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## COMMENTARY

### Women and Oklahoma Law: How It Has Changed, Who Changed It, and What is Left

JANICE P. DREILING\*

For the Twenty-sixth time we have come together under the shadow of the Capitol, asking that Congress shall take the necessary steps to secure to the women of the nation their right to a voice in the national government as well as that of their respective States. For twelve successive Congresses we have appeared before committees of the two Houses making this plea, that the underlying principle of our Government, the right of consent, shall have practical application to the other half of the people. Such a little simple thing we have been asking for a quarter of a century. For over forty years, longer than the children of Israel wandered through the wilderness, we have been begging and praying and pleading for this act of justice. We shall someday be heeded, and when we shall have our amendment, everybody will think it was always so, just exactly as many young people believe that all the privileges, all the freedoms, all the enjoyments which women now possess always were hers. They have no idea of how every single inch of ground that she stands upon today has been gained by the hard work of some little handful of women of the past.

*Susan B. Anthony, 1894<sup>1</sup>*

The ratification of the nineteenth amendment to the United States Constitution, extending the voting privilege to women, was twenty-six years in the future when the famous women's rights leader spoke those words. The Oklahoma Territory, created by an act of Congress in 1890, was only four years old.

Today title 32, section 2 of the Oklahoma Statutes states: "The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto." The Oklahoma Territorial Legislature adopted that law in 1890. It has not been changed. It comes from the eighteenth-century common law concept, promulgated by the famous English jurist, Sir William Blackstone in his *Commentaries on the Law of*

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1. 4 HISTORY OF WOMEN'S SUFFRAGE 233 (E. Stanton, S. Anthony, M. Gage & I. Harper, eds. 1881-1922).

*England*, that by marriage, the husband and wife become one person in law and the one is the husband.<sup>2</sup> The legal existence of a wife disappears during the marriage and merges with that of the husband. The premise can also be related to the King James translation of the Bible and the apostle Paul's statement that wives should be submissive to their husbands.<sup>3</sup> The struggle for women's rights historically can be understood by recognizing the significance of this concept in our law and our society; it has been the cornerstone and the justification for legal discrimination on the basis of sex.

In July 1986, the Attorney General issued an opinion that state law "deeming the husband as the head of the family and giving him the right to choose the place or mode of living is unconstitutional as an improper gender-based classification under the equal protection clause of the 14th amendment to the United States Constitution."<sup>4</sup> Since Attorney General opinions are only advisory as to constitutional issues, a state supreme court decision concurring with the Attorney General's opinion will be necessary for title 32, section 2, to be judicially stricken. Numerous attempts to amend or repeal this statute have been defeated over the past decade, each time amidst colorful debate on the floor of the Oklahoma legislature regarding woman's place and God's will.

This commentary presents a history of the treatment of women under Oklahoma law, emphasizing how the law has changed and who has changed it. A brief historical description of the legal status of women throughout the United States will provide a necessary background for the development of the law in Oklahoma. The author has presented the substance of this commentary in speech form to numerous groups over a period of many years. It is the author's experience that the historical facts are relatively unknown even to women in the legal profession. The commentary also submits that title 32, section 2 of the Oklahoma Statutes, which is a codification of the common law concept that the husband and wife are one and the legal existence of the wife is suspended during the marriage, is the historical and current basis for legal discrimination against Oklahoma women. The commentary concludes that Oklahoma women will not achieve equal rights under the law until title 32, section 2 of the Oklahoma Statutes is repealed or amended.

#### *Women and the Law in the United States Before 1890*

Oklahoma became the forty-sixth state when it was admitted to the Union in 1907. The lyrics of the beloved song "Oklahoma" includes the words "brand new state, gonna treat you great . . ."; and, relatively speaking, Oklahoma did treat women well. Many of the other older states at one time

2. W. BLACKSTONE, COMMENTARIES ON THE LAW ch. 15, at 189 (1941).

3. See *Ephesians*, ch. 5, at verses 22-24.

4. Op. Att'y Gen. No. 86-10, 3 (Okla., May 16, 1986).

had some rather shocking statutes dealing with women. For example, wife-beating was legal in almost every state before 1830.<sup>5</sup>

