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On the day a woman marries, her financial situation is altered drastically by the marital property law of the state in which she and her new husband reside. If they live in one of the forty-three separate property jurisdictions,[1] her financial rights and responsibilities in the marriage, upon divorce, or upon her death or her husband's death, will be governed by laws which are essentially the altered remnants of the English/Common law much as it existed soon after the Norman Conquest.[2] If she and her husband reside

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* *See* introductory note *infra* at p. 42. *See also* Appendix A: General And Code-Indexed Equal Rights Amendment Bibliography, ___ at p. ___. Prepared by the California Commission on the Status of Women, Equal Rights Amendment Project, *infra* at p. 69.

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1. All states except Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington are separate property states. The named states are community property states. The District of Columbia is a separate property jurisdiction.

2. Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U.L. REV. 1033, 1044-1046 (1972) (hereinafter cited as Johnston).

in Washington, California, Arizona, New Mexico, Texas, Louisiana, Nevada or Idaho, the new wife's financial rights at all stages of her life will be governed by the marital property system known as community property, older yet than the common law system,[3] and also substantially altered by the legislative reforms to be described below.

In the forty-three separate property jurisdictions, the legal theory under which married persons own property may be simply stated. The earnings of each spouse after marriage retain precisely the status they had before marriage—as the separate property of the earning spouse, in which the other has no legal right or interest. Just as each has legal ownership of his or her earnings, each also has the sole right to contract with regard to those earnings, obtain credit based upon them and manage and control them.[4] Similarly, all property brought to the marriage or inherited is separate property of the owning spouse and under his or her sole management and control.

In addition to her right to ownership and control of any earnings or property she may have, a wife's financial rights in a separate property jurisdiction include the right to be supported by her husband in the fashion and manner he chooses.[5] In return for this support, she is responsible for rendering the wifely services of keeping the house and tending any children the couple may have.[6]

3. W. De Funiak and M. Vaughn, PRINCIPLES OF COMMUNITY PROPERTY §§ 7-36 (2d ed. 1971) (hereinafter cited as De Funiak and Vaughn). The authors trace the community property system from the law of the Visigoths which was carried into Spain in the fifth century by that tribe and eventually incorporated into the marital property law of Spain and other civil law countries.

4. Until passage of the Married Women's Property Acts in the nineteenth century, the husband had sole control of his wife's separate property as well as his own. For a description and history of the passage of the Married Women's Property Acts, *see* 1 AMERICAN LAW OF PROPERTY, § 5.56 (A. Casner ed. 1952).

5. The phrase "in the manner and fashion he chooses" is used advisedly. As a practical matter, the husband's legal duty of support is totally unenforceable by the wife because of courts' reluctance to "interfere" in on-going marriages. In the most famous case illustrating this reluctance, McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336 (1953), the Nebraska Supreme Court refused to order the husband to supply indoor plumbing for the couples' residence, although he owned a farm valued at $90,000, government bonds in the amount of $104,500, and had almost $13,000 in a bank account.

6. *See generally,* for a description of the common law theory which

Under the marital property law of the separate property jurisdictions, the only financial right of the wife who is not employed is the husband's duty of support. She has no legal interest in or right to his earnings or what those earnings purchase, unless he deliberately makes a gift to her of some portion of his property by placing it in their names jointly or in her name alone.

The underlying theory of the separate property systems may be simply stated. In application, as we shall see, it becomes more complex.

In the eight community property states, a new wife's financial situation is quite different.[7] If she is employed, her earnings, which before marriage were her separate property, become community property in which she and her husband each have a one-half ownership interest. Similarly, her husband's earnings after marriage become community property in which she has a one-half interest, regardless of whether or not she happens to be employed herself. Each of them will retain, as his or her separate property, any property brought to the marriage or inherited during it. The other spouse has no legal right or interest in this property, and the owning spouse has sole management rights over such property.

