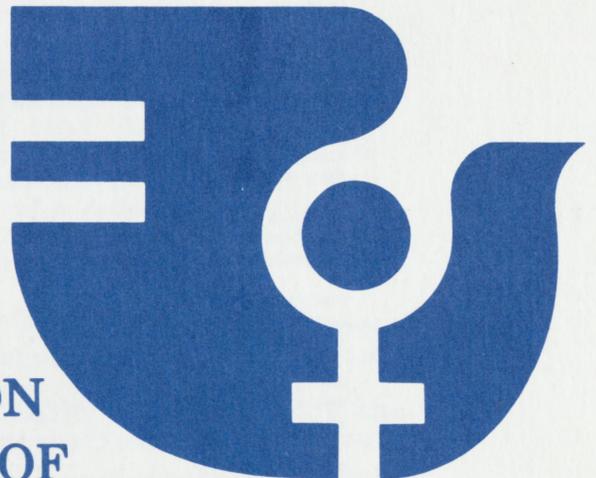


THE LEGAL STATUS OF HOMEMAKERS IN TEXAS

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ON THE OBSERVANCE OF
INTERNATIONAL WOMEN'S YEAR



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Texas Women's Meeting
June 24-26, 1977
Austin, Texas

THE LEGAL STATUS OF HOMEMAKERS

IN TEXAS

BY SARAH RAGLE WEDDINGTON

* * * * *

This report was prepared under contract with the Center for Women Policy Studies, Washington, D. C., which commissioned an authority in each State to write a paper on the law of that State from the viewpoint of the homemaker. Opinions and points of view stated in this document are those of the authors and do not necessarily represent the official position or policies of any Federal agency, the National Commission on the Observance of International Women's Year, of its Homemaker's Committee, or of the Center for Women Policy Studies.

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March 1977

THE LEGAL STATUS OF HOMEMAKERS

IN TEXAS

BY SARAH RAGLE WEDDINGTON

This report was prepared under contract with the Center for Women Policy Studies, Washington, D.C., which commissioned an author in each State to write a paper on the law of that State from the viewpoint of the homemaker. Opinions and points of view stated in this document are those of the author and do not necessarily represent the official position or policies of the Federal agency. The National Commission on the Observance of International Women's Year is the Bureau's Commission of the Center for Women Policy Studies.

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Stock No. 052-003-00339-2

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MESSAGE FROM MARTHA GRIFFITHS

Importance of Legal Status of Homemaker to All Women

The legal status of homemakers is of most direct importance to the minority of women whose husbands neglect to make a will or fail to be honorable and decent in their relationships with their wives and children, for these are the women who experience the effects of the law most directly. The legal status of homemakers, however, has great significance for all women, for the parents of daughters, and for the society at large.

The rights of homemakers under support laws, property laws, divorce laws, and inheritance laws are the concrete evidence of the value society places on the homemaker's role. If women's work is not valued in the home, it has a low value outside the home. If our daughters (and sons) cannot expect that their work in the home will be recognized as of equal value and deserving equal dignity with that of the spouse who works outside the home, the institution of the family and our society will suffer. The laws in most States are not grounded in this evaluation of the homemaker's role.

The laws under consideration in this leaflet apply to all wives (and in most cases to husbands) whether they work at home or outside the home. This paper, however, has been written from the viewpoint of the homemaker not employed outside the home, because she (or he) is the most vulnerable to economic inequalities.

Divorce Arrangements as an Indicator of Worth of Homemakers

Because divorce is usually the only way a wife can enforce support rights, property settlements at divorce, and awarding of alimony (or maintenance), and child support provide the best evidence of the worth ascribed to the homemaker in the law. With 1,000,000 divorces in 1975, the economic impact of divorce on women and children is important to the society.

Inadequacy of Present Data

There is very little information of any kind available on economic arrangements at divorce and none that can be analyzed State by State. All available data, however, point to the conclusion that alimony is granted in only a very small percentage of cases, that fathers, by and large, are contributing less than half the support of the children in divided families, and that the enforcement of alimony and child support awards is very inadequate.^{1/}

One 1972 nationwide study of 133 couples divorced since 1968 concluded, "Probably because children usually remain in the maternal family after a separation, the economic status of former husbands improves while that of the former wives deteriorates." This statement is based on the status after alimony and child support payments are made.^{2/}

A poll of 1,522 women conducted in September 1975 at the request of the National Commission indicated the same pattern with respect to relative economic status and also indicated that only 14 per cent of divorced wives are entitled to alimony by award of the courts or through a voluntary settlement approved by the courts. Of the 14 per cent, only 46 per cent collect it regularly.^{3/} Only 44 per cent of divorced mothers were awarded child support and 47 per cent were collecting regularly.

1. Citizens' Advisory Council on the Status of Women, "The Equal Rights Amendment and Alimony and Child Support Laws", Department of Labor, Women's Bureau, Washington, D.C. 20210.

2. Duncan, Greg J. and Morgan, James N., editors, Five Thousand American Families - Patterns of Economic Progress, Vol. III, p. 185, Survey Research Center, Institute for Social Research, University of Michigan, Ann Arbor, Michigan 48106.

3. Poll of 1,522 women conducted in September 1975 by Market Opinion Research for the National Commission on the Observance of International Women's Year. A summary of the findings will be published by the Commission.

Women have never received alimony on a large scale. In 1922, the last year in which the U.S. Government collected national data, alimony was awarded or agreed to in 14.7 per cent of divorces. The proportions varied widely by State -- from 0.5 per cent in Pennsylvania and 0.7 per cent in Texas to 48.2 per cent in Wisconsin. In 1916 alimony was awarded in 15.3 per cent of divorces and was no higher in earlier years.^{4/}

Collection of alimony and child support is clearly a problem of national proportions. At my request in 1974, as Chair of the Subcommittee on Fiscal Policy of the Joint Economic Committee, U.S. Congress, the General Accounting Office reviewed a sample of recipients of aid to families with dependent children in seven States and found that many fathers were not under any court order or voluntary agreement to pay child support; that the amounts supposed to be paid had little relationship to the father's ability to pay; and that less than one-half of the amounts due were being collected.^{5/}

Effort of Committee to Gather Facts

The National Commission has recommended to the President that data be collected by the Bureau of the Census on economic arrangements at divorce, including the proportion of the support of children that is being contributed by each spouse and by the State through welfare programs. Part of the desired information is being collected in the 1976 Survey of Income and Education, and the Department of Health, Education, and Welfare plans to collect the remainder in 1976.

In addition, the National Commission, through its Committee on the Homemaker, is spending a large portion of its resources to secure these analyses by States, with examples, of how the laws affect homemakers during marriage, at widowhood, and at divorce. The Committee

4. Bureau of the Census, Marriage and Divorce, 1922, Government Printing Office, Washington, D.C. 20401.

5. General Accounting Office, "New Child Support Legislation - Its Potential Impact and How to Improve it," Single copies available from Members of Congress.

contracted with the Center for Women Policy Studies for the preparation of this leaflet and similar leaflets for all other States and the District of Columbia.

Since the primary purpose of the Committee are to make recommendations for reform in areas where homemakers are inequitably treated, and to inform the public about little known aspects of domestic relations law, our papers in this series emphasize those laws and judicial precedents that fail to give proper recognition to the value of the homemaker and the welfare of children and those about which there is little general knowledge. The cases are chosen to illustrate these problems. The authors were asked to include any available statistical information or factual studies on the topics covered, but there seems to be even less available locally than is available nationally.

Recommendations of Committee

Based on these analyses of State laws and presentations by experts, the Committee on the Homemaker has proposed and the National Commission has endorsed several specific recommendations to improve the status of the homemaker and raised a number of questions for further study. The recommendations and questions are quoted following the discussion of State laws.

The Commission's Report "...To Form a More Perfect Union..." includes these and over 100 other recommendations with supportive information. Copies are available from the Government Printing Office, Washington, D.C. 20401.

I hope concerned readers will urge organizations interested in the status of women and preservation of the family to make detailed studies of the State laws covered in this leaflet and their application and of the recommendations of the Commission. Other publications that may be useful in such a study are listed on the last three pages of this leaflet.

Where permitted, "court watching" is an effective technique for learning how laws are actually applied in divorce cases, what changes are needed, and for sensitizing judges and other court personnel to the legitimate needs of dependent spouses (usually women) and children. It is easy for judges to over-emphasize

the needs of the chief wage earner (usually husbands) and fail to even think about how the wife and children will live on what is left over after his needs are met. Court watching may reveal that there are not enough judges and supporting staff to give adequate consideration to each case, or that the quality of judges and other staff needs to be improved.

Most importantly, those concerned with the status of women and the family should insist that State legislatures and the U.S. Government give a high priority to the revisions in State and Federal law needed to recognize the homemaker's role as having equal value and deserving equal dignity with that of the spouse who works outside the home.

Martha Griffiths

Martha Griffiths, Chair
Committee on the Homemaker

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Martha Griffiths

Martha Griffiths, Chair
and Chairman of the
Committee on the Homemaker

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MARRIED IN TEXAS: SHOULD YOU BE?

