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Married Women's Property Rights in North Dakota

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MARRIED WOMEN'S PROPERTY RIGHTS IN NORTH DAKOTA

In this paper I will attempt to make a survey of the more outstanding features of North Dakota law in respect to the property rights of married women, and compare some of our Code provisions with those of other states.

According to the law of this state, a married woman has the same capacity and rights with respect to property, contract, and torts, and is subject to the same liabilities as before marriage.[1] Twenty-two other states also give women this same freedom to contract. Six other states give a married woman full capacity to contract except that she cannot convey real estate without her husband joining in the conveyance.[2] Our neighboring state of Minnesota belongs to this group. In five states, Arizona, California, Nevada, New Mexico, and Washington, the community system of property prevails, and under that system derived from the Civil Law, a married woman has absolute power of contract in respect to her separate estate, but she has no power over the community property during the lifetime of her husband. Other states have various restrictions on the right of a married woman to contract. So in this respect we see that North Dakota stands as one of the most liberal states.

In North Dakota, the common law rights of curtesy and dower have been abolished by statute.[3] The dower rights of the common law was, of course, a one-third interest in all the husband's real estate which the wife could claim upon his death if she had not consented to its transfer by joining in the conveyance; and she might assert her claim regardless of how many times the land had been conveyed.

In this state if the decedent leaves no children and the estate does not exceed $15,000 it goes to the surviving widow. Any excess over $15,000 is divided between the surviving spouse and the father and mother of the decedent, or the survivor of them. Where the husband dies intestate, if there is a surviving widow and one child the estate is divided equally between them; if a widow and more than one child, the surviving spouse takes one-third, and the remainder is divided between or among the children. If the husband is survived only by his widow, and both his father and mother are dead and the estate does not exceed $25,000, the whole goes to the widow. Any excess over $25,000 is divided, one-half to the surviving spouse and the other half in equal share to the brothers and sisters of the decedent, or to their children. If the decedent leaves none of these above-mentioned relatives, but the widow, then she receives the whole estate.[4] Comparing our law with that of New York, we find that in that state, when the husband dies and is survived by his parents and

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[1] N. D. Comp. Laws Ann. (1913) § 4414 and § 5744, subd. 5.

[2] Breckinridge, A Survey of the Legal Status of Women in the Forty-eight States (1930) p. 9.

[3] N. D. Comp. Laws Ann. (1913) § 4414, subd. 5; § 5744.

[4] N. D. Comp. Laws Ann. (Supp. 1925) § 5743, subd. 2.

his widow, the widow receives only $5000 and one-half the residue. And where he leaves a brother or sister, nephew or niece, the widow receives but $10,000 and half the residue instead of $25,000, as in North Dakota.[5]

One peculiar feature of the law of North Dakota is that there is no provision anywhere in it that the widow may dissent from her deceased husband's will and elect to take the share which she would receive in case her husband had died intestate. A survey of the forty-eight states reveals that South Dakota is the only other state which lacks such a provision. The laws of our neighboring state of Minnesota[6] provide that she may refuse to accept the provisions of the will and elect to take the share under the statute of descent. This share under Minnesota law is an undivided one-third interest in all the lands of which the husband at any time during the marriage was possessed, to the disposition whereof the wife had not consented in writing, except such as sold by judicial sale, etc. This interest is not the same as dower, however, as it is a mere expectancy and not to be construed according to the rules of the common law.[7] In the state of Montana the wife still has the common law dower interest and she may elect whether she will take the devise under the will or renounce it and take her dower in the lands and her share in the personal estate.

It is a historical fact that one of the reasons why New York would not accept the **Field Code** which North Dakota adopted, was because of this absence of any provision for dower or a substitute therefor. This is, I believe, a defect in the law of this state that should be the subject of severe criticism. In North Dakota, a man of sound mind can, if he wishes, will a hundred thousand dollars worth of property to his friends, or club, or some institution, and not will five dollars to his wife and family, and nothing can be done about it, as long as that was his clear intention. In such case there are no grounds for contesting the will, and the wife has no choice. She cannot, it would seem, refuse to accept the will and elect to claim her share under the statutes of descent. The only thing that is guaranteed to her is her right to the homestead and the $1500 personal property exemption. The rather liberal homestead provisions may atone somewhat for this seeming lack of protection mentioned above, although it would not in a case where the husband's property was nearly all personalty. The homestead right cannot, of course, be cut off without the consent of the wife.[8]

The statutes in regard to homestead rights provide[9] that the homestead of every head of a family residing in this state and consisting of not to exceed two acres of land and the improvements thereon, if within a town plat, and not exceeding in value

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[5]N. Y. Laws (1929) c. 229.

[6]Mason's Minn. Stat. (1927) § 8722.

[7]Scott v. Wells, 55 Minn. 274, 56 N. W. 829 (1893); Dayton's Estate v. Johnson, 75 Minn. 4, 77 N. W. 421 (1898).

[8]N. D. Comp. Laws Ann. (Supp. 1925) § 5608.