Insofar as ownership of property during marriage is concerned, then, the wife in a community property state is undoubtedly in a better position than her sister in a separate property jurisdiction. As far as management of community property is concerned, however, the situation in community property states is not as simple. Until 1972, no community property state allowed wives to manage community personal property equally with their husbands, although some did allow them to manage their own wages.[8] Since 1972, however, five of the eight community property states have converted to a system of equal management, giving the wife by statute the "equal right" with her husband to manage and control the entire community personal property. In Texas, a wife may control her own earnings and may jointly control the community prop-

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is still a part of our law, Sayre, *A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services*, 29 VA. L. REV. 857 (1943); and Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169, 1187 (1974) (hereinafter cited as Weitzman).

7. There are in reality eight different community property systems, not one, just as there are forty-three varieties of the separate property system described above. For simplicity's sake in a short paper, however, each of the two systems is described here as if all jurisdictions conformed to the common basic patterns.

8. California, Idaho, Nevada, Texas and Washington all had provisions allowing wives to manage their own wages before 1972. *See* De Funiak and Vaughn, *supra* note 3, at § 114 for citations to the statutes of each state.

erty if her earnings are commingled with her husband's. In Nevada and Louisiana, a wife's right to management and control remains restricted or nonexistent.[9]

What are the practical consequences of these two marital property systems which exist side by side in the United States today? Do their theoretical legal differences make any real difference in married women's lives? To answer the question, the four principal stages which may occur in any married woman's life and her property rights under each system and at each stage, must be examined.

PROPERTY RIGHTS DURING MARRIAGE

In a credit-oriented society, the most important single aspect of a wife's financial rights during marriage is the ability to obtain credit. Through the use of credit, she may effectively enforce her husband's duty to support—which is otherwise totally unenforceable[10]—by purchasing needed items and deferring payment for them, or obtaining unsecured loans to make such purchases.

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9. In Arizona, California, Idaho, New Mexico and Washington, the spouses have the statutory power to equal management of the entire community personal property. *See* A.R.S. §§ 25-214 (1975 Supp.); CAL. CIV. CODE § 5125 (1975 Supp.); I.C. §§ 32-912 (1975 Supp.); N.M. STAT. ANN. § 57-4A-8 (1975 Supp.) and R.C.W.A. § 26.16.030 (1975 Supp.).

In California, the wife's and husband's powers over the entire community personal property are limited by CAL. CIV. CODE § 5125(d) (1975 Supp.), which provides: "A spouse who is operating or managing a business or interest in a business which is community personal property has the sole management and control of the business or interest." This provision would limit the ability of the non-managing spouse to obtain credit based on that portion of the community property invested in a community business.

In Texas, the wife may manage her own earnings if she keeps them separate and uncommingled with other community personal property. If they do become commingled, they are subject to the joint management of both spouses. If the wife has no earnings, the husband becomes, in effect, the sole manager of community personal property in most instances. *See* T.C.A.-FAMILY CODE § 5.22 (1973).

In Nevada, the husband is given the sole power to manage the entire community property, except in the case where a wife's earnings are "used for the care and maintenance of the family," in which case the wife has sole control of her own earnings. *See* N.R.S. § 123.230 (1973). It is difficult to understand how this provision works in practice.

In Louisiana, the wife has no power to manage any portion of the community property, even if it consists of her own earnings. *See* L.S.A.-C.C. art. 2404 (1971). The wife may, however, contract with regard to any separate property she may have. *See* L.S.A.-R.S. § 9-103 (1965).

10. *See supra* note 5.

In October, 1974, Congress passed the Equal Credit Opportunity Act, effective on October 28, 1975, which prohibits any creditor in the United States, whether a bank, savings and loan, small loan company, retail merchant or other creditor, from discriminating in the granting of credit on the basis of sex or marital status.[11] The Act recognizes, however, the pervasive effects of state property laws upon a creditor's decision to extend credit. It specifically provides, among other things, that in making a particular decision as to whether to grant or deny credit, a creditor may consider the application of state property laws which affect an applicant's creditworthiness.[12]

What is the impact of the Equal Credit Opportunity Act on a wife's ability to obtain credit in separate and community property states?

In any of the forty-three separate property jurisdictions, whether a wife obtains credit under the New Act will depend on several factors. If she is employed, a creditor must evaluate her creditworthiness just as he would any married person's, male or female. However, because most women's incomes are lower than men's, the application of purely objective standards will not give the employed wife in a separate property jurisdiction the same amount of individual credit which the average employed husband would obtain. If an employed wife wishes to obtain a greater amount of credit, she may ask her husband to pool his income with hers in making the

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11. P.L. 93-495, Title VII, Section 701(a), effective October 28, 1975, provides:

> It shall be unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.

