THE LEGAL PARENTAL RIGHTS OF WOMEN IN NEW BRUNSWICK (1909)

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There can be no question of more vital interest to women than that which concerns the legal parental rights of women, and the fact that the subject deserves the most earnest attention from those present will, we trust, compensate, in some measure at least, for the dryness incidental to a strictly legal paper.

My subject in one sense is not at all comprehensive, but in another sense it is very much so. No words are needed to describe the legal parental rights of a New Brunswick woman over her legitimate child during the lifetime of the father, because she has practically none, while it will take some time to speak of the rights which the father possesses to the exclusion of the mother, and in which she should share.

I was asked to tell you about the legal parental rights of women in New Brunswick, and was rather surprised on glancing through the handbook to note that I was down for the Legal Parental Rights of Women in Canada – New Brunswick is a very small part of Canada. Having prepared to speak in accordance with the request made of me, from the standpoint of New Brunswick law, and having found that the subject though so confined, had proved so comprehensive as to compel me, owing to the time at my disposal being necessarily limited, to deal with it in a manner not so thorough as I should have liked to do, and moreover, having but scant time since seeing the programme to devote to the broadening of the subject to include specifically the law of all the Provinces of the Dominion of Canada, I have thought it wiser to let the matter rest as I had it prepared, and deal as thoroughly as possible with the law as it exists in the Province of New Brunswick, merely making a few incidental references to the law of the other Provinces of the Dominion, and with regard to the law of the Dominion of Canada as a whole, the general statement that the law in most of the Provinces of the Dominion, on the various points mentioned hereafter by me, is practically to all intents and purposes the same.

Owing to the fact that there are but few New Brunswick decisions on the various points I shall raise, I have had to resort quite frequently to authorities of other Provinces and of England for illustrations. All the authorities quoted from or referred to by me are (unless expressly stated otherwise) applicable to the Province of New Brunswick.

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It is necessary, in considering this subject, to have due regard to the rights and obligations of the father as well as to those of the mother, since the rights of the mother during the father's lifetime, are, generally speaking, only such as the father may lose and she acquire, by the forfeiture by the father of his rights. It is impossible to adequately explain the legal status of the mother without first considering that of the father, and in instances where I may seem to devote an unnecessary attention to the legal rights of the father, kindly bear in mind that it is done with the object of casting light on the legal status of the mother with regard to the custody, control or guardianship of her child, as the case may be.

The law of New Brunswick on this subject is, aside from the modifications made from time to time by statutes and decided cases, the common law. It is the *lex non scripta*, and derives its force and authority from the universal consent and immemorial practice of the people. The evidence of our common law is contained in our works of reports and judicial decisions, in the records of the several courts of justice and in the treatises of learned sages of the profession, preserved and handed down to us from times of highest antiquity.

In popular language, the father or mother is the "natural guardian" of their children; but, according to the strict common law meaning, this term applied primarily to the father of an heir apparent; and this feudal guardianship terminated when the heir, whether male or female, attained the age of fourteen; this strict common law meaning has, however, for a long period been merged in the wider sense of the term "natural guardian," namely, that nature marks out the parent as being the right person to have the control and custody of his child. To quote from Blackstone: "The power of parents over their children is derived from this consideration, their duty; this authority being given to them partly to enable them more effectually to perform their duty, and partly as a recompense for their care and trouble in the faithful discharge of it, and upon this score the municipal laws of some nations have given much larger authority to the parents than others. The ancient Roman laws gave the father a power of life and death over his children upon this principle – that he who gave had also the power of taking away; but the rigour of these laws was softened by subsequent constitutions to that we find a father punished by the Emperor Hadrian for killing his son though he had committed a very heinous crime. But still, they maintained to the last very large and absolute authority; for a son could not acquire any property of his own during the life of his father; but all acquisitions belonged to the father, or at least the profits of them, for his life."[1] The power of a father by our English and Canadian laws is sufficient to keep the child in order and obedience, and it is laid down that a father may lawfully correct him, being under age, in a reasonable manner, for this is for the benefit of his education.

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[1]W. Blackstone, *Commentaries on the Laws of England*, 15th ed. (London: A. Strahan) at 452. Notes and additions by E. Christian, Esq.

