

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
DECEMBER 4, 1981
BURLINGAME

A meeting of the California Law Revision Commission was held in Burlingame on December 4, 1981.

Law Revision Commission

Present: Beatrice P. Lawson, Chairperson
Jean C. Love, Vice Chairperson
Alister McAlister, Assembly Member
Bion M. Gregory, Legislative Counsel
Robert J. Berton
Thomas C. Loo
David Rosenberg

Absent: Omer L. Rains, Senate Member

Staff Members Present

John H. DeMouilly
Nathaniel Sterling
Stan G. Ulrich

Consultant Present

Carol S. Bruch, Community Property

Other Persons Present

Suzanne Cummins, State Bar, Property North, San Francisco
Jan C. Gabrielson, Executive Committee Liaison, State Bar Family Law Section
Paul J. Goda, Professor of Law, School of Law, University of Santa Clara, Santa Clara
Susan Keel, State Bar, Property North, San Francisco
Hal B. Warren, Pacific Law Journal, McGeorge, Sacramento
Lenore Weitzman, Department of Sociology, Stanford University, Stanford

ADMINISTRATIVE MATTERS

MINUTES OF NOVEMBER 1981 MEETING

The Minutes of the November 20, 1981, meeting of the Law Revision Commission were approved as submitted by the staff. The staff reported that the amendments to various bills as set out in the Minutes of the November 20, 1981, meeting would require technical revisions.

MINUTES OF MAY 14-16, 1981, MEETING

The Commission approved the detailed minutes of the May 14-16, 1981, meeting as submitted by the staff. These detailed minutes, which related to the community property study, were attached as an Exhibit at the end of the Minutes of the November 1981 meeting.

ELECTION OF COMMISSION OFFICERS

The Commission unanimously elected Jean C. Love as Chairperson and Beatrice P. Lawson as Vice Chairperson. Their terms of office are one year, commencing on December 31, 1981.

The Commission determined that the Commission officers--Chairperson and Vice Chairperson--should serve for a one-year term, commencing on December 31 of each year.

SCHEDULE FOR FUTURE MEETINGS

The following schedule for future meetings was adopted.

January 1982

January 21 (7:00 p.m. - 10:00 p.m.) San Diego
January 22 (9:00 a.m. - 4:00 p.m.)

February

No meeting

March

March 18 (7:00 p.m. - 10:00 p.m.) San Francisco
March 19 (9:00 a.m. - 5:00 p.m.)
March 20 (9:00 a.m. - 12:00 noon)

April

No meeting

May

May 14 (10:00 a.m. - 5:00 p.m.) Los Angeles
May 15 (9:00 a.m. - 12:00 noon)

June

No meeting

July

July 22 (7:00 p.m. - 10:00 p.m.) San Francisco
July 23 (9:00 a.m. - 5:00 p.m.)
July 24 (9:00 a.m. - 12:00 noon)

August

No meeting

RESEARCH CONTRACT

The Commission discussed the contract with Professor Mitchell to prepare a background study in the form of a law review article on statutes of limitations on felonies. This contract was approved at the November 1981 meeting.

The Commission directed the Executive Secretary to advise Professor Mitchell that the Commission desired that he meet with the Commission after he has completed his research and before he starts to write his report. The purpose of this meeting would be to present to the Commission orally the consultant's recommendations. It was the Commission's belief that this meeting would provide the consultant with Commission input that would assist the consultant in preparing a report that will be useful to the Commission.

STUDY D-300 - ENFORCEMENT OF JUDGMENTS (HOUSEHOLD FURNISHINGS EXEMPTION)

The Commission considered Memorandum 81-80 concerning the exemption of household furnishings and other personal effects. The Commission approved the substance of the staff draft of Section 704.020 set out in the memorandum. The Commission also decided that if an item of necessary property is not exempt because its value is extraordinary, the proceeds at an execution sale of the item should be exempt in an amount determined by the court that is sufficient to purchase another item of the same type of ordinary value. The exemption for proceeds should last for 90 days.

STUDY D-300 - ENFORCEMENT OF JUDGMENTS (REDEMPTION FROM FORECLOSURE SALES)

The Commission considered Memorandum 81-81 concerning redemption from foreclosure sales and approved the staff draft of a statute that would permit redemption by the judgment debtor in a foreclosure case where a deficiency judgment may be ordered. The redemption procedure will be added to Assembly Bill 798. It was noted that the word "pursuant" should be deleted from Section 729.010(b)(3) as set forth in Exhibit 1 attached to Memorandum 81-81.

