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Published by: Omohundro Institute of Early American History and Culture

Stable URL: http://www.jstor.org/stable/1923419

Accessed: 24/06/2010 18:18

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Married Women's Legal Status in Eighteenth-Century New York and Virginia

Joan R. Gundersen and Gwen Victor Gampel

A single woman in eighteenth-century British America possessed the same legal, if not political, rights as a single man, but when she married she became a feme covert, thereby undergoing a substantial change in legal status. Historians have disagreed on the meaning of coverture in the colonial period and in their assessments of the legal relationship of wives to husbands and to the system of law in general.¹ English common law dictated the major terms of the judicial arrangements for the feme covert in the colonies. While some historians have accepted a literal interpretation of Blackstone's famous dictum that "the husband and wife are one and that one is the husband" to mean complete unity of spouses under the common law, others have rejected this notion.² The foremost twentieth-century English legal scholars, Sir William Holdsworth, Frederick Pollock, and Frederic William Maitland, have shown that married women often appeared as persons before the law in England.³ Our research extends this argument to free white women in eighteenth-century New York and Virginia. We will demonstrate that matrons in

Ms. Gundersen is a member of the history faculty at Saint Olaf College, which contributed financial support for research for this paper. She did the basic research on Virginia. Ms. Gampel, who did the New York research, is a Ph.D. candidate at the University of Michigan.


² Scholars continue to cite Blackstone as the "real" law and then note a few exceptions from Morris, Spruill, or Beard. See, for example, Linda Grant De Pauw and Conover Hunt, Remember the Ladies: Women in America, 1750-1815 (New York, 1976), 12, 151-152.

³ Holdsworth, A History of English Law, 5th ed., III (Boston, 1924), 520, 524,
these two colonies were active participants in the legal system, both because English common law was not as restrictive as has been imagined and because certain practices in the colonies deviated from those in England in ways that benefited married women.

We have chosen to compare New York and Virginia in order to broaden the scope of our study. New York was representative of the middle colonies in its rich ethnic and religious diversity as well as in the balanced nature of its commercial and agrarian economy. Virginia exemplified the more homogeneously agricultural societies of the South. New York's legal system had evolved from the grafting of English common law to an initial Dutch system. By contrast, Virginia maintained from the outset a relatively strong common law tradition. Our assumption is that if such different yet representative colonies exhibited similarities in the legal rights accorded married women and in the local implementation of the law, then historians can begin to develop a new synthesis regarding the legal status of the feme covert in colonial America.

The colonial practice of law was partly the province of amateurs and generally decentralized. Courts did not publish decisions, and legislatures were lax in printing and codifying statutes. This introduces a basic paradox: while the decentralized and nonprofessional nature of the law encouraged local variations or commonsensical decisions, the only readily available written body of law was English. Thus pressures for variations and for uniformity existed side by side. The colonies did experiment, but an increased desire to comply with the British code accompanied the emergence of a trained legal profession. Women's legal status diminished by mid-century as conformity to British practices constrained the flexible colonial practices that had benefited married women. By the time of the Revolution this pressure had not managed to negate all deviations from English prescription, however, and thus to a degree, the Americanized law survived to the end of the colonial period.

A variety of sources cast light on the precepts and practices of law. Colonial statutes and English equity and common law doctrines provide a descriptive and prescriptive framework. To determine how the law actually treated the married woman, it is necessary to examine court, town, and probate records. We use several approaches to ascertain local


4 Virginia's laws were printed individually (slip laws) at the end of legislative sessions. Because it was so difficult to keep track of what statutes were in effect, the legislature started over from scratch twice in the 18th century (1705 and 1748). The first compilation of Virginia's colonial laws came in the 19th century. New York began publishing its statutes in 1691, but until 1751, when the first authorized compilation appeared, the colony faced a difficult situation. Some bills that had not passed were printed, and others that had been passed were omitted or misprinted, so that the legal information available in New York was inadequate. See William Smith and William Livingston, comps., Laws of New York, from the Year 1691 to 1751, Inclusive ... (New York, 1752), ii.
practices. In Virginia we have looked intensively at the records for an area south of the James River and just west of Richmond. Originally part of Henrico County, the area later fell into Goochland, Cumberland, and Chesterfield counties. This locale seems especially appropriate because studies have suggested that the social institutions of Southside Virginia were less advanced than elsewhere in the colony. Thus if certain legal forms were followed here, it seems likely that they extended throughout Virginia. The same area provides a sample of wills that can be used to ascertain testamentary patterns. Because of the numerous ethnic enclaves in New York, we have surveyed records from all portions of the colony, including the Dutch areas of the Hudson Valley, the Puritan settlements on Long Island, and the heterogeneous society of New York City.

Our investigation explores both common and statutory law in relation to the following questions: Could a married woman dispose of her property, make contracts, or sue for debts? If widowed, was she named administratrix or executrix of her husband’s estate, and did she become the guardian of her children? Was the dower right enforced, and did husbands provide their wives with at least the minimum amount of real and personal property required by law? Did the colonists make any efforts to improve the legal status of wives? For example, did land conveyances change to benefit the feme covert? Last, with regard to family law, what economic options were open to the married woman? Our findings reveal that in every respect the New York and Virginia feme covert was very much involved in the legal system. Consequently, the traditional Blackstonian concept of marital unity does not apply.

**Property Rights and the Married Woman**

Women came in contact with the civil law in two general ways: in matters of property and contracts and of family law. In both regards, the common law definition of feme covert was the major disabling factor for women. A feme sole, the legal term for a widow or spinster, could convey property, make a valid contract, sue or be sued, execute a deed, and make a will. Technically, a feme covert could do none of these things without her husband’s consent or participation.

