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Sex-Based Discrimination in Oklahoma Statutes

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SEX-BASED DISCRIMINATION IN THE OKLAHOMA STATUTES

By Martin A. Frey

Sex-based discrimination is a double-edged sword. Men may be discriminated against as well as women. Statutory sex-based discrimination may take a number of forms. A statute may be discriminatory on its face, or a statute not discriminatory on its face may be applied to facts in a discriminatory fashion or a statute neither discriminatory on its face nor as applied may reflect, contribute to, and reinforce existing discriminatory attitudes.

This article will focus on sex-based discrimination in the Oklahoma statutes—discrimination against women **and** discrimination against men. The family law statutes will be used to illustrate the statute discriminatory on its face and the statute discriminatory as applied. The statutes regulating professions and occupations will be used to illustrate the statute that is neither discriminatory on its face nor as applied—but which reflects, contributes to, and reinforces existing discriminatory attitudes.

A statute that evidences sex-based discrimination on its face is the most obvious. The following illustrations come from four different titles on the Oklahoma statutes: title 10—Children; title 12—Civil Procedure; title 30—Guardian and Ward; and title 32—Husband and Wife. In title 32, a number of sex-based discrimination statutes still exist. Section 2, entitled "Husband head of family," provides:

> The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.[1]

This statute, which dates from 1890,[2] makes the husband and wife unequal partners in marriage. The man is superior and therefore is the head. He has the power to select the place and mode of living. The woman, being subservient, "must conform thereto."[3]

Section 3, entitled "Duty to support," provides:

> The husband must support himself and his wife out of the community property or out of his separate property by his labor. The wife must support the husband when he has not deserted her out of the community property or out of her separate property when he has no community or separate property and he is unable from infirmity to support himself.[4]

By this statute, the husband has the duty to support himself but the wife has **no** parallel duty to support herself. The husband also has the duty to support his wife. While the wife has been given a duty to support her husband, her duty is qualified by three conjunctive conditions. She has the duty to support her husband only when he has not deserted her **and** he has no community or separate property **and** he is unable from infirmity to support himself. The husband's duty to support his wife is not conditioned on her lack of community or separate property or her inability from infirmity to support herself.

Section 3 placed a third condition on the wife's duty to support her husband. She has the duty to support him only when he has not deserted her. Section 3 places no parallel condition on the husband's duty to support his wife. Section 11, "Liability on abandonment or separation by agreement," however, does limit the husband's duty in desertion type circumstances.

> 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.[5]

When the wife, however, does have the duty to support her husband, she need only support him out of the community property or out of her separate property. He must support her out of the community property or out of his separate property **or by his labor.** She is not required to support him by her labor.[6]

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Section 10, entitled "Husband bound for necessaries," provides:

> If the husband neglects to make adequate provision for the support of his wife, except in the cases mentioned in [section 11], any other person may, in good faith, supply her with articles necessary for her support and recover the reasonable value thereof from the husband.[7]

As the title states, section 10 is the husband's liability to third persons who supply the wife with articles necessary for her support. There is no comparable statute imposing liability on the wife to third persons who supply the husband with articles necessary for his support.[8]

The divorce and alimony statutes are found in title 12 ("Civil Procedure"). Section 1271 lists the grounds for divorce:

> The district court may grant a divorce for any of the following causes:
>
> Fourth. When the wife at the time of her marriage, was pregnant by another than her husband.[9]

There is no ground for divorce based on the fact that at the time of the marriage a woman other than the wife was pregnant by the husband.

Section 1278 provides for the "Restoration of wife's maiden name:"

> When a divorce is granted, the wife shall be restored to her maiden or former name if she so desires.[10]

While the tradition has been that upon marriage the wife takes her husband's surname, it is becoming less than uncommon for a wife upon marriage to retain her maiden name. While this statute would not affect the wife's retention of her former name, it would discriminate against the man who upon marriage decides to assume a new name whether it be his wife's surname, a hyphenated combination of his surname and his wife's surname, an abbreviated compilation of his and his wife's surnames, or a new surname. Upon divorce, section 1278 does not permit the husband to be restored to his former surname if he so desires.

The statutes concerning the custody of children are found in several locations in the Oklahoma statutory compilation. In title 10, entitled "Children," section 5 of chapter 1, "Custody, services and earnings," provides:

> The father of a legitimate unmarried minor child is entitled to its custody, services and earnings; but he cannot transfer such custody or services to any other person except the mother, without her written consent, unless she has deserted him or is living separate from him by agreement. If the father is dead, or be unable or refuse to take the custody, or has abandoned his family, the mother is entitled thereto."

