

DESCENT AND DISTRIBUTION: STATUTORY RIGHT OF  
HUSBAND TO DISSENT FROM WIFE'S WILL HELD  
UNCONSTITUTIONAL UNDER MARRIED WOMAN'S  
PROPERTY PROVISION IN NORTH CAROLINA  
CONSTITUTION

AT COMMON LAW, a married woman did not have the right to make a will,<sup>1</sup> and she could only effect transfer of property at her death with the aid of equity or through the exercise of a power of appointment.<sup>2</sup> Beginning in the 1830's, however, states began to pass legislation designed to confer upon married women certain rights in their separate property,<sup>3</sup> including the right to make inter vivos and testamentary conveyances.<sup>4</sup> As the law developed in this area, the rights of married women approached equality with those of their husbands, and in some jurisdictions their rights became superior.<sup>5</sup>

As early as 1784, North Carolina legislation reflected this general pattern of concern over the property rights of married women. In that year North Carolina married women were first empowered to dissent from their husbands' wills and take their intestate share in his personal estate.<sup>6</sup> At the time, this was a much-needed privilege in

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<sup>1</sup> See 1 MORDECAI, LAW LECTURES 371 (2d ed. 1916) [hereinafter cited as MORDECAI]; 1 PAGE, WILLS §§ 12.10, 12.14 (4th ed. 1960); 6 POWELL, REAL PROPERTY ¶ 944 (1958) [hereinafter cited as POWELL]; THOMPSON, WILLS § 58 (3d ed. 1947); 3 VERNIER, AMERICAN FAMILY LAWS § 181 (1935) [hereinafter cited as VERNIER].

<sup>2</sup> See 1 PAGE, WILLS §§ 12.12-13 (4th ed. 1960); 4 POMEROY, EQUITY JURISPRUDENCE §§ 1098, 1103-06 (5th ed. 1941); 1 POWELL ¶ 117 (1949); THOMPSON, WILLS § 58 (3d ed. 1947).

<sup>3</sup> Some states moved in a step-by-step manner, obtaining judicial interpretation of each change in the law, and then enacting subsequent changes to correct misinterpretations. Other states, perhaps irritated with the courts' distrust for innovation and strict construction of statutes in derogation of the common law, attempted to free the wife entirely with one comprehensive revision. Such individualized state action resulted in law lacking uniformity and simplicity. See generally 1 AMERICAN LAW OF PROPERTY § 5.56 (1952); 1 POWELL ¶ 117; 3 VERNIER § 167.

<sup>4</sup> See generally 1 POWELL ¶ 117; 6 POWELL ¶ 944; 1 THOMPSON, WILLS § 58 (3d ed. 1947); 3 VERNIER §§ 181-83; Bordwell, *The Statute Law of Wills* (pts. 1-4), 14 IOWA L. REV. 1, 172, 283, 428 (1928-1929); Rees, *American Wills Statutes: I*, 46 VA. L. REV. 613, 657-58 (1960).

<sup>5</sup> See 3 VERNIER § 167. Perhaps the most common superior right has been that of dower or its statutory substitutes, while a surviving husband has no share of his deceased wife's property other than that which may be left him by her will. See table in Phipps, *Marital Property Interests*, 27 ROCKY MT. L. REV. 180, 191-208 (1955).

<sup>6</sup> N.C. Sess. Laws 1784, ch. 204, § 8, as amended, N.C. GEN. STAT. § 30-1 (Supp. 1961). See generally DOUGLAS, ADMINISTRATION OF ESTATES IN NORTH CAROLINA §§ 18, 48,

view of the husband's rights *jure mariti* as to his wife's property.<sup>7</sup> Major legislation concerning a wife's rights in her separate property, however, was first enacted in 1868 as a part of North Carolina's reconstruction constitution. The provision, similar to married womens' property acts, gave the wife a right to devise and bequeath her separate property "as if she were unmarried."<sup>8</sup> In removing the disabilities of married women, the provision also terminated most of the husband's common law marital property rights. Removal of these prerogatives resulted in new disability, for the North Carolina Supreme Court interpreted the 1868 constitutional provision as having cut off both the husband's common law right to curtesy initiate and curtesy consummate,<sup>9</sup> except in his wife's intestate property.<sup>10</sup> The net result was that a husband had neither the right to dissent from his wife's will nor any right to a prescribed share in the property as to which she died testate.<sup>11</sup> Therefore, a wife had complete freedom of testation, and could totally disinherit her husband, while at the same time a husband could not obviate the possibility of his wife receiving at least her intestate share,<sup>12</sup> except by pre-marital agreement.

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158 (1948) [hereinafter cited as DOUGLAS]; 2 MORDECAI 1156; 1171; Bolich, *North Carolina's New Intestate Succession Act: II: Election, Dissent and Renunciation*, 39 N.C.L. REV. 17, 24 (1960); McCall and Langston, *A New Intestate Succession Statute for North Carolina*, 11 N.C.L. REV. 266, 274 (1933).

<sup>7</sup>The husband's rights of marriage at common law were extensive. See generally 1 MORDECAI 291-96, 389. The right to dissent, therefore, protected the wife against complete disinheritance, thus protecting the family unit. See 1 WOERNER, AMERICAN LAW OF ADMINISTRATION 17, 64 (3d ed. rev. 1923).

<sup>8</sup>N.C. CONST. art. X, §6, provides: "The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried. . . ."

Since there were two principal legal classes of women at common law, *i.e.*, married women and unmarried women, it appears that the General Assembly concluded that separate property rights could best be conferred upon a married woman by including her in a class (that of single women) whose property rights were already recognized.

<sup>9</sup>*Walker v. Long*, 109 N.C. 510, 14 S.E. 299 (1891) (curtesy initiate); *Tiddy v. Graves*, 126 N.C. 620, 36 S.E. 127 (1900) (curtesy consummate). It is generally held that curtesy initiate was abolished by married womens' property legislation. However, there is a split of authority on whether curtesy consummate in her testate property was abolished. See 2 TIFFANY, REAL PROPERTY § 575 (3d ed. 1939).

<sup>10</sup> See 1 MORDECAI 294.

<sup>11</sup> See 1 MORDECAI 294-95; Bolich, *supra* note 6, at 24.

<sup>12</sup> See DOUGLAS 39, 48; 1 MORDECAI 294-95. These authorities do not comment directly on the unfairness of the law, nor do they propose any solutions. However, criticism and corrective provisions are to be found in McCall and Langston, *supra* note 6, at 274.

Thus, it became apparent in a number of states that legislation intended merely to give wives equal rights in their separate property had actually given them superior rights and placed husbands in an unequal position. Subsequently, efforts were made to equalize the inter vivos rights of married persons and protect the surviving spouse through a limitation of the right of the decedent to devise or bequeath property.<sup>13</sup>

In North Carolina, the General Assembly, without an accompanying constitutional amendment, passed corrective legislation<sup>14</sup> in the Intestate Succession Act of 1959.<sup>15</sup> This act, *inter alia*, permitted either the surviving husband or wife to dissent from the deceased spouse's will and to take a prescribed fee simple share if an amount equal to that share was not provided by the will or by certain inter vivos provisions.<sup>16</sup>

The above provision in the Intestate Succession Act was held unconstitutional in the recent case of *Dudley v. Staton*.<sup>17</sup> Rufus L. Dudley, whose deceased wife had not devised him any interest in her property, dissented from her will and brought a partition action to obtain his statutory fee simple share. In compliance with the statute, the lower court awarded partition of the land and gave Dudley his prescribed share. On appeal, the North Carolina Supreme Court held that the General Assembly could not abridge the right of a married woman to dispose of her property by will "as

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<sup>13</sup> Some states give both husband and wife protection, while others protect only the wife. See generally 1 PAGE, WILLS §§ 16.6-16.7 (4th ed. 1960). Community property laws usually provide that half of the community property belongs to the survivor. Some states still retain common law dower and curtesy without other protection. See generally, the table in Phipps, *supra* note 5, at 191-208.

<sup>14</sup> North Carolina was not inadvertent to the inequalities of the former law and to the changes which were necessary. In 1933, it was suggested that it was time to abandon "antiquated doctrines of intestate succession by regulating the devolution of property in terms of a modern social and economic order." McCall and Langston, *supra* note 6, at 269.

<sup>15</sup> N.C. GEN. STAT. §§ 29-1 to -30, 30-1 to -3 (Supp. 1961).

<sup>16</sup> N.C. GEN. STAT. §§ 30-1 to -3 (Supp. 1961). Section 30-1 (a) provides that "a spouse may dissent from his deceased spouse's will in those cases where the aggregate value of the provisions under the will for benefit of the surviving spouse, when added to the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator: (1) Is less than the intestate share of such spouse, or (2) Is less than one-half of the deceased spouse's net estate in those cases where the deceased spouse is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent."

Subsections 30-1 (b) and (c) make provision for valuing the decedent's estate.

Section 30-2 provides for the time and manner of dissent, while § 30-3 provides for the effect of the dissent.

<sup>17</sup> 257 N.C. 572, 126 S.E.2d 590 (1962).

if she were unmarried."<sup>18</sup> The court said that inasmuch as this right was created by the constitution in absolute and unambiguous language, any attempt to limit it by statute was unconstitutional.

In so holding, the court relied principally on two old North Carolina cases which dealt with the effect of the 1868 constitutional provision on the husband's common law right of curtesy in his wife's property. The first case was an 1891 decision involving curtesy initiate,<sup>19</sup> where the court stated that the 1868 provision was very broad, and plainly gave the wife complete ownership and control of her property as if she were unmarried. Nine years later, in the second case relied upon,<sup>20</sup> the provision was invoked to deny curtesy consummate in devised property. In striking down this right, the court said: "With this explicit provision in the Constitution, no statute and no decision could restrict the wife's power to devise and bequeath her property as fully and completely as if she had *remained unmarried*."<sup>21</sup> Neither of these early decisions cited any authority for the interpretation given to this provision. The court in both cases read the provision literally, considered it plain on its face, and therefore unsusceptible to any other construction.<sup>22</sup>

However, another construction of the 1868 provision was available, and the court in the *Dudley* case was not compelled to follow the two old curtesy cases. In *Flanner v. Flanner*,<sup>23</sup> the court in construing a subsequently enacted statute held that a married woman does *not* have an absolute right to dispose of her property by will. Here the court indicated that the purpose of the 1868 provision was "to remove . . . the common-law restrictions on the right of married women to convey their property and dispose of same by will, and was not intended to confer on them the right to make wills freed from any and all legislative regulation."<sup>24</sup> In *Dudley*, however, Justice

<sup>18</sup> *Id.* at 581, 126 S.E.2d at 597, quoting article X, § 6 of the North Carolina constitution.

<sup>19</sup> *Walker v. Long*, 109 N.C. 510, 14 S.E. 299 (1891).

<sup>20</sup> *Tiddy v. Graves*, 126 N.C. 620, 36 S.E. 127 (1900). <sup>21</sup> *Id.* at 623, 36 S.E. at 128.

<sup>22</sup> Several subsequent North Carolina cases followed this early interpretation as to common law curtesy, but only these two cases were cited as authority for this position. See, e.g., *Freeman v. Lide*, 176 N.C. 434, 97 S.E. 402 (1918) (right of a married woman to devise and bequeath her property); *Richardson v. Richardson*, 150 N.C. 549, 64 S.E. 510 (1909) (wife may by will deprive husband of curtesy consummate); *Watts v. Griffin*, 137 N.C. 572, 50 S.E. 218 (1905); *Hallyburton v. Slagle*, 132 N.C. 947, 44 S.E. 655 (1903) (latter two cases cited with approval *Tiddy v. Graves*).

