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Joseph L. Lewis

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PROPOSED LEGISLATION

IT'S TIME TO ABOLISH DOWER AND CURTESY IN VIRGINIA

*Joseph L. Lewis**

INTRODUCTION

IN its deliberations during 1966 and 1967 regarding estates of decedents, the Virginia Advisory Legislative Council gave particular consideration to the advisability of abolishing the contingent rights of dower and curtesy in Virginia.¹ The VALC had to determine what interests, if any, should be reserved to the surviving consort, and whether the distinction between real and personal property in intestate succession should be abolished.²

In its report to the 1968 Virginia General Assembly, the VALC took note of the fact that most of today's wealth is manifested in personal property, such as life insurance, bank deposits, stocks, bonds, and business interests, rather than land.³ As a result of this, it explained, dower and curtesy offer little in the way of guaranteeing for the surviving spouse a reasonable share of the decedent's property since they attach only to real property.⁴ While recognizing the anachronistic nature of dower and curtesy in modern society, the VALC appeared reluctant to recommend abolishing them because of the predominance of real estate values over personal property in rural areas of Virginia and in some decedents' estates.⁵ It therefore merely recommended to

*Member of the Virginia Bar. B.S., Richmond, 1961; LL.B., 1964.

¹ The dower and curtesy interests in Virginia consist of the right to have an assignment of a life estate in one-third of all the real estate whereof the deceased spouse, or any other to his use, was at any time seized during coverture of an estate of inheritance, unless such interest has been lawfully barred or relinquished. VA. CODE ANN. § 64.1-19 (1968); *First Nat'l Exch. Bank v. United States*, 335 F.2d 91 (4th Cir. 1964).

² REPORT OF THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA ON COMMISSIONERS OF ACCOUNTS AND FIDUCIARIES 6 (1967).

³ *Id.* at 8, 9.

⁴ In support of this conclusion, the VALC reported that England and about two-thirds of the states in the United States have abolished the common law estates of dower and curtesy. *Id.* at 7, 9.

⁵ *Id.* at 8, 9.

the General Assembly that the dower and curtesy interests be converted into interests in fee simple.⁶ This recommendation was introduced in the General Assembly as Senate Bill Number 275.

The VALC and the sponsors of the bill apparently decided that it would be desirable to change dower and curtesy into a fee simple interest in order to remove the distinction between the surviving spouse's interest in real and personal property in case of intestate succession. By making this change, the surviving spouse's interest in intestate realty would be brought in line with his or her interest in intestate personalty.⁷ This change would also give the surviving spouse a greater interest in the decedent's real estate, replacing the presently inadequate dower or curtesy interest.

The bill was referred to the Senate Committee for Courts of Justice which failed to report it to the Senate.⁸ In view of the significance of the proposed change in Virginia law suggested by the bill, a consideration of potential problem areas related to this change appears in order.

PROBLEM AREAS

First, under present Virginia law, the surviving spouse takes all the intestate realty subject to the debts of the decedent, as an heir in the second class if the intestate leaves no issue surviving.⁹ The surviving spouse also takes a dower or curtesy interest prior to the rights of the decedent's general creditors.¹⁰ If real property is sold in the lifetime of the deceased spouse to satisfy a lien or encumbrance thereon created

⁶ This bill contained the following provisions:

1. That VA. CODE ANN. § 64-20 (1950) (defining the curtesy interest) be amended by adding thereto the following sentence: "An estate by the curtesy shall be a fee simple interest." *Id.* at 15.

2. That VA. CODE ANN. § 64-27 (1950) (defining the dower interest) be amended by adding thereto the following sentence: "Dower shall be a fee simple interest." *Id.* at 15, 16.

The Virginia General Assembly then combined the above sections to form VA. CODE ANN. § 64.1-19 (1968).

⁷ This would be an interest in one-third of the surplus personalty if the intestate is survived by issue. VA. CODE ANN. § 64.1-11 (1968). Under VA. CODE ANN. § 64.1-1 (1968), the surviving spouse has no interest as an heir in intestate realty if the decedent is survived by issue but receives only a dower or curtesy interest therein under VA. CODE ANN. § 64.1-19 (1968).

⁸ It is believed this action was taken primarily because the Committee felt that insufficient consideration had been given to the effect of the bill on other provisions of Virginia law.

⁹ VA. CODE ANN. § 64.1-1 (1968).