This statute states that the mother and father do not share equally in the custody, services, and earnings of their children. The father is superior. Only when he is unable or unwilling does the mother acquire the parental rights to custody, services, and earnings of her children. This statute represents the common law position that the father's right to custody of his legitimate children was virtually absolute.

This absolute right of the father to the custody of his children ceases once a petition for divorce, legal separation, or annulment has been filed. Title 10, chapter 1, section 5, must be read in conjunction with title 12 ("Civil Procedure"), chapter 22 ("Divorce and Alimony"), section 1277, which provides for the "Care and custody of children:"[11]

"By statute the mother and father do not share equally in the custody, services, and earnings of their children. The father is superior. . . the common law position that the father's right to custody of his legitimate children was virtually absolute."

> A petition or cross-petition for a divorce, legal separation, or annulment must state whether or not the parties have minor children of the marriage. If there are such children, the court shall make provision for guardianship, custody, support and education of the minor children, and may modify or change any order in this respect, whenever circumstances render such change proper either before or after final judgment in the action.[12]

But this statute, which gives neither parent a superior position as to custody of their children, must be read with title 30, section 11:

> In awarding the custody of a minor . . . . , the court or judge is to be guided by the following considerations:
>
> 1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question.
>
> 2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father.[13]

Section 6 of title 10, "Custody of illegitimate child," states:

> The mother of an illegitimate, unmarried minor is entitled to its custody, services and earnings.[14]

No parallel provision exists for the father of an illegitimate, unmarried minor. For the father to be entitled to the custody, services, and earnings of an illegitimate, unmarried minor, he must legitimatize the child.[15]

Section 84 provides for "Liability of father for expenses of mother:"

> The father of a child born out of wedlock is liable for the reasonable expenses of the mother during the period of her pregnancy, confinement and recovery, whether or not the child is born alive. This liability may only be enforced within three years after the birth of the child and, where the child is born alive, it must be enforced in an action for the support of the child.[16]

This statute places all of the expenses on the father and none on the mother. Responsibility is not shared.

Section 15, "Support of step-children," provides:

> A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and where such is the case, they are not liable to him for their support, nor he to them for their services.[17]

No parallel provision exists for a wife to maintain her husband's children by a former wife.

Section 22, entitled "Wife of manager or superintendent of institution having orphans or delinquent children as employee," provides:

> It shall be lawful for the wife of any chief managing officer or superintendent of any institution in the State of Oklahoma, the inmates of which are orphans or delinquent boys and girls to be also employed at said institution and be carried on and paid through the pay-roll of said institution.[18]

The statute has no counterpart for the husband of any

chief managing officer or superintendent of any institution. As is the case of many sex-based discriminatory statutes, the discrimination is against both women and men. This statute assumes that women will not be the chief managing officer or superintendent of the institutions referred to in the statute. But if a woman does become the chief managing officer or superintendent, her husband is not authorized to be employed at that institution and be carried on and paid through the pay-roll of that institution.

These statutes demonstrate that facial discriminaton against both sexes exists in the Oklahoma statutes. We will focus now on statutes that are discriminatory as applied.

Divorce and alimony statutes will be used to illustrate sex-bias application of statutes that evidence no sex-bias on their faces. As previously discussed the statutes for custody of children upon a petition for divorce, legal separataion, or annulment are facially neutral. Neither parent has preference as to custody but if other things are equal, the mother will be awarded custody of children of tender years.[19] In practice, however, before a mother is deprived of the custody of her children of tender years, it must clearly appear that she is an improper person to be entrusted with their custody.[20]

Sex-based discrimination also occurs in the application of the statute concerning the disposition of property upon divorce.[21] The statute divides the property into three categories: (1) property owned by the husband or wife before marriage; (2) property acquired after marriage by the husband or wife in his or her own right; and (3) property acquired by the husband and wife jointly during their marriage, regardless of whether the title is in the husband, the wife, or both. As to property in the first two categories, the statute directs the court to "enter its decree confirming in each spouse [that] property . . . ." As to property in the third category (property acquired jointly during marriage), the statute mandates the court to "make such division between the parties as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof."

Neither sex has received a preference by the wording of the statute. But sex-based discrimination may occur when the courts apply the statute to the facts of a given case. One such problem occurs in the determination of whether property acquired during the marriage should be classified as property acquired by one spouse (property that remains his or her separate property) or as property acquired jointly (property that the court will distribute). A few illustrations will illuminate the discrimination.

