

1991

## Wills and Trusts: "The Kingdom of the Fathers"

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### Recommended Citation

Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers"*, 10 LAW & INEQ. 137 (1991), available at [https://scholarship.law.umn.edu/faculty\\_articles/267](https://scholarship.law.umn.edu/faculty_articles/267).

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## Wills and Trusts: "The Kingdom of the Fathers"

Inaugural Lecture of Professor Mary Louise Fellows\*  
as the Everett Fraser Professor of Law  
University of Minnesota Law School  
March 5, 1991

The title of this speech is borrowed from the third chapter of Adrienne Rich's book entitled "Of Woman Born: Motherhood as Experience and Institution." She begins the chapter by observing:

For the first time in history, a pervasive recognition is developing that the patriarchal system cannot answer for itself; that it is not inevitable; that it is transitory; and that the cross-cultural, global domination of women by men can no longer be either denied or defended. . . . For the first time we are in a position to look around us at the Kingdom of the Fathers and take its measure.<sup>1</sup>

The purpose of my talk today is to use doctrines in wills and trusts law as the yardstick with which to measure the Kingdom of the Fathers. I will show that wills and trusts law has always and continues to operate to preserve and sustain their Kingdom.<sup>2</sup>

Conventional wisdom is that during the last 500 years Western women have won substantial rights to inherit and make gifts

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In transforming the event of a delivered speech to a printed article I have clarified language and provided the reader with the sources I used in developing my ideas. Notwithstanding these changes, I have attempted to maintain the content, tone, and form of the speech that I delivered on March 5, 1991.

1. ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 56-58 (10th ann. ed. 1986).

2. My thesis and the support for it are limited to a review of laws, legal precedent, and legal arrangements made by and for the married white middle-class or aristocracy in England and the United States. This is the starting point for my analysis because of the relatively easy accessibility to original documents and scholarship that focuses exclusively on this privileged segment of the population.

All that follows should be regarded as a preliminary and incomplete analysis. To complete the analogies of the impact of inheritance laws on women requires simultaneous consideration of two other social categories: race-ethnicity and class. The focus of my future work is to analyze the three categories together because the processes of domination and subordination in the Kingdom are not easily distinguished and are not experienced independently of one another. See TERESA AMOTT & JULIE MATTHAEI, *RACE, GENDER, AND WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES* 11-13 (1991).

of property. Five hundred years ago daughters had no right to inherit real property from their fathers, but instead the property passed to the eldest sons.<sup>3</sup> The most significant manner in which daughters shared in their fathers' wealth was when fathers made payments to grooms of a so-called "portion" or "dowry" upon their daughters' marriages.<sup>4</sup>

These daughters had little better rights as wives. Customs and laws only required a husband to provide an income interest for life in one-third of all the land that he owned during the marriage.<sup>5</sup> The rest of his land wealth was preserved for the subsequent generations of eldest sons.<sup>6</sup> If by some demographic fluke a daughter or widow came to inherit real property, she was denied the power to make a will long after that power was accorded her brothers and husband.<sup>7</sup>

Today the role of women in inheritance laws appears very different. Throughout the United States, daughters share equally with their brothers when their father dies without a will.<sup>8</sup> If fathers write a will, they are likely to treat their daughters and sons alike.<sup>9</sup>

Women also seem to fare better as wives today. More and more states accord a wife the right to inherit all of the marital estate held in the title of her husband if he dies without a will.<sup>10</sup> If he writes a will that excludes her or gives her an insubstantial share, a widow in a separate-property law state has the right to demand a percentage ranging anywhere from one-third to one-half of the marital estate held in his name.<sup>11</sup> Moreover, the courts and the legislatures have adopted rules that make it difficult for a husband to undermine his widow's right to a share of the marital es-

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3. 2 WILLIAM BLACKSTONE, COMMENTARIES 208 (1765).

4. See LLOYD BONFIELD, MARRIAGE SETTLEMENTS, 1601-1740: THE ADOPTION OF THE STRICT SETTLEMENT 94-95 (1983).

5. See BLACKSTONE, *supra* note 3, at 129.

6. See *id.* at 208.

7. In 1540, the first English Statute of Wills was enacted, permitting testamentary disposition of land. 32 Hen. 8, ch. 1. Three years later, another act was passed providing that a married woman's devise was invalid. See 34 & 35 Hen. 8, c. 5, § 14. It was not until the nineteenth century when legislatures enacted married women's property acts that women obtained the power to write a will. See 1 Page on the Law of Wills § 12.14 (ed. W. Bowe & D. Parker, 1960) [hereinafter *Page*].

8. See Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, AM. B. FOUND. RES. J. 321, 368 (1978).

9. See *id.* at 369.

10. See UNIFORM PROBATE CODE § 2-102 & Comment (1990) (9th ed. West).

11. See Lawrence Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 239, 247-53 (1991).

tate.<sup>12</sup> Along with the real possibility of becoming a property owner, the states also have accorded daughters and wives the privilege of will making.<sup>13</sup>

When these inheritance rules are considered with the concomitant legal and social reforms that provide women access to education and employment outside the household, unmarried and married women living in the 1990s would seem to have the means to achieve, if they have not already achieved, autonomy and security.

This description of the progressive evolution of women's property rights suggests that women have conquered the Kingdom of the Fathers.<sup>14</sup> Mothers have victoriously won seats of power alongside fathers. Wives have successfully earned the right to reign alongside their husbands. And all women now have a viable alternative to becoming a wife and mother. We should be skeptical of this progressive-evolutionary description, however, because it is a product of patriarchal thought and culture and serves to fortify the Fathers' Kingdom. As Adrienne Rich explains:

The powerful person would seem to have a good deal at stake in suppressing or denying his awareness of the personal reality of others; power seems to engender a kind of willed ignorance, a moral stupidity, about the inwardness of others, hence of oneself. . . . To hold power over others means that the powerful is permitted a kind of short-cut through the complexity of human personality. . . . Colonialism exists by virtue of this short-cut — how else could so few live among so many and understand so little?<sup>15</sup>

Two centuries ago Jane Austen in her novel, *Persuasion*, voices the same sentiments when the protagonist Anne Elliot says:

[P]lease no reference to examples in books. Men have had every advantage of us in telling their own story. Education has been theirs in so much higher a degree; the pen has been in their hands. I will not allow books to prove anything.<sup>16</sup>

To understand why and how the story of the successful vindication of women's inheritance rights is a story that is believable only to loyal citizens and soldiers of the Kingdom of the Fathers, it is helpful to put forward another metaphor — that of a dramatic stage production. I borrow this metaphor from Marilyn Frye. She

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12. See *id.* at 253.

13. See *supra* note 7.

14. The "progressive evolution" notion was suggested by Professor Gordon's examination of "evolutionary functionalism" in Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

15. RICH, *supra* note 1, at 65.

16. JANE AUSTEN, *PERSUASION* 237 (1985).

is a philosopher from Michigan State University who is here at the University of Minnesota at the Center for Advanced Feminist Studies as a Rockefeller Fellow this academic year. In an essay, "To Be and Be Seen: The Politics of Reality," Frye explains the "erasure" of lesbians in male-created reality, which she refers to as the "phallocratic scheme." She explores the erasure of all women when she writes:

The exclusion of women from the phallocratic scheme is impressive, frightening and often fatal, but it is not simple and absolute. Women's existence is both absolutely necessary to and irresolvably problematic for the dominant reality and those committed to it, but our existence is *presupposed* by phallocratic reality, but it is not and cannot be *encompassed* by or countenanced by that reality. Women's existence is a background against which phallocratic reality is a foreground.<sup>17</sup>

The scene created by the foreground and background constitute for Frye a dramatic stage production in which as she writes:

The situation of the actors is desperately paradoxical. . . . The actor must be immersed in the play and undistracted by any thought for the scenery, props or stagehands, lest the continuity of the characters and the integrity of their reality be dissolved or broken. But if the character must be lived so intently, who will supervise the stagehands to make sure they don't get rowdy, leave early, fall asleep or walk off the job? . . . Those with the most intense commitment to the maintenance of the reality of the play are precisely those most interested in the proper deportment of the stagehands, and this interest competes directly with that commitment. . . .

The solution to the actor's problem which will appear most benign with respect to the stagehands because it erases the erasure, is that of training, persuading and seducing the stagehands into *loving* the actors and taking actors' interests and commitments unto themselves as their own.<sup>18</sup>

Fathers continue to reign and their Kingdom thrives because fathers and husbands have persuaded themselves that their daughters and wives share their perceptions. They have exercised their patriarchal power to persuade and seduce daughters and wives into believing that what is good for their fathers and husbands is good for them. It is no wonder then that the legal reforms in property law have made no substantial difference. It is not because the reforms did not have the potential to bring autonomy and security to women, but because men used their patriarchal power to subvert them.

The rights of daughters and wives to inherit and make wills

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17. MARILYN FRYE, *To be and Be Seen: The Politics of Reality*, in *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 152, 167 (1983).

18. *Id.* at 168-69.

do not place them in the foreground of the play. That is, these rights do not make a difference in their lives because the foreground actors need them to remain in the background to support their reality but not to be part of it. At the core of patriarchal power is the individual family, and so long as legal, religious, and cultural institutions support the male hierarchy within the family, transformation of women from background stagehands into foreground actors is impossible.

The work of two Scottish sociologists, R. Emerson Dobash and Russell P. Dobash, on marital violence is instructive to understand why women are at risk both before and after legal reforms are enacted in their name and on their behalf. As Dobash and Dobash note in their article, "Wives: The 'Appropriate' Victims of Marital Violence,"

[i]t has only been a hundred years since men were denied the legal right to beat their wives in Britain and the United States. Prior to the late 19th century it was considered a necessary aspect of a husband's marital obligation to control and chastise his wife through the use of physical force.<sup>19</sup>

Dobash and Dobash present an historical review of violence starting with the Roman law in 750 B.C., which proclaimed that married women were "to conform themselves entirely to the temper of their husbands and the husbands to rule their wives as necessary and inseparable possessions."<sup>20</sup> They go on to show how all of the legal systems of Europe and America, along with Christianity, supported a husband's right to beat his wife. It clearly was the community norm. Only in the eighteenth century was the husband's power of correction doubted and even then it was not until the nineteenth century that laws against wife beating were actually passed. The Dobashes' work demonstrates that:

[a]lthough domestic chastisement of wives is no longer legal, most of the ideologies and social arrangements which formed the underpinnings of this violence still exist and are inextricably intertwined in our present legal, religious, political and economic practices. Wives may no longer be the legitimate victims of marital violence, but in social terms they are still the 'appropriate' victims.<sup>21</sup>

I will demonstrate that just as laws against wife beating have not reduced violence against women in the home, laws giving daughters and wives inheritance rights and use and access to property have not changed their power relationship with their fathers,

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19. R. Emerson Dobash & Russell P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 *Victimology* 426, 426 (1978).

20. *Id.* at 427.

21. *Id.* at 439.

husbands, and sons. Under the rubric of privacy and family autonomy the law creates and supports what Robin West, a leading feminist scholar, refers to as a "zone[ ] of protection within which patriarchal violence is freed to destroy us."<sup>22</sup> Within that zone women are denied physical and economic security.

Patriarchal power subverts women's property rights in three distinct ways — all of which operate to keep men in the foreground and women in the background of the dramatic production we call western society. First, women's legal rights provide feeble protection against patriarchal power because fathers and husbands fear that the rights of their daughters and wives place men at serious risk. Therefore, they enact other laws or design new legal devices to undermine the rights accorded their daughters and wives and to assure fathers and husbands continuing reign in the Kingdom. Second, fathers and husbands use women's legal rights as a justification to intrude on any autonomy and security daughters and wives have won. In other words, the pervasiveness of patriarchal power is sufficient to recast women's legal rights into a male prerogative. Third, patriarchal power completes the subversion by using women's property rights to convince daughters and wives that their fathers and husbands care about their well-being. In fact, it is this use of property rights that explains how and why they arise. Fathers and husbands believe that they are acting on behalf of their daughters and wives and prove it by according women these rights. At the same time, of course, the fathers and husbands ignore the ways that they undermine women's rights.<sup>23</sup> This blindness contributes to the subversion as fathers and husbands pursue legal rules that they justify as essential to a secure and orderly society — the patriarchy. Through it all, fathers and husbands, to use Frye's words, "persuade and seduce" daughters and wives into believing that what is good for the men they love is good for them. Subversion of women's testamentary freedom and inheritance rights in all three of these ways is easily detectable by the selected examples that follow.

#### A. *Neutral Rules*

Sometimes the law applies so-called neutral rules developed for men and by men to women. The result is that courts judge wo-

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22. Robin West, *Feminism, Critical Social Theory and Law*, CHI. LEGAL F. 59, 65 (1989). I use the term "privacy" in this context to refer to both "privacy rights" as it is used in constitutional jurisprudence and to the private/public distinction. Both uses of the term contribute to patriarchal violence. See *id.*

23. A clear example of this process is the law regarding common-law marriage.

men's exercise of their rights as deviant and ultimately legally invalid. For example, in 1947 a New Jersey court in *In re Strittmater's Estate*,<sup>24</sup> held that the testator's will, which devised her estate to the National Women's Party, was invalid. The testator was a single woman who had no relatives except some cousins whom she saw only infrequently during the last part of her life. In contrast, she had been a member of this feminist organization from 1925 until her death in 1944 and during some of that period she had been an active volunteer. The basis for the court's holding was its determination that the will was the product of the testator's insane delusions concerning men. Relying on memoranda and comments written by the testator on the margins of books, the court held that they demonstrated "incontrovertibly her morbid aversion to men" and "feminism to a neurotic extreme."<sup>25</sup> What the court left to be considered for another day was whether any level of feminism could avoid the label of extremism and mental instability.