In 1848, when a small band of Quakers convened the first women's rights convention in Seneca Falls, New York, they wrote a "Declaration of Sentiments,"<sup>6</sup> which basically described the legal status of women in the United States at that time. Among other things, the Declaration noted that women had been denied legal rights given to the "most ignorant and degraded men"; that she had been denied the right to vote; that, if married, she was "civilly dead in the eye of the law"; that she had no right to own or control property, even her own wages; that she had been made morally irresponsible because she could commit crimes and escape punishment, provided the crimes were committed in the presence of her husband; that she was compelled to obey her husband; that, if separated from her husband, she was denied any rights to the guardianship of her children; and that she was denied a thorough education. "In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement."<sup>7</sup>

The Seneca Falls convention is historically regarded as the official beginning of the women's rights movement in the United States. If nothing else, the Declaration of Sentiments, as a reflection of the legal status of women in the United States in 1848, illustrates the significance and the entrenchment of Blackstone's concept that the husband and wife are one in the law and the one is the husband.

New York passed the Married Women's Property Act in 1848,<sup>8</sup> partly in response to the Declaration of Sentiments. The Act gave women full control over their own real estate and personal property. However, it still left husbands the legal right to whatever income their wives might earn.

In 1870 the Supreme Court of Ohio presented a restatement of Blackstone when the court outlined the rights and obligations of husband and wife according to the common law:

Whatever may be the reason of the law, the rule is maintained, that the legal existence of the wife is merged in that of the husband, so that, in law, the husband and wife are one person. The husband's dominion over the person and property of the wife is fully recognized. She is utterly incompetent to contract in her own name. He is entitled to her society and her service; to her obedience and her property. All her personal property is absolutely his.<sup>9</sup>

5. 4 M. CORT, *THE SWEEP WESTWARD: THE LIFE HISTORY OF THE UNITED STATES, 1829-1849*, at 65 (1963).

6. *Declaration of Sentiments*, in J. HOLE & E. LEVINE, *REBIRTH OF FEMINISM* 430 (1971).

7. *Id.*

8. 4 M. CORT, *supra* note 5.

9. Phillip Phillips v. Benjamin Graves and wife, 20 Ohio St. 371, 380 (1870).

The inferior legal status of women was also reflected in their attempts to practice law. In 1869, Arabelle Mansfield was licensed to practice law in Iowa. In Iowa, as in the Midwest generally, it was not uncommon for a woman to practice law within a county without being admitted to the state bar association. The problem arose when she asked to be admitted to the state bar. Iowa admitted Ms. Mansfield, but in the same year Myra Bradwell was denied a license in Illinois. Ms. Bradwell was the wife of a Cook County judge, and she was the publisher of the *Chicago Legal News*, the first law journal printed in the West. Her denial letter from the court clerk stated that since she was a married woman, she lacked the capacity to contract and, therefore, could not assume the obligations necessary to maintain attorney-client relationships.<sup>10</sup> The Illinois Supreme Court ultimately held that her admission to the bar would mean that "every civil office in Illinois may be filled by women, that it would mean that it is in harmony with the spirit of our Constitution and our laws that women should be made governors, judges, and sheriffs. This," said the court, "we are not yet prepared to hold."<sup>11</sup>

Ms. Mansfield was not the first woman attorney in the United States, however. That distinction goes to Margaret Brent who arrived in Maryland in 1638, served as personal attorney for the governor, represented clients in more than a hundred court cases, including numerous jury trials, and ultimately served as executor of the governor's estate.<sup>12</sup> History does not record other women attorneys in the United States until Arabelle Mansfield, although there were many women who pled their own cases, a right which could not be denied even to women. Lucy Prince, a black woman, successfully defended a land claim before the United States Supreme Court in 1795,<sup>13</sup> becoming the first woman to address the Supreme Court. In the early 1800s, Myra Gaines of New Orleans argued and won a case against Daniel Webster regarding her inheritance.<sup>14</sup> The first Oklahoma woman attorney was Laura Lykins in 1898.<sup>15</sup>

### *Oklahoma Territory*

In 1890, Congress passed the Organic Act, which established a government for Oklahoma Territory.<sup>16</sup> Electors were defined as male citizens twenty-one and older including all male persons of foreign birth who had, at least twelve months prior to voting, declared their intentions to become citizens.<sup>17</sup> In 1893 the Oklahoma Territorial Legislature gave women the right to vote in school

10. K. MORELLO, *THE INVISIBLE BAR—THE WOMAN LAWYER IN AMERICA: 1638 TO THE PRESENT* 16 (1986).

11. *In re Bradwell*, 55 Ill. 535, 540 (1869), *aff'd* 83 U.S. 130 (1872).

