The Incapacity of a Married Woman to be Next Friend or Guardian Ad Litem

Even today, the emancipation of women is far from complete in parts of Canada. Some Courts still appear to be zealous in upholding ancient restrictions placed upon married women. In Ontario the old rule continues that a married woman cannot act as a next friend or guardian ad litem for infant parties to litigation.[1] An attempt to determine the reason for its continuance may be of interest. There are two possible explanations. The first is that the rule preventing a married woman from so acting is a rule of the common law. If so, it must be conceded that legislation is required before the Courts can allow a married woman to act as a guardian or next friend. If, however, the rule is not derived from the common law, then it must be merely one of practice adopted by the Courts. If so, the only reason for its present observance is the failure of the Courts to change their practice to conform to modern needs. It appears that the latter is the true reason.

The leading case is **Re Duke of Somerset**[2] where the Court refused to allow a married woman to be appointed a next friend. Chitty J. stated:

> It was the established practice that a married woman could not fill the office of next friend or guardian ad litem, and the rule appears to be founded on the incompetence of a married woman to sue and be sued, and to be answerable in costs.

The decision of the Court was based on five points:

(1) It was the established practice that a married woman could not act as a next friend or guardian ad litem.

(2) That practice was founded on the incompetency of the married woman to sue and be sued and to be answerable in costs.

(3) The Married Woman's Property Act has not made a married woman a femme sole for all purposes.

(4) The rules provide for the former practice.

(5) To grant the application would be a dangerous innovation because (a) a married woman is not responsible for costs or (b) is liable for costs only to the extent of her own property. It is to be noted that the learned Judge stated that it was a rule of **practice.**

The New Brunswick Court made a similar ruling when Barker J. stated:

> It is not the practice of the Court to appoint a married woman as sole guardian.[3]

1. **Peterson v. Peterson** [1952] 3 D.L.R. 239 (Ont. H. C.)
2. **In re Duke of Somerset; Thynne v. St. Maur** (1887), 34 Ch. D. 465.
3. **Re Gladys Julia Freeze** (1905), 3 N. B. Eq. 172.

Further support for the argument that the rule is one of practice is the case of **Mastin v. Mastin**[4] where Armour C. J. said:

> The established practice is that a married woman cannot fill the office of next friend or guardian ad litem because she cannot be answerable in costs.

The fact that a married woman did act as guardian or next friend did not render the action void; it was a mere irregularity which could be cured.[5] This would seem confirmatory of the proposition that the rule was one of practice, not a common law prohibition.

In England the Judges have taken more progressive steps than have been taken in Canadian Courts. In January 1923, the Judges of the Chancery Division stated that there were certain exceptions to the general rule, and in December 1923, they gave further notice that there were special cases in which married women might act as guardians or next friends.[6] Finally, without reference to, and without having to decide whether the Law Reform (Miscellaneous Provisions) Act, 1935,[7] made any change in this aspect of the law, a new rule of Court was made in 1947 as follows:

> O. 16, r. 17A: Nothing in Rule 16 or 17 of this Order shall prevent a married woman acting as next friend or guardian.

It is of interest to note two recent decisions concerning the effect of the Married Woman's Property Act. In Ontario it was held that the Act gave a married woman the capacity to contract. Accordingly she could be found guilty of conspiracy with her husband because conspiracy involved contract.[8] In Nova Scotia an opposite view was taken when the Court held that the Act did not change the status of a married woman sufficiently to allow her husband to sue her to recover funds which he had entrusted to her care, and which she had fraudulently disposed of.[9] If the main reason a married woman was not allowed to act as guardian or next friend was that she was not answerable in costs, it is suggested that the accepting of the office of guardian or next friend could be considered a form of contract, and having entered into such contract, the married woman would be bound by the result of the action.

If a contract cannot be established it is submitted that in some provinces at least, the statutory provision that

> A married woman shall be subject to the enforcement of judgments and orders and be capable of acting in any fiduciary or representative capacity[10]

4. (1893), 15 P.R. 177, at p. 179.
5. **Re. Duke of Somerset** (1887), 34 Ch. D. 465; **Drinkwater v. National Sand Co.** [1938] 1 D.L.R. 799 (Ont. S.C.); **Wainburgh v. Toronto Board of Education** (1914), 7 O.W.N. 396; **Mastin v. Mastin** (1893), 15 P. R. 177.
6. White Book, **Annual Practice**, 1925, 249.
7. 25 & 26 Geo. V, c. 30.
8. **Regina v. Kowbell** [1953] 3 D.L.R. 809.
9. **Grove v. Lively** [1953] 3 D.L.R. 522.
10. Married Woman's Property Act, R.S.N.B., 1952, c. 140, s. 2(e) & (f).

should be sufficient to overcome the objection that she is immune from costs. An order for payment of costs would be an order of the Court and the married woman would be bound by the Court's order once she had submitted to its jurisdiction by accepting the office.

In any event, it is suggested that under modern conditions there is no reason why a married woman should not be allowed to act as next friend or guardian. If the Courts are reluctant to take upon themselves the task of removing the archaic rule, then the Legislatures should do so.

Eric L. Teed,

Saint John, N. B.

SCHOLARS ELECTED

Lord Beaverbrook Overseas Scholarships

The following scholars in the Faculty of Law have been elected to Beaverbrook Overseas Scholarships since their inception. The Scholarships enable graduates or former students of the University of New Brunswick to enter post graduate work at the University of London, Great Britain; the amount of each scholarship is sufficient to provide for travelling expenses to Britain and return, University tuition fees, normal living expenses while undergoing course, and travelling expenses within the United Kingdom during the vacation periods.

David Dickson—1947
George A. McAllister—1948
William F. Ryan—1949
Vernon Copp—1950
Edward O. Fanjoy—1951
Wallace D. Macaulay—1951
John L. Ryan—1951
Harold E. Stafford—1951
Donat J. Levesque—1953
Thomas B. Drummie—1954
Franklin O. Leger—1954