In contrast, consider the same rules of testamentary capacity applied to a male decedent in an 1849 case from Georgia, *Potts v. House*.<sup>26</sup> The court upheld the will saying, "One thing is certain — that *eccentricity*, however great, is not sufficient, of itself to invalidate a will. [The testator] believed that *all women are witches*."<sup>27</sup> (In this perhaps, he is not so *singular*!)

### B. Categories of Women

In other circumstances, the law creates different categories of women with the result that all women's conduct is controlled by the regulation of a few women. One example of the way the law uses categories for control of women is in its definition of a wife for inheritance purposes. It restricts that definition to someone who married the decedent by obtaining a license from the state.

The movement to abolish common-law marriage grew out of a fear of social disintegration, which followed the Civil War and arose during this country's industrialization period.<sup>28</sup> It also grew from a belief that strong matrimonial laws were an important element to preserving the public welfare.<sup>29</sup> Clearly, concerns about inheritance rights influenced the debate concerning common-law

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24. *In re Strittmater's Estate*, 140 N.J. Eq. 94, 53 A.2d 205 (1947).

25. *Id.* at 95, 53 A.2d at 205.

26. *Potts v. House*, 6 Ga. 324 (1849).

27. *Id.* at 350.

28. See MICHAEL GROSSBERG, (GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA) 83 (1985).

29. See *id.* at 85-86.



marriage because opponents argued that instead of aiding the virtuous, "common-law marriage merely protected the disreputable acts of an immoral minority and bred blackmail [and] *fraudulent estate claims*" (emphasis added).<sup>30</sup> By the early part of the twentieth century, most states abolished common-law marriage by statute. That time period coincides with and predates the legal reforms increasing the inheritance rights of wives and husbands.

The abolition of common-law marriage has created particular hardship on nonlegal wives because traditional gender roles and a workplace that compensates men more than women typically lead to the nonlegal husbands in these cohabitation relationships working outside the home and the nonlegal wives maintaining the home and rearing the children. Without the protection of the state acknowledging the economic value of her work through its inheritance statutes, the nonlegal wife is left to rely on the generosity of her cohabitating partner to include her as a beneficiary in his will. Although the law provides her contractual and equitable remedies, these remedies are inevitably inadequate because they are not self-executing, require time-consuming and expensive litigation, and apply arm's-length marketplace criteria to a domestic relationship involving love, affection, and sexual relations. If she prevails, it is only because a court and jury are willing to distort the reality of the relationship. Moreover, even if she prevails, she is unlikely to obtain anywhere near the amount of property she would have received as a legal wife under current intestacy or forced share statutes.<sup>31</sup>

Not only does the abolition of common-law marriage have a detrimental effect economically on women who cohabit with men, but it also detrimentally affects legally recognized wives in two distinct ways. First, the substantial reduction in economic recovery, depending upon whether a homemaker is a legal wife or a cohabitor, operates as a controlling restraint on legal wives. The

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30. See *id.* at 87.

31. *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (1987) provides a good example of how expensive and time-consuming it can be for a nonlegal wife to pursue her claim for a share of the couple's estate. The Wisconsin Supreme Court held for the nonlegal wife on the question of whether she stated a claim upon which relief may be granted and remanded the case to the circuit court on the question of whether she could prove the elements of her claim. It is also a good example of how the court's analysis distorts the reality of the relationship by underscoring marketplace interactions rather than familial interactions between the nonlegal spouses. Consider this passage: "In this case, the plaintiff has alleged many facts independent from the parties' physical relationship which, if proven, would establish an express contract or an implied in fact contract that the parties agreed to share the property accumulated during the relationship." *Id.* at 527, 405 N.W.2d at 312.

message of the cohabitation law is that homemaking has an insubstantial economic value under the law. The treatment of cohabitation partners contradicts any claim a legal wife might make to an equal stake in the married couple's wealth. Legal wives are put on notice that the basis for their inheritance rights is the fact that they have a marriage license and not that their contribution of efforts to the home and marriage are valuable. This message contributes to the legal wife's belief that her husband owns the money his employer pays him and to her disbelief in her ownership rights to the marital estate. In contrast, legal husbands receive the message that they need not place substantial value on homemaking and they are correct in considering themselves as sole owners of the marital wealth. The wife's lack of a sense of ownership means that she feels she has less right to control the disposition of the marital estate and means that the husband feels he has more right to control its disposition. Abolition of common-law marriage thus becomes a contributing factor in discouraging legal wives from exercising their right to make wills and, in general, fortifying the traditional marital hierarchy.

The second way the abolition of common-law marriage detrimentally affects legal wives is that it implies that the homemaker who cohabitated with the wage earner not only has no substantial claim to the wage earner's wealth, but that her claim is unscrupulous. The abolition of common-law marriage gives credence to the fear that unfair advantage will be taken of a man. It represents the law's decision to protect propertied men against the fraudulent and overreaching claims of women rather than to protect devoted women against disinheritance by disloyal or ungrateful men. Thus, the abolition of common-law marriage sends the message to the legal wife that if she claims her legal rights to the marital estate, she is acting unscrupulously and taking unfair advantage of her husband. At the same time it sends the message to the legal husband that he should feel quite comfortable controlling the marital estate and its ultimate disposition because it is rightfully his and any claim that his wife might make to ownership is the product of overreaching.

In sum, the law's treatment of cohabitators and the abolition of common-law marriage is one of the means by which the male actors in the play maintain themselves in the foreground and the female stagehands in the background. The enactment of laws giving wives legal rights to inherit and the right to make wills is used to convince women that the patriarchy is tolerable because these enactments prove that men respect and value their efforts in the marriage and that they have genuine concern for their economic

security and individuality. Legal wives are convinced that they have a stake in the system. The creation of the category of the nonlegal wife, which is based on the stereotype of the unscrupulous woman, prevents legal wives, as well as nonlegal wives, from exercising their economic rights and becoming foreground actors. Therefore, we can see how the abolition of common-law marriage is one of the ways the male actors presuppose women without encompassing them into the foreground action of their play.

*C. The Ideology of Fatherhood and Maintenance — The History of Dower*

The gendered application of purportedly neutral legal rules and the gendered legal categorizations that I just described are motivated by three ideological beliefs: (1) fatherhood is defined in terms of property and inheritance; (2) wives have the right to maintenance throughout their lives; and (3) wives who obtain an amount more than is necessary for their maintenance during their lives are receiving windfalls from their husbands' property and encroaching on their husbands' ownership and fatherhood rights. These three beliefs relegate a married woman to the role of merely a vessel holding the marital estate for and on behalf of her husband's children and grandchildren. A common belief that maintenance and only maintenance is a woman's just desserts serves the patriarchy well. What better way for the male actors to control the female stagehands than providing them only support and making them grateful for it?

