace. He therefore advocated that provision should be made for those 'who never reach maturity, or reach it later than others [...] by Interdiction,<sup>61</sup> which is only (sic) a prolongation of guardianship during a prolonged childhood'.<sup>62</sup>

The idea of guardianships remaining in place until no longer needed, a landmark development of Bentham's thinking, and widely accepted at a general conceptual level,<sup>63</sup> contrasts with the duration of parent-offspring relations. Whatever period of time this affords does not necessarily correspond to the time taken to meet offspring's needs: where, for instance, parents die prematurely, i.e. during a youngster's early development, or if the relationship breaks down, unmet need remains unmet. Furthermore, although the normal expectation is that parental functions diminish gradually as the offspring reaches maturity, the process may be disrupted and/or prolonged in whole or in part at any stage; development stages and chronological age progression do not always proceed in parallel. This has major implications for youngsters facing adulthood with learning difficulties or mental health problems. Parents may experience irresistible pressure to undertake

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<sup>61</sup> Interdiction measures and their implications are discussed in Cox 'Bentham's Guardianship', pp. 5-6.

<sup>62</sup> *IPML (CW)*, p. 348

<sup>63</sup> H. Hiz, 'The Ethics of a Guardian and the Ethics of a Legislator', *The Philosophical Forum*, xxix (1998), pp. 50-65. Hiz applies this principle by analogy apropos the duration of education and medical treatment vis-à-vis the respective roles of teachers and doctors.

parental functions continuously or episodically well into their offspring's adult life, yet find considerable difficulty in fulfilling this extended role.

In comparing the manner of closure of these sets of relations, the above has described the situation in which parent-offspring relations cease at the first death of either party. When a parent dies this may well leave an offspring's needs unmet. Again by way of contrast, in a situation in which a death or other exigency precipitately curtailed a guardians' engagement in a formal guardian-ward relationship, a replacement guardian would be required<sup>64</sup> – provided of course that the need for guardianship was unchanged.

### Protection and Trust

Bentham claimed that security was the most important of the subordinate ends of the law, and that its maintenance had primacy over the other ends, namely subsistence, abundance, and equality.<sup>65</sup> He particularly stressed the need to protect young children<sup>66</sup> and clearly perceived guardians as the most appropriate persons to afford their wards the right kind and degree of protection. The general tone of his account suggests that he was confident that such protection was actually afforded, though he acknowledged the fallibility of individual guardians guilty of breach of trust.<sup>67</sup> However, in the absence of any effective code of practice or regulatory process in place, Bentham relied on penalties for criminal acts or defaults that would deter such failures.

The link between protection and trust in Bentham's exposition is clearly forged by the affirmation that guardians are trustees and wards their beneficiaries. Guardianship as a form of trust offered not only an assured intention to protect but, in effect, a guarantee of actual security: wards were not beneficiaries 'in anticipation', as it were, but were 'beneficiendaries' – Bentham's preferred term for those who actually (demonstrably) gained this benefit.<sup>68</sup> Guardians had trustees' 'powers', more accurately called mandatory responsibilities, to make this happen. Their trustworthiness could be viewed as the

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<sup>64</sup> J. Chitty, *A Treaty on the Law of the Prerogative of the Crown*, London, 1820, p. 156.

<sup>65</sup> 'Code', Bowring, i. p. 302

<sup>66</sup> *Ibid.*, p. 347.

<sup>67</sup> *Ibid.*, p. 308.

<sup>68</sup> *IPML (CW)* p. 208n.



dynamic element that links trust in the ethical sense with the more abstract connotation conveyed by legally formed trusts.

As to wards unable or unwilling to trust their guardians, an issue Bentham does not address directly, it seems that he would have maintained that it was precisely the trust status of the relation that provided security *in lieu* of the missing element. Further, with the addition of a time-related dimension, we can envisage wards becoming able to trust their guardians as and when guardians demonstrated their trustworthiness. Also needing to be allowed for are wards' diminishing or increasing needs for protection over time, which called for guardians to be skilled in knowing when to relinquish or intensify their protective functions.

