The Property Rights of Married Women Under Modern Laws (Part II)

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Wisconsin Supreme Court

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Notwithstanding this hint from the judicial to the legislative branch of the government, the defect was not corrected until 1872, when by Chapter 155 of the laws of that year the legislature provided that thereafter the husband should not be liable for the payment of the wife's ante-nuptial debts, that the individual earnings of the wife resulting from labor for persons other than her husband should be her separate property, free from her husband's control or debts, and that she could sue alone for her earnings and be sued alone for her ante-nuptial debts.

This statute was a body blow at the ancient theory that the husband and wife are one and that the husband was the one.

Another curious result followed from the old common law principle that husband and wife were one and the husband was the one, namely, that if the wife suffered injuries to her character by slander or libel, or injuries to her person by violence or negligence of another person, i.e., if she were hurt in a railroad accident, the husband was the owner of the damages which might be recovered for the injuries and might do with them as he chose. This remained the law after the passage of the Married Women's Act of 1850 before referred to, as that act only gave the wife the right to hold and control her own separate property and a right of action of this kind was not considered property.\textsuperscript{12}

The wife could join with her husband in bringing the suit, but the husband could settle and control it as he chose, and take the damages when recovered. This absurdity remained in the law until the passage of Chapter 99 of the Laws of 1881, by which it was provided that any married woman might bring and maintain an action in her own name for any injury to her person or character, the same as if she were married, and any judgment she might recover would become her separate property.

\textsuperscript{12} Shaddock v. Clifton, 22 Wis. 110.
By Chapter 86 of the Laws of 1895 another relic of the common law system was removed, namely the principle that neither husband nor wife could transfer property to the other and give a title which would be good at law. This chapter provided that any conveyance, transfer, or lien, executed by either husband or wife to or in favor of the other should be valid to the same extent as between other persons. By an act passed a few years later all transfers of real estate made by a husband direct to his wife before the passage of the Law of 1895 were validated, and made equal in law to conveyances between persons not married.

Very early in the history of the state the legislature realized the necessity of guarding the proceeds of life insurance policies which a husband had taken out for the benefit of his wife. It was a principle of common law that if a person insured his own life for the benefit of his wife or infant child and paid the premiums himself, he was the real owner of the policy and might sell and transfer or stop paying premiums on it without let or hindrance from the wife or child. By Chapter 158 of the Laws of 1858 the legislature provided that any policy expressed to be for the benefit of a married woman, whoever takes it out, should enure to the benefit of the woman and her children free from all claim of her husband, his creditors or his executors. This act has remained to the present day, changed only by an amendment preventing the effecting of very large insurance of this kind with the intention of defrauding the husband’s creditors, and another amendment enabling the married woman to dispose of such a policy of insurance with the written consent of her husband or other person who effected the same.

Her rights in her husband’s property after his decease have been considerably enlarged in recent years and may be briefly enumerated as follows: She is entitled to all her own wearing apparel and personal ornaments, also those of her deceased husband (unless he specifically bequeathes them elsewhere) also to the household furniture, provisions and fuel on hand and other personal property to be selected by her not exceeding $200 in value; a reasonable allowance out of the estate for her support during the settlement of the estate but not exceeding one year if the estate be insolvent; if there are minor children and the estate does not exceed in value $1000 in addition to the allow-
ances before spoken of, the county court may assign the whole estate for the support of the widow and children. In addition to these provisions for immediate support she becomes (in case her husband dies without will) the heir of his entire property, real and personal, in case he leaves no lawful issue, but in case of his leaving issue she takes only the share of a child in the personal property; if there be no issue the homestead goes to her absolutely, but otherwise only during her widowhood; she also takes her dower in all the real estate of her husband which means the right to use or rent to others during her life one-third of the husband's real estate; in case her husband leaves a will and makes some provision for her therein she may within a year elect not to take under the will and in that event she will be entitled to the same dower and homestead rights as if the husband had died without will, also the same share of his personal estate, not exceeding, however, one-third thereof.

Whether these provisions are entirely just to the widow in all cases may well be doubted. It is claimed by many that the widow should always be entitled to one-half of the property accumulated during the existence of the marital relation and that anything short of this is injustice. I readily agree that where husband and wife have worked side by side through life the joint accumulations might justly be equally divided, but otherwise there might be great injustice in such a provision. If a practical plan to accomplish justice in both cases could be worked out it seems likely that the change would soon be made if the attention of the law-making branch of the government should be sharply called to the matter, for the effort in recent years to make just and humane provision for widows and orphans has been very marked.