In *Baker v. Baker,*[22] throughout 17 years of marriage, the husband worked at a military career and the wife, at his request, did not work outside the home. Shortly before the divorce, he retired from the Army and was entitled to government retirement benefits. The District Court classified the retirement benefits as jointly acquried property to be distributed between the husband and wife. The Oklahoma Supreme Court held the District Court in error, modified the District Court's order, and affirmed the order as modified. The retirement benefits were not subject to division by the court because they were not property acquired jointly during marriage. The wife's services in the home which enabled the husband to acquire the retirement benefits went unnoticed. Nor did the court consider that the wife's agareement to forego employment which would produce retirement benefits meant that she was relying on sharing in her husband's benefits.[23]

Sex-based discrimination in classifying property as jointly acquired is further illustrated by *Colvert v. Colvert.*[24] The parties were married while both were in school, he was a graduate student and she was an undergraduate student. During the early part of the marriage, the wife continued with her education and became a registered pharmacist. The husband then entered medical school and at the time of divorce was six months from graduation. The Oklahoma Supreme Court treated the husband's education as jointly acquired property but refused to treat the wife's education the same. The court then affirmed the trial court's judgment granting the wife a $35,000 property settlement—the property being the husband's education jointly acquired. The rationale was the different motives for seeking education. The decision to use the wife's income for the husband's medical education was viewed as an investment decision. The decision to use the husband's income for the wife's pharmaceutical education was deemed to emanate from his statutory duty to support his wife. She had no parallel duty to support him through medical school. Thus a statute not discriminatory on its face is discriminatory as applied since it is read in conjunction with a discriminatory statute on its face.

Even when property is classified as acquired jointly during marraige, what criteria will the courts use in making "such division between the parties as may appear just and reasonable" and will these criteria reflect sex-based discrimination? Unlike the division of property in a community property system, property acquired during marriage in a common law state will not be divided half-and-half. The division is based on the respective efforts of the parties in contributing to the accumulation of the jointly acquired property. The court in *Spencer v. Spencer* focused on the following efforts:

> The evidence made material by these principles is that the father is a hard-working, industrious

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> man not only holding down a full-time job during the day, but ordinarily working around the house at other times either tending a good size garden, building a new house, or performing other valuable services. He is frugal, temperate and not given to riotous living or truant associations.

On the other hand the evidence disclosed that the mother is somewhat of an economic millstone hanging on appellant. Neighbors testified that she spent most of the day (until about 30 minutes before appellant was due home from work) loafing around the house with nothing on except a see-through "nightie;" that she neglected not only her household duties but the two young boys who were not "kept clean" and were not given proper meals (cookies before a frequent supper of "hot dogs" notwithstanding the deep freezer was full of vegetables grown by the father). There was evidence that instead of canning or using the produce from appellant's garden "she would just let it lay in the icebox or just throw it out."[25]

Aside from *Spencer v. Spencer*, a system based on evaluating relative efforts is subject to sex-based discrimination. Will the best efforts of the spouse outside the home, that is, the spouse who is the "breadwinner," be considered more important than the best efforts of the spouse inside the home? When both spouses contribute maximum effort to the family, the argument could and should be made that upon a division of the property jointly acquired during marriage, the wife and the husband should share equally.

Sex-based discrimination may occur in the application of the statute concerning the awarding of alimony upon divorce. On its face the statute states no sex-based discrimination:

> Either spouse may be allowed such alimony out of real and personal property of the other as the court shall think reasonable, having due regard to the value of such property at the time of the divorce. Alimony may be allowed from real or personal property, or both, or in the form of money judgment, payable either in gross or in installments, as the court may deem just and equitable.[26]

Unlike its predecessor, this statute sanctions alimony for either spouse and dispenses with the concept of fault.[27] The discrimination may occur when the statute is applied to a set of facts arising from a divorce action. Alimony for support, unlike alimony for property distribution, is based on the need for support. Factors in determining need include each spouse's separate estate, the ability to support him or herself, the ability to pay alimony, and additional burdens such as support of children. Need varies depending on the family's life style. Seldom will the husband be entitled to alimony for support because he has continuously been employed outside the home. Many times the wife has given up employment to stay at home, take care of her family, and tend the house. She has not been employed outside the home and the skills that she has will permit her to enter the "labor" force at only a low level. So in the traditional marriage it is the wife who is disadvantaged upon divorce and who can demonstrate the need for support.

But if the purpose of support is need, then a strong effort should be made to insure that this need is temporary. If alimony for support is granted only to the unemployed spouse, then every effort should be made to provide that spouse with the skills necessary to acquire work and eliminate the need. Discrimination exists if the spouse receiving alimony for support is not required to make reasonable efforts to eliminate or at least reduce his or her inability to support himself or herself.