STUDY D-325 - STATUTORY BONDS AND UNDERTAKINGS

The staff gave an oral report to the Commission concerning the status of the recommendation relating to statutory bonds and undertakings. The staff reported that some surety companies feel it would be an improvement in the law to eliminate undertakings in favor of bonds, whereas others feel that it is important to retain undertakings, particularly in a litigation context. The Commission decided not to eliminate undertakings from the statutes, but in the Commission's general statute governing bonds and undertakings to define "bond" to include "undertaking" and thereafter refer only to "bond" throughout the statute.

Concerning the award of attorneys' fees to a beneficiary forced to litigate the liability of a surety where the liability of the principal has been established, the staff reported that the surety companies have pointed out there is a substantial difference in the coverage of litigation as opposed to nonlitigation bonds. The Commission decided to limit the award of attorneys' fees to cases involving established liability of the principal on a litigation bond only.

STUDY F-610 - COMMUNITY PROPERTY (ENHANCED EARNING CAPACITY)

The Commission considered the portion of Memorandum 81-78 and the First Supplement to Memorandum 81-78, along with a letter and attachments from Equity in the Family (a copy of which is attached to these Minutes), relating to enhanced earning capacity. At the meeting the Commission heard a brief presentation by Dr. Lenore J. Weitzman of data collected in a study entitled "The Economics of Divorce: The Social and Economic Consequences of Property, Alimony and Child Support Awards," to be published shortly in the UCLA Law Review.

The Commission discussed the findings of Dr. Weitzman that there is a substantial post-dissolution discrepancy between the financial positions of the former spouses, and noted the contrary opinion of practicing lawyers present at the meeting that there does not appear to be as severe a problem as the statistics indicate. Possible reasons offered for these differing views include that the practicing lawyers see a limited, propertied segment of the dissolution population, that perceptions of adequacy and inadequacy depend on the point of view of the

perceiver, and that practicing lawyers may not be involved in the post-dissolution activities (including enforcement problems) of the former spouses.

The Commission felt there were a number of problems the law should seek to remedy. These problems were (1) the inequity in a short-term marriage during which one spouse is working and substantially contributes to the professional education, license, or other career assets of the other spouse, and at dissolution the contributing spouse realizes little or nothing for the contribution; (2) the inability of a nonworking spouse at dissolution of a long-term marriage to find employment or to earn anything like a fair income in comparison with the earning capacity of the other spouse; (3) the inadequacy of child support awards.

The third problem the Commission decided was beyond the scope of the present study of community property. The first two problems, and related problem of the inadequacy of spousal support, should be addressed by attempting to achieve more adequate remedies. The notion of a property right in enhanced earning capacity was not believed to be a suitable remedy. The staff was directed to devise possible remedies for consideration by the Commission. Among the remedies suggested were: (1) recast the language of the support statute to encourage or require more adequate support awards; (2) set a presumption for the percentage of income to be awarded as support and the duration of the support award, depending on such factors as the duration of the marriage and the standard of living of the spouses; (3) create a special provision to permit a lump-sum award of support on an equitable basis, taking into account the discrepancy in earning capacity of the spouses; (4) allow installment payments of a lump-sum award; (5) direct the court to award a sufficient amount to enable a nonworking spouse time to obtain education and training to be self-supporting at a reasonable level, including child care if necessary; (6) allow reimbursement for expenses or restitution for benefits conferred on the other spouse that enhanced career assets; (7) allow the support obligation to survive the death of the supporting spouse; (8) provide for a support lien on the property of the supporting spouse; (9) require life insurance or an annuity plan or disability insurance to be maintained by the supporting spouse; (10) permit the spouse given custody of the children to keep the family home; (11) devise more satisfactory enforcement remedies; (12) examine the Uniform

Payment of Judgments Act and statutes of other jurisdictions for useful provisions.

In devising remedies, the staff should take into consideration, among other factors, the relative financial status of the spouses at marriage as well as at dissolution, the differing moral obligations in long- and short-term marriages, the likelihood of remarriage of the supporting spouse and new support obligations, the effect of the marriage on the earning capacities of the spouses, the inability of a young spouse to make substantial payments, and the tax implications of the remedies.

STUDY F-611 - COMMUNITY PROPERTY (GOODWILL)

The Commission considered the portion of Memorandum 81-78 relating to valuation of goodwill of a business or professional practice at dissolution of marriage. The Commission decided to gather together on a pro bono basis accountants, appraisers, lawyers, and others who are active in this field to explore the possibility of providing a statutory means of simplifying and clarifying the valuation process, whether by codifying factors that may or may not be considered, by creating presumptions, by codifying statutory formulae, or some other means. The primary objective of the discussion is to ascertain whether such an approach might be feasible and if so whether it could be done by such a group or whether a consultant would be necessary. The representatives of the State Bar Family Law Section present at the meeting agreed to give the staff names of persons who might be expert and interested in helping in this endeavor. One thought expressed was that if the Commission is unable to devise rules to simplify the valuation process, it might be desirable not to value the goodwill directly but to compensate for it through support-type awards.

STUDY L-601 - PROBATE LAW (NONPROBATE TRANSFERS--AB 325)

The Commission considered Memorandum 81-82 relating to Assembly Bill No. 325 (nonprobate transfers). The Commission approved the amendments to AB 325 that were attached to the memorandum.

The Commission expressed some interest in the simplified durable power of attorney provision enacted in Minnesota for accounts with financial institutions. However, in view of the lack of support for such a provision on the part of representatives of financial institutions, the Commission decided not to give further consideration to such a provision at this time.

APPROVED AS SUBMITTED _____

APPROVED AS CORRECTED _____ (for corrections, see Minutes of next meeting)

Date

Chairperson

Executive Secretary

Equity in the Family

December 2, 1981

Mr. John H. DeMouilly
Executive Secretary
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Mr. DeMouilly:

Thank you for your letter of November 23 and the agenda and memoranda for the meeting this Friday.

Wise is one who knows when he is overpowered in a given endeavor and ceases to struggle in it, especially when the "overpowerer" is the State Bar. Equity in the Family is concerned, not with legalistic pragmatism, but with fundamental principles such as justice and the premises on which the family was instituted. Not being a lawyer and therefore not equipped to discuss the "mechanics" of our proposal, I can see no useful purpose in my presence at this Friday's meeting. Moreover, considering my post-divorce economic circumstances after 23 years as a homemaker during marriage, I can ill afford to miss a day of work.

Needless to say, I am disappointed over not being permitted to give my presentation orally, particularly since it is obvious that some of the objections to the proposal come from a failure to have read the written presentation carefully. For example, the Staff's observation that "the award of increased earning capacity assumes continued earning at full capacity" is incorrect (page 9, Memorandum 81-78). It apparently reflects Mr. Reppy's view. This point is clarified in the presentation (EXHIBIT 5) on page 3, paragraph 3. As for the presumption of full-time earning capacity on the date of marriage and the date of marriage termination, this is to be made solely to establish a common time base for purposes of comparison. The comparison could as well be made on a per-hour basis. The point is amplified in the discussion about child support on page 9, paragraph 3 (parenthetical comment beginning on line 6) and paragraph 4. It is clear in that section that earning capacity is presumed as full time (except in unusual cases) only for the purpose of determining child support. (A parent with full-time earning capability may not rightly expect to have his or her child-support obligation reduced by voluntarily reducing his or her gainful employment to part time.)

The contention that our proposal would inject the concept of fault in divorce is fallacious. On the contrary, it would remove the implication of fault that exists under present law, wherein the contributions of husband and wife to a significant economic asset acquired in the operations of the marriage partnership are implicitly regarded by the courts as unequal. The asset to which I refer, of course, consists of the interests in the earning-capacity increase gained by each spouse during the marriage. This point is carefully developed in my presentation.

Mr. John H. DeMouilly
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December 2, 1981

The contention that the qualifications which a man and a woman brought to a marriage may be unequal is addressed on page 4, EXHIBIT 5. This is discussed more fully in the enclosed letters to Captain Palau (in case any of the Commissioners are interested in a more detailed discussion).

As for the "lien on the future," why not? (This probably ought to terminate, however, on the obligee's death, even though only the obligor's permanent retirement or death would permanently zero out the interests in his or her earning capacity.) Both parties are inevitably affected by the marriage for the remainder of their lives. Is it right that one be left trailing in the dust -- retroactively exploited -- in order to free the other to benefit from his career as though it had not developed partially through the joint efforts and sacrifices of both spouses? Contrary to Paul Goda's assertion about "punishing" the person whose earning capacity rose during marriage, our proposal would remove the penalty inflicted under present law on the spouse who sacrificed the development of her full earning potential in the interests of the development of her spouse's earning potential.

As for the recently enacted North Carolina statute that provides for equal division of marital property "unless the court determines" that an equal division would be inequitable, I refer the Commission to the comments in paragraphs 2 and 3 on page 2 of my presentation. If the courts could be trusted to recognize what is inequitable, divorced women who were homemakers during marriage would not be in the disadvantageous economic circumstances we are in.

Our proposal does not address a lot of issues. We had been repeatedly advised to keep it simple. However, it does not preclude future legislation such as that dealing with cases involving decreases in original earning capacity. In the meantime it would prevent much inequity.

As a non-lawyer, not mentally locked into the legal structure, I fail to see why interests in an earning-capacity increase gained during marriage may not be regarded as property just as much as are interests gained during marriage in a retirement income anticipated for the future. Nevertheless, because of the legalistic difficulties apparently involved in a property concept, it would appear that the moral right and obligation of the spouses to share equally in the interests in any earning-capacity increase gained during the marriage would be better stated in some other terms -- not as spousal support, however, or at any rate not under the present limitations of spousal support. The interests were earned during the marriage; nothing that subsequently happens changes that fact.

May I ask you please to read this letter at Friday's meeting.

Sincerely,

Elaine Elwell
Elaine Elwell
Legislative Chairman

cc: Beatrice Lawson
Carol Bruch
Alister McAlister

All too often, divorced homemakers who could maximize their talents in the job market drag their heels for fear of losing the equity in a large part of their lives; for the only thing that will prevent phaseout of their spousal support is their inability to find employment suitable to support themselves adequately (which, except where the community property permits the hiring of very skilled--and expensive--lawyers, usually means just well enough to keep them off welfare). Lawyers even advise them not to become employed. If a divorced homemaker does find a good job--one that, added to her spousal support, promises to bring her income somewhere close to that of her former husband--she must be secretive about it in order to hold onto her economic standard. In view of the present discrimination in the courts against former homemakers, this concern is valid. The attached proposed bill, in providing for economic justice for all divorced persons, would eliminate the cause of the concern and provide divorced homemakers the margin needed to find the place where they fit best in the world following divorce.

201 N Washington Street
Alexandria, Va. 22314 (703) 549-2311



**The
Retired
Officers
Association**

May 5, 1981

Miss Elaine Elwell
Equity in the Family
1057 Middlefield Road
Palo Alto, CA 94301

*Rec'd
5/8/81*

Dear Miss Elwell:

You sent a copy of your letter of March 19, 1981 addressed to Cdr. John Wanamaker to me. Since we work in adjoining offices I did not feel that it was necessary for both of us to respond. After reading your responses of April 22 and 24 to Cdr. Wanamaker, however, I feel compelled to provide a personal response to some of your views. I want to emphasize that much of what I am about to say represents ONLY my personal attitude and is not something that I have cleared with our Board of Directors.

First, let me reiterate some of the thoughts which Cdr Wanamaker expressed in which our Board has specifically concurred. We believe that a person has an obligation to meet legal and moral responsibilities. We do not believe that military retired pay should be sheltered from legitimate spousal or child support payments. We do believe that it is proper to include it within the total assets to be considered in arriving at a proper level of spousal support. We provide auxiliary membership to widows at one third the cost of regular membership. We have established a Survivors Administrative Assistance Service, A Widows and Dependents Health Benefit Trust, and have led the fight to improve the military Survivor Benefits Plan, so you can see that we practice what we preach.

My wife and I have both celebrated our parents' fiftieth wedding anniversaries with them. We have celebrated our own twenty-fifth anniversary and don't see any clouds on our marital horizon. I think it's safe to say that we believe in the family institution.

I concur in your assumption that a man and woman are equal partners in a marriage. I do not agree that they are "equal in worth" if you are talking about earning capability. I am an attorney and my wife is an elementary school teacher with a Master's degree in education. We do not have the same earning potential. My wife has a cousin who is a college graduate and is employed as a sales representative for a large corporation. His wife is a board-certified radiologist. They do not have equal earning potentials.

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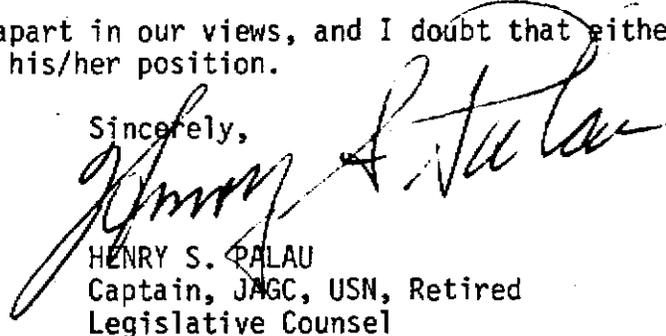
I suspect that if there was as much equality and joint responsibility in every marriage as you suggest there would be far fewer divorces than is in fact the case. I would opine that one of the leading causes of divorce is a recognition of a mistake having been made in the first instance.

If you take your assumption of present and past "capabilities" back to its logical beginning we should recognize that all men (persons (?)) were created equal. If this is where you want to start, then we should all have the same potential, all lead the same lives, all have the same income, all live in identical homes, have identical families, and so forth ad nauseam.

If all my present capabilities are a reflection of my past capabilities as you suggest, then perhaps my parents who contributed to my capabilities during my formative years and paid for the bulk of my education are the ones who have the real claims on my retirement. I submit that this is at least as logical (?) as your position that a former spouse is entitled to a pro-rata share of all the future retirement regardless of whether it was earned during the marriage.

As you can see, we are a long way apart in our views, and I doubt that either of us will ever persuade the other to his/her position.

Sincerely,



HENRY S. PALAU
Captain, JAGC, USN, Retired
Legislative Counsel

HSP:bj

Equity in the Family

July 28, 1981

Captain Henry S. Palau, JAGC, USN, Retired
Legislative Counsel
THE RETIRED OFFICERS ASSOCIATION
201 N. Washington Street
Alexandria, VA 22314

Dear Captain Palau:

Certain exigencies required that I set aside your letter of May 5, 1981, and I was unable to return to it until now. The letter has been helpful to me in revising the presentation I am scheduled to give to the California Law Revision Commission at its meeting of December 3-5, this year (recently rescheduled by the Commission from the September meeting). Thank you for your comments.

The McCarty decision also entered into the revision, as did comments from other persons with views similar to yours. The points developed in the presentation apply equally to marriage-accrued interests in earning-capacity increase and marriage-accrued interests in retirement benefits, even though only the former are addressed explicitly (as they are the subject of the proposal being presented to the Commission).

It is clear that in assuming I was talking about the equal worth of husband and wife in any given marriage merely in terms of earning capability, you missed the thrust of my arguments -- throughout which is the underlying premise that "worth" includes considerations not normally recognized in the marketplace. I speak of "worth" in terms of benefits to the family and society. For example, the capability of a woman to bear her husband's child is of inestimable worth; and if she has chosen to do so -- if she has rejected the self-seeking of pro-abortionists -- her contribution to the marriage is of infinitely greater worth than anything he could possibly have contributed. I call your attention to the comments on the top half of page 4 of the presentation. These will also answer your objection that husband and wife in any given marriage may not be presumed to be equal in worth for the reason that "one of the leading causes of divorce is a recognition of a mistake having been made in the first instance."

You suggest that your parents, who contributed to your capabilities during your formative years and paid for the bulk of your education, are perhaps the ones who have the real claims on your retirement. You submit that "this is at least as logical (?)" as my position -- which you then state simplistically, apparently disregarding the solution I offered to the problems posed by Commander Wanamaker, to which he had invited me to respond. I see your reasoning as fallacious; for, a duty of parents is to provide their offspring with the best preparation for life within their

Captain Henry S. Palau, JAGC, USN, Retired

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means, as was similarly the duty of their parents. It is not the duty of a wife to help her husband, through taking on the bulk of his share of their jointly incurred domestic obligations, to gain interests in either his separate economic future or his economic future and that of some other woman.

According to my proposals, all that he began the marriage with -- all that his parents had helped him to achieve up to that point -- insofar as it is part of the base for his future economic benefits, including retirement pay, remains his own; he may do whatever he wishes with the economic benefits derived therefrom. But the woman with whom he joins forces in marriage brings to the marriage, qualifications of worth equal to his (and, again, I refer you to the top half of page 4 of the enclosed presentation). From there on, beginning with the combined bases of their two lives -- lives which have now become a single entity, a union -- all that accrues as a result of the operations of what is now their equal partnership of marriage, rightfully accrues to both partners equally. If the union is subsequently dissolved, with the two partners then going their separate ways, that which accrued for them as a single entity must then be separated into two equal portions.

I agree with Commander Wanamaker's implication that a second marriage might be more conducive to developing a person's economic potential than his first. The suggestions in my April 22 and 24 letters to the commander take this into account. May I suggest that you look at those letters more thoughtfully. I do not agree with Pat Schroeder's approach using a proration according to the duration of the marriage.

It is possible that all of the foregoing is moot in the wake of McCarty; nevertheless, it is still valid and I believe merits consideration in any studies aimed at correcting the problems created by McCarty.

Sincerely,

Elaine Elwell

Elaine Elwell
Legislative Chairman

Enclosures,

Presentation (rev. 7/81)

"Marriage, Careers and the Family"

7/27/81 ltr. to Mr. David Mainz

Your ltr. of 5/5/81 (copy)

cc: Cdr. Wanamaker

Equity in the Family

July 29, 1981

Captain Henry S. Palau, JAGC, USN, Retired
Legislative Counsel
THE RETIRED OFFICERS ASSOCIATION
201 N. Washington Street
Alexandria, VA 22314

Dear Captain Palau:

In the process of refileing your May 5th letter after answering it yesterday, I glanced through it again and realized I had neglected to answer your "ad nauseum" comments.

Although willing to be enlightened, I fail to see how the premise I stated leads to the conclusion that all humans are created equal, with equal potentials. That a given man chooses to marry a given woman, drawn to her because of the unique combination of her various tangible and intangible characteristics -- and vice versa, -- means only that those two may be presumed equal in worth. Indeed, the selectivity that operates evidences the very opposite of your conclusion.

"Potential," particularly in a materialistic sense, is only an incidental part of "worth" -- which is the net of the various positive and negative aspects of each spouse in the context of their family responsibilities. Because no one outside the marital relationship can really know all that goes into it (in fact, only God can know), I speak of presuming husband and wife to be of equal worth, on the basis of the prima facie evidence of their having chosen to marry each other.

If the marriage fails, I submit that it is at the point where equality, through the operation of free will, becomes inequality. It is in the fact of the now irreversible untenability of the relationship that the inequality resides. But to the extent that one spouse "recognizes" his or her "superiority" to the other ("a mistake having been made in the first instance"), he or she is not superior. The arrogance necessarily concomitant with such "recognition" ("I am superior to my wife [husband]") could only have contributed to the marriage failure. Such arrogance might well be the hinge on which all failed marriages turned (and a word to the wise, in what is basically a spiritual paradox here, is sufficient).

In this "equality become inequality," the former must be presumed as having existed throughout the marriage, with each spouse thus seen as having contributed equally to the marriage and therefore as entitled equally with the other to the fruits of its operations. And part of the operations were the giving of one spouse's time and services in behalf of the other -- that is, carrying out the larger portion of the other's equal share of their jointly incurred domestic responsibilities -- and the latter's utilization

Captain Henry S. Palau, JAGC, USN, Retired

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of the time and freedom thereby released to him to develop his career potential to the point where it was developed during the marriage. Had they not accrued economic interests in the future by means of this arrangement, his financial support of the family would have balanced matters. Such interests were accrued, however, and he must either share these equally with her or have exploited her. And I submit that many a West Point graduate has failed to understand the full implications of the Academy motto, "Duty, Honor, Country." What may be said of him may also be said of the military force, which benefited from the time and services of his wife -- and may be said, in turn, of the country which the military force serves: My country has exploited me and cast me aside. It is difficult for me any longer to love this country.

Sincerely yours,

Elaine Elwell

Elaine Elwell
Legislative Chairman

cc: Cdr. Wanamaker