The idea that trust is inherent in the nature of guardianship responsibility was judged by the present writer to be the key principle influencing contemporary practice of social worker guardians for persons with mental disorder:

[T]rusteeship and guardianship [...] make similar demands on trustees and guardians to exercise care towards beneficiaries/wards in a continuing, consistent and above all individualised way [...] Conversely, help offered which is sporadic, inconsistent and impersonal [...] is a contradiction in the nature of the trust relation.<sup>69</sup>

Bentham gave tacit, though perhaps lukewarm,<sup>70</sup> recognition to the distinction between 'guardianship of the person' and 'guardian of the estate' as distinct means of protecting different kinds of interests. Ways that Bentham described for providing personal protection included tending to the ward's 'education [...] choosing his station [...] fixing his habitation' and imposing discipline,<sup>71</sup> with maintenance and custodial responsibilities seemingly implicit. As to the protection of property, i.e. safeguarding ward's material possessions and their future entitlements, Bentham acknowledged that

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<sup>69</sup> B. E. Cox, 'Guardianship for People with Mental Illness; Social Workers' Perspectives and Decisions', Ph.D. Dissertation, University of London, 1993, p. 8.

<sup>70</sup> Bentham appeared to view protecting a person and protecting his/her property as 'two sides of a coin' so far as they affected the person's happiness.

<sup>71</sup> 'Code', Bowring, i. p. 347.

this could call for the appointment of a second guardian in circumstances such as the protection of a youngster's inheritance.<sup>72</sup>

The question of whether parenting itself affords the necessary degree of protection may be addressed by asking if trustee-beneficiary relations underpin those of parent-offspring. If so, this would realistically apply to care of infants, usually with a diminishing need for protection as offspring mature. Whilst this may be a reasonable expectation, it clearly does not contain as an assurance of trust that parents provide appropriate levels of protection afforded continuously or on a contingent basis. A particularly worrying issue concerns parents' physical proximity to offspring. Their closeness and ease of access puts them in the best position to counter offspring's vulnerability but their much publicised failures, some of which relate to too close or inappropriate physical contact, i.e. abuse, need also to be taken into account.

It could be maintained that satisfactory parent-child relating depends on the child being able to trust his/her parents and that trust can only form from good parenting experience, more fully discussed under *Competing Demands on Parents*. Protection against vulnerability and avoidance of inappropriate over-protection would be part of this. These taken together are bases for the trust assumption, but it is questionable whether such an assumption is justified apropos parent-offspring relations.

At first sight, the divide between protection of person and protection of property seems less apposite to the parental role, but closer scrutiny in the more obvious context of adult children questions this. The way parents attend to their own affairs so as to be able to provide for their offspring when they die has become a major issue. Again, the question raised is how reliable and efficient parents are in attending to the future needs and financial security of offspring.

Researchers have shed light on parent's consistency or otherwise in providing offspring with protection, reporting divergent attitudes as between 'conservative' and 'radical' parental dispositions. The findings revealed that the conservative parent was protective in seeking to prevent the child entering dangerous situations but tended to be controlling and to stifle initiative. The radical parent encourages the child to experiment,

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<sup>72</sup> *Ibid.*, i, p. 347

thereby possibly involving risk, and to develop new skills by engendering enthusiasm and confidence, but tends to lull both parties into a falsely egalitarian stance.<sup>73</sup>

### Agency and Representation

A clear presumption present throughout Bentham's account is that the institution of guardianship vested guardians with authority, and that this empowered them to represent persons unable to act or decide in their own interests so as to be able to effectively advocate on wards' behalf. This was described in *The Profile* as the agency basis of guardian-ward relations. If Bentham tacitly accepted the convention that this authority resided in the Crown as 'Guardian of Guardians', he made no direct reference to this. However, we know that Bentham as a law reformer was uncomfortable with what he may well have perceived as 'fictions' of this kind and therefore looked instead to the more direct and practical alternative of applying agency law tenets.