At common law the father has, and may exercise in the strictest sense, the paramount right to the custody of his children as against the world, and even as against the mother, though the child be an infant at the breast. This was due to his superior position in the family; he was the strongest person, and could best assert his rights to their custody, and he won the means of their support; thus many reasons combined to assign to him the arbitrament of their destinies. To the father solely belongs the right to say how the child shall be educated, and what religion it shall be brought up in, and how it shall be controlled and conduct itself. He has sole authority over it, and can, if he so desires, entirely disregard the wishes of the mother as to the manner of its education and training.

On the point of education, we have this dictum of a very learned judge. "This authority of a father to guide and govern the education of his child, is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law. It is not to be abrogated or abridged without the most coercive reason; for the parent and child alike its maintenance is essential that their reciprocal relations shall be reciprocal of happiness and virtue, and no disturbing intervention should be allowed between them whilst those relations are pure and wholesome and conducive to their mutual benefit."

His Lordship, in thus construing divine law did not endeavour to explain just how it happened that the Almighty, in bestowing this sacred power, recognized the father alone, and completely ignored the mother's right to some consideration. With all due respect for the opinion of his Lordship, can we regard this view as being entirely consistent with divine justice, or can we for an instant suppose that the Almighty would frown on an intervention made by the mother regarding the welfare and education of her child, an intervention founded on the best of rights and springing from a love and understanding so deep and so wide that its limits can never be reached?

During the lifetime of the father, a mother, in her mere capacity as mother, is entitled to no power, but only to reverence and respect.

This common law right of the father to the custody and control of his children lasts under ordinary circumstances, and unless interfered with by the courts, until the infant becomes of age. Courts of law as well as the Supreme Court in Equity, will allow the child, if it has reached the age of discretion, to decide whether it shall remain with the father or go to the mother. In the case of female infants, the courts have fixed sixteen years as the earliest age at which they will be allowed to exercise this choice, and following the English and Irish decisions, fourteen years would probably be fixed as the age of discretion in the case of a male infant, should the point arise. But, unless interfered with by the courts, the *patria potestas* may be exercised until the child arrives at majority, or marries under that age, by

way of legitimate control.[2]

Regarding this question of choice by the child a rather interesting case was decided in British Columbia in 1898,[3] and as it would probably be decided similarly in New Brunswick, I will give to you the facts. An illegitimate child named Ellen Atanasse had been placed by her parents, when she was six years old, in the mission school for Indian and half-breed children at Fort Simpson, which is managed by the Methodist Church of Canada. After the child had been an inmate of the school for about ten years, the mother, an Indian woman, desiring that the child should be brought up in the Roman Catholic religion, made an application to regain custody of the child. She contended that the child was over sixteen years of age. It was evidently her intention to give the child into the charge of the putative father and his wife, should the court order her to be delivered up to her. The child was examined separate and apart, and stated that she wished to remain in the school, and was strongly opposed to being given into the case of her putative father and his wife. She alleged that while with them once when absent from school they both beat and otherwise ill-treated her. The application of the mother was refused.

As I have said, to the father solely belongs the right to say what religion the child shall be brought up in, and in this connection it may interest you to hear something regarding antenuptial contracts. The result of all the cases shows that a contract entered into before marriage that the children of the marriage shall be brought up in a particular religion is not binding on the husband and cannot be enforced in a court of equity. Such contracts and stipulations to be executed in the future are deemed to be against public policy, they not only discount the future, but are mischievous in their operation on family life. The following is an extract from an English judgment on this point: "How can the court enforce the performance by the father of the child of such a contract? Is the court to separate the child from the father to prevent a violation of the contract? Is the court to separate the husband and wife and place the children with the wife to enable her to educate them in the faith which she professes, and in which the husband contracted they should be brought up? Who is to provide the funds to educate the child in the religion which the father objects to? Is the court to apply the property of the husband during his lifetime and against his will to the education of the child in that form of religious faith from which he conscientiously differs, and the adoption of which by the child he believes will be destructive to its eternal welfare? By which process is the property of the husband to be sequestered for such purpose? Is the court to pronounce a decree against the husband, who, from the purest and most conscientious motives does not perform his agreement? And

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[2] *R.* v. *Clarke*, 7 E. & B. 186 at 192.

[3] *R.* v. *Redner* (1898), 6 B.C.R. 73.

is the court to issue an attachment against him and lodge him to gaol for his life unless he consents that his child shall be brought up in that religious faith which be believes to be unscriptural and erroneous, and furnishes the funds necessary for that purpose?"