¹⁰ VA. CODE ANN. § 64.1-19 (1968).

by a deed in which the survivor has united, he or she is entitled to dower or curtesy in any surplus of the proceeds remaining after satisfying the lien or encumbrance.¹¹ If the recommendation of the VALC is adopted, will the surviving spouse's new fee simple dower or curtesy interest still achieve priority over general creditors in the same fashion as present dower and curtesy, or will the new interest be treated as the share of an heir of the estate subject to claims of general creditors of the decedent? Presumably since the interest retains the designation of "dower" or "curtesy," the surviving spouse will have priority over general creditors¹² and thus receive a greater interest in realty than in personalty. The bill, in this respect, would increase, rather than eliminate, the disparity between the surviving spouse's interest in intestate personalty and realty, and could seriously affect the rights of creditors.¹³

Second, if any real or personal estate is conveyed or devised for the jointure of the wife to take effect in profit or possession immediately upon the death of the husband, such conveyance or devise in Virginia bars her dower in real estate¹⁴ unless jointure is waived.¹⁵ There are similar provisions in regard to the husband's curtesy.¹⁶ If it was a purpose of the recommended change to equate the provisions on intestate realty and intestate personalty by changing dower and curtesy into a fee simple interest, jointure should be abolished because there is no jointure in regard to intestate personalty. The surviving spouse is able to receive any property, real or personal, by devise or conveyance, and still retain his or her share of intestate personalty.¹⁷

¹¹ VA. CODE ANN. § 64.1-28 (1968).

¹² This assumption will be maintained throughout the remainder of the article.

¹³ "Some statutes, like that of Florida, have increased the wife's interest to a fraction of the fee without lessening the priority over creditors. This can result in a widow receiving a fortune when the husband had no net worth at death." 2 R. POWELL, *REAL PROPERTY* § 213[1] at 170.18(19) (1967). Paul L. Sayre expresses this viewpoint:

. . . [I]t is a rather serious thing to let the widow take one-third of the realty in fee free from the claims of creditors, regardless of the amount of property involved . . . [This] may result . . . in great injury to . . . [the husband's] creditors, and at the same time leave the widow decidedly more than reasonable protection for life.

Sayre, *Husband and Wife as Statutory Heirs*, 42 HARV. L. REV. 330, 357 (1929).

¹⁴ VA. CODE ANN. § 64.1-29 (1968).

¹⁵ VA. CODE ANN. § 64.1-30 (1968).

¹⁶ VA. CODE ANN. § 64.1-22 (1968).

¹⁷ VA. CODE ANN. § 64.1-11 (1968). Jointure does not bar the surviving spouse from taking an intestate share of real property as an heir under VA. CODE ANN. § 64.1-1 (1968). Professor Emerson G. Spies, in an excellent article, discusses in some detail the complications introduced into the Virginia law of decedents' estates by the jointure provisions. Spies, *Property Rights of the Surviving Spouse*, 46 VA. L. REV. 157 (1960).

Third, if the surviving spouse renounces the decedent's will, he or she takes one-third of the surplus of the decedent's entire personal estate (including intestate personalty) if there are issue surviving, or one-half of the surplus of the entire personal estate if there are no issue surviving.¹⁸ If the decedent leaves issue surviving, the renouncing spouse takes a dower or curtesy interest in both the decedent's testate and intestate realty free of the claims of creditors, or a dower or curtesy interest in testate realty plus a fee simple interest in all of the intestate realty if the decedent leaves no issue surviving; such fee simple interest being subject, of course, to the claims of creditors. Under Senate Bill Number 275, the renouncing spouse would take a dower or curtesy interest consisting of a one-third fee simple interest in all testate realty plus a one-third fee simple interest in all intestate realty if the decedent was survived by issue. Why should the proposed one-third fee simple dower or curtesy interest not be subject to the claims of creditors as is the one-third or one-half interest in personalty? Why should the surviving spouse, in a case where the decedent is not survived by issue, receive only one-third of the decedent's realty upon renunciation of his will while receiving one-half of his personalty? Why should the surviving spouse receive a one-third fee simple interest in testate realty plus all the decedent's intestate realty when he or she renounces the decedent's will in a case of partial intestacy, while he or she receives only one-third or one-half of the surplus personal estate under these circumstances?

Fourth, the surviving spouse takes all the decedent's intestate realty, if there are no issue surviving, as an heir of the decedent, subject to the claims of his creditors.¹⁹ The survivor takes a one-third fee simple interest as dower or curtesy under Senate Bill Number 275 in all the decedent's realty prior to the claims of general creditors of the decedent. If the decedent's estate is insolvent, can the surviving spouse elect to take the one-third dower or curtesy interest ahead of creditors or must the spouse take his or her fee simple interest as an heir subject to the claims of creditors? Presumably the surviving spouse has the right to make an election as to what interest he or she will take, but this is unclear.²⁰ It

¹⁸ VA. CODE ANN. § 64.1-16 (1968). The Supreme Court of Appeals held that the surviving spouse cannot take all the intestate personalty plus one-half of the testate personalty if he or she renounces the will where the partially intestate decedent leaves no issue surviving, but is allowed only one-half of the surplus of the entire personal estate (including both testate and intestate personalty). *Newton v. Newton*, 199 Va. 785, 102 S.E. 2d 312 (1958).

¹⁹ VA. CODE ANN. § 64.1-1 (1968).

²⁰ Of course, it must be acknowledged that the question of whether the surviving

would seem advisable to clarify this matter at the time any changes are made in the dower and curtesy statutes.

