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Equal Rights in Divorce and Separation

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EQUAL RIGHTS IN DIVORCE AND SEPARATION

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The most potentially all-encompassing changes looming on the legal horizon today are the changes which will be required by the highly publicized Equal Rights Amendments. The purpose of this paper is to consider the present state of New Mexico law concerning divorce and separation with a view to pointing out those areas most likely to be affected by the passage of an Equal Rights amendment, to show how present law violates the spirit or the letter of the proposed amendments, and to suggest changes that might be required to comply with the proposed amendments. To begin our discussion we must consider the moving force behind the incipient changes, the proposed Equal Rights Amendments.

There are two proposed Equal Rights amendments that potentially affect New Mexico—state and federal. The proposed Amendment to the New Mexico Constitution is contained in House Joint Resolution Number 2[1] which was passed by the 1972 legislature. The amendment will be submitted to the electorate at the next general election, and if approved, would amend Section 18 of Article II of the New Mexico Constitution to read as follows:

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973.

The proposed amendment to the United States Constitution is contained in House Joint Resolution Number 208, passed by Congress on March 22, 1972.[2] The proposed amendment reads as follows:

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

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1. N.M.H.J. Res. 2 (1972).
2. H.J. Res. 208, 92d Cong., 2d Sess. (1972).

> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

We have neither the time nor space here to explore the differences between the two amendments or the policies behind them. Two things only should be kept in mind as we consider the laws relating to divorce and separation in light of these proposals. First, if these amendments are passed, the New Mexico amendment will have the most immediate effect because of its earlier effective date. If the amendment is approved by the voters in the 1972 General Election the 1973 Legislature will have little time to legislate any corrections to our existing law. It will take an emergency clause to make any corrective legislation take effect before the amendment. The problem is not theoretical, but immensely practical. Secondly, and perhaps most importantly, we must remember that this amendment is designed to provide equality between the sexes. The mass of publicity about the "Women's Lib" movement and its support for these amendments sometimes creates the impression that these proposals are solely attempts to improve the lot of women. Actually, as we shall see, there are many areas in existing law where men are being discriminated against, and the proposed amendments will work in their favor. Particularly is this true in the area of divorce and separation.

With these two caveats in mind, we can proceed to an examination of existing law.

JURISDICTION AND VENUE

Subject matter jurisdiction in all divorce actions lies in the District Courts.[3] Similarly, subject matter jurisdiction is what is here loosely termed "separate maintenance" cases is also vested in the District Courts.[4]

Specifically in divorce actions, either the plaintiff or the defendant must have resided in New Mexico for at least six months immediately preceding the filing of the complaint and have domicile within the state. Domicile for the purpose of divorce is defined by statute as being a) physically present in this state and having a place of residence here, and b) having the

3. N.M. Stat. Ann. § 22-7-1 (1953).
4. N.M. Stat. Ann. § 22-7-2 (1953).

present intention in good faith to reside in New Mexico permanently or indefinitely. Special provision has been made to define domicile in the case of military personnel.[5]

Under New Mexico law the husband is the head of the family and may choose any reasonable place or mode of living and the wife must conform thereto.[6] This statute seems to indicate that the husband has the exclusive right to determine the wife's domicile, so that a wife could not establish a home here apart from her husband even if she had the present intention to remain within the state permanently or indefinitely.

Frequently it has been said that the wife, since she cannot establish a domicile separate from her husband, cannot file for divorce within the state where she resides because her legal domicile is in the state where her husband has chosen to reside.[7] At first blush this would seem to be the rule under the above New Mexico statute. However, the great weight of authority today is that, although the wife's domicile is usually that of her husband's, if necessary she may acquire a separate domicile for the limited purpose of filing for divorce.[8] Professor Leo Kanowitz has determined that in all states today married women are permitted to acquire a separate domicile for the purpose of instituting divorce proceedings.[9]

Our own court considered this problem in *Bassett v. Bassett*[10] and said:

> Where a ground for divorce, that is, incompatability, exists she (the wife) is justified, under the law, in establishing a separate residence and domicile from that of her husband.

The right of the wife to establish a separate residence and domicile from that of her husband for the purpose of obtaining a divorce would also appear self-evident from the wording of the New Mexico divorce jurisdiction statute.[11]

Our rule is as it should be with respect to divorce because without this special domicile exception in the case of divorce it

5. N.M. Stat Ann. § 22-7-4 (Supp. 1971).
6. N.M. Stat. Ann. § 57-2-2 (1953).
7. Heimler v. Heimler, 129 N.J.Eq. 479, 19 A.2d 790 (1941); Coheen v. Coheen, 233 Ala. 494, 172 So. 618 (1937).
8. Annot., 39 A.L.R. 710 (1925).
9. Kanowitz, *Sex-Based Discrimination in American Law*, 12 St. Louis U. L.J. 3, 18 (1967).
10. 56 N.M. 739, 250 P.2d 487 (1952).
11. N.M. Stat. Ann. §22-7-1 (1953).

seems certain that any Equal Rights amendment would require the rules governing domicile to be the same as those for men.[12]

It is possible that the husband's right to choose the family's residence could bar the wife of a non-resident from filing for the New Mexico equivalent of separate maintenance. This type of suit may be instituted in the county where either of the parties resides.[13] Under the law which allows the husband to choose a reasonable place to live and requires the wife to conform thereto, those women who cannot come within the *Bassett* rule would be without the remedy afforded by separate maintenance.

Admittedly, since we have incompatability as a ground for divorce it would be the rare wife who could not find a ground for divorce to bring her within the *Bassett* rule, but it is not an impossible situation. Experience has shown several cases where husband and wife have lived together amicably enough, but simply preferred to live alone or with someone else. In such a case the wife of a non-resident would be unable to file a separate maintenance action in New Mexico. The simplest solution in this case would be to repeal the cause of the problem, Section 57-2-2.[14] Repeal would not be disruptive and would clearly allow all women the right to maintain an action for separate maintenance on equal footing with men. Once a spouse has decided that he or she desires to separate from the other the rule as it exists does not promote harmony, but rather increases strain, and places an unequal burden on the wife.[15]

GROUNDS AND DEFENSES

There are ten different grounds for divorce in New Mexico listed in two separate statutes. They are 1) abandonment, 2) adultery, 3) impotency, 4) pregnancy at the time of marriage by a man other than the husband, if the husband is ignorant thereof, 5) cruel and inhuman treatment, 6) neglect on the part of the husband to support the wife, according to his means, station in life and ability, 7) habitual drunkenness, 8) incompatability, 9) conviction of a felony, and imprisonment therefore, subsequent to the marriage,[16] and 10) incurable insanity existing continuous-

12. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 941 (1971).
13. N.M. Stat. Ann. § 22-7-3 (1953).
14. N.M. Stat. Ann. § 57-2-2 (1953).
15. Brown, Emerson, Falk & Freedman, *supra* note 12, at 942.
16. N.M. Stat. Ann. § 22-7-1 (1953).

ly for a period of five years preceding the filing of the complaint.[17] Only grounds 3, 4 and 6 appear to be discriminatory. Generally divorce grounds may be used by the defendant as defenses, though defenses are rarely presented, and in such a case grounds 3, 4 and 6 would be equally discriminatory.

Ground three, impotence, is generally used to refer to a male's inability to copulate and is also used synonomously with sterility.[18] Hence a woman may obtain a divorce because her husband is unable to have sexual relations with her or is sterile, but her husband has no recourse for his wife's frigidity or sterility. This is discriminatory on its face.