"Such a contract is not like any other – no damages can be recovered for a breach of it in a court of law, and it cannot be enforced by suit for specific performance in equity."

"A father cannot bind himself by contract to exercise in all events in a particular way, rights which the law gave to him for the benefit of his children, and not for his own."

If, however, the father permits the children to be brought up in that form of the Christian religion from which he dissents until they arrive at that period of life where they are capable of forming and entertaining particular religious views, the court will sometimes refuse to interfere. It was decided in a certain English case that where the father had not only agreed that the child should be brought up as a Protestant, he being a Roman Catholic, but also allowed the child to be baptized and educated in the Protestant faith, and after his death her Roman Catholic relatives had allowed her to be educated in the Roman Catholic [sic – Protestant] religion, there was such an amount of acquiescence that the court would not be justified in interfering.[4]

An interesting case once came up for decision before a Roman Catholic judge. The father was a Protestant and had engaged that the children should be brought up as Roman Catholics. He had allowed the mother of these children every hour of her life to instil into them the doctrines of the Roman Catholic religion, and after the mother died, which happened when the children were six or seven years of age, he had allowed his deceased wife's sister to continue to educate the children in the Roman Catholic religion for three years or more until the children were in their tenth year, and then the father, having married again, decided that the children should be brought up as Protestants. This was resisted by the children's aunt. In his judgment, Lord O'Hagan, who, as I have said, was a Roman Catholic, and who had here to decide whether the children should be brought up in the religion of the father, which was Protestant, or in the religion of the mother, which was Roman Catholic, and where there had been as positive an undertaking on the part of the father as could be given, said: "I have no doubt as to the making of the promises imputed by the petitioner to the respondent. From the breach of them has arisen all the strife and bitterness which have destroyed the kindly relations here subsisting between the parties, and one can hardly avoid a feeling of natural regret that an engagement so open, so solemnly

[4]*Re Andrews* (1873), L.R. 8 Q.B.D. 153.

avowed, so strengthened by repetition, so confirmed by the consecration of the grave, should have been disregarded." After which expressions of regret, Lord O'Hagan decided in a most impartial manner that the children must be brought up in their father's religion.

In the Province of New Brunswick there is a law permitting adoption, and the law recognizes any rights, claims or duties arising out of such a relation. Our law permits any unmarried person, or a husband and wife jointly to petition the court for leave to adopt a child or children, and for a change of name of such child or children.[5]

When the child proposed to be adopted is of the age of twelve years or upwards, the written consent of such child to such adoption must be presented with the petition, and also the written consent of each of the parents of such child, or the survivor. If, however, one of the living parents is hopelessly insane, or divorced from the other and has not the custody of such child or children, the consent of such parent will not be required. And in no case is it necessary to obtain the consent of the putative father of an illegitimate child.[6] By virtue of such adoption the natural parents are divested of all legal rights in respect to such child. Its surname becomes changed, and it becomes free from all legal obligations of obedience and maintenance in respect of them; and it has the same right to any claim for nurture, maintenance and education upon its adopted parents, as if such adopted child were the natural child of such parents.[7]

Unless, however, the child has been legally adopted, the father may by *habeas corpus* proceedings regain possession of an infant child whom he has allowed to be brought up by others, provided the child has not reached the age of discretion and exercised a choice against him, and also provided that he is not proved grossly unfit to be charged with its care.

There is a New Brunswick case on this point. A father being in poor circumstances, left his infant daughter, then aged seven years, with her uncle and aunt, upon the understanding that she should be considered as their child, and that they should support and educate her as such. She remained with her uncle and aunt until she was nearly fifteen years of age and was educated by them, and became much attached to them, her father contributing nothing towards her support during that time. The majority of the court, upon an application by the father upon a writ of *habeas corpus*, to obtain possession of the child, held that he had the legal right to resume the custody of her, notwithstanding his agreement,

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[5]S.N.B. 1903, c. 112, s. 240.

[6]*Ibid.* s. 241.

[7]*Ibid.* s. 244.

even though his object in doing so was that she assist in the work of his house, and that thereby her duties would be more laborious and her mode of living less easy and comfortable than she had been accustomed to in her uncle's house. One of the judges, Wetmore J., said: "A father has the absolute right to the custody of his daughter unless there are surrounding circumstances which deprive him of that right. It is said that the girl has obtained a very comfortable position, with her uncle and aunt and that it would be a hardship on her to be taken away from the luxurious surroundings in which she is placed to go to the humbler home of her parents. But I think she should be taught a wholesome lesson of the duty of children to their parents, and go to the assistance of her mother who is in ill-health."[8] Had the girl been a little older she would have been allowed to exercise a choice, but being under the age of sixteen she had to go with her father whether or not she wished to do so.