The third type of discriminatory statute may neither be discriminatory on its face nor as applied but may reflect, contribute to, and reinforce existing sex-based discriminatory attitudes. The following materials move from the traditional family law statutes—marriage, divorce, support—to career choices. Title 59 of the Oklahoma Statutes Annotated is devoted to "Profes-

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sions and Occupations." In this title, thirty-five professions and occupations—including architects, barbers, doctors, nurses, plumbers, social workers, and cosmetologists—are licensed and regulated.

Searching the statutes for pronoun references revealed a number of interesting facts. First, no uniform reference to men and women has been developed. Various pronoun references have been used—"he," "he or she," and "he (she)." Two statutes resolve the pronoun problem by stating "Masculine words shall include the feminine and neuter, and the singular includes the plural."[28] In many statutes, an attempt has been made to avoid use of a pronoun and to use instead such terms as "every applicant," "any person," "student," or the name of the occupation. A few statutes refer at times to "he or she,"[29] but most refer only to "he."[30]

The lists are revealing as to occupational sex-based discrimination. Although not all the statutes that make use of the pronoun "she" are occupations stereotypically for women, many such as barbering, cosmetology, electrology, and nursing, have been in that category. On the other hand, only a few statutes that make use of the pronoun "he" exclusively are occupations stereotypically for women. In the medicine and medically related fields, statutes dealing with dentists and doctors (M.D.s) refer to "he" while statutes licensing nurses refer to "he or she." Throughout the statuates on dentistry the reference is only to the masculine "he." The sex-based bias is obvious when the statute regulating the unlawful practice for dentists is compared with the statute regulating the unlawful practice for dental hygienists.[31] The pronoun used for dentists is "he" and that for dental hygienists is "he or she." Even in those occupational statutes using the disjunctive "he or she," the disjunctive is not consistently used. One statute may speak in terms of "he or she" and another statute dealing with the same occupation will refer to "he."[32]

The only occupational statutes that do not show this inherent preference for men are those regulating nurses, an occupation traditionally classified as for women. Even within the same statute, the disjunctive "her or she" is not consistently used. For example the statute for "Examinations — Qualification of applicants — Fees — Licenses" for chiropody has nine pronoun references—seven to "he or she" and two to "he."[33] Similar patterns exist for other statutes as well: chiropractic, cosmetology, optometry and electrology.[34]

Section 691, "Practicing veterinary medicine—Who regarded as—Exceptions," illustrates the existence of internal inconsistency:

> Any person shall be regarded as practicing Veterinary Medicine, within the meaning of this Act, who assumes, advertises, or holds **himself** out as a veterinary practitioner, or prescribes for, in any way treats sick, or injured animal or animals or administers preventive treatment therefor, to other than **his or her** own, for compensation.[35]

These illustrations are not intended to imply that sex-based discrimination in certain occupations is sanctioned by statute. Certainly statutes using "he" will be interpreted to include "he or she." But the statutes foster what had been occupational sex-based discrimination and do nothing to counter the old mores. Most occupational discrimination has been discriminatory against women but implicit in the statutory pattern is discrimination against men as well. Men seldom enter occupations stereotyped for women. The statutory discrimination against men is more subtle since these occupational statutes may refer to "he or she" and thus appear to be non-discriminatory. But by considering all of the "he" statutes and all of the "he or she" statutes, the "he or she" statutes may really mean "she" alone. Certain occupations are for men and others are for women and this pattern, although without sharp boundaries, is reinforced by statute.

In light of the foregoing, what can be done to combat sex-based discrimination? Two types of discriminatory statutes, those discriminatory on their faces and those

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that reflect, contribute to, and reinforce existing sex-based discriminatory attitudes, can be corrected with legislative action. Indeed, the legislature has taken action to amend some statutes formerly discriminatory on their face. For example, until 1975 the statute relating to support and education of children read:

> The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability.[36]

This statute was amended in 1975 to read:

> The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the parent having custody is able to give are inadequate, the other parent must assist to the extent of his or her ability.[37]

The change was in the second sentence.

> If the support and education which the [father of a legitimate child] **parent having custody** is able to give are inadequate, the [mother] **other parent** must assist [him] to the extent of **his or** her ability.

The words bracketed are from the older statute, the words in boldface are from the newer statute, and the words neither bracketed nor boldfaced are common to both statutes. The 1975 changes eliminate most of the sex-based discrimination of this statute. It is interesting to note that no change was made in the first sentence which uses the masculine pronoun when referring to the child. Certainly this statute is not limited to the support and education of male children.

