Recent Changes of Husband's Rights in Wife's Estate in Wisconsin

Frederick H. Fowle

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Frederick H. Fowle, Recent Changes of Husband's Rights in Wife's Estate in Wisconsin, 28 Marq. L. Rev. 36 (1944). Available at: http://scholarship.law.marquette.edu/mulr/vol28/iss1/7

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
RECENT CHANGES OF HUSBAND'S RIGHTS IN WIFE'S ESTATE IN WISCONSIN

By Chapter 316, sec. 1 and 4, respectively, of the laws of 1943, effective June 16, 1943, section 233.23 of the Wisconsin Statutes\(^1\) entitled "Estates by the Courtesy," was amended to enlarge the interest of a surviving husband in the estate of his wife to the extent of giving him title in fee to one-third of the lands of which his wife died seised and which were not disposed of by will; provided that the wife leaves no surviving issue of a previous marriage; and section 318.01(1), entitled "Distribution of personalty," was amended so as to create an interest for a surviving husband in the intestate personal property of his wife. This interest is equal to that of a surviving child and is not less than one third where more than one child survives.\(^2\)

Until recently, one of the outstanding features in the picture of marital property rights has been the willingness of the legislatures to curtail the husband's protected interest in the wife's property, and yet to retain a similar interest for the wife—an interest that, in most jurisdictions, is greater than her common law dower. This discrimination was most extensive at the time when dower and curtesy were first undergoing statutory changes. The modern tendency is to treat husband and wife alike.

Historically, the primitive notion of curtesy was a continuation of the wife's inheritance given to the husband for the benefit of the issue of the marriage\(^3\) while dower, until the time of Glanville, was an outright gift of lands or chattels from the husband to the wife.\(^4\)

At common law, the husband had two distinct types of rights in his wife's property: his marital rights by virtue of the marriage alone, and his rights as tenant by the curtesy.

---

\(^1\) 233.23 of the statutes is amended to read as follows: "The husband on the death of his wife shall * * * be entitled to one-third of the lands of which she died seised and which were not disposed of by her last will and testament * * * , provided, that if the wife, at her death, shall leave issue by any former husband, to whom the estate might descend, such issue shall take the same discharged from the right of the surviving husband to * * * the same * * * ." SESSION LAWS of 1943, Chapter 316, Section 1.

\(^2\) 318.01(1) of the statutes is amended to read as follows: "The residue, if any, of the personal estate of any intestate and the residue of the personal estate of a testator not disposed of by will and not required for the purposes mentioned in section 313.15, shall be distributed in the same proportions, and to the same persons, and for the same purposes, as prescribed for the descent and disposition of real estate in Chapter 237, except that when the deceased shall leave a widow or widower a lawful issue, the widow or widower shall be entitled to receive the same share of such residue as a child of such deceased, when there is only one child, and in all other cases one third of such residue." SESSION LAWS of 1943, Chapter 316, Section 4.

\(^3\) 2 Pollock and Maitland, HISTORY OF ENGLISH LAW (2nd Ed.) p. 414.

\(^4\) Digby, HISTORY OF THE LAW OF REAL PROPERTY (5th Ed.) p. 129. After Glanville, dower property passed to the wife for life and then reverted to the husband's heirs or devisees or his successors in title. See PARK, DOWER, Sec. 341.
By virtue of the marriage a husband was entitled, absolutely, to all of his wife's personal property then in her possession, and all of her choses in action which he reduced to possession during the coverture. Choses in action not reduced to possession in her lifetime belonged to him as her administrator if as such he took them into possession. All the wife's chattels real became the husband's to use and enjoy for the period of their married life and to dispose of and hold their proceeds if he alienated them during coverture. They were liable for his debts but he could not will them away. The interest of the husband in his wife's real property was initially an estate during coverture which might last for his life. Upon marriage the husband was entitled to the possession and enjoyment of all his wife's real property. Husband and wife were considered jointly seised of the property in the wife's right, but the husband had the sole rights to the rents, issues, profits and control. Although his marital rights were so extensive that lands could be aliened by him or could be levied upon for his debts, the husband's interest was nevertheless limited to a present estate that existed only during coverture and that terminated upon the death of the wife—the property descending to the wife's heirs of whom the husband was not one.