Ground four, pregnancy of the wife at marriage by another without the husband's knowledge, appears to give tacit recognition to the double standard of sexuality so frequently discussed in popular literature today. A good reason exists for this ground, based upon the legal presumption or fiction that a child born during a valid marriage is presumed to be the child of the husband and he is then responsible for its support.[19] It is only fair to say that a man should not be forced unwittingly to support a child which is not his or live with that child's mother after she has practiced a deception upon him. Likewise, a wife may suffer if her husband acknowledges and accepts responsibility for the support of a child which he fathered out of wedlock, or if he is adjudged a father in a bastardy proceeding and ordered to support a child of which his wife had no knowledge. If the wife had no knowledge of the existence of such a child prior to their marriage, she may also desire a divorce and resent the use of community funds, or even her husband's separate property, for the support of the child.[20] If we forget, as we should, the scarlet aura that we attach to the wife's premarital pregnancy, arising solely from many years' acceptance in our society of the "double standard," ground four is also discriminatory on its face for not allowing wives divorces when the husband is a secret father.

Ground six, failure of the husband to support the wife, is, of course, an outgrowth of the statutory duty of the husband to support the wife.[21] The Court said in *Taylor v. Taylor*[22] that the

17. N.M. Stat. Ann. §22-2-7 (1953).
18. Black's Law Dictionary 889 (4th ed. 1951).
19. 14 C.J.S. *Child* §1108 (1939).
20. Brown, Emerson, Falk & Freedman, *supra* note 12, at 951.
21. N.M. Stat. Ann. §57-2-3 (1953).
22. 20 N.M. 13, 145 P. 1075 (1915).

husband's non-support was a sufficient ground for divorce in every instance, except if it was unintentional. Unintentional non-support, as used in *Taylor*, seems to cover only cases of illness, physical or mental disability.

The husband's duty to support the wife has for many years been the norm in our society. But this norm is rapidly changing. Today modern marriage is considered to be a partnership with each spouse contributing in some form to the support of the other. In the past all married men worked and few married women did. Today more and more women are employed outside of the home and contribute financially to the support of the family. Much publicity has been given to role reversal in marriage, and some couples are actually putting the wife to work outside the home and the husband to work inside it.

Under present law the wife has a duty to support her husband only if, due to infirmity, he is unable to support himself and has no separate or community property upon which to draw for support.[23] The wife's non-support is not a ground for divorce in any case. This is blatantly discriminatory because it places an unequal burden upon the husband. This is neither in accord with modern marriage theories, nor attuned to a society where a large percentage of married women are gainfully employed.

It is only fair to say that in New Mexico much of this might be irrelevant except in the academic sense since incompatability is allowed as a ground for divorce and is the one most commonly used. Incompatability can probably be found in any of the discriminatory situations which have been mentioned here. However, the very presence of discriminatory grounds may increase social tensions.[24]

The most satisfactory solution to the problems mentioned in this section would be to abolish all grounds other than incompatability for the reason that this would best comply with the recognized practice in this state of filing almost exclusively on this ground. Also, there is a growing trend toward removing all fault basis from divorce grounds for social and psychological reasons, and repeal of all other grounds would be in line with this trend.[25]

If all grounds except incompatability are not repealed it will be

23. N.M. Stat. Ann. § 57-2-5 (1953).
24. Kanowitz, *supra* note 9, at 65.
25. Brown, Emerson, Falk & Freedman, *supra* note 12, at 949.

necessary, in order to comply with an Equal Rights Amendment, to add frigidity of the wife, a wife's non-support of the husband, and a husband's fathering a child out of wedlock without the wife's knowledge as additional grounds for divorce.

ALIMONY AND DIVISION OF PROPERTY

When we approach the subject of alimony and property settlements we invariably become tangled up in the principles of community property which underlie so much of the marriage relationship. Because a divorce is in essence a dissolution of the community it is impossible to completely separate our discussion from a discussion of community property principles, but we will try to limit ourselves to those areas of the law governing divorce and property division which are discriminatory by themselves, and not because of the specific instances of sexual discrimination which pervade our community property law.

