

A COMMENT ON FAMILY PROPERTY RIGHTS AND THE PROPOSED 27th AMENDMENT

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I. INTRODUCTION

The proposed 27th Amendment¹ will substantially affect intra-family property rights if adopted, and if the institution of marriage survives the combination of legal, economic and social pressures of the women's liberation phenomena. A significant portion of law which defines the nature of marital status is that defining intra-family property rights. Because laws pertaining to marriage status and laws pertaining to property are primarily state law issues there is a substantial diversity in state laws applying to intra-family rights. No previous overriding federal concern such as that displayed in constitutional aspects of criminal law,² racial discrimination in property,³ and apportionment⁴ has previously made a substantial impact on this area of law. The 14th amendment has not had a substantial impact because distinctions in the law based on sex, hallowed by time and intertwined in marital status, have not been treated as presumptively invidious. A trend toward indulging such a presumption in employment cases is discernible.⁵ This article is intended to bring out some of the problems in marital property law which may be confronted and also to point up the diversity of the legal systems in which the changes would be required.

II. THE PROPOSED 27TH AMENDMENT

The proposed 27th Amendment is not a new concept to the United States Congress. The first such amendment was introduced in Congress in 1923 and there has been at least one in each subsequent year. Serious attention, however, was not given to such an amendment until 1946. Although far short of receiving the requisite number of votes, the attention given to the proposal

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¹ The text of the amendment is:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

² *Fay v. Noia*, 372 U.S. 391 (1963) added the habeas remedy to certiorari and vastly extended supervisory federal jurisdiction.

³ See *Shelley v. Kraemer*, 334 U.S. 1 (1948) and the civil rights legislation by Congress reflected in *Jones v. Mayer Co.*, 392 U.S. 409 (1968).

⁴ See *Baker v. Carr*, 369 U.S. 186 (1962), described by Chief Justice Warren as the most significant decision in his tenure.

⁵ See, e.g., *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529, (1971).

did indicate that several Senators were viewing the subject more favorably.⁶

In 1947, the Taft-Wadsworth Bill⁷ was introduced providing that there was to be no distinction made because of sex except where "reasonably justified" by differences in physical structure, biological, or social function.⁸ This proposal met defeat, apparently because *advocates* of the Amendment would not permit the distinction that there were justifiable discriminations.

In 1950, a proposed amendment to prohibit sex discrimination was passed by the United States Senate. However, this was accomplished only after a floor amendment was adopted which attempted to preserve special labor laws. That key amendment provided that "the provisions of this article shall not be construed to impair any rights, benefits or exemptions now or hereafter conferred by law upon persons of the female sex."⁹ This victory was short lived, as the amendment died in the House of Representatives. In fact, the proposed amendment never got out of the House Judiciary Committee. Again in 1953 the Amendment died in the House.

President Nixon, in 1969, set up a Presidential Task Force to study Women's Rights and Responsibilities.¹⁰ That Task Force recommended that an amendment be passed and also advocated social security benefits for the spouses of disabled and deceased female workers, government child care centers for all economic groups and stricter enforcement of anti-bias laws in employment and education. Sex discrimination, concluded the Task Force, brings about greater economic distress than racial discrimination.¹¹

The proposed amendment finally got out of the House Judiciary Committee in 1970 and was passed by the House.¹² As a turnabout, the amendment was defeated in the Senate, largely because of the efforts of Senator Irvin whose arguments against the amendment still remain as the main thrust of the opposition. He thought that the "narrowly worded prohibition against sex discrimination was insufficient to guarantee women their goals of equal pay for equal work."¹³ The Senator cited such possible adverse effects as destroying laws requiring separate rest rooms for women; making women eligible for the draft; endangering the tax exempt status of non-profit "women only" institutions; and weakening the legal presumption that a woman should keep custody of children and should receive financial support in the event of a divorce.¹⁴ Irvin suggested a change to remedy these possibilities,¹⁵ which was supported by some women in lower paid job classifications¹⁶ but was opposed by many activists groups. Consequently, the amendment was defeated.

⁶ S.J. Res. 61, 79th Cong., 2d Sess. (1946).

⁷ 93 CONG. REC. 1067 (1947).

⁸ *Id.*

⁹ 96 CONG. REC. 809 (1950).

¹⁰ PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE (1970).

¹¹ *Id.*

¹² H.R.J. Res. 264, 91st Cong., 2d Sess. (1970).

¹³ 116 CONG. REC. 35624 (1970).

¹⁴ *Id.*

¹⁵ S.J. Res. 231, 91st Cong., 2d Sess. (1970).

¹⁶ 116 CONG. REC. 35625 (1970).

The current proposed Amendment has been passed by both houses of Congress and has gone to the states for ratification. To date twenty-nine states of the necessary thirty-eight have ratified. In Nebraska an attempt was made to withdraw ratification which is of doubtful effect.

III. FAMILY PROPERTY LAW

As reflected by laws pertaining to dower, curtesy, community property and succession, the cultural and legal patterns of the several states are more diverse in regard to intra-spousal rights than in most other fields. Some effects of physical mobility can be seen in the evolution of the patterns of intra-spousal rights, but no dominant uniformity has as yet emerged. The acquisition of territories since the original Thirteen Colonies is shown in Map A, suggesting the

Map A—Territorial Annexation

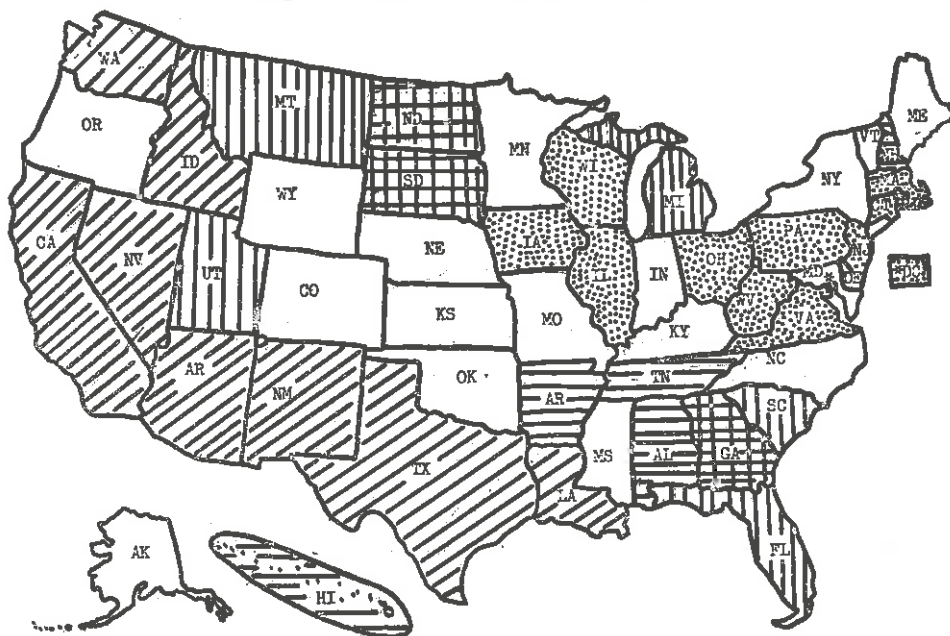








reception of law situation. Louisiana alone of the territory acquired by the purchase of 1803 was substantially settled when annexed; Texas, California, New Mexico, and Arizona were also settled, or partially so, at the time of annexation. Population and settlement of the United States occurred first on the Atlantic, Gulf, and Pacific Coasts, and movement was then inland. By the time the mid-region (Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Kansas and Oklahoma) was settled, the effect of the first women's rights movement was being felt. Differences of culture, attitude and life style existing at the time when organic law was evolving impressed substantial initial differences on marital law. Subsequent evolution has been affected by religious

mores, family structure (itself affected by farm family economics and wage-earner urban family economics) and other socio-political factors. In Appendix C a summary of the evolution of rights of married women in Iowa, California and Colorado as examples of three frequent patterns is set out.

In a general way six legal patterns of family property rights are in current use as reflected in Appendix A and shown on Map B:

Map B—Rights in Property of a Spouse



1.  Inter vivos interest of each, not identical.
2.  Inter vivos interest of wife only.
3.  Identical inter vivos interest in real property of other spouse; right of election against will.
4.  No inter vivos interest of either spouse in property of the other spouse; right of election against will.
5.  No inter vivos interest; no right of election against will.
6.  Community Property

1. Six eastern and southern states have retained the common law dower¹⁷ and curtesy¹⁸ pattern, with statutory variations, giving an inter vivos interest to husband and wife in the real property of the other which are *not* identical interests. Hawaii has also adopted this pattern;
2. Two western states, two southern states and Michigan have abolished curtesy without a substitute interest but retained an inter vivos interest of the wife in the property of the husband;
3. Curtesy has been abolished but an inter vivos interest in favor of the husband in the wife's real property identical to the wife's "dower" as modified by statute has been adopted by thirteen states, including Iowa, and by the District of Columbia;
4. The less mandatory pattern of an elective interest without any inter vivos rights in the other spouse's property¹⁹ is in effect in five midland states, three midwestern states, three southern states, three northeastern states, plus Oregon and Alaska, making 16, the largest group;
5. Even less requirements exist in North and South Dakota, recently joined by Georgia where there is neither dower-curtsey nor a forced share of the deceased spouse's property;
6. Eight states of the southwest and west are community property²⁰ states.

Most of the community property states follow the California pattern. Texas allocates the product of separate property earned during the marriage to the community and, in a revision in 1970, has eliminated managerial authority and dominance of the husband. Louisiana and, to a lesser degree, California still reflect the husband as head of the family management concept. Appendix B contains capsule summaries of common law dower and curtesy, American Community Property concepts and the Homestead exemption to provide context for this analysis.

Many other legal matters relate to the cultural pattern of which family property rights are a part, and each state is unique in its allocation of legal rights and duties. Florida has adopted a statute giving a forced share to minor children for support which would introduce another civil law concept and a new dimension to family property law in the United States.²¹

Within the framework of legally enforceable family property law, married people in every jurisdiction adjust their interest and see to family security by voluntary action (contracts, trusts, insurance, co-tenancy ownership, and volun-

¹⁷ See Appendix B for a definition of dower.

¹⁸ See Appendix B for a definition of curtesy.

¹⁹ In New York a limited right is generated by the holding in *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937), holding that a deathbed gift is in fraud of the right to elect.

²⁰ See Appendix B for a definition of community property.

²¹ FLA. STAT. ANN. § 733.20(j) (Supp. 1972). For an example of the complexity of a maintenance-of-child forced share see *Bosch v. Perpetual Trustee Co.*, [1938] 2 All E.R. 14 (Privy Counsel).

tary waiver or disclaimer of legal rights). Social security, welfare, old age pension, veterans' benefits and other state-federal tax-spend laws substantially affect the need for protection by compulsory family property law and affect the marital mores and culture as well.

IV. IMPACT OF THE PROPOSED AMENDMENT

If adopted, the 27th Amendment will confront legislatures and/or courts with problems of varying degrees of severity in those states with non-reciprocal marital property laws. Those states include the community property states, those that have abolished curtesy without a substitute, and those that have retained both dower and curtesy—three of the six common patterns. In those states having reciprocal dower-type rights and those states having compulsory election rights, however, there may be constitutional difficulties as well. In a context of inequality, identical compulsory rights may be discriminatory.²² Inequalities between the sexes exist and at least the following are relevant: life expectancy; ownership of wealth; control of wealth; earning ability; educational level; and career disruptions for child bearing and child rearing. There are also legal differences such as civil and criminal liability for child support, spouse support and family expenses. Presumably these laws will be revised (an increase in married women's power is ordinarily accompanied by decrease in protection and increase of civil and criminal family support liability).²³ Presumably every divorce decree based on a legal or de facto presumption that father supports and mother takes care of the children will be subject to constitutional re-examination as well.²⁴ Only some three or four states are apparently safe from major revision of basic intra-family property law, and customary assumptions underlying discretionary decisions in those states would no longer be permissible.

Marriage and family rearing as a primary career for a majority of women is still a primary style of our culture. Women, however, live past this career, and many women are forced by economic and social pressures to supplement family income by following a concurrent secondary career. Although forty plus percent of the work force are women,²⁵ the number in voluntary primary careers is still a relatively small minority. Laws, including family property rights laws, creating beneficial incidents for women who prefer the homemaker role—a non-economic career—are in some degree inconsistent with the concept

²² See, e.g., *Jenness v. Fortson*, 403 U.S. 431 (1971); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

²³ See Appendix C.

²⁴ Whether or not the constitutional revision is a "change of circumstances" ground for modification, enforcement of a decree would constitute governmental action.

²⁵ *Hearings on Equal Rights Amendment Before the Subcomm. of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 39 (1970).

Of all adults living in poverty in 1966, 6.9 million were men and 11.2 million were women. Of families headed by a woman worker in 1968, 45 percent non-white and 16 percent white were below poverty levels. Median income for non-white women was \$3,487 and for white women was \$4,580 in 1968. *Hearings, supra* at 102.

of free economic competition without regard to sex and are probably within the prohibition of the proposed Amendment. Assuming no discrimination in favor of head-of-family wage earners either in job priority, wage scale, tax benefits or retention rights, the economic system may force more women out of homemaker roles, necessitate child care by the community rather than the family²⁶ and increase urban-rural life style differences. Since *Reynolds v. United States*,²⁷ the public interest in the dominant role of family ordering in not only cultural morality but also in economic and political structures has been apparent. In *Wisconsin v. Yoder*,²⁸ the Supreme Court reaffirmed the right of parents to regulate religious training of children, vis-a-vis state compulsory education laws. The family, as an entity has had reinforcement through laws providing rights and obligations conformable to the reality of sexual and parental roles.²⁹ It appears difficult to reconcile such public policy with laws that are indiscriminate as to sex.

If courts adopt the view that every distinction between the sexes implies an invidious discrimination and is, thus, violative of the proposed 27th Amendment,³⁰ realistic assignment of parental responsibility between husband and wife by law may become impossible. In absence of state regulation on intra-spousal property rights, salutary, customary *private practices* supportive of the family entity may result, lessening the harmful effect of the Amendment on family unity. Predicting the interaction between law and custom, however, is very chancy. In general the law tends to be or become the custom or vice versa. Seldom would an expectation of diverse custom be justified.

If the proposed 27th Amendment were construed as allowing sexual distinctions based on reality of family and cultural roles, laws adjusting intra-spousal rights, including property rights, would be constitutional. Such laws, however, necessarily reinforce the status quo ante, a status of women which the proposed Amendment is presumably intended to change. Application of the equal protection and due process clauses of the 14th amendment to status of women cases has allowed sexual distinction in the case of married women

²⁶ Of 1,630,400 AFDC households in 1969, 275,500 were headed by a father in the home. 1,332,900 were headed by a mother (perhaps an overestimate since the female head of household statistic was derived by subtraction from the father in the home figure and does not include households having a stepfather in the home. *Hearings on H.R. 163311 Before the Comm. on Finance*, 91st Cong., 1st Sess. 312 (1970).

²⁷ 98 U.S. 145 (1878).

²⁸ 406 U.S. 205 (1972).

²⁹ For legal changes reflecting social concepts see, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972), but the effect of legal changes on the society are more difficult to document. See note 26, *supra*.

³⁰ The equal protection clause of the 14th amendment has generally been construed to allow sex based distinctions. See *Hout v. Florida*, 368 U.S. 57 (1961) (jury duty); *Muller v. Oregon*, 208 U.S. 412 (1908) (employment); *Bradwell v. Illinois*, 83 U.S. 130 (1872) (law practice); *Allred v. Heaton*, 336 S.W.2d 251 (Tex. Civ. App.), *cert. denied*, 364 U.S. 517 (1960) (admission to state university). The trend, however, is toward a more critical look and may be approaching the "presumption of invidiousness." See *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971). The 27th Amendment would, presumably, apply the presumption developed in race cases such as *Brown v. Board of Education*, 347 U.S. 483 (1954).

because there has been no presumption that every sex-based distinction was invidious. It is precisely to get that presumption of invidiousness that the Amendment has been offered.³¹

V. PROPERTY LAW PROPOSED BY THE COMMISSION

A family property law solution was propounded in the Report of the Task Force on Family Law and Policy to the President's Commission on the Status of Women.³² The general thrust of those recommendations is the adoption of a marital partnership concept involving what amounts to a community property system after eliminating managerial control by the husband and other sex-based distinctions.³³ It is a *compulsory* "partnership" with limitation on inter vivos transfer of community property; compulsory inheritance for minor children for support; alimony, child support and property settlement in the discretion of the court; support liability affecting separate property; and limitation of support liability to the nuclear family. The Task Force apparently borrowed from the laws of Denmark, Norway, the new Texas code, and Florida's new child inheritance statute. The Texas and Florida laws have not been in effect long enough to give an experiential basis; the social, economic and cultural patterns and legal systems of Norway and Denmark may be exportable to the United States, but cross-cultural comparison to establish that fact would be an immense job.

While a compulsory inter vivos interest in property *acquired* during coverture would at first seem "protective," it does not provide farm wife protection where the farm is acquired by inheritance or gift, which affects a large class of married women and thus a degree of protection seems needful. It does not affect inherited wealth unless income from such separate property is allocated to the community;³⁴ and it provides no protection in case of improvidence by the "dominant" spouse.³⁵ Its greatest impact is on earned income. Low through middle income wage earners have increasingly sought family economic

³¹ *Id.* *Hearings on H.R. 163311 Before the Comm. on Finance*, 91st Cong., 1st Sess. 312 (1970).

³² *Hearings on Equal Rights Amendment Before the Subcomm. of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 39 (1970).

³³ In common law jurisdictions inter vivos control of the wife's real property by the husband via tenancy by curtesy initiate has generally been held abolished by the married women's acts. *Duncan v. Duncan*, 23 S.W.2d 91 (Mo. 1929). In community property states, however, the managerial authority of the husband over the community property was not so eliminated. *See, e.g., United States v. Mitchell*, 403 U.S. 190 (1971); *United States v. Malcolm*, 282 U.S. 792 (1931).

³⁴ Although California and Texas constitutional protections over separate property are identical, Texas includes and California excludes earnings on separate property from the community. *See* note 40, *infra*. Texas held damages for personal injury includible in the community property in *Northern Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App. 1927). California has increased the individual liability of the wife for family support obligations, encroaching on separate property protection from *Lewis v. Johns*, 24 Cal. 98 (1864), dealing with her necessities, to CAL. CIV. CODE § 5132 (West 1970) creating an obligation for family support and section 5102 giving occupancy rights in family dwellings whether held as separate or community property.

³⁵ *See United States v. Mitchell*, 403 U.S. 190 (1971), for an example of such improvidence.

security through Social Security, retirement systems, welfare laws, and insurance—a combination of governmental and voluntary action. Use of joint tenancy ownership coupled with homestead rights for urban family homes leaves small need for compulsory “community” ownership. The community property system would have substantial effect on high income wage earners only. When considered in light of the complexities of the system—determining what is and is not “in” the community, transmutation, record keeping, attribution of income from capital to community or separate property, and succession rights—it seems doubtful that those states not having a community property system will wish to take this plunge. The Amendment, if adopted, however, will force states to rewrite their family property laws prior to its enforceability date or suffer the havoc which will follow from court decisions that strike down various parts of an integrated system.