During the middle ages, a moral obligation developed to secure maintenance for a wife upon her husband's death.<sup>32</sup> The English common law reflected this obligation in its doctrine of dower. Dower gave the widow a right to possession of one-third of the land owned by her husband during their marriage.<sup>33</sup> This dower right was not self-executing. To obtain it, the widow had to sue out a writ against her husband's eldest son who was otherwise owner.<sup>34</sup>

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32. See SHULAMITH SHAHAR, *THE FOURTH ESTATE: A HISTORY OF WOMEN IN THE MIDDLE AGES* 81 (Chaya Galai trans., 1983).

33. See *supra* note 5.

34. See 3 WILLIAM BLACKSTONE, *COMMENTARIES* 183 (1765). On the issue of self-execution, Staves' comparison to the husband's right of curtesy provides further insights:

Early curtesy is not the husband's entitlement to his wife's land by a special favor of the law, as later commentators tended to say; instead, curtesy is a continuation of the husband's possession of land already his as the lord's man and tenant, even if the land had earlier come to him as his wife's inheritance. He needs no action to secure such pos-

A widow's dower rights were successfully subverted by her husband's conveyances of the land to uses before marriage, which was the precursor of what in modern day is known as the trust.<sup>35</sup> Essentially a third person would be owner of the land and hold it for the use of the husband. Since the husband was not owner, the common-law right of dower did not attach to it. Of course, the equity court's willingness to enforce the husband's rights to the land against the third person made this mechanism a viable and attractive alternative. Notably, the development of the use mechanism is attributed to the husband's perceived need to avoid the so called "inconvenience" of dower.<sup>36</sup>

One of those inconveniences was that dower was thought to interfere with the alienability of land. Dower attached to any land owned by the husband during the marriage. The argument was made that dower made land titles uncertain because a purchaser was exposed to the risk that a widow of some remote prior owner would demand her dower from the subsequent purchaser upon that remote owner's death. Procedures had been developed for a wife to release her dower rights so that a parcel of land could be successfully transferred, but those procedures were viewed as an inadequate response because they were cumbersome.<sup>37</sup>

Another perceived inconvenience was that dower was viewed as too generous to women. It was not unusual to have an argument made that it was inappropriate for a "young woman of little or no fortune" to get one-third of the estate of a wealthy groom.<sup>38</sup>

The problem with this latter concern is that it ignored the fact that most marriages were arranged between the bride's and the groom's families and, therefore, both bride and groom could be expected to be from the same economic and social class.<sup>39</sup> Moreover, the custom of the payment of so-called "portions" by the bride's family to the husband meant that it would be highly unlikely that a groom of fortune would marry a woman whose father could not offer a substantial portion.<sup>40</sup> Just as the risk of fraudu-

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session and consequently has no writ. A woman, by contrast, could never have been the lord's man or rendered homage to the lord. Even if she was an heiress, her position was not so much that of an owner as that of a transmitter of the inheritance from her father to her son . . . .

SUSAN STAVES, *MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660-1833*, 83 (1990).

35. See *id.* at 27-49.

36. See *id.* at 47-49, 113-14.

37. See *id.* at 33.

38. See *id.* at 85, quoting from *Drury v. Drury*, 2 Eden 39, at 42 (1760-61).

39. See LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800* 102 (1977).

40. See *id.* at 60.

lent claims by unscrupulous women allegedly justified repeal of common-law marriage, we see that the purported undeserved windfalls of property to wives justified legal recognition of devices to circumvent their legal claims.

With dower perceived as a constraint on the economy because it interfered with alienation and as potentially too generous, it is not surprising to see the development of marriage settlements by the fourteenth century.<sup>41</sup> Normally the groom's father would transfer land to a third party to be held for the joint lives of the bride and groom, which was called a "jointure." The remainder would go to the couple's male heirs entail, which meant that the couple's eldest son would take and then his eldest son would take and so on.<sup>42</sup> In return for this right to maintenance if she survived her husband, the bride relinquished her dower rights to any land owned by the groom during her marriage.<sup>43</sup>

It is misleading to see the development of the marriage settlement exclusively in terms of spousal rights. An equally important aspect of these settlements is that they provided for the transmission of family wealth to subsequent generations of male heirs.<sup>44</sup> By the second half of the seventeenth century the courts adopted rules that gave fathers the power to prevent their sons from transferring the property outside the line of the father's male heirs and destroying the contingent remainders owned by the grandsons.<sup>45</sup> The marriage settlement of the fourteenth century became the strict settlement of the seventeenth century as it tightened the grip of landowners to preserve the land for future male generations by preventing their sons from destroying the interests of their grandsons.<sup>46</sup> As the law assured the passage of property solely to male heirs, wives who had previously exchanged dower for maintenance now found even their contractual right to maintenance viewed by their sons as a burden and inconvenience.<sup>47</sup>

The strict settlement became the focus of controversy in the courts, not with regard to whether it subverted the widow's dower rights, but whether the alienation constraints on the father's son were appropriate.<sup>48</sup> Ultimately, the courts gave the strict settlement their imprimatur by allowing the interests to remain fet-

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41. See BONFIELD, *supra* note 4, at 1.

42. See *id.* at 2.

43. See *id.*

44. See *id.* at 49.

45. See *id.*

46. See *id.* at 55-81.

47. See STAVES, *supra* note 34, at 203.

48. See BONFIELD, *supra* note 4, at 11-45.

tered for one generation. This was the basis for the development of the Rule Against Perpetuities. Notably, by allowing the use (or trust) to continue, the court assured that the wife of the son of the next generation could claim no dower rights.<sup>49</sup>

To complete the story about the rights of daughters and wives to the property subject to a settlement, it is only fair to note that sometimes the strict settlements made provision for younger sons and daughters produced by the marriage.<sup>50</sup> Sometimes provision would be in the form of giving the eldest son a power to appoint some of the property to his younger sons or daughters so that he might provide portions upon their marriages.<sup>51</sup> Sometimes a daughter could receive a portion if the marriage produced no male child.<sup>52</sup> Alternatively, a condition placed on a collateral male heir who took in the absence of a male child might be the payment of a portion to a daughter. For the daughter the right to this portion meant that, if it was paid, it would be paid to her husband's family and in return she would receive a jointure or the right for life to use of the property placed in a marriage settlement if she survived her husband.<sup>53</sup> Fathers strapped for funds frequently were unable or unwilling to pay the designated portions.<sup>54</sup>

Dower, jointure, portions — the property rights associated with married women or women about to be married — had one common feature. They were all designed to provide maintenance

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49. The inattention of the seventeenth-century courts to protecting married women's rights in the development and analysis of the strict settlement continues into the twentieth century. An egregious example of disrespect for married women comes from Barton Leach, a highly respected property scholar who devoted his professional life to reforming the Rule Against Perpetuities. In 1952, he wrote a critique of the Rule entitled, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*. This critique contains language that leaves little doubt that wills and trusts law and the Rule, in its common-law or reformed form, is part of the phallocratic reality. The theme of woman as "spoiler" in the area of conveyancing resounds loud and clear. He writes:

The Rule persists in personifying itself to me as an elderly female clothed in the dress of a bygone period who obtrudes her personality into current affairs with bursts of indecorous energy. Time was when she stood at the center of family activity, necessary to the family welfare. A new generation with new problems has arisen; yet she persists in treating ancient issues as present realities and in applying her own familiar solutions. . . . The old lady of our allegory must learn to sit by the fire and confine her activity to a few words of wise advice from time to time; she must forego this skittish activity that has caused such trouble and damage in the household.