Had the matter come before the Equity Court instead of a court of law for decision, it might have been decided differently. The guiding principle in deciding such points is not the same in the two courts, as I shall endeavour to explain hereafter. A court of law is frequently powerless where equity can prevail. The Court of Chancery has jurisdiction to control the authority of a father over his infant children in a manner which a court of law cannot do on a writ of *habeas corpus*.

The common law rights of the father to the custody and control of his children, springing as I have said, from his duty to provide for their maintenance, protection and education, has always been upheld by the courts whenever possible, but there have been cases where the courts have found it impossible to do so.

In other words, he may, by his misconduct, forfeit his right to their custody, and show himself to be an improper person to be entrusted with their protection and education, or he may be adjudged unfit mentally or physically. While the law imputes ability and inclination of the parent to perform his duty to his child, the right is yet founded upon his actual capacity to discharge the duty, and his superior claim to the custody of his offspring may be suspended while the incapacity lasts.

An Ontario decision illustrates what the court will consider sufficient incapacity to deprive the father of his right. In this case the father had, after the death of the mother, left the child with his mother and brother who were in comfortable circumstances and were fond of the child. The brother had made his will in the child's favour, and expressed his willingness to provide for it in future. On the other hand, the father had had about three years previous to the application, a severe attack of paralysis which had permanently affected his brain. He was enfeebled in mind to the verge of imbecility. Under these circumstances the court

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[8]*Re Eva Coram* (1886), 25 N.B.R. 404 at 415 (C.A.).

refused to give to him the custody of the child.

The father's right is always subject to the control of the courts, and he will be removed from guardianship, or refused the custody of the child upon *habeas corpus* proceedings to determine the right of custody for such unfitness or misconduct as imperils the child's welfare – but the misconduct must be flagrant.[9]

Just here I wish to explain the difference between the jurisdiction of the Court of Chancery and that of a court of law.

First – The Supreme Court in Equity, or the Chancery Division of the High Court of Justice, as it is called in England, representing the sovereign, has a special care over its wards. The method of procedure is by petition to the court, praying the court to appoint the guardianship of the infant. On the hearing the court will inquire into all the surrounding circumstances of the case, the claim of the petitioner to the custody, and the best interests of the ward, and will then decide according to the very right of the matter, not attending solely to the legal right of the father, but looking to the benefit and best interests of the child. The court will not permit the interests of the child to be sacrificed, "and the welfare of the child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in the widest sense. The moral and religious welfare of the child must be considered as well as its physical wellbeing. Nor can the ties of affection be disregarded."[10]

While the Supreme Court in Equity has a general jurisdiction to interfere in some cases, an even more comprehensive jurisdiction has been conferred by statute which gives to the Supreme Court in Equity a discretionary power over the custody of children under the age of sixteen years.

We have in New Brunswick the following statutory provisions:

"It shall be lawful for the court upon the petition by the next friend or mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants at such times and subject to such regulations as the court shall deem proper; or to order that such infant or infants shall be delivered to the mother and remain in or under her custody or control, or shall, if already in her custody or under her control, so remain until such infant or infants shall attain such age, not exceeding sixteen years, as the court shall direct, and also to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants,

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[9]*R.* v. *Greenhill*, 4 A. & E. 624 at 640.

[10]*Re Armstrong* (1895), 1 N.B.R. 208 at 210, quoting *Re McGrath* (1893), 1 Ch. Div. 143.

and otherwise as the court shall deem proper.[11]

"Whenever any application shall be made to the court for the custody or control of an infant or infants, or for access to any infant or infants, it shall be the duty of the court to take into consideration the interests of such infant or infants in deciding between the claims of the parents of such infant or infants."[12]

There is a somewhat similar enactment in England, and, I believe, in most of the Provinces of the Dominion.

Alberta and Saskatchewan have the following provisions: "Court or judge upon application of mother of any infant being in the sole custody of the father or other person by his authority, may make an order for the access of the mother and at such times and subject to such regulations as the court or judge thinks convenient or just, and if such infant be within the age of twelve years may make an order for the delivery of such infant into the custody and control of the mother, and there remain until the court and judge shall prescribe."