VI. DISCRETION

Adjustment of property rights in inter vivos dissolution of marriage situations will probably continue to have substantial impact on marriage mores. Statutes providing equitable property distribution and support in the court's discretion, as suggested by the Task Force, are common, but the “equity” is necessarily based on legal rights provided by the state laws concerning intra-family property and on support obligations. Local community mores determine discretion. Achieving “flexibility” by introduction of a near-arbitrary discretion to offset a compulsory intra-family proprietary interest is not an ideal methodology.

VII. DIVERSITY OF “MARITAL” RELATIONSHIPS AND COMPULSORY LAW

Monogamous lifetime marriage oriented to the production of progeny as a norm seems to be implied in the rationale of the Task Force recommendations. Marital laws, however, should meet the current realities. Marriage for companionship, sequential marriages, informal liaisons both temporary and semi-permanent,³⁶ and other sexual compacts are common.³⁷ If legally compulsory systems are adopted, they should give cognizance to every form of relationship not violative of strong public policy.

VIII. TREND TOWARD INDISCRIMINATE LAW

The trend in American law relating to intra-family property has been to diminish any distinction between husband and wife and to increase the legal powers while diminishing the legal rights of married women. The proposed 27th Amendment would continue and nationalize that trend, if adopted and

³⁶ California recognizes a putative marriage relation to the extent of establishing community property rights. *Wilkinson v. Wilkinson*, 12 Cal. App. 3d 1164, 91 Cal. Rptr. 372 (1970). Iowa, California, and Texas, *inter alia*, have joined the no-fault divorce trend. See J. BERNARD, REMARRIAGE (1956).

³⁷ See note 18, *supra*. A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

construed to require that a presumption of invidiousness be applied to all sex distinctions in the law. Prediction of the ultimate effect on the several American cultures would, in light of the complexity of the factors and the fundamental conflicts of social, emotional, religious, economic, political and legal elements necessarily involved, be rash indeed. If non-discrimination by sex is a constitutional policy, state public policy must become indiscriminate. The increase in legal powers may be empty for most married women while the loss of legal rights may prove substantial. If that is the case and there is not an effective counterforce in customary mores functioning without legal reinforcement, some disintegration of the molecular family basis of our social chemistry may be expected.

IX. CONCLUSION

In view of the difficulties of writing statutes protective of women in the housewife and mother profession without discriminating by sex, in view of the trend toward decreasing rights while increasing powers, and in view of the inherent complexity of laws necessary to regulate in detail diverse status situations, it seems probable that many states will adopt a wildly permissive approach should the proposed Amendment be adopted. This would minimize legal reinforcement of cultural mores supportive of family life, tend to degrade the homemaker role, and support economic development requiring women to seek careers. Plato's concept of common women and common children (public child care is implied by degrading the homemaker role) may not be far away. It remains to be decided whether that is an improvement in the status of women. It seems clear that a cultural revolution of proportions beyond the ken of the proponents of the Amendment is implied.

APPENDIX A INTRA-SPOUSAL PROPERTY RIGHTS BY STATES

STATE	DOWER	CURTESY	COMMUNITY PROPERTY	ELECTION AGAINST THE WILL	TIME
Alabama	1. If estate solvent and no lineal descendants, widow endowed with one-half realty. 2. If estate insolvent or lineal descendants, endowed with one-third. ALA. CODE tit. 34, § 41 (1959).	One-half of personalty of wife's separate estate, use of realty for life. Tit. 16, § 12.	None.	Dower share plus portion entitled to in case of intestacy. Limited to first \$50,000 of personal estate if no children or their descendants. ALA. CODE tit. 61, § 18 (Supp. 1971).	Within six months of probate of will. ALA. CODE tit. 61, § 19 (1958).
Alaska	Abolished by § 30 ch. 38 SLA 1963. ALASKA STAT. § 13.35.010 .210 (Supp. 1971).	Abolished by § 30 ch. 38 SLA 1963.	None.	If more than two-thirds of net estate willed away, survivor may elect to receive one-third. § 13.05.105.	Within three months of admission of will to probate. § 13.05.105.
Arizona	No provision.	No provision.	One-half of community property goes to survivor and other half is subject to testamentary disposition. ARIZ. REV. STAT. ANN. § 14-203 (Supp. 1972).		
Arkansas	1. Widow endowed with one-third of realty seized at any time during marriage. ARK. STAT. ANN. § 61-201 (1971). 2. Widow endowed with one-third of personalty possessed by husband at death. ARK. STAT. ANN. § 61-202 (1971). 3. If no children, widow endowed with one-half of real and personal estate. ARK. STAT. ANN. § 61-206 (1971).	1. If wife leaves descendants, life estate in one-third of realty and one-third of personal property absolutely. 2. If no descendants, one-half of real property in fee and one-half of personal property absolutely. ARK. STAT. ANN. § 61-288 (1971).	None.	May elect intestate share. ARK. STAT. ANN. § 60-501 (1971).	Within one month after admission of will to probate. ARK. STAT. ANN. § 60-501 (1971).

STATE	DOWER	CURTESY	COMMUNITY PROPERTY	ELECTION AGAINST THE WILL	TIME
California	Abolished. CAL. CIV. CODE § 173 (1954).	Abolished. CAL. CIV. CODE § 173 (1954).	One-half of community property to survivor and other half subject to testamentary disposition. CAL. PROBATE CODE § 201.5 (West Supp. 1972).		
Colorado	Abolished. COLO. REV. STAT. ANN. § 153-2-1(2) (1963).	Abolished. COLO. REV. STAT. ANN. § 153-2-1(2) (1963).	None.	Surviving spouse may elect one-half of testator's estate. COLO. REV. STAT. ANN. § 153-5-4 (1963).	Within six months of admission of will to probate. COLO. REV. STAT. ANN. § 153-5-4 (1963).
Connecticut	Surviving spouse endowed with one-third life estate in all real and personal property owned at death. CONN. GEN. STAT. ANN. § 46-12 (Supp. 1972-73).	See dower.	None.	May elect dower share. CONN. GEN. STAT. ANN. § 46-12 (Supp. 1972-73).	Within two months of expiration of period of filing claims against the estate. CONN. GEN. STAT. ANN. § 46-12 (Supp. 1972-73).
Delaware	One-third life estate in all land seized during marriage. DEL. CODE ANN. tit. 12, § 901 (1953).	Tenancy by curtesy recognized. DEL. CODE ANN. tit. 13, § 311 (1963).	None.	May elect dower. DEL. CODE ANN. tit. 12, § 904 (1953).	Within thirty days of notice by citation. DEL. CODE ANN. tit. 12, § 905 (1953).
District of Columbia	Surviving spouse has one-third life interest in all lands seized during marriage. D.C.C.F. § 19-102 (Supp. 1972).	Abolished. D.C.C.F. § 19-102 (Supp. 1972).	None.	May elect dower share not exceeding one-half of net estate. D.C.C.F. § 19-113 (Supp. 1972).	Within six months of admission of will to probate. D.C.C.F. § 19-113 (Supp. 1972).

Florida	Widow endowed with one-third of real property in fee and one-third of personalty owned at time of death. FLA. STAT. ANN. § 731.34 (Supp. 1972-73).	No provision.	None.	Election of dower. FLA. STAT. ANN. § 731.34 (Supp. 1972-73).	Within nine months of first publication of notice to creditors. FLA. STAT. ANN. § 731.35 (Supp. 1972-73).
Georgia	Abolished effective 7-1-69.	None. GA. CODE ANN. § 85-608 (1970).	None.	Repealed 7-1-69.	Repealed 7-1-69.
Hawaii	One-third interest in fee of all lands seized during marriage and one-third of personalty owned at time of death. HAWAII REV. LAWS § 533-1 (Supp. 1971).	Life interest in one-third of all realty owned by wife at time of death and one-third absolutely of all personalty. HAWAII REV. LAWS § 533-16 (Supp. 1971).	Abolished in 1949.	May elect dower. HAWAII REV. LAWS § 533-14 (1968).	Within six months after probate of will. HAWAII REV. LAWS § 533-14 (1968).
Idaho	Abolished. IDAHO CODE ANN. § 32-914 (1963).	Abolished. IDAHO CODE ANN. § 32-914 (1963).	One-half of the community which belongs to the decedent passes to the surviving spouse. IDAHO CODE ANN. § 15-2-102(b)(1) (Supp. 1971).	Surviving spouse may take one-third of augmented estate. IDAHO CODE ANN. § 15-2-201, § 15-2-202 (Supp. 1971).	Within six months after publication of notice to creditors. IDAHO CODE ANN. § 15-2-205 (Supp. 1971).
Illinois	Surviving spouse endowed with one-third of realty seized during marriage. ILL. ANN. STAT. ch. 3, § 18 (Smith-Hurd 1961).	Abolished. ILL. ANN. STAT. ch. 3, § 18 (Smith-Hurd 1961).	None.	1. If testator leaves a descendant, may elect to take one-third of realty and personalty. 2. If testator doesn't leave a descendant, may elect one-half of realty and personalty. ILL. ANN. STAT. ch. 3, § 17 (Smith-Hurd Supp. 1972).	Within eight months of admission of will to probate. ILL. ANN. STAT. ch. 3, § 17 (Smith-Hurd Supp. 1972).
Indiana	Abolished. IND. ANN. STAT. § 6-211 (1953).	Abolished. IND. ANN. STAT. § 6-211 (1953).	None.	Surviving spouse may elect one-third of net personal and real estate of testator. IND. ANN. STAT. § 6-301 (1953).	Within ten days after expiration of time for filing claims against the estate. IND. ANN. STAT. § 6-302 (1953).