A second illustration of legislative activity is the revision of the alimony for support statute. Prior to 1975, only the wife could receive alimony for support. The revision permits alimony for support for either spouse if he or she demonstrates need.[38] A third change eliminates the age differentials when dealing with males and females.[39] But what is needed is a uniform revision of all current legislation discriminating on its face. Piecemeal revision will be slow and ineffective.

The legislature has yet to take action to correct statutes that reflect, contribute to, and reinforce existing sex-based discriminatory attitudes. No attempt has been made to cull the statutes for the pronoun problem. Even in recently enacted statutes, the legislature has demonstrated a lack of awareness of the problem. The newly enacted statutes basically use the masculine.[40] Occasionally the disjunctive "he or she" will be used in a statute but the disjunctive is not consistently used.[41] The job of culling existing statutes can only be long, tedious, and expensive. But these excuses are inapplicable to new legislation. A general interpretation statute regarding pronouns followed by strict adherence to the general statute would at least resolve the problem as to future legislation.[42]

The fact that a statute has been applied in a discriminatory fashion does not mean that it must continue to be applied in that fashion. If this statute is so applied only because it must be read in conjunction with another statute which is discriminatory on its face, then the change of the facially discriminatory statute may resolve the problem. Or a statute may be applied in a discriminatory fashion due to a lack of awareness that the statute is being so applied. The consciousness level of those that draft the statutes, those that apply the statutes, those that assist in the application of the statutes, and those to whom the statutes are applied must continually be raised. Since the turn of the century much has been done to eradicate discrimination. Much more remains to be done.

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1. Okla. Stat. Ann. tit. 32, §2 (West 1976). The origin of this statute is an 1887 Dakota statute.
2. Okla. Stat. ch. 40, §(1890).
3. Does the fact that the husband is the head of the family and selects the place of living preclude the wife from residing in one state when her

husband has selected another state as the family residence? The problem comes to the fore when a wife seeks divorce in a state which is different from that in which her husband has chosen to reside. A former Oklahoma statute provided that:

> The plaintiff in an action for divorce must have been an actual resident, in good faith, of the state, for six (6) months next preceding the filing of the petition, and a resident of the county in which the action is brought at the time the petition is filed.
>
> . . . .

Okla. Stat. Ann. tit. 12, §1272 (West 1961). In order to circumvent the problems created by the husband's selection of the place of residence, another statute was required:

> A wife who resides in this State at the time of applying for a divorce, shall be deemed a resident of this State, though her husband resides elsewhere.

Okla. Stat. Ann. tit. 12, §1286 (West 1961). ("Residence of the wife when plaintiff").

Both statutes have been updated. Section 1272 now provides:

> Either the plaintiff or the defendant in an action for divorce must have been an actual resident, in good faith, of the State, for six months next preceding the filing of the petition.
>
> . . . .

Okla. Stat. Ann. tit. 12, §1272 (West Supp. 1977-1978). Section 1286, has a name change as well as language changes:

> A married person who meets the residence requirements prescribed by law for bringing a divorce action in this State may seek a divorce in this State, though the other spouse resides elsewhere.

Okla. Stat. Ann. tit. 12, §1286 (West Supp. 1977-1978). ("Residency in divorce cases" rather than "Residence of the wife when plaintiff.")

4. Okla. Stat. Ann. tit. 32, §3 (West 1976). Except for the lack of community property references, the statute remains as it was in 1890:

> The husband must support himself and his wife out of his property or by his labor. The wife must support the husband, when he has not deserted her, out of her separate property when he has no separate property and he is unable from infirmity to support himself.

Okla. Stat. Ch. 40, §3 (1890).

5. Okla. Stat. Ann. tit. 32, §11 (West 1976). The language of this statute has remained unchanged since it first appeared in the Oklahoma statutes in 1890. Okla. Stat. ch. 40, §11 (1890).

6. Section 3 limits the wife's duty to support her husband to cases when the husband has not deserted her. While section 3 does not limit the husband's duty when his wife has deserted him, section 11, "Liability on abandonment or separation by agreement," does limit his duty:

> 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.

Okla. Stat. Ann. tit. 32, §11 (West 1976).

Limiting the wife's duty to when the husband "is unable from infirmity to support himself" is common. For example, the new Texas Family Code provides: "The husband has the duty to support the wife, and the wife has the duty to support the husband when he is unable to support himself." Tex. Fam. Code Ann. §4.02 (Vernon 1975).