The image of the bride in American society is associated with great joy. It evokes several expectations: a groom who can be depended upon to protect her and to provide for her; financial security; children who are a constant source of pride and pleasure; spouses who are loving and courteous; years of sharing and staying young together in good health, good humor, and with good looks.

For a few brides the expectations become a reality. For many others the expectations turn into a cruel hoax; the reality for these brides may be:

- A husband who is lazy or an alcoholic or a gambler, or who abandons the family, or fails to support it. Texas courts provide no real enforceable remedy in such cases. Generally they are extremely reluctant to interfere in an ongoing marriage.
- A husband who is disabled or is unable to find work. The burden of providing for the family, as well as performing the household chores, may become the wife's.
- Working outside the home, plus the responsibilities of caring for children and trying to keep house. Of the 5,277,500 people employed outside the home in Texas, 1,982,200 (38%) are women.¹ A majority of women work because of economic need: Three-fifths are single, widowed, divorced, separated, or have husbands whose earnings are less than \$7,000.
- Inability to get a job -- 6.9% of the women in the Texas labor force are unemployed; for men, it is 5.4%. Of those actively seeking work outside the home in Texas, 136,700 are women.²

- ° A low-paying job. The average annual income in Texas families headed by women in 1969 was about half that of all families: \$5,360 for female-headed households; \$9,955 for all households.³ Only 9% of families headed by women have incomes greater than \$10,000.
- ° Extraordinary stress. One researcher, Carol S. Hatfield, has documented "the extraordinary stresses women are now undergoing in our changing society, with the results being increasing numbers of women under 45 who have experienced heart attacks, hypertension ulcers, and strokes. More women of all ages have problems with migraine headaches, acute depression, mental problems, alcohol, and drugs."⁴
- ° Children or parents who suffer serious illnesses, imposing enormous medical expenses on the family.
- ° Physical abuse. In Texas a husband by law cannot be found guilty of raping his wife, and no real remedy has been found for the growing number of instances of wife battering.
- ° Divorce. In 1974 in Texas, 69,762 divorces were granted and 153,002 marriages performed. Thus, for almost every two marriages that began, one ended.⁵

One out of three marriages in Texas ends in divorce. For some brides, divorce comes early; for countless others, divorce comes in their middle or later years -- often after years of marriage. Seldom does the wife have an earning capacity equal to her husband's. Although she will probably get half or more of the community property, if the couple has debts and has accumulated few items, she may get virtually nothing. By law she is not entitled to any portion of his future earnings. One child in six is being raised by a single parent, and the divorce rate is rising rapidly among families with children.

- ° Problems providing for her children. Even if her husband is ordered to make child support payments, the payments may be too small to cover even half of the actual expenses; she may receive them irregularly, if at all.

The number of Texas households headed by mothers with children under 18 has nearly doubled in 10 years, from 103,641 in 1960 to 192,322 in 1970. From 1960 to 1970, female-headed households increased 34% but households headed by mothers jumped 85.6%.⁶

- ° Being widowed and left destitute, alone, and without any substantial earning capacity.

Even if a woman avoids these misfortunes, she may still experience a variety of legal problems in her role as homemaker. Texas law has improved greatly in its treatment of homemakers in recent years. Nevertheless, additional changes of law and of attitude are necessary.

Almost every woman knows, either personally or through friends, of these unresolved problems and of their emotional toll. The woman who examines these problems can plan her life in a way to avert tragedy or minimize its consequences. More important, identifying the problems may eventually result in changes necessary to ensure that the role of homemaker does not leave the woman who chooses that role at a disadvantage. If the homemaker's personal security, rights and responsibilities are strengthened, the partnership into which she has entered will also profit from that strength.

The way it was

Until the Texas Family Code became effective⁷, the attitude of Texas courts and the Texas legislature was exemplified by the saying that "the husband and wife are one -- and that one is the husband."⁸ Many of the laws that denied a woman a legal existence separate from her husband's have been amended or repealed. However, the climate in which these laws existed and the attitudes formed by them still exist. For example, loan or credit officers who were trained at a time when married women had no legal power to make a contract still reject applications from women, or, alternatively, continue to require the husband's signature. A Houston judge, with the attitude that a woman's name always changes upon marriage, recently refused a married woman's request to use her maiden name professionally, explaining that it would have the appearance of being immoral.

Examples of the previous laws include:

1. Until 1967, a woman had to have her husband's consent and signature to do almost anything with property.⁹

2. Any claim for personal injuries (such as the loss of a leg in a car accident) was community property; ¹⁰ the husband had to bring the suit even if the wife was the one injured.¹¹

3. A married woman could not contract,¹² and she could not become a partner in business with her husband or anyone else.¹³

4. A husband, by law, controlled the establishment of the home.¹⁴

5. The father alone was the guardian of the minor children, and was entitled to be appointed guardian of their estates.¹⁵

Women, remembering their lowly status under the old laws, now are more involved in determining what laws are passed and what decisions the courts make.

MARRIAGE

The wedding napkins said: "Louella and Ralph."

Louella and Ralph are a hypothetical couple who have been married for 13 years. They have two children: Sue, 7, and John, 10. Louella worked for two years before they married, but since then has devoted her time entirely to being a wife and a mother. Ralph is a hard-working geologist who earns \$15,000 per year.

We will use Louella and Ralph as examples of the effect of various Texas laws and court decisions. Louella is but a pseudonym for each individual woman in Texas who will marry, who is married, or who has been married.

Getting married

Before Louella and Ralph started living together, they married in the traditional way: by obtaining a marriage license and having a ceremonial marriage. However, more and more people are choosing to live together without having first gone through a marriage ceremony. Some of them are establishing common law marriages, either as they begin to live together or, more commonly, some time after they've been living together.

Texas is one of the few States that recognizes common law marriage. Three elements must exist to establish such a marriage. The parties must (1) intend to be married; (2) live together; and (3) hold themselves out to the public as husband and wife. The first element is often inferred from the conduct of the parties.

If they choose, the parties may at any time record the fact of their marriage at the county courthouse. Doing so avoids the possibility of future litigation with one party claiming they established a common law marriage and the other party claiming they did not.

A common law marriage has all the same legal consequences as a ceremonial marriage. If a common law marriage is proven, any children born of the union are presumed to be legitimate.

To end a common law marriage, the parties must follow regular divorce procedures.

What's her name?

Louella's last name is Smith. Ralph's last name is Jones. When the marriage ceremony ends, what is Louella's surname? Smith? Or Jones? Does she have a choice? Can she use both Smith and Jones? What if she starts using Jones and then wants to go back to using Smith?

Some women now prefer to retain the use of their pre-marriage names. The woman who has established an academic record, a credit rating, a business or a career may wish to continue using the name by which others know her. Other women wish, as a matter of principle, to retain an identity separate from the husband's.

There has never been a statute in Texas specifying whether marriage changes Louella's name. Traditionally, most women simply assumed the husband's surname without question. As a result, members of the public and the judiciary believed-- incorrectly -- that a woman's name changed upon marriage. Court cases perpetuated the misconception. In one instance, a woman signed a contract prior to marriage, defaulted on the payments due under the contract after marriage, was sued in her maiden name, and the court dismissed the law suit, saying no such person then existed.¹⁶

In October 1974, the Attorney General of Texas rendered an opinion stating that in Texas a woman does have the choice upon marriage either to retain her name prior to marriage or to assume her husband's surname.¹⁷

A question left unanswered by the opinion, however, is whether Louella, who has been using Ralph's surname, can now use her premarriage name for professional or social purposes if she wishes to do so. There is certainly no law against her doing so, unless she does it to avoid creditors. As a practical matter,

she may have trouble getting school or government officials to change her name to Smith on official documents without evidence of a court order of change of name. If necessary, a court order can be secured with minimal court costs and attorney's fees. Louella may also act as her own attorney before a state district court.

A minority of district judges, however, retain the old attitude and may be reluctant to enter such an order. This seems to be especially true if the woman is given custody of minor children in a divorce and wishes to return to using a former name.

Where's their homestead?

Each person who owns a home should establish it as a homestead. Texas generously protects from creditors such property as the homestead, clothing, household furnishings, tools by which a living is earned, and various animals.¹⁸ In addition, the taxes on a homestead are less than on other property.

The head of the family designates and sets apart the homestead.¹⁹ The most recent case in this area holds that the husband has "the right to choose the homestead without the wife's concurrence so long as his act of designation is made in good faith and is not unjust or unfair to her."²⁰ In other words, the husband may select a family home without even consulting his wife and that becomes the homestead under Texas law.

Where a person's domicile is located can be a significant factor in many legal situations. Ordinarily a wife's domicile follows that of her husband, but if his behavior causes her to separate from him she may establish her own. Until 1967 a wife could be sued in the county where her husband was domiciled, regardless of whether she lived there or not. That provision was deleted, so arguably she can now have a separate domicile if not a separate homestead.²¹

Who owns the property?

Texas is one of eight community property states.²² The community property system is based on the theory that marriage is a partnership. The law presumes that both Ralph and Louella are contributing all of their efforts to the well-being of the marital enterprise.