When we first look at the statutes governing the property rights of husband and wife we are tempted to believe that there is no sexual discrimination written into our law. Section 57-2-1 proclaims the obligation of husband and wife to each other. "Husband and wife contract toward each other obligations of *mutual* respect, fidelity and support."[26] (Emphasis ours). But that initial aura of equality quickly disappears in the face of the laws which follow. Under N.M.S.A. section 57-2-3 if the husband neglects to make adequate provision for the support of the wife, except in the cases mentioned in the next section, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband.[27] Section 57-2-4 N.M.S.A. provides that a husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living separate from him, by agreement, unless such support is stipulated in the agreement.[28] According to section 57-2-5 the wife must support the husband out of her separate property when he has not deserted her, and he has no separate property, and there is no community property, and he is unable, from infirmity, to support himself.[29]

26. N.M. Stat. Ann. § 57-2-1 (1953).
27. N.M. Stat. Ann. § 57-2-3 (1953).
28. N.M. Stat. Ann. § 57-2-4 (1953).
29. N.M. Stat. Ann. § 57-2-5 (1953).

The result of these sections is to place on the husband the burden of supporting his wife, with the threat that he will be charged for her upkeep if he does not do so, while the wife is only obligated to support her husband when he is infirm and impoverished. It would seem that the easy solution for a wife burdened with an ailing husband would be to divorce him, since the obligation would then cease. Under state law a court is authorized to award alimony only to the wife.[30] No provision is made for alimony to the husband, even in extreme cases. Since section 57-2-5 requires a wife to support her husband only if he is infirm, presumably by terminating his status as husband through divorce a wife can avoid any further liability for support.

We see then that the law requires a husband to support his wife and gives the court power to take his property for the support of his ex-wife, while a wife has only a duty to support a husband who is ill, and cannot be required to support an ex-husband, whatever his condition. Clearly an Equal Rights Amendment would require that our laws be changed to reflect the mutuality of obligation given lip service in section 57-2-1 by making each spouse equally responsible for the support of the other, and by making each one liable for alimony in appropriate cases.

A more blatant discrimination is evident when we investigate the New Mexico statutes governing division of property and establishment of post-divorce obligations. While the wife may be entitled to slightly favored treatment during the existence of the marriage, it is in the dissolution of the contract that her welfare is most especially protected, to the detriment of the male partner.

The principal section of New Mexico divorce law governing the disposition of the property of the parties is N.M.S.A. 22-7-6.[31] Although too voluminous to quote in its entirety, this section gives the courts discretion to do the following:

a) provide for the support of the wife during the pendency of the suit;

b) insure the wife an efficient presentation and preparation of her case; and

c) allow the wife alimony, in lump sum or installments, from the separate property of the husband.

30. N.M. Stat. Ann. § 22-7-13 (1953). "In divorce, separation or support suits between husband and wife, the court may make an allowance to the wife of the husband's separate property as alimony, and the decree making such allowance shall have the effect and force of vesting title to property so allowed in the wife."

31. N.M. Stat. Ann. § 22-2-6 (1953).

The husband is not allowed support, attorneys fees or alimony, except in the rare case covered by N.M.S.A. 22-7-11,[32] which allows alimony and fees to an insane spouse in the court's discretion. An Equal Rights Amendment would require the removal of this built-in bias.

Statutory law is not the only law which expressly favors the wife in divorce situations. Case law closely follows the lead of the legislature in exhibiting its concern for the "weaker" sex, and the courts do not hesitate in exercising their discretion in making orders and decrees which benefit the wife to the detriment of the husband. Section 22-7-6 referred to above allows the court wide discretion, and the courts have exercised this discretion to benefit the wife even though she may have been the "guilty" party, if that term can justifiably be applied to a divorce situation.

In *Redman v. Redman*,[33] the court in discussing section 22-7-6 said:

> This section constitutes a clear and unequivocal grant of power to district courts to award the wife, in divorce actions, reasonable alimony, in installments or lump sums, independent of which spouse may have been the guilty party. The power is limited only to a grant of a reasonable sum, as that factor is limited by the facts of the particular case.