P.L. 93-495, Title VII, Section 502, provides:

> *Congressional Findings and Statement of Purpose. . .* The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination on the basis of sex or marital status, as well as by the informed use of credit which Congress has heretofore sought to promote. It is the purpose of this Act . . . to require that financial institutions and other firms engaged in the extension of credit make that credit equally available without regard to sex or marital status.

12. P.L. 93-495, Title VII, Section 705(b), effective October 28, 1975, provides:

> Consideration or application of State property laws directly or indirectly affecting creditworthiness shall not constitute discrimination for purposes of this title.

application, and to expressly agree to be liable on any debts either of them incurs.

If the wife in a separate property jurisdiction is not employed—and over 55 percent of wives are not[13]—she may obtain credit only in one or two ways. In all credit transactions except those with retail merchants, her husband must sign an agreement stating that he will pay any debts she incurs. The credit so obtained will then be not hers, but her husband's.

The second means of obtaining credit for such wives is used only by retail merchants who, under certain circumstances, will open accounts for the wife alone for the purchase of "necessaries." Under the common law, and today, the doctrine of "necessaries" supplements the husband's duty of support by allowing merchants to extend credit to a wife for goods purchased without the consent of a husband and to hold the husband liable for the purchase price. However, because the doctrine is hemmed with legal uncertainties,[14] any individual creditor may justifiably refuse to extend credit under the doctrine, and thereby leave the unemployed wife in a separate property jurisdiction with only one means of obtaining credit—the express agreement of her husband to pay any debts created. For such wives, who are the majority of married women in the United States, the Equal Credit Opportunity Act is hardly a giant step forward. In fact, for them it represents only a small advance in the crucial matter of obtaining equal credit.

After October 28, 1975, in the five community property states with completely equal management provisions for community personal property, including California, a wife, whether employed or unemployed, may obtain credit on exactly the same terms and in exactly the same amounts as her husband may, without his signature or consent to any transaction. This is so because she has a one-half ownership of all the community property, which includes both his and her earnings, and has the legal right to manage and incure debts binding the entire community personal property, just as he does. Thus, if the community itself is creditworthy, she may obtain

13. During calendar year 1973, 42.8 percent of married women were employed outside the home. *See* Dept. of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES 340 (1974).

14. *See* Annot., 60 A.L.R.2d 7 (1958) for a summary of the legal problems merchants face in relying on the doctrine.

charge cards, retail charge accounts, or unsecured bank or small loans on precisely the same terms as her husband. The credit so obtained will be hers alone.[15]

The situation is not so happy for wives in Nevada and Louisiana. Because those states have not given them the same right to manage the entire community personal property which their husbands enjoy, wives in these jurisdictions are in much the same position as is the unemployed wife in a separate property jurisdiction: they may be granted credit only with the express consent of their husbands, or through retail merchants' willingness to apply the doctrine of "necessities" to their credit applications. In Texas, a wife must be employed in order to obtain credit independently of her husband. The unemployed wife is in precisely the same position as the wife in Nevada, Louisiana or any separate property jurisdiction.[16]

During marriage, then, the most important financial rights of a wife are those involving credit. The community property system, as recently amended in five states by the addition of equal management provisions for community personal property, unquestionably offers married women the best chance to obtain credit on the same terms as their husbands.

Property Rights Upon Divorce

As has been noted by a sociologist, whose specialty is divorce and its impact on American life, the marital property laws of most of the United States assume that a husband and wife will marry only once and that they will stay married until they die.[17]

In fact, American society has long since moved away from that model, as attested to by the fact of 981,000 divorces and 2,215,000 marriages in the twelve-month period ending in February 1975.[18] How does a wife fare upon divorce in separate and community property states?

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15. The importance of building a credit history in one's own name cannot be overemphasized. If credit which a wife uses during marriage is maintained in the husband's name, the credit history will be his alone on divorce or his death. The wife will be left with no credit history of her own, in spite of the fact that she may have contributed greatly to actual payment of debts incurred. Thus, the name in which credit is granted and held is of the utmost practical importance for married women.

