PUBLIC HEARING

before

Commission on Sex Discrimination in the Statutes

on

Sex Discrimination in Probate, Inheritance Taxes and Credit

Date Held:
September 28, 1983
Room 114
State House Annex
Trenton, New Jersey

MEMBERS OF COMMISSION PRESENT:

Senator Wynona M. Lipman (Chairwoman)
Assemblywoman Angela L. Perun
Joan M. Wright
Greta Kiernan
Phoebe Seham

ALSO PRESENT:

Alma Saravia, Executive Director
Commission on Sex Discrimination in the Statutes

Robert Wolin, Research Associate
Estelle Bronstein, Legislative Intern
Commission on Sex Discrimination in the Statutes

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SENATOR WYNONA M. LIPMAN (Chairwoman) : I would like to begin this hearing by introducing the members of the Commission. To my left is Joan Wright, Director of the Division on Women; to my far right is Phoebe Seham, Esquire; Greta Kiernan; and Alma Saravia, who is the Executive Director of the Commission and probably the hardest working member of this Commission; Robert Wolin, who is an intern; and Estelle Bronstein.

Good morning and welcome.

Since 1978, the Commission on Sex Discrimination in the statutes has been reviewing the statutes and case law in order to identify those laws which result in sexual discrimination against either men or women and to recommend the appropriate legislative changes.

To date, we have issued reports on employment, marriage and family law and wage discrimination. Two years ago, the Commission decided to study sex discrimination in insurance, pensions, credit, inheritance and taxes. Today's public hearing represents the last phase of our research in this study -- we conducted a public hearing on sex discrimination in insurance in February of 1982. The Commission plans to issue a comprehensive report analyzing specific insurance, pension, inheritance, tax and credit statutes that need to be amended or repealed early next year. Accompanying the report will be proposed legislation to implement the Commission's recommendations. In fact, the Commission's insurance legislation is already pending in the Legislature. That is Senate Bills 3137 and 3141, if anyone wishes to look them up.

While many strides have been made in eliminating sex discrimination, there are still laws in the books which have a disparate impact on women. The elective share is a significant improvement over th old dower and curtesy laws, yet it may need some revisions to reflect the contemporary views that each partner in a marriage has a right to obtain some marital assets at the death of the other spouse. If one believes, as the Commission does, that marriage is a partnership whether in-spousal inheritance taxes should be imposed is another area for inquiry. Finally, it is necessary to strengthen and clarify the laws prohibiting sex discrimination in credit.

We appreciate your appearance before us today to advise us on these important issues.

Our first witness is in a hurry, so we will hear from him first, Mr. Winard. Mr. Winard, do you have written testimony?

T E D W I N A R D, E S Q U I R E: I do not have written testimony. My purpose in being here today is to address the Commission with regard to the recent opinion of the Attorney General concerning marital status discrimination in credit transactions. I would like to briefly summarize that opinion, and then advise the Commission as to what I believe the import and the implications of that opinion are.

We were asked by the Division of Civil Rights for an interpretive opinion of the meaning of a law against discrimination as it bears on inquiries into marital status discrimination. The specific issue that was posed before us is, whether or not the law against discrimination absolutely, in all circumstances, precludes an inquiry as to marital status, or whether there are circumstances where that type of inquiry may be appropriate.

We reviewed the law, we reviewed the Federal law, and the law of some other states as well, and we concluded that an inquiry with regard to marital status is absolutely prohibited insofar as it bears on the credit worthiness of the applicant. However, we further recognized certain circumstances. For various business reasons, it may be appropriate for a creditor, financial institution, to make inquiry with regard to marital status, bearing on the nature of the security that is being offered to secure the particular loan in question.

We felt that there is room in the statute to allow for that type of inquiry. In other words, there is no impediment, rather, to that type of inquiry. However, we further pointed out that a marital status inquiry, although it may be appropriate in certain circumstances -- for example, to protect the creditor's interest in the event of equitable distribution, or in the event there may be an elective share chosen by the spouse -- must be justified. It may not be, and should not be, a pretext for discrimination. That type of inquiry should be reasonably related to a legitimate need of the creditor; it should be stated, unequivocally, in the information provided to the applicant, so

the applicant knows the nature and the reason for the inquiry, that the inquiry is not designed as a pretext for discrimination, but rather, to protect the interest of the creditor, financial institution.

The import of that opinion, I think -- I want to provide some clarification in this regard -- is, that although we recognize that there may be room for marital status inquiry, there very well may be other alternatives that can be used by creditors to obtain the same or similar information. We are recommending to the Division of Civil Rights that it adopt rules and regulations in this area, that it hold hearings, if necessary, solicit comment from a broad of the creditor, financial community, as well as the public at large, to determine what the appropriate circumstances are, where this type of inquiry should be made, and what procedure should be utilized by the creditor community in order to afford the applicant the greatest degree of protection against not only actual discrimination, but any perceived discrimination on the part of the applicant.

So, I think the bottom line is, and the next step is, a further exploration of this issue by the Division of Civil Rights as part of their rule-making process.

Do any of the Commission members have any questions?

SENATOR LIPMAN: Ms. Seham?

MS. SEHAM: Mr. Winard, we have been very concerned about this Attorney General's opinion, because the fact is, no matter what the reason for the inquiry into marital status is, if that inquiry is made out of threshold time, that information is there. What it is being used for is anybody's guess. There is an analogous situation in pre-employment interviews, and I think a possibility to get around the discriminatory problem and retain what you are talking about, is for the questions before the credit worthiness is determined, for those questions not to include marital status until credit worthiness has been determined. Then, if the person is credit worthy, that question can be asked to protect the bank's interest, or the grantor's interest. Just as in the employment situation, those questions can be asked after the person has been employed for the purpose of benefits, and so on.

MR. WINARD: Yes. I would agree.

MS. SEHAM: You would agree with that?

MR. WINARD: Yes. I would agree wholeheartedly with that suggestion, and I would offer it to the Division in its further exploration of the problem as an acceptable or a very credible solution to avoid at least any sort of hidden discrimination that may come out of an inquiry.

MS. SEHAM: Thank you.

SENATOR LIPMAN: Thank you, Mr. Winard. I don't have any questions. We wanted to hear from the Attorney General's office directly about this ruling, which has caused a little controversy. We will hear some testimony on that today. Thank you for clarifying it for us. We are glad to know about the Division on Civil Rights. Do you know if they are going to follow through?

MR. WINARD: I think they are supposed to appear here today. Hopefully they will.

SENATOR LIPMAN: Mr. Winard, Ms. Wright has a question.

MS. WRIGHT: Are you going to be submitting written testimony?

MR. WINARD: No, I do not have written testimony.

SENATOR LIPMAN: We are having this transcribed. Thank you, Mr. Winard.

MR. WINARD: Thank you.

SENATOR LIPMAN: Our next witness will be Ms. Renee Finkel.

R E N E E F I N K E L: I am here today as a private citizen. I am not representing any group. I am here to tell you my story about the inheritance tax laws.

My father's recent death has brought me into contact with New Jersey's Transfer Inheritance Tax Law, specifically, Section 54:34-1f.

I was utterly amazed to discover that joint accounts are joint only as long as both parties are living. Upon the death of one of the parties, all property held jointly is assumed to have belonged absolutely to the deceased and is taxed accordingly.

Since my mother had outside employment for a very short time, the State considers that all assets belonged to my father.

Thus, fifty-four years of taking care of a household and raising two children means nothing because my mother did not earn a salary.

A jointly held safe deposit box contains some jewelry belonging to my mother. This is also assumed to belong to my father and is considered part of the taxable estate until an affidavit is prepared and signed by my mother attesting to the fact that the jewelry is hers and never did belong to my father.

I find it incomprehensible that such an archaic statute remains on the books in this "enlightened" day and hope that this injustice will soon be rectified. Thank you for listening.

SENATOR LIPMAN: Could you wait just a minute, Ms. Finkel? Are there any questions? Ms. Seham?

MS. SEHAM: Not yet. You were too quick for me.

MS. FINKEL: I'm sorry.

SENATOR LIPMAN: Would you just--

MS. FINKEL: Do you want me to repeat anything?

SENATOR LIPMAN: Yes. We would like to hear the story one more time, briefly.

MS. FINKEL: Okay. I had always assumed that joint accounts meant just that, joint accounts. I didn't know they were joint only as long as both parties are living. When my father passed away -- I am the executrix of the estate -- I was suddenly involved in all of this. I was told by my lawyer that it was because my mother didn't work. I said she worked a couple of years when we were little. He said that didn't count. She didn't contribute financially to the household, with an outside income. He said, "If I could get an affidavit stating that, let's say, $50,000 of whatever is in the estate was something that my mother earned, then that wouldn't be taxable, but, there is no such thing. The whole estate is not even $50,000."

Well, $15,000 is deductible. The State does not request tax on the first $15,000. But, whatever is left is considered taxable by the State of New Jersey.

I understand if the situation was reversed, that if my mother had passed away and my father remained, he could claim the complete exemption on the whole estate, because he earned the income. That is something I just found out, before I wrote this testimony. I didn't realize that. I thought it was equal, at least, but it isn't. It is too late to do anything for my mother, but I would like to see

something done for other women who are in the same situation as my mother, who are not yet widowed.

SENATOR LIPMAN: Ms. Seham?

MS. SEHAM: You were commendably brief. I just didn't get myself together in time to ask you a question. What we are doing is attempting to make recommendations to the Legislature as to how laws might be changed to be less discriminatory. Would you recommend to us that we draft something saying that the presumption -- we are talking about a presumption, which you can rebut by affidavits. The burden, then, is on the person trying to rebut the presumption. Would you recommend that we recommend that the presumption be, that each spouse owned 50% of the property of any jointly-owned property, and then that would have to be refuted, if somebody wanted to say they owned more?

MS. FINKEL: I don't feel jointly-held property should be taxed. I would recommend that it not be taxed at all, between spouses. If my sister and I were inheriting the estate, I can see that we would pay a tax on it. I don't feel that either a husband or a wife should have to pay taxes on jointly-held income, or an estate.

MS. SEHAM: Okay. That would be your recommendation to us?

MS. FINKEL: Right.

MS. SEHAM: And political reality being what it is, if we could not get that kind of a provision accepted by the Legislature, what would you then recommend? Would you recommend the 50-50 presumption?

MS. FINKEL: Yes. It is better than 100%-0%. Anything.

MS. SEHAM: Thank you.

SENATOR LIPMAN: Ms. Finkel, we have a specialist in this area who works for us, Robert Wolin. He wants to ask you a question.

MR. WOLIN: The language in this statute seems to be written, basically, neutral. In the Administration, if the male spouse had not contributed or had not worked and the wife had worked, would they have been forced to go through the same procedure of affidavits, and so forth?

MS. FINKEL: From what I understand. I am not that familiar with the law. I had a terrible time even getting a copy of it. I had a fight with the auditors at the Inheritance Tax Bureau, and I said, "I

am not calling to argue with you. I realize that your job is to collect the tax. I'm just trying to get a copy of it, so that I can try to read it" -- it's not that easy to understand if you are not a lawyer, and I am not a lawyer -- "so that I can contact some local women's groups, or something, and have somebody try to do something about it."

The first man I spoke to gave me the statute number, and I went to the State library on my lunch hour and he gave me the wrong statute number. So, I spent the whole hour looking for the wrong number. When I got back to work, I called again and said I got the wrong number, that it was not what I am looking for, and I have some kind of a supervisor on the phone. He said, "All the states are the same. Everybody does it." I said, "I don't know that everybody does it. I'm not sure. I don't think Pennsylvania does it. I have investigated it since I live in New Jersey." And I said, "Once again, I am not here to argue with you. I would just like a copy." So finally, I got the book on the statute, so I could read it myself.

It looks like it is neutral, but from what I understand, it isn't. I understand that if the wife passes away first, and if she did not have outside employment, the husband could state that he was the only income provider, and therefore, he can claim complete exemption on the whole estate. That is not fair.

MR. WOLIN: And you didn't get the impression that it would work the reverse way?

MS. FINKEL: Yes, if the woman was the provider. Yes, it would work the reverse way. You and I know -- well, maybe now -- more women are working. Women of my mother's generation did not work. They stayed home. They provided a home for their families, for their husbands and their children, in good times and in bad times. For them to have to be penalized when they are pushing eighty years old is ridiculous.

MR. WOLIN: What was the amount of the tax involved in this?

MS. FINKEL: I don't know. The estate is still not settled. I don't know what the tax is going to be.

SENATOR LIPMAN: Okay. Then your recommendation is that we try to change the presumption, if the married partner is the house

spouse who will receive nothing because the male spouse is presumed to have owned the entire property, except--

MS. FINKEL: Except that she won't receive anything. She will receive it, eventually, when everything is settled. It is just that she is going to have to pay taxes on--

SENATOR LIPMAN: So many taxes.

MS. FINKEL: The inheritance tax on not 50%, but on whatever the estate is, once above the $15,000.

SENATOR LIPMAN: Once everything is settled.

MS. FINKEL: Yes, above the $15,000.

SENATOR LIPMAN: Okay. Thank you. So, what you would like is that that part of the law be changed.

MS. FINKEL: Yes.

SENATOR LIPMAN: Thank you very much. We will now hear from Ms. Judith Vickers.

J U D I T H V I C K E R S: I was told before I started to give an explanation of who I am. Do you want that?

SENATOR LIPMAN: Yes.

MS. VICKERS: Okay. I am here as a private citizen, I work for the State, in Human Services, I am Coordinator of the Women's Political Caucus in Middlesex County, and I am also on the Bargaining Committee for Communication Workers.

As a private citizen, I am basically here to talk about the older women, women with children and who are identified now as "the new poor." The women who have not been out of the house, have not worked, who really believe that the system worked and would work for them. From the divorced woman's standpoint -- not so much from the widow's standpoint, because that has been stated well -- once she is thrown on the system, she has no survival skills and no knowledge. She has no work history, no social history, no pension, and in child support or any other legal issues, she has no enforcement of the laws and she has no money to get the laws enforced.

Now, in my own case, when I was divorced, in my forties and had no money, I had the advantage of knowing a lot about finance and how the system worked. I was able, by lying a lot, to get hold of

money, to get loans, to borrow money, to get credit -- I'm still paying off that credit. It has been twelve years, and I'm still paying it off. But, if you don't have those skills, and very few people do, and you don't know how the system works and you are in awe of authority figures, such as bankers, you have a real problem.

I am here to talk about the credit problem. How does this woman get credit?

I used to go in the bank and say, "I made up a trust fund." For many years, I led them to believe that I had trust funds. I used to go in and say, "I don't know whether I should go into my trust fund or I should borrow the money." They always suggested I borrow the money. I survived on borrowing money, but you see, I am an exception. I survived. I had three children still at home and one in college.

The point is, women don't have those skills. There is nothing in the law to protect them. With child support monies, if you don't get your money, what do you do?

Now, a man calls and says, "I am no longer responsible for my wife's debts." They are still married, but in the process of divorce, and the phone company comes in and cuts off the phone. They don't call the woman to say, "Can you afford to pay this? What do you want to do?" She comes home and the phone is dead.

I had a neighbor, the sheriff came to her house and said, "Your house is going up for sheriff's sale." Her husband put all kinds of liens on her house -- I'm talking about a suburb now. She was never informed and she was part-owner of the house. I suspect that should a woman have the opportunity to put liens on the house, that the man would be informed. This actually happened to my neighbor. She lost the house. She had no knowledge of this.

These are the kinds of things. I don't see any place that is protective for women.

If you go into a bank, how are you going to get credit? How are you going to do that? You have never worked and you have no assets. If you are lucky and have part of a house or a house, what do you do about that? If you have no money to keep the house, it is going to be a forced sale. And, very often, as I have said, there are a lot liens and loans against that house.

I bought my house from my husband by lying. I found out it was a Federal crime. No bank would give me any money, so, I found a bank where the president was a woman. I made up a portfolio of stocks and told her that I had this collateral. She probably knew I was lying, but she went with me. I got my mortgage to buy out my husband.

I am talking about myself because it shows, if you don't have the knowledge to do these things-- Today -- this was about ten years ago -- that would be a much more difficult thing to do. Credit is much much harder to get. There was a period where anybody could get a VISA card. That is not true today. It is very difficult. So, if you can't get access to credit, I don't know what happens.

I can go on for hours. Are there any questions?

I do want to bring up one other issue. When you talk about women's rights and there are laws, there are laws. If a woman has the money to go in court -- I know many women who have been given whatever, $25.00 a week child support. I find that they give that amount to keep you off of welfare. Now, they don't get the money. They have to petition the court and say, "My husband didn't pay." That would cost a lot of money, to go to court and ask for that money. Legal services is backed up 2,000 cases. They can't take these cases. So, never mind what the law is, the woman has no access to this. This is the problem.

MS. WRIGHT: Yes, I would just like to make a comment, because I have to excuse myself very shortly. I was interested in what you were saying. I certainly don't recommend to anyone else to do what you said--

MS. VICKERS: No.

MS. WRIGHT: But, as the Director of the Division on Women, I have complete empathy for what you are going through.

MS. VICKERS: Well, I'm out of it now.

MS. WRIGHT: Or what you went through, but what many other women are going through. I would just like to make a comment. The problems faced by displaced homemakers are a priority of the Division on Women. I would like to invite you to be part of our study. We are evaluating what really happens and how laws practically work against us. And women not realizing this until they get into that situation themselves, find that the system really is not a supportive one.

MS. VICKERS: I would like to add one more thing on that. When women are in the middle of divorce, the lawyer -- maybe they believe it -- says, "Oh, don't worry about it. We are going to get all of these things. Don't worry about it." She wants to believe that, no matter what someone else might tell her. And in the end, she now has a lien on her house from her lawyer because she can't pay him either, and she has not gotten these things. The courts simply do not enforce any women's rights. I can go through several counties with a lot of examples.

MS. WRIGHT: I think that problem has no geographical occasion either. It happens in the cities as well as the suburbs, as you point out. That happens to women no matter what their socio-economic background is, and no matter how many years they put into a traditional marriage also.

MS. VICKERS: It's not recognized.

MS. WRIGHT: No.

MS. VICKERS: It has been found from inheritance. It is not recognized.

MS. WRIGHT: Just for the record, we had believed that there were 300,000 such women in the State. And in our new county-by-county study, our numbers are 677,000. That is a population which is not identified as being in need. So, I think it is something that this Commission ought to address in a very real way, and I know they would be interested in doing that.

MS. VICKERS: Just one more thing. There are a lot of obvious major things that can be done, but I think there are obviously some simple things that can be done, such as, if a lien is placed on your house, that you are notified. If you are part-owner of a piece of property, I think you should be notified that a lien is placed on your house.

MS. SEHAM: Even before that, we have discussed in Commission meetings the thought of recommending an appropriate requirement, that if credit is extended with the house as collateral, that this not be done without the written permission of the spouse. Being informed that the lien is on your house is a little late in the game. If you had not been a party to this extension of credit, why should you be responsible for the creditors going out to your house?

MS. VICKERS: Exactly.

MS. SEHAM: Would you recommend that that be one of our recommendations?

MS. VICKERS: Definitely.

MS. SEHAM: Another suggestion that we have had is, creditors be instructed to look at the credit record in a spouse's name or a former spouse's name, if it can be demonstrated that the person who is applying for the credit was partly responsible for those payments made and for that good record.

MS. VICKERS: I had opened an account. I paid for it. I had my own bank account at that time. I went out to Channel Lumber, and somebody came up to me and said, "Your card has been discontinued." It was always in my name and paid on my account. The man came over and said, "What's the matter, honey? Are you and dad having problems?" Of course today, we would have a real scene over that comment. Those days, I was less assertive. This is the kind of attitude. There is no effort made to find out if the woman has any wherewithal. Or, let us say she does own half the house, why can't part of that house be used as collateral for her to get some money to pay the phone bill, or whatever? There are people with literally no money, and then the phones are cut off and they want you to put up $100.00.

MS. SEHAM: I understand. Since the early '70s, we have had both State and national legislation that permits a spouse to ask that the credit rating be reported in her name as well as her husband's name.

MS. VICKERS: I know that.

MS. SEHAM: Not everybody has taken advantage of that. It has to be requested. It has to be a written request.

MS. VICKERS: But you see, what they do is, when that comes up, let's say you have it on your husband's credit. Now let's say the credit card is up this month, they don't renew it. They ask you--

MS. SEHAM: What I am asking you is -- we are trying to get specific recommendations -- it is true that the law, as written, is not always enforced, but at least what we can do is try to get the law written as helpful as possible, and then, of course, we all would have to be very vigilant as far as enforcement is concerned. Would you

recommend that we require creditors to consider the credit record of the spouse or former spouse when it can be demonstrated the spouse applying for credit has had something to do with the fact that these payments are made, even if the credit rating has not been reported in her name? Is that something you would recommend?

MS. VICKERS: Yes, I think so. The only thing that worries me about that is, it has to be covered that they could then say that the man had a lot of debts, he had a bad credit rating. That will fall over on the woman, too.

MS. SEHAM: But this is something that would be at the request of the applicant, so that she would perhaps be able to control whether she requested that or not.

MS. VICKERS: I would be glad to write out and give you more suggestions on credit. There really has to be some threshold for women who are suddenly standing there with children with absolutely no money, not even for a telephone. There has to be some system set up to enable these women to get on their feet.

MS. SEHAM: Yes, we would appreciate your written suggestions. Thank you very much.

SENATOR LIPMAN: Thank you very much, Ms. Vickers. At this time, in order to clarify some thoughts, I will call on Verice Mason. The Public Advocate's office has been studying this problem of credit. Perhaps we will be able to get a little bit of clarification.

V E R I C E M A S O N, E S Q U I R E: Thank you so much, Senator Lipman and other members of the Commission, for letting us speak today. My name is Verice Mason. I am an Assistant Deputy Public Advocate with our Division of Public Interest Advocacy in the Department of the Public Advocate. I am here today on behalf of Joseph H. Rodriguez, the Public Advocate of New Jersey. We are particularly interested in one of the four issues before you today, which is whether or not a lender may ask an applicant's marital status on a loan application.

We particularly appreciate the opportunity to come before you, because we have so long supported your role as a public body, which is designed to review State laws to ensure that they are free

from discrimination and comport with contemporary standards of equality. We have participated in the work of the Commission on several prior occasions through testimony at these public hearings. We consider such opportunities for interested members of the public to present their views on State laws as critical to the elimination of all vestiges of discrimination in New Jersey statutes.

The issues being considered by the Commission today, we believe, require careful examination to ensure that State statutes do not have a discriminatory effect in important areas affecting the daily lives of New Jersey residents.

We particularly appreciate this chance -- as I said before -- to provide our view on one of the issues, which is whether a lender may ask an applicant's marital status on a loan application.

Although Federal law permits an inquiry into marital status where a secured loan is requested, our State law is decidedly more in favor of the State's consumers. New Jersey law currently provides that all requests regarding an applicant's marital status are prohibited. Our Department recognizes that a lender will need to obtain sufficient information from an applicant to protect a lender's rights in the event of a default. Yet, it is our position that a lender may determine its interests in the property, whether it be real or personal, which is offered as security without the need to request marital status and instead, may ask other questions to determine the lender's interests in the event of default. We are, therefore, suggesting that it is inadvisable for a lender to request an applicant's marital status on a loan application.

An examination of this issue, we believe, is particularly timely, for as you know, our Attorney General has recently issued a formal legal opinion on this particular point. He concluded that a lender may make an inquiry as to marital status in order to enable it to protect its interest in the security provided to obtain the loan. In reaching this conclusion, the Attorney General stressed that a lender may not ask about marital status to determine an applicant's credit worthiness. He also strongly recommended that the Division of Civil Rights and the Department of Banking jointly promulgate regulations explaining those situations in which lenders may make

marital status inquiries. As stated above, we believe that a different approach should be taken -- an approach which is more in line with the dictates of our particular State law.