In practice, in the early eighteenth century both New York and Virginia were willing to modify the common law restrictions when necessity or reason required. Three examples involving the rights of married women to dispose of property or to designate a guardian illustrate this flexibility. In 1709 the Henrico County Court in Virginia debated whether to admit an oral will made by Jane Durand. The court was unsure whether her husband (apparently a mariner) was dead, hence whether her will was valid. Lacking determinate information, the justices ordered the will recorded and an estate inventory taken; they also honored the woman’s choice of a guardian for her child. New York courts occasionally went

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5 Henrico County, Virginia, Order Book, May 2, 1709 (microfilm), Virginia State Library, Richmond, Va. Unless noted otherwise all Virginia county records are located in the Virginia State Library.
beyond English practice and recognized the wills of married women. For instance, under common law rulings a wife could not reserve the right to grant legacies from an estate placed in trust for her before marriage, even if her husband had consented. The Westchester County Court, however, honored and proved the 1759 will of Elizabeth Sands which began "By and with the advise and consent of my husband Samuel Sands, and my trustee Elisha Barton, I do make this my last Will and Testament." Likewise contrary to law, Martha Smith of Long Island, though married, ran a very lucrative whaling business in the first decade of the century without resorting to equity law to declare herself a feme sole trader.

Feme covert status, as interpreted by the courts of these colonies, permitted the filing of suits by married women if they acted jointly with their husbands. Court records from Goochland, Cumberland, and Henrico counties indicate that the joint suit was the normal procedure in Virginia. The Minutes of the Mayor's Court for the City of New York, 1707-1735, confirm a similar practice in that colony. A joint suit covered all debts owed to a wife, whether contracted before or during the marriage. In all likelihood aspiring young New York law students learned this from a book of precedents which included the case of David and Margaret Jones. The Joneses were filing a joint suit to collect a debt of £50 incurred before Margaret married. Stephen Stockcum, the defendant, had refused to pay because he erroneously believed that, because a married woman could not make a valid contract, the debt he owed Margaret while she was single was no longer in force. The New York Supreme Court upheld the debt. Thus the would-be lawyers learned both that marriage did not invalidate contracts and that married women should file joint suits.

The joint suit also served in Virginia and New York as the normal procedure to settle debts owed to an estate administered by a widow who remarried. In New York in 1736, for example, Gabriel Stelle and Margaret Stelle, widow of Isaac Carrie, filed together to collect a debt

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6 William S. Pelletreau, ed., Early Wills of Westchester County, New York, from 1664 to 1784... (New York, 1898), 163.

7 Feme sole trader meant that with a husband's consent or a court order dispensing with the need for his assent (for example, if he had deserted her) a woman could go into business and make contracts, sue and be sued as if she were feme sole. See Linda Briggs Biemer, "The Transition from Dutch to English Law: Its Impact on Women in New York, 1643 to 1727" (Ph.D. diss., Syracuse University, 1979). Biemer believes that Martha Smith was able to circumvent English practices because of wealth and class.

8 Minutes of the Mayor's Court..., microfilm, Reels MC3, MC5, Queens College Historical Documents Collection, Paul Klapper Library, Long Island, N.Y.

9 Peter Saunders, "Forms of Sundry Precedents: Forms of Peter Saunders," microfilm, Box 5, p. 109, New-York Historical Society, New York City. This is a collection of 18th-century cases. Such books of forms were references for lawyers and training tools for students. Paul M. Hamlin, Legal Education in Colonial New York (New York, 1939), 66.
owed to Isaac. Likewise, a husband and wife joined suit to claim bequests made to the wife prior to marriage. "Cornelius Van Dyke who hath intermariied with Elizabeth the Relict and Administratrix of Captain Silvester Salisbury Deceased" was co-plaintiff in a suit by Elizabeth to recover land given her under the terms of the captain's will. Rarely did a new husband sue in his own name alone for debts due his wife in her own right or as administratrix.¹⁰

Sometimes a remarried woman retained some independence of action as administratrix, executrix, or guardian.¹¹ In both New York and Virginia remarried women occasionally appear in court records as if they were still feme sole. Elizabeth Lavillain of Cumberland County, Virginia, remarried twice while administering the estate of her first husband, Anthony Lavillain. When she filed the final report, the accounting for each year appeared under her name alone. Her rapid changes of marital status had worried the men who had posted bond for her administration, and they had petitioned the court to require her last husband, Joseph Starkey, to post bond for the estate. Starkey refused, and Elizabeth Lavillain Starkey presented the accounts alone. Clearly she had sole responsibility.¹²

The Dutch heritage of New York allowed another exception to English testamentary practices. Roman-Dutch law permitted husbands and wives to execute joint wills. By this system the wife automatically took immediate possession of one-half of the joint estate when her husband died. She also had the right to decide how the remainder would be divided unless the deceased husband specified otherwise. Often the joint will granted the remaining spouse the entire estate, the only restriction being a provision that half would go to the children if the widow remarried. In a sample of ninety-eight Dutch wills filed before 1700, half were joint. Unfortunately for New York married women, the custom rapidly declined in the eighteenth century, even though courts continued until the Revolution to honor any Dutch joint wills.¹³ Perhaps concern over the

¹⁰ This case is from Joseph Murray MS., Murray Collection, 61-64, Columbia Law School, New York City. Joseph Murray was a prominent 18th-century New York lawyer. The debt in the Stelle case was contracted in 1729. For the Van Dyke case see "Proceedings of the General Court of Assizes Held in the City of New York, October 6, 1680, to October 6, 1682," N.-Y. Hist. Soc., Collections, XLV (1912), 21-22.

¹¹ An administrator (administratrix) is the person appointed to handle the affairs of a person who has died without making a will. If the deceased has left a will, then the person (or persons) expressly or implicitly indicated by the terms of the will becomes the executor (executrix).

