

LEGAL STATUS OF WOMEN

Second Edition

by Philip Francis

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by PHILIP FRANCIS

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INTRODUCTION

In the late sixties and seventies, "Women's Lib", became a household word. The phrase has come to mean many things to many people. Numerous books and articles have been written on its meaning and it is not within the scope of this book to discuss the nature and aims of this movement. Suffice it to say that one of its prime aims is or should be that women must be traced as individuals with the basic right to determine for themselves what they will do with their lives, whether it be a career in the professions or the business world, or to become a homemaker and mother.

In order to achieve this freedom and develop all their potentials, women must receive help from the law. Traditionally the courts have always regarded women as inferior to men and usually accorded them the same treatment as children, seeking to protect them from themselves and others.

Throughout the years various individual women have sought not to be protected, but to be treated as man's equal. As with the Civil Rights movement for blacks and other minorities, it has been a long and discouraging battle. Gradually, the walls of inequality are beginning to crumble. What follows is an attempt to show the status of women in the eyes of the law today.

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Chapter I

MARRIAGE

Marriage and Age

The legal age for marriage is specified in each of the states. In some states, a court order authorizing marriage by persons under the statutory ages may be secured if the female is "pregnant, or has given birth to a child." The legal age for marriage without parental consent is now 18 in most, but not all, states. All applicants under age 24 are often required to present proof of age.

Marriage and Change of Name

When a woman marries, the most immediate change in her legal status is her name. The tradition that a married woman take the name of her husband is related to the early common law concept of marriage. Under that law, a woman ceased, legally, to be a person upon her marriage. She was without legal capacity. A husband and wife were regarded as one person, and that one person was the husband.

Marriage laws, however, do not require a woman to take the name of her husband. Women who retain their own names, however, have had difficulties with state laws governing licensing, voting, and registration. Some, but not all, of these laws have been changed. The Tennessee Supreme Court recently ruled that women do not have to take their husband's name when they marry.

After divorce or annulment, a wife may generally resume use of her maiden name, adopt a new name or continue to use that of her husband. This privilege has sometimes been limited "when there is a minor child or children."

Most states recognize the common law right to change one's name without having to go through legal proceedings as long as the change is not for fraudulent or illegal purposes. A name change can be effected through common usage. A better way of changing one's name is through application to a court. Fees for processing and publication of the change may be required, but if no objections are found, the court will authorize the name change. This provides for a clearer record for obtaining passports and for other purposes.

Women are not clamoring for the right to be known by their maiden names after marriage or for the right to change their names without their husbands' approvals. But in those instances where for some reason or another married women have expressed a desire to do this, the courts have uniformly rejected the effort. Despite the common law rule, which does not appear to differentiate between the rights of married men and their wives to change their names in an informal manner, no cases can be found in which the wife has been permitted to do this over the husband's objection. In addition, under many of the statutes that prescribe formal procedures for changing one's name, the right to do so has been either expressly or by implication denied to married women. No comparable restriction has been imposed upon married men. Finally, the law, once more either expressly or by implication, generally requires that a change in the husband's surname produce a corresponding change in that of his wife, but never the reverse.

Married Women's Domiciles

Marriage affects a person's legal domicile, that is, the place where one lives and to which, when absent, he

or she intends to return. While this place is usually one's immediate reference, it is not unusual for domicile to be in one state and residence in another.

The areas of law in which a person's domicile may be important are numerous and varied. Domicile of a party for a decedent often determines whether a court has jurisdiction to hear and decide certain kinds of legal questions: *e.g.*, divorce suits, probate matters, and guardianship proceedings. The availability of many rights and privileges of citizenship also depend upon a person's domicile. These include the right to vote, to hold and therefore, to run for public office, to receive welfare assistance, or to qualify for free or limited tuition at state-operated institutions. Some obligations of citizenship — *e.g.*, jury duty and the taxability of personal and intangible property — are also determined by the juror's or taxpayer's domicile, respectively.

Clearly, then, the location of a person's domicile has important practical as well as legal consequences. In general, all men and unmarried adult women are free to choose their place of domicile and this they do automatically when they reside in the place where they intend to make their home. This domicile of free choice is otherwise for married women. Though exceptions exist, the general rule remains that a wife's domicile follows that of her husband's. This means that by law when a woman marries she loses her domicile and acquires that of her husband, no matter where she resides, or what she believes or intends.

This rule can create hardship. If a married woman owns personal property in state X, it may be taxed at the higher rate of state Y, her husband's domicile, although she is residing in state X with her husband's consent.