It cannot be disputed -- as many before you said today -- that credit has become an integral part of life in this country today. In our credit-conscious society, all of us have at one time or another borrowed money. In fact, our American economy is fueled on credit. The consumer is urged to buy on credit, and almost every major purchase involves the use of credit. America's puritan thrift ethic has given way to the practice of living beyond or at the limit of one's means. And, because of this new attitude, unfortunately, consumer credit has grown at a phenomenal rate.

The Congress of the United States recognized this, and in 1974, in conjunction with a series of consumer credit laws, enacted the Equal Credit Opportunity Act, which mandates equal credit opportunities for women by outlawing credit discrimination based on sex and marital status. Prior to its passage in 1974 and several amendments of the Act that took effect in 1975, a female applicant requesting a loan could be asked her age, sex, race, marital status, color, religion, national origin, birth control practices and both child bearing intentions and capabilities. Lenders were permitted to make oral or written statements that would discourage a reasonable person from pursuing a loan. It was reported that even if a female applicant were divorced and received no support from her ex-husband, the bank could still request information regarding the husband and establish his credit worthiness as a pre-condition to the applicant's obtaining the loan. Testimony at Senate hearings prior to passage of the Equal Credit Opportunity Act, cited thirteen different types of credit discriminations experienced by women that related to marital status and sex. I have attached these at the end of my testimony for your convenience.

SENATOR LIPMAN: Excuse me. Do we have copies of that?

MS. MASON: Yes, I did provide them to you. One of the stated discriminations was that creditors could use credit scoring systems that apply different values depending on the sex or marital status of the applicant. The clear intent of Congress in enacting the

Equal Credit Opportunity Act, was to stop this credit discrimination against women. Indeed, when the Equal Credit Opportunity Act was enacted, it was publicized as a "Woman's Bill" designed to address the problems of women in obtaining credit.

Now that I have provided this brief background on the intent of Congress of its action in the 1970's in the area of credit discrimination, I now turn to what was happening in New Jersey in this regard at that same time.

The law against discrimination which had been initially designed and enacted to outlaw discrimination in housing was amended by the Legislature in 1970. This amendment prohibited discrimination based on marital status, soley in the extension of housing loans. Then in 1975, one year after passage of the Federal Equal Credit Opportunity Act, the New Jersey Legislature, in apparent recognition of developments at the Federal level on this issue, extended this prohibition to all bank loans, not merely those relating to real property. This law, which remains the law today, is N.J.S.A. 10:5-12(i), and prohibits any application form "which expresses, directly or indirectly, any limitation, specification, or discrimination as to ... marital status." In short, any inquiry regarding an applicant's marital status is statutorily prohibited in this State.

Recently, as I stated previously, our Attorney General, upon request by the Division on Civil Rights for a formal opinion, determined that it is not unlawful under the New Jersey law against discrimination for lenders to request an applicant's marital status, provided that such a request is predicated on the valid business purpose of protecting the lenders' rights and remedies. The Attorney General's opinion focused on the need for information about marital status for a lender interested in obtaining an enforceable security interest, creating a valid lien, or passing clear title or waiving inchoate rights to property. In formulating his opinion that marital status inquiries were permissible in these situations, the Attorney General pointed to the Federal Equal Credit Opportunity Act, and similar to New York state.

The Attorney General relied on the Federal Equal Opportunity Act in determining that marital status requests may be appropriate in certain instances. The Equal Credit Opportunity Act permits martial status to be asked on an application to protect the creditor's rights and remedies in the credit transaction. Marital status, in those instances, may only be requested by the use of the terms "married," "unmarried," and "separated." This marital status information may not be used to determine an applicant's credit worthiness.

Because the Equal Credit Opportunity Act is Federal law, and thus, could preempt State law, we must examine what the Equal Credit Opportunity Act's intended relationship is to the State laws. The legislative history of the Equal Credit Opportunity Act explains that the practice of credit discrimination is so abhorrent that Federal law ought not foreclose the states from initiating their own laws, unless those laws are incompatible with the dictates of the Equal Credit Opportunity Act. Accordingly, when the Act was enacted, it specifically addressed the problem of State laws different from the Equal Credit Opportunity Act, which is the case here in New Jersey. The Equal Credit Opportunity Act provides that persons must comply with State laws relating to credit discrimination, except to the extent that those laws are inconsistent with the provisions of the Equal Credit Opportunity Act.

The Equal Credit Opportunity Act also establishes a procedure for determining whether State laws are indeed inconsistent with its provisions. The Board of Governors of the Federal Reserve System determines, upon an application, whether a State law is inconsistent with the Equal Credit Opportunity Act. The Board is not permitted to deem a State law inconsistent with the Equal Credit Opportunity Act if the State law provides greater protection to the applicant. Our State statute, which prohibits all marital status inquiries, clearly provides greater protection to the female applicant and, thus, does not appear to be inconsistent with this Federal law.

In 1979, the Board of Governors of the Federal Reseve System did have an opportunity to determine whether the Federal law preempted New Jersey's law, for it was asked to provide what is considered an official staff interpretation in this area. A preemption determination

involves a two-step analysis. First, the Board of the Federal Reserve must determine whether New Jersey's law is inconsistent, and second, whether New Jersey's law is more protective of an applicant. In this instance in 1979, however, the Board did not have to reach the second point, because it found New Jersey's law was not inconsistent with the Federal law.

In examining this question of inconsistency, the Board has, by regulation, explained the factors that one must consider in making an inconsistency determination. The key question is whether or not New Jersey's statute requires or permits a practice that is prohibited by the Equal Credit Opportunity Act. If it does, then New Jersey's statute would be deemed inconsistent. What the Board of Governors determined in its official interpretation in 1979, however, was that it did just the opposite -- that New Jersey's law, in fact, prohibited a practice that was permitted by the Equal Credit Opportunity Act.

At that point, the only other relevant inquiry regarding inconsistency was whether New Jersey's law prevents a creditor from seeking information required for Federal monitoring purposes and for the establishment of special purpose credit programs.

Specifically, Regulation B of the Equal Credit Opportunity Act, which was one of the amendments enacted in 1975, about six months after the Equal Credit Opportunity Act was initially enacted, requires that lenders obtain information on marital status when a consumer credit application involves the purpose of residential real property. However, this Federal requirement is not at odds with New Jersey's law. As the Board stated, the latter phrase of New Jersey's statute -- now, New Jersey's statute actually prohibits all marital status inquiries, but in the latter phrase of that statute its says, "Unless otherwise required by law or regulation to retain or use such information." We think that this latter phrase would permit an inquiry into marital status for compliance with Federal monitoring requirements under Regulation B. In short, the Board of Governors of the Federal Reserve System determined in 1979 that a creditor can comply with New Jersey's statute, which prohibits marital status inquiries, without violating the Equal Credit Opportunity Act. Consequently, according to the Board, New Jersey's law, which prohibits all marital status inquiries, was not inconsistent with the Equal Credit Opportunity Act.

However, three months after the Board of Governors made this initial determination, they suspended this interpretation of New Jersey law with this cryptic comment that, "A number of persons complained to the Board," and questioned "its analysis of the effect of the New Jersey law." At that point, the Board advised that it would study this issue and issue an interpretation later. In recent conversations with John Wood, who is a Senior Attorney on the staff of the Division of Consumer and Community Affairs, on the Federal Reserve Board, we learned that no such study was or has yet to be undertaken by the Board. In addition, we were also advised that the Board has not been asked by our State Attorney General that an official staff interpretation be issued prior to our State Attorney General's issuing his most recent interpretation in this regard.

Thus, our analysis, that of the Department of the Public Advocate, of the question of whether a loan application may request marital status information, has taken into account the "suspended" advice of the Federal Reserve Board upholding the statutory bar on such inquiries in New Jersey as well as the recent New Jersey Attorney General opinion condoning such requests. We also believe that a look at the actions of other states might be helpful. New York's State statute, which prohibits all marital status inquiries, is substantially similar in language to our own State law against discrimination. Yet, New York provided an exception to their general prohibition by enacting a regulation permitting a lender to request an applicant's marital status where an application is made for a mortgage, and a creditor determines that the signature of the spouse is required in order to pass clear title should default occur. Although our State Attorney General relied upon this particular New York regulation in concluding that New Jersey should have a similar exception, our position, as a Department, is that this reliance is indeed misplaced, and that New Jersey's action in this regard should not be influenced by the weaker protections of the New York law.

In looking to the laws of Pennsylvania, we found that its human rights statutes make no reference at all to marital status as a discriminatory aspect of credit, so we as a State, are very far ahead of them. Delaware also has no such reference. However, Connecticut

and Maryland both prohibit marital status discrimination in any application of credit, but the language of their statutes is so different from that of New Jersey, that we think it provides little guidance as to how one should interpret New Jersey's law.

In sum, our research reveals that a state's response to the issue of credit discrimination, based upon marital status, does indeed differ from state to state. Indeed, so much confusion has been generated by the overlap of state laws, that when the Consumer Credit Protection Act was enacted in 1968, Congress decided to change its approach to implementing the Equal Credit Opportunity Act. They decided that they would permit a state to apply to the Board of Governors of the Federal Reserve System for particular determinations on inconsistency, rather than to totally preempt the area by exclusive Federal Authority to the detriment of state laws. In enacting the Equal Credit Opportunity Act, Congress was indeed sensitive to different State property laws affecting credit worthiness and the different needs states might have in fashioning distinctions based upon marital status.

The point of this entire recitation of history is that New Jersey, in determining whether a loan application may request marital status information, should make its own decisions, so long as it does not offend Federal law. Our statute obviously prohibits all marital status inquiries in loan applications and is a strong statement of policy in favor of an absolute prohibition in credit transactions.

Although there exists no legislative history on the enactment of our State statute, the language of the statute itself, clearly prohibits all such inquiries at any stage of the application process. We recognize that that latter phrase of New Jersey's statute, "Unless otherwise required by law or regulation to retain or use such information" may reflect the intent of our Legislature to comply with the Equal Credit Opportunity Act's Regulation B, or with future State regulations to be promulgated. However, we would strongly urge this Commission that New Jersey's statutory provisions on marital status inquiries should be read narrowly to prevent any marital status inquiries in credit transactions. This interpretation, we believe, preserves all of the language and spirit of the legislative

prohibition. The statutory exception will then be properly limited to actions which New Jersey must undertake to comply with Federal monitoring of the availability of credit in residential real estate transactions under Equal Credit Opportunity Act's Regulation B.

In conclusion, it is the position of the Public Advocate that credit discrimination against women is so distasteful in our society, that the State of New Jersey should not permit lenders to inquire about marital status on loan applications. We recognize that lenders might need this information to determine their rights when an applicant seeks credit for which it is offering security and that a valid business purpose might indeed exist in those instances. We suggest, however, that instead of asking an applicant's marital status, other questions could be asked to determine the applicant's ownership interest in the property, because that is what is really an issue.

We suggest the following questions: One, does anyone else have an interest in this property? Two, what is that interest? And three, who is the other interested individual or individuals?

We submit, however, that there is no valid business purpose for directly asking about marital status.

We understand that our suggested approach on this issue is not consistent with the position taken by the Attorney General in his recent opinion. He would permit a lender to make marital status inquiries based upon regulations to be promulgated, governing the situations in which lenders may request marital status information and specifying procedures to be followed. In contrast, our position is that marital status information should never appear on the loan application or be inquired into during the loan application process, except as required by Federal law. Instead, other questions may be asked, which will provide a lender with all pertinent information should default occur.

We appreciate this opportunity to present our view on this issue this morning. The Public Advocate has requested that I advise the Commission that we are willing to aid you in any way in reaching a final resolution on this particular issue, because we deem it to be of great importance.

SENATOR LIPMAN: Thank you very much, Ms. Mason. We appreciate your extensive testimony. May I clarify a little by asking a question?

MS. MASON: Certainly.

SENATOR LIPMAN: Although the Public Advocate's office wishes a different approach taken toward the questioning on bank applications for credit, you would not, totally, disagree with the Attorney General's ruling?

MS. MASON: We disagree with his ruling, insofar as it permits any marital inquiries at all. We recognize that he would limit those instances in which marital status inquiries could be made. He would limit those instances to times when the applicant is seeking a loan for which they are providing collateral, and that collateral usually involves property. However, it need not always involve property. In the instances, however, where it does, we recognize that the lender's rights must be protected and that some action must be taken to protect those rights. Our position, however, is that other questions may be asked. Our only concern about promulgating regulations is that possibly, if we just take the position that indeed marital status inquiries are prohibited, other questions could be asked on the application form, which could then give the creditor the opportunity to obtain the information which it needs, should default occur.

SENATOR LIPMAN: It would scarsely be the case that banks would have different applications to hand out to women who are seeking loans on property. You see, if we did not insert a different set of questions, which would get the information about credit worthiness that the banks needs, then it would seem to me that if loans were to be made for other reasons, the bank would have to have different sets of applications to elicit the kind information they want.

MS. MASON: Well, quite frankly, Senator Lipman, our understanding is that many banks do have separate applications.

SENATOR LIPMAN: Oh, they do?

MS. MASON: Yes.

SENATOR LIPMAN: I was afraid of that. I was afraid you were going to tell me that.

MS. MASON: What I mean is, there are some sample bank forms that appear in the regulations regarding the Equal Credit Opportunity Act. They show different kinds of applications, usually those for one that is offering security of collateral, and others when you are not offering security, that kind of difference.

What we are stating is, we recognize that there is a need to get certain information to the lender. However, we think that marital status itself should not be asked, that other questions may be asked on the application. Our concern is that we stick as closely as we can to the dictates of our statute, and yet, recognize and respond to the concerns of lenders.

SENATOR LIPMAN: Ms. Seham?

MS. SEHAM: Thank you. I am going to ask you questions similar to the questions I asked Mr. Winard. I have seen pre-employment applications, which have some questions in a box in the middle saying, "You don't have to answer these questions if you don't want to," and, "These are only for statistical purposes." They ask you in that box all of the questions that are prohibited by the law against discrimination. If you don't answer them, you are telling them something, and if you do answer them, you are giving them information that could be used for discriminatory purposes.

It seems to me that the questions you propose here, although they may be necessary to the bank, still reveal marital status, even though they are not put in those terms. I wonder what you think of the suggestion we discussed earlier, about a kind of bifurcated process, that the credit worthiness be determined first, and perhaps even on that application, the applicant can be told -- if you are offering collateral in which someone else has an interest -- "We are going to need to know who that other person is, after we have determined your credit worthiness." and then, when the credit worthiness has been determined, then the question about anyone else with interest in the property be asked, even these questions which are not stated in terms of marital status, but would still reveal marital status.

I'm not going to ask you for an opinion now, because you probably have to think about it. I think we would be very much interested in the opinion of the Department of the Public Advocate of

that kind of transaction, whether it would be so cumbersome that the banks and credit companies would totally reject it, or whether there is already at two stages into which this can be incorporated.

MS. MASON: Well, your question really does relate to, at what stage of the application process can one inquire about marital status? My understanding of that is, that the earlier one finds out the marital status, the more likely there may be some type of discrimination. So, of course, we would prefer that that information not come out at all until at least a determination of credit worthiness has been made.

However -- I should add this -- our Department has spent a lot of time speaking with persons who are knowledgeable about the Equal Credit Opportunity Act and how these kinds of things work. We were, indeed, concerned about the mere fact that marital status can even be requested, must be requested by Regulation B, when the transaction involves the purchase of residential real estate. We were very concerned that that information would then nullify anything that we were trying to say here today.

What we were advised, and in discussing this in detail, what conclusion we have come to in that regard is, first of all, Regulation B provides that marital status must be requested, but it does not have to appear on the application form; it can be on a separate form that is keyed to the application. That is the way many banks actually handle it. Also, that the individual who is necessarily taking down the information that the applicant is giving for the loan purpose, would not necessarily be the same individual making the determination as to who receives the loan.

So therefore, my point is, it does not necessarily have to appear on the application in a box, "What is your marital status?" and "This information will not be used to determine credit worthiness, but will only be used for Federal monitoring purposes." It does not even have to appear on the application. So, in that regard, we can, at least, try to get away from that.

As a matter of fact, John Wood, with whom I spoke at the Federal Reserve System, thought that that was a good idea. They had some particular concerns, because women are not sufficiently

knowledgeable about the dictates and the mandates of the Equal Credit Opportunity Act. They felt that if it did not appear on the application, possibly, then, women would not believe that it would be an issue in the determination of credit worthiness. They said maybe it is a very good idea that you can suggest these alternative questions, and therefore, the applicant will then begin to understand that marital status is something that should not be asked and should not be part of the application process.

I would also like to add that there is a problem with marital status inquiries and how banks obtain that information. First of all, it is not illegal for an applicant to just state, "I am married." That, of course, can have whatever impact it does. In addition to that, a credit report can state on it that an applicant is married. Therefore, the bank has obtained that information and in no way is it illegal. However, that goes back to what I was saying previously, about trying to not have it on the application, so that as much as possible, you try to steer the lender away from that kind of information. So, in that regard, I wholeheartedly agree, and I think our Department would agree, that we would like marital status inquiries not to be on the application at all, and if it has to come out, please let it come out after a determination of credit worthiness has been made. We would opt for these three questions, which we think that as women become more knowledgeable, can be answered without necessarily divulging one's marital status, especially if women have different last names from their husbands or whatever.

MS. SEHAM: Thank you.

SENATOR LIPMAN: I would like to introduce Assemblywoman Perun, who is also a member of the Commission.

ASSEMBLYWOMAN PERUN: Good morning. Ms. Mason, I have a problem here. The questions here, to use someone else's terminology, seem like a little bit of window dressing. I know you did not intend it to be that way. We are in a very delicate area, where it is very difficult to devise the terms which we can apply to an area, because frankly, if you take a woman who wants a loan and someone says to her, "Does anyone else have an interest in this property?" She says, "Yes. My husband?" Okay? So, now you know her marital status. In other

words, the question really elicits that which, indirectly, we are not asking for directly. Doesn't it really elicit that same type of information? She says, "Sure, my husband?" So, where are we? To me, it is just a matter of taking words and putting them in another form. They come to the same end. And not unless you have pre-education of women before they go in for a loan.

MS. MASON: I was going to say, at some point, let's not kid ourselves. We are really trying not to deal in semantics. We recognize that as a problem. But, we believe if you do not have the marital status inquiry on the application, that is the first step toward trying to educate the female. We cannot go out and educate everyone over nine. There is no question about that.

ASSEMBLYWOMAN PERUN: Ms. Mason, believe me, I am not trying to put on-- I approach you very respectfully, because I realize that you have thought about this for a long time. I am merely addressing these questions because we are trying to reach a certain objective. We want to help each other, I am sure. If I can, I would be very happy to. I think the language here, in these questions, simply leads to the same end of eliciting the marital status. I'm not making a judgment about whether that is good or bad. That is why I say I have a little problem.

MS. MASON: Well, I don't think that it always would elicit that information. I think it depends on the--

ASSEMBLYWOMAN PERUN: Or the man I live with.

MS. MASON: I think it depends on the sophistication of the applicant.

The other problem is, indeed, in all instances, regardless of whether the woman is married or not, she may not own the property with her husband. So, in those instances, it would definitely be preferrable not to even have marital status discussed at all on the application.

ASSEMBLYWOMAN PERUN: All right. The thing I threw out kind of jokingly just a moment ago, they ask you, "Who else has an interest in this property?" And you mention, let's say, some male's name. They say, "What is his address?" And it is the same as the applicant's address. Then we have some bigot there who may say, "We don't like

this kind of thing." We do know that banks are very conservative and lending institutions are very conservative. They may use this as a wedge-- Now, that is another collateral issue, and I don't want to get involved in that. We want to stick with the matter of the husband.

I agree, there is an education process involved in this type of questioning, and I do agree it is going to be a long time before we can educate women out of their own naivete, which is one of the biggest stumbling blocks we have here. We can espouse and profess as much as possible, but unless a woman develops what we are trying to do here, she is still going to go in and blow it.

MS. MASON: Well, she may or may not. I can appreciate that sentiment. I can especially appreciate the practical problem that you are discussing, which is whether or not a woman is just going to blurt out the information.

I will say this however, we feel that these three questions are at least an alternative. They are within the dictates of our State law and they do not require further elaboration by regulation.

I might also add this: We could have taken a relatively hard line approach and stated that the bank should not ask any information relating to marital status or pose these three questions. At some point, to understand its interest, it is going to do a title search of the property.

ASSEMBLYWOMAN PERUN: Exactly.

MS. MASON: Usually, however, that is done at the last stage of the application process, and we felt that making that kind of a recommendation would really be burdensome to the banks, and also time-consuming to the applicant because it would slow down the application process. We were concerned that it would also engender an antagonistic relationship between applicant and lender that is unnecessary. So, we therefore felt that the questions should be asked at some stage of the application process. As we stated earlier, we would prefer it be asked as late in the process as is necessary.

My point is, yes, indeed these three questions are not direct ways of asking marital status. Actually, what it does is, allow a direct way of determining the applicant's interest in the property. If the applicant, unfortunately through our inability at this point to

educate all of the women in this country, is sufficiently unsophisticated that she blurts out the information, we cannot really deal with--

ASSEMBLYWOMAN PERUN: Prevent it.

MS. MASON: We can't prevent this, but we can at least try a less discriminatory way of eliciting the information.

ASSEMBLYWOMAN PERUN: Thank you.

SENATOR LIPMAN: Excuse me. I just had a question about your appendix. You have cited thirteen reasons why it is difficult for a woman to get credit, thirteen discriminations.

MS. MASON: Right. These were particularly set forth when the Congress held its hearings on the issue of credit discrimination of women, prior to the enactment of the Equal Credit Opportunity Act. The Equal Credit Opportunity Act specifically prohibits discrimination in credit based on sex and marital status. And, in 1975, when it was amended, it extended that relative to race and all of these other factors. But, they started with sex and marital status, because they felt that those were the most important discriminations that were being effectuating against women in the area of credit.

SENATOR LIPMAN: In the area of credit. These discriminations no longer apply.

MS. MASON: Well, I can't say that. I can only say that one would hope they no longer apply, and that the purpose of the Equal Credit Opportunity Act was to try to overt these types of discriminatory actions. There is still the recurring problem, of course, that women face in credit transactions. I think that is why we are hoping that you will more or less decide that there should be a general prohibition in this State on asking marital status inquiries, and that we try to stick as closely as possible, yet, understanding the lender's rights and remedies, to the dictates of our Legislature. We think that our Legislature was indeed aware of these kinds of problems when they enacted the amendment to our State law in 1975, and therefore, we would hope that you would go along with those dictates as much as possible - not require that marital status be asked on a loan application.

So, in short, Senator, I'm not sure that these discriminations are necessarily out of the window. As a matter of fact, I think what the staff members of the Federal Reserve System were saying to me was, as much as possible, the less a lender knows about marital status, the less likely he will be to discriminate on that basis.

SENATOR LIPMAN: It would seem that he is a special case in and of himself. For example, number seven, where the creditors apply more strict standards to married applicants where the wife, rather than the husband is the supporter of the family. That is a bit of an upset.

MS. MASON: Well, I would think that when the Equal Credit Opportunity Act was enacted, they tried to outlaw some of these types of discriminatory actions. In addition, they were particularly concerned at that time about credit scoring systems and how they were used to discriminate against women. I didn't really talk about that today, because it really wasn't pertinent to the issue.

SENATOR LIPMAN: Are there any questions? Mr. Wolin?