Had Bentham pursued this way forward he would firstly have had to confront the limitations of agency law, at that time poorly developed,<sup>74</sup> its main restriction being that it could only provide guardians with the necessary authority if principals (wards) themselves gave guardians that authority; principals incapable of providing such authorisation required authority to come from elsewhere. The alternative to invoking the Royal Prerogative that Bentham may have favoured was to extend agency law tenets to empower guardians to act without authority from wards on a substituted judgement basis. Agency law principles were the starting point for the Law Commission's discussion of the position of the 'incapacitated principal'.<sup>75</sup>

The status and function of parents as their offspring's representatives has been questioned,<sup>76</sup> as indeed has the whole basis of parental authority following the precedent set by the Gillick case.<sup>77</sup> Whilst they lack status as legally authorised advocates, it is commonly accepted that parents generally strive to represent their youngster's interests and that this parental function reduces over time as the need diminishes. However, it is

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<sup>73</sup> Frolik, 'Plenary Guardianship'.

<sup>74</sup> O. W. Holmes, 'Agency' in *Collected Legal Papers*, New York, 1952, p. 50

<sup>75</sup> The Law Commission, *The Incapacitated Principal*, London, 1983, p. 2.

<sup>76</sup> H. F. Pitkin, *The Concept of Representation*, Berkeley, 1967, p. 141.

<sup>77</sup> *Gillick v. West Norfolk and Wisbech Area Health Authority*, 1984.

also generally acknowledged that parents have their own legitimate agendas to pursue that may conflict with those of offspring; moreover these may become particularly acute and critical over representation issues. Overall, It could be concluded that the parent-offspring relation provides no *assurance* that parents consistently or reliably speak or act in their offspring's best interests.

### *The Power Dimension*

Powers of guardians derived from trusteeship (mandatory responsibilities) and agency law (as authorised representatives) have been mentioned already, and the effect of fiduciary obligations upon guardians in enhancing their powers is discussed in the following section. However, Bentham seems to have been less concerned with guardians' legal powers *per se* than that guardians exercised such powers that they possessed to benefit wards, and appeared confident that this was generally the case.<sup>78</sup> As between two recognised kinds of power relation<sup>79</sup> as applied to guardian and ward, it seems that Bentham was predominantly considering 'power over' (imposed power) but also envisaged there being a relation that gave 'power to' wards (i.e. by empowerment).<sup>80</sup> The relevance of this key distinction in the nature of power relations cannot be properly assessed given the absence of a dynamic element in Bentham's account that would enable us to follow shifts in 'the balance of power' over time. This is necessary to indicate how the nature of the power might change (in either direction) over the course of the guardianship. Such changes would depend on whether compulsion was needed and on the ward's increasing or decreasing capacity to function without exercise of guardians' power(s).

One specific kind of 'power over' has already been covered in the section on agency and would apply where the agent is authorised to override the principal's expressed wishes. This is lawfully and ethically allowable when the agent acts properly in assessing that the decision or proposed action will best serve the principal's interests. The parallel with actions and decisions of guardians is easily recognisable.

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<sup>78</sup> *IPML (CW)* p. 266.

<sup>79</sup> S. Lucas, *Power*, London, 1974, pp. 28-31.

<sup>80</sup> Cox, '*Bentham's Guardianship*', p. 17.

The particular ‘imposition’ on parents of common law guardianship, discussed above, remains an enigma in terms of specific requirements as does the general question of the nature and extent of legal powers of parents, notwithstanding the readily recognisable power difference between parents and their offspring as an aspect of normal family life. It seems safe to say, however, that the distinction between parents’ power(s) and guardians’ power(s) is that the former may well be exercised variably and possibly inconsistently so far as the needs of offspring are concerned. Inevitably, we think of parents’ use of power as being at least to some extent for their own benefit rather than for that of offspring.

### The Fiduciary Dimension

The single statement from Bentham linking guardianship with fiduciary relations – that a guardian’s ‘power... thereby coupled with a trust, may be termed a *fiduciary* one’<sup>81</sup> – does not convey its importance. It is perhaps surprising therefore that he did not discuss the fiduciary concept *per se*: its original connection with Chancery and Equity; its meaning in ethical or legal terms; or its particular application to guardian-ward relations. Nevertheless he would probably have endorsed the following explanation of fiduciary relations, it being of general application and not framed within its more usual modern commercial context. This explanation stresses the inequality of the relation, the dominant position of the fiduciary, the reliance of the ‘entrustor’<sup>82</sup> on the fiduciary and the fiduciary’s recognition of this reliance. The entrustor reposes trust, confidence and loyalty on the fiduciary and this reliance or dependence renders him/her vulnerable to the fiduciary.<sup>83</sup> An alternative to Sheppard’s term, ‘Reliance Theory’, that better conveys the thinking underlying this formulation is ‘Reliance-Dependency-Vulnerability Theory’.<sup>84</sup>

The main thrust of Bentham’s exposition clearly showed the guardian-ward relation as essentially fiduciary. As fiduciaries, guardians would *know* that their wards are vulnerable in being dependent on them for protection and for having their representational interests furthered. Thus, besides a duty of care under law of tort,

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<sup>81</sup> *IPML (CW)*, p. 238.