Fifth, the bill seriously affects the position of those who have purchased realty subject to an inchoate dower or curtesy interest under the assumption that the interest of the grantor's spouse would end upon his or her death, and prior thereto would be, at most, only a life interest in one-third of the realty. Under Senate Bill Number 275, upon the grantor's death, the surviving spouse would possess a fee simple interest in one-third of the realty which would pass upon his or her death to his or her heirs. This is particularly significant when it is realized that possibly the grantee could not even rely upon his adverse possession to bar the dower or curtesy interest.²¹ If Senate Bill Number 275 were enacted, a prospective purchaser could not afford to buy a parcel of realty if his title examination disclosed a deed far back in the chain of title which failed to recite the marital status of the grantor. He could no longer rely on the probable advanced age of the grantor's spouse as a minimization of his risk.²²

Sixth, Senate Bill Number 275 does not state whether the change in the dower and curtesy interests would apply (1) to dower and curtesy interests vested at the time the change in the law would become effective, (2) to inchoate dower and curtesy interests existing at the time the change in the law would become effective or (3) only to inchoate dower and curtesy interests arising after the change in the law would become effective. This uncertainty would surely create much confusion and could raise constitutional questions. It was probably intended that the bill apply to inchoate dower and curtesy interests arising both be-

spouse can elect which of the two interests to take has remained unresolved in Virginia ever since the surviving spouse became an heir. Such right of election between a dower or curtesy interest and a fee simple interest as an heir has been permitted in other states. See *In re Clemmon's Estate*, 242 Iowa 1248, 49 N.W. 2d 883 (1951); 25 AM. JUR. 2d, *Dower and Curtesy*, § 38 (1966).

²¹ MINOR, REAL PROPERTY § 255 (2d ed. 1928). While Minor supports this conclusion, he points out that an argument could be made that if the husband's right of entry or action were barred by the statute of limitations before the husband's death, the wife would not be endowed since the statute only gives her dower in case she would have been entitled to it if the husband had recovered possession of the land, and he could not have recovered possession after the right was barred by the statute of limitations. Minor concludes, however, that the provision upon which this argument is based simply means that the right of entry or action must be in connection with the kind of estate in which dower is allowed where the husband has the possession. *Id.*

²² The spouse might have survived the grantor and become vested with a one-third fee simple interest in the property. If the spouse survived the grantor and then died, this interest would pass under the spouse's will to his or her heirs if he or she died intestate.

fore and after the effective date of the change in the law, but not to interests vested prior to the effective date thereof.

Seventh, Senate Bill Number 275 fails to remove restrictions on the conveyancing of real property because the grantor's spouse must still join in a conveyance to release his or her dower or curtesy interest in order to give the grantee a clear title. In fact, the bill intensifies these restrictions by increasing the dower or curtesy interest to a fee simple interest.

From these problem areas it can be seen that Senate Bill Number 275 fails to solve many problems already existing, and in fact, creates numerous problems, only a few of which have been mentioned.²³ It is regrettable that the 1968 Virginia General Assembly did not see fit to abolish dower and curtesy in Virginia and revise the law of decedents' estates to give the surviving spouse the same rights in real property as in personal property.²⁴ Although this article will attempt to establish the

²³ There are many more. For example, should the surviving spouse enjoy the quarantine right granted under VA. CODE ANN. § 64.1-33 (1968) if he or she is to receive a one-third fee simple interest in the decedent's real estate? Moreover, would not the statutes which provide for the commutation and assignment of dower [VA. CODE ANN. § 64.1-34, 35, 36 (1968)] be rendered obsolete by the proposed change in the law except in regard to dower and curtesy presumably not affected by Senate Bill No. 275 (*i.e.*, dower and curtesy interests already vested on the effective date of the bill)?

²⁴ House Bill No. 732, introduced in the 1968 Virginia General Assembly, provided that VA. CODE ANN. § 64-1 (1950) [now § 64.1-1 (1968)] would be amended to give one-third of the intestate realty to the surviving spouse and the remainder to children and descendants of the decedent. It is understood that this bill arose from deliberations by the Virginia Code Commission. The sponsors of the bill apparently were seeking to accomplish the same result as the sponsors of Senate Bill No. 275, *i.e.*, to bring the surviving spouse's interest in intestate realty in line with his or her interest in intestate personalty under VA. CODE ANN. § 64.1-11 (1968), which gives the surviving spouse one-third of the surplus personalty if the intestate is survived by issue. They attacked the problem, however, by dealing directly with VA. CODE ANN. § 64.1-1 (1968) rather than VA. CODE ANN. § 64.1-19 (1968) (the dower and curtesy statute).

The bill was referred to the House Committee for Courts of Justice which reached the conclusion that this matter should be studied prior to any change in the law. As a result, it was resolved by the House, the Senate concurring, that the Virginia State Bar and the Virginia State Bar Association be requested to conduct a study of this matter and report thereon to the Committees for Courts of Justice of the House of Delegates and Senate prior to the next regular session of the General Assembly. H.D.J. Res. 170 (1968).