MR. WOLIN: I guess the only question I would have at this point is, how would you balance your position against the considerations that were raised by Ms. Vickers, where one spouse may have no knowledge of liens that have been placed against the house, and so forth. Under your system, how would you offer that kind of protection?

MS. MASON: For the lender?

MR. WOLIN: For the other spouse? In other words, if we are going to ask the bank to notify a spouse when a lien is placed against the home, or whatever, they have to know exactly what the marital relationship is. So, I think you are looking at it from two sides here; one, we want to protect one spouse, and one, we want to protect her from the creditor.

MS. MASON: You'll have to ask that again. I'm not sure I understand what you are asking.

MR. WOLIN: Okay. We, the bank, cannot ask marital status to discriminate against the wife, husband, or whomever, in obtaining the credit, and then we say on the other side, you have to notify a spouse if you are going to place a lien against the house. How do you balance

those two considerations? One, you say you can't know, and the other you say you must know.

SENATOR LIPMAN: Verice, perhaps you were not here when we had testimony on what would we do if in a separation or divorce the spouse who was left in the home did not know there was a lien put on the house.

MS. MASON: So, your concern is that if there is no inquiry as to marital status, that the bank will not be aware-- The bank will be aware of the marital status of the applicant. Is that what you are saying, because the lien will be placed--?

MR. WOLIN: No. What I am saying is, we are asking the bank to notify a spouse that a lien is being placed against her property, which means immediately, the bank has to know whether it is the husband and wife who own it, because we may not immediately see it as a husband and wife in the form of ownership.

MS. MASON: You cannot see that from the title search?

MR. WOLIN: Right. In other words, whether it is "tenancy in common" as opposed to "tenancy by the entirety." It may not always be clear as to who exactly owns the home. In other words, if a couple was first living together, then if John Doe and Mary Roe later became married, they would own the property as "tenancy in common." The title search would not tell you that they are husband and wife; yet, we are asking you to notify a spouse if a lien is being placed against them, or at least under Ms. Vickers approach, you are being asked to notify a spouse of a lien.

MS. MASON: I don't know what I would answer to that. For some reason, it is not sinking in.

MR. WOLIN: I'm sorry. I didn't realize that you weren't here when Ms. Vickers testified.

MS. MASON: I'm really not sure I understand that, and I wouldn't feel comfortable commenting on it.

MS. BRONSTEIN: I think I can answer the question. I think, to solve the problem for any jointly-held property, the other joint owner should be notified of any liens. It shouldn't matter what the relationship between the two parties is, whether it is tenancy in common or tenancy by the entirety. If there are two people who

jointly-own the property, they should each be informed of any liens upon the house.

SENATOR LIPMAN: Excuse me. That was Estelle Bronstein, who has been studying with us. Assemblywoman Perun?

ASSEMBLYWOMAN PERUN: And then we get to the issue that Mr. Wolin brought up, then there has to be some form of inquiry. That would be elicited by the forms of the questions which Ms. Mason presented here. "Does anyone else have an interest in the property?" So, it is either at some stage when two people are living together, or later, when they are married, if they do marry. There is elicited at that time -- has to be elicited -- a marital status. This is the dichotomy with which I confront myself as well, because there has to be a disclosure, then, according to what Ms. Vicker says, otherwise, one of the partners is blind and suddenly awakens to the reality one day that there is a lien against that property, either held as tenancy in common or by the entirety. Frankly, I don't see how anyone could tamper with that kind of lien where there is a tenancy by the entirety, without the disclosure of marital status. That kind of tenancy arises only in a marital situation, anyway. So, if you say, "I own property with someone else by the entirety," well immediately, one knows there is a marital relationship there.

Let me put it this way -- I apologize to all of the knowledgeable women around, but I must state that there are a lot of women who don't know if they own the property, "Oh, I own the property with my husband?" but they don't know the legal terminology, which really puts into gear that mechanism for understanding what those interests are. They both totally own that property at the same time, which is different from the matter of tenancy in common, who own one half of whatever the partial amount of the property is. So, I think somewhere along the line, this is a disclosure that has to be made under certain circumstances. That is why I said I have a problem with this. I am not exactly making a judgment about the goodness or the badness of even the Attorney General's determination. Frankly, my interest is not so much from the lender's point of view, although I know this is a very important issue. Certainly, the lender has a right to be secure in his or her interest. On the other hand, I feel that

the disclosure, or non-disclosure, should be to the benefit of the debtor, or the would-be debtor. I think there has to be some balance here somewhere along the line, where yes, it will be disclosed, or no, it will not, but under certain limited circumstances. That language I will leave to the experts.

SENATOR LIPMAN: All right. Verice, if there are no more questions, thank you very much for this opinion from the Public Advocate's office. If we need further testimony from you or further information, we hope that you will remain available.

MS. MASON: All right. Certainly.

ASSEMBLYWOMAN PERUN: Thank you very much.

SENATOR LIPMAN: Thank you. I would like to call on Danielle Reid, a counselor at law.

D A N I E L L E R E I D: Senator Lipman and members of the Commission, good afternoon. I am Danielle Reid, attorney with Evans, Koelzer, Osborne, Kreizman & Bassler in Red Bank. I practice in real property litigation and probate law.

I would like to speak about two parts of the probate law. One is the Elective Share, N.J.S.A. 3B:8-1, and the other is the Dower and Courtesy Statute, N.J.S.A. 3B:38-2.

This is a very legal-technical subject, but I will try to talk about it in plain English, not "legalese," and I will try to explain first what an elective share is.

It means that a spouse may choose between what that person is entitled to under a will, or, if there is no will, under the law of testate succession in New Jersey, or, one-third of the augmented estate.

It turns out that in New York, where they used to have these elective shares, people used to give away everything they owned right before they died, and the spouse inherited nothing. It might say, "I give everything to my spouse," but there was nothing to give. So, they brought back into the estate banks, that which was given away in the last three years or so. There were certain requirements for this. This was called an augmented estate, and the Elective Statute was primarily to help women as surviving spouses, frequently, to inherit something instead of nothing.

Elective Share Statutes were passed in Ohio and New Jersey as long as fifty years ago. They also exist in Michigan, Pennsylvania, Alabama; and, the Uniform Probate Code, which is suggested for enactment throughout the country, also has this. Usually, there are two or three grounds for disqualifying a surviving spouse; in other words, saying that a spouse may not get this elective share. Those grounds would include: murder, a judgment of divorce; bigamy, incest, adultery, or willful desertion.

To give you an example of how far things can go on the ground of abandonment of desertion, in New York, someone tried to disqualify a spouse who had a brief vacation before the spouse died.

New Jersey adopted many parts of the Uniform Probate Code in 1978. However, the Elective Share Statute was not enacted until 1980. It was first introduced in 1972, and was amended many times, and there were two public hearings in 1973 and 1974. The Senate Judiciary Committee statement to the bill says that this New Jersey statute is based on the Pennsylvania statute. I know, however, that Pennsylvania only has three grounds for disqualification. Those are: murder, willful desertion, and non-support.

The New Jersey Elective Share Statute differs greatly from the Uniform Probate Code and other state statutes, because there are fourteen grounds for disqualification. The New Jersey statute says that if a married person dies living in this State, after February 28, 1980, the surviving spouse has a right to an elective share of one-third of the augmented estate, if -- this is the big "if" -- at the time of death, the spouses had not been living separately under a judgment of divorce, or, under circumstances which would have given rise to a cause of action for divorce or annulment.

Under New Jersey law, N.J.S.A. 2A:34-1-2, these fourteen grounds are the following: bigamy; incest; impotency; lack of capacity, possibly because of influence of drugs, duress, or fraud; marriage to a person under eighteen; general equity; adultery; willful desertion; extreme cruelty, which could be either physical or mental; separation; voluntary addiction to drugs or habitual drunkenness; institutionalization for mental illness; imprisonment; and deviant sexual conduct.

I have some examples of situations from actual reported cases in New Jersey or other jurisdictions to explain what these grounds mean. I would like you to imagine this in the context of a death proceeding.

Bigamy: The decedent was married during the prohibited time after a spouse's earlier divorce. This was felt to be bigamy. The decedent died in Viet Nam, and his parents claimed the marriage was void and the estate should go to them, and nothing should go to the spouse.

Incest: A decedent married his niece in a foreign country and later moved to this country in a state where such a marriage was prohibited. The relatives tried to say the spouse should inherit nothing.

Impotency: Decedent wife was still a virgin after three years of marriage, and the presumption of impotency was not overcome.

Fraud: Decedent learned shortly after marriage that the spouse had concealed the fact of heroin addiction when they were married. This was considered to be fraud as to the essentials of marriage, that is, sexual relations.

Age: Decedent was only sixteen upon marriage to a spouse in another state, and later moved to New Jersey where the age is eighteen. This spouse could lose the elective share if the decedent was under eighteen when he or she died.

General equity: Decedent's learned after marriage that a spouse's claim of being a practicing Orthodox Jew was incorrect, and the spouse did not intend to follow the practice. This was considered the essentials of marriage, and a divorce would be appropriate forfeiture as possible.

Spouse committed adultery acting upon decedent's suggestion and acquiescence.

Desertion: Spouse refused to have sexual relations with decedent, but continued to live in the same house.

Extreme cruelty: Spouse had a homosexual relationship or spouse insisted on decedent's use of contraceptives. This entitled people to divorce and it could forfeit an elective share.

Spouse was habitually drunk or addicted to a controlled dangerous substance, such as marijuana.

Spouse was institutionalized for paranoid schizophrenia and was released for week-end visits as part of rehabilitation. This was grounds for divorce and could be grounds for forfeiture of elective share.

There is no case yet on deviant sexual conduct, but an article in the New Jersey Law Journal suggested that this would include acts with a spouse and member of the same sex, animal, or oneself. Under New York law, this constitutes any form of intercourse with physical force.

These are the fourteen grounds that would disqualify a survivor from taking an elective share. I submit, that would include many people.

Now, there are several substantive and procedural problems that I can see with the Elective Share Statute as it exists.

First of all, the Statute covers no-fault divorce. A party who does not seek divorce on religious grounds, or for hopes of reconciliation, could be disqualified from receiving a share. The effect is that the surviving spouse could not get the elective share, and the surviving spouse could not get equitable distribution under the divorce law.

Equitable distribution is available only if a divorce proceeding was started and one party to the marriage died just before judgment was entered. It might seem to people that death during divorce proceedings is unlikely, but this really has occurred in New Jersey in reported cases, involving equitable distribution and automobile accident policies. There are no reported opinions on the New Jersey Elective Share, as far as I know. The effect, therefore, is that the Elective Share Statute rewards someone who institutes divorce proceedings and penalizes the person who does not institute divorce proceedings, either in hope of reconciliation or on religious grounds.

Secondly, the Elective Share Statute really conflicts with the Annulment Statute for incest. That Statute forbids inquiry after the death, into the validity of the marriage. However, the Elective Share Statute really forces an inquiry into the validity of the marriage, and it would probably pre-empt the Incest statute because it was more recently enacted.

Third, the Elective Share Statute encourages litigation by a person who wants to increase the share of other beneficiaries in the estate. Based on my study of existing cases, this person could be a greedy relative, a hostile in-law, a step-child, a lover, even a school, charity, or private institution.

Fourth, the Elective Share Statute may encourage perjury in probate proceedings. Several law review authors have complained that perjury existed in divorce proceedings.

Fifth, the Elective Share Statute is a possible due process violation, because neither spouse seeks the remedy of divorce or annulment, but an outsider to the marriage does seek such remedy. New Jersey cases have upheld no-fault divorce, because they say the public interest in granting divorces is in preserving viable marriages, while permitting spouses to remarry if the marriage is not meaningful or valuable. The Elective Share Statute does not serve this public interest, because one party to the marriage has already died.

Sixth, the Elective Share Statute is a possible due process violation, because it is based, simply, on the "cause of action." This is a technical term, which means a ground exists. It does not refer to the usual matrimonial defenses, which are called, "right of action." A court could avoid this problem by construing the word "circumstances" to include the matrimonial defenses as well as the "cause of action." This Statute may also conflict with statutes on wrongful death awards, which pass to beneficiaries according to interstate succession. That means, whether the person is technically a spouse, regardless of whether divorce grounds exist.

A spouse may be disqualified from receiving an Elective Share, but could receive his share if they contest the will and say that the spouse was omitted under the decedent's will. There is a statute, passed in 1979, about omitted spouses. It requires that a spouse prove the following three things: First, that the will was written after September 1, 1979; second, that the marriage occurred after the will was written; and third, the will or other evidence, doesn't indicate that the testator intentionally provided for the spouse outside the will.

Also, the Elective Share may conflict with family allowance and expenses during a will contest. In order to get family allowance, a surviving spouse has to prove only that there was a ceremonial marriage and that the spouse and decedent were living together. There is no reference to grounds for divorce.

The Elective Share Statute may have different consequences from Social Security benefits. Those statutes require only that marital status be looked at and that there is no court decree of divorce. They may technically be married, no reference to grounds for divorce.

There is also a difference from Workers Compensation Statutes. That requires dependency. It does not look into living arrangements. It also raises procedural problems, because a surviving spouse has to file a complaint for an elective share only within six months of the date of death. If you don't do it within six months, you lose your right to an elective share.

The spouse could file something that is called, "An order to show cause returnable in twenty days." If the estate, through its personal representative, the executor or administrator wants to disqualify the spouse, the estate has only twenty days in which to gather information to support its disqualification, and also to estimate the value of the augmented estate. This puts a burden on the estate, but it also puts a burden on the spouse because he or she does not know what assets would be in the augmented estate. It is difficult to compare what you would get under the elective share compared to what you would get without that under the will or under the law of New Jersey.

Finally, another procedural problem involves the evidence rule that replaces the dead man's statute. That rule says that any statements by a decedent must be proven by clear and convincing evidence. This is a higher standard than preponderance of evidence. Therefore, a surviving spouse must prove that the matrimonial grounds did not exist by this higher standard. It is also not clear who bears the burden of persuasion, the estate or the spouse.

I would also like to note that a personal representative of the estate has a statutory duty to settle or distribute an estate

expeditiously or efficiently within the best interest of the estate. He or she may compromise a claim for an elective share, especially where tax consequences, litigation costs, or litigation delays are significant, and the conduct of the surviving spouse has not been egregious.

I have a few recommendations about amendments to the Elective Share Statute. At the very least, I recommend that the Legislature remove the ground of divorce based on no-fault separation. The public hearings in 1973 and 1974 showed a concern for disqualifying a spouse who is guilty of some misconduct. There is sometimes no misconduct whatsoever in a no-fault divorce, and a person who did not seek a divorce should not be penalized by losing both the elective share and equitable distribution.

An even better amendment would be to narrow the grounds from fourteen to three or four, such as: judgment of divorce, murder, willful desertion, and non-support.

The phrase "circumstances which would have given rise to a cause of action for divorce" should be changed to "circumstances which would entitle a decedent to divorce." This would permit matrimonial defenses. It would look more at the whole picture of things, not just whether a ground existed.

The next statute I would like to discuss, briefly, is Dower and Curtesy.

New Jersey did not adopt the Uniform Probate Code suggestion, which said, only, "all rights of Dower and Curtesty are abolished." They wrote a very long statute. It says, "Dower and Curtesy is abolished only for real property that a married person owns after the date of the statute and it allows a right of joint possession during marriage.

The first question is whether this statute is retroactive. That means whether it covers property owned before 1980 or after 1980. The statute uses a very technical legal term, "property of which a person is seized," which means property that a person owns. On its face, the statute seems to apply to property already owned and owned in the future. However, the Senate Judiciary Committee statement that appears after the statutes says, "This applies to property only

acquired after the date of the statute." There is confusion about whether this is retroactive or prospective.

Secondly, the relationship to the Elective Share Statute is not clear. Originally, the Dower and Curtesy Bill said nothing about the elective share. The Senate Judiciary Committee, in 1979, amended this statute to say, "This does not apply where the surviving spouse doesn't get an elective share." In other words, you would get either Dower and Curtesy, or the elective share - not both. The next month, the Assembly concurred in the Senate Amendment. However, the next month, on the very last day of the legislative session, the Senate unanimously rescinded the Amendment. The Committee statement had said the Amendment was supposed to emphasize that the rights were abolished only when the surviving spouse was going to get an elective share. The recision of an emphasizing amendment confuses the relationship. The problem is, a spouse may be entitled to no elective share, and at the same time, get no Dower and Curtesy, so, there would be no interest in living in the matrimonial residence. The spouse, if disqualified, would get nothing.

Third, the Dower and Curtesy Statute creates something called a right of joint possession during marriage. The question that title insurance companies raise is, whether the spouses have a right of joint possession; for instance, for an entire apartment complex they own, if their principal marital residence is only one unit of that apartment.

Therefore, I would recommend the following amendments to Dower and Curtesy: First, replace the phrase, "be seized" with "become seized." To clarify that, the statute only applies to property acquired after 1980.

Second, to reinstate the rescinded amendment that clarifies Dower and Curtesy as abolished only when the surviving spouse is going to get an elective share.

And third, that the right of joint possession during marriage includes only the living unit used as a principal marital residence, not all the units in a multi-unit dwelling.

Before the Elective Share Statute was enacted, many writers and women's groups supported the elective share. For example, there was an article in the New Jersey Lawyer magazine that supported this.

They supported it because they said it was fair to surviving spouses who might be disinherited by a decedent's will.

In my research, I found no articles that analyzed the actual grounds for forfeiture, these fourteen grounds. I would like to note that these disqualification grounds on their face do not discriminate against women, but in my experience with the estate administration, and in the experience of other attorneys to whom I have spoken, the surviving spouse is frequently a wife. Among the estates that are being probated today, there may still be many traditional marriages in which assets are in the name of the husband, whether they are business assets or real property, etc. If the estate's personal representative can show that any ground for divorce existed, the surviving spouse may get nothing. Until the time that property is more evenly divided between the spouses, I think the Elective Share Statute will cause harsh results for many women, who may be unaware that they may lose the Elective Share Statute if they don't hurry up and bring a divorce proceeding.

I hope this testimony will help the Commission in pointing out some of the problems and in suggesting some solutions to those problems.

SENATOR LIPMAN: Ms. Seham?

MS. SEHAM: I don't have any questions. I want to thank you. I think that is a very helpful analysis. As you went through your analysis, I was going to ask what do you recommend, but you did. We have a lot to digest. Thank you very much.

MS. REID: Okay. Thank you.

MS. KIERNAN: I just wanted a clarification from you, Ms. Reid. I agree with Ms. Seham. I think your testimony was excellent and very, very helpful.

Your suggestion in the no-fault, the arrangement where somebody would have the grounds for divorce, you suggested that be changed to, instead of "lead" to a divorce, "entitled" to a divorce.

MS. REID: Right.

MS. KIERNAN: Wouldn't the separation of the parties fit into both categories, if they lived separately for any length of time? It

would be "entitled" to, as well as could "lead" to divorce. I was wondering how that kind of situation could be handled?

MS. REID: Well, grounds for divorce, they look at things very superficially, if you look at a clause of action. It doesn't include a right of action. There may be a presumption of irreconcilable differences, which could be rebutted. If you look at the phrase, "cause of action," then you are not allowed to bring in information to rebut the presumption. You would not be allowed to bring in certain defenses to divorce proceedings, some of which have been abolished already by the Legislature, but these are frequently things like connivance, acquiescence, and knowledge, where one party knew of something but sort of gave up the right to bring a divorce action because they were aware of it.

MS. KIERNAN: Okay. So what you are saying is, in those situations, at the time of the death, the surviving spouse would have an opportunity to make clear to the court that this situation, then, existed?

MS. REID: Right.

MS. KIERNAN: It would not be considered to have been in a pre-divorce situation.

MS. REID: Right. I think you should be required to prove that you would be entitled to a divorce, not simply that there would be a reason you could bring to court, but you would actually be entitled to it.

MS. KIERNAN: Thank you.

SENATOR LIPMAN: Do you have a question, Assemblywoman?

ASSEMBLYWOMAN PERUN: No, I don't.

SENATOR LIPMAN: I want to thank you for such extensive testimony and research. There is one thing that seems to be giving us a bit of trouble here, and that is the elective share in the divorce after the death. Would you just explain that a little bit, the reasons for going into a divorce action? This is higher law.

MS. REID: Okay. There are cases in New Jersey where divorce proceedings had started. At sometime while the people were in court, the spouse died. The question was whether the spouse who was living could still get equitable distribution, where you divide up the assets

from the marriage, or, whether because the judgment had not been entered, everything that was in the decedent's name went to the decedent's estate. The cases said, as long as the divorce proceedings were started and there was testimony there, the divorce action would abate -- which means it drops, because you no longer need the divorce proceedings, but equitable distribution claim would continue beyond death. So, the court could go ahead, divide up the marital assets, whether it is 50-50 or 60-40, and then the surviving spouse would walk away with some assets. On the other hand, if a person does not bring divorce proceedings, you can't come in after death and say, "Hey, I forgot to ask for a divorce, because I really want to get equitable distribution." I think it is difficult where they say, "Grounds for your divorce exist. You don't get your elective share, and it is too bad you didn't bother to come to court earlier and bring in divorce proceedings."

SENATOR LIPMAN: Are you saying, then, that the surviving spouse may be able to claim equitable distribution, would be able to claim at least one-half, or whatever the estate is worth, rather than the elective share of one-third?

MS. REID: If divorce proceedings had started, the equitable distribution could amount to more than one-third in the augmented estate. It is something that would depend on the circumstances of each case. The arithmatic is complicated for figuring out what is an augmented estate.

SENATOR LIPMAN: You know the present law, which was changed after some eighteen years in New Jersey, allows one-third of the estate. There have been queries to us about why not one-half? So, what you have actually cited is a case, you have cited cases in which it is possible, under the present law, to get one-half, equitable distribution after death.

MS. REID: If the divorce proceedings had started before death, it would be possible to get a larger amount. But, what is available for equitable distribution may not be exactly the same as what is available for augmented estate. One looks at the time of separation and one looks at the date of death, so, your balance sheet, so to speak, might be different on those two days.

SENATOR LIPMAN: It just seems strange to bring divorce proceedings after your husband dies.

MS. REID: You can't bring it after.

SENATOR LIPMAN: But it has to have been started?

MS. REID: Yes. That's right.

ASSEMBLYWOMAN PERUN: I have just one question just for clarification. What you are suggesting then, is that the statute should be altered, changed, or amended to indicate where one would be entitled to a divorce action, so that that person could come in, other than the elective share, could go for the equitable distribution where those conditions exist that would have entitled one to a divorce proceeding? Is that what you are saying?

MS. REID: No. It was just the words in the statute. It sounds like, if grounds exist, you lose the elective share.

ASSEMBLYWOMAN PERUN: Right.

MS. REID: And I think you should look at whether you are entitled to it. That is a different issue from equitable distribution. The equitable distribution is just an example to show you that if a spouse did go to court, that spouse could get something. And, if grounds for a divorce existed and the spouse had not gone to court to get a divorce, then the spouse might get nothing instead.

ASSEMBLYWOMAN PERUN: Well, you are speaking of the present state of the statute.

MS. REID: Yes.

ASSEMBLYWOMAN PERUN: Okay. I'm speaking of something you suggested before. I'm trying to reason out everything you threw at us, which is marvelous. Whether or not this alteration in the statutes would give an entitlement, rather than in the absence of having initiated a divorce proceeding.

MS. REID: I see what you mean. Changing it to entitled to a divorce, I don't think would have any affect on equitable distribution.

ASSEMBLYWOMAN PERUN: Okay. That is what I wanted to clear up.