STATE	DOWER	CURTESY	COMMUNITY PROPERTY	ELECTION AGAINST THE WILL	TIME
Iowa	One-third in fee of land held during coverture. IOWA CODE § 633.211, 212 (1973).	See Dower.	None.	Surviving spouse may elect one-third of realty, exempt personally and one-third of remaining personally not necessary for payment of debts and charges. IOWA CODE § 633.238 (1973).	Within four months after notice by executor. IOWA CODE § 633.238 (1973).
Kansas	No provision.	No provision.	None.	May elect intestate share. KAN. STAT. ANN. § 59-2233 (1963).	Within six months of probate of will. KAN. STAT. ANN. § 59-2233 (1963).
Kentucky	Surviving spouse endowed with fee interest in one-half of surplus realty and one-half of surplus personally owned by deceased at time of death. KY. REV. STAT. § 392.020 (1970).	See Dower.	None.	May elect intestate share to a maximum one-third life interest in realty owned at death. KY. REV. STAT. § 392.080 (1970).	Within twelve months after probate of will. KY. REV. STAT. § 392.080 (1970).
Louisiana	Civ. Law Juris.	Civ. Law Juris.	If no surviving father, mother or descendants, surviving spouse takes undisposed share in fee. LA. STAT. ANN. Art. 915 (1950). Marital portion upon showing of necessitous circumstances: 1. no children—one-quarter of succession in full property. 2. less than four children—life estate in one-quarter of full property. 3. more than three children—a child's share for life. LA. STAT. ANN. Art. 2382 (1971).	None.	None.

Maine	Abolished. ME. REV. STAT. ANN. tit. 18, § 1051 (1964).	Abolished. ME. REV. STAT. ANN. tit. 18, § 1051 (1964).	None.	May elect intestate share. ME. REV. STAT. ANN. tit. 18, § 1056 (1964).	Within six months of probate of will. ME. REV. STAT. ANN. tit. 18, § 1056 (1964).
Maryland	Abolished. MD. ANN. CODE Art. 93, § 3-202 (1969).	Abolished. MD. ANN. CODE Art. 93, § 3-202 (1969).	None.	May elect intestate share. MD. ANN. CODE Art. 93, § 3-203 (1969).	Within thirty days of expiration of time for filing claims against the estate. MD. ANN. CODE Art. 93, § 3-206 (1969).
Massachusetts	Surviving spouse endowed with one-third life estate in all land seized during marriage. MASS. GEN. LAWS ANN. ch. 189, § 1 (Supp. 1972).	See Dower.	None.	Surviving spouse may elect: 1. if issue—one-third of realty and one-third of personalty. 2. no issue—\$25,000 and one-half of realty and personalty abso- lutely. 3. kindred—\$25,000 and one-half of realty and one-half of per- sonalty. MASS. GEN. LAWS ANN. ch. 191, § 15 (Supp. 1972).	Within six months after probate of will. MASS. GEN. LAWS ANN. ch. 191, § 15 (Supp. 1972).
Michigan	Life estate of one-third of all lands husband seized during marriage. MICH. STAT. ANN. § 26.221 (1957).	Abrogated in 1855.	None.	May elect intestate share of real estate, plus in general, intestate share of personalty to a maximum of \$5,000 and one-half of remainder. MICH. STAT. ANN. § 27.3178(139) (1962).	After notification by the adminis- trator. MICH. STAT. ANN. § 27.3178(139) (1962).

STATE	DOWER	CURTESY	COMMUNITY PROPERTY	ELECTION AGAINST THE WILL	TIME
Minnesota	Abolished. MINN. STAT. ANN. § 519.09 (1969).	Abolished. MINN. STAT. ANN. § 519.09 (1969).	None.	May elect intestate share. MINN. STAT. ANN. § 525.212 (1969).	Within six months after filing of certificate of probate. MINN. STAT. ANN. § 525.212 (1969).
Mississippi	Abolished. MISS. CODE ANN. § 453 (1956).	Abolished. MISS. CODE ANN. § 453 (1956).	None.	Intestate share up to a maximum of one-half of real and personal estate. MISS. CODE ANN. § 668 (1956).	Within six months after probate of will. MISS. CODE ANN. § 668 (1956).
Missouri	Abolished. MO. ANN. STAT. § 474.110 (1956).	Abolished. MO. ANN. STAT. § 474.110 (1956).	None.	Surviving spouse may elect exempt personally plus: 1. if no lineal descend- ents—one-half of estate subject to claims. 2. if lineal descend- ents—one-third of estate subject to claims. MO. ANN. STAT. § 474.160 (Supp. 1971).	Within ten days after expiration of time allowed for contesting will. MO. ANN. STAT. § 474.180 (Supp. 1971).
Montana	Widow endowed with a third of all lands husband seized during marriage. MONT. REV. CODE ANN. § 22-101 (1967).	Abolished. (not allowed) MONT. REV. CODE ANN. § 36-131 (1961).	None.	Widow may elect dower plus share of personally under intestate statutes not to exceed two-thirds net estate. MONT. REV. CODE ANN. § 22-107 (1967).	Within six months after probate of will. MONT. REV. CODE ANN. § 22-108 (Supp. 1971).
Nebraska	Abolished. NEB. REV. STAT. § 30-104 (1965).	Abolished. NEB. REV. STAT. § 30-104 (1965).	None.	Survivor may elect intestate share. NEB. REV. STAT. § 30-107 (1965).	Within one year after filing letters testamentary. NEB. REV. STAT. § 30-108(1) (1965).

Nevada	Abolished. NEV. REV. STAT. § 123.020 (1967).	Abolished. NEV. REV. STAT. § 123.020 (1967).	One-half of the community property vests in the surviving spouse, other half subject to the testamentary disposition and in the absence thereof goes to the surviving spouse. NEV. REV. STAT. § 123.250 (1967).	No provision.	None.
New Hampshire	Allowed. So much of any real estate of husband as will produce yearly income equal to one-third of yearly income of husband at time husband died or parted with title. N.H. REV. STAT. ANN. § 560:9 (1955).	Allowed. When he would be entitled to hold as tenant by the curtesy at common law. N.H. REV. STAT. ANN. § 560:9 (1955).	None.	Surviving spouse may elect: 1. if issue—one-third of realty and personally. 2. if no issue but surviving parent, brother or sister—\$10,000 of personalty and \$10,000 of realty plus one-half of remainder. 3. no issue or heirs—surviving spouse takes all of personalty and realty in fee. N.H. REV. STAT. ANN. § 560:11 (Supp. 1970).	Within six months of appointment of administrator. N.H. REV. STAT. ANN. § 560:14 (Supp. 1970).
New Jersey	Widow endowed with a life estate in one full part and equal half part of all realty husband seized during marriage. N.J. STAT. ANN. § 3A:35-1 (1955).	Same as dower. N.J. STAT. ANN. § 3A:35-2 (1955).	None.	May elect dower. N.J. STAT. ANN. § 3A:37-1 (1955).	Within six months of probate of will. N.J. STAT. ANN. § 3A:37-1 (1955).

STATE	DOWER	CURTESY	COMMUNITY PROPERTY	ELECTION AGAINST THE WILL	TIME
New Mexico	Abolished. N.M. STAT. ANN. § 29-1-23 (1953).	Abolished. N.M. STAT. ANN. § 29-1-23 (1953).	1. Upon death of wife, entire community property goes to the husband. N.M. STAT. ANN. § 29-1-8 (1971). 2. Upon death of husband, entire community property goes to the surviving wife subject to husband's power of testamentary disposition over one-half of the community. N.M. STAT. ANN. § 29-1-9 (Supp. 1971).	No provision.	None.
New York	No dower in marriages after 8/31/30. Real Property Laws § 190 (1968).	Abolished. Real Property Laws § 189 (1968).	None.	Surviving spouse may elect: 1. if issue—one-third of net estate. 2. no issue—one-half of net estate. Estates Powers & Trusts Law § 5-1.1 (Supp. 1972-73).	Within six months after issuance of letters testamentary.
North Carolina	Abolished. N.C. GEN. STAT. § 29-4 (1966).	Abolished. N.C. GEN. STAT. § 29-4 (1966).	None.	Survivor may elect intestate share where aggregate value of provisions for surviving spouse is: 1. less than intestate share. 2. less than one-half of deceased's spouse net estate and deceased spouse is not survived by parent or issue. N.C. GEN. STAT. § 30-1 (1966).	Within six months of issuance of letters testamentary. N.C. GEN. STAT. § 30-2 (1966).

North Dakota	Abolished. N.D. CENT. CODE § 56-01-02 (1972).	Abolished. N.D. CENT. CODE § 56-01-02 (1972).	None.	No provision.	None.
Ohio	Surviving spouse endowed with a one-third life estate in all lands of which consort seized during marriage. OHIO REV. CODE ANN. § 2103.02 (1968).	Abolished. OHIO REV. CODE ANN. § 2103.09 (1968).	None.	Intestate share not exceeding one-half of net estate. OHIO REV. CODE ANN. § 2107.39 (Supp. 1971).	Within one month of notice of citation to elect or within seven months after the appointment of an administrator. OHIO REV. CODE ANN. § 2107.39 (Supp. 1971).
Oklahoma	Abolished. OKLA. STAT. ANN. tit. 32, § 9 (1958).	Abolished. OKLA. STAT. ANN. tit. 32, § 9 (1958).	Repealed in 1949.	May elect intestate share. OKLA. STAT. ANN. tit. 84, § 44 (1970).	No provision.
Oregon	Abolished. ORE. REV. STAT. § 112.685 (1971).	Abolished. ORE. REV. STAT. § 112.685 (1971).	Repealed. ORE. REV. STAT. § 108.520 (1971).	Surviving spouse may elect one-quarter of net estate. ORE. REV. STAT. § 114.105 (1971).	Within ninety days after admission of will to probate or 30 days after filing of the inventory, whichever is later. ORE. REV. STAT. § 114.145 (1971).
Pennsylvania	Intestate share in realty of which husband seized during marriage. PA. STAT. ANN. tit. 20, § 1.5(a) (Purdon Supp. 1972).	Intestate share in realty of which wife seized during marriage. PA. STAT. ANN. tit. 20, § 1.5(b) (Purdon Supp. 1972).	None.	Surviving spouse may elect: 1. two or more issue— one-third of real and personal property. 2. less than two issue— one-half of real and personal estate. PA. STAT. ANN. tit. 20, § 180.8 (Purdon Supp. 1972).	Within one year after probate of will. PA. STAT. ANN. tit. 20, § 180.11 (1950).