7. Okla. Stat. Ann. tit. 32, §10 (West 1976). This statute first appeared as Okla. Stat. ch. 40, §10 (1890).

8. Not all states leave the wife without liability to third persons. For example, the new Texas Family Code provides: "A spouse who fails to discharge a duty of support is liable to any person who provides necessaries to those to whom support is owed." Tex. Fam. Code Ann. §4.02 (Vernon 1975).

9. Okla. Stat. Ann. tit. 12, §1271 (West 1961). This ground for divorce was not listed in the 1890 statutes as a ground for divorce. Okla. Stat. ch. 50, art. 2, §2 (1890). It first appeared in 1893.

10. Okla. Stat. Ann. tit. 12 §1278 (West Supp. 1977-1978).

11. Okla. Stat. Ann. tit. 10, ch. 1, §5 (West Supp. 1977-1978). The language of this segment of the statute has remained unchanged since 1890. Okla. Stat. ch. 63, §5 (1890). The statute now includes a paragraph on visitation rights of grandparents.

12. Okla. Stat. Ann. tit. 12 §1277 (West Supp. 1977-1978). **See, also,** Okla. Stat. Ann. tit. 12, §1275 (West 1961) (Parties in equal wrong—custody of children—disposition of property); §1277.1 (West Supp. 1977-1978) (Preference of child); §1277.2 (West Supp. 1977-1978) (Paternity determined).

13. Okla. Stat. Ann. tit. 30, §11 (West 1976).

14. Okla. Stat. Ann. tit. 10, §6 (West 1966). This statute first appeared in 1890. Okla. Stat. ch. 63, §6 (1890). In 1974 the Oklahoma Legislature enacted section 6.5, "Use of certain words in reference to children born out of wedlock prohibited."

> A. On and after the date upon which this act becomes operative, the designations "illegitimate" or "bastard" shall not be used to designate a child born out of wedlock.
>
> B. No person, firm, corporation, agency, organization, the State of Oklahoma nor any of its agencies, boards, commisison officers or political subdivisions, nor any hospital, nor any institution supported by public funds, nor any employee of any of the above, shall use the term "illegitimate" or 'bastard" in referring to or designating any child born on or after the operative date of this act.

Okla. Stat. Ann. tit. 10, §6.5 (West Supp. 1977-1978). After making this strong statement, the Legislature did not go back to section 6 to revise the language but left section 6 to refer to illegitimate minors.

15. Section 55 provides for "Adoption of illegitimate child by father:"

> The father of an illegitimate child by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The status thus created is that of a child adopted by regular procedure of court.

Okla. Stat. Ann. tit. 10, §55 (West 1966).

Or the father could proceed under the Uniform Adoption Act. Okla. Stat. Ann. tit. 10 ch. 2A (West Supp. 1977-1978). Section 60.3 states that:

> The following persons are eligible to adopt a child:
>
> (4) In the case of a child born out of wedlock, its unmarried father or mother.

Okla. Stat. Ann. tit. 10, §60.3 (West Supp. 1977-1978).

The father of a child born out of wedlock is not required to consent to that child's adoption.

> A legitimate child cannot be adopted without the consent of its parents, if living, nor a child born out of wedlock without the consent of its mother, if living.

Okla. Stat. Ann. tit. 10, §60.6 (West Supp. 1977-1978).

16. Okla. Stat. Ann. tit. 10, §84 (West 1966). This statute is found in chapter 3 to title 10, "bastardy proceedings." The other title 10 statutes are in chapter 1, "general provisions." Section 84 dates only back to 1965. 1965 Okla. Sess. Laws ch. 378, §4.

17. Okla. Stat. Ann. tit. 10, §15 (West 1966). The original statute was Okla. Stat. ch. 63, art. 1, §15 (1890).

18. Okla. Stat. Ann. tit. 10, §22 (West 1966). This statute dates to 1939. 1939 Okla. Sess. Laws ch. 26, art. 2, §1, at 115.

19. Okla. Stat. Ann. tit. 30, §11 (West 1976). See text accompanying notes 12-13 *supra*.

20. *Waller v. Waller*, 439 P.2d 952, 956 (Okla. 1968). At the time of divorce, custody was awarded to the mother: Application of Caldwell, 525 P.2d 641 (Okla. 1974) (4 year old boy); *Gilbert v. Gilbert* 460 P.2d 929 (Okla. 1969) (7 year old boy). A glance at the cases indicates that custody will be awarded to the mother unless she is unable to provide the proper environment for the child. *Brim v. Brim*, 532 P.2d 1403 (Okla. 1975) (3 year old boy) (mother's home environment considered immoral by society); *Lynn v. Lynn*, 443 P.2d 106 (Okla. 1968) (4 children ages 10-16) (mother's living conditions less than adequate); *Nowlin v. Nowlin*, 551 P.2d 1177 (Okla. Ct. App. 1976) (4 children ages 9-17) (mother around late at night).