MS. REID: I don't think it would have any affect on that. It would mean that if you had any information to rebut a presumption, or you had a defense, you could bring that in. I just think that an

awful lot of people are not aware of the fact that this divorce-type law exists in a probate code. It should not be so broad. It should not cover fourteen grounds. It should be very specific, for very good examples of misconduct, such as murder and desertion - not no-fault divorce.

ASSEMBLYWOMAN PERUN: Thank you.

MS. REID: Okay.

MS. KIERNAN: Just one further thing. I don't think the amenders of this legislation intended the State to be in a position of encouraging people to get a divorce. I think that is what is happening. I think what you are saying is very logical and really should not be public policy.

You do mention that of the fourteen grounds, you think there should be fewer. I think most of us would agree on that. Do you have any specific recommendations for the ones that should hold, or the ones that should definitely be gotten rid of?

MS. REID: All right. I did explain that in a copy of my written testimony. I would say the most common ones are murder, where there is already a judgment of divorce, where there is willful desertion for more than a year, in other words, somebody moved out and lived away for more than a year and did not support somebody.

Some Legislatures around the country feel very strongly about things like adultery, bigamy, and incest, so they throw that in. I don't think that is as significant as murder, judgment of divorce, or willful desertion for more than a year. They would be considered grounds. So, that would leave about six grounds instead of fourteen.

MS. KIERNAN: Thank you.

SENATOR LIPMAN: Thank you very much, Ms. Reid. I would like to call on the Director of the Division of Civil Rights, Ms. Pamela Poff, from the Department of Public Safety.

P A M E L A P O F F: Thank you, Senator Lipman and members of the Commission. I did not intend to appear personally on behalf of the Division on Civil Rights in light of Mr. Winard's indication to me that he was going to appear on behalf of the Attorney General's Office. However, in a phone call with your Executive Director, it was requested that I do make a personal appearance, and perhaps give some brief comments on some specific items that the Executive Director indicated were of interest to the Commission.

First, I am in a unique position because it is my agency that is required to enforce the directive of the Attorney General pursuant to his Formal Opinion No. 7 regarding inquiries into marital status on a lending application. I cannot add anything further to the concerns that have already been voiced by members of the Department of Public Advocate. I am familiar with some of the testimony that Mr. Winard offered this morning, and anyone else who appeared today and indicated that there are still some problems with the comprehension of the Formal Opinion Number 7.

What I would like to bring to your attention, -- and I would like to share with you, not via testimony, but by providing you with copies of a document -- is our proposed credit rules, which are still pending in the Attorney General's Office. They have been pending for awhile. I believe that these proposed credit rules, which will amplify the prohibitions against marital status discrimination in our statute, will--

SENATOR LIPMAN: Excuse me, Ms. Poff, did you bring copies of that with you today?

MS. POFF: Well, I just got the copy of the proposed credit rules this morning from the Attorney General's Office. I will provide each of you with a copy by the end of the day.

I believe that certain specific sections should be brought to your attention. I will do this by merely by citation so that you can refer to them. Section 1.7 regarding the definition of marital status, Section 1.14 regarding the establishment of creditworthiness and questions that a lender may ask in that regard; Section 1.15 regarding when a creditor may ask information about an applicant's spouse or

former spouse; and finally, Section 1.18, which has a general prohibition against a lender who refuses or denies an application for credit solely on the lack of the applicant's credit history or credit rating.

I believe that if the Division on Civil Rights, on behalf of the Attorney General's Office -- in addition to my person input -- could work jointly with the Commission, as well as any other agency or department, such as the Department of Public Advocate, on refining these credit rules and bringing them into conformity with the law against discrimination, and the intentions and directives of the Attorney General, I feel that many of the problems that we have entertained today may be solved. So, I would just like to share that with you, and you will all get copies by the end of the day.

I might add that they are still pending, because apparently there are people in the Attorney General's Office who feel that there are further refinements. Your Executive Director has advised me that these proposed credit rules were not put before the Commission at an earlier date, and they were not under my administration. So, I would be happy to work with you on those refinements, and I would be happy to accept any suggestions or changes from the Commission that would reflect your objectives as I understand them today.

I also have to tell you that I have -- and, I am speaking now for myself as an individual -- a personal interest in assuring that there are not marital status inquiries in the lending situation, which would violate the New Jersey law against discrimination. I am personally going through a divorce proceeding myself, and I am in the process of seeking to obtain credit pursuant to a settlement agreement. I can tell you that I have had my own fears about how a lender would or would not evaluate my credit status as a single person, or about to be a single person, as opposed to being a married individual. So, I certainly have a personal interest in that regard, and I would be happy, as an individual, as an attorney, and as Director on Civil Rights, to assist you in whatever way I can.

Alma also asked me to comment on a couple of other things, and I will take about five minutes of your time in doing so.

SENATOR LIPMAN: Is it going to be on the subject of credit?

MS. POFF: No, not on the subject of credit.

SENATOR LIPMAN: If there are questions for you now about credit, will you take them?

MS. POFF: I'll take them if I can answer them. I don't know if you were advised, but I am in the middle of giving a class on management training. I gave the class a fifteen-minute test, which has now gone into a hour and forty-five minutes. If I could give you my comments now and get the questions in later, I would appreciate it.

The other comments that I had to make were with regard to the Division's support of certain bills which are pending. I don't know the origin of the Commission's interest in this, but I will comment because Alma asked me to comment.

Assembly Bill No. 1015 and Assembly Bill No. 1017 are bills which would amend the law against discrimination, giving the Director of the Division additional enforcement powers to impose penalties and collect penalties, which are otherwise not provided by the New Jersey law against discrimination. We commented on both of these bills quite awhile ago. We indicated our full support for the passage of these bills. I think they are of particular interest to women for several reasons.

In the sexual harassment area, we are finding that the monetary damage awards are small, primarily because women who are terminated go out and get additional or substitute employment immediately. In addition to other areas of discrimination, where many of the monetary damages are small and there is a pattern and practice of discrimination, these bills will allow us to have greater power and impact on the respondent who is violating our law. We will be able to do more in terms of slapping them on the wrists and slapping them in the pocketbooks than we are able to do now.

Right now, unless there is a monetary award, the only impact that the Division on Civil Rights has, in terms of it being a sort of watchguard for the citizens who were discriminated against, is in negotiations for perhaps training programs or publication of a policy, many things of which do not have as great an impact on preventing discrimination again as it would be if we were able to collect penalties. That is Bill No. 1015.

Bill No. 1017 would allow us to collect compensatory damages, which we do now. We collect compensatory damages for complaintants, as well as pain and humiliation damages. We did support the bill because we do feel that if it is a formal part of our law, there will be less of as issue as to whether or not we have the legal basis for collecting those penalties.

The other comment that I would like to make would be with regard to Assembly Bill No. 3739, which we have yet to render a formal comment on. That bill, introduced by Assemblywoman Brown and Assemblymen Gill and Meyer, seeks to add a section on parental status. to the unlawful prohibition section of our statute. Initially, it was the Division's feeling, without a tremendous amount of research -- we are still researching this -- that parental status itself may not be a civil right under our law with respect to guaranteeing housing at least, for the most part, single females with children. Now, for us to support this bill, we would have to ascertain -- and, this is what my Executive Assistant is researching now, if the Commission could assist us, we would certainly be happy to receive your help -- as to whether or not this type of discrimination is something that the law against discrimination was designed to prohibit. You may be aware that there are numerous legislators who are seeking to amend our law right and left to include prohibitions which do not properly fall under our jurisdiction.

There is one out now requiring landlords to rent to people with pets as a civil right. We opposed that.

I don't think what we are interested in doing is amending our statute to prohibit any items which are not otherwise within our power to enforce and prevent, and to indicate any items which would not continue to allow for the respect that, I think, this agency has in enforcing the law against discrimination, or any items which would diminish the otherwise importance or the power element that I think this agency has in enforcing the law against discrimination, or any items which would diminish the otherwise important element that I think this agency has as a law enforcement arm of the Attorney General's Office.

So, the first comment I would have is that we are still researching as to whether this parental status protection is a civil right with respect the housing.

Secondly, we are trying to do this in relation to efforts by certain fair-housing counsels in this State. I believe I spoke to your Executive Director briefly about this. These counsels are researching, as part of a current amendment pending in Congress to the Fair-Housing Act, whether or not there is a substantial discrimination against women and single parents with respect to family rentals, with families who have children. This is something we can all talk about, but there are very little statistics that have been gathered on this issue. We are now working with -- I believe it is the Middlesex Fair-Housing Council, which has received a grant with regard to this particular issue. We hope that maybe between the Commission, ourselves, and this Fair-Housing Council's efforts, we may be able to provide a more sophisticated comment to Assembly Bill 3739.

In brief, we certainly support the rental of housing to families with children. I have a child myself. If I were seeking housing, I would certainly not want to be turned down because I have a three and one-half year old daughter. I certainly would not want to be turned down because I am a single female with a three and one-half year old daughter, and I understand this bill is also designed to effect this.

However, I am not so sure that our law is the avenue by which to address this problem. That is the only information that I would like to provide you at this point.

I don't know if there was another item that you wanted me to comment on.

Now I have a couple of minutes if you have any questions.

SENATOR LIPMAN: Yes, Phoebe?

MS. SEHAM: I'll ask my favorite question. Getting back to credit and the inquiry into marital status, and including the subsequent questions proposed by the Department of Public Advocate, which also reveal marital status or could easily reveal marital status-- I know that you are working on regulations, and I don't necessarily need an opinion from you now, but would you consider the

possibility of doing something similar to what the rule is in an employment case -- that is, determining credit worthiness at a threshold stage, without asking any questions directly revealing marital status, or indirectly revealing marital status? Then, let the questions about other people's interest in property be asked at a later stage.

MS. POFF: Yes, the Division would not be opposed to that. Just to comment a little bit further on something that you said before-- If you could give me the name of the company that has an employment application with all that data on it that says you don't have to answer these questions, please bring it to my attention, because that, itself, is illegal. You can only ask it if it is a separate document.

MS. SEHAM: I understand that. I have not seen it--

MS. POFF: Oh, I've seen them; they come in daily.

MS. SEHAM: I haven't seen it recently enough in order to get my hands on it.

MS. POFF: As to the bifurcated process, certainly we would be in support of it. After talking to the Attorney General yesterday, as well as with Mr. Winard, I think there may be some misunderstanding in terms of the application of the language in the Formal Opinion, but I don't it would preclude that bifurcated process at all.

MS. SEHAM: Thank you.

SENATOR LIPMAN: Are you aware of the Public Advocate's Office, which has a different opinion?

MS. POFF: No, and I must admit to my great chagrin that I was not consulted by the Public Advocate's Office, nor was the Attorney General prior to the issuance of that opinion. I would have liked to have been consulted, because since my agency is the one that is enforcing that opinion on behalf of the Attorney General's Office, I think we would have had some informative input. That is something that we have to work out and streamline between the two agencies.

SENATOR LIPMAN: I didn't mean to put you on the spot.

MS. POFF: I'm glad you did because I was hoping somebody would. I'm not so sure we disagree totally. I think we have the same concerns, and I think our concerns are very simply that the best credit

be given to the best applicant, and that our New Jersey law against discrimination is not violated. It is unfortunate that we are focusing as much on the Attorney General's Formal Opinion as to how we would use this Formal Opinion to effectuate the purposes of the law against discrimination, which is what I think working together on the credit rules will do.

SENATOR LIPMAN: Excuse me, we have with us Verice Mason, who is with the Public Advocate's Office. She is raising her hand. Verice, do you want to say something?

MS. MASON: I would like to say that the Public Advocate did not contact the Attorney General, but we have every intent of doing that. We did, however, contact the Department of Banking. We were advised that they will also draft some regulations in this regard.

MS. POFF: Okay, we'll be in touch. I think part of the problem is, if we could all sit down and work together and get all of our expertise together -- and we certainly defer a lot to the expertise of the Public Advocate and the Department of Banking -- maybe this should be a Committee setup of these four different minds. Maybe we could sit down and work something out. We would be happy to do so.

SENATOR LIPMAN: I think you will have your regulations ready before we are ready.

MS. POFF: That is possible, although they have been sitting for awhile.

SENATOR LIPMAN: You know, it takes us awhile, like two or three years, before we can finally formulate some kind of legislation which we think is the right kind of legislation. It may take two years longer to get this legislation through. Greta, do you have a question?

MS. KIERNAN: No, I don't.

SENATOR LIPMAN: Alma, did you want to ask a question?

MS. SAVARIA: No, she answered it.

SENATOR LIPMAN: Alma, tell her what you were going to ask.

MS. SAVARIA: I was going to ask about the civil penalties. You were talking about the legislation -- Assembly Bills 1015 and 1017 -- and you seemed to refer to those as applying remedies in other areas. Don't you think there is a need for remedies in the area of credit, or how many complaints are you now receiving in the area of credit, where you would need specific?--

MS. POFF: Virtually none. As a matter of fact, I can think of receiving only one, which never amounted to a formal filing since I've been with the agency, which is about three and one-half years.

I also think that that is a function of lack of awareness on the part of the complaints -- that we are in the business of handling those kinds of complaints, which could partly be our fault. We certainly will be addressing that.

SENATOR LIPMAN: Thank you very much. You had better get back to your class.

MS. POFF: Yes, they are probably all cheating on me by now. Thank you very much.

SENATOR LIPMAN: Thank you. Next we have Professor Diab from Seton Hall who stopped in. Would you like to speak? Professor Diab, are you going to talk to us about probate?

P R O F E S S O R R O B E R T D I A B: Yes, I would like to. I would like to actually use as a frame of reference, if I may, the position paper memorandum, of which I received a copy from Patricia Willard. I imagine members of the Commission have this before them. I believe Ms. Reid addressed some of the points.

I would like to concentrate of the elective share, if I may, and discuss, perhaps by was of repetition, something of what was said by Ms. Reid. I do agree, first of all, that the very beginning of the elective-share statute is in dire need of amendment. For one thing, it seems by its terms to be very uncertain and indefinite. For another, as was indicated by Ms. Reid, there are all of these grounds that would give rise to a cause of action for divorce, which could prove to be very unfair to the claims of a surviving spouse.

In particular, the example that impressed me most was the one on page eight of this memorandum: "After thirty-five years of marriage and ten children, the deceased husband had move into a separate apartment, but continued payment of expenses for the house and wife for eighteen months. Neither party sought a divorce due to religious beliefs. The wife's assets were $5,000, and the husband's assets were $500,000 when husband died."

One thing that I think we should make clear at the outset is that -- and sometimes there is a misconception about this -- the surviving spouse is the one who is deprived of the right to an elective share, if, in fact, the decedent spouse is the one who would have had a cause for action for divorce. Normally one would tend to think of that as comprising an element of forte. In other words, if let's say, the surviving spouse -- and I'll use the pronoun "she," if you don't mind -- instead of saying "he" or "she," I'm going to assume, since it is the more common experience that the husband dies first, and the wife is the surviving spouse-- If it was he, the decendent, who would have had a cause for action for divorce, then, of course, the surviving spouse, even though an actual divorce did not take effect, would be deprived of exercising this right to an elective share. The catch, however, is that-- When you are talking about fault, that perhaps, is understandable, but if, in fact, the decendent husband deserted and lived apart for eighteen months, and nothing else was done, and then he died, well then, of course, he himself, would have had a cause of action for divorce because of our no-fault laws -- an eighteen month separation. If we don't eliminate that -- that latter part -- that there ought to be an exception in there to the effect that unless the decendent spouse himself caused the separation by way of desertion or some such language-- In other words, I think that desertion should be the main ground here for not preventing a surviving spouse from exercising her elective share, even though there might have been a cause for action for divorce from the decendent spouse. The way it is stated now is that if, in fact, the parties are living apart -- and you have got to conjoin these two, by the way -- I think there is a certain misconception -- that there are really two conditions: They must have not been living together or ceased to cohabit, either as a result of judgment of divorce, or under circumstances which would have given rise to a cause of action for divorce or annulment of marriage to a decedent prior to his death.

So, you see, they would have had to be living apart, and then even after his death, it would have to be proven that he would of at least had a cause of action for divorce. As I pointed out, if there is an eighteen-month separation, even though it had been brought about by

his desertion, technically under this statute, she would still be deprived of her right to an elective share.

I think, perhaps, that we should specify the grounds which might deprive. I think you have got to go beyond just a divorce.

The Uniform Probate Code itself has a section which we did not adopt, and it is a pretty simple, straight-forward section. It is in 2-802, and it reads this way: "A person who is divorced" -- there are two subsections -- "A person who is divorced from the decendent or whose marriage to the decedent has been annulled is not a surviving spouse unless by virtue of a subsequent marriage, he is married to the decedent at the time of death. The decree of separation, which does not terminate the status of husband and wife, is not a divorce for purposes of this section."

One, of course, could debate that last sentence, because the policy in New Jersey has always been to equate a limited divorce with an absolute divorce. A limited divorce in other jurisdictions is called a legal separation, where parties because of religious beliefs or what have you, have decided to, in effect, terminate the marital relationship, but they are still technically married. They are not free to remarry, and so, you get a judicial separation.

The Uniform Probate Code very specifically says that such a decree of separation will not terminate the status of husband and wife. Our statute specifically says the opposite, and that is because we have always had this tradition that for all property purposes, a limited divorce -- a legal separation -- is equated with an absolute divorce.

So, I am not suggesting that that be changed. That, of course, is a matter for the Legislature to discuss. In terms of this other thing, that it should be, first of all, a marriage -- the marriage being dissolved or annulled -- that would then terminate the status of a surviving spouse.

Subsection B goes on to say -- and the purpose of Subsection B is to deal with the difficult problem of invalid divorce or annulment, which is particularly frequent after foreign divorce decrees, but may even arise as to a local decree, where there is some defect in jurisdiction. In other words, the parties may believe they are still married, or may believe, in fact, that they obtained a

divorce in some foreign jurisdiction, and where that divorce was not properly obtained because there was a lack of jurisdiction. It goes on to say this: "For purposes of Parts 1, 2, 3, and 4 of this article," -- which means everything that has gone before it -- testate, succession. In other words, a surviving spouse having that status in case the decedent died in testate without a will -- and for purposes of elective share, etc. "A surviving spouse does not include (1) a person who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this State, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as man and wife."

In other words, what has happened over there is that it is taking cognizance of the fact that a person wouldn't be a surviving spouse if, in fact, -- or a person technically would be a surviving spouse -- if let's say, one of them -- the decedent -- obtained a divorce in another jurisdiction, like one of these quicky divorces, which isn't recognized if the parties move back to New Jersey. So, she could claim then to be a surviving spouse, even though, for all intense and purposes, they are not living as husband and wife, they are separated, and they believe that the marriage is terminated.

In that instance, she wouldn't be a surviving spouse, despite the fact that the divorce is void, only if the person obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage. In other words, if she, in fact, consented to that final decree and participated, etc., it is a question of what is called in legalise "estoppel." She couldn't then claim that she is a surviving spouse if she participated in that quicky divorce. I think this is a very salutary statute. There seems to be no attempt made to adopt this part of the statute. Instead, we went to what I consider to be an awfully awkward thing.

I'll give you one other example apart from the fact that if the husband did the deserting, and then was separated for eighteen months, it would have given him, the decedent, a cause for action for divorce. That could be litigated even after his death. The evidence there would be clear enough. In no-fault, you don't have to use very cogent evidence. It is just the period of actual separation.

But, suppose they were living apart just for a short while -- maybe a couple of months before he died -- and she, the surviving spouse, committed a single act of indiscretion. Let's say adultery -- and it was found out -- it was discovered. Technically, under the statute, the decendent would have had a cause of action for divorce. It doesn't matter how you put it; she would still be barred from getting her elective share. Whether that was the intent of the Legislature or not, who knows? It certainly ought not to be. I think that is a very bad part of the law.

Some of the other aspects-- I made notes on this. This is another point: The second sentence of 3B:85 creates a loophole by which the main purpose of the elective-share statue, prevention of spousal disinheritance, may be defeated. It does exempt life insurance, accident insurance, pensions, and joint annuities from the augmented estate. This provision in 3B:85 allows a person to use all of his or her assets to purchase an annuity on insurance policies, which names someone other than the spouse as the beneficiary. That is true. I'm not sure how one would tackle that. The comment to the Uniform Probate Code explains the rationale for that exception. In other words, as Ms. Reid pointed out -- perhaps I should say just a little bit more by way of elucidating that. The concept underlying the augmented estate was to prevent a decedent -- let's say again, the husband -- from being able to make lifetime dispositions of his property by way of what is called "will substitutes" -- in such a way that he virtually remained the owner of that property. He was entitled to all of the economic benefits of that property, but yet, he had made an effective transfer. It was designed to change most of the elective-share statutes that exist to this day in a great majority of jurisdictions. New York in 1966 took the lead and really set the pace for the Uniform Probate Code, and it is patterned really on the New York concept of augmenting the estate.

Prior to this kind of statute, just about every state except three -- and we, I am sorry to say, were one of those three states until 1980 -- permitted a surviving spouse to have an elective share. Very often that elective share was a hollow shell, because the elective share was one-third -- a fractional interest. It admitted every type

of property, real and personal. But, it was a fractional interest of the probate estate. The probate estate, therefore, did not include these other what are called "non-probate assets," which do not become part of a person's estate that is administered after his death.

So, for example, to give you some specific examples, I could disinherit my spouse by opening a joint account, to make a very simple example, and make the other joint tenant of that account a niece or a nephew. I could open up a savings account in which I am the depositor, and I would name this other person -- again, let's say my niece -- as the beneficiary. It would say "d," dear, in trust for -- it is a very simple account -- niece. That is a valid transaction, but notice that while I am alive, that bank account is mine. I can freely draw on it, I can add to it, I can withdraw the whole thing, and only if there is a balance when I die, will that niece be entitled to what is left, provided that she survives me. To all in tense and purposes, that is like a will, and hence, it is called a will substitute. Many of our lower courts have held that that is a valid testamentary transaction, and it should conform to the requirements of the statute of wills -- the requirements for making a will. Our statute now leaves that point to rest.

The important thing is that there are a whole lot of these will substitutes whereby a person can deplete his estate, and then saying that the surviving spouse is entitled to one-third of the estate -- one-third of nothing -- is still nothing. That is a mathematical phenomenon, which is a truism. This sort of a statute was designed to give teeth to this right of a surviving spouse and to enable her to recapture a lot of those assets which were disposed of in such a way as to leave that decedent, during his lifetime, virtually the owner of that property. That is what we have done here.

When you come to insurance, the feeling is -- and it is pointed out in a comment-- The comments of this Uniform Probate Code are very enlightening to read, because they do explain a lot of the rationale of this whole statute. But, it is pointed out that the average person does not take out life insurance in order to deplete his estate, and thereby, deprive his surviving spouse of her elective share. By and large, that is true of the average person. After all,

if I took out a term insurance policy of $100,000, I might, in terms of my life expectancy, have to pay out $6,000 a year in premiums. I might very well die two years later, after the payment of two premiums. I've depleted by estate by $10,000, but yet, I have generated $100,000 at my death. One can now say that that surviving spouse certainly ought not to be able to claim -- that the $100,000 should be put back into the estate. At best, she might be able to claim the $10,000 that I depleted from my estate by paying premiums, or I might have depleted by estate of $20,000 or $30,000 -- that that could be recaptured. There is no question that this is a loophole, because suppose I were a very old person -- I could be in my seventies, and let's say, so is my spouse. We're not going to get divorced; she doesn't believe in it and neither do I. But, I have made up my mind to disinherit her somehow. I could take out what is called an insurance parlance-- I'm sure there are some people from the insurance industry who will testify here. But, when you take out what is called a single premium insurance policy, you could, in effect -- which is very similar to an annuity -- and, an annuity is the opposite of insurance -- you are laying out a sum of money in return for getting these installment payments paid back to you over a certain period, whether it is your lifetime or what have, and the amount you get paid back is determined actuarily, based on your life expectancy. The point is, if my life expectancy is very short, and I have laid out $100,000, and I die soon after putting that out -- or I might have put it out and had a joint and survivor annuity, so that my niece is going to be the surviving annuitant and she'll get it for the rest of her life -- the fact of tha matter remains that I have actually depleted my estate by $100,000. It is a pretense to say that people do not - the average person may be, but the more sophisticated person with a certain amount of wealth, who might be the kind of person who is minded to disinherit a spouse -- can certainly resort to that type of device.