¹² The accounts showing her name changes were all registered in 1753. Cumberland County, Va., Will Book, Nov. 26, 1753.

legality of these wills, more than anything else, led to the demise of the practice. Fear of a challenge led Margaret Van Slechtenhorst Schuyler to execute a new will in 1711. Her youngest son was “apprehensive that by the strict rules of the common law, the will made by my said husband and myself on March 4, 1683 [would] not be authentick enough to make such equal division among our eight children.”14

In Virginia and New York, as in England, a widow normally became the administratrix of her husband’s estate. By statutory law New York widows had first right (rarely refused) to administer an intestate husband’s estate, and the courts upheld that right. In Virginia a wife also had first claim. Mary Anne Dutarte complained in 1709 to the Henrico County Court that Peter Chastain had been appointed administrator of her husband Lewis’s estate before she arrived in Virginia. The court complied with her petition by voiding its earlier commission and issuing a new order naming her as administratrix. Nor did Virginia women give up their right of administration when they remarried. The courts did not name the new husband as administrator, although they might ask for new security.15

To mitigate the disabilities placed on married women under the common law, the courts and legislatures of the two colonies also provided protections for the feme covert consistent with English law by including her in statutes covering wards and minors. Every statute governing property conveyances, debts, or similar actions provided that femes covert, minors, and others unable to bring suit in their own names would have a period of grace, often as long as ten years, to bring suit when their coverture, wardship, or minority ended. New York statutes usually limited the period for legal action to three to seven years. For example, a 1710 act “for the better Settlement and Assureing of Lands in this Colony” gave a widow three years to bring suit or be “utterly barred” from redress.16 Widows occasionally made use of these rights. In 1748 a


14 Albany Court of Probate of Wills, Queens College Hist. Doc. Coll., Box 5; Abstracts of Wills, II, 73-74. See also David Narrett, “Patterns of Inheritance in Colonial New York City, 1664-1775: A Study in the History of the Family” (Ph.D. diss., Cornell University, 1981), chap. 3. According to Narrett, the shift from mutual wills to those made solely by men did affect the status of women of Dutch descent in New York City. Although the widows continued to inherit the same portion of the estate whether or not they made a joint testament in the period 1664-1725, there was a decline in granting wives sole administration of the estate. After 1751 testators of Dutch origin significantly reduced the amount of real property they bequeathed to spouses. Thus Dutch women lost the most in the transition to English inheritance practices.


16 The period of grace for femes covert was above and beyond the statute of limitation governing the act. See, for example, William Waller Hening, ed., The
Goochland County jury awarded 5s. damages to Tabitha Evans, who had sued to recover her dower rights in land sold while she was under coverture. The courts also allowed married women to sue to protect their rights. Under equity procedures an adult “next friend” could sue to protect the rights of a minor or feme covert. Thus “Martha Clay wife of Charles Clay by Abraham Green her next friend” sued “the said Charles Clay” in Cumberland County, Virginia, in 1770.17

New York also followed English common law inheritance rules that protected a widow’s property rights. If the husband died intestate, New York awarded the widow one-third of his personal property or one-half if there were no children. She also received her dower right to a life interest in one-third of the realty in which the husband had been seised during coverture. In other words, the widow enjoyed the use and profit of one-third of their land during her lifetime. On her death the property would then descend to the husband’s heir-at-law. A statute of 1683 granted the dower within forty days, during which time a widow could remain in her late husband’s house. This law, however, was disallowed by the crown, and custom permitted the widow to remain as long as she desired. Necessity dictated that at times a woman enjoy the use of the entire estate during her widowhood, particularly when minor children were involved.18

The inheritance practices of New Netherlands helped to create a milieu that encouraged property holding and business activity among New York married women. Unlike the English law that provided a dower right as a widow’s old age pension, the Dutch practice called for an equal division of marital assets. On the death of either spouse both realty and personality were divided into equal shares. One-half belonged to the survivor, and the other could be disposed of by the decedent by will, or in the absence of a will would pass to the intestate heirs. As a result Dutch women not only automatically received half of the estate but usually a part of the intestate property. Several of New York’s most notable businesswomen inherited their lands under Dutch custom. The introduction of English inheritance practices diminished the property rights of eighteenth-century wives, but the transition was not abrupt, since women who had inherited under the old Dutch system remained active in business for many years.19

A widow’s share in Virginia was nearly identical with that under the English system in New York. For intestate estates, a Virginia widow

Statutes at Large; Being a Collection of All the Laws of Virginia . . . (Richmond, Va., 1809-1823), III, 522, and Colonial Laws of N.Y., I, 712-713.

17 Goochland County, Va., Order Book, July 20, 1748; Cumberland Co., Va., Order Book, Mar. 27, 1770, and Mar. 26, 1771.


received one-third of the personalty after debts were settled and a one-third life interest in the realty. If a man wrote a will, he could reduce his wife's share of the personal estate, but she could not receive less than the share given to a child. If there were only one or two children, the woman was entitled to at least one-third.

The difference between the dower one-third life interest in real estate and the unencumbered but variable share in personal property led to a unique feature of Virginia's inheritance law. In 1705 the legislature declared that slaves were real estate. The intent was to encourage landowners to consider slaves and the land they worked as a package, and provide for entail. Thus a widow would get the same share in slaves as she did in land. The numerous exceptions written into this law made clear that the assembly wanted slaves treated as chattels in every way except inheritance. The law did not work well, and the burgesses modified it in 1727 to make more explicit the wife's dower right to slaves (while vesting ownership in the husband during his life) and to prevent this movable property from leaving the colony before it passed into the hands of residual heirs. In 1748 the colony attempted to simplify inheritance by making slaves personal property. The inheritance statute enacted the same year, however, continued the widow's life interest in one-third of her husband's slaves rather than letting slaves pass to her as part of the personal estate. The crown disallowed these laws, leaving the situation as it stood in 1727. Thus Virginia widows had important rights to a one-third life interest in the family's slaves despite their lack of control of this property while their husbands lived.20

The law also protected widows whose husbands slighted them in wills. In both New York and Virginia, if the husband left a widow less than the share specified in law, she could renounce the bequest and sue for her dower right, the one-third life interest.21 Women did exercise the right to claim the widow's portion when dissatisfied with their husbands' bequests. William Maxey of Virginia ordered that his plantations be rented out during his widow's lifetime and that she receive a feather bed, a horse with sidesaddle and bridle, a Negro girl named Doll, and £15 yearly for life. Mary Maxey preferred, however, to have a place to live and control of their four-hundred-acre farm. Accordingly, in 1768 she renounced the legacies and claimed her share under law.22 She was not the only woman to take this step after mid-century, but the action remained rare. After 1750 an increase in the number of wills giving wives no interest in land indicates that women had something to gain by filing such suits, but the rarity of the suits reflects the fact that most husbands exceeded the legally required bequest.