W. Barton Leach, *Perpetuities in Perspective, Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 725, 727 (1952).

50. BONFIELD, *supra* note 4, at 102.

51. *See id.* at 105-06.

52. *See id.* at 108.

53. *See id.* at 107-108.

54. *See STAVES, supra* note 34, at 118.

for women during their widowhood, without any right to the ownership of capital. It is no wonder that the patriarchal families viewed a woman's claim to maintenance as conflicting with the best interests of her "family" rather than as integral to her family's success. Her role in the family as mother and childbearer seemed not to matter. She was only the vessel by which the children received their inheritance from their father. It was not her due that she received maintenance, rather it was the family's generosity for which she was trained to be grateful.<sup>55</sup>

One other dominant feature of marriage settlements that I have not yet emphasized in this brief historical discussion is the lawyer's role. Susan Staves, in her book, *Married Women's Separate Property in England, 1660-1833*, writes that:

[a]n important fact about the legal history of this period is that legal professionals invented complex and difficult conveyancing tactics which satisfied the desires of male clients and, consequently, also both enriched these legal professionals and became a source of their professional prestige. . . . [T]he complexity of the land law did not just grow like Topsy and in consequence cause an increase in conveyancing business. Conveyancers themselves were important causes of this increased complexity as they experimented with new technical innovations and urged judicial acceptance of their validity. Conveyances grew longer, more complex, and hence more expensive. . . . An important and growing "product line" of these conveyancing professionals involved ways to avoid traditional common law rules that their male clients considered "inconvenient."<sup>56</sup>

#### D. *The Ideology of Fatherhood and Maintenance — Modern Estate Planning*

A review of modern estate planning law and practice shows that it contains the same notions concerning married women's limited right to maintenance and the manifestation of fatherhood through property and inheritance that were present in the fourteenth century. The actors—fathers, husbands and their lawyers—continue to use wills and trusts law to keep the stagehands—daughters and wives—in the background by persuading themselves and their daughters and wives that it is in everyone's interest to do so.

How else can we explain the continuing reliance in the majority of states on inheritance and forced share rights, rather than the community-property system, to acknowledge the contribution

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55. See *id.* at 225-30.

56. See *id.* at 58-59.

and support needs of spouses? We must look at two aspects to this question. First, why are inheritance and forced share rights an inadequate recognition of spousal contribution? Secondly, how have the social, legal, and political dynamics operated to keep the community-property system from being broadly adopted in the United States?

We will first take up the question of why inheritance and forced share rights are inadequate. Even if we focus on the most "progressive" of intestacy schemes, such as that promulgated in 1990 by the National Conference of Commissioners on Uniform State Laws in which a wife has the right to inherit the entire intestacy estate in almost all situations, the separate-property scheme is inadequate because the right of a wife to the marital estate is contingent on her surviving her husband.<sup>57</sup> In contrast, community-property law provides that a wife and husband each have an equal, undivided interest in income earned by a spouse and in income earned from community property.<sup>58</sup> Therefore, community-property rights are not conditioned upon survivorship, but are owned by the respective spouses at the time the property is brought into the marital estate. That means both the wife and husband have the legal right to direct the disposition of one-half the community property at their respective deaths.

Recognizing a wife's claim to the marital estate only if she survives is wholly consistent with the maintenance (or vessel) ideology of the fourteenth century. It denies the wife the right to testamentary control over capital except, and only reluctantly, when practicality demands this solution. As the reporter for Article II of the Uniform Probate Code, Lawrence Waggoner, explained in a 1989 speech, a preferred solution would be:

to create a statutory trust of *all* the decedent's property (land and personalty), under which the surviving spouse would receive the right to all the income generated by the trust for life, coupled with a power in the statutory trustee to invade the *corpus* of the trust to the extent the surviving spouse's other sources of income prove inadequate for his or her support and maintenance; upon the survivor's death, any remaining income and corpus would go to the decedent's own children and not stepchildren . . . .<sup>59</sup>

Waggoner continues this discussion by stating:

The statutory-trust approach . . . has a lot to commend it, except for one thing: It makes little practical sense! It's simply

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57. See UNIFORM PROBATE CODE, *supra* note 10, at § 2-102.

58. WILLIAM DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1943).

59. Lawrence Waggoner, *Spousal Probate Rights in a Multiple-Marriage Society*, 45 Rec. A. B. City N.Y. 339, 347-48 (1990).



not practical to compel a statutory trust in every intestate case with a surviving spouse, with respect to mainly small estates of, say, \$15,000 to \$25,000.<sup>60</sup>

Although this language is gender-neutral, given earning capacities and life expectancies, the probabilities are that the propertied decedent is likely to be a man and that the surviving spouse is likely to be a woman. In 1989, we see Professor Waggoner, a leading wills and trusts' law reformer, still believing that a widow should only receive funds necessary for her support and that a father should be the property-giver to his children.

The forced share under the Uniform Probate Code and under other state statutory schemes is inadequate because it too is conditioned on survivorship.<sup>61</sup> Just as troubling, however, is the procedural posture established for a wife to claim her marital share. For her to take, she "has a right of election" against her husband's estate. Not only must she be advised of the existence of her right to elect and the procedures for exercising her rights, but the law as Susan Staves puts it, forces the:

widow . . . to be prepared to cast herself in the role of a wife rejecting her husband's will. Social, psychological, and moral inhibitions could prevent her from doing this. The will could be and often [is] read not merely as a legal document but as a solemn expression of the man's desire and command.<sup>62</sup>

The elective procedure reinforces the historical tradition of viewing the wife's claims as a burden on the rest of the family rather than as a worthy owner.

The second question is why has the community-property system been rejected by the overwhelming majority of the states in this country. The answer is that fourteenth century notions that wives only deserve maintenance and should not acquire equivalent ownership rights to their husbands continue to prevail. To provide wives more control over property, risks moving them from the background to the foreground of the play and disturbing, if not destroying, the phallographic reality. As I will show, such notions became the basis in the 1940s for the separate-property states' rejection of the community-property system even though its adoption would have resulted in considerable federal income tax savings for their citizens. They were also the basis for the federal government's adoption of the joint income tax return in 1948. The federal tax law should be understood as significantly contributing

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60. *Id.* at 348.