Some states, by statute, now permit a woman to have a legal domicile different from that of her husband. Wisconsin law states, for example: "Women shall have the same rights and privileges under the law as men in the . . . choice of residence. . . ." But nearly half the states

deny her the right to maintain a separate domicile.

Married Women and the Law of Support

Except for some states that impose a duty upon the wife to support the husband "under certain circumstances," the universal rule is that the primary obligation to provide financial support to the family rests upon the husband.

The precise legal duty of a husband to support his wife is rarely defined so long as the marriage is stable and the spouses are living together. This is because the courts refuse to intervene except in cases of marital breakdown. Thus even if a husband refuses to give his wife any money whatsoever for her own personal needs — clothing, for example — she cannot, as long as she continues to live with her husband, get a court order to compel him to provide her with reasonable support money. Her only recourse is to institute a suit for legal separation or divorce.

Married Women and Torts

The general rule of law is that if one person causes physical injury to another, as a result of the first person's negligence or willful misconduct, the injured person has a legal cause of action to obtain redress from the person who caused the injury. At one time under the common law, though a married woman was theoretically liable for the injuries she inflicted in this manner, that liability was of limited significance since the law attributed her misconduct to her husband. Today, the wife's immunity from suit for tort damages and the corresponding imputed liability of the husband has almost everywhere been abrogated by statute or judicial decision.

Husbands and wives under the common law were absolutely prohibited from suing each other, whatever the circumstances, including intentional serious injury.

Under the common law a husband and wife were regarded in law as one person so that a suit between them would in reality have been a suit by one individual against himself.

In some states spouses may now sue one another for willful infliction of injury, but most states continue to deny husband and wife the right to sue one another for negligently inflicted injuries. Most negligent injuries result from automobile accidents or other activities covered by insurance. Since it is feared that if suits are permitted between spouses for accidental injuries, too many fraudulent claims will be filed, such tort actions are generally prohibited. It is argued that husbands and wives would take advantage of insurance companies. But there are a growing number of states that now allow injury suits between spouses.

When a person is physically injured, he or she may not be the only one to suffer harm as a result of those injuries. The victim who has actually been injured may be so related to another party who has a legal right that certain attributes of the injured person remain unimpaired. This right is a relational interest. Under the law, husbands and wives have such an interest in one another. A husband or a wife may sue a third person for "loss of consortium." Loss of consortium is the loss of "conjugal" rights to enjoy a spouse's physical, sexual, and psychological well-being. If a wife or husband is injured so that one may not enjoy his or her conjugal rights, twenty-eight states and the District of Columbia permit the other spouse to bring suit for loss of consortium; sixteen permit only the husband to sue a third party for his loss. Seven states (Connecticut, Louisiana, Massachusetts, North Carolina, Rhode Island, Utah, and Virginia) have all abolished the right of either spouse to bring a lawsuit on the ground of loss of consortium.

Married Women as Witness At Trial of Husband

A husband and wife relationship presupposes a

privilege of uninhibited communication, without which they would presumably confide in each other only at their peril. Married couples are viewed like parties in a confidential relationship between attorney-client, doctor-patient, and priest-confessor. Such parties are not generally allowed to testify about their communications with each other where one of the parties is on trial.

However, the statutes vary on husband and wife testimonial privilege. Some hold that the privilege is personal to the witness only, and if that witness *wants* to testify for or against the spouse, the spouse cannot object. Other statutes hold that the witness may only testify against the spouse with the spouse's consent. Generally, a husband or wife need not testify against his or her spouse unless he or she wants to do so. In a criminal trial, however, if the witness desires to testify and the other spouse has given consent, then the witness must do so as if she or he were not married.

Chapter II

ABORTION RIGHTS AND WOMEN

In 1973 the United States Supreme Court rendered two decisions which resulted in making the abortion laws of nearly every state in the country either entirely or partially unconstitutional. The two companion cases were *Roe v. Wade* and *Doe v. Bolton*. The first case ruled that the Fourteenth Amendment guarantees the "right of privacy," which includes a woman's decision to seek an abortion. Thus any state law that permits abortion *only* to save the life of the mother is unconstitutional. The second case held unconstitutional those portions of the Georgia abortion statute that required abortion to be performed in specially credited hospitals, or be approved by a hospital abortion committee, or be concurred in by two doctors other than the woman's physician. This ruling also prohibited state residence requirements for women who want abortions.

Only New York had a law that met the Supreme Court's standards. Nine other states: Alaska, Georgia, Hawaii, Idaho, Indiana, Montana, North Carolina, Tennessee, and Washington — now have laws that place no over-all restrictions on a woman's right to have an abortion.