<sup>82</sup> T. Frankel, ‘Fiduciary Law’, *California Law Review*, lxxi (1983), p. 800.

<sup>83</sup> J. C. Shepherd, *The Law of Fiduciaries*, Toronto, 1981, p. 56.

fiduciary obligations would include putting the ward's interests first above other considerations, including guardians' own needs or claims by third parties. What they had to avoid was being compromised by demands that could detract from their obligations to their wards, such as concurrently maintaining other relations that impose conflicting demands.

Because this account fits comfortably with the view that guardian-ward relations are fiduciary *by definition*, we might have expected Bentham to sympathise with the view that parents, irrespective of their personal qualities and sincere intentions, could not qualify as fiduciaries because they have their own interests to pursue and could not therefore maintain a relation with their offspring that is exclusively for the benefit of offspring. However, as we have seen, the picture painted by Bentham was more complex as he perceived parents' 'natural affection' for their offspring enabled them to give priority to offspring's interests. This leaves the following questions apropos the fiduciary issues raised, viz.: was Bentham making an implicit endorsement of parents' status as fiduciaries? Or was he maintaining that a fiduciary relation, or at least guardian-ward relations, could trump, over-ride or take precedence over a non-fiduciary relation in terms of interests served?

Without seeking answers to these questions, it needs to be acknowledged that besides the standard cases regarded as fiduciary by definition – principal-agent, trustee-beneficiary and guardian-ward – other relations are sometimes judged fiduciary because they contain 'fiduciary-like' elements, e.g. a specific obligation between the parties to uphold confidentiality. According to Gautreau, this description could apply within a potentially limitless range of relations deemed fiduciary given 'the particular undertakings between the parties'.<sup>85</sup> However, it is highly questionable whether 'fiduciary-like' is an apt description of parent-offspring relations in general and raises contentious questions, such as whether the idea of 'undertakings' is appropriate or realistic within such relations and whether specifying the requirement would imply the need for a formal agreement, albeit of highly questionable enforceability.

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<sup>84</sup> Cox, '*Bentham's Guardianship*', p. 20.

<sup>85</sup> J. R. M. Gautreau, 'Demystifying The Fiduciary Mystique', *Canadian Law Review*, lxxviii (1989) p. 5

Notwithstanding such difficulties, abundant discussion on the pros and cons of parents as fiduciaries can be found in contemporary literature, of which the following is a sample. Among commentators who maintain or assume that parents are fiduciaries, Sheppard applies the fiduciary description to the specific area of ‘custodial’ responsibilities,<sup>86</sup> leaving us with the question as to why the ‘custodial’ aspect of parents’ obligations is treated separately from others while being upheld as indicating ‘fiduciary relations’.

Two further observations supporting the status of parents as fiduciaries are of interest. Shapiro states unequivocally that ‘[...] as fiduciaries, parents represent the interests of their charges until they are able to do this for themselves [...]’.<sup>87</sup> Bryan, discussing the way defaulting parents may be treated by the Courts the USA, says that if they cannot be successfully convicted for offences such as technical assault or undue influence, the Courts have looked sympathetically at an alternative basis for prosecution, namely a ‘catch all’ breach of fiduciary obligations.<sup>88</sup>

Of special interest from among commentators whose premise is that parent-offspring relations are *not* fiduciary (at least under prevailing USA law) is a work that explores the feasibility and benefit of attempting to ‘apply a fiduciary framework to the parent-child relationship’. This enterprise, the authors admit, ‘requires accommodation of some peculiar features that distinguish this relationship from many others in the fiduciary category’. They go on to explain that the task would necessitate ‘legal regulation to encourage the parent to act so as to serve the interest of the child rather than her conflicting interests’; therefore ‘bonding’ patterns would need to be strengthened, with progress towards achieving this verified by additional ‘monitoring’ from child care agencies.<sup>89</sup>

On balance, the argument advanced in this paper is that, in contrast to guardian-ward relations, parent-offspring relations are not definitively fiduciary, whether or not they contain ‘fiduciary-like’ qualities. There is no firm evidence that Bentham thought

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<sup>86</sup> Sheppard, *Fiduciary Law*, p. 109.