Under our present statute, that cannot be recaptured. I would like to point out a difference between our statute and New York's statute.

If the Legislature is not minded to change that particular provision, then it might be a good idea to adopt the New York position,

which is that all life insurance annuities, etc. are exempt. If you'll notice, this isn't too fair to the surviving spouse, because she, in the second segment of what is included in the augmented estate -- there are three segments-- The first segment is the probate estate, the second component is what I just described to you a moment ago -- the will subsitutes -- joint bank accounts and then, of course, transfers made within three years of death-- A lot of this is parallel to the estate tax concept where the Federal government recaptures a number of these transfers made during life. If a transfer is made during a lifetime under the fourth subsection of that augmented estate, and the person dies, anything over an excess of $3,000, which would parallel again -- except now, under the Economic Recovery Tax Act, the annual exclusion is $10,000 -- but in any event, any transfer made within three years of death is recapturable by the spouse. Obviously, that would include transfers made in contemplation of death. That is the second
component.

The third component that augments the estate, but it must be noticed here, is something that tends to diminish the ultimate share of the surviving spouse. She has to account for anything that she had derived from him. Included among that is life insurance. If he takes out a life insurance policy and depletes his estate by a couple of premiums that he has paid, and he has generated $100,000 at death, she has to account for that. That is included in the augmented estate. Then you divide by three to get the one-third share, and then you have to subtract that $100,000 before you arrive at a final determinatinon of what her net share is going to be. Am I making myself clear on that? It is a simple mathematical calculation, and if you want to take an example, suppose the net probate estate was $100,000, and there are no other will substitutes. He has made a will disinheriting her entirely. All right? Yet, he did take out a life insurance policy of $50,000 for her. To show you the difference between how our statute works and the New York statute works, under the New York statute, she would be entitled to $33,333 and she can keep her entire $50,000 life insurance policy. The net result out of the total wealth generated at death is that she is going to get $83,000. That is not so bad --

$83,000 out of a total of $150,000. Do you follow me? -- $100,000 in his estate, and $50,000 from the policy which he took out. What is the result in New Jersey?

To show you how this works, in New Jersey, you take that $50,000 policy, because she derived it from him, you add it to the $100,000 estate, you take one-third to arrive at her share, and her share now is $50,000. Right? Her would-be elective share is $50,000, but now you have got to subtract the $50,000 -- she has to account for it. So, you would subtract it, and the net result is zero elective share. There is no elective share. So you say, well, she's got nothing, but what she has really gotten is one-third of the total wealth generated. By this process of having to account for that insurance policy, which she derived from him, she will get zero out of his estate of $100,000, but she has gotten $50,000 from that insurance policy. By way of contrast in New York, she has got that insurance policy, and she has got another $33,333. That it is something that the Legislature could do through a simple amendment.

Just to show you how it reads now, right now it says, "Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity or pension, payable to a person other than the surviving spouse." All you have to do is change "other than the surviving spouse," and say, "to any person including the surviving spouse." It is a very easy amendment -- just a couple of words -- "including the surviving spouse."

One other thing that has not been brought up: A lot was made of dower and courtesy, etc. At the end of this memorandum, it is pointed out that "it would thus be discriminatory to bar persons with dower or courtesy interests access to the same quality of inheritance rights, which New Jersey citizens, who have not acquired dower or courtesy, enjoy."

There is nothing in our statute, by the way, -- and I don't think that is entirely accurate -- that suggests that she is put to that kind of an election. If she gets dower or courtesy, then she still, of course, has her elective share. This has caused a lot of confusion in the minds of many attorneys. They constantly call me on the phone and ask me this particular question.

It is clear that in that one statute, which begins the section on dower and courtesy, we have abolished dower and courtesy perspectively. Though technically its says, "as to any property of which this person was seized," that should be changed and it should be changed to "any property of which a person becomes seized after that effective date, there shall be no dower." In other words, as to any property that I owned prior to the effective date of that statute, dower is still preserved, and will continue. That is some form of protection. Often it is not worth a lot, because remember, it is only a life estate -- the right to income from that property, and it is only real property. That is the other thing to remember.

If I marry today and I purchase property other than for a marital residence, then dower isn't going to attach anymore. That is for the good, because we shouldn't have to resort to the pretense of incorporating. There was an easy-out before. If I were a real estate developer or a speculator, the easy way of avoiding dower would be for me to form a corporation, and the corporation would be deemed. We have cases in our courts on this very point where the wife attempted to contend, but he really is the owner because he owns 100% of the stock of that corporation. The court said, "No. There are two separate entities. The corporation owns the real estate, and all he owns is stock, and stock is personal property." So, dower did not attach to that.

The point that I want to make, and it hasn't been mentioned in this memorandum, is a very important point for the Legislature. I really hope you will adopt this amendment. That has to do with Section 3B:8-17, which says "In an action for an elective share, the electing spouse's total or proportional beneficial interest in any life estate as real or personal property or in any trust shall be valued at one-half of the total value of the property or trust or of the portion of the property or trust subject to the life estate." I will explain all of this in a moment and translate it from this legalise.

I just want to add that the crucial part that we omitted, which is in the Uniform Probate Code -- and, I cannot understand why we omitted this -- says, "Unless higher or lower values for these interests are established by proof,"-- Let me explain what this means.

Suppose I am minded not to leave any outright property to my spouse in my will, but I want to create a trust. Trusts are very useful in the whole estate planning scheme, especially with regard to a sizeable estate. When you are planning an estate property to create trusts, always take advantage of the marital deduction. In 1987, there will an exemption which will be equivalent to $600,000 by way of a credit. It is still customary to set up two trusts, so that you can leave your spouse a certain amount -- not outright necessarily, but in trust -- with the right to income for life of what is called the "martial deduction trust." In this way, you can take advantage of and qualify for the marital deduction. Thereby, you can have a deductable from your estate and you will not have to pay any estate tax. You can then put the balance into a family trust where, again, the surviving spouse is going to be entitled to a life estate, and then the remainder may go to the children. That amount would be the equivalent of the exemptions, so that your total estate tax would actually be zero. Then, of course, you even save estate taxes when she dies, assuming that she doesn't remarry, because she won't have a marital deduction. But, she'll also have a $600,000 exemption.

The point of this statute is that if when I create a trust, -- and, as I said, it is commonly done -- for my surviving spouse, and she gets this income, -- it could be a sizeable amount -- the point is that what she has to account for here, assuming that I create a trust of $100,000, and I leave nothing else -- I have this huge estate -- she has to account the amount that will augment the estate. Remember, the greater the amount that she has to account for, as I just illustrated by the example of life insurance, it is a loser for that surviving spouse -- the more she has to account for.

This section is saying that if I create a trust for her, she must account for one-half of the value of that trust property. If I were leave a trust -- create a trust in my will -- with the value of the trust property being $100,000, she has to account for $50,000. Suppose that when I die, -- I am seventy-five and she is seventy-two -- is it fair to evaluate her life interest in that trust at one-half the value of the $100,000? The value of a life estate is determined actuarily. In other words, it is in terms of her life expectancy, and

there are tables that we use now. They are right in the Internal Revenue Code. I don't have the figures right at my fingertip, but let us suppose that actuarily the value of that life estate is only $10,000. She, nevertheless, has to account for the full $50,000.

What I am saying is that if we just add on these few words-- You'll find it, by the way, in this book. I am not trying to push this book, but I authored it. It is called "Probate Reform in New Jersey." What I did was, I took all the sections from all the different statutes which we have enacted in New Jersey, and I appended to them the comments from the Uniform Probate Code -- you can see how thick it is. There is a substantial part of this that we did not adopt.

You can either look at Section 3B:8-17, or in this book, which I haven't renumbered, the section is 38:38a-6.

SENATOR LIPMAN: Will you repeat that?

PROFESSOR DIAB: Pardon me?

SENATOR LIPMAN: Would it be possible for us to get your book?

PROFESSOR DIAB: You can obtain it from (inaudible).

SENATOR LIPMAN: Thank you very much.

PROFESSOR DIAB: I want to point out the need for adding that. You can find it is the corresponding section of the Uniform Probate Code. It reads exactly the same as 3B:8-17, but it has added to it, "Unless higher or lower values of these interests are established by proof." So, that means in the example I just gave you, if she were seventy-two years old, and could prove -- it would be an easy matter to prove in terms of her life expectancy -- that her life estate, the value of her life estate in that trust fund of $100,000, is only $10,000, she would only have to account for $10,000. Under our present statute, she has to account for $50,000.

I would like to just say one final thing. As far as dower is concerned, I think you may have a hard time convincing the courts that we should abolish it retroactively. It isn't harmful, but again, the reason that I have been harping on this particular section is, when a surviving spouse has dower -- let's suppose she does have dower in a parcel of real estate -- that is worth $200,000, the value of her dower is a life estate of $100,000, which is one-half of that real property.

Again, because of this section, she will have to account for one-half of that, and that means it is $50,000, when in fact, its value may only be about $5,000 or $10,000.

I want to make one thing clear, and that is, though this is called an elective share, I think the Legislature should also realize that it is not truly a right of election. As the statute stands now, it is not really a right to elect between what a person gets in the will. The statute also makes it clear that whether she accepts what is in the will or not -- in other words, even if she renounces an interest -- she must still account for it. It is not really a right of election.

In the final analysis, what you do is, if she is going to claim her elective share, she must take into account and must augment the estate by everything that she has derived from him. Unfortunately, our Legislature saw fit at the end to add this other thing that is not in the Uniform Probate Code, but it is in this memorandum. That is something that is very unfortunate. It says that in the end, she must account not only for property that she derived from him, like that $50,000 insurance policy, but she must account for every last bit of property that she owns in her own right.

I don't mind telling you -- this was said to me in confidence -- but, I asked former Assemblyman Burstein, because he was the sponsor of this bill, why he did that. I said, "Everything else is all right, except for that 3B:8-17, which I hope will be amended by the addition of those few words, 'provided that' or 'unless' different values can be established." I said, "You know, it is really going to water down this right substantially." The feeling was that "we would never have been able to get this passed through the Legislature."

My understanding was that in 1980, or in 1979, I guess -- it took effect in 1980 -- there was considerable resistance. Maybe that resistance continues. I still sense that there is a resistance to this statute amongst many members of the bar because you also have to appreciate that there is this basic primeval instinct, I suppose, of testamentary freedom. Some people say, "Well, look, if I made this money by the sweat of my brown, I can throw it away into the sea if I want." Of course, that is one attitude, but it is clear that

regardless of how high the incidence of this right of election is or isn't, I can tell you that I receive umpteen phone calls, and I am consulted constantly, so it is happening. Despite what many commentators have said to the contrary, people are dying and disinheriting their spouses. People sometimes consult me and ask me, "How can I disinherit my spouse? I know I can't any longer, but what is it that I have got to leave her?" And, of course, she with regard to him because this is a two-way street. If she has the wealth, she asks, "What is it that I can do to leave him the damnest minimum, because I know I have got to come through with something? I've been told one-third, but one-third of what?" Then you have got to go into this explanation of one-third of all those other assets that she might want to play with or he might want to play with by way of those will substitutes.

If this thing could be removed from whatever source acquired so that she would not have to account for that, then I think the balance of that statute -- and if we could amend that very first section as to when a person qualifies as a surviving spouse-- Finally, as I said, and this is important, it hasn't been stated in this memorandum, and that is why I am emphasizing it -- 3B:8-17 should be amended regarding the valuations placed upon the life estate that is created for a surviving spouse.

With those three amendments, I think the rest of the statute is a good statute. It is a heck of a lot better than exists in about forty other states, because we are just one of eleven or twelve states now that have the Uniform Probate Code. New York, as I said, has a similar kind of statute, but there are all kinds of loopholes in the New York statute. Pennsylvania and Ohio have it. We are still in a minority, and this is a good statute.

Thank you very much.

SENATOR LIPMAN: Wait just a minute. Professor, don't go anywhere.

PROFESSOR DIAB: Are there any questions?

SENATOR LIPMAN: Yes, Phoebe?

MS. SEHAM: No, but I thank you. I think you explained everything very thoroughly. Thank you very much.

SENATOR LIPMAN: Greta?

MS. KIERNAN: Thank you, Professor Diab. It was very nice to have you address us again.

PROFESSOR DIAB: Oh yes, Ms. Perun, I recognize you. You are one of our alumnae. I think I had the pleasure of teaching you.

MS. KIERNAN: Thank you.

SENATOR LIPMAN: I have to apologize to the people who are here because the Professor has a class and has to leave. So, we had to entertain his testimony.

Next I would like to call on Nancy Stultz.

N A N C Y S T U L T Z: I'll be brief. I am Nancy Stultz, the Cochairman of the Legislative Task Force for the National Organization for Women of New Jersey. I'm not going to read my statement, although I have written testimony for you.

I certainly learned a lot today about a number of subjects that we're not testifying about today, so that is always good.

During the course of testimony today, there were a couple of points that were raised that I would like to deal with. I have a brief statement in my testimony about education -- really what it amounts to is consumer education. I'm here primarily to testify about credit.

Perhaps one of the reasons why the Division on Civil Rights is not getting complaints about credit is that -- I can tell you for one -- my organization has primarily been referring to the F.T.C. We have been getting a lot of complaints about credit, particularly recently. I think women are becoming more aware.

I have included a copy of a brochure that the National Organization for Women puts out. It is a national brochure, and it primarily deals with the Federal law. I am suggesting that some agencies of State government -- I don't know that this be the appropriate one-- One of the things that might come out of this is that there be some comprehensive educational piece in the State law, telling you where to file complaints, because it is an extremely confusing area.

I know that in the area of employment, while the Division on Civil Rights and the EOC, the Federal agency, have had a long-standing policy on how they work, or sometimes don't work, together -- it seems

to me that it is more developed in the employment area -- how to handle complaints, how that information is brought out. There is an enormous need in this area of credit to get some very basic information to the public. I think the complaints are there.

Within the last month, I applied for credit right here in Trenton. I am divorced, but marital status was on the form. My understanding now is that that is against the law under the current law, even though I have credit in my own right and I would not want my husband's credit record considered. I know that that is against the law, and I now know that the Division on Civil Rights handles those complaints.

I do think there is going to be work needed on--

SENATOR LIPMAN: (interrupting) Excuse me, Nancy, I have to tell you that that has nothing to do with the legislator's office, since we get complaints all the time.

MS. STULTZ: Yes, and I am not sure where the legislators are referring those complaints and whether the Division on Civil Rights is seen as the appropriate place for that.

ASSEMBLYWOMAN PERUN: If they come to me, you know where they will be referred, Nancy. I write letters to everybody.

MS. STULTZ: The F.T.C. is the agency that handles the Federal complaints under the Federal law.

Basically, I would also like to say that NOW-New Jersey would support the position of the Public Advocate in terms of what remedies might be necessary to deal with the Kimmelman decision of July. We would like the latest possible introduction of information on marital status, or not asking that question at all. It would come out in terms of any security necessary for the loan.

I guess they are the major things that I wanted to cover. I do thank you for having us here today.

The other thing that I must mention -- I can't let the opportunity ever go by -- is that I think this whole session today just underscores once more the necessity for the Equal Rights Amendment, that what you are doing is the nitty-gritty work of equal rights for women, which is not being done on the Federal level right now. We

particularly applaud your efforts in this regard, underscoring once again the need for the Federal Equal Rights Amendment, which we hope will be coming this way again soon. We would like to encourage immediate consideration of the resolution in the State Senate, again putting NOW-New Jersey on the record for the Equal Rights Amendment. I can't ever let a chance go by without saying that.

Thank you very much or having us. We would be glad to work with you during the next two years or longer in order to change the laws in New Jersey. Thank you.

SENATOR LIPMAN: Thank you.

MS. SEHAM: Nancy, I appreciate your brevity. I'm sure everybody else sitting out there does too. You really covered it, but let me just emphasize it -- the questions which do not directly mention marital status, but which would elicit that information about security interests and property. Would you agree that it would be best if those questions could be deferred to a second stage after creditworthiness was established?

MS. STULTZ: Yes.

MS. SEHAM: (continuing) without those questions.

MS. STULTZ: I hadn't heard the concept exactly that way, but the later you ask the question, the better. I think that would be a general good rule.

MS. SEHAM: Thank you.

ASSEMBLYWOMAN PERUN: I just want to make one comment, Nancy. In reference to the ERA, I am very strong for that. As you well know, and to any of the doubters -- and there are still doubters around as to the need of it, -- when you see the difference from state to state, that is why you just step off the borderline; you can be in some prehistoric period of time as far as womens' rights are concerned. I know that this may be collateral to what we are talking about, but I think it is so necessary to emphasize again to anyone who is in the audience here and who feels that he doesn't know what we are bleeding and blatting about -- that the ERA is an absolute necessity in the absence of our Supreme Court saying that we are involved or we are included in the fourteen amendment. Until the day comes when those esteemed justices can see their way free to state it, we are going to push for that ERA, come hell or high water, I assure you.

SENATOR LIPMAN: Thank you very much, Assemblywoman Perun. Next, I would like to call on Irene Holler from the American Association of University Women.

I R E N E H O L L E R: I am Irene Holler from the New Jersey Division Legislative Committee of the American Association of University Women.

At this point late in time, I would just like to say that we have submitted testimony to the fact that we strongly support equity for women, and our testimony is on behalf of the nonworking spouse as a part of marriage as a partnership. We support legislation that would bring our inheritance tax laws more in line with the Federal tax laws that have been passed.

Thank you for the opportunity to testify.

SENATOR LIPMAN: That was really brief. I am sorry, but we were rustling papers. Will you make your points just once more?

MS. HOLLER: All right, we have traditionally and historically supported equity for women. We are one of the oldest organizations for women in this country.

In terms of equity for women, as far as this hearing is concerned, we are speaking for economic equity and the worth, the value, of the unpaid worker's spouse in terms of inheritance tax laws. Marriage is a partnership, and the unpaid worker's spouse should be recognized in our inheritance tax laws. We recommend that New Jersey's inheritance tax laws be brought more in line with the Federal inheritance tax laws, and that discrimination be eliminated.

MS. SAVARIA: Are you suggesting the abolition of interspousal interheritance tax transfers?

MS. HOLLER: Yes.

MS. SAVARIA: Okay, thank you.

SENATOR LIPMAN: Very good. Are there any other questions?

MS. HOLLER: I believe that each member of the Commission has a copy of our testimony.

SENATOR LIPMAN: Yes, we do.

MS. HOLLER: Okay. Thank you for the opportunity to testify.

SENATOR LIPMAN: Thank you. Next, I would like to call on Ms. Diana Herman from the League of Women Voters. Is she still here?

D I A N A H E R M A N: I am Diana Herman, the Executive Director of the League of Women Voters of New Jersey. We thank you for the opportunity to appear here today, and in appreciation, I am going to edit my testimony substantially.

I do want to tell you that we appreciate the work that the Commission on Sex Discrimination is doing as far as the statutes are concerned to eliminate the discriminatory impact of sex differentiation in New Jersey. I would like to read to you our concensus position based on a 1977 study done on the legal status of women. It states:

"The League of Women Voters believes laws should protect the rights of women. We recognize that few woman remain in the same category for a lifetime, but may at one or more times be single heads-of-housholds, full-time homemakers, or working wives. Laws should reflect these changes in women's lives. Marriage is a partnership, and the contributions of the homemaker should receive adequate recognition. We have a special concern for the needs of the displaced homemaker in our society. We, therefore, support the revision of property and inheritance laws in accordance with Uniform Probate Code concepts."

On the basis of this position on the legal status of women, we do have have number of general suggestions regarding the topics before the Commission today. These suggestions are a logical extension of our affirmation of the concept of marriage as a partnership, economic as well as emotional.

I believe a good deal of the subsequent testimony has been discussed already, but I would like to reiterate that New Jersey has obviously based the Elective Share Law on a policy of need to minimize the chance that the surviving family will become charges of the estate, rather than on the premise that the surviving spouse has an inherent economic interest in the other spouse's estate. Therefore, we propose revision of the law so that the elective share becomes a recognizition that both spouses have made an economic contribution to the marital partnership, and therefore, both have an inherent interest in ownership of the accumulated assets.

We also suggest reevaluation of the requirement that the spouses not have to live separately at the time of the deceased spouse's death. Current patterns of employment and education sometimes result in the temporary location of spouses in two separate domiciles, and such circumstances should not be a cause of forfeiture of the right of election.

Again, as Nancy has done, we have to reiterate that another League position which applies to some of these issues is our unreserved support of the Federal Equal Rights Amendment. Implicit in that support is action to bring laws into compliance with the goals of the ERA. We, therefore, oppose the current sex-based valuation and taxation of annuities, life estates, and remainders.

We also support extension to all types of loans and credit, the prohibition of discrimination on the basis of pregnancy, parentage, birth-control practices, or intent or capacity to have children. Questions concerning the marital status of an applicant for a loan or to obtain credit should be closely tailored to the purpose for which the information is sought, rather than a general request to reveal marital status. While the League has not studied these issues in sufficient depth to be able to propose specific formulas for legal remedies to the points in question, we strongly believe that our proposed application of the presumption of marriage as an economic partnership can provide guidelines for revision of some of the current statutues.

We thank the Commission for its good work, and we encourage and support your continued efforts to eliminate sex discrimination in all areas of New Jersey law.

SENATOR LIPMAN: Just a minute. Do you have any questions?

ASSEMBLYWOMAN PERUN: No, I have no questions.

SENATOR LIPMAN: Phoebe?

MS. SEHAM: I'm not going to ask you my question because I know the League can't answer it at this time. I know how the League operates.

I thank you very much for your very thorough testimony. We appreciate it.

MS. HERMAN: Thank you.

SENATOR LIPMAN: Greta?

MS. KIERNAN: I don't have a question either -- just a comment. I think your testimony was very, very understood and it grasped all of the things we needed to hear. I just wanted to say that we are always pleased to have the League come before us. As a graduate of the League, I wouldn't be anywhere in this world without it. I'm delighted that you chose to come to speak with us today. Thank you.

MS. HERMAN: Thank you.

SENATOR LIPMAN: All right, thank you so much for coming. Ms. Pat Cherry from the New Jersey Women's Political Caucus?

P A T R I C I A N. C H E R R Y: Good afternoon. The general position of the National Women's Political Caucus is that of awareness of economic hardships which face women, many of them embodied in inequitable laws. One route to remedy is to have individuals in public office who are sensitive to these problems, and electing supportive legislators, especially women, is a priority of the Caucus.

Speaking as a member of the Steering Committee of the Women's Political Caucus of New Jersey and the Coordinator of the Mercer County Women's Political Caucus, I wish to commend the Commission for its work in identifying inequities in the New Jersey legislative area, a task in which we are ahead of most states.

Since 1975, the NWPC has adopted resolutions against practices which discriminate against women in applying for and granting of credit and against inequitable inheritance laws.

At the 1983 NWPC General Convention, resolutions recognized marriage as an economic partnership and called for pooling of earnings of a married couple.