In another case, the defendant husband was protesting the award of alimony as being in violation of a pre-separation agreement between the parties which recited that no alimony would be asked for.[34] The court did not decide that issue directly, but gave some indication of its feelings when it said, "Whether such an agreement would be invalid as an attempt to oust the divorce court of its jurisdiction, and against public policy, would be worthy of consideration if the point were adequately presented."

This power of the court to award the wife alimony is not entirely based upon a desire to see that her needs are being met; in at least one case the court seemed to indicate that the right to support from the ex-husband is somehow inherent and not based on need. In *Lord v. Lord*[35] the defendant had been ordered to pay $100 monthly to his ex-wife. When the husband re-married,

32. N.M. Stat. Ann. § 22-7-11 (1953).
33. 64 N.M. 339, 328 P.2d 595 (1958).
34. Oberg v. Oberg, 35 N.M. 601, 4 P.2d 918 (1931).
35. 37 N.M. 24, 16 P.2d 933 (1932).

he stopped the alimony payments. In ordering the husband to continue, the court said that the mere fact that the former wife was being comfortably supported by her father was not a sufficiently changed condition to warrant abrogation of the alimony provisions of the divorce decree. The court said that only a showing of inability, to support the present wife, or undue hardship, would justify a termination of the alimony.

In a later opinion rendered in the same case,[36] the court was ruling upon the wife's request for attorneys fees for the previous appeal. In granting her request the court made a statement of policy which is worth repeating for the insight it gives into the built-in judicial bias in favor of the wife.

> We have held that on an appeal in a divorce case we have the inherent power to allow the wife suit money to enable her to present her case (citing earlier case).
>
> This allowance to the wife is founded upon the husband's legal obligation to furnish necessaries, upon his control of the community purse, and upon the statutory policy that, in the trial court at least, the wife shall have the means for "efficient preparation and presentation of her case."
>
> . . . The policy which insists that the wife have counsel when her marital status and support are involved originally would seem to require the same protection when the latter is again jeopardized.

Here the court seems to feel that "once a wife, always a wife" and the husband's duty to furnish necessaries continues long after the relationship which originally gave rise to that obligation has been terminated.

So far we have been discussing alimony and attorneys' fees, but these are not the only financial matters which have to be determined between husband and wife. Where children are involved there is also the matter of child support, but since the award of child support follows and is dependent upon the award of child custody, that topic is treated in the section dealing with child custody.

Finally, there is the matter of the division of the community property. In most states this subject never arises in divorce, since in a non-community property state the earnings and property acquired by the husband belong solely to him. In New Mexico the community property laws dictate that one-half of all the property acquired during the marriage, with few exceptions,

36. Lord v. Lord, 37 N.M. 454, 24 P.2d 292 (1933).

belongs to the wife. Thus it becomes necessary in divorce to separate out the wife's one-half share and set it aside to her.

It is only fair to point out that there is nothing inherently discriminating about splitting community property. In theory, the whole idea of community property is to give the wife some recognition and reward for her contributions to the family life. But the theory is often forgotten when it comes down to the actual practice of "splitting the sheet."

In the average New Mexico divorce it would not be too much of an exaggeration to say that the wife gets most of the property and the husband gets most of the debts. There are several ways to explain this result, some of which may seem quite fair. First, it can be stated that the wife usually has custody of the children and needs more of the property to care for them. Or it can be pointed out that the wife probably has no job or skill, and will have difficulty finding employment in order to take care of herself. Since the husband is probably earning more money, he can better afford to pay the debts. No doubt the desire of the family's creditors to have a responsible party as debtor rather than an unemployed female is indirectly responsible for the common practice of making most of the debt the sole responsibility of the husband. Whatever the reason, the husband rarely gets his fair one-half share of the community property.

This becomes doubly unfair when we realize that in addition to giving up most of what the couple has acquired during the marriage, the husband could be required to pay alimony to the wife. In theory her one-half of the property should obviate the need for further support, but in fact not only does she usually receive the lion's share of the property, but all too often alimony in addition.