It is believed the failure of House Bill No. 732 to deal in any degree with the dower and curtesy statute was one reason that this legislation did not move forward. The General Assembly apparently took the view that the problem was far too complicated to be solved by a simple amendment to one statute. This is further proof that a complete revision of the law of decedents' estates is necessary before any changes can

advisability of abolishing both dower and curtesy, the emphasis in the remainder of the article will be placed on the abolition of dower, since it is believed there would be no substantial opposition to the abolition of curtesy if dower were abolished.²⁵

ABOLITION OF DOWER

In the Middle Ages land was the principal source of wealth and a husband had neither life insurance, pensions, social security, joint bank accounts nor securities. Dower was desirable because it protected the widow and prevented her from becoming a burden on society.²⁶ Today, however, the position of the widow is not the same as it was in the Middle Ages. The widow has no great need for dower today because of her social security payments, her rights as an heir to a substantial part of her husband's intestate personal property and real property (if the husband

be made in the law affecting dower and curtesy and the rights of the surviving spouse as an heir of the decedent.

²⁵ Those who oppose the abolition of dower and curtesy seem primarily concerned with protecting the wife from the husband's depletion of his estate prior to death. It seems they wish to retain curtesy because it would be unfair to take away the husband's curtesy rights but retain the wife's dower rights.

The lack of concern about protecting the husband is shown by the fact that under VA. CODE ANN. § 64.1-21 (1968), a surviving husband is not entitled to curtesy in the equitable separate estate of the wife if such right thereto has been expressly excluded by the instrument creating same; but there is no similar provision for the benefit of the husband in regard to his separately owned realty. The Virginia Code Commission suggested to the General Assembly that VA. CODE ANN. § 64-22 (1950) [now § 64.1-21 (1968)] be amended to make the separate equitable estate provision applicable to the husband, but this suggestion was rejected by the General Assembly. REPORT OF THE VA. CODE COMM'N TO THE GOVERNOR AND GENERAL ASSEMBLY OF VA. ON REVISION OF TITLE 64 OF THE CODE OF VA. 5 (1968).

²⁶ In the Middle Ages, as in modern times, dower provided a widow with a measure of economic and social security. It likewise afforded support for younger children who, because of the role of primogeniture, ordinarily took no rights in their father's land. Land was the chief source of substance at that time; unless she had land of her own, a widow would frequently have been destitute without some rights in the lands of her husband. The husband's chattels were generally few, and not often of great value; and, even if his personal property were considerable, his widow's assurance of any share therein was uncertain . . . If he died intestate and she survived him, she was entitled to an aliquot share of the personalty, but that share was subject to the claim of creditors. The dower interest, on the other hand, was not subject to the payment of her husband's debts and was the widow's exclusively to enjoy for her life. Dower also gave a widow social standing in the community in an age when social status was closely connected with land and tenure.

1 AMERICAN LAW OF PROPERTY § 5.3, at 622-623 (A.J. Casner ed. 1952).

leaves no issue surviving),²⁷ and her rights to take against any will that she deems unfair to her.²⁸ In addition, title to any joint bank account,²⁹ real estate owned by the husband and wife as tenants by the entirety,³⁰ and any automobile owned by the husband and wife as joint tenants with the right of survivorship³¹ vests in the widow upon the husband's death. Moreover, the widow is usually the principal beneficiary of the husband's life insurance and pension benefits.³²

Dower does not afford as much protection as is generally believed because there are numerous ways it can be defeated. If the husband owns realty jointly with others and there is a partition suit resulting in a sale of the property, the contingent dower interest is barred even though the wife is not a party to the suit.³³ To defeat the dower interest, the husband may have real estate conveyed to himself and another as joint tenants with the right of survivorship so that he will not be seised of an estate of inheritance therein at death.³⁴ He may also defeat dower by having real estate conveyed to himself as a life tenant with a general power of appointment, and a remainder interest reserved for his children upon his death if the power of appointment is not exercised.³⁵

If real estate is conveyed to a corporation, the stock of the corporation is personal property and not subject to dower even if the corporation is solely owned by the husband. Thus, if the husband incorporates his real estate at the time of acquisition, he can prevent his wife from exercising any control over its transfer.³⁶ Where the husband gives a purchase

²⁷ VA. CODE ANN. § 64.1-11, 1 (1968).

²⁸ VA. CODE ANN. § 64.1-13 (1968).

²⁹ VA. CODE ANN. § 6.1-73 (1968).

³⁰ If clearly set out in the instrument. See *Allen v. Parkey*, 154 Va. 759, 149 S.E. 605 (1929).

³¹ VA. CODE ANN. § 46.1-68.1 (1968).

³² See *Cook, American Land Law Reform: Legal Co-Ownership, Dower and Curtesy*, 1960 DUKE L. J. 485, 503; *Report on Bill to Limit Dower and Curtesy to Land Owned on Death*, 43 MASS. L. Q. 68-75 (Oct., 1958).