<sup>87</sup> I. Shapiro, *Democratic Justice*, London, 1999, p. 70.

<sup>88</sup> M. Bryan, ‘Parents as Fiduciaries: A Special Place in Equity’, *The International Journal of Children’s Rights*, iii (1995), p. 238.

<sup>89</sup> E. S. & R. E. Scott, ‘Parents as Fiduciaries’, *Virginia Law Review*, lxxxi (1995), p. 2430.

otherwise and arguably no convincing case has since been made to support the notion. As to an alternative authority base for the relation, it has been acknowledged that although Bentham's 'theory of government seems to preclude the notion of natural authority [...] [t]here *is* a place in Bentham's thinking for authority which exists in some sense by nature [...]'.<sup>90</sup> Possibly Bentham thought the concept of 'natural relations' conveyed its own credentials, without going so far as to endorse Blackstone's view that the 'natural' origin of the relation showed that it was founded on and regulated by 'natural law'. Interestingly, given variable interest in natural law theory and its relevance over recent years, the above-mentioned study<sup>91</sup> provides an update discussion of the notion that parental rights originate in natural law.

#### *Quality Control, Accountability and Responsibility*

We may be certain that Bentham would have been concerned to maintain the credibility, integrity and effectiveness of the institution of guardianship. Therefore he may well have accepted that it is insufficient to base quality control, i.e. upholding standards, on his extensive list of penalties, which were in effect default sanctions. Arguably preventive measures were also necessary, such as: a recognised code of practice; transparency of intentions; scrutiny as to progress; and procedural clarity both at points of inception and of closure. However, Bentham did attend to perhaps the most important requirement, namely right choice of guardians as persons suitable for the task, seemingly expecting guardians drawn from the upper echelons of society to meet these criteria and to use their power in a socially responsible manner, encouraged by social approval and kudos.

Mention has been made of the embryonic role of Chancery in monitoring satisfactory guardianship performance taking parental wishes into account. Given Chancery Courts' equitable jurisdiction, we might speculate that a possible way forward of interest to Bentham would have been to draw upon the fiduciary concept to promote certain standards – confidentiality, trust, reliance etc. – as the socially approved way to respond to the situations of vulnerable groups. He may therefore have been less than enthusiastic with modern ways in which guardians are employed within welfare

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<sup>90</sup> Burns, 'Bentham's Natural Authority', p. 212.



organisations, where their accountability to wards can be compromised by loyalties to their superiors. This implies that, as fiduciaries, guardians ideally function in a free-standing capacity thereby being exclusively accountable to wards. Modern managerial assumptions about efficient employee performance stress the need for ‘in-line’ organisational accountability but the notion that this ensures sufficiently high standards of guardians’ performance at least towards elderly wards in care homes has been questioned.<sup>92</sup>

Although, parents’ responsibilities toward their children are sometimes seen as containing their own quality controls by way of a ‘duty of care’, the parental role *per se* is notably lacking in self-regulation. The only legally effective quality ‘controls’ are retrospective default sanctions sought after failures become evident and there is a notable absence of really effective, i.e. enforceable, preventative measures. As to the quality of parents’ relationships with their offspring, this obviously varies in intensity and involvement, families’ social circumstances determining this to some extent. Two particular factors effecting quality of care of an individual offspring would be actual physical presence of parents in the home (discussed in *Protection and Trust*) and the family’s size. As to the latter, parental attention to the needs of all their offspring (individually or collectively) could well adversely limit necessary attention to a particular child. By contrast, we would expect the number of wards assigned to a guardian to be limited depending upon the amount of attention each required and the guardian’s other commitments.