Two resolutions of the 1981 General Conference of WPC-NJ are particularly relevant to your proceedings today -- the first on marital property reform, and the second on gift and inheritance tax reform.

MARITAL PROPERTY REFORM

WHEREAS marital property laws should reflect the basic partnership nature of marriage, and the widely held belief that property acquired other than by gift or inheritance during marriage is "ours," and not "his" and "hers," and,

WHEREAS marital property laws should recognize the numerous important -- but non-monetary -- contributions of each spuse, including those of the traditional homemaker, and,

WHEREAS marriage is a partnership between equal individuals, each of whom has the right to equal management and control of marital partnership property,

NOW, THEREFORE, BE IT RESOLVED BY THE WOMEN'S POLITICAL CAUCUS OF NEW JERSEY --

THAT we support the reform of marital property laws based on the principle of common law, so that they will now be based instead in the principle of marital partnership, in which there is equal ownership, management, and control of earnings and assets accumulated (other than by gift and inheritance) by either partner during the marriage.

GIFT AND INHERITANCE TAX REFORM

WHEREAS marriage is a partnership between equal individuals whose contributions to the marriage are of equal importance and value, and,

WHEREAS gift and inheritance tax laws should reflect the basic partnership nature of marriage and the widely held belief that property and savings accumulated during the marriage are "ours," and not "his" and "hers," and,

WHEREAS, under the existing laws, based on the principle of common law, a surviving spouse must pay inheritance tax on all marital assets jointly titled and those only in the decedent's name, with the exception of the first $15,000, a jointly-titled family home, and that portion of assets to which a survivor can prove she/he has financially contributed, and,

WHEREAS, under laws reformed so that they are based on the principle of marital partnershp, there are no taxes (including gift and inheritance taxes) on any transfers of assets between husbands and wives, and therefore, when either partner dies, half of the marital estate is already owned by the survivor, and thus is not subject to tax, and any of the estate willed to the surviving partner is also exempt from inheritance tax,

NOW, THEREFORE, BE IT RESOLVED BY THE WOMEN'S POLITICAL CAUCUS OF NEW JERSEY --

THAT we call for enactment of legislation which would provide an exemption from gift and inheritance taxes on all transfers of assets and money between spouses.

Thank you very much.

SENATOR LIPMAN: Are you able to provide us with a copy of your statement?

MS. CHERRY: I turned it in at the beginning. I don't have multiple copies, but I did leave one.

SENATOR LIPMAN: All right, as long as we have a copy for the transcript-- Greta?

MS. KIERNAN: Thank you very much.

SENATOR LIPMAN: Alma?

MS. SAVARIA: No.

SENATOR LIPMAN: Wait just a second. I just want to thank you for your presentation and for waiting so long. Thank you so much for staying.

MS. CHERRY: I found it very interesting, and I learned a great deal. I didn't have the research capacity, and I didn't have anecdotal information, but I certainly learned a great deal as I listened to some of the others who testified.

SENATOR LIPMAN: Very good. I'm very glad you did. Is there anyone else present who wants to testify on any of these subjects which we have considered today? (no response)

I want to thank everyone for coming to this hearing today. We appreciate your testimony, and we will take it into considersation when we try to formulate our attitude towards the subjects considered today.

Thank you so much. This hearing is now terminated.

(Hearing concluded)

IRWIN I. KIMMELMAN
ATTORNEY GENERAL

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
CN 080
TRENTON, N.J. 08625
609 292-4919

July 5, 1983

Pamela S. Poff, Director
Division on Civil Rights
Room 400
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 7 - 1983

Dear Director Poff:

You have asked for our opinion as to whether it is unlawful under the Law Against Discrimination for a lending institution to include inquiries in credit applications concerning the marital status of a prospective borrower. The Division on Civil Rights has received numerous inquiries from lending institutions as to whether a designation of marital status may be included on an application for credit when the information is necessary to either enable the institution to obtain an enforceable security interest or to create a valid lien, pass clear title, or waive inchoate rights to property. For the following reasons, it is our opinion that under the Law Against Discrimination a lender may make an inquiry in order to enable it to protect its interest in security provided on account of the loan. A lender, however, may not make an inquiry as to the marital status of a prospective borrower in order to ascertain his or her credit worthiness.

The Law Against Discrimination ("LAD") N.J.S.A. 10:5-12(i), provides that it shall be unlawful

> For any person, bank, banking organization, mortgage company, insurance company or other financial institution, lender or credit institution to whom application is made for any loan or extension of credit ...
>
> 2) To use any form of application for such loan, extension of credit or financial assistance or to make record or inquiry in connection with applications for any such loan, extension of credit or financial assistance which expresses, directly or indirectly, any limitation, specification or discrimination as to... marital status... or any intent to make any such limitation, specification or discrimination; unless otherwise required by law or regulation to retain or use such information.

The evident purpose of this section was to preclude blatant or subtle efforts by lenders to collect information about credit applicants for the purpose of practicing marital status discrimination. It was also designed to preclude lenders from attempting to discourage married or unmarried persons from applying for credit by indicating, directly or indirectly, the lender's intent to discriminate on the basis of marital status. The LAD is "aimed at subtle and covert activities designed to defeat its policy as well as at outright and blatant violations." Wilson v. Sixty Six Melmore Gardens, 106 N.J. Super. 182, 185 (App. Div. 1969). See Passaic Daily News v. Blair, 63 N.J. 474, 484-488 (1973) (placing job advertisements in sex-segregated advertising columns constitutes the making of a specification, limitation or discrimination based on sex). Where a creditor makes an inquiry as to marital status in a situation where there is no valid business need for that information, or where a valid business need is not obvious and is not explained to the applicant, it is reasonable to infer that the inquiry was actually made for the purpose of excluding or discouraging applicants on the basis of marital status.

On the other hand, there are certain situations in which a lender may have a valid business necessity at an appropriate stage of a credit application process for inquiring about an applicant's marital status. The Federal Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §1691, et seq., for example, generally prohibits inquiries regarding marital status, Harbaugh v. Continental Ill. Bank and Trust Co., 615 F.2d 1169 (7th Cir. 1980), but allows a creditor

> to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of creditworthiness [15 U.S.C. §1691(b)(1)].

The ECOA also permits a creditor to request "the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title, waiving inchoate rights to property, or assigning earnings..." 15 U.S.C. §1691d(a). Moreover, in New York, a state having a civil rights statute similar to the LAD,*

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the Division of Human Rights has adopted a regulation which provides that

> it shall not be considered an expression of limitation, specification or discrimination on the basis of sex or marital status if
>
> (2) where application is made for a mortgage and the creditor determines that the signature of the spouse is required in order to pass clear title in the event of a default, a creditor requests information concerning marital status, provided that the information disclosed by such inquiry is used solely for the purpose of perfecting title [9 N.Y.C.R.R. §466.7].

The foregoing statutory and regulatory provisions contemplate situations in which a creditor may have valid business reasons for inquiring about the marital status of a credit applicant. These include situations where a loan is to be secured by property in which the applicant's spouse has an ownership interest or in which the spouse may have inchoate rights.

Although the LAD by its literal terms could be read to prohibit all inquiries by creditors regarding marital status, it is fundamental that the statute is to be interpreted sensibly in accordance with its remedial purpose. N.J. Builders, Owners and Managers Assn. v. Blair, 60 N.J. 330, 338 (1972). Moreover, "the matter of statutory construction ... will not justly turn on literalisms ... it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation." Id. at 339, quoting New Jersey City Chapter Prop. Owner's Assn. v. City Council, 55 N.J. 86, 100 (1969). It would be inconsistent with common sense to presume that the Legislature intended to preclude creditors from making inquiries regarding marital status in situations where such information is necessary to obtain an enforceable security interest. On the other hand, inquiries should be made only where needed for a valid business purpose and at the

*The New York Executive Law, §296-a(1)(c), provides that it shall be unlawful for a creditor

> To use any form of application for credit or use or make any record or inquiry which expresses, directly or indirectly, any limitation, specification, or disrimination as to... marital status...

stage of the application process where such information is clearly needed. Moreover, to avoid the appearance of an intent to discourage applicants on the basis of marital status, such inquiries should be accompanied by a clearly worded written explanation of their business purpose and by a statement that the applicant's marital status will not be used to determine credit worthiness.*

In conclusion, it is our opinion that there is no absolute impediment under the Law Against Discrimination to an inquiry made by a lender as to the marital status of a prospective borrower provided, however, any inquiry, whether contained in an application for credit or otherwise, must be supported only by valid business concerns of the lender reasonably relating to the ascertainment and protection of the lender's rights and remedies. It is also our opinion that an inquiry should not be made either as a reason or subterfuge for an investigation into the credit worthiness of the applicant.

Very truly yours,

IRWIN I. KIMMELMAN
Attorney General

*In order to clearly define the obligations of creditors under N.J.S.A. 10:5-12(i), it is strongly recommended that the Division on Civil Rights and the Department of Banking jointly promulgate regulations setting forth situations in which creditors may make inquiries regarding marital status and specifying procedures to be followed by them.

TESTIMONY OF THE DEPARTMENT OF THE PUBLIC ADVOCATE BEFORE THE COMMISSION ON SEX DISCRIMINATION IN THE STATUTES COMMENTING ON THE ADVISABILITY OF A LENDER REQUESTING MARITAL STATUS INFORMATION ON A LOAN APPLICATION

PRESENTED BY:
JOSEPH H. RODRIGUEZ
PUBLIC ADVOCATE OF NEW JERSEY

BY: VERICE M. MASON
ASS'T DEPUTY PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST
ADVOCACY

SEPTEMBER 28, 1983

THE DEPARTMENT OF THE PUBLIC ADVOCATE WELCOMES THIS OPPORTUNITY TO APPEAR BEFORE THE COMMISSION ON SEX DISCRIMINATION IN THE STATUTES. WE HAVE LONG SUPPORTED THE ROLE OF THE COMMISSION AS AN IMPORTANT PUBLIC BODY DESIGNED TO REVIEW STATE LAWS TO ENSURE THAT THEY ARE FREE FRÓM SEX DISCRIMINATION AND COMPORT WITH CONTEMPORARY STANDARDS OF EQUALITY. WE HAVE PARTICIPATED IN THE WORK OF THE COMMISSION ON SEVERAL PRIOR OCCASIONS THROUGH TESTIMONY AT THESE PUBLIC HEARINGS. WE CONSIDER SUCH OPPORTUNITIES FOR INTERESTED MEMBERS OF THE PUBLIC TO PRESENT THEIR VIEWS ON STATE LAWS AS CRITICAL TO THE ELIMINATION OF ALL VESTIGES OF DISCRIMINATION IN NEW JERSEY STATUTES.

THE ISSUES BEING CONSIDERED BY THE COMMISSION TODAY REQUIRE CAREFUL EXAMINATION TO ENSURE THAT STATE STATUTES DO NOT HAVE A DISCRIMINATORY EFFECT IN IMPORTANT AREAS AFFECTING THE DAILY LIVES OF NEW JERSEY RESIDENTS. WE PARTICULARLY APPRECIATE THIS OPPORTUNITY TO PROVIDE OUR PERSPECTIVE ON ONE OF THE FOUR ISSUES BEFORE YOU TODAY -- WHETHER A LENDER MAY ASK AN APPLICANT'S MARITAL STATUS ON A LOAN APPLICATION.

ALTHOUGH FEDERAL LAW PERMITS AN INQUIRY INTO MARITAL STATUS WHERE A SECURED LOAN IS REQUESTED, OUR STATE LAW IS DECIDEDLY MORE PROTECTIVE OF OUR STATE'S CONSUMERS. NEW JERSEY LAW CURRENTLY PROVIDES THAT ALL REQUESTS REGARDING AN APPLICANT'S MARITAL STATUS ARE PROHIBITED. OUR DEPARTMENT RECOGNIZES THAT A LENDER WILL NEED TO

OBTAIN SUFFICIENT INFORMATION FROM AN APPLICANT TO PROTECT THE LENDER'S RIGHTS UPON DEFAULT. YET, IT IS OUR POSITION THAT A LENDER MAY DETERMINE ITS INTERESTS IN THE PROPERTY (BOTH REAL AND PERSONAL) OFFERED AS SECURITY WITHOUT THE NEED TO REQUEST MARITAL STATUS AND INSTEAD MAY ASK OTHER QUESTIONS TO DETERMINE THE LENDER'S INTERESTS IN THE EVENT OF DEFAULT. WE ARE, THEREFORE, SUGGESTING THAT IT IS INADVISABLE FOR A LENDER TO REQUEST AN APPLICANT'S MARITAL STATUS ON A LOAN APPLICATION.

AN EXAMINATION OF THIS ISSUE IS PARTICULARLY TIMELY, FOR AS I WILL EXPLAIN LATER, THE ATTORNEY GENERAL RECENTLY ISSUED A FORMAL LEGAL OPINION ON ~~JUST~~ THIS ISSUE, CONCLUDING THAT A LENDER MAY MAKE AN INQUIRY AS TO MARITAL STATUS IN ORDER TO ENABLE IT TO PROTECT ITS INTEREST IN THE SECURITY PROVIDED TO OBTAIN THE LOAN. IN REACHING THIS CONCLUSION, THE ATTORNEY GENERAL STRESSED THAT A LENDER MAY NOT ASK ABOUT MARITAL STATUS TO DETERMINE AN APPLICANT'S CREDIT WORTHINESS. HE ALSO STRONGLY RECOMMENDED THAT THE DIVISION ON CIVIL RIGHTS AND THE DEPARTMENT OF BANKING JOINTLY PROMULGATE REGULATIONS EXPLAINING SITUATIONS IN WHICH LENDERS MAY MAKE MARITAL STATUS INQUIRIES. AS STATED ABOVE, WE BELIEVE THAT A DIFFERENT APPROACH SHOULD BE TAKEN -- AN APPROACH WHICH IS MORE IN LINE WITH THE DICTATES OF OUR STATE LAW.

IT CANNOT BE DISPUTED THAT CREDIT HAS BECOME AN INTEGRAL PART OF LIFE IN THIS COUNTRY TODAY. IN OUR CREDIT-CONSCIOUS SOCIETY, ALL OF US HAVE AT ONE TIME OR ANOTHER BORROWED MONEY. IN FACT, THE AMERICAN ECONOMY

IS FUELED ON CREDIT. THE CONSUMER IS URGED TO BUY ON CREDIT, AND ALMOST EVERY MAJOR PURCHASE INVOLVES THE USE OF CREDIT. AMERICA'S PURITAN THRIFT ETHIC HAS GIVEN WAY TO THE PRACTICE OF LIVING BEYOND OR AT THE LIMIT OF ONE'S MEANS. AND, BECAUSE OF THIS NEW ATTITUDE, CONSUMER CREDIT IS GROWING AT A PHENOMENAL RATE.

THE CONGRESS OF THE UNITED STATES RECOGNIZED THE INCREASED IMPORTANCE OF CONSUMER CREDIT AND IN 1974 ENACTED, IN CONJUNCTION WITH OTHER REFORMS IN THE AREA OF CONSUMER CREDIT, THE EQUAL CREDIT OPPORTUNITY ACT WHICH MANDATES EQUAL CREDIT OPPORTUNITIES FOR WOMEN BY OUTLAWING CREDIT DISCRIMINATION BASED ON SEX AND MARITAL STATUS. PRIOR TO ITS PASSAGE IN 1974 AND SEVERAL AMENDMENTS OF THE ACT THAT TOOK EFFECT IN 1975, A FEMALE APPLICANT REQUESTING A LOAN COULD BE ASKED HER AGE, RACE, SEX, MARITAL STATUS, COLOR, RELIGION, NATIONAL ORIGIN, BIRTH CONTROL PRACTICES AND BOTH CHILD BEARING INTENTIONS AND CAPABILITIES. LENDERS WERE PERMITTED TO MAKE ORAL OR WRITTEN STATEMENTS THAT WOULD DISCOURAGE A REASONABLE PERSON FROM PURSUING A LOAN. IT WAS REPORTED THAT EVEN IF A FEMALE APPLICANT WERE DIVORCED AND RECEIVED NO SUPPORT FROM HER EX-HUSBAND, THE BANK COULD STILL REQUEST INFORMATION REGARDING THE HUSBAND AND ESTABLISH HIS CREDIT WORTHINESS AS A PRE-CONDITION TO THE APPLICANT'S OBTAINING THE LOAN. TESTIMONY AT SENATE HEARINGS PRIOR TO PASSAGE OF THE EQUAL CREDIT OPPORTUNITY ACT CITED THIRTEEN TYPES OF CREDIT DISCRIMINATION BASED ON SEX

AND MARITAL STATUS COMMONLY EMPLOYED BY CREDITORS IN THEIR CREDIT EVALUATIONS.[1] ONE SUCH STATED DISCRIMINATION WAS THAT CREDITORS USE CREDIT SCORING SYSTEMS THAT APPLY DIFFERENT VALUES DEPENDING ON THE SEX OR MARITAL STATUS OF THE APPLICANT. THE CLEAR INTENT OF CONGRESS IN ENACTING THE EQUAL CREDIT OPPORTUNITY ACT WAS TO STOP THIS CREDIT DISCRIMINATION AGAINST WOMEN. INDEED, WHEN THE EQUAL CREDIT OPPORTUNITY ACT WAS ENACTED, IT WAS PUBLICIZED AS A "WOMAN'S BILL" DESIGNED TO ADDRESS THE PROBLEMS OF WOMEN IN OBTAINING CREDIT.

WITH THIS BRIEF BACKGROUND ON THE INTENT OF CONGRESS REGARDING CREDIT DISCRIMINATION IN THE MID '70's, WE CAN NOW TURN TO WHAT WAS HAPPENING ON THIS ISSUE WITHIN THE NEW JERSEY LEGISLATURE AT THAT TIME.

THE LAW AGAINST DISCRIMINATION WHICH HAD BEEN INITIALLY ENACTED TO OUTLAW DISCRIMINATION IN HOUSING WAS AMENDED IN 1970 BY THE LEGISLATURE. THE AMENDMENT PROHIBITED DISCRIMINATION BASED ON MARITAL STATUS IN THE EXTENSION OF HOUSING LOANS. THEN IN 1975, ONE YEAR AFTER PASSAGE OF THE FEDERAL EQUAL CREDIT OPPORTUNITY ACT, THE NEW JERSEY LEGISLATURE IN APPARENT RECOGNITION OF DEVELOPMENTS AT THE FEDERAL LEVEL EXTENDED THIS PROHIBITION TO ALL BANK LOANS, NOT MERELY THOSE RELATING TO REAL PROPERTY. THIS LAW, WHICH REMAINS THE LAW TODAY IN N.J.S.A. 10:5-12(i), PROHIBITS ANY APPLICATION FORM "WHICH EXPRESSES, DIRECTLY

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1 SEE APPENDIX TO THIS TESTIMONY AT PAGE 13.

OR INDIRECTLY, ANY LIMITATION, SPECIFICATION OR DISCRIMINATION AS TO ... MARITAL STATUS." IN SHORT, ANY INQUIRY REGARDING AN APPLICANT'S MARITAL STATUS IS STATUTORILY PROHIBITED IN THIS STATE.

RECENTLY, HOWEVER, THE STATE ATTORNEY GENERAL, UPON A REQUEST BY THE DIVISION ON CIVIL RIGHTS FOR A FORMAL OPINION, DETERMINED THAT IT IS NOT UNLAWFUL UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION FOR LENDERS TO REQUEST AN APPLICANT'S MARITAL STATUS PROVIDED THAT SUCH A REQUEST IS PREDICATED ON THE VALID BUSINESS PURPOSE OF PROTECTING THE LENDERS' RIGHTS AND REMEDIES. THE ATTORNEY GENERAL'S OPINION FOCUSED ON THE NEED FOR INFORMATION ABOUT MARITAL STATUS FOR A LENDER INTERESTED IN OBTAINING AN ENFORCEABLE SECURITY INTEREST, CREATING A VALID LIEN, OR PASSING CLEAR TITLE OR WAIVING INCHOATE RIGHTS TO PROPERTY. IN FORMULATING HIS OPINION THAT MARITAL STATUS INQUIRIES WERE PERMISSIBLE IN THESE SITUATIONS, THE ATTORNEY GENERAL POINTED TO THE FEDERAL EQUAL CREDIT OPPORTUNITY ACT AND A SIMILAR NEW YORK STATUTE.

THE ATTORNEY GENERAL RELIED ON THE FEDERAL EQUAL CREDIT OPPORTUNITY ACT IN DETERMINING THAT MARITAL STATUS REQUESTS MAY BE APPROPRIATE IN CERTAIN INSTANCES. THE EQUAL CREDIT OPPORTUNITY ACT PERMITS MARITAL STATUS TO BE ASKED ON AN APPLICATION TO PROTECT THE CREDITOR'S RIGHTS AND REMEDIES IN THE CREDIT TRANSACTION. MARITAL STATUS MAY ONLY BE REQUESTED BY USE OF THE TERMS "MARRIED", "UNMARRIED" AND SEPARATED." THIS MARITAL STATUS

INFORMATION MAY NOT BE USED TO DETERMINE AN APPLICANT'S CREDIT WORTHINESS.

BECAUSE THE EQUAL CREDIT OPPORTUNITY ACT (ECOA) IS FEDERAL LAW AND, THUS, COULD PREEMPT STATE LAW, WE MUST EXAMINE THE ECOA'S INTENDED RELATIONSHIP TO STATE LAWS IN THIS AREA. THE LEGISLATIVE HISTORY OF THE ECOA EXPLAINS THAT THE PRACTICE OF CREDIT DISCRIMINATION IS SO ABHORRENT THAT FEDERAL LAW OUGHT NOT FORECLOSE THE STATES FROM INITIATING THEIR OWN LAWS UNLESS THOSE LAWS ARE INCOMPATIBLE WITH THE ECOA. ACCORDINGLY, WHEN THE ECOA WAS ENACTED, IT SPECIFICALLY ADDRESSED THE PROBLEM OF STATE LAWS DIFFERENT FROM THE ECOA, AS IS THE CASE HERE IN NEW JERSEY. THE ECOA PROVIDES THAT PERSONS MUST COMPLY WITH STATE LAWS RELATING TO CREDIT DISCRIMINATION EXCEPT TO THE EXTENT THAT THE STATE LAWS ARE INCONSISTENT WITH THE ECOA'S PROVISIONS. 15 USC §1691d(f).

THE ECOA ALSO ESTABLISHES A PROCEDURE FOR DETERMINING WHETHER STATE LAWS ARE INCONSISTENT WITH ITS PROVISIONS. THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM DETERMINES, UPON APPLICATION, WHETHER A STATE LAW IS INCONSISTENT WITH THE ECOA. THE BOARD IS NOT PERMITTED TO DEEM A STATE LAW INCONSISTENT WITH THE ECOA IF THE STATE LAW GIVES GREATER PROTECTION TO THE APPLICANT. OUR STATE STATUTE, WHICH PROHIBITS ALL MARITAL STATUS INQUIRIES, CLEARLY PROVIDES GREATER PROTECTION TO THE FEMALE APPLICANT AND, THUS, DOES NOT APPEAR TO BE INCONSISTENT WITH THIS FEDERAL LAW.

IN 1979, THE BOARD OF GOVERNORS HAD AN OPPORTUNITY TO DETERMINE WHETHER FEDERAL LAW PREEMPTED NEW JERSEY'S LAW, FOR IT WAS ASKED TO RENDER AN OFFICIAL STAFF INTERPRETATION ON THIS ISSUE. A PREEMPTION DETERMINATION INVOLVES A TWO-STEP ANALYSIS. FIRST, THE BOARD MUST DETERMINE WHETHER NEW JERSEY'S LAW IS INCONSISTENT AND, SECOND, WHETHER NEW JERSEY'S LAW IS MORE PROTECTIVE OF AN APPLICANT. IN THIS INSTANCE, HOWEVER, THE BOARD DID NOT HAVE TO REACH THE SECOND POINT BECAUSE IT FOUND NO INCONSISTENCY BETWEEN STATE AND FEDERAL LAW.