STATE	DOWER	CURTESY	COMMUNITY PROPERTY	ELECTION AGAINST THE WILL	TIME
Rhode Island	Widow endowed with one full and an equal third part of lands husband seized during marriage. R.I. GEN. LAWS ANN. § 33-4-1 (1970).	Recognized. R.I. GEN. LAWS ANN. § 33-6-21 (1970).	None.	Widow may elect dower. R.I. GEN. LAWS ANN. § 33-6-22 (1970).	Within six months of probate of will. R.I. GEN. LAWS ANN. § 33-6-22 (1970).
South Carolina	Common law dower recognized. S.C. CODE ANN. § 19-153 (1962).	Abolished. S.C. CODE ANN. § 19-101 (1962).	None.	Widow may elect dower. S.C. CODE ANN. § 19-155 (1962).	Pursuant to the common law. S.C. CODE ANN. § 19-155 (1962).
South Dakota	Abolished. S.D. CODE § 29-1-3 (1967).	Abolished. S.D. CODE § 29-1-3 (1967).	None.	No provision.	None.
Tennessee	Widow endowed with a one-third part of all lands of which husband seized during marriage. TENN. CODE ANN. § 32-601 (1966).	Recognized. TENN. CODE ANN. § 32-111 (1966).	None.	May elect intestate share. No children and less than third of personal estate in addition to dower. More than 2 children, she receives a child's part. TENN. CODE ANN. § 31-606 (Supp. 1971).	Within nine months after probate of will. TENN. CODE ANN. § 31-605 (Supp. 1971).
Texas	No provision.	No provision.	1. If no issue, all of community estate to the survivor. 2. If issue, one-half of community property to the survivor and one-half to the issue. V.A.T.S. Probate Code § 45 (1956).	No provision.	None.

Utah	Abolished. UTAH CODE ANN. § 74-4-9 (1953). However, UTAH CODE ANN. § 74-4-3 (1953) provides that if a wife survives, she takes a one-third interest in fee of all lands husband seized during marriage.	Abolished. UTAH CODE ANN. § 74-4-9 (1953).	None.	Widow may elect dis-tributive share. UTAH CODE ANN. § 74-4-4 (Supp. 1971).	Within four months after admission of will to probate or such additional time as may be allowed by the court. UTAH CODE ANN. § 74-4-4 (Supp. 1971).
Vermont	1. If no issue—widow entitled to one-third in value of all realty husband died seized. 2. If issue—widow entitled to one-half in value of all realty husband died seized. Vt. STAT. ANN. tit. 14, § 461 (1958).	Same as dower. Vt. STAT. ANN. tit. 14, § 474 (1958).	None.	Widow may elect dower. Vt. STAT. ANN. tit. 14, § 465 (1958).	Within eight months after proving of will. Vt. STAT. ANN. tit. 14, § 465 (1958).
Virginia	Surviving spouse endowed with one-third life estate in all realty of which husband seized during marriage. VA. CODE ANN. § 64.1-19 (1968).	Same as dower. VA. CODE ANN. § 64.1-19 (Supp. 1972).	None.	Surviving spouse may elect: 1. if no surviving issue— one-half of surplus personality. 2. if surviving issue— one-third of surplus personality. VA. CODE ANN. § 64.1-16 (Supp. 1972).	Within one year after admission of will to probate. VA. CODE ANN. § 64.1-13 (Supp. 1972).
Washington	Abolished. WASH. REV. CODE ANN. § 11.04.060 (1967).	Abolished. WASH. REV. CODE ANN. § 11.04.060 (1967).	One-half of community property to the surviving spouse, remainder subject to testamentary disposition. WASH. REV. CODE § 11.02.070 (Supp. 1971).	No provision.	None.

STATE	DOWER	CURTESY	COMMUNITY PROPERTY	ELECTION AGAINST THE WILL	TIME
West Virginia	Surviving spouse endowed with one-third seized by spouse during marriage. W. VA. CODE ANN. § 43-1-1 (1966).	Abolished. W. VA. CODE ANN. § 43-1-18 (1966).	None.	May elect dower. W. VA. CODE ANN. § 43-1-8 (1966).	Within eight months after admission of will to probate. W. VA. CODE ANN. § 43-1-8 (1966).
Wisconsin	Abolished. Inchoate dower is abolished, but concept of dower retained and expanded. WISC. STAT. ANN. § 861.03 (1971).	Abolished, but replaced by dower. WISC. STAT. ANN. § 861.03 (1971).	None.	Surviving spouse may elect one-third of net probate estate. WISC. STAT. ANN. § 861.05 (1971).	Within one year after filing of petition for probate of will. WISC. STAT. ANN. § 861.11 (1971).
Wyoming	Abolished. WYO. STAT. ANN. § 2-37 (1959).	Abolished. WYO. STAT. ANN. § 2-37 (1959).	None.	Surviving spouse may elect one-half of real and personal estate. WYO. STAT. ANN. § 2-47 (Supp. 1971).	Within three months after probate of will. WYO. STAT. ANN. § 2-47 (Supp. 1971).

APPENDIX B

I. CAPSULE SUMMARIES

A. Community Property

Husband and wife, as an entity and not separately, are the "owner" of property in the marital community. The community property is to be distinguished from that held by either spouse separately. The California Constitution of 1849 provided protection for the separate property of the wife in terms identical to those of the Texas Constitution of 1845.³⁸ The separate property of the wife under the California law was held to include not only the property she owned prior to marriage and subsequent gifts and inheritances, but also the product of such property³⁹ free from any charge for management by her husband.⁴⁰ The legislature was held to be without authority to subject the wife's separate property to the debts of her husband,⁴¹ but the 1850 statute requiring joinder by her husband to convey was upheld.⁴² In *Commentary on the Community Property of Texas*⁴³ it is stated that the product of the separate property of the spouses was part of the community in the Spanish civil law, but most of the American community property states followed the California contrary rule. In *Arnold v. Leonard*⁴⁴ the Texas constitutional provision was held to preclude addition to the wife's separate property, preventing legislative adoption of the California rule.

Aside from the problems of ascertaining what property is separate,⁴⁵ ownership concepts are essentially unaffected with respect to individual property, and the authority of the wife in respect to that property is greater or less as affected by adoption and interpretation of married women's statutes. The nature of the community interest, however, is more difficult. The United States Supreme Court considered the effect of the managerial powers of the

³⁸ Huie, *Commentary on the Community Property Law of Texas*, 13 TEX. REV. CIV. STAT. 1, 49 (Vernon 1960); CAL. CONST. art. II, § 14 (1849); CAL. CONST. art. XX, § 8 (1879, as amended 1970). The code definition of community property in California appears in CAL. CIV. CODE § 687 (West 1970) and is cast in terms of what is not separate property.

³⁹ *George v. Ransom*, 15 Cal. 322 (1860).

⁴⁰ *Lewis v. Johns*, 24 Cal. 98 (1864).

⁴¹ *Id.* But see CAL. CIV. CODE § 5121 (West 1970), subjecting some of her separate property for necessities. A spouse's property is, of course, liable for her individual obligations. *United States v. Mitchell*, 403 U.S. 190 (1970), is a strikingly hard case. The protection of separate property is, thus, diminished by increase of personal obligations such as CAL. CIV. CODE § 5132 (West 1970) providing an obligation for family support. CAL. CIV. CODE § 5102 (West 1970) goes a step further and provides occupancy rights in the family dwelling whether held as separate or community property.

⁴² *Dow v. Gould & Curry Silver Mining Co.*, 31 Cal. Rptr. 630 (1867).

⁴³ Huie, *supra* note 38.

⁴⁴ 114 Tex. 535, 273 S.W. 799 (1925). Even damages for injury to a person are held community. *North Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App. 1927).

⁴⁵ See, e.g., CAL. CIV. CODE § 5110 (West 1970) generating a presumption from record title; Note, *Characterization of Property in California When Period of Acquisition Overlaps Creation or Termination of Marital Community*, 17 HASTINGS L.J. 815 (1966).

husband on the interest of the wife in a series of cases beginning in 1926 with the holding in *United States v. Robbins*⁴⁶ that a California wife had a mere expectancy, but finding half ownership for income tax purposes by 1930 in Washington,⁴⁷ Arizona,⁴⁸ Texas,⁴⁹ and Louisiana,⁵⁰ predicated on limitations on the husband's authority and sanctions for wrongful exercise. The same result was reached for California on the basis of changes in its laws in *United States v. Malcolm*.⁵¹ The termination of the interest of a deceased spouse was held to increase the rights of a surviving spouse sufficiently to justify levying the federal estate tax, as an excise tax, on the entire community rather than upon one half of it, in *Fernandez v. Wiener*.⁵² Renunciation of community rights by married women in Louisiana, pursuant to code provisions, to insulate their separate property from community obligations, even in the context of state laws giving no right to an accounting of the husband's management and control over the community, was held to be insufficient to protect separate property (even after acquired) from a lien for income taxes levied on the product of the community, though Justice Blackmun's opinion for a unanimous Court conceded it was a hard case.⁵³

Texas' new Family Code, effective in 1970,⁵⁴ has substantially separatized the ownership of the community property, in extreme contrast to the Louisiana law reflected above, by providing that the spouses each manage not only their separate property but also the portion of the community he or she would have owned if single; the revenues earned from such property; revenues from separate property; and personal injury damages. Commingled community property is to be jointly managed. The extent to which such laws change the community theory can be judged by comparison to the discussion of the nature of the community in *La Tourette v. La Tourette*,⁵⁵ a decision of the Arizona Supreme Court in 1914 which has found its way into the course books for its discussion comparing the community to the tenancy by the entirety for elements of entity and to the tenancy in common for elements of divided interest. It seems clear that the elements of divided and individual interest are increasing in Texas.