16. *See supra* note 9, for an explanation of the Nevada, Texas and Louisiana provisions which make it difficult or impossible for a wife to obtain credit in her own name in those states.

17. Weitzman, *supra* note 6 at 1200-1210.

18. *Monthly Vital Statistic Report*, Provisional Statistics (HRA) 75-1120, Vol. 24(2), April 24, 1975, pp. 1-3.

Two property questions are involved in any divorce in any jurisdiction—property division and the payment of any alimony or child support ordered in the divorce decree.

Although it is a common belief that alimony awards are a component of most divorces, that belief is simply unfounded. In fact, alimony is awarded in less than 10 percent of all divorces, and because alimony is deductible from the husband's income and includible in the wife's, payments (which are actually for the support of children) are often labeled "alimony" to lower the husband's income tax.[19] Thus, alimony is not a large factor to be considered in the property questions which arise upon divorce.

Child support, which is customarily awarded to a wife granted custody of children, is not as customarily paid. The record of child support payments actually made by husbands is a dismal one, as demonstrated by the following statistics:

> 62 percent (of husbands) fail to comply fully with court ordered (child support) payments in the first year after the order, and 42 percent do not even make a single payment. By the tenth year, 79 percent are in total noncompliance.[20]

Thus, with alimony awards infrequent and child support awards difficult or impossible to enforce, the question of the division of property owned by either spouse upon divorce is an important one for wives. How does each marital property system deal with the problems?

Theoretically, in a separate property system, the spouse who has earned property is the sole owner of it. In those marriages—over 55 percent of all marriages—in which the wife does not work outside the home, the spouse who owns property upon divorce will necessarily be the husband. Even in those marriages where the wife is employed, the property she has accumulated is sure to be of less value than her husbands, because women generally receive lower pay and even most employed women spend many years outside the labor force rearing children. Theoretically, then, upon divorce,

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19. Weitzman, *supra* note 6 at 1186. The reason for excluding alimony from a husband's income and including it in his former wife's is that the husband is usually in a higher income-tax bracket than is the wife, which makes the tax savings greater to him.

20. Weitzman, *supra* note 6 at 1195.

property is divided according to which of the spouses owns it. Obviously, the separate property system gives a husband much-favored odds.

In fact, however, there has been a trend in separate property states toward dividing property "owned" by husbands alone "equitably" between the spouses where specific legislation in a particular separate jurisdiction allows it. In 1968, twenty-six of the forty-three separate property jurisdictions had statutes providing for such a division.[21] The theoretical harshness of the separate property systems has thus been mitigated by legislation in the majority of jurisdictions.

The Uniform Marriage and Divorce Act seeks to foster and encourage the same trend toward "equitable" division of property acquired by either spouse during marriage by the explicit provisions of Section 307 of the Act, as amended in 1973. Alternative A of that section, drafted to apply in separate property jurisdictions, states that upon divorce, all property, regardless of the name of the spouse in which formal legal title is held, shall be divided between the spouses according to such factors as the duration of the marriage, the skills and employability of each spouse, and the age, health and station in life of each. The section specifically includes the contribution of a spouse as a homemaker as a factor to be considered in the division of property belonging to both spouses upon divorce. Thus, the Uniform Act attempts to focus a court's attention upon a variety of factors to be considered in making an "equitable" division of property.

Although enacted in only three states as of December 1974,[22] the provisions of the Uniform Marriage and Divorce Act represent movement toward a system of community property upon the dissolution of marriage in separate property states. Were the Act to be adopted widely throughout the United States, it would help to end the inequities of the separate property systems for married

21. K. Davidson, R. Ginsburg & H. Kay, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 248 note 31 (1974).

22. Those three are Arizona, Colorado and Kentucky. However, only Colorado adopted a provision which closely paralleled that of the Uniform Act. *See* C.R.S. § 14-10-113 (Supp. 1973). For Arizona's statute, *see* A.R.S. § 25-318 (Supp. 1974).