In *Alaska* an abortion is legal at any time before the fetus is viable. An unmarried woman under 18 must have the consent of parents or guardian. But this latter requirement may be unconstitutional under the *Roe v. Wade* case. The operation must be performed by a licensed physician in a hospital or other approved faculty.

There is a thirty day residence requirement which may also be unconstitutional.

In *Georgia* an abortion is legal during the first or second trimester of pregnancy if the physician considers it necessary based on his clinical judgment. After the first trimester the operation must be performed in a licensed hospital. After the second trimester, abortion may be performed only to save the mother's life or health. Two physicians must certify that it is necessary and it must be approved by a committee of the hospital's medical staff. There is a state residency requirement which is unconstitutional.

In *Hawaii* an abortion is legal at any time before the fetus is viable. The operation must be performed by a licensed physician in a licensed hospital. This hospital requirement is unconstitutional for the first trimester of pregnancy. There is an unconstitutional ninety day residence requirement.

In *Idaho* an abortion is legal during the first or second trimester (about the first twenty-five weeks of pregnancy) if the physician, after consulting with the woman, determines it is appropriate in consideration of a number of highly restrictive factors. After the fetus becomes viable, abortion may be performed only to save the life of the mother or if, on birth, the fetus would be unable to survive. No residence requirement exists.

In *Indiana* an abortion is legal during the first trimester of pregnancy if the woman consents and the operation is performed by a physician in a hospital or licensed facility. Again, the hospital requirement for the first trimester of pregnancy is unconstitutional. During the second trimester, the abortion must be performed in a hospital. An unmarried woman under 18 must have the consent of parents or guardian unless the abortion is necessary to save her life. After the fetus is viable, abortion may be performed only to save the mother's life or physical health, and the attending physician must certify in writing that it is necessary. No residence requirement exists.

In *Montana* an abortion is legal during the first three months of pregnancy if the woman gives her written, "informed" consent. A married woman must have the consent of her husband; an unmarried minor must have the consent of parents or guardian. The operation must be performed by a licensed physician. After the first three months, the operation must be performed in a licensed hospital. After the fetus is viable, abortion may be performed only to save the mother's life, and the attending physician must certify in writing that it is necessary, with concurrence from two other physicians. No residence requirement exists.

In *New York* an abortion is legal during the first twenty-four weeks of pregnancy. Either a licensed physician may perform the abortion or the woman herself may induce a miscarriage on the advice of a physician. After the first twenty-four weeks, abortion may be performed only if a licensed physician believes it is necessary. No residence requirement exists.

In *North Carolina* an abortion is legal during the first twenty weeks of pregnancy. The operation must be performed by a licensed physician in a licensed hospital. The hospital requirement is unconstitutional for the first trimester of pregnancy. After the first twenty weeks, abortion may be performed only if it is necessary to save the mother's life. There is a thirty day residence requirement which is unconstitutional.

In *Tennessee* an abortion is legal during the first three months of pregnancy if a licensed physician considers it necessary and the woman gives her written consent. The operation must be performed by a licensed physician. After the first three months but before the fetus is viable, the operation must be performed in a licensed hospital. After the fetus is viable, abortion may be performed only to save the mother's life or health. The woman must be a resident of the state, an unconstitutional requirement.

In *Washington* an abortion is legal during the first four months of pregnancy if the woman gives her con-

sent. A married woman must have the consent of her husband; an unmarried minor must have the consent of parents or guardian. The operation must be performed by a licensed physician in an accredited hospital or approved facility unless the physician determines pregnancy must be terminated immediately; in that case it may be performed elsewhere. The hospital requirement for the first trimester of pregnancy is unconstitutional. A three-month residence requirement is unconstitutional.

Chapter III

CONTRACTS AND DEBTS

The Right to make Contracts

Under common law, the legal existence of the wife was merged into that of her husband. In general, therefore, the contracts of a married woman were void. Today, in every state, a married woman has had restored to her by statute many of the contractual powers that she lost under common-law rule, particularly in regard to property set apart to her as her separate legal estate.

New York State is typical of the completely broad base of women's contractual rights established by statute. In New York, a married woman may make contracts regarding property with any person including her husband, and she will be liable on those contracts as if she were unmarried. She has a right to contract for insurance on her husband's life. A husband or wife, however, cannot contract to alter or dissolve the marriage or to relieve the husband from his responsibility for support. A contract by a married woman does not bind her husband or his property, and a judgment for or against a married woman may be rendered or enforced as if she were unmarried.

Against the background of these general statements, it is useful to explore specific areas of contractual relationships:

CONTRACTS BETWEEN HUSBAND AND WIFE:
Husband and wife may contract freely with each other regarding both real and personal property in 18 states. They are: