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# THE PROPOSED EQUAL RIGHTS AMENDMENT TO THE UNITED STATES CONSTITUTION (Part IV)

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By SARAH JANE M. CUNNINGHAM, Lincoln, Nebraska

## *Right of a Married Woman to Engage in a Separate Business.*

Under the common law a married woman's contracts are void, and her earnings are the property of her husband. She cannot, therefore, engage in trade or business in her own name for her personal profit.

Currently, in most States, by virtue of the so-called Married Women's Acts, a wife may engage in an independent business, using her own funds and acting on her own liability, without interference from her husband or others claiming through him.

A small group of States<sup>29</sup> have the so-called Free-dealer or Sole-trader statutes. These statutes vary in detail, but all require some formal procedure on the part of the married woman who desires to engage in a separate business. This is usually a petition to the superior court of the county in which she resides showing why the disability should be removed. However, in the States having such requirements, it is not the general practice for the wife to petition the court before engaging in a separate business.

At least 7 additional States<sup>30</sup> have statutes that permit a married woman to place on public record a list of her separate personal property, from whatever source derived, in order that her rights of ownership may be protected from her husband's creditors. Such an inventory of record is notice and prima facie evidence of the title of the wife.

## *Right to Dispose of Separate Property by Will.*

Under common law, a married woman cannot make a valid will as to real property. With her husband's consent she can make a will disposing of any real property that he had not taken into his possession.

Currently in 26 States<sup>31</sup> 21 years is the

age at which both males and females are competent to make a valid will disposing of either real or personal property. In 15 jurisdictions<sup>32</sup> the age is 18. In Georgia any person over 14 may make a valid will.

The District of Columbia and Maryland differentiate between the sexes: 18 is the age for females; 21 for males.

New York, Rhode Island, and Virginia permit a minor of 18 to make a valid will as to personal property. Real property cannot be willed until the testator is 21. Missouri has the same requirement, but only males may will personal property at 18.

In general a married woman may dispose of her separate property both real and personal, as if unmarried.

## *Parent's Right to Services and Earnings of a Minor Child.*

Under common law, the father is entitled to the services and earnings of a legitimate minor child. On his death the mother becomes entitled to the child's services and earnings.

Currently the parents are equally entitled to services of minor children in 21 states.<sup>33</sup> The father, by common-law rule, has such right in 14 States.<sup>34</sup> A few States<sup>35</sup> that make provision for a parent's control of a minor's earnings have no specific statutes relating to a parent's right to the services of minor children; presumably services and earnings are considered to be synonymous.

## *Guardianship of a Minor Child.*

The father is the natural guardian of the person of a minor child, at common law. This right does not extend to control over

(Continued on page 14)

29. California, Florida, Nevada, Pennsylvania, Texas.

30. Arkansas, California, Idaho, Montana, Nevada, Oklahoma, South Dakota.

31. Alabama, Arizona, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Washington, West Virginia, Wyoming.

32. Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Montana, Nevada, North Dakota, Oklahoma, South Dakota, Tennessee, Utah.

33. California, Delaware, Idaho, Kansas, Kentucky, Maine, Maryland, Mississippi, Montana, Nebraska, New Jersey, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia.

34. Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Michigan, New York, North Carolina, Oklahoma, Vermont, Wyoming.

35. Alabama, Arizona, District of Columbia, Louisiana, Massachusetts, Minnesota, Missouri, Nevada, New Mexico, Oregon, Texas, Washington, Wisconsin.

(Continued from page 9)

a minor's property. In appointment of a guardian of the child's estate, the father is generally preferred. If he is dead or cannot serve, preference is then given to the mother.

Currently in all but 6 States<sup>36</sup> the parents, if living together, are the joint guardians of the person of their minor child. In those six jurisdictions the father is preferred over the mother, but there is no law which says the mother cannot be guardian of a minor child if the father is dead, unfit, or incapable of being the child's guardian.

#### *Domicile of a Married Woman.*

The domicile of a married woman is the same as that of her husband for all purposes, under common law.

Currently, for purposes of family relationship, the domicile of a married woman and of the minor children of the marriage is that of the husband and father, in all States. However, for certain specified purposes, a number of States grant a married woman the right to establish a separate domicile.

##### a. For Voting.

Nine States,<sup>37</sup> by statute, permit a married woman to have a domicile separate from her husband for voting purposes.

##### b. For Office Holding.

1) Five States<sup>38</sup> give a married woman the right to establish a domicile separate from her husband for purpose of holding public office.

2) Two States, Maine and New Jersey, specifically provide that a married woman may have a domicile separate from her husband for jury-service eligibility.

3) The Nevada law, in addition to enumerated rights, declares that with respect to "any right dependent on resident" the domicile is the place where the person is actually, physically, or corporeally present in the State or county."

##### c. For Separation, Annulment, or Divorce.

1) At least 11 jurisdictions<sup>39</sup> provide that if a husband and wife are sepa-

36. Alabama, Georgia, Louisiana, New Mexico, North Carolina, Texas.

37. California, Maine, Massachusetts, Michigan, New Jersey, New York, North Carolina, Virginia, Wisconsin.

38. Maine, Michigan, Nevada, New Jersey, New York.

39. Georgia, Idaho, Iowa, Kentucky, New Jersey, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, Washington.

rated, the wife may establish her own domicile.

2) For the purpose of filing an annulment or divorce action, at least 14 States<sup>40</sup> permit a married woman to have her own domicile.

##### d. For Other Purposes.

Florida permits the wife of a non-resident of the State to have a domicile within the State for probate purposes. New Jersey permits a wife to have a separate domicile for probate and taxation purposes.

#### *Public Office—Eligibility of Women.*

Under common law, women are greatly restricted as to political rights on the basis of sex and of marital status.

Today, in all States, women are eligible for election to public office on the same terms and conditions as men. Generally, women are eligible for all types of State appointive office. There are some types of offices in which State law may require the appointee to be of a designated sex. Examples of such offices are those in State penal or corrective institutions in which the sexes are segregated.

#### *Jury Service—Eligibility of Women.*

Women are not qualified under common law to serve on either grand or trial juries.

Today, women are eligible for jury duty in all but 3 States—Alabama, Mississippi, and South Carolina.

Twenty-three States<sup>41</sup> make women eligible for jury service on the same terms and conditions as men.

Twenty States<sup>42</sup> have jury-service laws that permit women to be excused from jury service on the basis of sex.

Compared to the various discriminations which have been generally set out above in regard to discriminations between the sexes in the various States, Nebraska can almost be considered the "white-spot" of the Nation. In most instances in the three areas of the law with which we are here concerned, Nebraska has established equality

40. California, Georgia, Idaho, Iowa, Kansas, Missouri, Nebraska, New York, North Dakota, Oklahoma, South Dakota, Virginia, West Virginia, Wyoming.

41. Arizona, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Michigan, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Wyoming.

42. Arkansas, District of Columbia, Florida, Idaho, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New York, North Dakota, Rhode Island, Tennessee, Utah, Virginia, Washington, Wisconsin.

between the sexes. However, it must always be borne in mind that what the State legislature grants today it may take away tomorrow. Passage of the Equal Rights Amendment would mean that women would no longer be subject to the whim and fancy of the Legislators.

In the area of jury service the Supreme Court of the United States, in one of the most discriminatory statements ever issued, said: "We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it . . ."43

Discussion of the probable effect of such an amendment may well be prefaced by a consideration of existing constitutional safeguards against discrimination. The Fourteenth Amendment still forbids any state to deny to any person within its jurisdiction the equal protection of the laws. Certainly women are persons. Are they not therefore fully protected against discrimination because of their sex?

They are not. The Fourteenth Amendment does not require all persons to be treated exactly the same. It recognized the power of the state to classify its citizens and requires only that the classification be not arbitrary and that all persons within a class be treated equally. The presumption in favor of the classification adopted requires the courts to assume the existence of any reasonably conceivable state of facts that would sustain it.<sup>44</sup> The proposed amendment seeks to take from the judiciary the power to determine that classification based on sex is reasonable.

What the effect of such an amendment would be is a matter of conjecture. The context gives little indication of the precise meaning to be attached to "equality of rights."

43. *Strauder v. West Virginia*, 100 U.S. 303, 310.

44. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.  
*Dominion Hotel v. Arizona*, 249 U.S. 265, 268.

The likely specific effects of the amendment are set forth in some detail in the pro and con arguments in the following section of this paper. In general, three broad classes of laws would be effected by the adoption of the proposal: (1) laws dealing with the relative rights of husband and wives, many of which are based on the inferior position of women under old English common law; (2) labor laws dealing with conditions under which women may be employed; and, (3) family support laws and certain provisions of social insurance laws based on the traditional dependence of the family on the father for support.<sup>45</sup>

Under the terms of the proposed equal rights amendment "equality of rights under the law" could not be denied or abridged on account of sex. (S.J. Res. 80; 85th Congress)

Precisely what constitutes "equality of rights" and what would amount to a denial or abridgement of them on account of sex are questions that very likely could be resolved only by litigation instituted subsequent to the ratification of such an amendment. Accordingly, assertions as to the effects which adoption of that amendment would have on state community property laws can be little more than predictions of the manner in which the courts would dispose of controversies arising as to the alleged discriminatory nature of various provisions in those laws. Among the pertinent provisions likely to be challenged as effecting a denial of equality of rights are the following:

#### *Idaho*

Provision granting to the husband the management and control of the community property. —Gen. Laws Ann. (1948) Sec. 39-912.

Also likely to be altered are judicial precedents under which it has been held that the entire community property is liable for the husband's debts contracted in his separate interest (*Holt v. Empey* (1919) 32 Ida. 106; 178 p. 703).

#### *Arizona*

Married women do not have the right to make contracts binding the community property. —Rev. Stat. Ann. (West, 1956) Sec. 25-214.

The community property of the husband and wife is liable for community debts contracted by the husband. Rev. Stat. Ann. (West, 1956) Sec. 25-216. The husband has been held to possess the power of general management of the community property

and in that capacity to contract community debts. (*City of Phoenix v. State ex rel. Harless* (1943) 60 Ariz. 369; 137 P 2d 783.)

Also likely to be contested is a judicial precedent permitting the husband to lease community real estate without joinder of the wife (*Hoad v. Fletcher* (1927) 31 Ariz. 456; 254 P. 253).

#### California

Whenever any real or personal property or any interest therein is acquired by a married woman, the presumption is that the same is her separate property. —Civil Code (West, 1954) Sec. 164.

Community property is not liable for contracts of the wife, made after marriage, unless secured by mortgage or pledge executed by the husband. —Civil Code (West, 1954) Sec. 167.

The husband has the management and control of community personal property with like power of disposition as he has of his separate estate. —Civil Code (West, 1954) Sec. 172.

The husband has the management and control of community real property and the sole lease, contract, mortgage or deed of the husband holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid. —Civil Code (West, 1954) Sec. 172 a.

#### Louisiana

Damages resulting from personal injuries to the wife shall remain the separate property of the wife. —Civil Code (West, 1952) art. 2402.

The husband is head and master of community gains; he administers its effects, disposes of revenue which they produce, and may alienate them by an onerous title, without the consent or permission of his wife. —Civil Code (West, 1952) art. 2402.

Likely to be contested is a judicial precedent holding that under Louisiana law, the husband's debts, however incurred, before or after marriage, are collectible out of community property while creditors of the wife must look elsewhere for satisfaction. The husband is bound to pay the community debts while the wife is not so bound. —*Jefferson Lake Sulphur Co. v. Walet* (1952) 104 F. Supp. 20.

#### Nevada

The husband shall have the entire management and control of the community

property. —Comp. Laws (Hillger, 1929) Sec. 3360.

Upon the death of the wife the *entire* community property shall vest in the husband. Upon the death of the husband *one-half* of the community property shall vest in the wife. —Comp. Laws (Supp. 1931-1941) Secs. 3395.01, 3395.02.

#### New Mexico

Whenever any real or personal property, or any interest therein is acquired by a married woman by an instrument the presumption is that title is thereby vested in her as separate property. Stat. Ann. (1953) Sec. 57-41.

The husband has the management and control of personal community property and shall have the sole power of disposition of said property, as he has of his separate estate. —Stat. Ann. (1953) Sec. 57-1-3.

Upon the death of the wife the *entire* community property belongs to the surviving husband. Upon the death of the husband *one-half* of the community property goes to the wife and one half is subject to testamentary disposition by the husband. —Stat. Ann. (1953) Sec. 29-1-8 to 29-1-9.

#### Texas

The joinder of the husband shall be necessary to the incumbrance or conveyance by the wife of her lands and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her. —Civ. Stat. Ann. (Vernon, 1951) art. 4614.

During coverture community property may be disposed of by the husband. —Civ. Stat. Ann. (Vernon, 1951) art. 4619 (1).

The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife, except for necessities furnished herself and children unless the husband joins in the execution of the contract.

Such community property as the personal earnings of the wife shall be liable for debts of the wife. The wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of the husband with her in making such contract. Civ. Stat. Ann. (Vernon, 1951) art. 4623.

#### Washington

The husband shall have the management and control of community personal property, with a like power of disposition as

# IDEA EXCHANGE

By LUCILLE PERELMAN, C.P.A., Charleston, West Virginia

## "CHAIN OF COMMAND" CHART

In connection with the study of internal control in an organization, the auditor would find it helpful to make a diagram of personnel indicating the "Chain of Command." The diagram could start with a box for the office manager's name and title, for instance, with lines to boxes showing the names of assistants and duties of each. Additional lines would indicate other personnel and their duties. Serving not only as a study for internal control, this chart would also provide a reference for the names of personnel in later contacts.

Virginia M. O'Hern, Los Angeles

## ADD THE DIGITS

Before checking through yards of adding machine tape for errors in balancing journals, inspect each column of figures by adding the digits in the column, eliminating the "9's" and comparing the result with

the sum of the digits in the total of that column. If they agree, the column is added correctly. If they don't, there's the culprit!

The following column of figures will show the mechanics of the method:

	<i>Step #1</i> Add the Digits	<i>Step #2</i> Eliminate the "9's"
\$ 306.24	15	6
476.83	28	1
334.56	21	3
24.69	21	3
440.60	14	5
12.23	8	8
390.60	18	0
\$1,985.75	35	8

As with most rules, there is always an exception. If the difference is divisible by "9", the error cannot be detected by this method, but it is, most likely, a transposition of figures.

Linda R. Van Leaven, Buffalo

he has of his separate property, except that he shall not devise by will more than one-half thereof. —R.C.W. (1951) Sec. 26.16.-030.

The husband has the management and control of community real property. —R.C.W. (1951) Sec. 26.16.040.

Also likely to be challenged are judicial precedents to the effect that community property was liable for an indemnity agreement by the husband who agreed as an attorney, to indemnify a surety on his client's bail bond. In this case no profit resulted to the community property from the transaction (*O'Malley v. Lewis* (1934) 176 Wash. 194, 29 P 2d 283; in accord: *Fidelity Nat. Bank v. Fox* (1927) 144 Wash. 494; 258 P 335; *Fleding v. Denholm* (1905) 40 Wash. 463; 82 P. 738). Washington courts also have held that every debt created by the husband during marriage is presumed a community debt (*Mor-*

*rison v. Duncan* (1935) 182 Wash. 503; 47 P. 2d 988).

These few judicial decisions cited do not, of course, represent a definitive enumeration of all adjudications that under the proposed amendment might be contested as inequitable to one of the spouses.

It would appear that basically the amendment will:

*Preserve States' Rights* — States may still legislate under their police power on health, welfare, civil matters—the only proviso is that laws shall apply to *citizens* without regard to sex.

*Establish in law* the term "men" as generic, to include women.

*Encourage the maximum* use of woman-power through removal of petty restrictions.

*Dignify family* and recognize the partnership of marriage as it exists.

*Fulfill platform pledges* of both political parties.