³³ VA. CODE ANN. § 8-695 (1957). Moreover, the widow's dower interest does not attach to the proceeds of sale.

³⁴ VA. CODE ANN. § 55-20, 21 (1959).

³⁵ See *MINOR*, *supra* note 21, at § 286. But see *Note, Powers of Appointment in Virginia*, 47 VA. L. REV. 711, 715 (1961) for a discussion of the possibility that the possession of a life estate coupled with a general power of appointment, exercisable both during life or by testamentary disposition, will be treated as constituting fee simple ownership of the property in spite of VA. CODE ANN. § 55-7 (1950).

³⁶ See *MINOR*, *supra* note 21, at § 288. If the public policy in Virginia is to give the wife some control over her husband's conveyance of real estate, it is certainly not a well-protected public policy when it can be so easily defeated by simply incorporating the

money deed of trust when real property is conveyed to him, the widow's dower interest is subject thereto by virtue of the doctrine of transitory seisin.³⁷ If the husband wants to defeat the wife's dower and marital rights, he can have real estate purchased by him conveyed to a trust under the terms of which he retains a life interest in the trust corpus and such control thereof that he has almost as much enjoyment of and control over the property as he would have if he held the fee simple title.³⁸ In Virginia, the widow has been highly unsuccessful in attacking this and similar devices as illusory transfers or as a fraud on her marital rights.³⁹

Even if not defeated, the present dower interest in Virginia offers, at best, only limited protection to the widow, as this interest will represent only a small portion of the value of the decedent's real estate, especially if dower is commuted when the widow is advanced in years. Moreover, if the husband desires to defeat the property rights of his wife upon his death, he can rid himself of all his personal estate during his lifetime, without any recourse available to the wife to stop him from doing this or to reclaim the property upon his death.⁴⁰ Since, in modern society,

real estate. Judging from the abundance of incorporated real estate in Virginia, this method of destroying the rights of the wife has been resorted to quite frequently.

³⁷ *Id.* at § 257.

³⁸ The wife would not be entitled to dower because the husband was not seised of an estate of inheritance as required by VA. CODE ANN. § 64.1-19 (1968).

³⁹ Other devices the husband might employ to defeat his wife's property rights include gifts *causa mortis* and deposits in a bank account in the name of the husband as "trustee" for a designated person. A good example of the futility of a widow's attack upon these devices as constituting illusory transfers or a fraud on her marital rights is the case of *Gentry v. Bailey*, 6 Gratt. (47 Va.) 594 (1850). There the husband conveyed certain personal property to a trustee to be held in trust with income and possession to the husband. Upon the husband's death, the trust estate was to be equally divided among his children by his first wife, but he reserved the right to alter the distribution to each child.

The husband died and the wife filed suit to attack the trust as being a will in disguise and claimed that she should be entitled to treat the trust property as part of her husband's estate. In denying the wife's claim, the Supreme Court of Appeals pointed out that in Virginia a husband has the power to alienate, by sale or gift, during his lifetime, the whole or any part of his personal estate and thereby exclude his widow from any interest therein. It also stated, by way of dictum, that the wife might have been successful in this suit if the husband had retained an absolute and complete power of revocation over the trust corpus. 6 Gratt. (47 Va.) at 604. Yet the later case of *Russell v. Passmore*, 127 Va. 475, 103 S.E. 652 (1920) appears to hold that even revocability does not prevent an inter vivos trust from being valid. See also *Freed v. Judith Realty Corp.*, 201 Va. 791, 113 S. E.2d 850 (1960); *Hall v. Hall*, 109 Va. 117, 63 S.E. 420 (1909); *Lightfoot v. Colgin*, 5 Hen. & M. (19 Va.) 42 (1813); 1955-1963 OPINIONS OF BROCKENBROUGH LAMB 86 (1964). Cf. *Norris v. Barbour*, 188 Va. 723, 51 S.E.2d 334 (1949).

⁴⁰ *Hall v. Hall*, 109 Va. 117, 63 S.E. 420 (1909). There the Supreme Court of Appeals stated that while a husband cannot, by will, defeat his wife's claim to her distributive

the value of the husband's personal estate is usually much greater than the value of his real estate, it would seem that, instead of being so concerned about depletion of the husband's real estate, some means should be found to protect the wife from the depletion of the more valuable personal estate.⁴¹

After considering the limited advantages of dower as compared with its numerous disadvantages, even its most adamant proponents must admit that there is serious doubt whether dower is worth saving.

