
LAW AND THE FAMILY

"Married Women's Rights"

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TODAY, MARRIED WOMEN are afforded equal treatment with single women. This was not always the case. At common law single women had legal capacity to make contracts, to hold property and to sue or be sued. A wife, however, stood on entirely different footing. Due to the mystical religious theory that marriage made them one, and because of feudal principles that made the husband the one who counted, the wife suffered a general legal disability and was not regarded as a legal person.

In return for this subjugation of wives, the husband was supposed to be the guardian, provider and protector, while he functioned as lord and master. Chancery or ecclesiastical courts, as distinguished from the common law courts, sometimes asserted authority to make husbands discharge their duty to be faithful guardians for their wives.

At common law a wife could not contract with either her husband or third persons. She could, however, make contracts that bound her equitable estate, if she had any, although such contracts did not bind her personally. [FN1]

By the common law the wife could not sue or be sued except where she was joined with her husband. However, in cases relating to her equitable separate estate, the wife alone could be sued in equity. This was another aspect of the merger-of-identity theory.

The wife lacked capacity to hold property, except through a trust device. Professor Clark summarizes the situation as follows:

He was entitled during the marriage to the rents and profits from any land in which she held an estate of inheritance and if issue was born alive, he acquired a tenancy by the curtesy which gave him the rents and profits during his life. On his death the wife or her heirs took the land. If the land

was sold by the wife and her husband, the money received as the price became his absolutely, like the rest of her personalty. The husband also became seized of any lands in which the wife held a life estate, and was entitled to the rents and profits for the duration of the life estate." [FN2]

Upon marriage, the wife's personalty and possessions (except for paraphernalia such as clothing and jewels) became the property of her husband, and on his death it passed to his personal representative. This also was true as to personalty she acquired during the marriage. If the husband pre-deceased her, however, the paraphernalia was returned to her. The wife's choices in action could be enforced by the husband and they became his alone when he acquired possession of them. If he failed to take possession, however, the choices in action remained hers. [FN3]

Duty to Support

In return for his entitlement to the wife's rents and profits, the husband had a unilateral duty to support his wife and family. He was also entitled to their services. The husband could convey his interest in the wife's land without her consent, but the wife required the husband's consent to convey her interest in such land. There could be no conveyance between husband and wife due to the merger of identity theory.

Upon marriage, the husband became a tenant by curtesy in his wife's land. The corresponding entitlement for the wife was her dower interest in her husband's realty. Dower gave the wife a life estate in one-third of the land of which her husband held the fee at any time during marriage, and upon his death his estate was liable for her dower interest.

Today, in New York, dower and tenancy by curtesy have been replaced by a system of statutory forced share in a spouse's estate, which usually is one-half or one-third, depending upon whether children were born to the marriage. [FN4]

The husband was also responsible for the wife's antenuptial debts and for any torts she might commit either before or during the marriage. If the wife committed a crime in her husband's presence, it was presumed to be at his direction, and this provided her with the defense of coercion. The same presumption applied to her torts. [FN5]

The wife's lack of legal status was mitigated somewhat by Chancery where equitable principles evolved from the 17th Century on and were designed to protect the wife's personalty and the rents and profits from her realty. The technique for accomplishing this objective was that of the trust device by which the settlor created an estate in equity for the exclusive use of the wife. The settlor might be the wife's father, her husband or any other person. The

corpus of the trust became her separate property in equity, and it might encompass realty, or personalty, both tangible and intangible. [FN6]

The wife, by the trust device, did not have the use of the property in her separate estate, but she could convey it by deed or will, and she could make contracts that, although not enforceable against her personally, might be enforced against her separate estate.

Married Woman's Act

Thus, for those who could afford solicitors, meaning the affluent, the trust device and equitable principles somewhat relieved wives from the harsh feudalistic principles of the common law. The next significant step was the passage of Married Women's Property Acts [FN7] during the mid-19th Century which, in general, conferred legal capacity on wives to leave and dispose of their own property, to contract and to sue or be sued.