In Kentucky, the property division section of the Act provides that "if a wife does not have a sufficient estate of her own, she may, on divorce obtained by her, have such allowance out of that of her husband as the court considers equitable; but no such allowance shall divest the husband of fee simple title to real estate." *See* K.R.S. § 403.060. *See generally, Uniform Marriage and Divorce Act*, in 9 UNIFORM LAWS ANNOTATED (West, 1974 Supp.).

women upon divorce. As matters stand now, however, it is both fair and true to say that women in separate property jurisdictions are not as well compensated for their years spent as homemakers as are wives in community property states.[23]

In community property states, as Dean Judith Younger has pointed out, although the statutes give each spouse a vested ownership in one-half of all community property, only two of the eight states require that such property be equally divided upon divorce.[24] In the six other states, the statutes allow a court in a divorce proceeding to make such division of the community property as it considers "equitable" under the circumstances. In particular cases, such statutes may work a hardship upon the wife, especially in those states where fault is taken into consideration in dividing property upon divorce,[25] but in the majority of situations the wife in a community property state is aided by the unstated presumption that community property belongs equally to the spouses, and should be divided equally upon divorce.

Upon divorce, then, while the differences between the two systems may be in fact less great than they are in theory, the basic premises of the separate and community property systems have a substantial effect on the divisions of property ordered. The basic premise of the separate property system, as we have seen, is that property is owned by the person who earned it during the marriage. In a community system, the basic premise is just the opposite: regardless of who earned property during marriage, it is owned equally by both spouses. Although no studies are available on the question, it seems inevitable that the wife in a community property state will receive a larger share of the property accumulated by either of the spouses during marriage than will the wife in a separate property jurisdiction.

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23. *See* Foster & Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L.Q. 169 (1974), for a criticism of the division of property upon divorce in a separate property state, New York.

24. Those two are Louisiana and California. Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U.L. REV. 211, at 241-242 (1973).

25. In an attempt to remove considerations of fault from property division questions, the Uniform Marriage and Divorce Act states in both Alternatives A and B to Section 307, as amended in 1973, that property shall be divided "without regard to marital misconduct."

With alimony and child support orders elusive promises at best, the matter of property division at divorce is one of paramount interest to wives in the United States.

Property Rights of a Wife Who Predeceases Her Husband

Although the majority of American wives outlive their husbands, the right to will property at death for those who do not is severely affected by the property system of the jurisdiction in which the couple lived. If that jurisdiction adheres to a separate property system, the wife will have the right to will only property which she has acquired by her own labor outside the home, or which she inherited or was given. As we have seen, she has no legal interest in property earned or accumulated through her husband's labor, and no statutes exist which give her the right to will any portion of her husband's property if she predeceases him. Thus, those women who are not employed during marriage die literally penniless in separate property jurisdictions, with no property whatsoever to leave to children, parents or others they might wish to care for unless they inherited or were given property during their lives.

Women in community property states, by contrast, die owning one-half of the community property, and in all eight community property states have the right to will their halves of the community to whomever they choose.[26] Very often, this right can make a real difference to a woman concerned about the care of children, parents or others.

For wives who predecease their husbands, then, the theoretical differences described at the beginning of this article have a very real and important impact upon their ability to assure that persons they care for receive property from them at their deaths. As to this aspect of a married woman's financial life—her ability to will property at death if she predeceases her husband—the marital property law of the jurisdiction in which the woman resides has an immense practical effect.

Property Rights of a Wife Whose Husband Predeceases Her

The endless permutations of laws concerning the property rights of a wife whose husband has predeceased her make generalization

26. Wives in New Mexico acquired this right only after passage of an Equal Rights Amendment to the State Constitution, effective July 1, 1973. The Amendment required repeal of former N.M. Stat. Ann. § 29-1-8 (1953), which denied wives the right to will their halves of the community upon predeceasing their husbands while N.M. Stat. Ann. § 29-1-9 (1953) gave husbands such a right. New Mexico was the only community property state which ever had such a provision.

in this area difficult at best. However, it may be said that in all but three separate property jurisdictions,[27] either the common law protection of dower or a statutory "widow's election" offer the surviving wife some share of the separate property of her deceased husband.

In general, in those jurisdictions where a form of common law dower is still in effect, the wife has the right to a life estate interest in an amount varying from one-third to one-half of the real property which her husband either owned at any time during the marriage or died owning. A dower interest is only the right to enjoy the property or its benefits for the lifetime of the surviving wife, not an absolute ownership interest. The deceased husband has the right to name those persons who will take the property after the wife's death.