From the point of view of transferees and creditors of the husband, inchoate dower is an encumbrance upon title which impairs marketability. From the point of view of title searchers and conveyancers it frequently presents unexpected difficulties. It is a serious question whether the policy in favor of protecting the wife may not be outweighed by the disadvantages of the restrictions upon the husband's power of alienation and the litigation arising from such restrictions.⁴²

OTHER STATES

At this point it might be helpful to take a brief glance at how other states have dealt with the problems created by dower and curtesy. Some states have abolished dower and curtesy and eliminated the requirement that the grantor's spouse join in the deed conveying realty. For example, in North Dakota, dower and curtesy have been abolished.⁴³ The owner of realty can convey it without his spouse's consent, and the entire estate of a decedent may be disposed of by will, subject only to the homestead rights of the surviving spouse.⁴⁴ In Mississippi, common law dower has

share of his personal estate, he may do so by an irrevocable disposition of property in his lifetime, although he secures a life estate to himself, and his purpose is to defeat the claim of his wife as one of his distributees.

⁴¹ What logical reason is there for a husband being able to transfer his personalty at will but his realty only with his wife's consent? This situation appears particularly ludicrous when stock of a corporation owning only real estate can be transferred without the wife's consent.

⁴² 1 AMERICAN LAW OF PROPERTY § 5.1 at 692-693 (A.J. Casner ed. 1952). Other criticisms of dower have been summed up by Powell as follows:

. . . Modern dissatisfactions with common law dower have proceeded from two convictions, first that an estate for life in a third of the husband's estates of inheritance is too small a share of his land ownership to provide for a widow's needs; and second, that unqualified priority of dower over creditors of the deceased husband is unfair.

² R. POWELL, REAL PROPERTY, § 213 [1] at 170.18 (1967).

⁴³ N.D. CENT. CODE § 14-0709, 56-0102 (1960).

⁴⁴ The homestead in North Dakota is an estate for the life of the surviving spouse

been abolished and the grantor's spouse need not join in a deed of conveyance.⁴⁵ Where a husband dies intestate in Mississippi leaving no children surviving, his widow is entitled to his entire estate after payment of debts, and when the deceased husband dies intestate leaving a child or children, his widow gets a child's part of the estate.⁴⁶ The widow in Mississippi may renounce her husband's will within six months after probate and take her intestate share, but in this situation she can receive only one-half of the real and personal estate.⁴⁷

Other states have abolished dower and curtesy but have inserted provisions in their laws designed to protect the grantor's spouse by preventing a conveyance of realty without the consent of such spouse. Missouri has abolished dower and curtesy and replaced it with a homestead allowance, but, in that state, any conveyance of real estate without the consent of the grantor's spouse duly acknowledged, is deemed to be in fraud of the spouse's marital rights.⁴⁸ Dower and curtesy have also been abolished in North Carolina,⁴⁹ but to keep the husband from depleting his estate, the surviving spouse can elect to take a life estate in one-third of the value of the real property owned by the deceased spouse during coverture.⁵⁰ Thus, if the husband in North Carolina attempts to convey his realty without his wife joining in the deed, his vendee will take title thereto subject to the spouse's right of election, just as

until he or she remarries; if there is no surviving spouse, or if the surviving spouse dies before all the children reach majority, it goes to the children until the youngest reaches majority. *Meidinger v. Security State Bank*, 55 N.D. 301, 213 N.W. 850 (1927). The extent of the homestead is up to two acres of land, if within a town, not exceeding \$40,000 in value, or up to 160 acres if not within a town. N.D. CENT. CODE § 47-18-01 (Supp. 1967).

One writer has suggested that more adequate protection should be afforded the surviving spouse, but he questions the advisability of reviving dower and curtesy. *Meschke, Estates in North Dakota*, 30 N.D.L. REV. 299-300 (1954).

⁴⁵ MISS. CODE ANN. § 453 (1956).

⁴⁶ MISS. CODE ANN. § 470 (1956).

⁴⁷ MISS. CODE ANN. § 668 (1956).

⁴⁸ MO. REV. STAT. ANN. § 474.290, 150 (Supp. 1955). The homestead allowance goes to the surviving spouse and unmarried minor children and consists of an amount not exceeding 50% of the value of the estate but not to exceed \$7,500 in any event. See also *Dribben, Dower, Homestead, Homestead Allowance and Release of Marital Rights under the New Missouri Probate Code*, 21 Mo. L. REV. 151 (1956).

⁴⁹ N.C. GEN. STAT. § 29-4 (1966).

⁵⁰ N.C. GEN. STAT. § 29-30 (1966). The North Carolina General Statutes Commission proposed to the state legislature a Homestead Statute which would have made void every conveyance of realty by the husband without the wife's joinder unless he proved to the clerk of the recording court that the conveyance did not include his principal place of residence. This was rejected in favor of the "election" provision.

he would take subject to dower before it was abolished.⁵¹ Still other states have retained dower and curtesy but have restricted their application to realty of which the deceased spouse is seised at death.⁵² This facilitates free alienation of realty during the grantor's lifetime.⁵³

