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REIMBURSEMENT OF HUSBAND FOR FUNERAL EXPENSES OUT OF SEPARATE ESTATE OF DECEASED WIFE

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THE question as to whether the husband can ever subject the separate estate of the wife to liability for any expenditures made by him in fulfillment of his duty as such under the common law is not a novel one. This question has been raised frequently in cases where the husband sought reimbursement from the separate estate of his deceased wife for expenses incurred by him on account of her last illness and for her burial.

As a general rule, at common law, the husband was primarily liable for the expenses of his wife's last illness and for the funeral expenses of his deceased wife regardless of whether she had a separate estate or not. But although at common law neither the wife nor her estate were held legally liable for the expenses of her last illness or for her funeral expenses, courts empowered to administer her estate on equitable principles generally have allowed such expenses and other debts as well against her separate estate where the husband had failed to pay on account of poverty, or, being insolvent, payment from him or his estate could not be enforced.¹

Modern statutes such as Sections 246.02 and 246.03, Wisconsin Statutes, 1925, have given to a married woman the exclusive use and ownership of her separate property, free from any claim or the control of the husband, and, on the other hand, have provided that a married woman shall hold such separate estate free from any charges on account of the debts and obligations of her husband. In view of these statutes the question has arisen as to the effect upon the common law liability of the husband for funeral expenses and other charges of statutes such as Section 313.16, Wisconsin Statutes, 1925, providing for the order of payment of claims against any estate and giving preference to the funeral expenses and then to the expenses of the last illness over all

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other debts against the estate. The weight of authority seems to be that statutes like Section 313.16, supra, make the funeral expenses a primary charge upon and enforceable against the estate of the wife irrespective of the duty of the husband to pay therefor and without regard to his financial ability to pay them. Some courts so hold the separate estate primarily liable irrespective of any statute or the common law duty of the husband.

The majority of the courts holding the estate primarily liable were influenced by the Massachusetts case of Constantinides v. Walsh, in which the decision was largely placed on the ground that the statutes of that state had granted to married women the exclusive use and control of their separate property wholly independent from any claim or control of the husband and consequently enlarged the liabilities of their estates, so that if the statutes providing that the estates of deceased persons shall be liable for the funeral expenses are to be applied to estates of married women, the estate became primarily liable. However, nearly all of these courts have refused to extend the application of statutes similar to Section 313.16, supra, so as to make the medical expenses of the last illness of the wife a primary charge against her separate estate where the husband was solvent and could pay them. This conclusion was reached on the theory that while the funeral expenses are presumably incurred on the credit of the state, the medical attendance and other services for the wife are incurred on the credit of the husband and therefore are to be considered his individual debt.

But although the estate of a deceased wife is primarily liable, does the husband become secondarily liable?

At common law a husband, of course, could not have such reimbursement for the payment of funeral expenses and expenses of last illness of

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2 McClellan v. Filson, 44 Ohio 184, 5 N.E. 861; Hatton v. Cunningham, 162 N.Y. Supp. 1008.

3 Supra.

4 Estate of Kelley, 183 Wis. 485, 190 N.W. 280.

5 Hayes v. Gill, 226 Mass. 388, 115 N.E. 492; Moulton v. Smith, 16 R.I. 126, 12 Atl. 891; Stonsifer v. Shriver, 100 Md. 24, 59 Atl. 139; see also In re Stadtunller, 96 N.Y. Supp. 1101.

Contra: In re Skillman's Estate, 146 Ia. 601, 125 N.W. 343, (influenced by a local statute making family expenses chargeable upon the property both of the husband and wife); Smith v. Eichner, 124 Wash. 575, 215 P. 27; McClellan v. Filson, 44 Ohio 184, 5 N.E. 861.
his deceased wife, and only where a married woman by her will expressly charged her separate estate with the payment of her funeral expenses, could the husband become entitled to reimbursement from such estate in case he had paid such charges.  

The courts, however, which have held that the separate estate of the wife is primarily liable under the statutes for the funeral expenses of the wife, are not in accord on the question of whether a husband, who has paid such funeral expenses, can have reimbursement from her separate estate.

Some of these courts have held that as between the estate of a married woman and her husband the estate must, under the statute, be regarded as primarily liable, and although it is the husband's duty as before to see that his wife is buried, yet if he pays her funeral expenses, he is entitled to recover his reasonable expenditures from her separate estate, as in other cases, when a person has paid, in pursuance of a legal duty, what, as between himself and another, that other was bound to pay.

Other jurisdictions, which have likewise held that the funeral expenses are a primary charge upon her estate, have denied that the effect of so holding was to make the husband as between himself and the separate estate of his deceased wife secondarily liable. They hold that the husband as before remains primarily liable, that the modern statutes must not be regarded as enlarging the liabilities of her estate but merely enabling the creditor to proceed against the wife's estate in the first instance without regard to the ability or willingness of the husband to pay, or whether or not the funeral work was done on the credit of the husband or the estate. Though the estate is primarily liable, yet the ultimate liability for these expenses rests upon the husband, and, if he pays them, he cannot recover them.

In those jurisdictions which hold that the husband is primarily liable as at common law, reimbursement is denied to the husband where he has paid such expenses.

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1 Rocap v. Blackwell, (Ind.) 137 N.E. 726; In re Skillman's Estate, 146 Ia. 601, 125 N.W. 343.