Beside the right to a present estate during coverture a husband might, under the common law, become a tenant by the curtesy. Curtesy was defined as being a life interest of a husband in all the real property of which his wife was beneficially seised of an estate of inheritance during coverture, provided a child be naturally born of the marriage, born alive and capable of inheriting property. After the birth of issue and while the wife was still living, the husband had curtesy initiate in the real property of which his wife was seised. Curtesy initiate was a freehold estate for his life in the realty; an interest which gave him the power to convey, which could be reached by judgment and sold on execution against him, for which he could sue alone in his own right if it was wrongfully injured or taken from him, etc. On the death of the wife leaving the husband surviving, curtesy became consumate by operation of law. He thus acquired an interest that was to continue during his own life which he held as he would any other life estate, being subject to the same incidents, rights, and duties as those that belonged to life estates in general. Accordingly, he could sell it, encumber it, or lose it for his debts, but he did not lose it because of a subsequent marriage.

5 2 Kent's Commentaries pp. 130-143.
6 2 Blackstone's Commentaries p. 434.
7 Reeves on Real Property p. 636.
8 2 Blackstone': Commentaries p. 128.
9 Cruise, Real Property tit. 5 Ch. ii, Sec. 26.
Before the statute of uses there was no curtesy in a use or other equitable estate. But after that statute, whereby law sought to destroy uses, had been emasculated, chiefly through the decision in Tyrrel's Case, and uses had been retained under the guise of passive trusts, the courts of Chancery applying to uses the maximum "Equity follows the law" allowed curtesy in them and ultimately in all the forms of equitable estates.11 Thereafter a husband had curtesy in a fee of any kind that his wife owned during coverture, whether legal or equitable in nature.

At an early date the fact that this great control over the disposition of his wife's property often resulted in great injustice was recognized by the court of equity; consequently, when a husband was seeking in that tribunal to perfect his possession and use of his wife's property, the requirement that there be an adequate settlement made out of it for the support of her and her children was laid down. This was designated her "equity in settlement"12 and was later extended so that even though the husband was not seeking a remedy, the wife, when circumstances so required, could affirmatively apply to the court of equity and have settled on her a fair share of the property for the support of herself and her children.13 Not only did the court of equity work out this important advantage of settlement for the wife, but also, in several other instances, bestowed property rights on her such as the law would not recognize.14 The principles underlying these equitable interests of a wife were fully recognized in this country; however, their importance lies not in their ensuing application but rather in the fact that these inventions of the court of equity laid the foundation for that wave of legislation, beginning about 1844, which carried forward until the wife was completely liberated from the harsch dogmas of the common law.

Much legislation has affected the legal life estate enjoyed by the husband under the common law. Academically, it may be said that, in the beginning, common law curtesy was recognized in Wisconsin;15 however, this recognition, if it did exist, was short lived. In 1849 the legislature, by statute, gave the husband what was labeled as "Estates

11 Reeves on Real Property Sec. 450.
12 2 Kent's Commentaries p. 139.
13 Elibank v. Montolieu, 1 Lead. Cas. Eq. 486.
14 The method early came into use in England and was fostered by the Court of Chancery of making settlements in trust "for the sole and separate use" of married women. See Parker v. Brooke, 9 Ves. 583; 2 Perry on Trusts, Sections 646-649.
15 Wis. Const., Art. XIV, Sec. 13.
by the Courtesy," but which by contrast to that estate under the common law, did not warrant the use of the term. Although the statute on its face appeared to give the husband the same right of curtesy as was known under the common law, contingent, however, upon the non-existence of issue by a previous marriage of the wife, the passage of the Married Women's Act in 1850 and subsequent judicial construction limited the statutory right of curtesy to a life estate in intestate lands of the wife. This life estate was not contingent upon the birth of issue and came into existence only after the death of the wife. Beside the wife's ability to defeat curtesy by conveyance or testamentary disposition, the husband's rights could be defeated by his wife's grantors; indeed, the statutory right of curtesy resembled its common law predecessor in name only. The 1849 legislature also provided a statutory method for the distribution of personalty. This method, which has been in effect until the 1943 amendment, did not give a surviving husband an interest in the intestate personal property of his wife.

The revolution for the liberation of women reached its culmination in the 1921 Wisconsin Equal Rights Statute which granted to women all privileges and rights enjoyed by men. It is notable that in the same session but not in accordance with the "Equal Rights" philosophy, a husband's estate by the courtesy, meagre as it then was, was further reduced by limiting it to an estate during widowerhood.

The inequity that exists relative to the property rights of husband and wife is increased by the fact that in the same situation, one rule of law will apply if a wife is involved while another will apply if the

16 R. S. 1849, Chapter 62, Sec. 30. Estates by the Curtesy: "When any man and his wife shall be seised in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life, as tenant thereof by the curtesy; provided, that if the wife, at her death, shall have issue by any former husband, to whom the estate might descend, such issue shall take the same, discharged from the right of the surviving husband to hold the same as tenant by the curtesy."