It may be remembered that in 1875 a lady, Miss Lavinia Goodell of Janesville, made application for admission to the bar of the Supreme Court, she having passed the required examination in the circuit court of Rock County, and having been admitted in that court. Ryan was then Chief Justice, and he was not a believer in anything of this kind. The Court denied the application, holding that neither under the common law nor the statute was there any authority for the admission of women to the bar. The Chief Justice wrote the opinion, and he gilded the bitter pill with that inimitable felicity of language which was all
his own, but which, I fancy, did not make it any more satisfac-
tory to Miss Goodell. After discussing the statutes of Wiscon-
sin on the subject and concluding that there was no statute giving
the right, he proceeds to give his own general views as follows:13

“So we find no statutory authority for the admission of
girls to the bar of any court of this state. And, with all the
respect and sympathy for this lady which all men owe to all
good women, we cannot regret that we do not. We cannot but
think the common law wise in excluding women from the profes-
sion of the law. The profession enters largely into the well
being of society; and to be honorably filled and safely to society,
exists the devotion of life. The law of nature destines and
qualifies the female sex for the bearing and nurture of the chil-
dren of our race and for the custody of the homes of the world
and their maintenance in love and honor. And all life-long callings
of women, inconsistent with these radical and sacred duties of their
sex, as is the profession of the law, are departures from the
order of nature; and when voluntary, treason against it. The
cruel chances of life sometimes baffle both sexes, and may leave
women free from the peculiar duties of their sex. These may
need employment, and should be welcome to any not derogatory
to their sex and its proprieties, or inconsistent with the good
order of society. But it is public policy to provide for the sex,
not for its superfluous members; and not to tempt women from
the proper duties of their sex by opening to them duties peculiar
to ours. There are many employments in life not unfit for female
character. The profession of the law is surely not one of these.
The peculiar qualities of womanhood, its gentle graces, its quick
sensibilities, its tender susceptibility, its purity, its delicacy, its
emotional impulses, its subordination of hard reason to sympa-
thetic feeling, are surely not qualifications for forensic strife.
Nature has tempered woman as little for the juridical conflicts
of the courtroom, as for the physical conflicts of the battlefield.
Womanhood is moulded for gentler and better things. And it is
not the saints of the world who chiefly give employment to our
profession. It has essentially and habitually to do with all that
is selfish and malicious, knavish and criminal, coarse and brutal,
repulsive and obscene, in human life. It would be revolting to
all female sense of the innocence and sanctity of their sex,

13. 39 Wis. pp. 244, 245, 246.
shocking to man's reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the nameless catalog of indecencies, *la chronique scandaleuse* of all the vices and all the infirmities of society, with which the profession has to deal, and which go towards filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men. We hold in too high reverence the sex without which, as is truly and beautifully written, *le commencement de la vie est sans secours, le milieu sans plaisir, et le fin sans consolation*, voluntarily to commit it to such studies and such occupations."

I have quoted the language quite fully not to indicate either approval or disapproval, nor merely because it presents what may be called the sentimental argument against the practise of law by women, but rather because of the elevation of the thought and the beauty, not to say the majesty, of the diction.

This decision was made in December, 1875, but Miss Goodell was undismayed and applied to the legislature with better success. The legislative and executive branches of the government did not seem to be deeply impressed with Judge Ryan's logic or literary style, and in March, 1877, a law was put on the statute books providing that no person should be denied admission to the bar on account of sex. Under this law Miss Goodell was admitted to practise in the Supreme Court, June 18th, 1879, more than a year before the death of Judge Ryan. How much she practised, I am unable to say, nor do I know whether she is still in the practise, but I do not think she is. Mrs. Pier and her three daughters, of Milwaukee, furnish perhaps the most noted examples of women-lawyers in the state. They practised for a number of years both in the trial courts and in the Supreme Court with a considerable degree of success. Another lady, Belle Quinlan, is also practising in the state with success; but it must be said, I think, that there has been no great desire manifested on the part of women to enter the legal profession.

It goes without saying, of course, that medicine, engineering, teaching, and practically all other secular professions and callings are, and have for many years been, open to women without the necessity of legislative assistance, and it goes without saying also that in many of these fields their success has been great.
In connection with the right of admission to the bar, another expression of the legislative policy toward women is to be noted in the act passed in 1891, which provides that any married woman admitted to the bar may be appointed and act as receiver or assignee in legal proceedings, except of the estate of her husband or of property in which he is interested. The inability of a woman to act in such capacities arose from the fact that a married woman could not give a valid bond to ensure her faithful discharge of the duties of the position and as a bond is always an essential she could not be appointed. The enabling act just spoken of, however, expressly provides that she shall be subject to the same liabilities on her bond as other assignees or receivers. The act is still upon the statute books, but I do not think it has been extensively used.