In those states having a "widow's election", also known as a "forced" or "non-barrable" share of the deceased husband's estate, the wife is given an absolute ownership interest in one-third to one-half of all the husband's property which he owned at the time of death, regardless of any provision in his will to the contrary.[28]

Both these forms of protection for the widow constitute implicit recognition of the major defect of the separate property systems—their failure to compensate a wife for the services she performed in the household during the marriage. In fact, common law dower and the more recent statutory "widow's election" provisions in effect affirm the concept of a community of marital interest in property by ignoring the fact that such property was technically "owned" during life by the husband alone. As such, they can be faulted only in their assumption that all marriages will last for the lifetime of the spouses, and that wives who outlive their husbands will receive their just share of the marital property at that time. When that assumption fails, as it does in all marriages which end in divorce rather than the death of the husband, or in which the wife predeceases the husband, the separate property systems

27. Those three are North Dakota, South Dakota and Georgia. *See* Ryman, *A Comment on Family Property Rights and the Proposed 27th Amendment*, 22 DRAKE L. REV. 505, 509 (1973) (hereinafter cited as Ryman).

28. *See* Ryman, *supra* note 27 for a complete list of the dower and "widow's election" provisions of all fifty states and the District of Columbia.

offer at best a spotty and haphazard recognition of the wife's labor during the years of the marriage.

In the eight community property states, the wife whose husband has died is left with her one-half ownership interest in the community's real and personal property. Her husband is free to will, just as she is, his one-half interest in the property to anyone he chooses.

The Impact of the Equal Rights Amendment

In the four possible stages of a married woman's life—during the marriage itself, at divorce, at her death before her husband's, or at his death before hers—the community property system consistently offers wives the opportunity for ownership of greater amounts of property, and greater freedom to deal with it. Its assumption of a community of marital interest, and thus of marital property, is more consonant with the manner in which most couples view their marriages, and it gives the woman who works in the home and rears children both fair compensation for her labor and equal dignity with her husband. With two corrections, community property should be the marital property law adopted by the legislatures of all fifty states and the District of Columbia, with or without passage of an Equal Rights Amendment.

The first problem in need of correction is that of equal management. It is imperative that any community property system allow both spouses to share fully and equally in the management of all community personal and real property. Five of the eight community property states have already taken that step. If the system is adopted more widely, such provisions must be included.

A less obvious problem of equal management exists even where states have adopted provisions allowing both spouses to manage community personal property equally. If a husband is the sole wage-earner in the family, any paychecks will be made out in his name alone. He is free to deposit such checks in a bank account which is his separate account and upon which his wife cannot draw—although she has technically a one-half ownership interest in community property. Until the Equal Credit Opportunity Act became effective on October 28, 1975, even the unemployed wife in a community property state with entirely "equal" management provisions was totally dependent on her husband's goodwill or a creditor's willingness to extend credit to her based on her husband's earnings. Today, however, a merchant or creditor who refuses to extend credit to such a wife will be in violation of the

Equal Credit Opportunity Act if the community's credit rating justifies the amount of credit requested. Passage of the Equal Credit Opportunity Act, then, corrects in large part this more subtle defect in community property management systems. After its effective date, unemployed wives in the five community property states with equal management provisions will be able to borrow cash at banks or on credit cards if the community itself is creditworthy, making access to their husbands' checking or savings account less necessary.

For this reason also, then, enactment of equal management provisions is of crucial importance in the adoption of any community property system.

The second major defect of many of the community property systems now in existence is their total failure to provide for a wife who marries a wealthy man. If neither of them works, no community property will be accumulated, and under the law of five of the eight community property states, all increments in the value of the husband's separate property will be his alone.[29] At divorce, such a wife is in the same position as the wife of a wealthy man in a separate property jurisdiction: she is totally dependent upon what a judge feels is "equitable" to award her, either as a division of property or as support. Upon her husband's death, she is in a far worse position than is the wife in most separate property jurisdictions, for she has absolutely no legal right to any of his separate property.

This problem could quite easily be cured by enactment of some form of "forced share" provision in community property states, to be effective either upon divorce or death for persons married to spouses with substantial separate estates.