It has been decided in New Brunswick that in determining whether the custody of an infant child ought to be given to the mother as against the father under the above quoted sections of the *Supreme Court in Equity Act*, the court will take into consideration the paternal right, the marital duty of the husband and wife so to live that the child will have the benefit of their joint care and affection, and the interests of the child. If both parties have disregarded their marital duty in the above respect, the court will award the custody of the child to the father unless it is satisfied that it would not be for the child's welfare. In another New Brunswick case it was decided that to defeat the right of the father to the custody of his child as against its maternal grandmother, his habits and character must be open to the gravest objections. The court must be satisfied not merely that it is better for the child, but essential to its safety or welfare in some very serious or important respect before it will interfere with the father's rights.[13]

Very few cases have come up before our Equity Court under these sections of the Act, but it is safe to say that before the jurisdiction of the Court of Equity can be called into action, it must be satisfied not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such description as to render it not merely better for the children, but essential to their safety or their welfare in some very

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[11]S.N.B. 53 V., c. 4, s. 182.

[12]*Ibid.* s. 183.

[13]*Re Eva Coram*, *supra*, note 8 at 410, quoting *Re Flynn*, 2 De G. & S. 457, which in turn is quoting the headnote from *Re Goldsworthy*, 2 Q.B.D. 75.

serious or important respect, that his rights should be treated as lost or suspended, should be superseded or interfered with.

In an Ontario case where the wife was living apart from the husband under circumstances which the court thought justifiable, although there was no imputation of immorality against the husband, and the child's grandfather was willing to assist the mother in maintaining and caring for the child, the court was satisfied that it would be more for the interests of the child, a little girl of four or five years of age, to remain in the custody of the mother than in that of the father, however affectionate and kind, whose business engagements and frequent absences from home must render it impossible for him to afford the constant care and protection which a child of such tender years demands.

Second – The jurisdiction of a court of law. The method of procedure to gain the custody of a child in a court of law is by writ of *habeas corpus*. ... The writ of *habeas corpus* is the most famous writ in the law, and having been for many centuries employed to remove illegal restraint upon personal liberty no matter by what power imposed, it is often called the great writ of liberty. It is directed to the person detaining another and commanding him to produce the body of the person at a certain time and place.

The jurisdiction of a court of law on a *habeas corpus*, so far as the subject matter under discussion is concerned, is practically confined to an inquiry as to the legal right of the father, or other guardian, to the custody of the child – whether the child is in illegal custody without its consent. The father having by the common law, a general right to the control over the person, education and conduct of his children until they attain their majority, a court of law will order the children, on their coming before it on a writ of *habeas corpus*, provided they have not yet arrived at years of discretion, to be delivered without examination into the custody or control of their father or other guardian. In cases where the children are arrived at an age of discretion, and are capable of exercising a choice, they will be permitted to make an election. But if the children have not arrived at such an age a court of law can interfere with the father's rights only in cases where he is proved to be absolutely unfit to take care of them. When such a conclusion can be arrived at the court will no longer consider him the legal custodian and the control of the children will be taken from him. If it can be shown on such a proceeding that his immorality is of such a nature that the children's remaining under his care will result in their contamination such will be held sufficient ground for their removal. Excessive cruelty will also work a forfeiture of his rights on such a proceeding.

The theory upon which the court relies in taking the legal custody from the father when necessary has been clearly put in an English case as follows: "Where the person is too young to have a choice we must refer to legal principles to see

who is entitled to the custody because the law presumes that where the legal custody is no restraint exists, and when the child is in the hands of a third person that presumption is in favour of the father. But, although the first presumption is that the right custody, according to law, is also the free custody, yet if it be shown that cruelty is to be apprehended from the father, a counter presumption arises."[14]

The question was summed up in an English judgment as follows: "A court of law can only have regard to the legal right of the father. It has no discretionary power to control the father in the exercise of his rights such as the Court of Chancery, representing the Sovereign, possesses. Accordingly, on *habeas corpus*, a child which has not arrived at years of discretion must be delivered up to the proper custody, that is, the father, if he is living, or other guardian. It appears to have been the invariable practice of the common law courts on an application for a *habeas corpus* to bring up the body of a child detained from the father, to enforce the father's right to the custody even against the mother, unless the child be of an age to judge for itself, or there be an apprehension of cruelty from the father, or of contamination in consequence of his immorality or gross profligacy. It has been said also that in questions of this kind the court should consider what is most for the benefit of the child. If I correctly understand the rule laid down in the various cases, that principle (subject to certain exceptions) is not applicable where a matter comes before a court of law on *habeas corpus*, where the court has no such discretionary power as the Court of Chancery has."