The Model Probate Code would abolish the estates of dower and curtesy. Upon intestacy, the Code would allow the surviving spouse to take one-half the net estate if the intestate is survived by issue; or the first \$5,000 and one-half the remainder of the net estate if there is no surviving issue, but the intestate is survived by one or more parents, or their brothers or sisters, or their issue; or all the net estate if there is no surviving issue, or parent, or issue of a parent. If the decedent leaves a will, the Model Probate Code would provide that the surviving spouse could elect to receive his or her intestate share until the value of the share amounts to \$5,000 and of the residue of the estate above the part from which the full intestate share amounts to \$5,000, one-half the estate that would have passed to the surviving spouse if the testator had died intestate.⁵⁴

SUGGESTED CHANGES IN VIRGINIA LAW

If the arguments advanced against the retention of dower and curtesy in this article and the examples of other states, which have moved to abolish these archaic institutions, convince the Virginia General Assembly that it is time to abolish dower and curtesy in Virginia and completely revise the law of decedents' estates, the following changes in Virginia law are suggested.

1. A statute should be enacted abolishing dower and curtesy in regard to real estate owned by persons dying on or after the effective date of the statute.⁵⁵ Ample justification for doing this has already been

⁵¹ For a discussion of the North Carolina law, see McCall, *North Carolina's New Intestate Succession Act*, 39 N.C. L. REV. 1 (1960).

⁵² MASS. GEN. LAWS ANN., Ch. 189 § 1 (Supp. 1968); GA. CODE ANN. § 31-101 (1952); TENN. CODE ANN. § 31-603 (1955).

⁵³ For a further discussion of statutes modifying or abolishing dower and curtesy, see POWELL, *supra* note 42, at § 213; TIFFANY, REAL PROPERTY, § 551, 575 (3rd ed. 1939); 4A THOMPSON, REAL PROPERTY, § 1910, 1727 (1961); 25 AM. JUR. 2d, *Dower and Curtesy*, § 38-48 (1966).

⁵⁴ See Toelle, *Succession Under the Model Probate Code, Some Comparisons with the Montana-California Law*, 13 MONT. L. REV. 13 (1952); Simes, *Model Probate Code*, at 59, 68 (1946).

⁵⁵ This would have the effect of abolishing inchoate dower and curtesy on and after the effective date of the statute without affecting dower and curtesy vested prior to the effective date of the statute. Such legislative action would be in accordance with the

outlined in this article, but since the article will be read primarily by lawyers, most of whom engage frequently in real estate transactions, it might be well to mention some practical advantages to the attorney involved in a real estate transaction that would be derived from the elimination of dower and curtesy.

(a) It would no longer be necessary for the attorney to take the word of a grantor that he is unmarried or to search the court records for divorce proceedings if he says he is divorced.

(b) Frequently at a closing, one spouse appears with a deed which has already been signed by the other. It is impossible to ascertain whether or not the signature is actually that of the spouse. This would no longer be important.

(c) In examining titles in the future, when it is found that no recital has been made as to the marital status of the grantor, no question will arise. This is a major problem today even if the lack of recital occurs far back in the chain of title because adverse possession, which removes many title defects by the passage of time, possibly will not serve to bar dower and curtesy.

(d) A grantor's recalcitrant spouse would not be able to prevent the sale of real estate by refusal to sign the deed of conveyance.

(e) There would be no need to worry if the grantor's spouse were mentally incompetent and therefore unable to execute the deed.

(f) Real estate transactions could be more rapidly conducted without the need to arrange for the signing of a deed by the grantor's spouse.

(g) The attorney would not have to create a trust or corporation to which the real estate could be conveyed in a situation where the purchaser wished to prevent his spouse from having a veto power over a later conveyance of the property.⁵⁶

2. The statutes relating to descent of intestate realty and distribution of intestate personalty should be repealed and a new statute enacted, giving the surviving spouse a share of the decedent's net estate (including realty and personalty) after payment of the decedent's debts, funeral expenses and administration expenses. For example, it might be pro-

opinion of the Supreme Court of Appeals in *Wilson v. Wilson*, 195 Va. 1060, 81 S.E.2d 605 (1954), where the Court stated that the wife's inchoate right of dower during coverture may be abridged or taken away by a statute before the husband's death, but it cannot thereafter be so abridged.

⁵⁶ See *Four Pending Bills of Importance to Landowners and Their Counsel*, 1. *Shall Dower and Curtesy Be Abolished and If So to What Extent?* 39 MASS. L.Q. 21 (Dec. 1954).

vided that the surviving spouse receive one-third of the net estate if the decedent leaves issue surviving and all of the net estate if he leaves no issue surviving.⁵⁷ A further provision might be that in case the net estate fails to exceed a certain amount (such as \$10,000), the entire net estate will pass to the surviving spouse even if the decedent leaves issue surviving.

3. The right of the surviving spouse to renounce the decedent's will⁵⁸ should be retained, but the statute setting forth rights upon renunciation should be amended to provide that the spouse would receive, upon renunciation, a certain portion of the net estate (including personalty and realty). For example, it might be provided that the renouncing spouse would receive one-third of the net estate if the decedent leaves issue surviving or one-half of same if the decedent dies without issue surviving. A further provision might be that such spouse would receive all of the net estate if it did not exceed a certain amount (such as \$10,000).