Because of the sex-based stereotype of family roles, the father and the mother do not receive equal consideration when the issue is the welfare of the child—a crucial factor in the custody decision.

21. Okla. Stat. Ann. tit. 12, §1278 (West Supp. 1977-1978). this method of distribution dates back to 1893. Okla. Stat. ch. 66, §671 (1893).

22. 546 P.2d 1325 (Okla. 1975).

23. The rationale of the *Baker* decision was based on the interrelationship between property distribution (alimony for property settlement) and alimony for support:

> The nearest this Court has come to answering this question is the case of *Holeman v. Holeman*, Okla., 459 P.2d 611, in which we observed that if the retirement fund is divided at the time of the divorce as jointly acquired property that this would in effect destroy the husband's future livelihood and means of complying with an alimony or [sic] support award. We further observed, and inferentially approved, that the Trial Court obviously took into consideration the retirement fund in regard to setting an award of alimony for support out of the husband's future in-

come or earning capacity . . . . All of the cases cited in the annotation of *Heuchan v. Heuchan*, [22 A.L.R. 2d 1410], are to the effect that pension of a husband may be considered in determining amount of alimony for support. All of these cases would, by implication, rule out the consideration of a pension as property acquired during coverture and subject to division between the parties.

Baker v. Baker, 546 P.2d 1325, 1326 (Okla. 1975). Granted that future income or earning capacity of the spouse paying alimony should be considered in the alimony for support decision, the sequence of decisions should be reversed. First the jointly acquired property should be divided and then the decision should be made on alimony for support. The decision on alimony for support should not affect the decision categorizing property as individually or jointly acquired. The *Baker* decision certainly discriminates against the spouse who performs the duties that have been stereotyped for women—that is housework. This occupation generates neither wages nor a pension.

On first reading, it may appear that the spouse without the pension will acquire a share of the pension whether her or his interest is labeled alimony for support or alimony for property settlement. But this will not hold true for all cases. Death or remarriage of the recipient may terminate alimony for support but not alimony for property settlement. Okla. Stat. Ann. tit. 12, §1289B (West Supp. 1977-1978).

Weaver v. Weaver 545 P.2d 1305 (Okla. Ct. App. 1975), is distinguishable on its facts. Here the parties were married in 1953, permanently separated in 1966, and the husband was captured by the North Vietnamese in 1968 and released in 1973. The divorce was granted later in 1973. The husband's POW Fund was properly classified as his separate property since, prior to his capture, the parties had agreed on separation. From the point of their agreed separation, the affairs and property of each spouse were handled separately and no property was acquired by their joint industry. The husband's pension in *Baker* was acquired by their joint industry.

24. 568 P.2d 623 (Okla. 1977).

25. 567 P.2d 112, 115-16 (Okla. Ct. App. 1977). Even with this disproportionate lack of effort, the wife fared well. She was awarded a property settlement of $7,500 or 43% of the $17,300 net joint assets.

26. Okla. Stat. Ann. tit. 12, §1278 (West Supp. 1977-1978).

27. The prior statute read:

> When a divorce shall be granted by reason of the fault or aggression of the husband, the wife . . . . shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the value of his real and personal estate at the time of said divorce; which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable . . . .

Okla. Stat. Ann. tit. 12, §1278 (West 1961). This statute dates back to 1893. Okla. Stat. ch. 66, §671 (1893). The statute concludes with the statement:

> In case of a finding by the court, that such divorce should be granted on account of the fault or aggression of the wife, the court may set apart to the husband and for the support of the children, issue of the marriage, such portion of the wife's separate estate as may be proper.

Therefore the husband could not be granted alimony but only child support. *Poloke v. Poloke*, 37 Okla. 70, 130 P. 535 (1913), supports the conclusion that the legislature intended to disallow a husband alimony.

The new version of §1278 became effective October 1, 1975.

28. Okla. Stat. Ann. tit. 59, ch. 8, §353.1 (10) (West 1974) (Drugs and Pharmacy), and ch. 20, §858-102 (6) (West Supp. 1977-1978) (Real State License Code).