12. K. MORELLO, *supra* note 10, at 3-7.

13. *Id.*

14. *Id.*

15. *Id.* at 2-38.

16. Organic Act of 1890, ch. 182, 26 Stat. 81 (1890).

17. *Id.* § 5.

district elections.<sup>18</sup> This was a remarkably progressive move, considering that by 1893 only Wyoming and Colorado had extended the vote to women.

The organized effort in Oklahoma to secure the right for women to vote in all elections began in 1889 with the Women's Christian Temperance Union. Their forces were joined in 1895 by local chapters and national leaders of the National American Women's Suffrage Association. The women of these two groups lobbied the territorial legislature annually.

In 1904, Congress considered the Hamilton Bill providing for the statehood of Oklahoma, Arizona, and New Mexico. The suffragettes focused their efforts toward the inclusion of a clause guaranteeing women the right to vote, but the House of Representatives passed and sent to the Senate a version of the bill that declared that none of the three proposed states shall ever "enact any law restricting or abridging the rights of suffrage save and except on account of illiteracy, minority, sex, conviction of a felony, mental condition or residence." Organizations and individuals who advocated women's suffrage created a national outcry and the Senate struck the word "sex" from the bill.<sup>19</sup>

Before 1905, in the Oklahoma Territory, title or ownership to the property used by the family as a homestead was required to be held by the husband because he was "head of the family."<sup>20</sup> If title or ownership was held by the wife, it was not a homestead even though occupied by the family. The law was changed in 1905, and that change was adopted into the Oklahoma constitution and subsequent statutes so that a wife could own property and qualify it as homestead.<sup>21</sup>

### *The Oklahoma Constitution*

At the Oklahoma Constitutional Convention in Guthrie in 1907, women's suffrage was the hottest issue in town. Despite an active, well-organized campaign, the Suffrage Committee report presented at the convention classified women with felons, paupers, lunatics, and idiots, and recommended those groups of people be denied the voting privilege. Arguments against women centered on claims that they would abandon their domestic responsibilities. Opponents argued that socialists were behind the suffrage movement and that extension of the vote to women would enhance the political power of blacks. Black men, of course, already had the right to vote.

Governor-elect Charles N. Haskell stated to the convention that if women could vote,

You will come home to find the home once cheery, where the warm supper was on the table and the wife anxious for your

18. OKLA. CONST. art. III, § 3 (1907) (repealed) (enacted Stat. of Okla., 1893, ch. 73, §§ 5771, 5824).

19. 5 HISTORY OF WOMEN'S SUFFRAGE, *supra* note 1, at 130.

20. *Cordray v. Morgan*, 21 Okla. 574, 95 P. 761, 764 (1908).

21. 1905 Okla. Terr. Sess. Laws, ch. 18, at 255.

return, and you will find a candidate for county commissioner has taken so much of her time that really it hadn't occurred to her that supper was a part of everyday life.<sup>22</sup>

In retrospect one wonders if it ever occurred to Governor Haskell in 1907 that the candidate for county commissioner might be the wife herself.

Women's suffrage was rejected by the Guthrie Convention. The territorial law allowing women to vote in school elections was retained by only one vote, and its legality was challenged at least twice to the Oklahoma Supreme Court.<sup>23</sup>

When the Oklahoma constitution was ratified in 1907, it was regarded nationally as progressive, if not radical, for its time. But was it progressive for women? Article V spoke of certain rights reserved "by the people" but restricted the initiative and referendum petition provisions to men.<sup>24</sup> Qualifications for senators and representatives included being qualified electors, but article III defined electors as male citizens over twenty-one, including those born in a foreign country.<sup>25</sup> Article VI provided that the eight major state officers be male and over thirty years old, and jury service was restricted to men.<sup>26</sup>

The Oklahoma constitution did not expressly require that supreme court justices, district judges, or court clerks be male, although a county judge was specifically required to be a "qualified voter." Further, the constitution expressly allowed notaries and county school superintendents to be women.<sup>27</sup> A 1912 supreme court decision had to address whether a woman, otherwise qualified, was eligible to hold the office of court clerk. The Oklahoma Supreme Court said yes.<sup>28</sup>

Perhaps the most interesting section of the Oklahoma constitution as far as women are concerned is article VI, section 27, which provided that the office of Commissioner of Charities and Corrections "may be of either sex."<sup>29</sup> This exception was radical in 1907, considering women could not vote except in school elections. The reason for the exception was Kate Barnard.

In 1907, Kate Barnard, at the age of thirty-two, became the first woman to win statewide elective office in the United States. She led the ticket in an election in which only men voted. She began her career as a secretary to the Democratic minority in the territorial legislature and became active in labor circles. She became a nationally recognized champion of the poor and the im-

22. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF OKLAHOMA, FEBRUARY 5, 1907, at 81 (available at Oklahoma Historical Society Library, Oklahoma City, Okla.).

23. *Oelerking v. Hiatt*, 69 Okla. 92, 170 P. 476 (1918); *Shelton v. School Bd. Dist. No. 22 of Tulsa*, 43 Okla. 239, 142 P. 1035 (1914).

24. OKLA. CONST. art. V, § 5 (1907).

25. *Id.* art. III, § 1.

26. *Id.* art. VII, §§ 3, 9, 11; art. XVII, § 2; Schedule, § 6.

27. *Id.* art. III, §§ 5, 6.

28. *Gilliland v. Whittle*, 33 Okla. 708, 127 P. 698 (1912).

29. OKLA. CONST. art. VI, § 27 (1907).

prisoned. She is solely responsible for the beginning of the Oklahoma penal system after a personal investigation of the abuses Oklahoma prisoners suffered in Kansas prisons where they were sent on a contractual arrangement.

At the time of the Guthrie convention, Kate Barnard was a powerful person. Because of her endorsement, the Oklahoma constitution included a child labor provision, a compulsory education provision, and the provision for a department of charities and corrections. Unfortunately for women, Kate opposed women's suffrage because her father opposed it and because, as she stated, "the boys have always done everything I asked them to do."<sup>30</sup>

Kate Barnard was reelected in 1910. Despite her nationwide reputation, her career did not have a happy ending. In 1908, Congress transferred to Oklahoma courts the responsibility for dependent Indian children. Soon thousands of them fell into the hands of white male guardians whose only interest was in defrauding them of valuable oil and gas deposits and rich farmland. Kate launched an investigation that resulted in prosecutions and the eventual return of some two million dollars. Retaliation by the legislature was immediate; Kate's investigations had touched too many in power in the state. The "boys" in the legislature who had always done everything she asked virtually eliminated her department budget in 1913. She did not seek reelection in 1914 and died a pauper in 1930. Fourteen hundred people attended her funeral in Oklahoma City.

#### *Oklahoma Constitutional Changes Since Statehood*

In 1918 a special session of the legislature voted to submit the state suffrage question to a vote of Oklahoma's men. Despite opposition by the Governor and the *Daily Oklahoman*, it passed by 25,000 votes.<sup>31</sup>

Eleanor Flexner in her definitive work, *Century of Struggle, The Women's Rights Movement in the United States*, relates the following account of the Oklahoma suffrage campaign of 1918:

The difficulties encountered by the suffragists in the Oklahoma referendum probably represented the worst in unprincipled opposition in any suffrage campaign. There were innumerable special local problems, not the least of which was a complete breakdown of the state suffrage organization after the campaign was underway. This was particularly serious because the Oklahoma state constitution required that the number of votes in favor of an amendment must exceed the total, not only of the negative votes, but also of those ballots not marked for or against. The Governor, Lt. Governor, Attorney General, and Secretary of the State Election Board left no stone unturned to defeat the suffrage amendment. They even went to such lengths as printing only half as many ballots on the amendment as regular

30. 1 NOTABLE AMERICAN WOMEN, A BIOGRAPHICAL DICTIONARY 90-92 (1971).

31. State Question No. 97, S.C.R. No. 5, 1917 Okla. Sess. Laws 498.



ballots and withholding them altogether from the soldiers voting in the army camps in the state. . . . Flagrant efforts were made after election day to count out what was clearly a suffrage victory, and the last National organizer did not leave Oklahoma until December 3, one month later, when the Governor finally surrendered to the facts of life and proclaimed the measure passed.<sup>32</sup>

When the federal amendment was submitted to the states in 1920, opposition rose up again. This time Oklahoma's attorney general argued that Oklahoma should not ratify the amendment because doing so would interfere with the rights of other states to decide the issue for themselves. Nevertheless, on February 27, 1920, the Oklahoma legislature ratified the nineteenth amendment to the United States Constitution. Interestingly, Mississippi did not ratify it until 1984.

In 1934, Oklahoma was the only state that still prevented women from seeking major state office. In 1923, three years after the nineteenth amendment was ratified, Oklahoma voters passed a state question designed to amend section III, article VI of the Oklahoma constitution so that women could hold any state office. In fact, the amendment passed by an 86,000-vote margin.<sup>33</sup> But a lawsuit was filed, and in 1930 the Oklahoma Supreme Court held that the amendment was void because the question had been wrongfully submitted in a special election when it should have been submitted in a general election. It was 1942 before organized efforts were successful in getting the question finally passed, making women eligible for the top state offices.<sup>34</sup>

In 1936, Oklahoma voters added a provision to the Oklahoma constitution providing for a Public Welfare Department and stating that members of the board "may be of either sex."<sup>35</sup> The campaign to bring this part of Governor Marland's social security program to a vote of the people was supported by Mabel Bassett, who served as Commissioner of Charities and Corrections from 1923 to 1947. She, like Kate Barnard, was a tireless crusader for the underprivileged. In 1926, Mabel Bassett carried 73 of 77 counties to lead the Democratic ticket. She fought to make wife and child desertion felonies, and she was the first to promote a State Pardon and Parole Board. In her memory, the women's prison in Oklahoma City bears her name.<sup>36</sup>

Perhaps the single most surprising fact in the history of women and Oklahoma law is that it was not until 1951 that women became eligible to serve on grand and petit juries. In Wyoming women participated in jury service beginning in 1869. A constitutional amendment was required in

32. E. FLEXNER, *CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES* 324-25 (1977).

33. State Question No. 122, S.J.R. No. 5, 1923 Okla. Sess. Laws 445 (special election ruled invalid in *Looney v. Leeper*, 145 Okla. 202, 292 P. 365 (1930)).

34. State Question No. 302, S.J.R. No. 18, 1941 Okla. Sess. Laws 542.

35. OKLA. CONST. art. XXV, § 3.

36. Hand, *Mabel Bourne Bassett*, 32 *CHRON. OF OKLAHOMA* 360-68 (1954).

Oklahoma to enable women to serve on juries. It was largely the work of a handful of women attorneys in the 1940s, the Business and Professional Women's chapters throughout the state, and the League of Women Voters that finally accomplished getting this question on the ballot.<sup>37</sup> However, Oklahoma's grand jury statute today still states: "A grand jury is a body of men consisting of twelve jurors."<sup>38</sup> Readers of the law in 1987 are expected to interpret "men" generically to include women. One was not expected to draw such an inference in 1910 when the statute was adopted.

In 1974 three states still had laws providing that only men could be jurors. In 1975, however, a United States Supreme Court decision required all states to include women in jury selection.<sup>39</sup>

### *Statutory Changes Since Statehood*

Since territorial days, Oklahoma married women had the right to acquire property in their own names and to dispose of it;<sup>40</sup> their husbands could neither sell nor encumber such separate property. Married women had the same rights as their husbands with respect to the capacity to contract and to control their earnings and property.<sup>41</sup>

Many of the statutes passed in 1910 regarding the mutual obligations and separate rights of husbands and wives are still the law today.<sup>42</sup> One of those is title 32, section 2 which states: "The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto." This statute has been cited in numerous appellate court decisions over the years. For example, notwithstanding a married woman's ability to qualify property in her name as homestead property, the Oklahoma Supreme Court in 1916 ruled that household and kitchen furniture owned by a wife who is supported by and resides with her husband cannot be claimed as property exempt from execution for payment of debts as is one's homestead. The reason given for this decision was that under the statute the exemption for household goods is to the "head of the family," and section 2 designates the husband as head of the family.<sup>43</sup>

In 1954 the Oklahoma Supreme Court held in *Witt v. Witt* that

after a husband and wife have entered into a legal separation agreement, the husband has no statutory right to live in the wife's home and the wife is not required to conform to the husband's choice of the place and mode of living as provided in Title 32, Section 2.<sup>44</sup>

37. COMM. OF PAST STATE PRESIDENTS, 1919-1948, HISTORY OF THE OKLAHOMA FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS 42-43 (1949).

38. 22 OKLA. STAT. § 311 (Supp. 1969).

39. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

40. 32 OKLA. STAT. § 4 (1910).

41. *Id.* § 5; *id.* § 8 (1910) (amended 1945).

42. *Id.* §§ 1 through 7, 10 through 14 (1910).

43. *Nicholson v. Binion*, 59 Okla. 113, 158 P. 384 (1916).

44. 280 P.2d 709 (Okla. 1954).

As recently as 1972, the Oklahoma Supreme Court in *Sanditen v. Sanditen*<sup>45</sup> stated in dicta:

Of course, we do not intend to diminish the authority of a husband as head of the family or interfere with his duty to support himself and his wife. By statute he has the right to use his separate property and property acquired during coverture to fulfill his marital obligations and to conduct the affairs of his business in a manner which he deems proper and necessary.<sup>46</sup>

Repeatedly through the 1950s, the Oklahoma Court of Criminal Appeals upheld the common law rule that a married woman is presumed to have acted under coercion of her husband if she commits a criminal act in his presence.<sup>47</sup> Therefore, the court reasoned that the wife is entitled to acquittal unless the presumption that she acted under coercion is rebutted by competent evidence. The court said in a 1953 case: "Marriage does not take from the wife her general capacity to commit crime, but casts upon her the duty of obedience to her husband."<sup>48</sup> The court specifically relied on title 32, section 2, which states that "The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto." This presumption of a woman's incompetence to commit crime in her husband's presence was statutory and was repealed in 1976. It is interesting that the statute providing the presumption of incompetence included eighteen specific exceptions for crimes for which a wife would be fully accountable regardless of whether she might be fulfilling her statutory duty of obedience to her husband.<sup>49</sup>

It took a federal court to rule in 1974 that Oklahoma had violated the fourteenth amendment equal protection clause of the United States Constitution by allowing husbands, but not wives, to sue for loss of consortium in the event of injury or death of the other spouse.<sup>50</sup> Now by statute, both can sue.<sup>51</sup> Prior to 1976 another Oklahoma law provided that a husband could sue for damages for seduction of his wife, a father could sue for seduction of his daughter, and a brother could sue for seduction of his orphan sister.<sup>52</sup> There was no corresponding right in a wife, mother, or sister. That statute has since been repealed.

45. 496 P.2d 365 (1972).

46. *Id.* at 368.

47. *Kelso v. State*, 96 Okla. Crim. 367, 255 P.2d 284 (1953); *Paris v. State*, 66 Okla. Crim. 236, 90 P.2d 1078 (1939); *Sentell v. State*, 61 Okla. Crim. 229, 67 P.2d 466 (1937).

48. *Harmon v. State*, 97 Okla. Crim. 136, 260 P.2d 422 (1953).

49. 21 OKLA. STAT. § 157 (1971) provided the following exceptions: treason, murder, manslaughter, maiming, attempt to kill, rape, abduction, abuse of children, seduction, abortion, concealing the death of an infant, fraudulently producing a false child, bigamy, incest, the crime against nature, indecent exposure, obscene exhibition of books and prints, keeping a bawdy or other disorderly house. (Repealed by 1976 Okla. Sess. Laws, ch. 35, § 2.)

50. *Duncan v. General Motors Corp.*, 499 F.2d 835 (10th Cir. 1974).

51. 76 OKLA. STAT. § 8 (Supp. 1976).

52. 32 OKLA. STAT. § 15 (Supp. 1973).

Title 32, section 4 of the Oklahoma Statutes also remains unchanged since 1910. It states “neither husband nor wife has any interest in the separate property of the other, but neither can be excluded from the other’s dwelling.” The apparent purpose was to allow both spouses to maintain their separate property, thereby rejecting the common law rule that women lost the right to own and control property upon marriage. The second clause of the statute, however, is difficult to understand. Although there is no case law expressly interpreting the second clause, it seems to imply that a husband and wife could each have a separate dwelling. In January 1987, though, a magistrate dismissed a first degree burglary charge against a husband who had forcibly broken into his wife’s residence at three o’clock in the morning.<sup>53</sup> The husband had never lived in the residence since the couple had separated immediately following their wedding some five months before the incident. Apparently, the court thought the husband’s argument that the clause “neither can be excluded from the other’s dwelling” means there could not be an unlawful breaking and entering by a husband into the home of the wife.