All property owned by either Louella or Ralph is presumed to be community property and therefore to be owned one-half by Louella and one-half by Ralph. However, if either of them can prove that a particular item of property was acquired prior to the marriage or after marriage by gift, by inheritance, or because of a relative's death, then that property is separate property and is owned solely by the one who acquired it.

Whether property is separate or community is very important because it determines several rights: (1) who has the right to manage the property during the marriage; (2) who is likely to get the property in the event of divorce; and (3) what happens to the property when either Ralph or Louella dies.

The parties during the marriage can partition their property. Louella and Ralph could make an agreement that certain items of the property they had acquired up to that time would be Louella's separate property and therefore subject to her sole control and management and that other property would be Ralph's separate property and therefore subject to his sole control and management. Texas law does not allow a couple to divide property they expect to acquire in the future; they can divide only property they currently have. In addition, Louella could give Ralph her community interest in certain property and thereby make it his separate property, or vice versa.

Whether particular property is characterized as community or separate must often be determined by a lawyer. For example, the income from separate property is community property. Before the present Family Code, all money received because of personal injuries suffered by one spouse in an auto accident was community property; now that money is separate property, but money received for injury to the car (if it was community property) is community property.²³

What if you can't tell whose property it is?

The law presumes that all property owned by the couple at the time of divorce or death is community property. The burden of proving that property is separate is on the spouse who claims it. Meeting that burden is often impossible if the separate property has been mixed up with or "comingled" with community property.

Numerous women have suffered because they failed to keep track of their separate property. Women must learn, therefore, to protect themselves by keeping their separate property distinct from community property. They must also be able to prove what is separate property.

By keeping track of separate property, women can (1) retain the right to manage the property, (2) enhance the likelihood of being awarded that property in the event of divorce, and (3) preserve the right to decide what happens to the property when they die. One way to help establish what is separate property is to record a schedule of such property with the county clerk.

There are many sad situations in which women have found themselves after not keeping track of their property. For example, one Texas woman inherited a ranch from her father. Gradually, parts of it were sold at the insistence of her husband to pay for his extravagances: finally none of the property remained. When the husband filed for divorce, the wife was 47 years old, she had never been employed outside her home and had no job skills, and the community estate contained no property of any substantial

value. The husband has done well in real estate since the divorce, but the wife has been living in near poverty. Had she simply not agreed to sell the ranch, she would have had ample assets.²⁴

A wife may try to get reimbursement for the separate assets the community spent, but she is not likely to be successful, unless the community estate has assets at the time of the settlement and she can trace her money back to specific items.

Thus, if Louella has separate assets but mixes them with community assets or spends them for living expenses, in the event of divorce or Ralph's death, she may end up with nothing to offset the financial contribution she made to the marriage.

Who manages the property?

Louella and Ralph by Texas law each have "sole management, control, and disposition of that community property which he or she would have owned if a single person."²⁵

The law appears to treat Ralph and Louella equally. In reality it often operates to give a voice in family financial management to working wives, but denies a voice to a woman who chooses not to work outside the home.

Ralph is entitled to manage his separate property (including the revenue from it) and also his earnings. If Louella were working outside the home, she would have the right to manage her earnings, too. If those earnings were combined or commingled with Ralph's earnings, she would have a right to share in the management of the funds. If she had separate property that was commingled with community property, she would have a right of joint management of the commingled funds. Yet, if Ralph's earnings are put in an account and none of the funds in that account are attributable to Louella's earnings or separate prop-

erty, then Ralph has the sole right to manage all of the funds in that account. In that situation, Ralph has the sole right to manage the family income. The law does not consider the very real contributions to the marriage made by a spouse who does not earn an income outside the home.²⁶

One limitation on Ralph's management powers is that he cannot defraud Louella. However, fraud is very difficult to prove, and the courts would give Ralph wide latitude before finding fraud.

Can Louella get credit?

Prior to 1973, getting credit was a major problem for all Texas women. Women who had credit prior to marrying were informed after marriage that their accounts had been closed, and that they would have to reapply under their husband's name and with his signature. Upon divorce, women discovered that all the credit was in the husband's name and could be enjoyed by her only so long as she had status as his wife. As divorced women applied for credit in their own names, they were asked for credit references; since they had none, they couldn't get credit. However, women have been successful in getting credit in their deceased husband's name where they were denied credit in their own.²⁷

In 1973, credit became easier for Texas women to establish. A statute was passed forbidding any person granting credit to discriminate solely on the basis of sex.²⁸ Women with separate property or who work outside the home have been the main beneficiaries of this statute: Louella may still have the same problems with credit. Since she has no separate property and doesn't have an income, she will probably not be able to get credit in her own name. Louella "owns" half of the community property, but unless she and Ralph have acquired a good deal of property and the potential lender is convinced that her community interest is sufficient to guarantee repayment, Louella

may still be unable to get credit because she has no right to manage any of the family income which Ralph earns.

Serious problems for married women, divorcees, and widows have arisen from the fact that credit accounts, even joint accounts, have been customarily carried in the husband's name by creditors and consumer reporting agencies. Thus when a wife, widow, or divorcee with her own property or independent income, applies for credit in her own name, her application may be denied because she has no credit history of her own. Some creditors will not take the risk of extending credit to someone who, according to all records available, does not have a history of satisfactory payment.

Regulation B, issued by the Federal Reserve Board to implement the Federal Equal Credit Opportunity Act, attempts to remedy the situation. The regulation provides that after June 1, 1977, creditors must determine as to each new account whether both spouses will be contractually liable or whether the applicant's spouse will be permitted to use the account (if the account is for open end credit). If the answer is yes, the creditor must report the account to the credit bureau in a manner which will reflect the participation of both spouses. For accounts already in existence on June 1, the regulation requires that creditors must determine from a review of their files whether an account is one which should reflect the participation of both spouses. Alternatively, the creditor must mail a notice to account holders, notifying them of the right to have the credit information so reported.

In requiring credit designation and credit reporting in this manner even when the wife is not contractually liable, the Board recognized that often a homemaker who uses an open end account will play a significant role in maintaining the account -- by making the monthly payments or by budgeting income and expenditures. Thus, the payment history may be as much a product of her contribution as that of the wage-earning husband.

The Equal Credit Opportunity Act and Regulation B provide other protections against discrimination on the basis of sex or marital status. Information may be obtained from the Office of Saver and Consumer Affairs, Federal Reserve Board, Washington, D.C. 20551.

If Louella has access to credit only as Mrs. Ralph Jones and Ralph notifies the creditors that he will no longer be responsible for her debts (as often happens when one or the other of the spouses files for divorce), Louella will not be able to use any of that credit. One estranged husband published a notice in the local paper saying that he would no longer be responsible for his wife's debts or charges; the irritated wife promptly published a notice in the same paper saying that he never had been responsible for any debts, not even his own.²⁹

What Obligations of Support do Louella and Ralph have?

The Texas Family Code obligates both Louella and Ralph to support their children. In addition, Ralph has the duty to support Louella; Louella has the duty to support Ralph if he is unable to provide for himself.³⁰

However, the law will be of little help to Louella in a variety of situations, especially while they remain married. If Ralph becomes an alcoholic or is just lazy and quits his job or if he moves away from home, Louella will have to support herself and the children. If Ralph continues to work and simply decides not to give Louella any money, the courts may not order him to pay her a portion of his salary unless she files for divorce.³¹

The leading case in this area is McQuire v. McQuire.³² The husband, an affluent but stingy farmer, refused to provide his wife of 34 years with even the barest necessities. He would not give her money, provide her with clothing, or permit her to use charge accounts.

The house in which they lived had no toilet, no bathing facilities, and no running water. The furnace was faulty and the furniture was shabby. The wife sought assistance from the courts relying on her right to be supported and also on the fact that she had participated actively in the farming operation. The court refused to take any action on her behalf. The general rule continues to be that as long as the parties are living together, the court will not intervene to assure the wife her "right" to support. Of course, a right without any enforcement is not really a right.

Under Texas law, Ralph has a duty to provide Louella with necessaries. Louella has the legal authority to contract with another to provide her with those necessaries and then to bill Ralph for them. However, very few merchants will sell her goods or provide her services on that basis because of the trouble and expense of getting payment from Ralph. In order to collect, the creditor would have to prove that the goods or services provided were, in fact, necessary and if the court found they were not, Louella would have to pay for them herself.

What if Louella becomes ill?

A homemaker is almost unique in our society in that she alone is not covered by some sort of insurance, either private or through social security, for disabilities which may keep her from performing her job. If a husband becomes disabled, social security or private insurance will almost always replace all or part of his wages. But, if a homemaker becomes disabled, she and her family will find themselves in a very difficult position; a full-time housekeeper will cost a minimum of \$400 per month. Today, homemakers and their families find it very difficult and/or very expensive to insure themselves against this risk.

Can Louella be raped or assaulted by Ralph?

The rape section of the Texas Penal Code says: "A person commits an offense if he has sexual inter-

course with a female not his wife without the female's consent."³³ In a recent case,³⁴ a husband appeared at his wife's home on the same night that the judge announced their divorce was final. He was brandishing a pistol and forced her to accompany him to a deserted road where he raped her twice. He would not have been guilty of rape if they had still been married even though they were separated; since the divorce was announced that day, he was convicted.³⁵

If Ralph batters Louella, she can call the police and try to file assault charges against him.³⁶ But police officers are extremely reluctant to interfere in family disputes, and the prosecutors may not accept her complaint. Further, there may be a serious problem in establishing sufficient evidence to get a judge or jury to convict the husband. In one case, even though a neighbor heard screaming and when the police arrived the wife ran outside bleeding and crying "He is trying to kill me," by the time of the trial she said she had fallen in the bathtub and caused her own injuries. The court decided there was not sufficient evidence to convict the husband of assault.³⁷ The wife may well have been so afraid of her husband that she changed her story. What protection from him does she have? As a practical matter, she has little. Even if he were put in jail for a time, he would be out at some point, and then might return to harm her even more.

In another case, the husband and wife were separated. Even though a district court had issued a restraining order forbidding the husband from visiting the wife, he appeared at her home late one night, kicked in the front door, beat her, struck her in the head with a pistol (the wound required 19 stitches), shot her in the stomach, and told her he would kill her. He then forced her into her car where a friend of his was waiting, drove her around for an hour, and when stopped by the police said, "That's my wife. I'm going to kill her." After disarming the officer and fleeing, the husband was finally arrested. The

wife was taken to the hospital, where she remained for 14 months, undergoing seven operations and receiving 22 pints of blood. In that case, the court did find sufficient evidence to convict the husband of assault.³⁸

It is doubtful that a wife who has not previously filed a divorce petition can obtain a restraining order to prevent her husband from coming in the house to harass her. A restraining order is of questionable value against a determined husband. However, if he repeatedly violates the court order that he leave her alone, he can eventually be jailed.

A peace bond is generally available to a person who has been threatened with physical harm. The person charged will be required to attend a hearing before a magistrate. At the hearing the judge, if satisfied with the grounds for the complaint, will require the defendant to post a bond for one year. If the defendant fails to post bond, he may be jailed. If he fails to leave the complaining party alone, he may be jailed. As a matter of practice, peace bonds are rarely, if ever, granted unless a divorce has been filed. Furthermore, most judges are reluctant to give them even where a divorce action has been filed, but not finalized. Peace bonds are most likely to be issued after a divorce is final and one party is threatening abuse to the other. Even then the judge must be convinced the threats are severe.

In summary, Ralph, by law, cannot be guilty of raping Louella, even if they are living apart. If he starts battering her, she may have extreme difficulty getting help. If she brings assault charges, she will need witnesses or substantial physical injury to hope to get a conviction. Even if she does get a conviction, she will have to worry about whether the court will put Ralph in jail or give him a suspended sentence, and what he will do when he is released.

Who will take care of the children?

If Louella were divorced, or if Ralph died while the children were of preschool age, or if Louella had to go to work because of Ralph's inability to meet the family's financial needs, Louella's problems of finding suitable employment outside the home would be compounded by the need to make arrangements for the children. That problem is faced by many women. The facts are these:

- Parents often pay approximately \$50-\$100 a month to place one child in a day nursery. Parents who hire a full-time domestic to watch their children are required to pay \$2.30/hour (approximately \$368/month). according to Federal minimum wage guidelines.³⁹
- Of Texas mothers with children under six, 34% are in the labor force; in 1970, 268,000 Texas mothers with preschool children were in the labor force.⁴⁰
- The labor force participation rate for Texas mothers with children under six has increased 50% in 10 years. The rate for all Texas women has increased 20%. In 1970, 1.6 million Texas women were working; 267,583 of them were mothers with children under six.⁴¹
- Eighty-four percent of working mothers with children under six in Texas are working because of economic necessity; 28% of them are the sole support of the family.⁴²
- Sixty-five percent of single-parent families with children under six are in poverty, and an additional 23% are near poverty.
- Nearly three of four working mothers with children under six in Texas work at least 40 hours a week.⁴³

- The need for child care for working mothers is enormous, regardless of income level.⁴⁴
- Among Texas children under age six, one in three is in a child care arrangement.⁴⁵
- For the 420,000 Texas children under six whose mothers work, there are 108,000 licensed child care spaces.⁴⁶ The other children are either left alone, left with family or neighbors, or are in unlicensed day care facilities.
- Thirty-two thousand Texas children under six are left to care for themselves while their mothers work and another 33,000 may be left alone.⁴⁷

Because many Texas mothers need to work, better child care arrangements have to be made. Even if Louella is able to find child care, it may not be the quality of care she wants, or she may not be able to afford quality care.

What if Louella has to get a job outside the home?

Whether because of extraordinary medical expenses, the husband's losing his job or becoming disabled, the effect of inflation, divorce, or the husband's death, many women who have been outside the job market for years have recently been forced to seek employment. They are at a special disadvantage because of their lack of recent employment experience, particularly in a tight job market.

Some state universities are beginning programs to help women beyond normal college age complete their educations. The University of Texas at Austin, for

example, offers full-time counselors to work with such women, advising them on courses of study and providing opportunities for them to talk with other women facing the same readjustments and experiencing the same difficulties.

Several proposals have been made to encourage governmental agencies to give special consideration to the hiring needs of mature women and also to develop greater opportunities for part-time employment to help such women balance their family responsibilities and their financial needs. As yet, no legislative action has been taken.

DIVORCE

What if Louella wants to separate from Ralph?

There is no statutory law in Texas providing for separations. Prior to the present Family Code, Texas had an express statutory provision for "separate maintenance," that is, forcing the husband to give the wife financial help during a period of separation. The current legal situation is not clearly defined, but some Texas wives have successfully sued their husbands for separate maintenance.

Once the parties have separated, it is possible for them to enter into a contract regarding support. The agreement must be in writing with both parties' signatures notarized, and it must recite that the parties are living apart and evidence some consideration. If the husband contracts to give the wife money on a periodic basis and then later refuses to carry out the agreement, she can sue him for failure to abide by the contract and seek civil help in getting the money. As previously mentioned, the wife might also try to get creditors to furnish her necessities and to bill the husband for them; although the husband is obligated to provide necessities, few creditors will furnish goods or services in that situation.

Only after the filing of a divorce petition will the courts generally become involved in forcing Ralph to move out of the house or to pay part of his wages to Louella, in deciding who will provide for the children and who will take care of them, and in determining who will live in the parties' home.

What if Louella files for divorce?

Texas is a no-fault divorce State. The grounds for divorce most commonly used is that the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation.⁴⁸ The more traditional grounds for divorce, such as adultery, cruelty, and abandonment, are also available but are seldom used.

Once a divorce petition is filed, the courts will step in at the request of either party to determine what portion of his salary Ralph must give Louella for her and their children's support, who will care for the children, who will be entitled to live in the parties' home and drive their automobiles, and who will be responsible for paying their debts. The courts will also make a variety of other arrangements for the time during which the divorce action is pending.

Who gets what?

An initial problem in any divorce situation is determining what property is available for division. If Louella let Ralph take care of their financial matters, she may have absolutely no idea whether the couple owns stocks, what investments they have, the value of their assets, or even where Ralph keeps the family money. Some wives do not even have access to a checking account. If Ralph is determined to hide assets, trying to discover those assets can be a time-consuming and expensive process.

There have been situations where the husband suddenly refused to give the wife any money and where she had no access to credit. The wife was then left destitute with no money for daily necessities and no money to hire a lawyer to help her assert her rights.

Every wife would have general knowledge of the family finances and should have at least a small amount of money accessible to her in case of emergency.

The Family Code provides that the judge is to divide the property in such manner as is just and equal.⁴⁹ Therefore the judge has a wide discretion. The courts in Texas generally allow each spouse to retain any separate property he or she has and then divide the community property between the spouses. However, where equity requires, the judge can award the separate property (other than real estate) of one party to the other. In limited situations the court may impose a lien on the separate real property of one spouse to guarantee payment of a cash award to the other.

Theoretically, the community property system results in each spouse owning half of whatever they have acquired during the marriage. The theory breaks down in practice. Louella and Ralph, like the typical couple going through divorce proceedings, are not wealthy. In fact, they have a home with rather high mortgage payments and little equity; they have some furniture that is not particularly valuable, though most of it is paid for; they have two cars, neither paid for; and they owe money on various charge accounts. They have minimal savings, life insurance on Ralph, and no other assets except Ralph's retirement funds. Thus, even if Louella gets half or even most of the existing property, she will get very little. She may also be ordered to pay the debts owed on any property that is awarded her.

Ralph has used his time during the marriage to develop an earning capacity. Following the divorce, he won't share that earning capacity with Louella. She has

spent her time during the marriage working in the home and with the children and has not established or enhanced an earning capacity outside the home. Only because she has children younger than 18 is she entitled to any financial help from Ralph, and then she may not be able to enforce Ralph's obligations to pay or to pay regularly.

There is no permanent alimony or maintenance provision in Texas. We are one of only three States which do not provide for or at least permit ongoing support for the economically dependent spouse after a divorce.⁵⁰ Although the courts will enforce a husband's voluntary agreement to make support payments to the wife, they will not make any provision for the woman whose husband has forgotten her or has simply refused to contract with her. The theoretical basis for denying such court-ordered support is that the wife "owns" only one-half of what the community has. However, the other seven community property States recognize that in families who have not accumulated much, the husband who leaves the marriage with little capital but with a well-developed ability to earn has taken more than half of what the community owned.

If the couple owns a business, the wife has an interest in the business and is entitled at the time of divorce to receive her share of the business or payments buying out her interest. But if her husband is a professional working independently, she has no interest in his future earnings.

Texas courts have traditionally held that retirement benefits don't constitute property that can be divided unless and until such time as the husband has a "vested" interest, for example, he would be entitled to future retirement benefits had he retired at the time of the divorce. That line of cases has recently been changed by a Texas Supreme Court case allowing an award at the time of the divorce of an interest in retirement payments, payable to the wife "if, as and when received" by the husband.⁵¹ If the husband's retirement plan

has a cash value at any time in the future, the wife is entitled to a portion of the cash value.

For example, one of the most valuable retirement plans is that for military personnel. To be entitled to retirement benefits, military personnel must have served 20 years. What happens if there is a divorce when the husband has served 19 years and 10 months? Although not unanimous in answering the question, the courts had generally said that the wife would not be entitled to any portion of the military retirement benefits. A recent Texas Supreme Court case now says, however, that the wife in that situation is entitled to an interest in the military retirement benefits and that she might, for example, be awarded a proportional part of the benefits "if, as, and when received."⁵²

A special problem for military wives in Texas is the apparent lack of federal law to help them collect child support and awards of community property interests in military retirement. Federal law provides that military pay and retirement can be garnished "as provided by State law" for child support and alimony. Unfortunately Texas does not allow garnishment of such funds and so federal authorities to date have refused to recognize such remedies in Texas. In addition, the wife awarded a community property interest in retirement rather than alimony is not covered by the statute. Congressional offices are currently looking into the possibility of changing federal law to cover Texas wives in these situations.

In recognition of the special problems that married women like Louella have as they are forced to enter the labor market after some years outside, attempts have been made to get the Texas legislature to pass legislation providing for a "retraining allowance" in appropriate cases following divorce. If the bill passes, Louella would be able to seek financial assistance from her husband following divorce for a limited number of years to allow her to return to college and complete her degree or acquire a job skill, or to provide for her needs if she has to accept a low-paying job and work for salary

increases and promotions. The justice of such provisions is especially obvious in the cases where the wife has worked to put the husband through school or to help him establish himself professionally, but it is also true of other situations where the earning capacities of the parties are disparate. However, those special remedies are not currently available. All a court can do is to give the wife a larger share of the property.

Women are joining together to encourage both the Texas legislature and the Congress to address the problem of the displaced housewife, the woman who has worked as a wife and mother for years and suddenly has to seek employment outside the home.

Texas courts, struggling to provide for destitute wives, sometimes award more than half of the community property to the wife in recognition of the fact that the husband has an earning capacity and can provide for himself. However, that adjustment is possible only if the couple has acquired some property. The court might award some of Ralph's separate "personalty" (i.e., insurance, stocks, cash, or other assets except real estate) to Louella, or it might impress a lien (that is, a charge that would have to be paid to her before he could sell the property) against Ralph's separate real property to guarantee payment to Louella of some sum. Obviously, that is impossible if Ralph has no separate property.

As to the payment of community debts, courts often order the husband to pay the bulk of family debts if he has an earning capacity greater than the wife's. That court order has been small comfort to women awarded property that had been pledged for the payment of debts. Even though the husband may be ordered to pay the debts, if he fails or refuses to pay them, the creditors have the right to come and take the property that was pledged. Many a wife has seen some of her needed furniture removed by a creditor because her husband didn't pay for it, even though he was ordered to do so.

Who gets the children?

The Family Code makes the best interests of the children the test by which to determine which parent will be awarded "custody" of the children.⁵³ The test on its face does not discriminate either for or against Louella.

Following a Texas divorce, one party is made the "managing conservator" of the minor children and the other party is made the "possessory conservator." The managing conservator is given all the rights, powers, privileges, and duties of a parent, except those which are specifically given to the possessory conservator.⁵⁴ The managing conservator is the parent with the day-to-day responsibility for the children. The possessory conservator generally has visitation rights and a responsibility to see that they are well cared for during visitation periods.⁵⁵

In practice, Louella would probably be named the managing conservator. In 1971, the mother received custody of the children in approximately 80% of the cases tried in Travis County, Texas.⁵⁶ In recent years, however, fathers have begun more often to seek to be named the managing conservator or custodial parent. The court, in solving a contested custody case, generally looks first to see which party has provided the bulk of personal care for the children, and that generally is the mother. There is a definite trend in Texas to examine each contested case more closely than in the past to determine which party -- the mother or the father -- is, in fact, better able to provide the primary care for the children.

What if Louella is given custody but Ralph refuses to return the children?

Once a court has named a managing conservator for a child, other Texas courts will compel the return of the child to the managing conservator in a habeas corpus proceeding. However, if the governing order was entered in another State, the Texas court may order

a change if the previous court did not have authority over the parties or if the child has been within the State for at least 12 months immediately preceding the filing of the petition.

Texas also makes interference with the custody of a child a felony. Interference with custody occurs when an individual who takes or retains a child 18 years old or under out of the State and:

- (1) knows that his taking or retaining violates a temporary or permanent judgment or order of a court disposing of the child's custody; or
- (2) has not been awarded custody of the child by a court of competent jurisdiction and knows that a suit for divorce or a civil suit or application for habeas corpus to dispose of the child's custody has been filed.

It is a defense to prosecution if the individual returns the child within seven days after the date of the commission of the offense.

Who pays support? How much?

Under Texas law, both parents are equally liable for the support of their children. A child in Texas is entitled to support from his or her parents until the age of 18.⁵⁷ Thereafter, neither parent is obligated by law to support the child, whether or not the child has finished high school or wishes additional education. If either parent agrees by contract to provide support past 18, the courts will enforce that obligation in a civil proceeding, but not by contempt proceedings. That is, a parent cannot be jailed for failing to provide such support.

In a divorce proceeding, the court generally awards child support to the parent who has custody of the

children. This is particularly true if the wife has custody and earns less than the husband. Sometimes the wife is required to pay support to the husband when he is made the custodial parent.

What if Ralph refuses to pay child support?

Many women have severe financial problems in attempting to provide for their children after a divorce. In addition to low earnings after years out of the job market, they often experience great difficulty collecting the child support awarded them by courts. As soon as one year after the entry of a divorce decree, an average of 50% are no longer receiving child support that their husbands have been ordered to pay.⁵⁸

Ralph might not pay for a variety of reasons. He may be financially strapped following the divorce and may be attempting to pay off family debts the court ordered him to pay. He may decide he needs the extra money for dating. He may be supporting children by a prior marriage. He may just resent having to send any money to his former wife.

The basic enforcement tool Louella has is to ask the court to hold Ralph in contempt for failing to comply with the court order for child support. The judge can put Ralph in jail if he is found guilty of contempt or willful disobedience of the court's order. However, most judges are reluctant to jail Ralph because then he couldn't earn the money needed for child support. A second alternative is to assess a fine.

Louella can get a civil judgment for past-due child support, but this may be worthless unless Ralph is far enough behind to make the possible recovery sufficient to cover attorney's fees and court costs, and unless Ralph has some property or money that can be attached to satisfy the judgment. Meanwhile, Louella doesn't have the money she needs to pay the children's

expenses. Many times the wife does not have the financial resources to exercise even her limited rights under the law, and the husband does not have the financial resources to give genuine relief even when these remedies are exercised.

Some Texas counties provide free legal help for collecting past-due child support. Every county should do so to lessen the wife's economic burden of enforcing support.

The Federal government has stepped in to aid in collection of child support, and in some cases alimony. Concerned about the effects on welfare costs of the failure to collect support payments, the Congress in late 1974 amended the Social Security Act to strengthen collection of child support payments both for families on Aid to Families with Dependent Children and other families (Public Law 93-647). The law also authorized garnishment of Federal wages, pensions, and other remuneration of persons defaulting on alimony or child support payments.

The child support collection program, usually referred to as the "IV-D" program, provided financial penalties for States unless they established by January 1, 1977 an efficiently operating unit to help in collecting child support payments for all families. The units are to establish paternity, secure court orders for child support, locate defaulting parents, and collect the payments. A charge is made for collecting for families not on welfare. The Federal government was directed to establish a parent locator service to help in finding defaulting parents, and it is now in operation.

The new program is not yet operating effectively in all States. Women in Texas needing the help of the unit should write or call:

Regional Operations Legal Division
Department of Public Welfare
John H. Reagan Building
Austin, Texas 78701

Telephone: (512) 475-2006

Women concerned about this problem should monitor the performance of the Regional Operations Legal Division and see to it that mothers on welfare are justly treated and protected from harassment and that the collection of support for families not on welfare is included in the program as intended by the Congress.

Questions concerning the national aspects of the program can be addressed to:

Office of Child Support
Department of Health, Education,
and Welfare
Washington, D.C. 20201

or to your representative in the Congress.

The new law also authorizes garnishment of salaries and pensions of Federal employees, including military personnel, who have defaulted on alimony or child support payments, and provides for garnishment of Social Security benefits paid to the person on whose employment they are based. *

The U.S. Civil Service Commission has been directed by the President (Executive Order No. 11881) to prescribe regulations for implementing the garnishment provision. Information on the regulations can be secured from:

Office of Public Affairs
U.S. Civil Service Commission
Washington, D.C. 20415

or by writing your representative in the Congress.

*However as indicated on page 23, this law apparently will have no effect on garnishment of military retirement.

Despite the new laws, the collection of child support is made particularly difficult in Texas by the constitutional provision prohibiting garnishment of wages, even for child support.⁵⁹ That constitutional provision raises a question about whether military pay or retirement benefits can be garnished for child support in Texas. Even though the new Federal provisions do allow, within certain rigorous procedures, garnishment of pay and retirement for child support "in accordance with State law," Texas' constitutional prohibition against garnishment may mean that there is no way to use the Federal provisions and still be in compliance with State law. Cases are currently pending to determine the answer. Bank accounts and other liquid assets can be garnished once a child support debt is reduced to judgment.

If Ralph is living somewhere else, Louella can still use legal proceedings to collect child support. Texas has passed the Uniform Reciprocal Enforcement of Support Act (URESA), which makes it possible for a State district court where Louella lives to make a finding that Ralph has not paid child support as he should and for the matter to be forwarded to the proper authority where Ralph lives for the case to be pursued. The effectiveness of URESA actions depends on the diligence of the appropriate authority where Ralph lives.

Texas also provides, through its State Department of Welfare, assistance in locating fathers who are not providing support if a court has ordered them to do so.

In Texas it is a Class A misdemeanor for a spouse who is able to do so to fail to support a child under 18 or to fail to support a current spouse who is in needy circumstances. It is a felony to fail to provide such support if there has been a prior conviction or the offense is committed while residing in another state. Unlike prior law, a wife can now be convicted for failing to support a husband who is unable to support himself.

What if circumstances change and the children need more money?

Although the amount of support Ralph is ordered to pay might be fair at the time of the divorce, it may not be sufficient after several years because of inflation or the children's special needs. Louella can go back to court and ask that child support be increased, but Ralph can also go back and ask that it be decreased. To alter a court order, the party requesting the change must demonstrate a material change in circumstances since the entry of the order. The practical difficulty of increasing or decreasing child support is the necessity of paying the court costs and attorney's fees.

Texas law may be somewhat helpful to Louella if she moves to another city. The Family Code provides that after six months of residency for her and the children in a new city, Louella can transfer matters pertaining to child support to the new jurisdiction. Then Ralph would have to come to Louella's new residence to litigate matters pertaining to child custody or support.⁶⁰

What about insurance?

Following divorce, women have had special problems with insurance. During marriage, their car and health insurance is generally carried as part of the husband's coverage. When they are no longer eligible for coverage under his policy, they must seek policies of their own. Upon the death of a husband, similar problems with health insurance are often experienced.

Louella might find that insurance companies would refuse to write car coverage for her or would charge her an inflated premium on the theory that she, as a divorced woman, would be extremely emotional and inclined toward accidents (though the same theory is not applied to men), and that insurance companies

would refuse her health coverage if she had a history of any ailments other than colds. Companies have traditionally refused to issue disability insurance to women in a variety of situations where a man could get a policy.

Texas is one of several States that is beginning to examine the way women are treated by insurance companies. The State Board of Insurance is in the process of promulgating rules and regulations to be followed by all insurance carriers doing business in the State -- regulations that would prohibit discrimination against women unless an actuarial basis for the differentiation could be proven.

WIDOWHOOD

What if Ralph dies?

Since, statistically, women outlive men, most married women spend at least a portion of their later years as widows. Being a widow will be a special problem for Louella if she has never managed any of the family financial affairs or participated with Ralph in any of the decisions concerning their family's money. She will be particularly vulnerable to unscrupulous people who prey on widows and their often limited resources. If Louella has some knowledge of family financial affairs and some experience working with the family assets, she will be less likely to be victimized.

Louella and Ralph should reexamine, on an annual basis, the arrangements they have made in the event one of them dies. Louella should know where all the family papers are kept. Both Louella and Ralph should have a will if the property of either is to go to the other. If there is no will, a portion of the estate goes to the children. If the children are minors, the surviving spouse must institute guardianship proceedings to obtain authority over any of that property. The costs of establishing a guardianship for the estate

of minor children can be substantial. A will leaving everything to one's spouse eliminates those guardianship problems completely and better provides for the surviving spouse.

If Louella and Ralph own real estate or such assets as stock or bonds, having individual wills facilitates dealing with these assets after the death of either. Without a will, any property either owns outside of Texas will go according to the law of that State, which may not be the way Louella or Ralph would have intended; with a will, the property will go as provided.

It is also wise for the couple to check such assets as United States savings bonds, life insurance policies, employee death benefits, and Social Security benefits. If United States savings bonds are made to "Mr. and Mrs.," with a joint right of survivorship, whichever of the two survives will be entitled to full ownership of the bonds. If the life insurance policies are made to the surviving spouse as beneficiary, the proceeds will not go as part of the estate but rather will go directly to that spouse. Similarly, if someone other than the spouse is named as beneficiary, the spouse will not get any of the proceeds. Ralph needs to be sure that Louella is the designated beneficiary of any employee death benefits. If he makes someone else the beneficiary, Louella will probably not get any of the benefits, even if Ralph designated his mother before he married and forgot to change the beneficiary to Louella. Social Security benefits are often of substantial assistance; therefore, Louella should get information from her local Social Security Administration office about the benefits she would be entitled to should something happen to Ralph.

If Louella knows nothing of financial matters, Ralph may try to make arrangements to take effect in the event of his death to "protect" Louella. One favorite arrangement often recommended by lawyers is to set up a trust for Louella for life; the result is

that she never has any control over the property that is left to her, or even over her own community share in the property, but must live on an allowance distributed to her by the bank's trust officers as they see fit or as Ralph has instructed.

What if Ralph's will leaves all the community property to someone else?

Ralph may force upon Louella a "widow's election." Under State community property laws, Louella owns one-half of the community property outright, and that half is not Ralph's to distribute in his will. However, the husband may include the wife's portion in the property he devises by his will and then offer her something special to allow him to do so; Louella then has a widow's election: to take her one-half of the community property or to let Ralph distribute her share, taking, instead, whatever he has left her in his will. For example, Ralph might put the entire community property into a trust for Louella's benefit during her life and then direct that the property go to his kinfolk; thus Louella has to decide whether to keep full control of her half of the property or whether to accept the use of the trust assets. In one such will, where the husband had a great deal of separate property and there was virtually no community property, the widow had to choose between a one-eighth ownership of all the husband's property, under the will, and a one-half ownership of almost nothing.^{61/}

Ralph can do anything he wants with his half of the community property as well as with his separate property. He could direct that Louella would have his property only so long as she did not remarry. Foote v. Foote upheld the husband's right to have his wife's interest terminate should she remarry. The wife, who was 38 when her 63-year-old husband died, challenged the restraints as against public policy. The court quoted the following with approval:

It would be extremely difficult to say why a husband should not be at liberty to leave a homestead to a wife, without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood.⁶²

It should be noted that the case involved a situation where the husband left to his wife his entire interest in the property, so the question before the court was whether the testator could attach a condition to the gift of such an interest to his wife. The court held it could.

Will Louella get the family home?

The homestead right, which is a constitutional right to use and occupancy conferred by Art. XVI, sec. 52, cannot be defeated by the testator. If the survivor abandons the homestead, he or she cannot get it back. In such a case, the beneficiary would then get a clear title. Thus, if a husband left his house to a daughter by a previous marriage, the daughter could not oust the widowed stepmother if the stepmother chose to remain. The child could, of course, still sell the home, but the purchaser would buy it at a reduced price and take it subject to the widow's right to continue in possession as long as she so desired.

The primary protection Texas law gives widows is the homestead exemption. In order to prevent widows and minor children from being thrown into the streets upon the husband's death, the Texas Constitution and statutes provide that the homestead shall be free from debts and not be subject to forced sale, except for liens arising from the purchase price, liens occurring through improvements to the homestead, or taxes.⁶³ The wording of the statute does not make this same protection available to a widower or to children whose mother dies first.⁶⁴ However, the wife and children share the homestead and its benefits as tenants in common.

Should Louella sell the property, it is immediately partitioned unless the children agree. 65 The "protection" of the laws may, once again, then mean limitation by the laws of the woman's authority to control property.

These problems are faced by many women each year. In 1970 there were 492,827 widows in Texas, and by 1975 that figure was projected to have risen to 530,000. 66

What about pensions and Social Security?

A wife whose husband is covered by one of the pension plans provided by many employers may be entitled to a "survivor's annuity" on the death of her husband. Since passage of ERISA (Employees Retirement Income Security Act) by Congress in 1974 it is required that pension and retirement plans offer "survivor annuities." 67 A worker may, however, choose not to cover his or her spouse and the law does not require that the spouse be informed of this action.

It should be noted also that survivor annuities generally apply to the pension benefits of retired workers. If a woman is widowed before her husband retires, even if he was due to receive a benefit and had allowed for survivor coverage, she would probably be ineligible for pension benefits.

Under ERISA divorced spouses may also be precluded from receiving survivors' benefits if they are not married to the retired worker for the year prior to death. 68 Requirements to receive survivor benefits are made even more conditional by the proposed Internal Revenue Service regulations under ERISA, which allow pension plans not only to require marriage for the year prior to death, but allow plans to require marriage at the annuity starting date. 69

A wife whose husband is covered by Social Security is entitled under certain conditions to a benefit based on his employment record when he retires, dies, or becomes disabled. A wife divorced prior to 20 consecutive years of marriage loses all eligibility for

such benefits, unless he dies and she has children in her care who are entitled to a benefit based on his employment.

Even if she is divorced after 20 or more years of marriage, she would not be eligible for a benefit until he retired, was disabled, or died. She would lose eligibility to her ex-husband's account on remarriage.

Members of Congress are currently sponsoring measures to make the situation more favorable to former spouses.

CONCLUSION

Laws and court decisions have so many possible applications that a lawyer must be consulted for the correct answer to a particular problem. Nevertheless, the general problems faced by Texas housewives are sketched herein.

Louella may or may not face the situations discussed. Numerous Texas women will. Through an awareness of the potential problems and their legal impact, the Texas woman is in a better position to plan and avoid or minimize the effects of such problems should they occur.

Let us hope that the inequities outlined can be alleviated and that the Texas housewife will be able to enjoy her chosen role as wife and mother without fear of adverse legal consequences.

This paper was commissioned by the Homemakers Committee of the National Commission for Observance of International Women's Year with a view to bringing about reform through educating the public to the facts.

NOTE ABOUT THE AUTHOR

Sarah Weddington received her law degree from the University of Texas Law School in 1967. She has had her own law firm since 1971 and is certified by the State Bar of Texas as a Family Law Specialist.

Ms. Weddington, best known as the lawyer who argued and won the Texas abortion case (Roe v. Wade) before the Supreme Court, is the dean of the Travis County delegation to the Texas House of Representatives. She was the first woman Representative ever elected from Travis County. Selected by Texas Monthly magazine as one of the "Ten Best Legislators of the 64th Session," she was described as "Persuasive and respected in debate...with the genuine respect of even old-style House members..."

Ms. Weddington, an activist in women's issues from the beginning of her career, was one of the founders of the Texas Women's Political Caucus and was presented its First Annual Woman of the Year Award in 1973 "in appreciation for her dedicated efforts in furthering women's rights and her outstanding contributions to all people who cherish personal freedom." Recognized by many groups as an outstanding person, she has been selected for responsibilities in her profession of law. She was the first woman appointed to the American Bar Association's Joint Conference of Representatives of the American Bar Association and the American Medical Association.

FOOTNOTES

1. Discussion with the Director of the Texas Employment Commission, November 1975.
2. Ibid.
3. The Texas Department of Community Affairs and the Office of Early Childhood Development, THE DARKER SIDE OF CHILDHOOD 25 (November 1974).
4. Hatfield, Carol S. "From the Catbird Seat: One Woman's Outlook." Unpublished paper presented at Harvard University Conference "Changing Sex Roles: New Directions in Mental Health Service and Women."
5. Texas Judicial Council, FORTY-FIFTH ANNUAL REPORT 215 (1974).
6. The Texas Department of Community Affairs and the Office of Early Childhood Development, p. 24.
7. Title I became effective in 1970, Title 3 in 1973, and Title 2 in 1974. TEX. FAMILY CODE ANN.
8. "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is incorporated and consolidated into that of the husband; ..."I.Blackstone, COMMENTARIES 442-45 (1765).
9. If Louella had property she owned independently of Ralph, he still had to join for her to encumber or convey her land or to transfer any stocks or bonds she had. TEX. REV. CIV. STAT. ANN. art. 4614(c) (1960). The only way she could avoid having to get his signature was by filing a statement with the county clerk's office where she resided that she elected to exercise sole management of her separate property. TEX. REV. CIV. STAT. ANN. art. 4614(d) (1960).

If the property were owned by both spouses, Louella had no such election; Ralph was given exclusive control, management, and rights of disposition of the property. TEX. REV. CIV. STAT. ANN. art. 4619 (1960); Rankin v. Kerrville Bus Co., 115 S.W. 2d 997, 998 (1938). Ralph could sell or convey or rescind a sale of community property, execute a purchase money mortgage on it, rent or lease or agree to a sublease. RIGHTS IN TEXAS Sec. 365, at 529 (4th ed. 1961). The only exceptions to Ralph's right of control were in extreme cases, such as abandonment by the husband for a considerable period of time, or insanity. Ezell v. Dodson, 60 Tex. 331 (1883); Ulmer v. John Hancock Mutual Life Ins. Co., 161 S.W. 2d 862 865 (1942); Magnolia Petroleum Co. v. Still, 163 S.W. 2d 268 (1942).

10. Taylor v. Catalon, 155 S.W. 2d 965 (1941).
11. Johnson v. Daniel Lumber Co., 249 S.W. 2d 658 (1952).
12. Austin v. United Credit Corp., 268 S.W. 2d 793 (1954).
A note signed by a wife without her husband's signature was a nullity. Shaw v. Proctor, 193 S.W. 1104 (1917). As a form of contract, a married woman had no right to be a surety on a bail bond unless joined by her husband, and her execution of a bond would have been void. Coleman v. State, 28 S.W. 2d 114, 145 (1930).

The law was later amended to permit Louella to contract for debts for "necessaries" furnished her or her children and for expenses incurred for her separate property, TEX. CIV. STAT. ANN., art. 4623 (1960), if Ralph had abandoned her. Lane v. Moon, 103 S.W. 215 (1907).

13. Turner v. State, 163 S.W. 2d 205 (1942). One statute, however, provided that Louella, with the consent of and joined by Ralph, might apply by written petition to the District Court of the county in which she might desire to transact

business for action by the court, "to remove her disabilities of coverture and declaring her a feme sole for merchantile and trading purposes." TEX. CIV. STAT. ANN. art. 4626 (1960).

14. Ralph's domicile was Louella's domicile. Unless he gave his consent or was guilty of abandonment or misconduct amounting to abandonment, she could not change her domicile. Barnes v. West, 203 S.W. 2d 582, 584 (1947). When a new home was selected by him, it was her duty to follow, regardless of her feeling about the matter, and her refusal without sufficient excuse amounted to desertion. Speer, MARITAL RIGHTS IN TEXAS, Sec. 98, at 128 (4th ed. 1961).

"The husband, being the head of the family, and charged with the duty of supporting it, and being liable for all of its expenses, is pre-eminently the proper person to choose the home, and this may be without the wife's concurrence, or even contrary to her wishes, so long as the marital status exists, regardless of whether or not the relationship of husband and wife is being maintained, and whether or not he is recognizing his legal duty to support the wife and actually contributing to the best of his ability." Ibid.

15. TEX. PROBATE CODE ANN. Sec. 109(a) (1956).
16. Freeman v. Hawkins, 77 Tex. 498, 14 S.W. 364 (1890)
17. Texas Att'y. Gen. Op. No. H-432 (1974).
18. TEX. REV. CIV. STAT. ANN. art. 3836 (1966 Supp.).
19. TEX. REV. CIV. STAT. ANN. art. 3841 (1966).
20. Prince v. North State Bank of Amarillo, 484 S.W. 2d 405 (Amarillo Civ. App. 1972, reh. den.).
21. TEX. REV. CIV. STAT. ANN. art. 1995(1) (1964).

22. The other States are California, Idaho, Louisiana, Nevada, New Mexico, Washington, and Arizona. Texas inherited the community property tradition from the Spanish civil law which was in effect in Mexico when Texas was a part of that country. The Republic adopted and incorporated the system when independence was achieved. The Spanish originally acquired the concept of community property from the Visigoths, who invaded Spain in the seventh century. All of the barbaric tribes subscribed to financial equality between the sexes, largely because their existence necessitated that women shoulder a large burden of responsibility, often requiring them to work side by side with their husbands. The common law of England, adopted by most of the States in the U.S., evolved by way of the aristocracy, who were not economically dependent upon woman's labor. Consequently, the aristocracy never afforded woman extensive privileges and rights.
23. Now statutory laws make separate property out of "the recovery for personal injuries sustained by the spouse during marriage except any recovery for loss of earning capacity during marriage." TEX. FAMILY CODE ANN. sec. 5.01 (1970). Furthermore, the entire community recovery is now subject to the sole control of the injured party. TEX. FAMILY CODE ANN. sec. 5.22(a)(3) (1970).
24. This is an actual case brought to the attention of the author in the course of her practice.
25. TEX. FAMILY CODE ANN. sec. 5.22 (1970).
26. Comment, "Community Property: Male Management and Women's Rights," 1972 LAW & SOCIAL PROB. 163, 172 (1972).
27. Testimony before House and Senate committees, Texas Legislature, Spring 1973.

28. TEX. REV. CIV. STAT. ANN. art 5069-2.07 (1973).
29. Author's personal files.
30. TEX. FAMILY CODE ANN. sec. 4.02 (1970). This provision violates the Texas Equal Legal Rights provision, but has not yet been amended.
31. Martin v. Martin, 17 S.W. 2d 789 (Comm. of App. 1929).
32. 157 Neb. 226, 59 N.W. 2d 336 (1953).
33. TEX. PEN. CODE ANN. sec. 21.02 (1974).
34. Baugh v. State, 402 S.W. 2d 768 (1966).
35. Id.
36. TEXAS CODE CRIM. P. ANN. art. 38.11 (1965).
37. Dingler v. State, 328 S.W. 2d 303, 304 (1959).
38. Robinson v. State, 457 S.W. 2d 572, 573 (1970).
39. Texas Department of Community Affairs and Office of Early Childhood Development, THE DARKER SIDE OF CHILDHOOD 68 (November 1974).
40. Id. at page 71.
41. Id. at page 72.
42. Id. at page 73.
43. Id. at page 74
44. Id. at page 75.
45. Id. at page 76.
45. Id. at page 77.

46. Id. at page 77.
47. Id. at page 78, 79.
48. TEXAS FAMILY CODE ANN. sec. 3.01 (1970).
49. TEXAS FAMILY CODE ANN. sec. 3.63 (1970).
50. The other two are Pennsylvania and Indiana.
51. Cearley v. Cearley, 544 S.W. 2d 661 (1976).
52. Ibid.
53. TEXAS FAMILY CODE ANN. sec. 14.07 (1975).
54. TEXAS FAMILY CODE ANN. sec. 14.02 (1975).
55. TEXAS FAMILY CODE ANN. sec. 14.04 (1975).
56. Conversation with a State district judge, 1972.
57. TEXAS FAMILY CODE ANN. sec. 14.05 (1975).
58. Conversation with John Jones, attorney for the Travis County Domestic Relations Office, Austin, Texas, spring 1974.
59. TEXAS CONSTITUTION, article XVI, section 28.
60. TEXAS FAMILY CODE ANN. sec. 11.06(b) (1975).
61. Miller v. Miller, 235 S.W. 2d 624, 628 (1951).
62. Foote v. Foote, 76 S.W. 2d 194, 197 (1934).
63. TEXAS CONSTITUTION, article XVI, sections 50, 51, and 52; TEXAS PROBATE CODE ANN. section 284 (1956); TEXAS PROBATE CODE ANN. section 270 (1956).
64. TEXAS PROBATE CODE ANN. sec. 283 (1956); but see Jenkins v. Hutchens, 287 S.W. 2d 295, err. ref'd n.e.r. (1956).
65. Speer, MARITAL RIGHTS IN TEXAS, section 636, p. 389 (4th ed., 1961).

66. Conversation with the Director, Texas Committee on Aging, November 1975.
67. For further information on pensions and social security write for these publications: U.S. Department of Labor, Labor Management Services Administration, Often-Asked Questions About the Employment Retirement Income Security Act of 1974, Washington, D.C. 20216; U.S. Department of Health, Education, and Welfare, Social Security Administration, "A woman's guide to social security," DHEW Publication No. (SSA) 75-10127, June 1975, Washington, D.C. 20201.
68. P.L. 93-406, Employees Retirement Income Security Act, Section 205(d).
69. Internal Revenue Service, Proposed Regulation on Joint and Survivor Annuities, issued October 3, 1975, Section 1.104 (a)-11 (e) (2).

RECOMMENDATIONS OF THE HOMEMAKER COMMITTEE*
(All Adopted by the Commission)

REFORMING ESTATE, INHERITANCE, AND GIFT TAX LAWS**

The IWY Commission recommends that the provisions of the Internal Revenue Code relating to estate and gift taxes be amended to eliminate taxation on all transfers of property between husband and wife at death, and on all gifts between husband and wife during their lifetimes.

The Commission further recommends that State legislatures amend their tax laws to eliminate laws that provide for inheritance or gift taxes in transfers between husband and wife.

COVERAGE OF HOMEMAKERS UNDER SOCIAL SECURITY

The IWY Commission recommends that the homemaker be covered in her own right under Social Security to provide income security for the risks of old age, disability, and death. The Commission further recommends that the Secretary of Health, Education, and Welfare be directed to give a high priority to developing an administration proposal for achieving this purpose.

*Copies of the recommendations with supporting position papers are included in the report of the Commission "...To Form a More Perfect Union..." Justice for American Women available from the Government Printing Office, Washington, D.C. 20401.

**The Secretary of the Treasury recommended abolition of these taxes in transfers between spouses to the Ways and Means Committee of the U.S. House of Representatives in testimony of March 22, 1976.

INHERITANCE RIGHTS OF SPOUSES

The IWY Commission recommends that State inheritance laws on disposition of property when a person dies without a will (intestate) be amended to provide that the surviving spouse's share is:

- (1) if there is no surviving child or parent of the person who dies, the entire estate;
- (2) if there are surviving children all of whom are children of the surviving spouse also, the entire estate;
- (3) if there are surviving children one or more of whom are not children of the surviving spouse, one-half of the estate.

The Commission recommends further that State Bar Associations, especially women members, and the National Conference of Commissioners on Uniform State Laws in order to provide greater considerations of equity review and redraft (a) the provisions when there are no surviving children but there are surviving parents, and (b) the provisions for a "forced share", or "widows election".

ECONOMIC PROVISIONS OF DIVORCE LAWS

The IWY Commission urgently recommends that State, county, and city commissions on the status of women, and other organizations concerned with the welfare of children and dependent spouses, actively seek amendments in State divorce laws where necessary to assure that as a minimum the economic protections of the Uniform Marriage and Divorce Act* for dependent spouses and children are included.

*National Conference of Commissioners on Uniform State Laws, Uniform Marriage and Divorce Act (1970 version and 1974 version). Order from National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago, Illinois 60637.

The Commission further recommends that State legislatures review and revise their divorce laws, adopting as a minimum the economic protections of the Uniform Marriage and Divorce Act.

The Commission recommends also that in addition to the protections of the Uniform Marriage and Divorce Act the following additional items be seriously reviewed and considered: (a) an effective proviso requiring disclosure of assets, such as that in the New York law (Section 250 of the Domestic Relations Law effective September 1, 1975); (b) authorization of child support until age 26 for children who are attending school; (c) the property divisions provisions that were in the 1970 version of the Uniform Marriage and Divorce Act; (d) specific mention of loss of pension rights as a factor to be considered in distribution of property; and (e) inclusion of a statement of intent such as that in Assembly Bill 995 introduced in the Wisconsin Assembly in 1975.

The statement of intent reads as follows:

It is the intent of the legislature that a spouse who has been handicapped socially or economically by his or her contributions to a marriage shall be compensated for such contributions at the termination of the marriage, insofar as this is possible, and may be reeducated where necessary to permit the spouse to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. It is further the intent of the legislature that the standard of living of any minor children of the parties be maintained at a reasonable level, so that insofar as is possible, the children will not suffer economic hardship.

DISPLACED HOMEMAKERS BILL

The IWY Commission recommends that the Administration endorse H.R. 10272, known as the "Equal Opportunity for

Displaced Homemakers Act," which provides for establishing multi-purpose service programs for displaced homemakers to help them through a readjustment period so as to become self-sufficient members of society.

GOVERNMENT COLLECTION OF DATA ON DIVORCE, ALIMONY,
PROPERTY DIVISION, CHILD CUSTODY, AND CHILD SUPPORT

The IWY Commission strongly urges that the 1976 Survey of Income and Education* which is to be conducted by the Census Bureau include questions which will provide answers to the following:

- How are children of divorced parents being supported, i.e., what proportion of the support is being contributed by each parent and by the Government as welfare?
- In what proportion of divorces is alimony awarded and in what amount?
- In what proportion of cases is child support awarded and in what amount?
- How is property divided?
- To what extent are alimony and child support awards being collected?
- To what extent are fathers getting custody of children? Are mothers paying child support in such cases?

*Through the cooperation and interest of the Department of Health, Education, and Welfare, some of the information requested will be collected in the 1976 Survey of Income and Education. The Department hopes to find collection of the additional data requested plus other information on single parent families.

- What are the relative economic situations, after divorce, of the spouse with custody of children and the other spouse?
- What is the economic status of women who are divorced after many years of homemaking and little labor force experience?

The Commission further recommends that such data be secured in each decennial census.

STATE HELP IN COLLECTING CHILD SUPPORT PAYMENTS FOR FAMILIES NOT ON WELFARE

The IWY Commission recommends that Sec. 455(2) of Public Law 94-88, which requires the termination on June 30, 1976 of Federal support to administrative costs for child support collection services for non-AFDC mothers, be amended to eliminate the deadline.

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16. National Conference of Commissioners on Uniform State Laws, "Uniform Marriage and Divorce Act" (1970 version and as amended in 1974) and "Uniform Probate Law." Order from National Conference of Commissioners on Uniform State Laws, 645 N. Michigan Avenue, Chicago, Illinois, 60611, \$1.00 each.

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NATIONAL COMMISSION ON THE OBSERVANCE OF
INTERNATIONAL WOMEN'S YEAR

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