In many instances the preferential treatment the wife receives is disguised as child support. The amount that the husband is required to pay as child support often exceeds the one-half maintenance that is his legal obligation, and often is sufficient to take care of all their needs with an additional portion left to go toward the support of the wife.

In *Harper v. Harper*[37] the court explained why the wife got what amounted to the bulk of the property:

> The primary question submitted for decision is whether the

37. 54 N.M. 194, 217 P.2d 857 (1950).

> district court upon decreeing an absolute divorce of the wife from the husband and ordering a dissolution of the community with a division of the community estate, may properly set over to the wife his one-half interest in a real estate purchase contract and a deed of trust, identified and adjudged to be community property, in lieu of an award of lump sum alimony. . . .
>
> It is true enough that the statute authorizing an award of property in lieu of alimony mentions only "separate property" . . . this circumstance is entitled to little weight when we consider that upon division of community property incident to divorce, separation or support suit, what was theretofore community property becomes henceforth the separate property of the respective spouses.[38] [The wife got all the property.]

In many cases the husband and wife agree to a division of the property and sign a property settlement agreement which is incorporated in the divorce decree, subject to the court's approval. This method saves the embarrassment and expense of having the court investigate the extent of the community assets and divide them. But a husband who is contemplating such an agreement had better be sure that his wife gets at least her one-half share or more, because the courts stand ready to help the wife enforce her rights. In *Cornell v. Cornell,*[39] the court overturned a property settlement agreement incorporated in a divorce decree upon the wife's showing that her share was less than a full one-half share of the total value of the community estate. In rejecting the agreement, which the wife had signed, the court said:

> It is the duty of the husband to show the payment of an adequate consideration, full disclosure as to the rights of the wife, the value and extent of the community property, and that the wife had competent and independent advice in the execution of the separation agreements.[40] [The wife was granted an additional $750 attorney fee plus an enlarged share of the property.]

By these words the court not only seems to be saying that the husband must be fair, but that he must prove he was fair and hire a lawyer for his wife to check his fairness. In an age when women were not allowed to dabble in financial matters and played no part in managing the family property, this might have been a

38. *Id.* at 195; 196; 217 P.2d at 858.
39. 57 N.M. 170, 256 P.2d 543 (1953).
40. *Id.* at 173; 256 P.2d 536, 537 (1953).

defensible position. But today, when statistics show that in a majority of American households the wife is the money-manager and purchasing agent, such discrimination is intolerable. No New Mexico case could be found wherein the husband overturned a settlement because his wife failed to make full disclosure, but in today's society such a situation is not so implausible as it might seem. Certainly our law should give equal rights to both parties in claiming an equitable portion of the community estate.

So far we have been dealing with sexual discrimination as it arises in divorce cases. But there are other ways in which the marriage relation can be terminated, and there, too, the built-in bias in favor of the female is apparent.

N.M.S.A. 57-1-9[41] contains restrictions on the power to annul marriages and rules as to what types of marriages may be annulled. Buried in the middle of the section is this curious provision concerning the annullment of marriages between minors under the age of consent: ". . . and in the case of a female, the court may in its discretion grant alimony until she becomes of age or remarries."

We have already seen that N.M.S.A. 22-7-2[42] provides for alimony to the wife in a separate maintenance suit. In addition one must remember that the husband's duty to support the wife continues all through the time of any separation, unless the parties have agreed to the separation and the agreement makes no provision for support. Furthermore, N.M.S.A. 57-3-7[43] provides that the earnings of the wife and any children living with her or in her custody while she is living separate from the husband are her separate property. Thus her earnings are held free from community debts, while the husband's earnings continue to bear the label of community property and remain subject to the community indebtedness. To remedy this inequality, and Equal Rights Amendment would probably require that the statute be changed to provide that the earnings of each spouse, while they are separated, remain their separate property.

Of course, if the parties agree to separate, they can make provision for the support of either of them by agreement. This is the only way, other than by becoming insane, in which a husband could be entitled to receive support from his wife.