Oklahoma’s rape statutes have been amended several times in the past few years.<sup>54</sup> Until 1981 rape was defined as an act of sexual intercourse accomplished with a female *not the wife of the perpetrator* by means of force overcoming her resistance.<sup>55</sup> In 1984 after heated debate in the legislature, the statute was once again amended to include a provision that rape can be an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution of the victim or of another person, *and if* a petition for divorce is pending, *or* a petition for a legal separation is pending or has been granted, *or* a petition for a protective order is pending, *or* the victim and perpetrator are living separate and apart from each other.<sup>56</sup> Thus, even as the statute is worded today, if sexual intercourse is accomplished by force or violence, used or threatened, a husband still could not be charged with rape unless there is a pending petition for divorce, protective order, or legal separation, or the husband and wife are living separate and apart. The burden of proof is on the victim to establish the latter.

The degree to which the rape laws have resisted change can be understood by recognizing the significance of title 32, section 2: “The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.” The legal reality that there is no crime of rape between husband and wife living together is a logical application of the plain language of title 32, section 2. Since the statute vests the husband with authority over the family, he may not be charged with rape while living

53. *State v. Hand*, No. CFR-86-196 (Osage County, Okla. Jan. 16, 1987) (preliminary hearing).

54. 21 OKLA. STAT. § 1111 (Supp. 1984) (amended in 1983 and 1984); § 1114 (Supp. 1986) (amended in 1983 and 1986).

55. *Id.* § 1111 (1971).

56. 21 OKLA. STAT. § 1114 (Supp. 1986).

with his wife. And the wife must conform to whatever mode of living he chooses to pursue as long as they live together.

The significance of title 32, section 2 can perhaps also explain the continuing resistance to meaningful legislation regarding domestic violence. Before the passage of the Domestic Abuse Act in 1982,<sup>57</sup> the common response from district attorneys and law enforcement personnel to complaints of domestic violence was "we don't get involved in family matters." This hands-off attitude can be traced to the significance in our society of the concept that "the husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto." It could be argued that the Domestic Abuse Act was in part a legislative decision that violence is no longer a "reasonable mode of living."

As long as title 32, section 2 remains the law, the legal power in a marriage relationship is statutorily absolute and rests with the husband. Women will not be equal under the law until the concept that the husband is the head of the family and the wife must conform thereto is eliminated. Various bills have been introduced and defeated regarding title 32, section 2. They range from simple repeal to amending the statute to define marriage as an equal partnership.

Despite efforts in Oklahoma to ratify the proposed Equal Rights Amendment to the United States Constitution and the resulting repeal or amendment in the 1960s and 1970s of numerous state statutes, women's rights in Oklahoma to equal education, credit, employment, and wages are federally, not state, mandated. Oklahoma does have a statute that forbids discrimination in wages on account of sex.<sup>58</sup> It provides for the Commissioner of Labor to investigate complaints and file charges against an offending employer. If the employer is proved to be guilty of sex discrimination as to wages, the employer is subject to a misdemeanor conviction and a fine of \$25 to \$100. This "penalty" for discrimination is relatively insignificant even when compared with the penalty provided by title 21, section 906 (adopted in 1910) for using obscene language in the presence of females or children under ten. A violation of that statute is a misdemeanor for which an individual is subject to a fine up to \$100 or up to thirty days in jail.

The only Oklahoma statute dealing with equal rights in education is found at title 70, section 626.5: "State tuition aid grants shall be awarded without regard to race, religion, creed, or sex." The 1971 statute has no accompanying enforcement provisions.

In the Consumer Credit Code, title 14A, section 1-109 states "no creditor shall limit or refuse to extend credit solely on the basis of sex or marital

57. 22 OKLA. STAT. §§ 60-60.7 (Supp. 1982).