61. See UNIFORM PROBATE CODE, *supra* note 10, at §§ 2-201 — 207.

62. STAVES, *supra* note 34, at 111.

to the maintenance of patriarchal power and to the traditional family structure of one wage earner and property owner.

In 1930, the United States Supreme Court held in *Poe v. Seaborn*<sup>63</sup> that each spouse residing in a community-property state should be taxed on one-half of the community income, whether that income arose from labor or from capital. This ruling meant that a couple who lived in a community-property state could split their incomes and enjoy the lower marginal tax rates imposed by the tax system's progressive rate schedule. Income-splitting was available to a couple residing in a community-property state even if only one of the spouses earned taxable income.

The pressure for separate-property states to consider converting to a community-property system intensified as tax rates began to increase at the end of the 1930s in response to New Deal programs and as the income tax emerged as a mass tax in the 1940s to support the war effort. In 1940, approximately seven million Americans paid income taxes. By 1945, that number had risen to forty-two million.<sup>64</sup>

Much of what I am about to say about the community-property controversy and the federal tax system relies on the work of Carolyn Jones, a legal historian and tax scholar.<sup>65</sup> Professor Jones asks the question why, with such incentives in tax dollars, only six separate-property states converted to community property.<sup>66</sup> She concludes that the reluctance to convert can be explained by at least two reasons. The first reason she posits was "a hostility toward a wife's present interest in community earnings and property, which were usually thought of as being the product of the husband's labors."<sup>67</sup> The hostility manifested itself in the now familiar theme of wives receiving windfalls. Professor Jones finds evidence of the antipathy in popular magazines. For example, in 1947 a magazine called the *Nation's Business* reported the following story to demonstrate the "radical change in property laws" that would occur upon the conversion of a separate-property state to community property.<sup>68</sup> The story was of a drunken gold-laden miner from Alaska who went to Seattle and married a woman the same evening that he met her. He bought a hotel after the ceremony. In dividing the property in the divorce action that followed,

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63. *Poe v. Seaborn*, 282 U.S. 101 (1930).

64. See Carolyn Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. 259, 294 (1988).

65. See *id.*

66. See *id.* at 269.

67. See *id.* at 270.

68. *Id.*

the court ordered a wall built through the hotel equally dividing ownership. The report concludes that the hotel symbolizes "how an evening in a community-property state can be profitable for a lonesome girl."<sup>69</sup>

The second reason why most states rejected the community-property system, which is related to the first reason, was the difficulty in moving from a separate-property regime to a community-property regime.<sup>70</sup> For example, the Omaha Evening World-Herald ran a report quoting an attorney who said that the new law "may upset the plans a man has made."<sup>71</sup>

Whether the antipathy toward having wives obtain community-property interests would have been overcome ultimately in most states by the prospect of tax savings cannot be determined. In 1948, the federal government adopted the joint return making it possible for husbands to retain the property rights they thought they deserved and still enjoy tax savings through income-splitting. Not only did the joint-return solution interrupt state law developments to increase the property rights accorded married women, but it did so in a manner that consciously reinforced traditional gender roles within the marriage and the marketplace.

Congress rejected a proposal that would have recognized income-splitting agreements between wives and husbands for tax purposes.<sup>72</sup> This proposal's supporters explicitly argued against the joint return because it:

[did] nothing in the way of improving the wife's position in society, whereas [the income-splitting agreement proposal] is a definite step in the direction of the emancipation of the married woman and the improvement of her economic condition. . . . The bill enables a man and wife to contract between themselves and rewards a wife for substantial services contributed toward the accumulations of the marriage.<sup>73</sup>

Moreover, Congress did not limit the joint-return proposal to earned income, but extended it to unearned income from capital so that, according to the legislative history, one spouse (presumably the husband) would not have to relinquish title and a considerable degree of legal control over income and its source to enjoy the split-income advantage.<sup>74</sup>

The federal and state governments' unwillingness to accord

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69. *Id.*

70. *Id.*

71. *Id.* at 272.

72. *See id.* at 295.

73. *See Revenue Revisions 1947-48: Hearings Before the House Comm. on Ways and Means*, 80th Cong., 1st Sess. 765 (1947).

74. *See id.* at 860.

married women property rights based on their contribution as wives and mothers is particularly incongruous given this period in the United States. During the war years, the percent of all married women working outside the home went from 15.2 percent in 1940 to 23 percent in 1945, as women were asked to contribute to the war effort by taking jobs outside the home.<sup>75</sup> The image of Rosie the Riveter as a patriotic citizen is familiar to all of us. At war's end, women were asked to serve another role. As historian Susan Hartmann indicates, "social stability had replaced military victory as the national goal; and women were needed as wives and mothers rather than as workers."<sup>76</sup> Not only were married women accorded the role of preservers of peacetime virtues and family life, but the baby boom, Dr. Spock's child-centered approach, and the increased availability of consumer goods all operated to set higher work standards on the homemaker.<sup>77</sup> All of this could have easily become justifications for acknowledging the marital partnership and according community-property rights to married women. Instead, fear of women's emancipation fueled by their Rosie the Riveter roles during the war and the traditional urgency of preventing wives from obtaining windfalls at their husbands' expense prevailed in keeping the separate-property system intact.

A further footnote to the community-property/forced share controversy is worth mentioning. The National Commissioners for Uniform Laws promulgated a Uniform Marital Property Act in 1983, which essentially embraces the community-property system. To date, it has been enacted in only one state, Wisconsin. Current reforms to the forced share statutes to provide surviving spouses more protection perhaps should be understood as an attempt to resist pressure to consider expanding married women's rights by adopting the Uniform Marital Property Act.<sup>78</sup>

I want to make clear that the foregoing consideration of community property was not an argument that married women enjoy autonomy and security under a community-property regime. I am using community property only to show the limited nature of the protections under a separate-property system. The community-property system, like the other historical and modern property rights I have described, had the potential to provide married wo-

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75. Jones, *supra* note 64, at 263.

76. See SUSAN HARTMANN, *THE HOME FRONT AND BEYOND: AMERICAN WOMEN IN THE 1940's* 25 (1982).

77. See Jones, *supra* note 64, at 264.

78. See Waggoner, *supra* note 11, at 235-53, for discussion of reforms to the elective share in the 1990 version of the Uniform Probate Code.

men independence, but that potential has never been realized due to laws and practices that have operated to subvert it.

Theoretically, a married woman under a community-property system owns one-half the community property. This means that she has the right to make a will to determine the disposition of that half of the community property. In practice, however, a prevailing estate planning technique in community-property states is the so-called "widow's election will."<sup>79</sup> Although there are an infinite number of variations, fundamental to all widow's election is that her husband executes a will that contains a dispositive scheme not only for his half of the community property but also for hers. Typically, the scheme provides for the property to pass to the husband's children or grandchildren at the death of his wife. In exchange for a wife relinquishing her right to control her half of the community property after her husband's death and to dispose of it herself at her death, she is typically provided an income interest for life and the ability to reach capital only if needed for her health and maintenance. What this technique accomplishes for the husband is obvious: it assures the wife maintenance, it keeps the entire marital estate out of the hands of a second husband, it keeps wives from managing any of the marital estate, and it assures that the marital estate passes to the husband's selected heirs. What this technique represents is the continuing tradition of viewing the wife's rightful claim to be only for maintenance, of denying her any meaningful opportunity to exercise her right to make a will, and allowing fatherhood to be defined in terms of property and inheritance.

This scheme should be quite familiar by now. It resounds with the structure of jointure and the forced share. The income interest for life is an echo of the marital settlements and the election aspect echoes widows' rights converted into family burdens. What should also be familiar to us by now is the role of the lawyer. She or he continues to be devoted to serving the husband at the expense of the husband's wife.

The federal government through its tax laws has given the imprimatur to a similar type of trust for husbands in separate-property states and, not surprisingly, it has become the dispositional scheme that attorneys frequently recommend to their clients. I am referring to a device called a Qualified Terminal Interest Property trust, QTIP, for short. In 1981, Congress enacted the Economic Recovery Tax Act, which included significant

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79. See Arnold D. Kahn & Jon J. Gallo, *The Widow's Election: A Return to Fundamentals*, 24 STAN. L. REV. 531 (1972).

changes to the estate and gift tax laws. Among those changes were new rules regarding the treatment of gifts and bequests between spouses.

Before this Act, gifts or devises between spouses in separate-property states enjoyed favorable tax treatment so that couples in separate-property states could enjoy the same tax advantages that couples in community-property states enjoyed.<sup>80</sup> In other words, the transfer tax treatment essentially followed the joint-tax return approach that had been adopted in the income tax arena. Except for relatively small estates, a husband could transfer 50 percent of his property to his wife tax free.<sup>81</sup> The tax law, however, only allowed a husband to avoid taxes if the gifts or devises were made to his wife in a certain form.<sup>82</sup> Generally, the tax advantages were available if the wife received the property outright or if the wife received a lifetime income interest in the property with the right at her death to appoint that property to anyone she chose.

The Economic Recovery Tax Act provided that all gifts or devises, even if their value exceeded 50 percent of the husband's wealth, could be transferred free of tax so long as the form in which the gift or devise was made met certain conditions — this is referred to as the unlimited marital deduction.<sup>83</sup> An outright gift still qualified. A gift of a lifetime income interest plus the power to appoint to anyone still qualified. In addition, the Act authorized that a lifetime income interest alone qualified — the QTIP.<sup>84</sup> It is no longer necessary to give a wife the power to appoint the property at her death. It should not surprise any of us who know our history of jointure, forced share, and community property to learn that since 1981 the QTIP has become a very popular form of gift-giving for husbands who leave property to their wives.<sup>85</sup> The wife

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80. See 4. ANDREW JAMES CASNER, *ESTATE PLANNING* § 13.1 (5th ed. 1983).

81. I have abandoned gender-neutral language because, given earning capacities and life expectancies, the propertied decedent is likely to be a man and the surviving spouse is likely to be a woman.

82. See CASNER, *supra* note 80, at §§ 13.13.9 - .18, 13.14 - .18.

83. I.R.C. § 2056(a), amended by Economic Recovery Tax Act of 1981, § 403(a)(1)(B); 2056(c), repealed by Economic Recovery Tax Act of 1981, § 403(a)(1)(A). See CASNER, *supra* note 80, at § 13.2.2 - .6.

84. I.R.C. § 2056(b)(7), added by the Economic Recovery Tax Act of 1981, § 403(d)(1); 2523(f), added by the Economic Recovery Tax Act of 1981, § 403(d)(2). See CASNER, *supra* note 80, at § 13.2.7 - .15.

85. Stephen Furman, *Estate Planning to Meet the Specific Requirements of the Corporate Executive*, *ESTATE PLANNING*, Nov./Dec. 1989, at 345 ("Consideration should be given to creating a . . . QTIP. . . . This will allow [the husband] to provide for the income needs of [the wife]. . . [and allow the husband to] direct . . . that the remainder of the property is to pass in equal shares to [their children] at [the wife's] death.") Clifford Bundge, *Strategies to Limit the Consequences of a Surviving Spouse's Election Against the Will*, *ESTATE PLANNING*, July 1983 at 228. ("In

is given a lifetime income interest and at her death the husband provides for his children and grandchildren.

The legislative history regarding these purported tax reforms is especially revealing of the patriarchy's subversion of married women's property rights. It shows how husbands used their wives' contribution to the marital estate to gain the advantage of an unlimited marital deduction and then used the unlimited marital deduction as an argument for permitting a mere lifetime income interest to qualify under it.

One example should be sufficient to demonstrate the corporate "moral stupidity," to use Adrienne Rich's words, of the lawyers and lawmakers. Malcolm Moore, a nationally recognized estate planner from Seattle, Washington testified before Congress:

Even though there are a great number of spouses who make transfers to the surviving or donee spouse in outright form, there are those who are legitimately concerned that the surviving or donee spouse (in many cases a spouse by a second marriage) might later redirect the property's ultimate disposition to persons outside the transferor's family — such as to a new spouse or to the second spouse's children. Those who have this concern want to insure, insofar as possible, that after the surviving or donee spouse's death some property remains for the transferor's children. . . . If a person wishes his spouse to have the full use of the property during such spouse's life, but also wishes his children to benefit from it after the spouse's death, should the law deny him a deduction from transfer tax for such a disposition, when such a deduction is granted for other types of transfers?<sup>86</sup>

He then goes on to argue:

I further believe that there should be an unlimited deduction for all transfers at death between spouses, so that if 100% of a spouse's property is left to or for the benefit of the surviving spouse, there would be no tax. Regardless of how the legal ownership of property is recorded, most spouses do not regard the property as "mine" or "yours" but rather as "ours" (at least insofar as its use is concerned) and, consistent with this

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some cases, a . . . QTIP . . . may discourage or even prevent the spouse from exercising the election to take against the will, thereby allowing the client to keep control of the ultimate disposition of property.") See also John Freeman Blake, *Drafting a QTIP Trust Where Extended Medical Care for the Surviving Spouse is Foreseeable*, ESTATE PLANNING, July/Aug. 1987 at 200 ("If the marital deduction gift is to be placed in trust at all, the preference of the reluctant client is to utilize a general power of appointment marital deduction trust because it appears to restrict the spouse for less than does a . . . QTIP . . . . A QTIP trust may have to be used where the surviving spouse is not the parent of the client's children, or to prevent the single most prevalent nightmare of estate planning clients—the possibility that the surviving spouse may give 'my hard-earned wealth' to a subsequent spouse.").