One would suppose that the mother of a nursling child is the most suitable person to have the care of it – it not being shown that she was unfit to have the care of it; yet in an English case where the father of an infant child eight months old had forcibly taken the child from its mother, who had separated from her husband on account of alleged ill-treatment, the Court of King's Bench refused to restore the child to her; Lord Ellenborough saying: "The father is the person by law entitled to the custody of his child. If he abuse that right to the detriment of the child, the court will protect the child; but there is no pretence that the child has been injured for want of nurture, or in any other respect. Then he, having a legal right to the custody of his child, and not having abused that right, is entitled to have it restored to him."[15]

Guardianship

In New Brunswick, the father may by will appoint the guardianship of his children,

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[14]*R.* v. *Greenhill*, 4 A. & E. 621 at 643.

[15]*Re Eva Coram*, *supra*, note 8 at 411, quoting from *R.* v. *DeManneville*, 5 East 221.

excluding the mother as legal guardian. Such testamentary guardian has absolute control over the children, standing to all intents and purposes in the place of the father himself, and the same ground will be necessary to supersede his guardianship as would have been necessary to supersede the father's. The mother has no right to interfere with him or her, nor with a guardian appointed by the Court of Chancery.[16] This power of the father to appoint a testamentary guardian rests upon an act passed in the twelfth year of the reign of Charles II., which provided that a father by deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more creditable witnesses might dispose of the custody and tuition of his child, either born or unborn, for or during such time as they should remain under twenty-one. A father cannot assign to anyone this power.[17]

The mother cannot appoint a testamentary guardian under any circumstances. If, however, the person sought to be appointed by the mother is a fit and proper one, the court will not refuse to pay attention to her wishes.

After the death of the father the mother does not occupy the position of guardian unless she has been expressly appointed by her husband's will. But, in the absence of the appointment of a testamentary guardian, the mother will, unless legally incapacitated, be appointed guardian by the court as being properly so by nature and nurture, and will in this respect be altogether in place of the father. But, as I have said, where a testamentary guardian has been appointed by the father, the mother, as such, has no right to interfere with him. The grounds necessary for superseding the mother's guardianship are, improper conduct, unfitness for her duties, immorality, or disobedience to the decrees of the Court of Chancery. Her second marriage does not necessarily operate as a supersession. The mother being dead, or incapacitated, favourable consideration will be given to the claim of the grandmother; but the court will be guided solely by what is best for the welfare of the child in deciding between her claim and another's.

All that I have said above regarding the guardianship of the child in New Brunswick obtained in England until the passing of the *Guardianship of Infants Act*, 1886.

A mother can only provisionally nominate a guardian to act jointly with her husband after her death, and her nomination will not take effect unless the court confirms it. This the court will do only in case it is shown that the father is for any reason unfitted to be the sole guardian of his children.

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[16]*Ibid.* at 414.

[17]*Re Andrews*, *supra*, note 4 at 154 (fn. 1).

In other words, the father may by will or deed compel his wife to suffer the interference of another in the rearing of their children after his death, while she may only make a nomination of a guardian to act jointly with her husband after her death, which nomination will not be confirmed until he is proved incapable of being the sole guardian. But, nevertheless, though the act has its limitations, it largely removed the mother's disabilities, since previously to its passing she was entirely ignored in favour of the testamentary guardian appointed by the father.

This Act also permits the mother to appoint by deed or will a guardian of her child after the death of herself and the father of such infant, if such infant be then unmarried, and where guardians are appointed by both parents, they act jointly – thus conferring on the mother a definite power which, as I have shown, she is in no wise possessed of at common law. Previously to this enactment all that was vouchsafed to her was a favourable consideration by the Court of the person sought to be appointed as guardian by her.