### **Summary and Conclusions**

The key reference point throughout this article has been the profile of guardian-ward relations based on the writings of Jeremy Bentham. A strength of Bentham’s treatment of parent-offspring relations is that he accepts that parenting entails competing demands as to interests served: their own and those of their offspring. Possibly because Bentham

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<sup>91</sup> Scott & Scott, ‘Parents as Fiduciaries’, p. 2407.

<sup>92</sup> L. A. Frolik, ‘Elder Abuse and Guardians of Elderly Incompetents’, *Journal of Elder Abuse & Neglect*, ii (1991), pp. 35-46.

lacked the personal experience of parenting, his limited appreciation of the emotional content of parent-offspring relations may to have caused him to invest unjustified blanket qualities in parents, a tendency evident within the guardianship context though not in other of his writings on parental relations. His attribution of unalloyed ‘natural affection’ to parents that enabled them to prioritise their offspring’s interests over other demands is difficult to refute or substantiate (in the absence of empirical evidence one way or the other) but appears not to recognise parents’ negative dispositions towards their offspring.

Bentham’s view that parents are their offspring’s masters as well as their guardians recognised parents’ need to ‘employ’ (gain economically) from them in order to survive, but the parallel presumption that offspring’s interests could still be protected or even furthered again suggests that Bentham’s expectations of parenthood were unrealistic. Having set out a clear picture of guardian-ward relations in terms of guardians’ fiduciary status within the institution of guardianship, their credentials, the bases of their authority, and their functions, he appeared to think that parents were qualified or could qualify as guardians. The only feasible answer to this seemingly contradictory position is to presume that Bentham’s viewed parents as ‘guardian-like’, i.e. effectively a caricature of parents derived from their apparently obvious role as protectors and representative of younger offspring.

A further difficulty arises from Bentham’s references to the imposition of guardianship law on parents. The earlier discussion revealed that it was not clear (a) precisely to which law he referred; (b) whether the law in question defined which ‘rights and obligations’ were imposed; (c) how effective an imposed law could be given serious doubts as to the effectiveness of parents in carrying out guardians’ functions; and (d) what mechanisms existed (or could be contrived) to ensure parental compliance with their legal requirements.

This writer’s verdict on ‘natural or parental’ guardianship as portrayed in the literature is that it was archaic and largely titular, bearing very little resemblance to Bentham’s guardianship as outlined in *The Profile*. Most notable was Bentham’s reluctance to invoke guardianship law as the way to safeguard offspring’s interests, possibly confirming his view of it as ineffective. Also, he may have absorbed some of

Blackstone's views of natural law responsibilities on parents and projected these credentials onto his view of what the institution of guardianship should provide.

The main conclusions in this article confirm that parenthood and guardianship are distinct institutions and *ipso facto* that parent-offspring and guardian-ward relations differ fundamentally in terms of status and purpose despite some functional similarities and overlaps. The validity of this contention was demonstrated by asking how well or otherwise parent-offspring relations compare with those of guardian-ward that revealed marked limitations within the former.

Key differences that emerge clearly from this review are as follows:

- Whereas a purpose of guardianship is to counter ineffective or damaged parental relations, or to fill the gap in situations where none exist, no such role is ascribed to parent-offspring relations. Parent only become 'replacements' in specifically defined circumstances, e.g. for children deprived of parents. Alternative parenting – fostering, 'special guardianship' and adoption – apply only to a limited range of offspring, i.e. to youngsters.
- No quality controls apply to parent-offspring relations other than by default. Bentham's account is judged to have anticipated the need to establish effective pre-emptive measures aimed at promoting good practice by guardians and avoiding abuse. We are left to wonder if he thought these would apply equally to 'parental guardians' and how effective or enforceable this could be.
- Duration of parent-offspring relation is governed by longevity rather than needs of offspring. The rationale for the duration of formal guardianship derives from needs of wards. Issues concerning 'age of maturity' as an administrative closure point may have caused Bentham

to base his thinking on the questionable assumption underlying ‘guardianship by nature’.

- Parent-offspring relations do not conform to the definitional requirements of fiduciary relations despite being ‘fiduciary-like’ in some respects. Although parents may be loosely described as their offsprings’ trustees or agents, no legal obligations attendant on either set of statuses or functions apply. Reliability and consistency are the missing elements that make it unreasonable to expect parents to persistently and comprehensively fulfil key protective and representational functions on behalf of their offspring. The entrustor-fiduciary relation offers this assurance.