[9]N D. Comp. Laws Ann. (Supp. 1925) § § 5605, 5607.

eight thousand dollars, over and above liens or incumbrances, and if not within a town plat, not exceeding in the aggregate more than one hundred sixty acres, and consisting of a dwelling house in which the homestead claimant resides and all of its appurtenances and the land on which same is situated, also all other improvements on said land and regardless of the value of same, shall be exempt from judgment, lien and from execution or forced sale except for debts secured by mortgages on the premises executed and acknowledged by both husband and wife; on debts secured by labor liens for work done or material furnished exclusively for the improvement of the same; on debts created for the purchase thereof and for all taxes accruing and levied thereon; and on all other debts when upon an appraisal it appears that the value of such homestead is more than $5000 over and above liens and incumbrances claimed under Section 5605, and then only to the extent of any value in excess of the sum total of such liens and incumbrances plus $5000."[10] In view of the fact that this is an agricultural state, this homestead provision is very liberal, as a farmer can claim as a homestead a farm of 160 acres, with buildings and improvements without any limitation on their value, where he does not have the aforementioned incumbrance.

The **Probate Code** provides for an exemption of $1500 of personal property which shall not be liable for any prior debt of the decedent except the necessary charges of his last sickness and funeral and expenses of the administration when there are no other assets available for payment of such charges.[11] This personal property becomes the absolute property of the surviving widow and children.[12] The case of **Bender v. Bender,** decided in August, 1934, refers to this statute. In this case[13] it was held that an ante-nuptial agreement to accept a sum in lieu of the widow's property rights or claims did not prevent the widow from claiming exemptions from the husband's estate to the extent of $1500 under Section 8725, since the widow's right to exemptions is not in the nature of an interest in property but is a preferred claim against the estate. The wife's interest in the homestead is a life interest or an estate for years according to statute.[14] If the wife is the sole heir of the husband then the death of the husband vests the fee in the homestead in the wife.[15]

The husband is, according to the laws of this state,[16] the head of the family, and is entitled to certain property exemptions. A married woman is not entitled to such exemptions, unless she can prove that her husband is incompetent to earn a living, and that she is forced to support the family by her own earnings or from her separated property. If she is sued individually her property is subject to execution with no exemptions, even though

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[10]N. D. Comp. Laws Ann. (Supp. 1925) § 5605; § 5607, subd. 1, 2 and 3.
[11]N. D. Comp. Laws Ann. (Supp. 1925) § 8725.
[12]Fore v. Fore, 2 N. D. 260, 50 N. W. 712 (1891).
[13]Bender v. Bender, — N. D. —, 256 N. W. 222 (1934).
[14]O'Hare v. Bismarck, 45 N. D. 641, 178 N. W. 1017 (1920).
[15]Cullen v. Sullivan, 51 N. D. 384, 199 N. W. 760 (1924).
[16]N. D. Comp. Laws Ann. (1913) § 4408.

she has been supporting the family by her own efforts, if it appears to the court that the husband is still technically the head of the family, able and willing to support the family, but nevertheless bankrupt and unsuccessful. Such would seem to be the inference from the case of **Ness v. Jones.**[17] The court in this case, however, does make the statement that there may be exceptional circumstances which will of necessity make the wife the head of the family, but did not consider the failure and bankruptcy of the husband in this case sufficient to shift to the wife the headship of the family. A bankruptcy case which came up from Mississippi cites **Ness v. Jones** and upholds this view.[18]

It may be well to summarize briefly a few other property rights of women in this state. The husband has no authority over the wife's separate estate. Neither husband or wife has any interest in the property of the other, except that neither can be excluded from the other's dwelling.[19] The separate property of the wife is not liable for the debts of her husband.[20] Husband and wife are jointly and severally liable for any debts contracted by either while living together for necessary household supplies of food, clothing, fuel, and shelter for themselves and family and for the education of their minor children.[21] According to the same section the wife owns her own wages earned outside of the home. The wife after the husband's death is given the personal property of the husband which would be exempt from execution if he were living. Also provisions for one year's supply are absolutely exempt from all levy or sale.[22] The wife inherits equally with her husband from a deceased child.[23] And the wife is also entitled to share equally in the services and earnings of a minor child.[24]

In closing, I would like to suggest that the one serious defect in our law as to married women's property rights pointed out previously, be remedied by the enactment of one statute. This could very easily be done. No law would have to be amended. It would require only a statute which would give to a married woman in this state the right to elect whether she would accept her husband's will or dissent from it and take the share to which she is entitled under the statutes of descent and distribution. Perhaps a law similar to the Minnesota statute[25] which provides that the surviving spouse may file a written renunciation of the will within six months after the probate thereof, would fit in best with our laws in regard to the property rights of married women, and would be, I think, a very necessary and enlightened piece of legislation.

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[17]Ness v. Jones, 10 N. D. 587, 88 N. W. 706 (1901).
[18]In re Logan, 1 Fed. Supp. 225 (1932).
[19]N. D. Comp. Laws Ann. (1913) § 4410.
[20]N. D. Comp. Laws Ann. (1913) § 4411.
[21]N. D. Comp. Laws Ann. (Supp. 1925) § 4414.
[22]N. D. Comp. Laws Ann. (1913) § 8725; N. D. Laws (1929) c. 127, p. 153.
[23]N D. Laws (1915), c. 249, p. 370.
[24]N. D. Laws (1923), c. 153, p. 145.
[25]Mason's Minn. Stat. (1927) § 8722.