4. It is felt that one should not be unduly concerned about an absolute transfer of his estate by the spouse during his lifetime. Few persons would transfer a substantial portion of their property without retaining some enjoyment and control thereof to insure provision for their needs prior to death. One should, however, be concerned about the so-called illusory transfers, previously discussed in this article, whereby a spouse retains the income from property and control thereof during his lifetime, with the property passing outside his estate upon his death to beneficiaries selected by him, free of the property rights of the surviving spouse. Abolition of dower and curtesy would increase the need for protection against illusory transfers because the grantor's spouse would no longer be able to prevent a transfer of real property without his or her consent. This problem should and can be met by enactment of a statute in Virginia, preventing a person from being able to defeat the rights of his surviving spouse by such easy and obvious means. In drafting such a law, a statute recently enacted by the State of New York could serve as an invaluable guide.⁵⁹ The New York statute appears to

⁵⁷ This is in line with the thinking of the sponsors of Senate Bill No. 275 and the sponsors of House Bill No. 732, previously discussed in this article.

⁵⁸ VA. CODE ANN. § 64.1-16 (1968).

⁵⁹ N.Y. ESTATES, POWERS AND TRUSTS LAW 5-1.1 (McKinney 1967) provides that the following transactions shall be treated as testamentary substitutes and the capital value thereof, as of the decedent's death, shall be included in the decedent's net estate as property subject to the rights of the surviving spouse who elects to take against the decedent's will:

offer a more workable solution than other plans that have been suggested,⁶⁰ however, it by no means affords complete protection to the surviving spouse.⁶¹

5. It is believed the widow could receive protection from the depletion of her husband's estate by his creditors through utilization of the homestead exemption law.⁶² If the homestead law is to be relied upon to protect the widow, it would seem advisable to retain the homestead exemption in essentially its present form but to increase the amount of property subject to exemption on the death of the householder.⁶³

6. An alternative to utilization of the homestead exemption would be

1. Gifts *causa mortis*.

2. Money deposited by the decedent in a joint checking account with another payable to the survivor.

3. Money deposited in a bank account in the name of the decedent in trust for another and remaining on deposit at the decedent's death.

4. Any disposition of property made by the decedent whereby property is held, at the date of his death, by the decedent and another person as joint tenants with the right of survivorship.

5. Any disposition of property made by the decedent, in trust or otherwise, to the extent that the decedent at his death retained, either alone or in conjunction with another person, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof.

⁶⁰ For example, Simes states that any gift made by a married person within two years of the time of death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary. Simes, *supra* note 54, at 68.

⁶¹ It is pointed out in Amend, *The Surviving Spouse and the Estates Powers and Trusts Law*, 33 BROOKLYN L. REV. 530, 538 (1967) that while the New York law covers many transactions designed to defeat the rights of the surviving spouse, it excludes other devices which may continue to prove fruitful means of evasion, e.g., joint and P.O.D. United States Savings bonds, life insurance and powers of appointment, and all transfers which are complete just prior to the death of the decedent. Perhaps Virginia could improve on the New York statute by discovering a means to cope with some of these devices.

⁶² VA. CODE ANN. § 34-4 (1953). Under this section no distinction is made between realty and personalty. This will facilitate use of the exemption to protect both realty and personalty received by the surviving spouse. After the death of the householder, the real estate set apart remains exempt from his debts as well as the debts of his widow until her death or remarriage. VA. CODE ANN. § 34-10 (1953). In the event the householder did not utilize his homestead exemption during his lifetime, upon his death his widow could petition the court to set it aside. VA. CODE ANN. § 34-11, 15 (1953).

⁶³ Protecting the widow through the homestead exemption is a much more satisfactory means than through the dower interest. The dower interest would be of too little value to protect a widow whose husband's realty holdings are limited, and of too much value in regard to the rights of creditors if the husband is a wealthy landowner. The use of the homestead exemption would give the General Assembly some control over the amount of exempt property.

to provide that the first \$10,000 (or some other specified amount) of the decedent's property passing to the surviving spouse would be received free of the claims of decedent's creditors. This would offer protection to both the surviving husband and the surviving wife, as the homestead exemption, in its present form, does not protect the surviving husband from claims of his deceased wife's creditors.

CONCLUSION

It has been the purpose of this article to demonstrate that while a change in Virginia law relating to dower and curtesy is desirable, and, in fact, long overdue, such change should be made only after carefully considering the effect on other provisions of Virginia law. If dower and curtesy is abolished, the law of decedents' estates must be revised to remove the distinction between the treatment of real property and personal property. Yet such a revision must protect the surviving spouse in such a way as not to unduly interfere with the alienation of property by the owner thereof or the rights of his creditors. Although it is anticipated that many will disagree with some or all of the comments made in the foregoing discussion, it is hoped that, at least, this discussion will stimulate thinking about these important matters.