<sup>23</sup> 160 N.C. 126, 75 S.E. 936 (1912).

<sup>24</sup> *Id.* at 129, 75 S.E. at 937. In the *Flanner* case, legislation providing that a child born after the making of a parent's will and unprovided for therein could take his

Parker refused to yield to this construction, although it appears to be a more accurate interpretation of the legal objective sought to be accomplished and the economic and social purposes underlying the constitutional provision.

It is submitted that the decision in *Dudley*, although consistent with the majority of prior statements by the North Carolina Supreme Court, is not in accord with the better interpretation of the policy reasons for married womens' property acts. The decision clearly frustrates the attempt of the General Assembly to equalize the rights of married persons with regard to a share in the estate of the survivor. Decisions in other jurisdictions, as well as the analyses of commentators, are to the effect that married womens' property legislation was not enacted to give a wife an absolute right in her separate property, but to remove the common law disabilities of married women as to their separate property and to free it from the marital control of husbands.<sup>25</sup> In the instant case, the court was cognizant of inconsistency in the interpretation which had been given the constitutional provision,<sup>26</sup> and could justifiably have reached a contrary result. Indeed, when considering similar statutory and constitutional provisions the Utah Supreme Court so held.<sup>27</sup>

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intestate share in the parent's estate was contested by a married woman's executor on the ground that the statute was an unconstitutional abridgement of her right to make a will as though unmarried. In upholding its constitutionality, the court stated that the "right to dispose of property by will is a conventional rather than an inherent right, and its regulation rests largely with the Legislature except where and to the extent that [the] same is restricted by constitutional inhibition." *Ibid.*

<sup>25</sup> See *Sykes v. Chadwick*, 35 U.S. (18 Wall.) 141 (1873) (District of Columbia); *State v. Herndon*, 158 Fla. 115, 27 So. 2d 833 (1946); *Cole v. Van Riper*, 44 Ill. 58 (1867); *Schindel v. Schindel*, 12 Md. 108 (1858); *Johnson v. Cummins*, 16 N.J. Eq. 97 (1863); *Madget v. Madget*, 85 Ohio App. 18, 87 N.E.2d 918 (1949); *Walker v. Reamy*, 36 Pa. 410 (1860); *Bloomfield v. Brown*, 67 R.I. 452, 25 A.2d 354 (1942); see generally 2 BISHOP, MARRIED WOMEN §§ 11-27 (1875); 1 POWELL ¶ 117; STEWART, HUSBAND AND WIFE § 150 (1885); 6 THOMPSON, REAL PROPERTY § 2955 (Perm. ed. rev. repl. 1962); Bolich, *supra* note 6, at 27. *But see* *Cashman v. Henry*, 75 N.Y. 103 (1878).

While no unqualified assertion has been made that married womens' property acts were not passed to give the wife an absolute right in her separate property, it seems strange to attribute that purpose to the legislatures, regardless of how absolute the phraseology of the statutes may appear. To have given women absolute rights in their separate property where there was a family unit would seem as inconsistent as granting a husband absolute rights in his separate property or allowing him to retain his absolute common law right over family property.

<sup>26</sup> Compare *Flanner v. Flanner*, 160 N.C. 126, 75 S.E. 936 (1912) with *Tiddy v. Graves*, 126 N.C. 620, 36 S.E. 127 (1900) and *Walker v. Long*, 109 N.C. 510, 14 S.E. 299 (1891). See 1 MORDECAI 320, where he notes that "the constitution and former statutes of North Carolina received such a complicated construction that it was with very great difficulty that any lawyer could...determine what were the rights of married women to their own property . . . ."