41. N.M. Stat. Ann. § 57-1-9 (1953).
42. N.M. Stat. Ann. § 22-7-2 (1953).
43. N.M. Stat. Ann. § 57-3-7 (1953).

CHILD CUSTODY

Child custody as a consequence of divorce is the area of divorce law least likely to be affected by the passage of an Equal Rights amendment. This is due primarily to the courts, which defend any sexual discrimination by concealing it behind the smokescreen of "child welfare."

The last statement deserves some explanation, because if the statutory law is not discriminatory one would wonder why the courts would have need of a defense for sexual discrimination. In the writers' opinion child custody is the area in which sexual discrimination although disguised, is most prominent in practice.

While we have no statistics to support our statements, we think we run little risk of exaggeration when we say that in the majority of divorce cases where the custody of a minor child is at issue, the wife ultimately ends up with legal custody of the child. In a certain percentage of cases this result may be due to agreements between the husband and wife wherein he willingly agrees to her custody, but we suspect that a large number of these agreements are the result of a lawyer's advice to their husband clients that the trouble and expense of a custody battle are not justified, since the wife usually wins. Regardless of the reason for the result, the fact is indisputable that in a large majority of divorces the minor children end up in the custody of the wife.

Yet the law regarding the rights of parents to the custody of their children contains no built-in discrimination such as we saw in the case of the laws governing alimony and property division. N.M.S.A. 22-7-6[44] authorizes the court to make orders concerning the guardianship, care, custody, maintenance and education of the minor children of the parties to a divorce. The statute contains no specific declarations as to who has a right to the custody, and the courts customarily have had extremely wide latitude in exercising their discretion. The laws which the court follows in determining the custody of children in general are beyond the scope of this article. Suffice it to say that in general the natural parents have rights superior to those of anyone else, and as between the two parents nothing matters except the paramount concern, the welfare of the child.

44. N.M. Stat. Ann. § 22-7-6 (1953).

Since as between mother and father the law has no openly avowed presumption as to who has a better right to the custody of a minor child, the facts of each particular case control. When we examine the actual results, however, we discover that most of the time the mother gets the children. The quick answer, and the normal one used to justify this result, is that in the majority of cases the court determines that the welfare of the child is best served by placing it with its mother. This principle has almost attained the status of a legal presumption, although the courts have been careful not to label it as such. Only one New Mexico case has been discovered which specifically deals with this principle. The Court in *Ettinger v. Ettinger*[45] said:

> Our statute relating to custody of children is § 32-1-4, N.M.S.A. 1953, which provides as follows: the parents of a minor child shall have equal powers, rights and duties concerning the minor. The mother shall be as fully entitled as the father to the custody, control and earnings of their minor child or children. In the case the father and mother live apart the court may, for good reasons, award the custody and education of their minor child or children to either parent or to some other person. . . .
>
> We concede that, as a general rule, the courts are reluctant to deprive the mother of the custody of a very young child. . . . Although no New Mexico case in point has been called to our attention, in *Albright v. Albright,* 1941, 45 NM 203, 115 P.2d 59, the court, in its opinion, did quote from the opinion of the trial court in that case, a part of which stated: The welfare of the child is a matter of course of primary interest. A child of tender years, such as this one, its normal place is with its mother.[46]

The court then went on to quote with approval an opinion from the Supreme Court of Oregon, which said in part, "In all cases motherhood is a factor to be given great weight in deciding questions of child custody."[47]

We think it is accurate to say today that New Mexico courts start off with the proposition that a young child should be placed with its mother. This is discriminatory in a most insidious way, because the courts justify this position by stating that it is the welfare of the child which is determinative, and not the sex of the parent which gets custody. Yet when we investigate the reasons for the presumption in favor of motherhood we see that in today's society it loses some of its validity.

45. 72 N.M. 300, 383 P.2d 261 (1963).
46. *Id.* at 303, 383 P.2d at 263.
47. Shrout v. Shrout, 224 Ore. 521, 356 P.2d 935 (1960).