Several of our Provinces have passed Statutes somewhat in line with the English Act. In Nova Scotia, on the death of the father, the mother becomes guardian either alone or jointly with any guardians appointed by the father. In Alberta and Saskatchewan the mother may be appointed notwithstanding appointment of [a] testamentary guardian by the father. In British Columbia the mother, although other guardian has been appointed by the father, can petition the Judge for the care of her children until they are seven years of age, and after they are seven years of age for the right to access to them. In Alberta and Saskatchewan a Court or Judge may give effect to the testamentary appointment of [a] guardian by the mother of infant children either as respects the persons or estates, notwithstanding the previous appointment of [a] testamentary guardian by the father upon petition presented and facts proved, if it shall be deemed advisable and in the interest of the infant.

Religious Education

Regarding the religion in which a child must be brought up by the mother as guardian. It may now be regarded as a settled rule that except under special circumstances the child must be brought up in the father's religion, even though he has died intestate and left no direction. I shall quote from an English Chancery decision on this point. "As regards religious education, it is settled law that the wishes of the father must be regarded by the Court, and must be enforced unless there is some strong reason for disregarding them. *The Guardianship of Infants Act*, 1886, which has so greatly enlarged the rights of mothers after their husbands' deaths, has not changed the law in this respect. The consequence is that notwithstanding that Act, the widow may still find herself compelled to bring up her child in a religion which she abhors. If the father is dead it will be naturally

inferred that, in the absence of evidence to the contrary, his wish was that the children should be brought up in his own religion; that is, the religion which he professed."

The Court would be very reluctant to interfere on account of mere pecuniary benefit to the child. "If the Court were ever to exercise that discretion it would be very difficult to say what was to be the extent of the pecuniary benefit which would require the Court's interference – what was to be the price of the child's faith."

"It is too late now for any power short of the Legislature to alter a rule which, as we have seen, a long line of cases has settled, that a child must be educated in the religion of the deceased father. If both parties are dead such a rule may be a fitting one, but it seems a strange extension of the father's rights when he is in his grave, to allow even his expressed wishes and still more, his merely presumed wishes, to override those of the living parent. The result in many cases, to quote the forcible remarks of V.C. Wickens, an English Chancellor, is to create a barrier between a widowed mother and her only child, to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union which ought to be as close and warm and as absolute as any known to man, and lastly to inflict severe pain on mother and child."

Although the mother is bound to bring up children in the father's religion, it does not necessarily follow that they are to be removed from her custody if she is of a different religion.

Of course I have been considering this question from the standpoint of equity jurisdiction. A Court of Law on a *habeas corpus* proceeding has no jurisdiction to make any order directing the child to be brought up in any particular religion and where the mother of an infant daughter claimed the custody of her, the father being dead, the Court ordered the child to be delivered up to the mother, although her intention evidently was to bring the child up in the Roman Catholic faith, differing from that of the father, who was a Protestant, notwithstanding that the Court believed it would be for the interest of the child to remain at the school where she had been placed by the Commissioner of the Royal Patriotic Fund. Lord Campbell said: "In this matter as there is nothing contrary to law in contemplation, we have no jurisdiction to determine, and we think that we are bound in the discharge of our official duty, to order that the infant be now delivered up to her mother." The application being made to a Court of Law, regard could only be had to the legal right of the mother to have the control and custody of the child as guardian by nature and for nurture, whereas the Court of Chancery representing the Sovereign as *parens patriae* has a very large discretion, and may give orders respecting the education of its wards which are entirely

without the jurisdiction of a Court of law. The Court of Chancery would probably have refused to grant to the mother the custody of the children in this particular instance. It would at least have made an order directing her to bring them up in the religion of the father.[18]

Regarding the waiver of the father's right to have his children educated in his own religion, by his conduct before death. There is no definite rule as to what conduct will amount to a waiver. It is a question of fact, and will vary according to an infinite diversity of facts. In one case where a Roman Catholic father allowed the eldest child to be baptized in a Protestant chapel in his presence, never had it taken to a Roman Catholic place of worship, nor exercised any control or religious instruction, and when it was six years of age had a Protestant governess, and allowed a second child to be baptized openly in the Church of England, it was held the father's rights were waived by his conduct. Although the father may not by his conduct have waived his rights, yet if the child be in fact trained for some time in a different one, so that it would be dangerous and cruel to enforce a change, no change will be made."[19]