The question of reimbursement for the payment by the husband for the expenses of the last illness of the wife stands upon a different footing. As above stated the presumption is that funeral expenses are incurred, under the statutes, on the credit of the estate, while medical attendance and other services are ordinarily procured on the credit of a living person, namely, the husband, and which the wife or her estate has no duty to pay. Hence the overwhelming weight of authority is that the husband cannot have reimbursement from the separate estate of the deceased wife for medical expenses paid by him.  

The precise question of whether an implied promise arises on the part of the administrator of the wife’s separate estate to reimburse a husband, who has paid his wife’s funeral expenses, and who has paid the expenses of the last illness of his wife during her lifetime has not, it seems, been decided in Wisconsin.

In the case of Schneider v. Breier, an undertaker filed his claim against the estate of the wife who died intestate, leaving a separate estate, and who was survived by a husband who had lived with her as such up to the time of her death. The claim was allowed by the county court and the allowance affirmed by the circuit court. An appeal was taken to the Supreme Court by the administrator.

The main contention of the appellant was that the husband had issued orders for the funeral arrangements and became primarily liable therefor. But it appeared from the findings of the county court that the work had been done solely upon the credit of the estate. The Supreme Court held that under Section 313.16, supra, providing for order of payment of debts against decedents and their estates, and decisions in other states under substantially similar statutes, the estate became primarily liable, and that the claim for funeral expenses was properly allowed against it without regard to the liability of the husband. The court, however, stated the case turned upon whether or not the estate could be primarily liable and expressly reserved the question of whether the husband would be liable in a proper case. Moreover, the question of reimbursement was entirely absent from the case.

In the Wisconsin case of Estate of Kelley, the decedent, at the time of her death, was an inmate of a sanitarium. The nearest relative of


Contra: In re Skillman’s Estate, 146 Ia. 601, 125 N.W. 343 (influenced by local statute); Smith v. Eichner, 124 Wash. 575, 215 P. 27; McClellan v. Filson, 44 Ohio 185, 5 N.E. 861.

1129 Wis. 446, 109 N.W. 99.

183 Wis. 485, 190 N.W. 280.
deceased, upon being notified of the death by the proper officials, requested appellants to perform the services of burial. Appellants omitted to file a claim therefor against decedent's estate within the time limited for creditors by the county court. The executrix objected to its allowance (1) that the claim was barred, (2) that the relative who had ordered the services became personally liable therefor. The court held that (1) a claim for funeral expenses is not a claim against a deceased person, and is not barred because not filed within the time limited for creditors; (2) the relative was not an officious intermeddler, and in the absence of evidence that the relative became personally liable to the undertaker, the estate was chargeable with the expenses of burial.

In view of strong expressions and decisions in this state upon the duty of the husband to support, nurse and care for his wife, it would not seem certain whether in this state a husband who is solvent and has paid the funeral and medical expenses could have reimbursement therefor.

In *Ryan v. Dockery*,\textsuperscript{14} it was held that the law requires a husband to support, care for, and provide comforts for his wife in sickness as well as in health, and that the husband cannot shirk such duty, even by contract with his wife.

In *First National Bank v. Jahn*,\textsuperscript{15} it was said that the purpose of section 6.015\textsuperscript{16} granting to women the same rights and privileges as men in freedom of contract was to remove the limitations imposed by the common law upon married women but at the same time to leave them with such protection as the law had hitherto afforded them. The disabilities of married women at common law were removed but the rights and privileges of the wife as such were preserved to her.

Although in the case of *Schneider v. Breier's Estate*, \textit{supra}, it was held that the provisions of section 313.16, \textit{supra}, making the estate of a married woman primarily liable for her funeral expenses, were not in conflict with sections 246.02 and 246.03, \textit{supra}, providing that the separate estate of the wife shall not be subject to debts exclusively those of the husband, yet it would appear that medical expenses furnished the wife in her last illness would be, under the rule of *Ryan v. Dockery*, \textit{supra}, such an exclusive debt of the husband that it could not be charged against her separate estate where the husband is solvent.

Moreover, it would seem that the case of *Schneider v. Breier's Estate*, \textit{supra}, does not militate against an intention on the part of the legislature by the enactment of section 313.16, \textit{supra}, to make the executor or administrator primarily liable for payment of funeral charges in his

\textsuperscript{14} 134 Wis. 431, 114 N.W. 820.

\textsuperscript{15} 179 Wis. 117, 190 N.W. 822.

\textsuperscript{16} Wis. Stats., 1925.
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representative capacity without changing the liability of the husband. Decisions following Constantmides v. Walsh, supra, allowing reimbursement to the husband, were decided on the theory that the passage of Married Women's Act was a relaxation of the duties and liabilities of the husband. The strong utterances of our Supreme Court that a husband cannot shirk or get rid of his duties as such would seem to negative that, in this state, an implied promise arises on the part of the administrator to reimburse him, since the husband has done only that which he in law was bound to do. The rule of Ryan v Dockery, supra, in conjunction with the expressions of our Supreme Court in First National Bank v. Jahn, supra, leaves mooted the question of whether in this state, as against the separate estate of the wife the common law duty of the husband to pay for the funeral expenses of his wife has become one of secondary liability.