This supposed inability of a married woman to execute a valid bond had much to do also with another curious idea which found much support in the English decisions and in the earlier decisions in this country, namely, the idea that a married woman could not act as guardian of the property or persons of her own minor children, and the cognate idea that the marriage of a single woman who is at the time of the marriage a guardian either terminates the guardianship ipso facto or authorizes proceedings for her removal. There is not much left of these ideas now as the tendency of modern legislation in nearly all of the American states is to place the parents on an equality. As to the guardianship of the person of the child the distinction between the sexes and between married and unmarried women has been abolished in nearly all of the states; in respect to guardianship of the property there are still a number of states in which the disability of a married woman remains.

In Wisconsin a married woman may be appointed and act as guardian of both person and estate. The first law on the subject was passed in 1870 and it provided that no married woman should be disqualified by the fact of marriage from becoming guardian of her own children by a former husband and declared valid any guardianship bond given by her for that purpose. This provision remained until 1889 when the present law was passed giving to a woman full power to act as general guardian, trustee, executrix, or administratrix in any case whatsoever.
There are still left, however, in the Statutes of Wisconsin two sections which seem to recognize in terms the superior right of the husband to the custody of the person and estate of a minor child over the right of the mother. Section 3964 of the Statutes of Wisconsin provide that the father, if living, and in case of his death, the mother, while she remains unmarried, if competent and not otherwise unsuitable shall be entitled to the custody of the person and estate of the minor and to the care of his education. Section 3965 of the Statutes provides that the father of a minor child, and in case of his death, the mother, may by last will appoint a guardian for the child.

These two provisions, if strictly construed, might seem to support the old idea of the father’s absolute right to control the property and have custody of the persons of his children even to the exclusion of the mother. The Supreme Court of the state, however, has given a rational and enlightened construction to Section 3964 which brings it into practical accord with present day thought.

In the case of Sheers vs. Stein, 75 Wis. 44 (decided in 1889) a father who had lost his wife and remarried, sought by habeas corpus proceedings to compel his sister to surrender to him the custody of a six-year-old child, and the statute was relied on as imperative in favor of the father’s right.

Judge Lyon, who wrote the opinion in the case, however, denied that the statute had any such effect and said:14

“By the common law, as interpreted in some of the old cases, particularly in England, the father had almost an absolute right to the care and custody of his minor child, without much regard to his fitness therefor of the welfare of the child. Modern adjudications, both here and in England, have greatly modified the rule, and have incorporated in the law more sensible and humane elements. It is now well settled, at least in this country, that although prima facie the father is entitled to the care and custody of his infant child, yet, if he be an unfit person therefor, or if it be for the welfare of the child that its nurture be committed to another, the court before which the matter is pending

14. 75 Wis. pp. 51 and 52.
on _habeas corpus_ may, in the exercise of a sound judicial discretion, deny such custody to the father, and give it to another.”

After quoting Section 3964 he further says:

* * * “This statute leaves open the inquiry as to the suitableness of the parent for that purpose; and it seems quite obvious that if, for any cause, the welfare of the infant demands that its care and custody be withheld from the parent and given to another, the parent is not a suitable person to have such care and custody, within the meaning of the statute.”

This leaves the so-called superior right of the father little more than a _prima facie_ right which easily gives way to proof of unfitness on his part or superior fitness on the part of the mother. It is safe to say that all Wisconsin courts when called upon to pass on the question as to the custody of minor children endeavor in each case to consult the welfare and best interests of the minors and when that is ascertained the question of relationship cuts very little figure.

It might be well to make a brief recapitulation here of a married woman’s rights and privileges in the line of the transaction of business and the holding and dealing with property as they exist today in Wisconsin.

Her property real and personal which she owns at the time of marriage remains her own, and its income remains her own; neither her husband nor her husband’s creditors can touch it without her consent; the same holds true of all property which she receives by inheritance, gift or grant of any kind from persons other than her husband during her married life; she may go into business with her own property, manage the same, employ her husband in her business, and remain sole mistress of the returns free from any claim of her husband or her husband’s creditors; she may use her separate property just as a man may use his property; she may deal with her husband, buy property of him, loan him money, and take security from him and in fact deal with him as one businessman may with another; she may, if she be enterprising, purchase a farm or real estate of any kind entirely on credit, even when she has no property of her own, and may operate the same, employing her husband for that purpose and will be entitled to hold the profits as her own and free from the claims of her husband’s creditors (unless, indeed, it should appear that
the whole transaction was for the purpose of defrauding such creditors); she may work for third persons and keep all her earnings as her very own free from the reach of her husband or his creditors; she may will her property exactly as she chooses; she has an absolute veto power on the sale of the homestead if her husband owns it, and if she herself owns it she may sell and convey it at will; she may prevent any mortgaging of the household furniture which is exempt and necessary for housekeeping and she may prevent any assignment of her husband's wages or salary; she may sue alone for all injuries to her person or character, and control the action herself, and the proceeds thereof become her own property; a policy of life insurance which has been taken out for her benefit can not be taken from her except with her own written consent, although she has contributed nothing toward paying the premiums; she is entitled under common law principles to support from her husband suitable to her condition in life, notwithstanding she may have ample means of her own; and upon divorce for the husband's fault provision is always made out of the husband's property and earnings for the support of herself and the children of the marriage if there be any. In addition to these substantial rights which enure to her during the lifetime of her husband, there must be added the rights which are guaranteed to her in case of the prior death of her husband which have already been enumerated at length and need not be repeated.

This review of the progress of the law relating to the property rights of married women in Wisconsin is necessarily brief and fragmentary, but it is surely sufficient to demonstrate that the men of Wisconsin have not been grudging in their recognition of the idea that the sexes should be equal before the law so far as the holding and enjoyment of property is concerned.

It is entirely correct to say that today the married woman in Wisconsin is the complete mistress of her own property and can deal with it absolutely without her husband's interference just as freely and effectually as he can deal with his.

In the way of property and earnings her emancipation is complete and, further than this, she has been given a veto power on her husband's power to sell or mortgage the homestead or the household goods which are exempt.
The men of Wisconsin may have been ungallant in refusing to women the right to vote, but it can hardly be said that they have been so in the matter of the holding and controlling of property, the doing of business and the power of making contracts.

It would be impossible for me within the time at my disposal to make a thorough investigation of the law in other states so as to be able to state how many of them have, like Wisconsin, given married women entire control over their property as if they were unmarried. Perhaps half of them have done so. In no state have the old common law disabilities and absurdities remained intact. In those states which have not gone so far as Wisconsin the right of women to deal with, manage, and enjoy their separate property by equitable means has been recognized and perfected by statute. It is safe to say that in all the states the legal relations of husband and wife so far as property is concerned have been revolutionized by modern statutes. The only essential difference is that in some states the revolution is more complete and radical than in others. In some of the western and southwestern states of the union what is called the system of community property* has been established. The general principle on which the system is founded is that all the property acquired by the industry of either husband or wife or both and the increment or product of such property belongs to both husband and wife during the continuance of the marriage relation and upon the death of either party the title to one-half thereof vests in the survivor, and the title of the other half vests in the heirs or devisees of the deceased spouse. Under the community system generally (subject to exceptions in some states) the separate property of either husband or wife owned before marriage together with the increase or profit thereof and all property purchased therewith remains separate property but all property conveyed to either husband or wife after marriage (unless purchased with separate property) becomes community property;

*NOTE—In the April issue, the Marquette Law Review will present to its readers an article on Community Property, by Edwin H. Flick of the Seattle Bar.
the earnings of both parties and all damages recovered for personal injuries to either go into the community fund. Generally the wife has control of her separate property as in Wisconsin, but the husband has the right of control, use, and transfer of the community property subject to the limitation that he must exercise the right in good faith and not with intent to defraud the wife of her rights; the husband also has the right to sue in his own name in all actions at law affecting the property.

This so-called community or partnership system came from Europe. It prevailed (and I think still prevails) in France, Spain and Holland, and in their colonies. It was brought to Louisiana and Quebec (where it still prevails) by France, and to Porto Rico and Mexico by Spain.

It seems clearly more favorable to the married woman than our own system, but I am unable to say how satisfactory it is in actual practise. It prevails in Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, Porto Rico, Mexico and the Province of Quebec. In passing, it may be said that in the Province of Ontario married women have absolute control of their own property as in Wisconsin.

It is interesting to notice for a moment the progress of the reform movement in England. Parliament first seriously dealt with the matter in 1870 when it passed an act securing to every married woman the right to the fruits of her own labor, as well as the right to certain classes of property within specified limits free from her husband’s interference; this act, however, left her without the power to make contracts. In 1882 the so-called Married Woman’s Property Act was passed which dealt with the whole subject. This act is described as follows by the English law writer whom I quoted in the early part of this paper:15

"The result of that piece of legislation, without pausing to consider for the moment the details of it, was to sweep away for all practical purposes the old common law disabilities of a married woman. Since January, 1883, a married woman can bring and defend actions in her own name; she can hold all classes of property and deal with or dispose of them in exactly the same

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manner as if she were unmarried. She can be sued alone for her debts incurred before marriage; and she can, under that act, as amended by the later act passed in 1893, enter into contracts as fully and effectually as if she were unmarried, and incur a liability which is now for all practical purposes a personal liability.”

Here this paper may well close with the remark that while the disabilities of married women have not yet been fully removed in all of the states it is simply a question of time when they will all go. No other result is possible. Not because women ask it, nor because man’s gallantry prompts it, but because justice demands it.