There is a strong case where the Court had ordered a child to be brought up a Roman Catholic, and the guardian, a Protestant, in contempt of the order, took her to the Continent and brought her up a Protestant. The Lord Chancellor refused to make any change. One writer, commenting on this case, said: "This is a rule open to abuse. Widows are apt to introduce children prematurely into an atmosphere of theological controversy, and this for the purpose of convincing them that the father had wrong views. Accordingly the Court is reluctant to follow these cases unless the impressions produced on the child's mind are considered to be so great and so permanent as to induce the Court to fear lest any attempt at altering them would do more harm than good, would end in unsettling the child's religious faith entirely."[20]

The Status of Illegitimate Children

The mother, as guardian by nature, and for nurture, has the right to the custody and control of her illegitimate child until it shall have attained an age when it can, in contemplation of the law, make an election between father and mother. This rule is based on the following reasons. An illegitimate child has, in contemplation of law, no father. Such child is *nullius filius*, and there is, therefore, no father who

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[18]*Re Eva Coram*, *supra*, note 8 at 412, taken from *R.* v. *DeManneville*, *supra*, note 15, quoting *R.* v. *Clarke*, *supra*, note 2.

[19]*Ibid.*, quoting *Hill* v. *Hill*, 31 L.J., Ch. 505, and *R.* v. *Isley*, 5 A. & E. 441.

[20]*Re Andrews*, *supra*, note 4.

is bound to support it, or can rightfully claim its care and custody. There are, it is true, certain statutory regulations by which the putative father may be compelled to indemnify the community against the expense of supporting a child who may otherwise become a public charge, but these statutes only make the person charged a father for a particular purpose, viz., for the indemnity of society against the expense of the support of the child. The paternal and filial relation, in all its endearing and legal consequences, does not exist between such a father and such a child. The law looks coldly upon this relation, and takes no further care of it than to see that the community is not put to expense. In such cases there seems to be more than a legal doubt as to who is actually the father – the known father being termed merely the putative father, while there can be no doubt who is the mother. The identity of the mother is beyond all mistake, and as she is the only parent such a child can have with any legal certainty, she is the parent to whom the custody of such a child seems properly to belong. Such is the inevitable result of the common law doctrines in regard to this relation.

If, on the other hand, the mother be dead, the father has the right to the custody and control of the child.

Illegitimate children are not looked upon as children for any civil purpose, yet the ties of nature, of which maintenance is one, are not easily dispensed with. At common law, it is true, the putative father is not bound to support the child, this obligation legally devolving upon the mother. By Statute, however, in England and in the Provinces of Nova Scotia and New Brunswick, upon the complaint of a mother or of certain designated public officers, an inquiry may be had as to the identify of the putative father, and upon sufficient proof, an order of affiliation made whereby the father is adjudged to pay a certain amount in support of his offspring, or suffer imprisonment in default thereof.

Where the parent of an illegitimate child neglects to provide the necessaries for its maintenance, it becomes chargeable to the public.

Being considered as *filius populi*, the rights of an illegitimate child are few, in fact only such as he may acquire. Having no inheritable blood by operation of the descent, no estate can be imposed upon him. For, in order to take by descent he must be capable of inheriting, and this he cannot do because he is not and cannot be an heir. Having the capacity to labour, there is no legal impediment to the acquirement of an estate by him. Being without inheritable blood he is of kin to no one, can have no ancestor, can be heir to no one, and for the same reason he can have no heirs save those of his own body.

Humane legislation has softened and tempered this common law rule in divers jurisdictions to at least some extent. Statutes in the United States allow, as a rule, inheritance and transmission of inheritance through the mother. In the Northwest

Territories and in British Columbia illegitimate children inherit from the mother as if they were legitimate – and through the mother, if dead, any land which she would, if living, have taken by purchase, gift, devise or descent.

UNDER ROMAN LAW – Under the Emperor Valentinian, A.D. 371, bastard children of fathers who also had legitimate offspring were allowed to acquire, either by donation or will one-half part of the paternal property. This Emperor also established the principle of giving to illegitimate children a legal claim to a portion of their father's property by inheritance *ab intestato*, which provided that in case the father died intestate, leaving neither wife nor legitimate offspring, his natural children and their mother should be entitled to one-sixth of the estate.

AS LEGATEE OR DEVISEE – When sufficiently designated, an illegitimate child, may take by will.

LEGITIMATION may be defined to be the investment of an illegitimate child, or of one supposed to be the issue of an illegal marriage, with the rights of one born in lawful wedlock.

It appears that legitimation by the supreme power of the state was first established by the Emperor Justinian.

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