Under the rule of freedom of testamentary disposition, husbands could bequeath their wives whatever they pleased as long as they met the minimum dower requirements. Our sample of 131 eighteenth-century Virginia wills reveals that men usually gave their wives more than the statute governing inheritance required. As the century progressed, however, the legacies changed from unencumbered ownership to life interests. There was also a trend toward granting more of the personal property and slaves to the wife while saving the land for the children. Increasingly, sons received the land and daughters got slaves or cash, reflecting a change from a more sexually neutral pattern.

Only 6 percent of husbands in the Virginia sample limited their wives' inheritances to the period of widowhood, although such limitations increased later in the century. The phrase "what the Law directs," which appears in the will of Cumberland County resident Edward Bryer, also appears in a few other wills, underlining awareness of the legal requirements. The shift from unencumbered interest to life interest, and the more frequent use of limitation of property to widowhood, had great consequences for the freedom of widows to manage their affairs. It is

The sample is not totally random. The wills, mainly from an area south of the James and upriver from Richmond, cover the years 1700-1780. They are part of a family reconstitution project that focuses on the French Huguenot parish of King William and uses a sample of English wills from the same locality as a control. By 1750 intermarriage was such that many English families were part of the King William network.

Unencumbered ownership meant that there were no restrictions on transfer or sale. A life interest gave a person possession of the land for his or her lifetime, after which the land passed to another person already specified. Thus the person with a life interest did not have the sole right to sell the property. Before 1750, 26% of the wills left the wife a life interest, 14% made her sole heir, and 24% gave her an unencumbered share. The other 36% included wills of widows and widowers as well as those who received no land but were named executrices of the estate. None were cut out entirely. After 1750, 41% received a life interest and only 3% an unencumbered share; 2% were sole heirs. The rest, 54%, included 8% executrices only, while the rest were the wills of widows or widowers. "Dower" is the life estate to which every married woman was entitled on the death of her husband intestate, or, in case she dissented from his will, one-third in value of all lands of which the husband had beneficially seized in law or in fact, at any time during coverture. It applies to real estate exclusively. The data from Lois Green Carr and Lorena S. Walsh's study of Maryland bequests suggest a similar shift in that colony ("The Planter's Wife: The Experience of White Women in Seventeenth-Century Maryland," William and Mary Quarterly, 3d Ser., XXXIV [1977], 566).

Henrico Co., Va., Deed Book, June 1744; Cumberland Co., Va., Will Book, Aug. 22, 1768. Daniel Blake Smith has found that after 1750 almost half of the widows with children were limited to bequests for widowhood in Albemarle County. On the other hand, before 1750 in Maryland the rate seems to have been closer to ours for Virginia. Smith, "Family Experience and Kinship in Eighteenth-Century Chesapeake Society" (Ph.D. diss., University of Virginia, 1977), 367; Carr and Walsh, "Planter's Wife," WMQ, 3d Ser., XXXIV (1977), 568.
possible that husbands came to put less trust in their wives' managerial abilities, indicating a changing attitude toward women. It is also possible that the men feared the effects of remarriage on the estate that would eventually pass to their children. Thus it seems that husbands increasingly worried that women would not be able to protect the estate after remarriage. There was no increase in the remarriage rate of widows to heighten this fear, nor do we find a correlation with any decrease in the availability of land.

New York men followed a more restrictive pattern than Virginians in bequeathing land to their spouses and were more likely to circumscribe their widows in other ways as well. The wills of New Yorkers were consistent over time, except for the years 1720-1740, with about two-thirds of the bequests being life interests. Between 1720 and 1740 the percentage of life interest bequests dropped to fifty-one to fifty-six, and the percentage of widows who were left no interest in land increased. Despite these limitations, in every decade at least three-quarters of the men bequeathed their wives the minimum or more required by dower and New York law.26

Similarly, although New Yorkers were more likely than Virginians to place such restrictions on widows as the loss of a portion of their legacies should they remarry, two-thirds of the husbands prescribed no such limits. In one common pattern the wife received the use of all real and personal property until the eldest son or all of the children came of age. At that point the widow normally retained only the use of the house or part of the house. There was a definite tendency after 1750 to bequeath a smaller portion to the widow and limit the household space she would occupy once the children came of age. New York widows relied on their roles as administratrixes of estates and as guardians of minor children to maintain their lifestyles. In these cases the estate often remained intact for many years. (As a result, when children came of age and the estate was divided, widows often found themselves in reduced circumstances in personality and land.) The majority of wills followed the law and granted the widow her share of the personal estate. A significant minority of the women, 44 percent, received more than an equal share of the personal estate. Thus, although widows in New York were not as well provided for as those in Virginia, they still fared better than the minimum statutory requirement for both real and personal property.27

26 The quantified evidence in this paragraph is based on a random sample of 120 New York wills drawn evenly by decade from the New York counties abstracted in the N.-Y. Hist. Soc. for the years 1700-1750. They are controlled for wealth and nationality. The figures for meeting dower limitations are a conservative estimate reached by combining those wills that specified life interest, a share, or the whole estate as the wife's portion. Conceivably, among those wills where the widow received "the remainder" could be some that would meet dower requirements. The percentage is also lowered because 17% of the wills could not be coded on this question.