IN EXAMINING THE QUESTION OF INCONSISTENCY, THE BOARD HAS, BY REGULATION, EXPLAINED THE FACTORS TO BE CONSIDERED IN MAKING ITS DETERMINATION. THE KEY QUESTION IS WHETHER NEW JERSEY'S STATUTE REQUIRES OR PERMITS A PRACTICE PROHIBITED BY THE ECOA. IF IT DOES, THEN NEW JERSEY'S STATUTE WOULD BE DEEMED INCONSISTENT. WHAT THE BOARD OF GOVERNORS DETERMINED IN ITS OFFICIAL STAFF INTERPRETATION IN 1979 WAS THAT IT DID JUST THE OPPOSITE -- THAT NEW JERSEY'S LAW PROHIBITED A PRACTICE PERMITTED BY THE ECOA.

THE ONLY OTHER RELEVANT INQUIRY REGARDING INCONSISTENCY IS WHETHER NEW JERSEY'S LAW PREVENTS A CREDITOR FROM SEEKING INFORMATION REQUIRED FOR FEDERAL MONITORING PURPOSES OR FOR THE ESTABLISHMENT OF SPECIAL PURPOSE CREDIT PROGRAMS.

SPECIFICALLY, REGULATION B OF THE ECOA REQUIRES THAT LENDERS OBTAIN INFORMATION ON MARITAL STATUS ON

ANY CONSUMER CREDIT APPLICATION INVOLVING THE PURCHASE OF RESIDENTIAL REAL PROPERTY. HOWEVER, THIS FEDERAL REQUIREMENT IS NOT AT ODDS WITH NEW JERSEY'S LAW. AS THE BOARD STATED, THE LATTER PHRASE OF NEW JERSEY'S STATUTE ("UNLESS OTHERWISE REQUIRED BY LAW OR REGULATION TO RETAIN OR USE SUCH INFORMATION") WOULD PERMIT AN INQUIRY INTO MARITAL STATUS FOR COMPLIANCE WITH FEDERAL MONITORING REQUIREMENTS UNDER REGULATION B OR FOR SPECIAL CREDIT PROGRAMS. IN SHORT, THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM DETERMINED IN 1979 THAT A CREDITOR CAN COMPLY WITH NEW JERSEY'S STATUTE WITHOUT VIOLATING ECOA. CONSEQUENTLY, ACCORDING TO THE BOARD, NEW JERSEY'S LAW, WHICH PROHIBITS ALL MARITAL STATUS INQUIRES, IS NOT INCONSISTENT WITH THE ECOA.

HOWEVER, THREE MONTHS LATER THE BOARD OF GOVERNORS SUSPENDED THIS INTERPRETATION OF NEW JERSEY LAW WITH THE CRYPTIC COMMENT THAT "A NUMBER OF PERSONS COMPLAINED TO THE BOARD" AND QUESTIONED "ITS ANALYSIS OF THE EFFECT OF THE NEW JERSEY LAW."* THE BOARD ALSO ADVISED THAT IT WOULD STUDY THE ISSUE. IN RECENT CONVERSATIONS WITH JOHN WOOD, SENIOR ATTORNEY OF THE FEDERAL RESERVE BOARD'S DIVISION OF CONSUMER AND COMMUNITY AFFAIRS, IT WAS LEARNED THAT NO SUCH STUDY WAS OR HAS YET BEEN UNDERTAKEN BY THE BOARD. IN ADDITION, THE BOARD WAS NOT ASKED BY OUR STATE ATTORNEY GENERAL TO RENDER ANOTHER OFFICIAL STAFF INTERPRETATION PRIOR TO THE ATTORNEY GENERAL RENDERING HIS MOST RECENT DECISION IN THIS AREA.

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* SEE 45 FR 3567, JANUARY 18, 1980.

THUS, OUR ANALYSIS OF THE QUESTION OF WHETHER A LOAN APPLICATION MAY REQUEST MARITAL STATUS INFORMATION, HAS TAKEN INTO ACCOUNT THE "SUSPENDED" ADVICE OF THE FEDERAL RESERVE BOARD UPHOLDING THE STATUTORY BAR ON SUCH INQUIRIES IN NEW JERSEY AND THE RECENT NEW JERSEY ATTORNEY GENERAL OPINION CONDONING SUCH REQUESTS. A LOOK AT THE ACTION OF OTHER NEARBY STATES MAY ALSO PROVE HELPFUL. NEW YORK STATE'S STATUTE WHICH PROHIBITS ALL MARITAL STATUS INQUIRIES IS SUBSTANTIALLY SIMILAR IN LANGUAGE TO OUR STATE'S LAW AGAINST DISCRIMINATION. NEW YORK EXECUTIVE LAW §296-a(1)(c). YET, NEW YORK PROVIDED AN EXCEPTION TO THIS GENERAL PROHIBITION BY ENACTING A REGULATION PERMITTING A LENDER TO REQUEST AN APPLICANT'S MARITAL STATUS WHERE AN APPLICATION IS MADE FOR A MORTGAGE AND A CREDITOR DETERMINES THAT THE SIGNATURE OF THE SPOUSE IS REQUIRED IN ORDER TO PASS CLEAR TITLE SHOULD DEFAULT OCCUR. 9 NYCRR §466.7(a)(2). ALTHOUGH OUR STATE ATTORNEY GENERAL RELIED UPON THIS IN CONCLUDING THAT NEW JERSEY SHOULD HAVE A SIMILAR EXCEPTION, OUR POSITION IS THAT THIS RELIANCE IS MISPLACED AND THAT NEW JERSEY'S ACTION IN THIS REGARD SHOULD NOT BE INFLUENCED BY THE WEAKER PROTECTIONS IN NEW YORK LAW.

IN LOOKING TO THE LAWS OF PENNSYLVANIA, ITS HUMAN RIGHTS STATUTES MAKE NO REFERENCE TO MARITAL STATUS AS A DISCRIMINATORY ASPECT OF CREDIT. 43 PA. CONS. STAT. §955. DELAWARE ALSO HAS NO SUCH REFERENCE. CONNECTICUT AND MARYLAND BOTH PROHIBIT MARITAL STATUS DISCRIMINATION IN ANY

APPLICATION OF CREDIT BUT THE LANGUAGE OF THEIR STATUTES IS DIFFERENT FROM THAT OF THE NEW JERSEY STATUTE, AND, THEREFORE, PROVIDE LITTLE GUIDANCE AS TO HOW TO INTERPRET NEW JERSEY LAW. CONN. GEN. STAT. §46a-66; MD. ANN. CODE §12-305.

IN SUM, OUR RESEARCH REVEALS THAT A STATE'S RESPONSE TO THE ISSUE OF CREDIT DISCRIMINATION BASED UPON MARITAL STATUS DIFFERS FROM STATE TO STATE. INDEED SO MUCH CONFUSION HAS BEEN GENERATED BY THE OVERLAP OF STATE LAWS WHEN THE CONSUMER CREDIT PROTECTION ACT WAS ENACTED IN 1968 THAT THE CONGRESS DECIDED TO CHANGE ITS APPROACH IN IMPLEMENTING THE ECOA. IT, THEREFORE, PERMITTED A STATE TO APPLY TO THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM FOR PARTICULAR DETERMINATIONS ON INCONSISTENCY RATHER THAN BE PREEMPTED BY EXCLUSIVE FEDERAL AUTHORITY IN THIS AREA TO THE DETRIMENT OF STATE LAWS. THEREFORE, IN ENACTING THE ECOA, CONGRESS WAS SENSITIVE TO DIFFERENT STATE PROPERTY LAWS AFFECTING CREDIT WORTHINESS AND THE DIFFERENT NEEDS STATES MIGHT HAVE IN FASHIONING DISTINCTIONS BASED UPON MARITAL STATUS.

THE POINT OF THIS HISTORY IS THAT NEW JERSEY, IN DETERMINING WHETHER A LOAN APPLICATION MAY REQUEST MARITAL STATUS INFORMATION, SHOULD MAKE ITS OWN DECISIONS SO LONG AS IT DOES NOT OFFEND FEDERAL LAW. OUR STATUTE OBVIOUSLY PROHIBITS ALL MARITAL STATUS INQUIRIES IN LOAN APPLICATIONS AND IS A STRONG STATEMENT OF POLICY IN FAVOR OF AN ABSOLUTE PROHIBITION IN CREDIT TRANSACTIONS.

ALTHOUGH THERE EXISTS NO LEGISLATIVE HISTORY ON THE ENACTMENT OF OUR STATE STATUTE, THE LANGUAGE OF THE STATUTE CLEARLY PROHIBITS ALL SUCH REQUESTS AT ANY STAGE OF THE APPLICATION PROCESS. WE RECOGNIZE THAT THE LATTER PHRASE OF NEW JERSEY'S STATUTE ("UNLESS OTHERWISE REQUIRED BY LAW OR REGULATION TO RETAIN OR USE SUCH INFORMATION") MAY REFFLECT THE INTENT OF THE LEGISLATURE TO COMPLY WITH THE ECOA'S REGULATION B OR WITH FUTURE STATE REGULATIONS TO BE PROMULGATED. HOWEVER, WE STRONGLY URGE THAT NEW JERSEY'S STATUTORY PROVISIONS ON MARITAL STATUS INQUIRIES SHOULD BE READ NARROWLY TO PREVENT ANY MARITAL STATUS INQUIRIES IN CREDIT TRANSACTIONS. THIS INTERPRETATION PRESERVES ALL OF THE LANGUAGE AND SPIRIT OF THE LEGISLATIVE PROHIBITION. THE STATUTORY EXCEPTION WILL THEN BE PROPERLY LIMITED TO ACTIONS WHICH NEW JERSEY MUST UNDERTAKE TO COMPLY WITH FEDERAL MONITORING OF THE AVAILABILITY OF CREDIT IN RESIDENTIAL REAL ESTATE TRANSACTIONS UNDER ECOA'S REGULATION B.

IN CONCLUSION, IT IS THE POSITION OF THE PUBLIC ADVOCATE THAT CREDIT DISCRIMINATION AGAINST WOMEN IS SO DISTASTEFUL IN OUR SOCIETY THAT THE STATE OF NEW JERSEY SHOULD NOT PERMIT LENDERS TO INQUIRE ABOUT MARITAL STATUS ON LOAN APPLICATIONS. WE RECOGNIZE THAT LENDERS MIGHT NEED THIS INFORMATION TO DETERMINE THEIR RIGHTS WHEN AN APPLICANT SEEKS CREDIT FOR WHICH IT IS OFFERING SECURITY AND THAT A VALID BUSINESS PURPOSE MIGHT EXIST IN SUCH

INSTANCES. WE SUGGEST THAT, INSTEAD OF ASKING AN APPLICANT'S MARITAL STATUS, OTHER QUESTIONS COULD BE ASKED TO DETERMINE THE APPLICANT'S OWNERSHIP INTEREST IN THE PROPERTY, SUCH AS THE FOLLOWING:

(1) DOES ANYONE ELSE HAVE AN INTEREST IN THIS PROPERTY?

(2) WHAT IS THAT INTEREST?

(3) WHO IS THE OTHER INTERESTED INDIVIDUAL OR INDIVIDUALS?

WE SUBMIT, HOWEVER, THAT THERE IS NO VALID BUSINESS PURPOSE FOR DIRECTLY ASKING ABOUT MARITAL STATUS.

WE UNDERSTAND THAT OUR SUGGESTED APPROACH IS NOT CONSISTENT WITH THE POSITION TAKEN BY THE ATTORNEY GENERAL IN HIS RECENT OPINION. HE WOULD PERMIT A LENDER TO MAKE MARITAL STATUS INQUIRIES BASED UPON REGULATIONS TO BE PROMULGATED GOVERNING THE SITUATIONS IN WHICH LENDERS MAY REQUEST MARITAL STATUS INFORMATION AND SPECIFYING PROCEDURES TO BE FOLLOWED. IN CONTRAST, OUR POSITION IS THAT MARITAL STATUS INFORMATION SHOULD NEVER APPEAR ON THE LOAN APPLICATION OR BE INQUIRED INTO DURING THE LOAN APPLICATION PROCESS, EXCEPT AS REQUIRED BY FEDERAL LAW. INSTEAD, OTHER QUESTIONS MAY BE ASKED WHICH WILL PROVIDE A LENDER WITH ALL PERTINENT INFORMATION SHOULD DEFAULT OCCUR.

WE HAVE APPRECIATED THIS OPPORTUNITY TO PRESENT OUR VIEW ON THIS ISSUE. THE PUBLIC ADVOCATE HAS REQUESTED THAT I ADVISE THE COMMISSION THAT WE ARE WILLING TO AID YOU IN ANY WAY WE CAN IN REACHING A FINAL RESOLUTION ON SUCH AN IMPORTANT ISSUE.

APPENDIX [1]

(1) SINGLE WOMEN HAVE MORE TROUBLE THAN SINGLE MEN IN OBTAINING CREDIT.

(2) CREDITORS GENERALLY REQUIRE A WOMAN UPON MARRIAGE TO REAPPLY FOR CREDIT, USUALLY IN HER HUSBAND'S NAME.

(3) CREDITORS ARE UNWILLING TO EXTEND CREDIT TO A MARRIED WOMAN IN HER OWN NAME.

(4) CREDITORS ARE OFTEN UNWILLING TO CONSIDER THE WIFE'S INCOME WHEN A MARRIED COUPLE APPLIES FOR CREDIT.

(5) WOMEN WHO ARE SEPARATED HAVE A PARTICULARLY DIFFICULT TIME, SINCE THE ACCOUNTS MAY STILL BE IN THE HUSBAND'S NAME.

(6) CREDITORS ARBITRARILY REFUSE TO CONSIDER ALIMONY AND CHILD SUPPORT AS A VALID SOURCE OF INCOME WHEN SUCH SOURCE IS SUBJECT TO VALIDATION.

(7) CREDITORS APPLY STRICTER STANDARDS TO MARRIED APPLICANTS WHERE THE WIFE RATHER THAN HUSBAND IS THE PRIMARY SUPPORTER FOR THE FAMILY.

(8) CREDITORS REQUEST OR USE INFORMATION CONCERNING BIRTH CONTROL PRACTICES IN EVALUATING A CREDIT APPLICATION.

(9) CREDITORS REQUEST OR USE INFORMATION CONCERNING BIRTH CONTROL PRACTICES IN EVALUATING A CREDIT APPLICATION.

(10) CREDITORS REFUSE TO ISSUE SEPARATE ACCOUNTS TO MARRIED PERSONS WHERE EACH WOULD BE CREDITWORTHY IF UNMARRIED.

(11) CREDITORS CONSIDER AS "DEPENDENTS" SPOUSES WHO ARE EMPLOYED AND NOT ACTUALLY DEPENDENT ON THE APPLICANT.

(12) CREDITORS USE CREDIT SCORING SYSTEMS THAT APPLY DIFFERENT VALUES DEPENDING ON SEX OR MARITAL STATUS.

(13) CREDITORS ALTER AN INDIVIDUAL'S CREDIT RATING ON THE BASIS OF THE CREDIT RATING OF THE SPOUSE.

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[1] SEE BLAKELY, CREDIT OPPORTUNITIES FOR WOMEN: THE ECOA AND ITS EFFECTS, 1981 WIS. L.REV., 655, 659-660.

Senator Lipman and members of the Commission:

I am Danielle E. Reid, attorney with Evans, Koelzer, Osborne, Kreizman & Bassler of Red Bank, practicing in commercial litigation, ~~in~~ real property, probate and trust law. I am author of a law review article on the elective share statute.

I am here to speak about two provisions of the probate code: First, the Elective Share Statute, now at N.J.S.A. 3B:8-1, and second, the Dower and Courtesy Statute, now at N.J.S.A. 3B:28-2.

Elective Share Statutes were passed in Ohio and New York about 50 years ago. Similar statutes also exist in Michigan, Pennsylvania, and Alabama; the Uniform Probate Code (UPC) also provides for an elective share. There are often only two or three grounds to disqualify a surviving spouse from an elective share. These grounds would include:

1. Murder (New York, Pennsylvania, Michigan)
2. A judgment of divorce or annulment or a valid contract between the parties (New York, Michigan, UPC)
3. Bigamy and incest (New York, Michigan)
4. Willful desertion and non-support, usually one year not a brief period like a vacation (New York, Pennsylvania, Michigan)
5. Adultery (many jurisdictions with great variation)

New Jersey adopted many parts of the Uniform Probate Code (UPC) in its Probate Reform Act of 1978. The Elective Share Statute, however, was not enacted until 1980. The Elective Share Statute was first introduced in 1972, and was amended many times

after two public hearings (9/11/73 and 5/23/74). The Senate Judiciary Committee statement to the bill that was enacted states that the New Jersey Elective Share Statute is similar to the Pennsylvania Statute. I would like to note however that the Pennsylvania grounds in the Elective Share Statute itself only concerns willful desertion and non-support; another statute in Pennsylvania Probate Law denies a surviving spouse any share in the estate if the surviving spouse murdered the decedent.

The New Jersey Elective Share Statute differs greatly from UPC and statutes in other states because there are fourteen grounds for disqualification - fourteen ways to leave out your spouse, so to speak. The New Jersey Elective Share Statute says that if a married person dies living in ~~the~~ this state, after February 28, 1980, the surviving spouse has a right to take an elective share of 1/3 of the augmented estate provided that at the time of death decedent and surviving spouse had not been living separately or had not ceased to cohabit as man and wife, either as the result of judgment of divorce or under circumstances which would have given rise to a cause of action for divorce, or annulment to decedent before his death.

Under New Jersey law, found at N.J.S.A. §2A:34-1-2, these fourteen grounds are the following:

1. Bigamy
2. Incest
3. Impotency
4. Lack of capacity because of mental disability at the

influence of drugs or intoxicants; duress or fraud as to the essentials of marriage.

5. Marriage to a person under 18 years of age.

6. General equity grounds.

7. Adultery

8. Willful and continued desertion for more than 12 months.

9. Extreme cruelty, physical or mental.

10. Separation of 18 or more consecutive months.

11. Voluntary addiction or habituation to drugs or habitual drunkenness. for 12 or more consecutive months

12. Institutionalization for mental illness for 24 consecutive months or more.

13. Imprisonment for 18 or more consecutive months.

14. Deviant sexual conduct without consent.

I have some examples of situations ~~that have been in courts~~ from ~~in~~ reported cases either in New Jersey or other jurisdictions with similar statutes.

1. Annulment; the decedent was married during the prohibited time after spouse's earlier divorce. Decedent died in military action and his parents claimed the marriage ~~is~~ was void and the estate ~~goes~~ should go to them, not to the spouse.

2. Incest; Decedent married his niece in a foreign country and later moved to a state where such marriages are prohibited.

3. Impotency; Decedent wife ~~is~~ was still a virgin after 3 years of marriage and the presumption of impotency was not overcome.

Fraud:

4. Decedent learns shortly after marriage that spouse had concealed the fact of heroin addiction (fraud as to essentials of marriage, that is, sexual relations).

Age:

5. Decedent was only 16 upon marriage to ~~her~~ spouse in another state and later moves to New Jersey (would ~~decedent~~ spouse forfeit elective share before decedent reaches the age of 18).

General equity:

6. Decedent learned after marriage that spouse's claim of being a practicing orthodox Jew was incorrect and spouse ~~does~~ did not intend to follow the practice (suggestive test of essentials of marriage).

7. Spouse commits an act of adultery acting upon decedent's suggestion and acquiescence.

Desertion:

8. Spouse refused to have sexual relations with decedent but continues to live in the same household (Rodie v. Rodie, 138 N.J. Eq. 470 (1946), unjustified withholding of sex).

Extreme Cruelty:

9. Spouse has a homosexual relationship or spouse insisted on decedent's use of contraceptives (H v. H 59 N.J. super. 227; G v. G, 97 N.J. super 534; A v. A, 87 N.J. super 440).

Separation:

10. Decedent moves out of the marital residence he shared with his family for over 30 years, but parties postpone seeking a divorce due to religious beliefs; or spouse was assigned to military or diplomatic service overseas for over 18 months and parties postpone seeking a divorce.

11. Spouse was habitually drunk or addicted to a controlled dangerous substance such as heroin or marijuana.

12. Spouse was institutionalized for paranoid schizophrenia and is released for week-end visits as part of rehabilitation; after decedent's death would spouse be disqualified from elective share.

13. Spouse was imprisoned for over 18 months by revolutionaries in a foreign country.

14. Spouse had committed an act of deviant sexual conduct (no case on this point yet, but it has been suggested that this would encompass ~~the NCOMPASS~~ Acts with spouse, a member of the same sex, an animal, or oneself. (Skoloff, 94 N.J.L.J. 701, 708 (1971)) or as in New York, vaginal, oral, or anal intercourse with physical force).

There are several substantive and procedural problems that I can see with the Elective Share Statute as it exists today.

First of all, ~~because~~ the Statute includes no-fault divorce after 18 month separation, (I don't mean no-fault as in the automobile insurance policies but no-fault in the divorce sense that neither party must prove the other party was at fault in termination of this marriage). A party who does not seek divorce on religious grounds or for hopes of reconciliation could be disqualified from receiving an elective share on the decedent's death. The effect ~~of this means~~ is that the surviving spouse would not be entitled to an elective share and that the surviving spouse would not be entitled to equitable distribution. Equitable distribution could be available if divorce proceedings had started and one party to a marriage died before judgment was

made. It might seem to most people that death during divorce proceedings ~~are~~ is very unlikely, but this has occurred in a few cases in New Jersey involving equitable distribution or automobile accident policies, but no reported opinions involving the elective share as far as I know. The effect is therefore that the Elective Share Statute rewards a person who institutes divorce proceedings and penalizes the person who does not institute divorce proceedings whether it's on the basis of hopes of reconciliation or desire not to seek divorce on religious grounds.

Secondly, The Elective Share Statute also conflicts with the Annulment Statute for incest. That Statute prohibits an inquiry after death into the validity of a marriage during the lifetime. However, the Elective Share Statute would probably preempt the Incest Statute because it was more recently enacted.

Third, the Elective Share Statute encourages litigation by a person who wants to increase the share of other beneficiaries in the state. Based on my study of existing cases, this person could be a greedy relative, a hostile in-law, a step-child, lover, school, charity, or private institution.

Fourth, the Elective Share Statute may encourage perjury in probate proceedings. Several law review authors have recognized that perjury existed in divorce proceedings.

Fifth, the Elective Share Statute is a possible due process violation, when neither spouse seeks the remedy of divorce or annulment, but an outsider to the marriage does seek such remedy.

New Jersey cases state that public interest in granting divorces is in preserving viable and meaningful marriages while permitting spouses to remarry if the marriage is not meaningful or viable. The Elective Share Statute does not serve this public interest because one party to the marriage has already died.

Sixth, the Elective Share Statute is a possible due process violation if it is based on a "cause of action", without reference to the usual matrimonial defenses, instead of basing it on a "right of action." However, a court could avoid this problem by construing "circumstances" to include matrimonial defenses as well as the "cause of action."

Seventh, The relationship of the Elective Share Statute to the Dower and Courtesy Statute is unclear. I will discuss that later ~~in a little while~~.