With these two defects cured, community property is unquestionably the fairer of the two systems for married women.

Will the Equal Rights Amendment mandate state legislatures to enact a community property system in the place of the existing

29. In Idaho, Louisiana and Texas, all increases in the value of separate property owned by either of the spouses during marriage is community, not separate, property. *See* De Funiak and Vaughn, *supra* note 3 at § 72. Such provisions go far toward solving what is described in the text as the second major defect in the community property system.

separate property systems? Although the answer is by no means clear, there is a legal argument which can be made to that effect.

The argument draws from cases decided under the Fourteenth and Fifteenth Amendments to the United States Constitution and Title VII of the 1964 Civil Rights Act. In those areas, the United States Supreme Court has held that statutes "neutral on their face" which operated in a particular factual setting to discriminate against blacks or religious minorities were unconstitutonal.[30] The Court stated explicitly that it could not ignore the facts of the society in which laws, which appeared at first glance to be neutral, operated.

Under these cases, the argument against the separate property systems under an Equal Rights Amendment would be that they, also, are laws which are "neutral on their face, but discriminatory in impact." These property systems say to all married persons, in effect, "you own what you earn." In the factual setting in which such systems operate, however, it is men in the society who are expected to fulfill the role of wage earners, and women who are expected to remain in the home and care for house and children, uncompensated by wages. Even if a wife does work outside the home, the facts of the society in which she must obtain employment mean that she will be employed at a lower level than would a comparable man; she will be paid less; will not advance as rapidly; and cannot expect to earn as much in her working lifetime. In what sense, then, can these "neutral" separate property systems be said to be truly neutral? The systems are so established as to reward the man who does only what society expects of him—work

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30. In 1974, the Supreme Court cast doubt on the validity of the earlier cases described at length below in this footnote which had relied on an analysis of statutes as "neutral on their face, but discriminatory in impact."

In Jefferson v. Hackney, 406 U.S. 535, 550 (1972), the Court refused to hold that laws which affected persons of whom almost 90% were Mexican-American or Black and less than 15% of whom were Anglo-Saxon were "neutral on their face, but discriminatory in impact", saying that percentages alone would not serve to trigger application of the strict scrutiny test under the Equal Protection Clause.

Thus, whether the Court will continue to apply the analysis suggested in the text, either under the Equal Protection Clause or the Equal Rights Amendment, should it be passed, is not clear today. However, the following cases provide examples of settings in which the Court has applied the doctrine in the past.

Cases decided under the Fourteenth Amendment include Green v. County School Board, 391 U.S. 430 (1968); and Sherbert v. Verner, 374 U.S. 398 (1963). Cases decided under the Fifteenth Amendment or the 1965 Voting Rights Act include Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960); and Gaston County v. United States, 395 U.S. 285 (1969). The case decided under Title VII of the 1964 Civil Rights Act is Griggs v. Duke Power Co., 401 U.S. 424 (1971).

outside the home—and to penalize the woman who also does only what is expected of her—work inside the home. It is arguable, therefore, that under certain Supreme Court precedents in the race and religous minority areas, the separate property systems are "neutral on their face, but discriminatory in impact" and should be declared unconstitutional under an Equal Rights Amendment.

If the Amendment is not passed, it is possible that the same result could be achieved were the Supreme Court to hold that sex, like race, is a "suspect" classification under the Equal Protection Clause of the Fourteenth Amendment. Four of the nine Justices on the present Court have declared their willingness to so rule,[31] and if such a decision comes down, the constitutional argument concerning the validity of the separate property systems would be the same as that under an Equal Rights Amendment.

Regardless of the Amendment's fate, however, or of the Supreme Court's willingness to hold that sex is a "suspect" classification, women in both separate and community property jurisdictions must become aware of the immense practical consequences which marital property systems have upon their lives—in obtaining credit, in the division of property at divorce, upon their ability to will property upon their own deaths, and upon their property rights when their husbands die.

It is past time that women debate, discuss and understand these issues. They are not the exclusive domain of lawyers, law professors or of courts and judges. They are the laws which determine the very amount and extent of the property owned by every married woman and man in the United States. As such, they deserve far more attention than they have yet received.

31. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).