29.
- Architects....ch. 2 (1947)
- Barbers....ch. 3 (1931)
- Chiropody....ch. 4 (1955)
- Chiropractic....ch. 5 (1921)
- Cosmetology....ch. 6 (1968)
- Nurses....ch. 12 (1953)
- Optometry....ch. 13 (1937)
- Veterinarians....ch. 15 (1953)
- Electrology....ch. 19 (1947)
- Sanitarians....ch. 22 (1953)

30.
- Accountancy....ch. 1 (1968)
- Dentistry....ch. 7 (1970)
- Embalmers & Funeral Directors....ch. 9 (1963)
- Engineering....ch. 10 (1968)
- Medicine....ch. 11 (1965)
- Osteopathy....ch. 14 (1921)
- Healing Arts....ch. 16 (1937)
- Physical Therapy....ch. 21 (1965)
- Optical Goods & Devices, Sales of....ch. 24 (1953)
- Public Auction Law....ch. 26 (1955)
- Plumbers & Plumbing Contractors....ch. 27 (1955)
- Water & Sewage Works Operators....ch. 29 (1959)
- Foresters....ch. 31 (1963)
- Social Workers....ch. 32 (1965)
- Bail Bondsmen & Runners....ch. 33 (1966)
- Psychology....ch. 34 (1965)
- Junk Dealers....ch. 35 (1967)
- Polygraph Examiners Act....ch. 36 (1971)
- Pawnbrokers....ch. 37 (1972)
- Hearing Aid Dealers & Fitters....ch. 38 (1973)
- Speech Pathology & Audiology Licensing Act....ch. 39 (1973)

The dates are included in the listing to demonstrate that the use of one pronoun or another is unrelated to the date of enactment.

31. *Compare* Okla. Stat. Ann. tit. 59 (West 1974): §328.28 *with* §328.29.

32. *Compare* Okla. Stat. Ann. tit. 59 (West 1974): §45.2 *with* 45.4; §73 *with* §72; §143 *with* §146; §163 *with* §164d; §328.21 *with* §328.29; §585 *with* §587; §677 *with* §684; and §804 *with* §806.

33. Okla. Stat. Ann. tit. 59, §144 (West 1974).

34. Okla. Stat. Ann. tit. 59, §§163 (chiropractic), 199.1 (cosmetology), 584 (optometry), 809 (electrology) (West 1974).

35. Okla. Stat. Ann. tit. 59, §691 (West 1974) (Emphasis added).

36. Okla. Stat. Ann. tit. 10, ch. 1, §4 (West 1966).

37. Okla. Stat. Ann. tit. 10, ch. 1, §4 (West Supp. 1977-1978).

38. *Compare* Okla. Stat. Ann. tit. 12, §1278 (West. Supp. 1977-1978), *with* §1278 (West 1961).

39. For example, the statute dealing with dependent and delinquent children provided:

> For the purpose of this Article the words "dependent child" and "neglected child" shall mean any male child under the age of sixteen years and any female child under the age of eighteen years who . . . . The words "delinquent child" shall include any male child under the age of sixteen years and any female child under the age of eighteen years who . . . .

Okla. Stat. Ann. tit. 10, §101 (West 1966). This statute was repealed as of January 13, 1969, and a uniform age was used:

> When used in this act, unless the context otherwise requires:
> (a) The term "child" means any person under the age of eighteen (18) years.
> . . . .

Okla. Stat. Ann. tit. 10, §1101 (West Supp. 1977-1978).

The marriage laws also have been changed. The statute that once read, "Any unmarried male of the age of twenty-one (21) years or upwards, or any unmarried female of the age of eighteen (18) years or upwards" now reads, "Any unmarried person of the age of eighteen (18) years or upwards . . . ." *Compare* Okla. Stat. Ann. tit. 43, §3 (West 1954), *with* §3 (West Supp. 1977-1978).

40. A survey of a recent issue of the Oklahoma Session Law Service revealed that statutes are currently being drafted in the masculine with references to "he," "him," "his," "policemen," and "ex-servicemen." 1978 Okla. Sess. Law Serv. chs. 1-310.

41. Okla. Stat. Ann. tit. 10, ch. 1, §4 (West Supp. 1977-1978): 1978 Okla. Sess. Law Serv. ch. 94, §3 (4).

42. The Uniform Commercial Code §1-102 (5) employs the general provision:

> (5) In this Act unless the context otherwise requires
> (b) words in the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

The provisions in article 1 apply to all the articles of the Code. Several of the chapters in the occupational statutes used a similar provision: "Masculine words shall include the feminine and neuter, and the singular includes the plural." *See* note 28, *supra*. No general interpretation provision exists for the Oklahoma Statutes. A general interpretation provision would avoid the contention that some crimes as the statute is drawn, could only be committed by men. *See* 1978 Okla. Sess. Law Serv. ch. 121 (crimes and offenses—lewdness and obscenity).