Mention has been made of Goodin’s thesis, the main thrust of which is to challenge the underlying rationale of specifically defined special relations, including those of parent-offspring, guardian-ward and master-servant. In assessing where responsibility lies towards vulnerable persons he asks: ‘who is actually in a position to remedy or change the harmful situation to which the person is vulnerable?’ Obtaining a reply should identify the person(s) with *de facto* ability to change the situation and it is he/she/them who are responsible. This article does not question the notion of *de facto* responsibility or its ethical implications but maintains that special relations and duties are the socially essential basis upon which to ascertain where responsibility lies, i.e. to enable us to judge who *should* be making sure they are in a position to alleviate the effects of vulnerability. This provides a much firmer ethical stance upon which to form judgements, but also takes the pragmatic aspect of the discussion a step further into consideration of appropriate skills and experience of the persons identified as well as their actual presence.

Goodin’s argument nevertheless provides a useful basis for comparing the principle relations considered in this paper. Parents, guardians and masters (employers) share a common kind of responsibility towards their respective ‘charges’, being the designated parties ostensibly able to combat their vulnerability and to recognise these persons’

vulnerability towards them. Their responsibilities transcend self-assumed or voluntary positions, specific legal obligations or the general ‘duty of care’, the real tests being pragmatic and logistical: ‘can these parties actually protect their charges?’ The implications of Bentham’s account of guardian and ward is that it exemplifies a ‘special’ relation entailing responsibility to fulfil ‘special duties’ towards certain vulnerable persons, and, most importantly, maintains that designated ‘guardians’ are the right persons actually in position to fulfil the task. Conversely, serious doubts have been shown to stand in the way of regarding ‘parents’ in the same light.

An interesting question for further research would be to enquire as to the connection between fiduciary relations and designated ‘special’ relations. As applied to parent-offspring relations, particularly due for review is the notion that appropriate responses to the needs and vulnerability of youngsters need not come from blood tied parents and can be met by substitute parents (related or otherwise) whose main qualification is that they are logistically and otherwise in a close enough position to meet the need. An alternative view - that society expects blood tied parents to ensure that they are prepared in both senses to respond appropriately, rather than depending on others to take their place – would also need to be considered.

The current conception of guardianship arguably suffers from loss of the coherence that is conveyed in *The Profile*, the distillation of ‘Bentham’s Guardianship’ offered in this article. This incoherence may be due such factors as: the splitting of guardianship law between children and narrowly defined groups of adults; the divisive effect of confining application to persons with mental disorder to within a separate statutory framework; and the absorption of protective functions within social policy agendas and legislative provision. Guardianship’s key representational function has arguably been submerged by these developments but is now regaining prominence. This is revealed in response to the need for added safeguards for ‘at risk’ groups such as elderly mentally infirm persons in residential care.<sup>93</sup>

Perspectives on the parent-child nexus have shifted from focussing on parental rights (and latterly parents’ obligations) towards giving prominence to protecting

children's welfare and interests, but in so doing have tended to polarise these positions rather than attending to relations between them.<sup>94</sup> Also, contemporary practice in the area of personal protection has been provided discretely vis-à-vis children and adults since English local authority social services departments were split into separate agencies with distinct 'client' responsibilities. Retaining family orientation may not have been sufficient to prevent the tragedies that have occurred due to neglect or abuse of offspring but would at least have better enabled parental relations to remain the key focus for effective intervention.

A fresh look at Bentham's portrayal suggests a number of ways forward – legally, socially and ethically – that would harness the services of a defined group of persons, i.e. guardians, appropriately motivated and skilled, to provide protection and representation for particularly needful groups of people through a special kind of relationship. Persons in this latter category are otherwise likely to remain socially vulnerable instead of being enabled to live effectively within society. In short, Bentham's validation of guardianship and its purpose is as relevant to-day as it was in his own time.

### **Acknowledgement**

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<sup>93</sup> B. E. Cox, 'Combating Elder Abuse: Role of Guardians for Older People in Residential Care', *The Journal of Adult Protection*, x (2008), pp. 33-38.

<sup>94</sup> Scott & Scott, 'Parents as Fiduciaries', p. 2401.



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