Until the passage of the Married Women's Property Acts, [FN8] New York law pertaining to husband and wife closely resembled the common law. A revolutionary reform, however occurred in 1848 when New York was one of the first states to enact the Married Women's Property Acts. The 1848 statute was the first in a series of related statutes designed to "emancipate" wives from feudalistic concepts.

Domestic Relations Law (DRL) s50 entitled Property of Married Women provides:

Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, shall continue to be her sole and separate property as if she were unmarried, and shall not be subject to her husband's control or disposal nor liable for his debts." [FN9]

This provision was the key section of New York's Married Women's Property Acts and constituted a radical reform of the common law property system. Once wives were permitted to own, manage and dispose of their own property, thereby cutting off the husband's former prerogatives in that regard, the door was opened for their economic independence if they had an estate. [FN10]

Pursuant to DRL s50, it was early held that where a wife carries on a business on the credit of her separate estate, the common law rights of her husband did not attach to the profits and earnings of such business. [FN11]

This section did not, however, deprive the husband of his common law right as a tenant by curtesy consummate if his wife died intestate without having exercised the powers conferred upon her to dispose of her real estate by deed or will. [FN12]

Curtesy and dower were not abolished in New York until 1930 [FN13] and, since the act was not retroactive, dower and curtesy under New York law continued to exist for marriages entered into before 1930.

Under this provision the wife retained title to the personal property she brought to the marriage or thereafter acquired with her own funds, unless there was a gift to the husband. [FN14]

When this provision became effective the marriage of the husband and wife no longer discharged or released any indebtedness of the husband to her [FN15] or the antenuptial indebtedness of the husband to his wife. The rule was changed by the Married Women's Property Act so that where the wife was the mortgagee and the husband the mortgagor before they were married, the marriage did not extinguish her rights under the mortgage. [FN16]

It is interesting to note that unless a gift was made out, the wife was required to return unspent household money that the husband had provided and that such balance was not regarded by the law as her property. [FN17]

Making Contracts

A key provision of the Married Women's Property Act of 1848 now appears as General Obligations Law (GOL) s3-301. It details the wife's powers as follows: "A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereto, and to make contracts in respect thereto with any person as if she were unmarried. Judgment for or against a married woman, may be rendered and enforced as if she was single. A married woman may confess a judgment." [FN18]

At common law a married woman was under a total disability to contract, and her contracts, as viewed by courts of law, imposed no liability upon her; they were void at law. [FN19] Between 1848 and 1884, a married woman had the power to contract debts enforceable against her estate when contracting for the benefit thereof. After 1884 a married woman had the same power to contract as a single woman, although her conveyance might be subject to her husband's curtesy interest, which was abolished with dower in 1930. [FN20]

Prior to 1884, a married women's contracts could be enforced only in three situations: (1) where created in or about carrying on a trade or business of the wife; (2) when the contract related to or was made for the benefit of her

separate estate; (3) when the intention to charge her separate estate was expressed in the instrument or contract by which the liability is created. [FN21]

Prior to the Enabling Act of 1884 [FN22] a married woman did not have plenary power to contract even with third persons. [FN23] The power of married women to make general contracts not related to labor to be performed on her sole and separate account, depended upon the Act of 1860 [FN24] and for her contract to be valid she had to possess a separate estate or be in a separate business, although she might be liable where there was an estoppel due to her representations. [FN25] Section 3-301 extended freedom to contract to wives and removed their common law disability. [FN26]

Section 3-301 should be read in conjunction with s3-305, which provides that a contract of a married woman does not bind her husband. Under this provision, a married woman may enter into a business or a partnership with third persons and incur the liabilities arising therefrom. [FN27]

GOL s3-309 provides: "A husband and wife may convey or transfer real or personal property directly, the one to the other, without the intervention of a third person; and may make partition or division of any real property held by them as tenants in common, joint tenants or tenants by the entireties. If so expressed in the instrument or partition or division, such instrument bars the wife's right to dower in such property, and also, if so expressed, the husband's tenancy by curtesy." [FN28]

Free Transactions

The legislative intention behind this provision was to freely permit transactions between husbands and wives, when in good faith, the same as between a spouse and outsiders. Although that objective was largely achieved in the case of personalty, [FN29] it was fulfilled only in part as to realty, where dower and curtesy remained until 1930, [FN30] and tenancies by the entireties continued to receive special protection. [FN31] This provision was a later addition to that hodge-podge of laws we call the Married Women's Property Acts.

GOL s3-311 provides that when an instrument or transaction creating or transferring an interest in personal property would create a joint tenancy or a tenancy in common in strangers, the same result is reached in persons who are husband and wife. Moreover, an instrument or transaction which does not create a right of survivorship in personal property between persons who are not husband and wife does not create a right of survivorship for persons who are husband and wife. Finally, this section applies without regard to the identity of the person who makes the transfer or at whose instance it is had,

or from whom the consideration for the instrument or transaction proceeds. [FN32]

The purpose of this provision is to abrogate the rule that, unless a different intention is shown, a transfer of personal property into the names of husband and wife operates to give the wife a right of survivorship only and creates no present interest in her, if the property, or the consideration for the transaction, came from the husband. [FN33]

Joint Ownership

Prior cases had held that where the parties were husband and wife and the husband was the sole source of the fund that was placed in both names, it was presumed that he intended to confer upon the wife a right of survivorship only with no present ownership whatsoever. [FN34] This section reverses the situation so that it is presumed that a present joint ownership was intended unless stipulated otherwise. If a joint ownership was created, it carries with it a right of survivorship, but if the form is that of tenancy in common, it does not.

GOL s3-313 provides:

1. A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved.

2. A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury as defined in s37-a of the general construction law, or resulting in injury to her property, as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any personal injury to her husband or to his property, as if they were unmarried. [FN35]

For a number of years, the New York statutes were construed as condomestic services, she may recover on a spousal contract to perform services where there is an express promise to pay for them and the services are rendered in the husband's business. [FN52]

It should be noted, however, that wages the wife receives or recovers during marriage, in the event of divorce, are regarded as marital rather than her separate property. Assets or ferring a partial spousal immunity. Actions for intentional torts and torts with reference to property came to be permitted between spouses, but the courts held back as to personal injury suits based

on negligence. Although the broad language of the above provision appears to completely abolish the common law spousal immunity and the public policy it entailed, there are significant qualifications or exceptions. [FN36] For example, the Legislature has also abolished alienation of affections, criminal conversation, seduction and breach of promise suits. [FN37] This does not mean, however, that a husband may not be liable for fraudulently inducing the marriage or the semblance of marriage. [FN38]

Under the ambit of GOL s3-313, each spouse may sue the other for injuries to person or property, [FN39] libel, [FN40] conversion of property, [FN41] ejectment, [FN42] fraud and deceit [FN43] and for personal injuries occasioned by negligence. [FN44] Under New York law, a wife, as well as a husband, may sue third parties for loss of consortium. [FN45] Finally, as we have seen, either spouse may sue the other for breach of contract [FN46] or to enforce his or her property rights. [FN47]

GOL s3-315, permits a married woman to bring her own action for wages earned, thus barring the husband from his former common law right to her wages. In its present form, this provision also creates a presumption that the wife alone is entitled to her wages. [FN48] This provision of the Married Women's Property Acts has been effective as regards the wife's right to collect wages from third parties, [FN49] but when she renders services or is an "employee" of her husband, or her husband's business, there are problems. What the statute failed to do may be more significant than what it did do. It did not accord a wife a right to recover against her husband for domestic services in the home or to affect the husband's common law entitlement thereto. [FN50]

This result was reached on the theory that in return for his duty to support his wife and family he was entitled to the services of the wife and children as a matter of law, and even if there was an alleged agreement, it failed for lack of consideration. Moreover, it was held that this section did not create an implied obligation that the husband would compensate his wife for services performed in his business. [FN51] This provision, as interpreted, raises possible constitutional issues as to a denial of equal protection of the laws.

Subsequently, these rules were relaxed, and the current rule appears to be that while a wife cannot recover for income acquired by individual or joint efforts or contributions comprise the res for equitable distribution upon dissolution of the marriage.

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FN1 See Clark, Domestic Relations: Cases and Problems, 725 (3d ED 1980).

FN2 Ibid.

FN3 See Clark, Law of Domestic Relations 7.1 (1968 Ed).

FN4 EPTL s5-1.1(b), attempt to define some kinds of inter vivos transfers which will be ineffective against the surviving spouse's statutory forced share.

FN5 Clark, Law of Domestic Relations s7.1 (1968 Ed).

FN6 Ibid.

FN7 New York's version of Married Women's Property Acts was adopted in 1848 and was one of the first. The current version may be found in the GOL s3-301 et seq, and in DRL s50. Since 1848, there have been numerous amendments and additions.

FN8 See GOL s3-301 et seq and DRL s50.

FN9 DRL s50, derived from Domestic Relations Law of 1896, Ch 272, s20, which revised Laws 1848, Ch 200, ss1, 2, and Laws 1849, Ch 375, s1; Laws 1860, Ch 90, s1; Laws 1862, Ch 172.

FN10 The effect of what now is DRL s50 was to deprive the husband of all of his common law rights to, or interests in, his wife's property during her life. *McIlvaine v. Kadel* ec (1865), 3 Robt 429.

FN11 *Gage v. Dauchy* (1866), 34 NY 293.

FN12 See *Albany County Sav. Bank v. McCarty* (1896), 149 NY 71, 43 NE 427.

FN13 Laws 1929, Ch 229, eff Sept. 1, 1930.

FN14 *Fitch v. Rathburn* (1875), 61 NY 579, held that where the wife mingled her separately owned furniture with her husband's, title remained in her. Her assignees could maintain an action for conversion against the husband. See also *Shirley v. Shirley* (1841), 9 Page 363.

FN15 The common law rule was that a marriage discharged or released.

FN16 *Power v. Lester* (1861), 23 NY 527.

FN17 *Marks v. Marks* (1937), 250 AD 289, 294 NYS 70, held that the husband was entitled to a return of unspent household money he had handed to, but had not given to, his wife and where she deposited the excess in her separate account, a press should be impressed on such sum since there had been a legal separation. See also, *Aaronson v. McCauley* (1892, City Ct), 19 NYS 690.

FN18 This provision derived in part from former DRL s51. Parts of the provision may be traced back to Laws 1835, Ch 275, but Laws 1848, Ch 200, s3, was the basic statute, which was amended in 1849, 1851, 1860, 1862, 1878, 1884, and 1892.

FN19 *Martin v. Dwelly* (1830), 6 Wend 9.

FN20 Laws 1929, Ch 229, eff Sept 1, 1930.

FN21 *Manhattan Brass & Mfg. Co. v. Thompson* (1874), 58 NY 80.

FN22 (Laws 1884, Ch 381).

FN23 *Dickerson v. Rogers* (1889), 114 NY 405, 21 NE 992.

FN24 (Laws 1860, Ch 90).

FN25 *Blaechinska v. Howard Mission & Home for Little Wanderers* (1892), 130 NY 497, 29 NE 755.

FN26 Prior to the Acts of 1860, Ch 90 and Laws 1862, Ch 172 s7, the contracts of a married woman were not enforceable in an action at law but could be a charge on her equitable separate estate enforceable in a suit in equity. *Frecking v. Rolland* (1873), 53 NY 422.

FN27 *Bitter v. Rathman* (1875), 61 NY 512; *Paul v. Van Da Linda* (1890, Sup), 12 NYS 638.

FN28 Derived from DRL s56, which was enacted by Laws 1896, Ch 272, s26, which in turn had revised Laws 1880, Ch 472, s1, and Laws 1887, Ch 537, s1.

FN29 This provision enables a wife and husband to give, assign, or transfer personal property directly to each other. *Dean v. Metropolitan E. R. Co.* (1890), 119 NY 540, 23 NE 1054. Laws 1929, Ch 229 eff Sept. 1, 1930.

FN31 Note that the language of GOL s3-309 has been construed to mean that although there may be a consensual partition of an estate held by entirety, and a valid divorce may terminate it, a tenancy by entirety is not subject to a "forced" partition as are a tenancy in common or joint tenancy, even though the section in question speaks of them on the same basis.

FN32 This provision formerly appeared as DRL s56-a. Laws 1959, Ch 580, s1, transferred this provision to GOL s3-311.

FN33 See report of the Law Revision Commission on Laws 1959, Ch 580, adding former 56-a to Domestic Relations Law.

FN34 *Telaro v. Telaro* (1969, 1st Dept), 32 AD2d 634, 300 NYS2d 432, rev'd on other grounds 25 NY2d 433, 306 NYS2d 920, 255 NE2d 158; and *Re Will of Levinsky* (1965, 2d Dept), 23 AD2d 25, 258 NYS2d 613. The latter case adds that this provision also was intended "to enlarge wife's property rights to accord with reality of actual situation existing at time of their creation."

FN35 This section is derived from former DRL s57, which may be traced back to Laws 1890, Ch 51, ss1-3, Laws 1896, Ch 272, s27. The critical amendment was by Laws 1937, Ch 669, s1, which finally completely abolished the former spousal immunity.

FN36 See *Allen v. Allen* (1927), 246 NY 571, 159 NE 656, which disallowed tort suits between spouses despite GOL s3-313. Compare, *Merenoff v. Merenoff* (1978), 76 NJ 535, 388 A2d 951, which abolished the inter-spousal immunity and cites decisions from other states.

FN37 See Civil Rights Law s80-a.

FN38 See *Tuck v. Tuck* (1964), 14 NY2d 341, 251 NYS2d 653, 200 NE2d 554; (sham marriage); *Levine v. Levine* (1955), 1 M2d 100, 146 NYS2d 393; (fraud in inducing marriage); *Snyder v. Snyder* (1939), 172 Misc 204, 14 NYS2d 815 (bigamous husband who represented he was single).

FN39 *People v. Morton* (1954), 284 AD 413, 132 NYS2d 302, aff'd 308 NY 96, 123 NE2d 790.

FN40 *Brown v. Mack* (1945), 185 Misc 368, 56 NYS2d 910.

FN41 A husband could maintain an action against his wife for the conversion of his property. *Mason v. Mason* (1892), 66 Hun 386, 21 NYS 306; *Berdell v. Parkhurst* (1879, NY), 19 Hun 358.

FN42 *Wood v. Wood* (1881), 83 NY 575; *Minier v. Minier* (1871), 4 Lans 421.

FN43 Cohen v. Kahn (1941), 263 AD 728, 30 NYS2d 875; Becker v. Becker (1954), 207 Misc 17, 138 NYS2d 397; Amsterdam v. Amsterdam (1945, Sup), 56 NYS2d 19; Lee v. Lee (1945), 184 Misc 686, 57 NYS2d 97. Suit was dismissed in Risikoff v. Risikoff (1953, Sur), 120 NYS2d 776, and Kujek v. Goldman (1894), 9 Misc 34, 29 NYS 294, affd 150 NY 176, 44 NE 773.

FN44 Pryor v. Merchants Mut. Casualty Co. (1958), 12 M2d 801, 174 NYS2d 24.

FN45 Millington v. Southeastern Elevator Co. (1968), 22 NY2d 498, 293 NYS2d 305, 239 NE2d 897, 36 ALR3d 891.

FN46 See prior discussion, supra, on GOL ss3-303 and 305.

FN47 See prior discussion, supra, of DRL s50, and GOL s3-301.

FN48 This provision originally appeared as DRL s60, and was enacted by Laws 1896, Ch 272, s30. It was amended in 1902, 1905, 1941, and by Laws 1961, Ch 576, s1.

FN49 Dean, "Economic Relations Between Husband and Wife in New York," 41 Cornell LQ 175, 185 (1956), says New York went further in this regard than a number of other states.

FN50 See Porter v. Dunn (1892), 131 NY 314, 30 NE 122. In Blaechinska v. Howard Mission & Home for Little Wanderers (1892), 130 NY 497, 29 NE 755, it was said that the husband's promise or agreement to pay his wife for services was "a promise to pay for that which legally belongs to him."

FN51 Re Manner (1924, DC NY), 11 F2d 286, affd (CA2 NY) 11 F2d 287.

FN52 See Re Paine's Estate (1939, Sur), 12 NYS2d 201, where the wife managed her husband's medical practice, kept books, received patients, made appointments and acted as a nurse to patients.

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