In an earlier age when a woman's place truly was in the home, raising the children, a small child was placed with the mother because the father worked for a living all day and could not properly supervise his child. Also, a woman was judged better able to perform the life functions of cooking for, clothing, cleaning, and feeding the child. In that earlier day this was probably true, But the facts today are different. Rare is the divorced woman whose alimony and property settlement is so generous that she can afford not to work. In this day of compulsory education when the child, after age six, is supervised daily by professional teachers for most of the day, the necessity of having a parent at home is decreased. The average father no longer works 60 hours a week, but 35 or 40. Child day care centers, babysitters, and the new labor-saving technology in the modern home makes it practical for a father to care properly for a child while maintaining a full-time job. In short, there is often very little difference between a father and a working mother in the amount of time and attention they can devote to raising a child properly. The very social forces which have given rise to the agitation for an Equal Rights Amendment have dissolved many of the differences between the father and the mother which once made the preference for the mother justifiable.

Unfortunately, however, an Equal Rights Amendment will have little effect on the prevailing customs regarding child custody for the simple reason that the courts openly acknowledge that they are protecting the welfare of the child, and not really discriminating against the father. Until the society changes its ideas and mores to conform in practice to what the Equal Rights Amendment provides in theory, judges will continue to award custody to the mothers, and the fathers will continue to be discriminated against, not because of any real consideration of the child's welfare but rather because of society's preconceived notions of how family roles affect the child's welfare.

Child support follows child custody and N.M.S.A. 22-7-15[48] gives the court authority to make an allowance from the property of either party to support the children. This seems equitable on its face, but no case has been found wherein the wife was required to pay child support to the husband for children placed in his custody. For practical purposes the responsibility of paying

48. N.M. Stat. Ann. § 22-7-15 (1953).

child support is normally solely on the husband, whether he is given custody or not.

CONCLUSION

We have seen briefly those areas of the law concerning divorce and separation which are potentially in conflict with an equal rights amendment. We have hopefully suggested the form which corrective legislation should take in order to bring our statutory law into compliance with the amended Constitution. There are other ways in which corrective measures could be taken and we have suggested only some of many ways in which the reform could be accomplished. The only point we urge is that, in some way, the reform be accomplished in the legislature through corrective legislation rather than in the courts.

Assuming that the 1972 election brings ratification of the New Mexico Amendment, the time is short in which the new laws must be created. But a legislative study committee, supported by the resources of the organized bar and the law school, could accomplish the task in the time available. If the legislature is prepared to take action to prevent the disruption which will occur if the changes are not made, we can have an updated, compatible set of statutes by the time the amendment becomes effective.

Much has been said against the passage of the amendment, based on the chaos that would result because of the conflict with our existing laws. This chaos will exist in no small measure if the legislature fails to act, and makes a political issue of what should be a technical, corrective issue.

As a lawyer one is always hesitant to voice any criticism of the bench, but in this instance we feel even the judiciary would agree that it would be an unfortunate mistake to leave the task of changing our laws to the courts. In the courts the task of bringing existing law into compliance could only be done on a piecemeal basis, as the issues arose in lawsuits. The changes would be made in an unorganized way, with no effective method of replacing those laws which the court strikes down. The new laws would eventually have to pass the legislature anyway. Most attorneys would agree that the courtroom is a last resort as a means of settling disputes, and it is equally inefficient as a means of changing legislation.

Our statutes need changing. The legislature has an opportunity to perform a vital and crucial function in 1973. If it accepts the

challenge and moves quickly to prepare a comprehensive plan of corrective legislation, New Mexico will be the better for it. We feel that the law school and the bar association would be eager to provide whatever assistance is asked of them. The choice now lies with our elected representatives—to accept the concept of the Equal Rights Amendment and take active steps to align our laws with its principles, or to lie dormant and abrogate its responsibility to an already over-burdened judiciary.