17 R. S. 1858, Chapter 95. Westcott and Husband v. Miller 42 Wis. 454, (1877).

18 Kingsley, Adm'r, etc. v. Smith, 14 Wis. 360, (1861).

19 R. S. Chapter 89, Sec. 30 was amended in 1878. Words at the beginning not now descriptive of the manner in which the wife's lands were held were omitted and the clause 'and which were not disposed of by her last will and testament' was added thereby making the statute, on its face, reflect the prior judicial construction.

20 Kingsley Adm'r. etc. v. Smith, 14 Wis. 360, (1861).

21 Schmidt v. Raymond 148 Wis. 271, 134 N.W. 362, (1912).

22 Haight v. Hall 74 Wis. 152, 42 N.W. 109, (1889).

23 R. S. 1849, Chapter 68, Sec. 1(6).

24 R. S. 6.015. See also 246.01, 246.03, 246.05, 246.07.

25 R. S. 1921 Chapter 98 Sec. 2180.

"... provided further, that in case of any husband whose wife dies after August 31, 1921, then any right of curtesy he may have attained shall be extinguished upon his remarriage."
husband is concerned. For example, a transfer of property without consideration by a wife to her husband is presumed to create a trust; a like transfer from a husband to his wife is presumed to be a gift. At the death of the transferor then, the property of a surviving wife can be restored to her with comparative dispatch, but the property of the surviving husband, though not intended as a gift, often is not returned to his possession. This leads to a common situation, namely where a man is unwittingly deprived of his property by the death of his wife intestate because he has placed his property in her name, not for the purpose of losing dominion over it but for his own convenience or her protection. Here failure to overcome the presumption that the transfer was a gift is fatal to the husband's rights.

If the husband is the sole heir, except for the burden of taxes, he will not suffer irreparable injury since he will regain his property by descent or distribution. But such is not the case if there are surviving issue of the marriage or if the wife leaves surviving issue of a previous marriage. As against his own children, the husband has enforceable rights under sections 233.23 and 318.01(1) whereby he could recoup one third of his property; but as against surviving issue of a wife's previous marriage, the husband is without legal remedy. Should issue of two marriages survive, the husband could recover one third of that portion of his wife's estate that descended to the children of his marriage, on the basis of the rule laid down in *Kingsley, Adm'r. etc. v. Smith.*

The 1943 amendments make it appear that the legislature is aware of the inequity that exists relative to the property rights of husband and wife; nevertheless the amendments have not solved the problem. While the amendment to sec 318.01(1) has created a valuable and definite interest, the amendment to the curtesy statute has merely given a husband a one-third interest in fee in place of an estate during his widowerhood in the intestate lands of his wife. This is still subject to the contingency that the wife leaves no surviving issue of a previous marriage. Only individual cases as they arise in the future will show whether a husband has been benefited or injured by this change since a life interest in an entire estate might devolve greater advantages upon the holder than ownership of one third in fee. Irrespective of what the result may be, Wisconsin continues in need of legislation that will equalize the property right of husband and wife.

It is to be noted that a substantial majority of the jurisdictions in this country have already given the husband a vested interest in the

---

26 Estate of Brundage, 185 Wis. 558, 201, N.W. 820 (1925); Harter, Ex'r. v. Holman, 152 Wis. 463, 139 N.W. 1128 (1913).
27 30 Corpus Juris 702, Husband and wife, sec. 298.
28 14 Wis. 360 (1861).
estate of the wife. Thirty-one jurisdictions have given the surviving husband an estate of the curtesy or some substitute which the wife may not defeat by her will\textsuperscript{29} and eight jurisdictions, known as community property states, have established systems of survivors' rights.\textsuperscript{30}

Wisconsin stands among the few remaining jurisdictions wherein reform is imperative.

There is little uniformity in legislation or in opinions regarding what portion of the wife's estate should go to the surviving husband; however, since, in Wisconsin, a wife already enjoys a statutory dower right, it would be reasonable to institute a complimentary system whereby a husband would have the absolute right to a similar portion of his wife's property.

There would seem to be no adequate reason why the protected rights of husband and wife in each other's property should not be the same.

\textbf{Frederick H. Fowle.}

\textsuperscript{29} Alaska, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, West Virginia, and Wyoming. See Vernier, American Family Laws Sec. 216.

\textsuperscript{30} Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington. See Vernier, American Family Laws Sec. 178.