86. Hearings of Subcommittee on Estate and Gift Taxation of Senate Fin. Comm., June 5, 1981, at 349.

perception, a great number of planned and unplanned death-time transfers of property between spouses occur, which transfers should not be subject to estate tax. Many couples feel that their properties should be wholly available for the surviving spouse's use and their testamentary planning reflects this desire . . . .<sup>87</sup>

Moore equates ownership with lifetime use for women while at the same time he equates ownership with testamentary control for men.

Ultimately, the QTIP in theory and in practice means that wives are not considered worthy of being property owners or of exercising their rights to make wills. Fathers want a Kingdom where they retain the prerogative to be the property-givers to their children and grandchildren.

### Conclusion

The foregoing historical and modern description of marital settlements reveals the intersection of family, property, and patriarchal power. It supports the following observations made by Adrienne Rich:

At the core of patriarchy is the individual family unit which originated with the idea of property and the desire to see one's property transmitted to one's biological descendants. . . . A crucial moment in human consciousness . . . arrives when man discovers that it is he himself, not the moon or the spring rains or the spirits of the dead, who impregnates the woman; that the child she carries and gives birth to is *his* child, who can make *him* immortal, both mystically, by propitiating the gods with prayers and sacrifices when he is dead, and concretely, by receiving the patrimony from him. At this crossroads of sexual possession, property ownership, and the desire to transcend death, developed the institution we know: the present-day patriarchal family with its supernaturalizing of the penis, its division of labor by gender, its emotional, physical, and material possessiveness, its ideal of monogamous marriage until death . . . , the "illegitimacy" of a child born outside of wedlock, the economic dependency of women, the unpaid domestic services of the wife, the obedience of women and children to male authority, the imprinting and continuation of heterosexual roles.<sup>88</sup>

Understanding a wife's function within the family and property law as procreator and, at best, as vessel by which property is transmitted from her husband to his children or from her father to his grandchildren provides us the means "to measure the Kingdom of the Fathers." It can be shown that woman seen as only wife,

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87. *Id.* at 350-51.

88. RICH, *supra* note 1, at 60-61.



procreator, and temporary receptacle of property is embedded throughout law and practice. Consider, for example, Carol Karlson's accounting for the New England witch trials in the seventeenth and eighteenth centuries. She shows that those accused, tried, convicted, and executed were more likely to be women who owned property, but who were from families without male heirs. She writes:

The amount of property in question was not the crucial factor in the way these women were viewed or treated by their neighbors, however. Women of widely varying economic circumstances were vulnerable to accusation and even to conviction. Neither was there a direct line from accuser to material beneficiary of the accusation . . . . However varied their backgrounds and economic positions, as women without brothers or women without sons, they stood in the way of the orderly transmission of property from one generation of males to another.<sup>89</sup>

Similarly, consider the 1977 case of *Engle v. Siegel*.<sup>90</sup> In this New Jersey case, a couple, Albert and Judith Siegel, died together with their two children in a hotel fire. Both Albert and Judith had wills and both wills contained similar common-disaster provisions. The provision provided for one-half the estate of each spouse to be divided between Albert's mother, Rose, and Judith's mother, Ida. Rose predeceased the couple, which meant that Ida inherited their entire estate. Albert's siblings sued arguing that distributing the marital property to Ida was inconsistent with the couple's probable intent.

If there were any doubt that neither Rose nor Ida were considered to be owners, consider the testimony of the attorney who drafted the will. He said that after raising the possibility of a common disaster, Albert and Judith conferred together and then Albert said, speaking for himself and his wife, that they wanted the property "split . . . down the middle so they (the respective families) get half. . ."<sup>91</sup> The attorney then said he pointed out that the word "family" was inappropriate because it was "a broad term."<sup>92</sup> The court concludes from this testimony that the attorney did not suggest that the Siegels should not provide for the persons constituting their family or that they were being told to designate an individual legatee. Rather it concludes that the lawyer was advising them to designate someone who would stand in a "representative

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89. CAROL KARLSEN, *THE DEVIL IN THE SHAPE OF A WOMAN: WITCHCRAFT IN COLONIAL NEW ENGLAND* 102-16 (1989).

90. *Engle v. Siegel*, 74 N.J. 287, 377 A.2d 892 (1977).

91. *Id.* at 295, 377 A.2d at 896.

92. *Id.*

capacity.”<sup>93</sup> Who better to represent nonownership and family than mothers? That felt natural to Albert, natural to Judith, natural to the attorney, and natural to the court. No one hearing the facts of this case could conceive of Ida, Judith’s mother, as owner and so the fair and just result was to assure that Albert’s siblings shared one-half of Albert’s estate and one-half of Judith’s estate.

It is also noteworthy that Judith, one of the testators, was not considered an owner. As the court says, “it is perhaps pertinent to note at this point that the assets constituting the estates of both Albert and Judith were derived almost entirely from Albert’s earnings. Judith had no money that had come from her own family.”<sup>94</sup> Once that was said, the court did not have to worry that perhaps Judith’s probable intent was to have her entire estate go to her mother. Once her ownership in the marital estate was denied, her probable intent did not have to be explored. What better evidence to prove the thesis that married women’s right to own property and the right to devise property in the twentieth century is not significantly different than it was in the fourteenth century? The formal law has changed but the patriarchal tradition continues to dominate the interpretation of society and culture — fundamentally masculine assumptions have shaped our whole moral and intellectual history.<sup>95</sup> In the end, not only did Albert and his lawyer and the court believe that Judith, Rose, and Ida were nonowners, but Judith, Rose, and Ida have also been convinced of their nonownership.

As Adrienne Rich says:

[T]ruly to liberate women . . . means to change thinking itself: to reintegrate what has been named the unconscious, the subjective, the emotional with the structural, the rational, the intellectual. . . . [and] to annihilate those dichotomies. In the being of a woman sold as a bride, or rejected because she is “barren” and cannot produce sons to enhance man’s status, economics and sexuality, legalism and magic, caste structure and individual fear, barter and desire, coexist inextricably; only in the outer world of patriarchal categories and patriarchal denial can they be conceived as separate.<sup>96</sup>

Let me at least begin that transformative thinking process today by pointing out the association of a woman as a mere conduit or vessel has for us a negative connotation. But Adrienne Rich reminds us that:

[I]n primordial terms the vessel is anything but a ‘passive’ re-

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93. *Id.*

94. *Id.* at 296, 377 A.2d at 896.

95. See RICH, *supra* note 1, at 57-58.

96. *Id.* at 81.

ceptacle: it is *transformative* — active, powerful. . . . [T]he transformations necessary for the continuation of life are thus, in terms of this early imagery, exercises of female power.<sup>97</sup>

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97. *Id.* at 98.