58. 40 OKLA. STAT. §§ 198.1, 198.2 (Supp. 1965). In addition, discriminatory practices in employment and housing are defined in 25 OKLA. STAT. §§ 1101-1506 (Supp. 1985), insofar as providing for execution within the state of the policies of the federal Civil Rights Act of 1964 by means of administrative complaints channeled through the Oklahoma Human Rights Commission.

status of the consumer.” This is far from an affirmative statement of equal rights. Additionally, the comment following the statute specifically eliminates any private right of action, restricting enforcement to the Department of Consumer Credit.

Recent United States Supreme Court decisions hailed as advancing women’s rights will have little if any effect in Oklahoma. One recent case upholding a California affirmative action plan for women will have absolutely no impact unless an Oklahoma business or subdivision of state government adopts such a plan voluntarily.<sup>59</sup>

Another 1987 United States Supreme Court decision that upheld state laws requiring employers to give female workers unpaid pregnancy leave and guaranteeing their jobs when they return to work will have no impact in Oklahoma because Oklahoma is not one of the ten states with such a law.<sup>60</sup> In the 1987 legislative session, the Oklahoma House of Representatives defeated by a margin of 63-34 a bill that would have granted three months of unpaid maternity leave to pregnant workers. Opponents argued it would create a hardship for small businesses and create an unattractive business climate in the state.<sup>61</sup>

### *Conclusion*

Oklahoma has not been a leader in the struggle to achieve equal legal rights for women. Decades of work were required to ensure that women could vote, hold any public office, and sit on juries. It is difficult to describe as an advancement for women the repeal of the statutory presumption that women committing crime in their husbands’ presence were excused because they were simply obeying their husband. That the presumption ever existed merely illustrates the significance in our society and in our law of the concept that the husband is the head of the family and may choose any place of residence or mode of living, and the wife must conform thereto. One way of explaining this presumption, keeping in mind the statute’s eighteen specific exceptions, is to say that it was more important to obey one’s husband than it was to live as a law-abiding citizen, an incredible statement of public policy. But perhaps it is equally incredible that there is so much resistance to the repeal or amendment of title 32, section 2 and equally incredible there is no crime of rape between a husband and wife living together.

Blackstone’s concept that the husband and wife are one, and that the one is the husband, codified in Oklahoma at title 32, section 2, is alive and well in Oklahoma. The concept accounts for most of the complaints included in the Seneca Falls Declaration of Sentiments, and it accounts for the remaining barriers to equal legal rights for women in Oklahoma.

Statistics from the United States Department of Labor show that women

59. *Johnson v. Transp. Agency, Santa Clara County*, 770 F.2d 752 (4th Cir. 1985), cert. granted, 106 S. Ct. 3331 (1986).

60. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 107 S. Ct. 683 (1987).

61. *Maternity Leave Bill Defeated*, *Tulsa World*, Mar. 24, 1987.

comprised 2.1 percent of attorneys in 1930.<sup>62</sup> By 1970 the percentage had risen only to 4.7 percent.<sup>63</sup> By 1980 the percentage rose to 12.4 percent, and by 1986 it was 18 percent.<sup>64</sup> It is estimated that by the year 2000, more than a third of all attorneys will be women. In Oklahoma, approximately 10 percent of attorneys are women.<sup>65</sup>

Department of Labor statistics show that 22 percent of the nation's judges are women.<sup>66</sup> Of the 149 elected trial judges in Oklahoma, thirteen are women.<sup>67</sup> Approximately fifteen women serve as appointed special district judges.<sup>68</sup> Thus, women comprise approximately 18 percent of the Oklahoma trial bench. Two of the nine justices of the Oklahoma Supreme Court are women,<sup>69</sup> and two women serve on the Court of Appeals.<sup>70</sup>

The women who now are part of the legal profession owe their opportunities to what Susan B. Anthony described as "the hard work of some little handful of women of the past." Whether women ever achieve equal rights under the law in Oklahoma will depend in large part on whether women in the legal profession choose to ignore the status of other women.

62. C. EPSTEIN, *WOMEN IN LAW* 4 (1983).

63. *Id.*

64. *Id.* at n.1.

65. This figure is based on internal, unpublished data of the Oklahoma Women Lawyers Association.

66. C. EPSTEIN, *supra* note 62, at 243, table 13.1.

67. *Id.*

68. Figure provided by Oklahoma Supreme Court.

69. *Id.*

70. *Id.*