27 Christine H. Tompsett, "A Note on the Economic Status of Widows in
The grant of a life interest theoretically limited a widow's ability to alienate the property, but it did not eliminate the possibility of doing so in either New York or Virginia. Both colonies occasionally granted widows the right to sell land inherited under intestate laws and thus held as a life interest. The New York legislature passed several laws similar to the one of 1712 "to enable Mary Brat, widow, of Johannes Brat, late of this County Albany, to dispose of his Lands and Tenements, for Payment of his Debts, and educating his Children." The widows of both Richard Crego and John Parmyer successfully petitioned the assembly in 1715 and 1721 for permission to sell lots (one with a house) held in life tenure in New York City. The right to dispose of land was also granted to a widow who inherited by intestate succession. The motive of the legislature in passing these private acts was to aid creditors and children rather than to show respect for a widow's rights. Any holder of a life interest could sell it. For example, in 1757 Elizabeth Starkey sold for £150 her life interest in lands she held from the intestate estate of her husband Anthony Lavillain. There are numerous Virginia deeds bearing the signatures of a widow and the heir to the land on her demise. These deeds conveyed both the woman's life interest and the future title in fee simple claimed by the next heir. The records do not indicate how the sellers divided the profits.28

Fortunately for married women, English law concerning land transfers proved cumbersome. Americans found the English attachment to an ancestral estate outmoded in a land-rich, labor-poor country. New Yorkers and Virginians speculated in land, traded estates to consolidate holdings, and sold worn-out acres in order to purchase fresh ones elsewhere. Under such circumstances a couple had to be able to dispose of any land brought to the marriage by the woman or acquired after marriage. In England conveyance of such land followed a circuitous procedure called a "fine and common recovery," in which a deed by the husband was accompanied by the wife's formal relinquishment of dower rights. Because a married woman had no independent legal existence, English law required a legal fiction to enable her to appear at court for a separate examination concerning her willingness to a sale. The process prevented a husband from selling the wife's inchoate property without her knowledge and consent, but it emphasized the subordinate status of a feme covert. About 1700 the colonies began to simplify the form of deeds, proceeding

Colonial New York," *N.Y. Hist.*, LV (1974), 328-329, establishes that as the century progressed widows found themselves in increasingly reduced circumstances because husbands bequeathed them less personal property and also because settlements of estates frequently required liquidation of some assets to pay debts. As a result, widows appeared on the tax rolls with less than a third of the valuation before their husbands' deaths. This probably exaggerates the plight of widows because tax assessors were inclined to undervalue estates.

in a manner suggesting a conception of equality or partnership in marriage. The new form was the joint deed, an important modification of English law.\textsuperscript{29}

The joint deed developed differently in the two colonies. While New York never enacted a joint-deed statute, Virginia made this method the statutory means of conveying land in which a married woman held an interest.\textsuperscript{30} A joint deed named the husband and wife together as the sellers, and both signed the document. Following the English fine-and-recovery tradition, the wife was then examined to assure the court that she had not been coerced. Other colonies followed suit. In 1764 the Pennsylvania Supreme Court, for example, upheld the tradition in that colony of using the joint deed followed by a private examination. Maryland, too, made similar provisions in its laws during the eighteenth century.\textsuperscript{31}

In Virginia the practice could vary despite the statute. Other forms of deeds are found in the records, but the joint deed was the most common. Occasionally, the wife's name does not appear in the document but is among the signatures. In other cases, the wife neither signed nor appeared as a party in the deed, but invariably the court registered her private interview. County courts were repeatedly instructed to enter these interviews. Since the women did not always appear in court on the day the conveyance was registered, the records of the interviews are scattered throughout Virginia deed books, either separated from the deeds or squeezed into the margins of the entry. In a few cases the private interview did not occur in court, and a signed, witnessed affidavit was registered instead.\textsuperscript{32}

New York land conveyances were even more diversified. A statute of 1691 and its amended form in 1771 provided only that no estate of a feme covert could be legally sold unless she previously (and privately) acknowledged the sale before a member of the council or a judge of the supreme, chancery, or common pleas courts. The examiner was to sign an endorsement to the deed certifying the separate examination. However, counties

\textsuperscript{29} Morris, History of Law, 166-171; Mary Sumner Benson, Women in Eighteenth-Century America: A Study of Opinion and Social Usage (New York, 1935), 238-239.

\textsuperscript{30} Hening, ed., Statutes at Large, III, 319. Ryan noted that some deeds had joint signatures and that some private examinations took place, but never stated that the law had changed (Womanhood in America, 28-29). Spruill also ignored the legal change (Women's Life and Work, 360).


\textsuperscript{32} Deed of James Robinson to William Battersby, Goochland Co., Va., Deeds, Jan. 15, 1744/5; Susanna Robinson dower relinquished, \textit{ibid.}, Nov. 19, 1745; Deed of William and Hester Lansdon to Thomas Turpin, \textit{ibid.}, May 16, 1732; Power of Attorney from Susanne Michaux to William Randolph, Henrico Co., Va., Deeds and Wills, June 2, 1707.
pursued at least four methods in different periods. Some deeds before 1708 in the East Hampton town records suggest that the husband controlled all the property and conveyed it by himself. The deeds make no mention of any relinquishment of dower rights or power of thirds by the wife. Her signature does not appear, and there is no record of a private examination. After 1708 this type of conveyance lapsed in East Hampton, and probably few, if any, deeds of this kind were made elsewhere in New York. Both the East Hampton town records and the Hempstead records of Queens County contain fine-and-recovery deeds. The wife is not mentioned in them, but she signed them and surrendered her dower rights. For example, “I Rachel Carpenter wife of John . . . do . . . give, grant . . . surrender up all my rights of Dowery and power of thirds . . .” The court examined her privately, as required. The third and most popular form of conveyance in New York was the joint deed, which, as noted, used the same procedure as that in Virginia. Last, in New York, the wife herself occasionally procured the conveyance because she lived apart from her husband or because an antenuptial agreement had been made. Under English law a married woman could circumvent many of the common law disabilities of a feme covert through an antenuptial agreement that permitted her to retain control of property. New York women at times used such agreements. For example, by her marriage contract with John Tooker, Sr., Hannah Elton could “alienate, give and dispose of to whomever she pleases” all that estate “which at her marriage she brings to John Tooker.”

While the dower right potentially gave the married woman protection in real estate transactions, the common law provided less protection for personal property. On marriage, a woman’s wages, livestock, clothes, jewels, furniture, and other income all became her husband’s for his lifetime. Yet it must be noted that he could not bequeath her “paraphernalia” (personal possessions) to others. Even though New York and Virginia made no statutory provisions for this rule of paraphernalia, each strictly adhered to the principle. Examination of several hundred wills written in New York between 1745 and 1760 shows that no man willed such property to another person and that only one man bequeathed to his wife

her own jewels and "apparell." The sample of New York wills from 1700 to 1760 reveals similar behavior. In no Virginia will examined does a husband mention his wife's clothing or personal possessions, nor does the wife's apparel or jewelry appear in any estate inventory. Magdalene Trabue Chastain, for example, had several pieces of jewelry to leave her children in 1727, but these are listed in neither of her two husbands' estates. The courts widely honored the rule of paraphernalia. Historian Julia Spruill found that seventeenth-century courts in the South recognized paraphernalia when selling estates, and Richard B. Morris found a similar protection in the North in debt cases.

Thus in both New York and Virginia, custom and statute modified the common law concerning women's property rights. In general, the colonies took the common law concepts, such as dower, and extended them in ways that gave women more control over property than their English counterparts enjoyed. Similarly, practice indicates that women did not disappear as legal entities when they married but rather joined with their husbands to pursue legal obligations incurred before marriage. A remarried woman retained administration rights but usually joined with her new husband in suits to recover debts. In practice, generous inheritances from husbands often left widows in control of a considerable share of property, while the honoring of a widow's rights to paraphernalia allowed her to regain control over personal effects. Life tenureship certainly limited these rights, but the widow was not stripped of her clothing and jewelry, nor could life tenureship prevent the sale of lands. Neither British common law nor colonial practice deprived the married woman of all property rights.

Rights within the Family

The legal relationship of wife and husband followed a pattern similar to that described for property rights. English practice was not totally restrictive, and colonial practice at times allowed even greater freedom. To assess the legal status of married women in the family we will focus on guardianship customs, economic rights, and powers of attorney.

While seeking to recognize the feme covert's property rights, neither New York nor Virginia tampered with traditional laws of guardianship. The common law gave the husband sole control of his children during his lifetime, and unless he specifically named someone else in his will, the courts gave preference to the mother as guardian on his death. Virginia law authorized the father to bind out children to trades and to name guardians without the mother's consent. A New York father also had the

37 Henrico Co., Va., Deeds and Wills, Oct. 3, 1726, and May 1731.
38 Morris, History of Law, 166-171; Spruill, Women's Life and Work, 360-361.
right to assign the custody and tuition of his children, born and unborn, to any person or persons he might select, either by deed during his lifetime or by his will.40 However, the extant records in Virginia and New York indicate that fathers very rarely availed themselves of this right, and the provisions in wills confirm this finding. The sampled wills for both colonies almost uniformly, by their silence, left guardianship to the widow. Only one Virginia and one New York will took guardianship from the mother.41

Unless specific complaint arose or a child requested a different guardian, the courts left children with their mothers. Thus, in Virginia, Peter Anthony Lookado assumed that his wife Elizabeth would be their children's guardian without specifically naming her as such in 1768, when he left her a life interest in all of his land and estate "for the better support education and maintenance of my children."42 New York husbands did likewise, and that colony's statutes clearly designated mothers as guardians of minor children in intestate administrations. The New York Chancery Court showed a similar preference for the mother as guardian unless she remarried. A minority of wills made provision for the education and training of children. A few people, notably widows or widowers, eliminated the need for a guardian by declaring a teenage child of age. The one Virginia will that did specify a guardian other than the mother actually varied little from the norm. The mother, Judith Hughes, was the joint administratrix of the estate with guardian Jacob Michaux. When Michaux died a few months later, guardianship reverted to Hughes.43 All the evidence suggests that women had control of their children in practice and that this was considered proper by courts and husbands alike.

Remarriage provides an important test of women's separate existence in law. Since coverture might limit a woman's ability to protect property eventually coming to her children, the courts had the power to intervene. Such interference was rare in New York. Before 1767 the New York Chancery Court heard only one or two guardianship suits per year. From

40 Hening, ed., Statutes at Large, IV, 285, V, 449. In New York testamentary guardians were appointed by virtue of 12 Car. II c. 24, passed in 1660 and adopted in New York.

41 The one New York will was Dutch, but this is a statistically insignificant part of the Dutch sample. Seventeenth-century studies suggest that Dutch men frequently preferred male relatives as guardians. See Berthold Fernow, ed., The Minutes of the Orphanmasters of New Amsterdam, 1655 to 1663 (New York, 1902-1907).

42 Cumberland Co., Va., Will Book, July 25, 1768.

43 Kenneth Scott, ed., Records of the Chancery Court Province and State of New York: Guardianships 1691-1815 (New York, 1971), 2-35. By law, orphan minors needed a guardian to maintain any action for an "infant legatee." Smith and Livingston, comps., Laws of N.Y., 315-316. For children declared of age see the will of Magdalene Chastain, Henrico Co., Va., Miscellaneous, May 5, 1724. The guardianship transfer is recorded in the will of John Hughes, June 27, 1774, and Jacob Michaux, Aug. 22, 1774, Cumberland Co., Va., Will Book.
1767 to 1775 the court averaged twelve such cases a year. In 80 percent of these cases the court placed the children with the mother or stepfather, except in 1767-1768, when in eleven instances the court chose a guardian other than the mother or stepfather. If the mother sought guardianship, she received it. Only once did the court deny a mother’s petition for guardianship, unfortunately without recording an explanation.44

Virginia courts took a more active interest in guardianship. The counties were empowered to hold special orphans’ courts at which guardians were summoned to give an accounting of the administration of minors’ estates. These orphans’ court sessions gave the justices leverage to intervene. They did, but not to harass mothers.45 Only once in our sample was a mother who had not remarried called to give an accounting. The Virginia justices, unlike those of New York, mistrusted stepfathers as guardians, and in the counties studied they seldom named a stepfather as guardian. Changes in guardianship in the southern colony were more a result of natural coming-of-age processes for orphans than of interference by the court because remarried mothers were considered unable to protect their children’s estates from stepfathers. Thus children changed guardians when an older brother or sister turned twenty-one and could assume guardianship, when they wished to assert independence from their mothers, or when minor women married. In all of these instances the young adult made use of common law provisions that allowed orphans fourteen years or older to choose their own guardians.46

Feme covert status did not prevent a married woman from participating in economic activities for her family or herself. The family, after all, was the basic economic unit of pre-industrial America, and the wife had separate economic duties within that unit. A few historians have questioned the extent of women’s participation in economic affairs,47 but evidence suggests that married women in New York and Virginia were active in at least three ways: as representatives for absent husbands, as managers of family businesses when husbands were present, and as operators of their own businesses.

The power of attorney gave wives a means to represent absent husbands or serve the couple’s business and legal needs. The power of attorney was a common tool in the seventeenth century, but English pressure forced

44 Colonial Laws of N.Y., I, 145; Scott, ed., Recs. of Chancery Court, 2-35.
45 The courts did not consider a father’s control above question. The Cumberland County justices ordered Littleberry and Betty Epperson bound out because their father William neglected them. Cumberland Co., Va., Order Book, Mar. 23, 1756, Oct. 22, 1758, and June 27, 1757.
46 Colonial Laws of N.Y., I, 301-302. See, for example, the requests for guardians in Goochland Co., Va., Order Book, Mar. 19, 1744/5, Aug. 17, 1748, and Sept. 20, 1748. For requests of accountings see Goochland Co., Va., Order Book, Mar. 16, 1747/8, and Oct. 19, 1742. For a case where the husband became guardian see the request of Mary Farcey, ibid., Mar. 16, 1747/8.
47 For a negative assessment see Mary Beth Norton, Liberty’s Daughters: The Revolutionary Experience of American Women, 1750-1800 (Boston, 1980), 125-151.
the colonies to limit its use as the eighteenth century progressed. Official grants of power of attorney to anyone are rare in the records of Henrico, Goochland, and Cumberland counties, although married women occasionally used it to relinquish dower rights in a land sale. It was fairly common in New York during the early eighteenth century for a married woman to appear as her husband’s legal agent. In fact, the first case heard by the Supreme Court of Judicature on October 6, 1691, involved two wives representing their husbands. Before 1750 there were numerous cases of New York women with or without power of attorney recovering debts, collecting rents, defending their husbands’ good names, and suing to enforce their husbands’ contracts. These examples indicate that there was more mutuality in marital relationships than scholars have usually recognized. It is significant, however, that such representation became uncommon after 1750 except among mariners’ wives. Long absences of sailors made it imperative that a husband such as Arent King, “being bound to Sea with the Snow ‘Dreadnought,’” appoint his “friend and wife, Jean King, my true and lawful attorney.”

The number of women acting as agents for their husbands declined after 1750, owing chiefly to the increasing number of professional attorneys. The effect was to limit the court appearances of wives, especially upper- and middle-class women who could afford a lawyer, thus reinforcing ideas of a separate sphere for women that were developing among the “better sort.”

Whatever their standing in law, women were able to participate extensively in economic matters through informal agreements with their spouses. Thus wives acted as attorneys-in-fact for their husbands whether or not a power of attorney had been granted. Many women in New York and Virginia were helpmates to their husbands in business or on the farm.


50 Will dated Nov. 24, 1756, proved Feb. 24, 1763, in Abstracts of Wills, VI, 218; will dated Aug. 26, 1756, proved June 22, 1757, ibid., V, 176. Morris stressed mutuality as a factor in the expansion of married women’s rights (History of Law, 126).

Women could perform this role without knowing the complete financial arrangements of their husbands' estates. A surprisingly large number of wives were the business managers for their families. Thus Alice Christie Colden freed her husband for duties as New York's surveyor general, council member, and lieutenant governor (not to mention for pursuit of his interests as a physician and botanist) by superintending the family farm.\(^52\) Virginia women performed the same roles. Canon law, for example, barred Anglican clergymen from doing manual labor, yet each Virginia parson had to manage a glebe farm. The parson's wife, rather than an overseer, sometimes assumed this duty, and the action excited no negative comment. Robert Carter, for instance, thought nothing of asking the Rev. Thomas Smith at church whether Mrs. Smith had 450 bushels of wheat for sale.\(^53\)

Though common law disabilities prevented a married woman from acting on her own to make contracts, sue, recover a debt, or sell property, English equity law provided a loophole by which a feme covert could be declared a feme sole trader. What is interesting is how often both the disabilities and the equity loophole were simply ignored by wives who acted on their own. Mrs. Smith, for example, had never been declared a feme sole trader, and yet Robert Carter transacted business with her and considered the wheat hers. Even the few instances where women petitioned for relief from the common law disabilities reflected the preference for granting married women informal rights rather than formal feme sole status. Susannah Cooper and Frances Greenhill both petitioned the Virginia assembly in the 1740s for private acts granting them the right to dispose of property because they had been deserted by their husbands many years before. Each woman had managed her family's affairs for over twenty years without formal feme sole status. The private act making Greenhill a feme sole in 1744 was disallowed (thus showing English disapproval of a formal change in status), but another, authorizing Cooper to dispose of her estate, passed scrutiny in England.\(^54\) This gave Cooper the freedom she wanted without formally changing her legal status.

Wives pursued a number of economic activities outside the household in both colonies by informal agreements with their husbands. Among other trades, married women in New York were shipowners, merchants, shopkeepers, midwives, fur traders, teachers, and keepers of taverns, boardinghouses, or "disorderly houses." Even in New York City, where technically only freemen could conduct a trade or business, there was a significant number of married businesswomen. Only fifteen women were granted freeman's status from 1691 to 1728, and none after that date, yet


the newspapers make clear that many women were in business without special acts of Council or grants of freemanship. Significantly, New York included women in the laws governing importation of liquor, sloop owners, and Indian traders, and used both "he" and "she" in all legislation concerning occupations. Also, although a husband jointly signed any apprenticeship indentures his wife might agree to, the indentures became void if she died before their expiration.

Probably the most notable example of a married entrepreneur is Mary Alexander (died 1760), who bore ten children during two marriages while prospering in New York City as an importer of dry goods. So great was her dedication to her business that the day after giving birth to a daughter, according to her husband, she returned to her store and sold over £30 worth of merchandise. Thus neither law nor custom appears to have prevented a feme covert from making contracts or pursuing a merchant's occupation in her own name. Less well known is Elizabeth Jourdaine, who in 1701 began importing a variety of merchandise while married to a shipowner and operator. She remained in business after her husband died and continued to import dry goods and rum until 1729.

Although it is difficult to explain the extension of women's legal rights to business management, the Dutch tradition in colonial New York undoubtedly helped create a positive milieu. The legislature recognized that single and married women (many of Dutch descent) were active in a variety of trades and occupations. Thus the statutes reflected reality by including women in all legislation governing occupations except that of surgeon. Economic necessity in a labor-scarce society and the respect

55 Minutes of the Court of Quarter Sessions of the Peace in the City and County of New York, 1691-1776, microfilm, Reels CMS1, CMS2, Queens College Hist. Docs. Coll. It is possible that the New York City charter passed in 1730 was interpreted to exclude women from freemanship. Widows of freemen were apparently granted the right to carry on a trade, though not permitted the status of freemanship. "Roll of Freemen of New York City, 1675-1866," N.-Y. Hist. Soc., Colls., XVIII (1885), 54-118; "The Arts and Crafts in New York, 1728-1776," ibid., LXIX (1936), 96, 271, 275, 324-325, 352.


57 Notable American Women, 1607-1950, s.v. "Alexander, Mary Spratt Provooost"; James Alexander Papers, IV, fol. 5, 8, N.-Y. Hist. Soc.; Jean P. Jordan, "Women Merchants in Colonial New York," N.Y. Hist., LVIII (1977), 416-418, 421-422, 436. According to Jordan, there were at least 106 women merchants in New York from 1660 through 1775 representing somewhat less than 2% of New York merchants. Though most New York women merchants were widows, some were married and a few were single.

men displayed for businesswomen helped assure that women would not be barred from any of the governed trades and occupations.

The economic activities of married women in Virginia are less well documented, yet their activities could be essential to the prosperity of their families. Plantation mistresses sold fruits, vegetables, and poultry in local markets and did sewing, spinning, and weaving for neighbors. They received payment for these activities, but, like Thomas Smith's wife, did not request that the courts grant them feme sole trader status. The orphans' court records of Cumberland County reveal that at least two married women in that area had medical/midwifery practices. In the small towns and cities of Virginia some women ran businesses separate from those of their husbands. For example, the wife of Williamsburg printer Alexander Purdie was a milliner. Julia Spruill documented payments to Virginia wives who were in business for themselves in a number of occupations, including those of teacher, milliner, shopkeeper, and tavern-keeper. These women did not bother to have themselves declared feme sole traders.69

Conclusion

What did the legal codes and practices in New York and Virginia mean for the average wife? The evidence indicates that women were active participants in nearly every phase of the system. Colonial laws recognized the English principle that married women had property rights by protecting the dower and went further by encouraging the joint deed. In practice, as in England, the private examination forced men to be cognizant of their wives' interests in property and abide by their wishes, but colonial laws did not introduce the concept of legal fiction for married women despite its strong position in England. Occasionally, lawyers trained in English law used fine and recovery, but these deeds were exceptions in practice. In a number of areas, as we have noted, significant changes occurred during the eighteenth century. In general, before 1750, if the custom of these colonies differed from that of England, it was in the direction of simplicity and in favor of women.

By mid-century, however, married women in both New York and Virginia faced new obstacles. New York City women could no longer become freemen; the power of attorney was no longer a frequent tool for wives; husbands began to give their wives less control over property; widows found themselves forced to sue to gain the minimum bequests set by law; and women increasingly received smaller portions or life interests when their husbands died. These changes resulted from the efforts of lawyers to make colonial practices conform to those of England, from a growing inclination among American gentry to accept the English view of

69 The estate administrations for orphans Mary Levillain and Margaret Bernard include payments to Mrs. Chastain for medical and midwifery services and to Mrs. Robinson as a midwife. Cumberland Co., Va., Will Book, Aug. 1755, Sept. 1756, and Aug. 1764; Spruill, Women's Life and Work, 258, 270, 279, 288-290.
the gentlewoman as an ornament, and from a variety of economic and demographic factors.

More restrictive interpretations of the common law by nineteenth-century jurists, feminists, and historians have obscured the actual workings of the eighteenth-century colonial legal system. The common law provided colonial wives with protections for their dower and paraphernalia as well as guardianship rights. Equity procedures could further mitigate the limitations of coverture. The records of Virginia and New York make clear that as need arose, these colonies staked out a larger sanctioned territory for wives and widows than historians have thought. The feme covert applied English precepts to good advantage and garnered further benefits from a pragmatic interpretation and application of the law by legislatures and courts.