Seven of the eight community property states are "common law" jurisdictions (Louisiana is not but common law concepts and principles are not entirely excluded there either).⁵⁶ The community property system is substituted for dower and curtesy in those states, but common law cotenancies are used in

⁴⁶ 269 U.S. 315 (1926).

⁴⁷ *Poe v. Seaborn*, 282 U.S. 101 (1930).

⁴⁸ *Goodell v. Koch*, 282 U.S. 118 (1930).

⁴⁹ *Hopkins v. Bacon*, 282 U.S. 122 (1930).

⁵⁰ *Bender v. Pfaff*, 282 U.S. 127 (1930).

⁵¹ 282 U.S. 792 (1931), construing CAL. CIV. CODE § 161(a) (West 1927).

⁵² 326 U.S. 340 (1945).

⁵³ *United States v. Mitchell*, 403 U.S. 190 (1971).

⁵⁴ Huie, *supra* note 25.

⁵⁵ 15 Ariz. 200, 137 P. 426 (1914).

⁵⁶ *Dieball v. Continental Cas. Co.*, 176 So. 2d 774 (La. 1965).

conjunction with the community system.⁵⁷

B. *Curtesy at Common Law*

The authority of a husband over the lands of his wife began with the marriage, but was not exclusive until issue capable of inheriting was born alive. "[I]t is laid down that by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone: whereas, before issue had, they must both have done it together."⁵⁸ Becoming, on birth of issue alive, part of the *curtis* (court) the husband was tenant by curtesy initiate and "may do many acts to charge the lands, but his estate is not *consummate* till the death of the wife."⁵⁹ "[T]his estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant."⁶⁰ The control over the wife's lands during her lifetime was substantially eliminated by the married women's statutes in the United States.⁶¹

C. *Dower at Common Law*

The dower rights of a wife in the lands of her husband at common law probably derived from the contractual marriage portion and could be varied by agreement at the church prior to the marriage (but not to exceed one-third to protect the incidents due the Lord). One-third became the custom and law. The interest was not, however, a fee estate but a right to life occupancy, the heir succeeding to the fee subject to the widow's interest. The dower attached to the legal estates of which the husband was seized beneficially during the marriage and could not be defeated by the husband's conveyance, continuing as a burden on the lands in the hands of the transferee. The interest was inchoate until death of the husband.⁶² The wife was "protected" by incapacity to release or convey the dower; subsequently a privy examination in the absence of the husband was required to validate release; and now, generally, all that is required is joinder in an instrument of conveyance.⁶³

D. *Homestead*

Beginning with constitutional adoption by the Republic of Texas in 1839, homestead laws for security of family have been prescribed by constitutions or statutes generally in the United States.⁶⁴ While the thesis of providing family

⁵⁷ See, e.g., *United States v. Mitchell*, 403 U.S. 190 (1971) and cases cited therein; *LaTourette v. LaTourette*, 15 Ariz. 200, 137 P. 426 (1914); CAL. CIV. CODE § 161 (West 1954); *Gonzales v. Gonzales*, 73 Cal. Rptr. 83 (1968).

⁵⁸ W. BLACKSTONE, COMMENTARIES §§ 126 *et seq.* (1775).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See note 38, *supra*.

⁶² BLACKSTONE, *supra* note 58.

⁶³ *O'Ferrall v. Simplot*, 4 Iowa (Clarke) 381 (1857) contains a discussion of early developments. *Simms v. Hervey*, 19 Iowa 273 (1865) completes the transition.

⁶⁴ *Barney v. Leeds*, 51 N.H. 253 (1871); *Zuniga v. Evans*, 87 Utah 198, 48 P.2d 513 (1935); 40 C.J.S. *Homesteads* § 2 (1944).

security is constant, the nature and incidents of homestead laws adopted in the several states are not uniform. Although the homestead has some characteristics of an "estate," the form of the laws are generally cast as procedural rules. The Texas homestead exemption extended to proceeds of fire insurance on the dwelling, but the conflicts of law rules pertaining to remedies was applied to give effect to an Illinois garnishment in an interpleader case.⁶⁵ Whether occupancy rights of surviving spouse and children generates an "estate" or not,⁶⁶ the interest is nevertheless substantial. Requirements still include a claim by "head of family."⁶⁷ Many jurisdictions have had little difficulty finding a separated or divorced woman entitled to establish a homestead claim while others strictly construed such requirements.⁶⁸ In many jurisdictions a value limit is placed on exemption from creditor's claims while in others the rest is exempt.⁶⁹ The community property system in California creates some problems with respect to the separate property of the wife which is subject to claim as a homestead only with her consent.⁷⁰ The homestead is neither a community property nor a common law institution, and differences by state derive from application of diverse statutes to the general proprietary system of the jurisdiction. Laws generally require joinder of the spouses to transfer or relinquish the homestead once the interest has been established.⁷¹ In that respect and in respect of the right to continued family occupancy after the death of the "owner," the interest has elements of similarity to the common law dower.

⁶⁵ *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1934).

⁶⁶ *Compare Tooley v. Comm'r*, 121 F.2d 350 (9th Cir. 1941), with *Arighi v. Rule & Sons*, 41 Cal. App. 2d 852, 107 P.2d 970 (1941). As to estates in land to which the homestead may attach see Annot., 74 A.L.R.2d 1355 (1960); CAL. CIV. CODE § 1238 (West 1954). For exchange of homestead for other property see Annot., 83 A.L.R. 54 (1933).

⁶⁷ California law still insists that the husband is head of the family. CAL. CIV. CODE § 5101 (West 1970). *Compare* COLO. REV. STAT. ANN. § 90-2-12 (Supp. 1970), providing right of wife to establish separate domicile.

⁶⁸ See Annot., 67 A.L.R.2d 779 (1959). In Colorado, a married woman living with her husband was held to be head of the family for the purpose of claiming the homestead exemption on the family residence held by her as owner as early as 1887. *McPhee v. O'Rourke*, 10 Colo. 301, 15 P. 420 (1887). *Compare* *Harley v. Whitmore*, 42 Cal. App. 2d 461, 51 Cal. Rptr. 468 (Dist. Ct. App. 1966) in which it was held that a married woman who was living separate after filing for a divorce could not claim as "head of family," and she could not claim as a single person. A declaration by a wife must be for the benefit of herself and her husband.

⁶⁹ Iowa's exemption extends to 40 acres of rural or one-half acre of city land occupied as a homestead. IOWA CODE § 561.2 (1973). California and Colorado have value limits. CAL. CIV. CODE § 1260 (West Supp. 1972); COLO. REV. STAT. ANN. § 77-3-1 (1964). Iowa's farm "40" provision obviously is intended to provide a minimum support base for the family, and should be compared to exemptions on wages for city residents.

⁷⁰ CAL. CIV. CODE § 1239 (West 1954).

⁷¹ *E.g.*, CAL. CIV. CODE § 1242 (West Supp. 1972); *Bradley v. Scully*, 62 Cal. Rptr. 834 (Ct. App. 1967).

APPENDIX C

DEVELOPMENT COMPARISONS

Iowa

Admitted: 1846.

Franchise: The Iowa Constitution still limits the franchise to male citizens, an amendment to delete "male" having failed in 1916.⁷² The 19th Amendment, of course, supersedes that provision.

Contract and Property Emancipation Statutes: The disability of married women concerning contract was lifted in 1851,⁷³ but a statute of 1873 has been construed as prohibiting husband and wife from making property contracts with each other.⁷⁴ The 1873 legislation included the married women's property acts and extended to women powers to own, acquire, manage, sell, convey and dispose by will in the same manner as their husbands.⁷⁵ The married women's acts of 1851 and 1873 also included the right to wages,⁷⁶ liability for family obligations⁷⁷ and exonerated the husband from liability for the torts of the wife.⁷⁸ The loss of capacity to contract on husband's credit limited non-working women,⁷⁹ and the working women were adversely affected by obligation for family support by the 1851 statutes.

General: Iowa has little protective labor legislation.⁸⁰

The heartbalm torts are actionable in Iowa, contrary to the Colorado and California laws.

Support of Family: The civil obligation to support is backed by criminal statutes under which, in contradistinction to Colorado and California, a woman may be prosecuted for felony non-support of children. The husband may be prosecuted for desertion and failure to provide for wife or children under the felony statute.⁸¹

As indicated above, family expenses can be recovered from either and is a charge on the property of both husband and wife.⁸²

Divorce: Upon divorce, the court may make such orders for alimony, child support and property settlement as may be justified.⁸³ The no fault dissolution of marriage law has been adopted, as in California.

⁷² IOWA CONST. art. II, § 1.

⁷³ IOWA CODE § 597.18 (1973).

⁷⁴ The policy was strong enough to avoid a valid Illinois agreement as it affected Iowa property. *Caruth v. Caruth*, 128 Iowa 121, 103 N.W. 103 (1905). This ruling might have the effect of undermining consideration for a separation agreement by spouses domiciled in jurisdictions not recognizing such a disability.

⁷⁵ IOWA CODE § 591.1 (1973).

⁷⁶ *Id.* § 597.16.

⁷⁷ *Id.* § 597.14.

⁷⁸ *Id.* § 597.19.

⁷⁹ *Id.* § 597.17.

⁸⁰ Landau & Dunahoo, *Women's Legal Employment Rights and Their Application in the Arbitral Process*, 23 HASTINGS L.J. 95 (1971).

⁸¹ IOWA CODE ch. 731 (1973).

⁸² IOWA CODE § 597.14.

⁸³ *Id.* § 598.21.

Transfer and Succession: In addition to the homestead, Iowa has an inchoate "dower" interest of each spouse in the estates in land, legal and equitable, owned by the other *during* coverture.⁸⁴ A direct comparison with the marital community may be of some use. Each spouse has a half interest in the community property which extends to property *acquired* during marriage (including, in Texas, earnings on separate property and excluding such earnings in California). The interest extends to personalty, but conveyance joinder is only required as to realty. The "dower" attaches only to realty, and joinder in conveyance is required. The "dower" amounts to 1/3 in fee, compared to the half of the community. Management of the community, in California, but not in Texas, is by the husband with the exception of the wife's earnings and personal injury damages. The management of the property of each spouse is by that spouse in Iowa, the dower interest of the other constituting a limitation on conveyance. The dower limitation on transfer, however, is more effective, since no action against a transferee is required until after death of the spouse ordinarily, (but marketability of title legislation may require an affidavit of claims within about ten years from date of transfer).⁸⁵

Both the Iowa homestead,⁸⁶ providing for 40 acres in the country and 1/2 acre in the city, and the dower are real protections to farm families and wives, but of less effect in ordinary urban life situations. The separate property aspects of the community system in California are of substantial significance to wealthy persons, of less to the wage earner.

Iowa places no restriction on transfer of personalty and the spouse has no interest therein except the right to elect against a will. The right of election extends to exempt personalty, the "dower" and 1/3 of other personal property owned at death.⁸⁷

The Iowa support allowance, like California's, is an amount fixed by the court.⁸⁸

The surviving spouse may elect to occupy the homestead (life interest in lieu of dower, or may have the homestead [in fee, if so held by decedent] included in his or her share).⁸⁹

In intestate estates where there is no right to dower in property not in the estate, and there are no issue of decedent, the surviving spouse is entitled to the first \$25,000 plus exempt personal property held by decedent as head of the household and an additional amount to make the total share equal \$25,000 plus one-half the net estate minus \$25,000, in addition to exempt personal property held by decedent as head of the household.⁹⁰ If there is a dower

⁸⁴ *Id.* §§ 633.211(1), 212(1), 238(1).

⁸⁵ *Id.* § 614.15.

⁸⁶ *Id.* § 561.2.

⁸⁷ *Id.* § 633.238.

⁸⁸ *Id.* §§ 633.374 *et seq.*

⁸⁹ *Id.* §§ 633.239-40.

⁹⁰ *Id.* § 633.212.

interest in lands not in the estate, the value is calculated in the spouse's share.⁹¹ Where there are issue, the share is the dower, plus exempt personality, plus 1/3 of other personality and whatever more, if any, is needed to equal \$25,000,⁹² a complex way of saying about 1/2 or about 1/3 depending on whether there are issue of decedent. The residue goes to issue, if there are any,⁹³ and where there are no issue, to relatives by consanguinity of decedent.⁹⁴

Admitted: 1849. *California*

Franchise: A proposal to enfranchise women was defeated at the convention leading to the adoption of the 1879 constitution after the California Supreme Court had ruled, in 1872, that the 14th Amendment did not require the vote for women.⁹⁵ A legislative referendum amended the constitution in 1911.⁹⁶

Contract and Property Emancipation Statutes: It was held in 1880 that a married woman might contract as to her separate property.⁹⁷ At least as early as 1872 the Code provided that husband and wife could contract with each other and with others, but this appears to have been limited to married women dealing with their separate property or acting as a sole trader under a statute still in effect.⁹⁸ Separation contracts are now explicitly authorized by the Code.⁹⁹ Until the amendments following the 1926 United States Tax case refusing the division of income benefit to California residents, the control of the husband over community property was so great that the wife's interest inter vivos was little more than a ghost.¹⁰⁰ The husband's control is still substantial,¹⁰¹ a limit on a married woman's right to contract, no longer fully justifiable by the support obligations of the husband and insulation of the wife's separate property from husband's and family debts.¹⁰²

⁹¹ *Id.*

⁹² *Id.* § 633.211.

⁹³ *Id.* § 633.219(1).

⁹⁴ *Id.* § 633.219. But see *McAllister v. McAllister*, 183 Iowa 245, 167 N.W. 78 (1918) in which the former section, not substantially changed in Iowa CODE § 633.219(3), was interpreted as giving a share to the second wife of a deceased parent of the intestate, the stepmother. Neither policy nor reason supports this outcome.

⁹⁵ E. GAYLORD, HISTORY OF CALIFORNIA ELECTION LAWS, CAL. ELECTION CODE ANN. 29 (West 1970). The 14th amendment case is *Van Valenberg v. Brown*, 43 Cal. 43 (1872).

⁹⁶ *Id.* See CAL. CONST. art. II, § 1.

⁹⁷ *Alexander v. Bouton*, 55 Cal. 15 (1880).

⁹⁸ See CAL. CIV. CODE § 5103 (West 1970), which also provides that inter-spousal contracts are governed by law relating to confidential relationship. The sole trader provisions are CAL. PROB. CODE §§ 1811-21 and date back to the statutes of 1852. A woman electing to act as sole trader is liable for support of minor children under section 1820.

⁹⁹ CAL. CIV. CODE § 4802 (1970).

¹⁰⁰ *United States v. Robbins*, 269 U.S. 315 (1926).

¹⁰¹ The control has been reduced by giving the wife control of her earnings and, subject to husband's use for payment of related expenses, damages for injury to her person. CAL. CIV. CODE § 5129 (1970). Husband may not make an inter vivos gift of community property, but remedies to set aside such a gift are limited severely. CAL. CIV. CODE §§ 5105, 5125 (1970). Gift restriction applies to wife's management as well. CAL. CIV. CODE § 5124 (1970). The husband may not convey community real property without joinder by wife (with some presumptions to protect transferee). CAL. CIV. CODE § 5127 (1970). However, by that section, the wife must act within a year of recordation to set aside if title was in husband's name.

¹⁰² See note 41, *supra*. The constitutional limit on legislative authority can, of course, be circumvented by imposing obligations personal in nature which become the wife's

General: California is among those states having the most extensive protective labor legislation.¹⁰³

The heartbalm torts have been abolished, but property transferred in contemplation of marriage was recovered on a fraud claim.¹⁰⁴

Support of Family: The duty to support has been extended to married women, and her separate property is, in essence, secondarily liable.¹⁰⁵ The duty of the male to support wife and children (including illegitimate children) is, in contrast, enforceable by misdemeanor statutes.¹⁰⁶ Obligation for family expenses is primarily on the community and husband's separate property.¹⁰⁷

Divorce: Under California divorce law the right of the wife to alimony was conditioned on fault of the husband until 1959, but is now dependent on support need, and, theoretically, the husband might seek alimony.¹⁰⁸ Alimony terminates on remarriage or living as husband and wife with a member of the opposite sex. Community property is to be divided equally, but in 1970 the statute was amended to increase the power of the court to vary division in the interests of justice.¹⁰⁹ Separate property is protected where the other spouse is self-supporting and there are no children, but may be reached otherwise.¹¹⁰ Either parent may be ordered to support children from his or her own property.¹¹¹

Transfer and Succession: Limitation on inter vivos transfer without joinder of the wife applies to community real property, but after a year from recordation the transferee is protected.¹¹² Gifts of community property without consent of spouse are prohibited.¹¹³ Early restrictions on conveyance of separate

own debt and, thereby, a charge on the separate property. Obligation for support of children is provided by CAL. CIV. CODE § 4700 (1970); obligation for necessities of life as a charge on separate property of the wife and on the community she manages (her earnings and damages for injury to her person) is provided by CAL. CIV. CODE §§ 5121, 5117 (1970) respectively; the sole trader designation carries a support if there is no separate property of his and no community property under CAL. CIV. CODE § 5132 (1970). A more direct encroachment arises from the provision preventing ejection of husband from her home when it is her separate property in CAL. CIV. CODE § 5102 (1970). In essence, the wife's separate property protection has been reduced from an absolute exemption to being at least secondarily liable for family support.

¹⁰³ *Supra*, note 80.

¹⁰⁴ *Norman v. Burks*, 43 Cal. App. 2d 687, 209 P.2d 815 (1949).

¹⁰⁵ See note 41, *supra*, concerning separate property insulation, and note 102, *supra*, concerning support obligation.

¹⁰⁶ CAL. PEN. CODE §§ 270, 270(a), 271, 271(a) (1970). Since extradition for misdemeanor is rare, the running husband can probably count on only the civil Reciprocal Enforcement of Support Act remedy pursuing him, a very weak reed.

¹⁰⁷ The husband's separate property is insulated only from the wife's premarital obligations. CAL. CIV. CODE § 5120 (1970). The community is subject to the husband's debts, but not the wife's debts. CAL. CIV. CODE §§ 5116, 5117 (1970). See *Harley v. Whitmore*, 242 Cal. App. 2d 461, 51 Cal. Rptr. 468 (1966). The liability of the wife is discussed in note 101, *supra*.

¹⁰⁸ CAL. CIV. CODE § 4801 (1970).

¹⁰⁹ *Id.* § 4800 also provides that personal injury damages are allocated, subject to some limits, to the injured spouse.

¹¹⁰ *Id.* §§ 4806, 4807. Division of homestead is provided by CAL. CIV. CODE § 4808 (1970).

¹¹¹ *Id.* § 4700.

¹¹² *Id.* § 5127.

¹¹³ *Id.* §§ 5124, 5125.

property by a wife without joinder by her husband¹¹⁴ have been renounced, and separate property is freely transferable by the owner spouse.¹¹⁵ Classification problems and transmutation of property from separate to community by voluntary and involuntary action are not discussed here on the basis that the added complexity would not contribute to the analysis. That practical problems in connection with classification, transmutation and creditor's rights are substantial is worth consideration in any effort at reformation. The alchemy of community property would justify an article double the length of this one.¹¹⁶

In summary, concerning transferability, the community property, still primarily "managed" and controlled by the husband may not be given away, and the community real property transfer requires joinder by the spouse even when standing in the name of one spouse alone. (Joint tenancy and tenancy in common are in use.)¹¹⁷ The remedies, however, for enforcement of restriction on transfer are materially limited by short limitations statutes and transferees have presumptions in their favor.

Upon dissolution at death, the surviving spouse is entitled to one-half the community as a continuance of his or her interest, like a tenancy in common situation.¹¹⁸ The other one-half is disposable by will, as is the separate property of the deceased spouse.¹¹⁹ The husband, however, if the survivor, is entitled to retain control of the community (which is subject to his debts), unless the executor requires it for execution of the wife's will.¹²⁰ A support allowance is payable to either survivor in an amount fixed by the court.¹²¹ Distribution of the homestead is specifically provided, but not here discussed.¹²² If the survivor of the spouse dies owning property which was community or was separate property of the other spouse, and lacks issue, family tracing favoring consanguinity with the original owner's family is provided.¹²³ On intestate succession the surviving spouse is entitled to the entire community and half the separate property of the deceased spouse, if there are no issue of the decedent, the other half of the separate property passing to the family by consanguinity of the decedent.¹²⁴ If there is one child or his issue, the spouse's share is the same, but the child or his issue take the other half of the separate

¹¹⁴ *Dow v. Gould & Curry Silver Mining Co.*, 31 Cal. 629 (1867).

¹¹⁵ CAL. CIV. CODE § 5107 (1970).

¹¹⁶ More than 1/3 of VERRALL AND SAMMIS, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY (1966), is devoted to definition and classification.

¹¹⁷ CAL. CIV. CODE § 5104 (1970).

¹¹⁸ *LaTourette v. LaTourette*, 15 Ariz. 200, 137 P.2d 426 (1914); CAL. PROB. CODE § 201 (1970).

¹¹⁹ CAL. PROB. CODE § 201 (1970).

¹²⁰ *Id.* § 202. But see *Kriego v. Grover*, 208 Cal. App. 2d 134, 25 Cal. Rptr. 158 (1962), excluding post-death debts of husband.

¹²¹ CAL. PROB. CODE § 680 (1970). See also *Tax Aspects of a Widow's Allowance*, 43 L.A.B. BULL. 518 (1968) concerning the terminable interest problem.

¹²² CAL. PROB. CODE §§ 660-80 (1970).

¹²³ Separate property, CAL. PROB. CODE § 229 (1970); community property, half in each family, CAL. PROB. CODE § 228 (1970). Both were amended in 1970 to prevent escheat.

¹²⁴ CAL. PROB. CODE § 201 as to community; § 223 as to separate property.

property.¹²⁵ If there is more than one child of decedent or issue thereof, the spouse's share is 1/3, the residue to children and issue of deceased children per stirpes.¹²⁶ Restriction on right to administer an estate by a married woman was reduced to a mere preference for men in 1891 and lifted in 1913; testamentary power without consent of husband was provided for women in 1866,¹²⁷ and testamentary power over 1/2 the community followed in 1923.¹²⁸

Colorado

Admitted: 1886.

Franchise: The constitution effective on admission contained a clause enabling the legislature to enfranchise women.¹²⁹ Such legislation was adopted in 1893.¹³⁰

Contract and Property Emancipation Statutes: The Territorial legislature had adopted contract and property "liberation" statutes in 1861,¹³¹ and these statutes were construed to reflect a statutory policy of civil rights for women in a case concerning admission to practice law decided in 1891.¹³²

Contracts between husband and wife, including those for settlement of property rights, are valid if fairly executed.¹³³

General: Protective labor legislation was adopted during the era when such legislation was "pro" rather than "anti" feminist.¹³⁴

The heartbalm torts are abolished and naming a co-respondent is illegal, thus diminishing the sanctions tending to keep wives, and sometimes husbands, from straying.¹³⁵

Support of Family: Mothers are under a legal duty for family support and education of children.¹³⁶ The duty of the male to support wife, children and for lying-in expenses in illegitimacy cases is, by contrast, enforceable by criminal felony sanctions, as well as civil action.¹³⁷ Family expenses may be recovered from either husband or wife, and from the property of either.¹³⁸

¹²⁵ *Id.* § 221.

¹²⁶ *Id.*

¹²⁷ TURRENTINE, INTRODUCTION TO THE CALIFORNIA PROBATE CODE.

¹²⁸ *Hirsch v. Hirsch*, 62 F.2d 128 (9th Cir. 1932).

¹²⁹ COLO. CONST. art. VII, § 2.

¹³⁰ COLO. REV. STAT. ANN. § 49-3-1 (1966).

¹³¹ *Id.* §§ 90-2-1 *et seq.* (Married Women's Acts).

¹³² *In re Thomas*, 16 Colo. 441, 27 P. 707 (1891). Compare *Bradwell v. Illinois*, 83 U.S. 130 (1872).

¹³³ *Daniels v. Benedict*, 97 F. 367 (8th Cir. 1899); *Kellogg v. Kellogg*, 21 Colo. 181, 40 P. 358 (1895).

¹³⁴ *Supra*, note 80.

¹³⁵ The statute adopted in 1937, makes filing such actions a misdemeanor and voids contracts executed in settlement. COLO. REV. STAT. ANN. §§ 41-3-1 *et seq.* (1966).

¹³⁶ COLO. REV. STAT. ANN. § 43-1-10 (1966).

¹³⁷ *Id.* ch. 43.

¹³⁸ *Id.* § 43-1-1. It was held that liability of husband for goods furnished without his authority for wife and children living separate depends on express or implied consent in *O'Brien v. Galley-Stockton Shoe Co.*, 65 Colo. 70, 173 P. 544 (1918).

Divorce: Upon divorce of the parties, the court may make such orders as are just for alimony, child support and a property settlement.¹³⁹

Transfer and Succession: Intestate succession law provides that the entire estate of a deceased spouse shall go to the surviving spouse if there is no issue, and if there is issue, one-half passes to the surviving spouse and one-half to the children and their issue per stirpes.¹⁴⁰

Except homestead rights and obligations for support, neither spouse has any inter vivos interest in the property of the other.¹⁴¹ There is no common property unless co-tenancy is elected by the husband and wife. A surviving spouse may elect to take one-half of the property which was owned by the deceased spouse at time of death against the deceased's will, but a non-testamentary gift made by the deceased spouse having the effect of avoiding the right of election is not a fraud.¹⁴² A surviving spouse is entitled to a support allowance of \$7,500 (still usually referred to as a widow's allowance).¹⁴³

¹³⁹ COLO. REV. STAT. ANN. § 46-1-5 (1966).

¹⁴⁰ *Id.* § 153-2-1.

¹⁴¹ Dower and Curtesy are abolished. COLO. REV. STAT. ANN. § 153-2-1 (1966).

¹⁴² *Thuet v. Thuet*, 128 Colo. 54, 260 P.2d 604 (1953).

¹⁴³ Raised from \$3,500 in 1969. COLO. REV. STAT. ANN. § 153-12-15 (1966) (as amended).

THE INSANITY DEFENSE AND THE JUROR

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One of the most disputed issues in legal history is the insanity defense. Basically such a defense is not a question of guilt per se but rather a question of legal responsibility for a crime. During an insanity trial, there is rarely any doubt that the defendant committed the crime for which he stands accused; *i.e.*, sufficient evidence is usually present to show a direct causal relationship between the defendant's conduct and the resultant harm that was inflicted. However, the issue to be resolved is whether or not *mens rea* was present; *i.e.*, whether the defendant willfully intended to commit the crime. It is *mens rea* which is challenged by the insanity defense. "The decision as to the defendant's responsibility or lack of it rests with a jury. If the jury believes the defendant was responsible for his behavior at the time he committed the acts, it will find him guilty. If it believes he was not, it will acquit him on the grounds of insanity."¹

Little is given in the way of guidance to help the jury decide the insanity issue. Instructions to the jury often refer to the presumption of sanity. "Jurors are told it is a matter of common sense to assume men are sane unless evidence is introduced to provide they are not The underlying assumption is that if errors are to be made about who is sane and who is not, they should be made in favor of sanity and that by doing so the principles of deterrence and retribution are reinforced as often as reasonably possible."² Psychiatrists, acting as expert witnesses, are retained by both the defense and prosecution to testify upon the mental condition of the defendant. Frequently, however, such testimony does not help the jury since the psychiatrists cannot assume the burden of deciding directly whether or not the defendant was insane at the time of the crime—insanity being a legal concept with no direct medical equivalency. The typical procedure in trials involving such testimony is for the judge to instruct the jurors that they are not bound to accept the testimony of expert witnesses.³ Hence the jury is left to its own devices to decide the ultimate issue of insanity. Considering the ambiguity of the law, the complex and technical nature of the expert testimony, and the instruction to presume sanity, the only "clear" and seemingly "simple" aspect that the jurors have in common while deciding the

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¹ R. SIMON & W. SHACKELFORD, *DEFENSE OF INSANITY: SURVEY OF LEGAL AND PSYCHIATRIC OPINION* 463-64 (1968).

² A. GOLDSTEIN, *THE INSANITY DEFENSE* 115 (1967).

³ R. SIMON & W. SHACKELFORD, *DEFENSE OF INSANITY: SURVEY OF LEGAL AND PSYCHIATRIC OPINION* (1968).