<sup>27</sup> *In re Petersen's Estate*, 97 Utah 324, 93 P.2d 445 (1939). The Utah constitution

If it had chosen to uphold the constitutionality of section 30-1 of the Intestate Succession Act, the North Carolina Supreme Court could have reasoned along the following lines. The old curtesy cases misinterpreted the purpose of the framers of the 1868 provision, through an overzealous adherence to its literal language. The *Flanner* case looked beyond the letter of the law and ascertained the problem which the provision was intended to correct, and is the proper interpretation of the purpose of the framers. Moreover, the curtesy cases can be distinguished, for they construe the effect which the 1868 provision had on the prior common law, whereas we choose to follow the *Flanner* case, which indicates its effect on subsequent statutes. Therefore, the dissent provisions of the act are a reasonable legislative regulation of the right conferred by the constitution, and also constitute a legislative expression of policy on marital rights.<sup>28</sup>

*Dudley v. Staton* may have an immediate effect on another provision of the Intestate Succession Act. Section 29-30 provides, as an alternative to section 30-1, that a dissenting spouse may take absolute title to the household furnishings and a life estate in one-third of the real property owned by the decedent during coverture.<sup>29</sup> This pro-

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vides that the real and personal property of a married woman "may be conveyed, devised or bequeathed by her as if she were unmarried." In considering this provision, and its effect on a statute reserving to the surviving spouse a homestead share in the property of the decedent, the court said:

[T]he very wording of the constitutional provision is such as to evidence an intent (1) to do away with the common law doctrines under which there was created by law an estate in the husband as an incident to marriage; and (2) so freeing it from such interest of the husband, give to the wife the right to dispose of it. Looking at the provision against its common law background, there is nothing in its wording which evidences an intention upon the part of its authors to go further and inhibit the legislature from placing upon the right to devise the limitation here in question. Its evident aim was to bring about equality, not inequality, between the parties to a marriage contract." *Id.* at 329, 93 P.2d at 447.

The court concluded that "the Constitution of this State effects equality between husband and wife in so far as disposing of her separate property by will is concerned, and hence the statute reserving to the survivor of either a homestead is not in contravention of the Constitution." *Id.* at 333, 93 P.2d 449.

<sup>28</sup> Bolich, *supra* note 6, at 28. *But cf.* 1 MORDECAI at 371, where he states that "now, married women can devise and bequeath their separate estates just as though they were femes sole; and an act of the legislature attempting to forbid their devising their lands so as to deprive their husbands of an estate by the curtesy, is unconstitutional." It appears that he is merely repeating, without comment, the holdings of *Walker v. Long*, *Tiddy v. Graves*, and two subsequent cases discussed *supra* in notes 19-22.

<sup>29</sup> N.C. GEN. STAT. § 29-30 (Supp. 1961). The life estate shall include the decedent's

vision is so similar to that struck down by *Dudley*, that as to the husband, it probably will also be held to be an unconstitutional attempt to restrict a married woman's absolute right to devise and bequeath her separate property.<sup>30</sup> Hence, one of the major inequalities produced by an antiquated interpretation of the reconstruction era constitution remains part of North Carolina law, and requires cure by constitutional amendment.<sup>31</sup>

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usual dwelling house "and lands upon which situated and reasonably necessary to the use and enjoyment thereof," regardless of any excess value above a one-third interest.

<sup>30</sup> The status of the *Flanner* case, allowing an afterborn child to take his intestate share (sustaining what is now § 31-5.5 of the North Carolina General Statutes) is also doubtful, due to the manner in which *Dudley* rejects the *Flanner* interpretation of the effect of the 1868 provision.

<sup>31</sup> See Bolich, *supra* note 6, at 26-28. See also Polster, *The Use of Will Substitutes to Disinherit the Surviving Spouse*, 13 W. RES. L. REV. 674 (1962), where a variety of inter vivos devices are suggested by which a husband might cut off the forced share of his wife.