Eighth, This statute may conflict with the statutes of wrongful death awards for settlement, which pass to beneficiaries according to the statutes on intestate succession, without any limitation based on divorce or annulment standards. Thus, the proceeds of the wrongful death action could pass to a person who is technically a spouse on death (in other words the marriage was not dissolved) provided that the person seeking wrongful death compensation has been able to prove a pecuniary loss for contribution that the decedent might reasonably have been expected to make to the survivor. However, a Pennsylvania case distributed wrongful death proceeds of a settlement, excluding a spouse, where the court determined the standards ~~to determine~~ for disqualification for the spouse would be the same as those that

would have been applied if the deceased spouse sought a decree of separation on grounds of abandonment.

Ninth, a surviving spouse may be disqualified from receiving an elective share, yet may receive a share under the statute providing for spouses omitted from the decedent's Will. That statute, passed in 1979, requires ~~that~~ the spouse ~~must~~ to prove the following in order to receive an intestate share (that means ~~passing as~~ the amount if there were no Will); (1) the Will was made after 9/1/79; (2) marriage to the decedent occurred after the Will was made; (3) the Will or other evidence does not indicate that the testator intentionally provided for the surviving spouse outside the Will instead of under the Will.

Tenth, the Elective Share may conflict with the Family Allowance Statute or it may be construed that the forfeiture under Elective Share also applies to family allowance. In order to receive a family allowance and expenses pending a Will contest, a surviving spouse must prove (1) a ceremonial marriage, and (2) spouse was living with decedent at decedent's death, with no requirement for the period of time that spouse and decedent were living together.

Eleventh, Elective Share Statute has different consequences from Social Security Statute. Social Security benefits are generally awarded according to state law on a spouse's marital status at the time of death. If there is no degree of divorce or annulment prior to death, the parties are still technically married and a survivor may receive benefits.

Twelfth, the Elective Share Statutes may also reach different results in the New Jersey Workers Compensation Statutes. Those statutes require dependency of a spouse in order to receive benefits, but there is a conclusive presumption of dependency if the surviving spouse was actually a part of the decedent's household at the time of decedent's death, with no reference to divorce standards.

Thirteenth, the Elective Share Statute may raise procedural problems where a surviving spouse must file a complaint for an elective share within 6 months of date of death. If the estate through its personal representative seeks to disqualify the spouse and file an order to show cause returnable in 20 days, the estate has only 20 days in which to acquire information to support its disqualification theory. Perhaps a longer discovery period is necessary for the estate.

Fourteenth, another procedural problem involves the evidence rule that replaces the dead man's statute. The evidence rule says that any statements by or transactions with a decedent must be proven by clear and convincing evidence. This is a higher standard than preponderance of evidence. Therefore, a surviving spouse must prove that the matrimonial grounds did not exist by this higher standard and must prove or disprove certain statements by this standard.

I would also like to note that a personal representative, (that is an executor or administrator) has a statutory duty to settle or distribute an estate expeditiously and efficiently but

within the best interests of the estate. The personal representative may compromise a claim for an elective share, and may do so where the tax consequences, litigation costs or litigation delays are significant, and especially where the conduct of the surviving spouse has not been egregious.

I have a few recommendations about amendments to the Elective Share Statute. At the very least, I recommend that the legislature remove the ground of divorce based on no-fault separation of 18 months. The public hearings of 1973 and 1974 showed a concern for disqualifying a surviving spouse who is guilty of some misconduct. There is frequently no misconduct in a no-fault divorce and a person who did not seek a divorce should not be penalized by losing the elective share.

A better amendment would be to narrow the grounds for disqualification to a few specific and common grounds. These could be murder, judgment of divorce, willful desertion or non-support for at least 12 months, and possibly bigamy, incest or adultery (grounds commonly found in other state statutes).

¶ The ambiguity between the Incest and Elective Share Statutes should be clarified, possibly by amending the Incest Statute to allow inquiry after death.

The phrase "circumstances which would have given rise to a cause of action for a divorce or annulment" should be changed to "circumstances which would have entitled decedent to divorce or annulment". This would clearly permit matrimonial defenses to be presented.

The second statute I would like to discuss today is the Dower and Courtesy Statute now found at 3B:28-2.

New Jersey did not adopt the ~~Simple~~ Uniform Probate Code (UPC) suggestion which would provide simply that "all rights of Dower and Courtesy are abolished." Instead the New Jersey Statute abolishes Dower and Courtesy for real property that a married person owns after the effective date of the statute, and allow~~ing~~s a right of joint possession during the marriage.

The first question this raises is whether the statute is retroactive. This statute uses a technical legal phrase "of which a person is seized" which usually means "owns". On its face, the statute seems to apply retroactively and prospectively but the Senate Judiciary Committee statement, which appears after the New Jersey Statute says that this statute applies to property acquired subsequent to the effective date of the act. Thus there is confusion about whether this is retroactive or not.

Secondly, the relationship to the Elective Share Statute is not clear. Originally the bill was silent as to its applicability to estates where there was an elective share taken. The Senate Judiciary Committee, in November 1979, amended the statute to say "this act does not apply to estates where the surviving spouse does not have a right to an elective share." In December 1979 the assembly concurred in the Senate Amendment. However, on Saturday, January 5, 1980, the last day of the legislative session, the Senate unanimously rescinded this Amendment. The Committee statement had said the Amendment was

intended to emphasize the that the rights were abolished only to the states in which the surviving spouse was entitled to an elective share. The recision of an emphasizing amendment now does not make it clear whether the Dower and Courtesy Statute does not apply where the surviving spouse does not qualify for elective share.

Third, the Dower and Courtesy Statute creates a right of joint possession during marriage. A question apparently raised by title insurance carriers is whether the spouses have a right of joint possession with respect to entire apartment complex that they own, where their "principal matrimonial residence" is one unit of that apartment. Another question is whether the right of joint possession entitles a spouse to sharing rents either from other apartments or perhaps the other unit in a duplex which is the "principal matrimonial residence".

Therefore, I would recommend the following amendments to the Dower and Courtesy Statute: replace the phrase "~~deceased~~ to be seized" with "become seized" to clarify that the statute only applies to property acquired after the date of the new Dower and Courtesy Statute; reinstate the rescinded amendment that clarifies Dower and Courtesy ~~Statute does not apply (Danielle, your second tape picks up here) that Dower and Courtesy~~ are not abolished if a surviving spouse does not have the right to an elective share; and that the right of joint possession during marriage includes only the living unit used as a principal marital residence, not all units in a multi-unit dwelling.

Before the Elective Share Statute was enacted, many writers and womens groups supported the elective share (for example Shirley O'Neill's article in the New Jersey Lawyer, August 1979 at page 19). They supported the elective share because they said it was fair to surviving spouses who might be disinherited by a decedent's Will. In my research I found no articles that analyze the disqualification grounds of the elective share. I would like to note that these disqualification grounds on their face do not discriminate against women, but in my experience with estate administration, and in the experience of other attorneys to whom I have spoken, the surviving spouse is frequently the wife. Among the estates that are being probated today there may still be many traditional marriages in which many assets are in the name of the decedent's husband. If the estates personal representative can show that any grounds for divorce or annulment existed, the surviving spouse may be effectively disinherited. Until the time that property is more evenly divided between the spouses, I think that New Jersey's Elective Share Statute as it exists today will cause harsh results for many women, who may be unaware that they may lose the Elective Share Statute if ~~they don't~~ divorce grounds exist, and may lose equitable distribution as well if they do not bring a divorce action before the spouse dies.

I hope that this testimony will help the Commission in pointing out some of the problems and in suggesting solutions to those problems. Thank you very much.

NOW - NJ

NATIONAL ORGANIZATION FOR WOMEN OF NEW JERSEY

198 W. State Street, Trenton, New Jersey 08608
(609) 393-0156

September 28, 1983

Testimony of NOW-NJ before the Commission on Sex Discrimination in the Statutes on Credit Discrimination

Nancy Stultz, Co-Chair, Legislative Task Force, NOW-NJ

I am here today representing the almost 9,000 members of the National Organization for Women in New Jersey and our twenty-three chapters.

I'd like to take this opportunity to point out the superior New Jersey Law Against Discrimination is one of the strongest state laws in the country and that New Jersey has for many years been a leader in eliminating legal discrimination. NOW-NJ is pleased that the Commission on Sex Discrimination in the Statutes will be continuing its work for at least the next two years to keep New Jersey in the vanguard.

Attorney General Kimmelman issued an order on July 5, 1983 that it is legal and correct for a lender to inquire about the marital status of an applicant "in order to enable it to protect its interest in security provided on account of the loan." The opinion is in accordance with the current provisions of the federal Equal Credit Opportunity Act (ECOA)

NOW-NJ would like to suggest an amendment to the State Law Against Discrimination which would change the right to ask marital status to the right to ask for information concerning anyone with property rights to the security. Although the federal and state laws clearly state that marital status may not be taken into account in connection with the evaluation of credit-worthiness, it is difficult to make that distinction with the current wording. Property rights to the security only become an issue in the cases of secured loans. Needless to say, there may be other property interests than that of a spouse. The consumer may be confused as to what information needs to be given on a credit application and how that information will be used.

NOW-NJ supports including Regulation B from the federal ECOA in the state law. Discrimination on the basis of pregnancy, parentage, birth control practices or intent to bear children is prohibited under current law, this change would only make that prohibition explicit. Our experiene suggests that consumers have a good understanding of the law in this particular area because of

several well-publicized cases.

NOW-NJ supports the inclusion of the section prohibiting discrimination on the basis of source of income - part-time work, public assistance and alimony. Women are the prime receipients of income from these sources.

NOW-NJ encourages all women to establish credit histories in their own name from an early age and to continue that practice throughout marriage. Eventually, every individual would have his/her own lifetime credit history. As an interium practice at this time applicants should be able to choose whether or not to have marital credit status reported. We support the inclusion of a section in the law allowing that choice on a case-by-case basis.

We strongly support increasing the enforcement mechanisms in the law. We support both Assembly Bill #1017 and #1015 to allow increased monetary damages and the right to bring civil suits.

It is clear that there are gaps in the law which need correction. Our biggest problem, however, is one of publicizing the legal rights for women that do exist and changing attitudes on the part of lenders and investigators about the role of women. I have attached a brochere of the National Organization for Women concerning the federal ECOA. Some organization or government agency should publish a similar one for the state law.

In conclusion, NOW-NJ would not let any opportunity pass to promote the need for ratification of the federal Equal Rights Amendment. The areas of economic discrimination being discussed here today can best be addressed by a uniform, national standard of legal and economic rights. We urge immediate consideration of a resolution in the state Senate putting New Jersey again on record for the Equal Rights Amendment.

American Association of University Women

New Jersey State Division
310 Summit Avenue, Summit, New Jersey 07901

TO: The Commission on Sex Discrimination in the Statutes

FROM: Irene Holler and Joyce G. Harrington
New Jersey State Divisin Legislative Committee Members

Date: September 28, 1983

Re: Probate law, inheritance taxes and estates between spouses

The American Association of University Women, one of the oldest and largest women's organizations, promotes programs to achieve legal, social, educational and economic equity for women. AAUW supports comprehensive legislation implementing legal rights for women and measures to ensure legal recognition and financial benefits for unpaid work.

The New Jersey State Division of AAUW, with over 6,000 members in 53 branches, supports reform of marital property laws on the principle of marriage as a partnership. Equity in the assets of the partnership should not be based only on the direct monetary contribution by either spouse, but should also recognize the intangible contribution of a non-working spouse. A surviving spouse's right to continue to live in the matrimonial residence should be guaranteed, without having to prove which spouse"paid" for the residence.

New Jersey has frequently taken the lead in enacting legislation to protect its citizens, but in inheritance taxation has fallen behind the federal example. New Jersey should move toward bringing its inheritance tax law more in line with federal law. We urge legislation to eliminate the taxation of interspousal transfers of jointly held marital assets.

We wish to commend the Commission on its continuing efforts toward eliminating sex discrimination in the statutes.

LEAGUE OF WOMEN VOTERS OF NEW JERSEY

212 WEST STATE STREET, TRENTON, NEW JERSEY 08608 / TELEPHONE 800-792-8836 / 609-394-3303

September 28, 1983

TESTIMONY BEFORE THE COMMISSION ON SEX DISCRIMINATION IN THE STATUTES

RE: PROBATE, INHERITANCE TAXES, ESTATES BETWEEN SPOUSES, CREDIT

- Testimony prepared by Roberta Francis, LWVNJ Women's Issues Director -

The League of Women Voters of New Jersey and the 82 local Leagues in New Jersey appreciate the work the Commission on Sex Discrimination in the Statutes is doing to eliminate the discriminatory impact of sex differentiation in New Jersey laws. This work is essential to further our progress toward the time when equality of rights under the law shall not be denied or abridged on account of sex. Only ratification of a federal Equal Rights Amendment can extend that guarantee to all citizens.

Today I am here to express the views of the League of Women Voters of New Jersey on laws regarding probate, inheritance taxes, estates between spouses, and credit. In 1977, New Jersey Leagues undertook a study of the legal status of women. The consensus position resulting from that study sets forth general criteria which we believe should apply to revisions of pertinent state statutes. Our position states in part:

> The League of Women Voters believes laws should protect the rights of women. We recognize that few women remain in the same category for a lifetime, but may at one or more times be single heads of households, full-time homemakers, or working wives. Laws should reflect these changes in women's lives. Marriage is a partnership, and . . . the contributions of the homemaker should receive adequate recognition. . . . We have a special concern for the needs of the displaced homemaker in our society. We therefore support the revision of property and inheritance laws in accordance with Uniform Probate Code concepts. . . .

During our study of women's legal status, we examined the series of bills before the Legislature in 1977 that were designed to substantially change the probate and intestacy laws. We concluded that such bills, modeled on the Uniform Probate Code, would correct many existing inequities, but we recognized that their effectiveness would depend in part on how courts interpreted their provisions. A 1977 League fact sheet on "Uniform Probate Code in New Jersey" warned: "It would still be possible to deny women fundamental rights to estates which they, as partners in the marriage, have helped to build." The League also worked for passage of the laws which eliminated dower and curtesy and established the right of election.

On the basis of our 1979 consensus position on the legal status of women, we offer several general suggestions regarding the topics before the Commission today. These suggestions are a logical extension of our affirmation of the concept of marriage as a partnership, economic as well as emotional.

First, we propose that New Jersey revise the policy underlying the elective share law in order to recognize the value of the surviving spouse's contribution, whether monetary or non-monetary, to the accumulation of assets by the marital partnership. In other words, the law should presume that the financial value of an estate left by a deceased spouse has been maximized by the economic contributions of the surviving spouse -- whether in the form of monetary contributions to help finance marital expenses or in the form of homemaker services performed without pay.

At present, however, New Jersey's elective share law contains a provision inconsistent with this presumption. This provision, which is not present in the Uniform Probate Code or in the elective share statute of any other state, to our knowledge, requires that any property owned by the surviving spouse, whether acquired inside or outside the marital partnership, be applied against the sum owed as the elective share. This means that, for example, a spouse who through employment or inheritance has personal property equal to the value of the elective share would not receive any portion of the estate accumulated by the deceased partner in the marital partnership. New Jersey has obviously based the elective share law on a policy of "need," to minimize the chance that the surviving family will become charges of the State, rather than on the premise that the surviving spouse has an inherent economic interest in the other spouse's estate.

We propose revision of the law so that the elective share becomes a recognition that both spouses have made an economic contribution to the marital partnership and therefore both have an inherent interest in ownership of the accumulated assets. We also suggest reevaluation of the requirement that the spouses not be "living separate and apart" at the time of the deceased spouse's death. Current patterns of employment and education sometimes result in the temporary location of spouses in two separate domiciles, and such circumstances should not be a cause for forfeiture of the right of election. We also suggest reevaluation of the exemption from the augmented estate of insurance, pensions, and annuities naming someone other than the spouse as beneficiary. This exemption provides a major loophole whereby the surviving spouse may truly be disinherited, despite contributions made to the accumulation of the marital assets.

We believe that a new look at the elective share law, using the policy articulated above in place of the policy of need, should result in a more equitable treatment of the surviving spouse. If it works as intended, the elective share law by its very presence should discourage a person from disinheriting the spouse who has helped in the accumulation and maximization of the estate in question.

The above premise of a marital economic partnership should also be applied to the issue of inheritance tax on interspousal transfers and jointly held property. The law should recognize that each spouse makes an economic contribution, whether monetary or non-monetary, to the accumulation of marital property. We are particularly concerned that the non-monetary contribution of the homemaker receive adequate economic recognition, since the career potential sacrificed by a homemaker results in diminished economic potential in later years. We propose no specific formula, but we affirm the need to achieve more economic equity for the non-wage-earning spouse in the marital partnership.

This same premise can be applied to the other issues before the Commission today. If marriage is indeed an economic partnership, the law should presume an interest in marital property by both partners. Our consensus position in fact specifically states that pensions should be joint, unless an alternate option is elected with the informed consent of the marriage partner.

Another League position which applies to certain of these issues is our unreserved support of the federal Equal Rights Amendment. Implicit in that support is action to bring laws into compliance with the goals of ERA. We therefore would oppose the current sex-based valuation and taxation of annuities, life-estates, and remainders. We would also support extension to all types of loans and credit the prohibition of discrimination on the basis of pregnancy, parentage, birth control practices, or intent or capacity to have children. Questions concerning the marital status of an applicant for a loan or credit should be closely tailored to the purpose for which the information is sought, rather than a general request to reveal marital status.

While the League has not studied these issues in sufficient depth to be able to propose specific formulas for legal remedies to the points in question, we strongly believe that our proposed application of the presumption of marriage as an economic partnership can provide guidelines for revision of some of the current statutes. We thank the Commission for its good work, and we encourage and support your continued efforts to eliminate sex discrimination in all areas of New Jersey law.

GENERAL ASSEMBLY
OF NEW JERSEY
TRENTON

MAJORITY LEADER
JOHN PAUL DOYLE
ASSEMBLYMAN, DISTRICT 10 (OCEAN)
917 N. MAIN ST.
TOMS RIVER, N. J. 08753
RES. 201-458-2676
BUS. 201-240-2200

September 28, 1983

Senator Wynona M. Lipman, Chairwoman
Commission to Study Sex Discrimination in the Statutes
State House Annex
Trenton, NJ 08625

Dear Senator Lipman:

Thank you for inviting me to testify at the public hearing scheduled by your commission on September 28. I am not able to personally present my testimony but will take this opportunity to request that the following information be made a part of the official testimony.

I am the prime sponsor of A-2294 which phases out the transfer inheritance tax over a period of four years. The bill has passed the Assembly, has been released from the Senate Revenue, Finance & Appropriations Committee and is presently awaiting a vote by the full Senate.

This bill is a key element in tax reform for thousands of average people in this State. Under this proposal the transfer inheritance tax would be eliminated over a four-year period in the 2, 3 and 4 percent tax bracket for Class A transfers. Class A inheritance tax applies to estate income to immediate family members. By removing the percentage of tax up to 4 percent, the present $15,000 estate exemption would be expanded to $150,000.

The transfer inheritance tax was first enacted in New Jersey in 1909 and was a relatively innocuous tax. However, after the devastating hurricane of 1962, the inheritance tax was substantially increased to finance the rebuilding of New Jersey's shoreline. This increase was to have been temporary. Presently it is one of the highest state death taxes in the nation. More than 50 percent of all states impose no state tax on the death of a spouse.

I am very much aware, as you are, that the surviving spouse is more often than not a woman. Consequently, I **am pleased to** report to you my sponsorship of the bill and its progress through the Assembly and Senate. I believe that this bill will help all New Jerseyans, particularly

women. I am pleased to bring it to your attention. I believe that it conforms to the major concern of your commission which is to provide economic equity to women and to ferret out areas where discrimination exists. If you have any questions regarding the measure, please don't hesitate to call me.

Very truly yours,

John Paul Doyle
Majority Leader

JPD/s:dcl

north jersey chapter
new jersey
AMERICANS FOR DEMOCRATIC ACTION
23 Beaumont Terrace, West Orange, N.J. 07052 • 731-2355

Alma Saravia, Executive Director
Commission on Sex Discrimination in the Statutes
State House Annex
Trenton, N.J.

Dear Ms. Saravia:

I am responding to the Commission's invitation that I testify before it on the New Jersey inheritance tax.

While I appreciate your invitation, it seems to me that any testimony I might give would be only peripherally related to your inquiry. I do not have any expertise on the details of the inheritance tax itself which I feel would be terribly useful to your inquiry.

The views of myself and the ADA are contained in the enclosed press release detailing my testimony before the State Democratic Platform Committee. It was the thrust of my remarks to caution against throwing out the baby with the bath water. I understand that your concern is with the"bath water," that is with reform of the statute to protect the rights of women. We have no problem with that. We would just like to make sure that in the name of reform the state does not do away with a needed and progressive source of revenues.

I hope our view will be of some help to you, but I doubt that I could add very much more by coming to Trenton to testify.

Thanks again for your interest in our views.

Sincerely yours,

Frank Askin

Frank Askin, president

north jersey chapter
new jersey
AMERICANS FOR DEMOCRATIC ACTION
23 Beaumont Terrace, West Orange, N.J. 07052 • 731-2355

FOR IMMEDIATE RELEASE - Aug. 30, 1983 Contact: Frank Askin, 731-2355

ADA URGES DEMOCRATS TO SAVE INHERITANCE TAX,
DEAL WITH COST OF LIVING, NOT COST OF DYING

It's the cost of living, not the cost of dying that is driving older citizens out of New Jersey, a spokesman for Americans for Democratic Action (ADA) told the State Democratic Party's platform hearing as he urged the Democrats to repudiate the action of the Democratic-controlled Assembly to phase out New Jersey's inheritance tax.

Frank Askin, Rutgers Law School professor and president of the North Jersey Chapter of the liberal political-action organization, told the Platform Committee, meeting at Essex County College, Newark, that elimination of the inheritance tax would cost the state more than $150 million a year in revenues.

"The inheritance tax is one of the more progressive forms of taxation," Askin said. "Three-quarters of the revenue it produces comes from the estates of persons who die with assets in excess of $100,000."

Under Assembly Bill 2294, which passed the New Jersey Assembly without opposition, the state's inheritance tax would be phased out over four years. The State Senate has not yet acted on the measure.

Askin agreed that the present tax structure should be revised to exempt small estates, but said total elimination amounted to "throwing out the baby with the bath water." He questioned claims of proponents of the phase out measure that the inheritance tax was driving senior citizens from New Jersey to states without such death taxes. "I know that our financial institutions claim that to be the case, but where is the hard evidence of that fact?" Askin asked, citing recent census figures showing that New Jersey had the second highest median age in the nation.

Furthermore, Askin said: "I think the cost of living in New Jersey has a much greater impact on older citizens than the cost of dying. If seniors are being forced out of the state, it is because they can't find affordable housing and can't pay skyrocketing utility rates. New Jersey would be better off to retain the inheritance tax and use some of its revenues to provide housing for the elderly, reduce their property taxes and provide additional assistance for utility ratepayers on fixed incomes."

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PROPOSED CREDIT RULES OF THE DIVISION ON CIVIL RIGHTS

Submitted at the September 28, 1983 Public Hearing on Probate, Inheritance, Banking and Credit and Estates between Spouses by Pamela Poff, Director of Division on Civil Rights.

1.1. Definitions:

For purposes of these regulations, unless indicated otherwise the following definitions shall apply:

(a) Account means any extension of credit for services rendered or property used.

(b) Adverse action includes, for purposes of notification of action taken, (a) a refusal to grant credit, (b) a termination of or unfavorable change in the terms of an account, (c) a refusal to increase the amount of credit available.

(c) Applicant means any person who requests credit or who has received an extension of credit from a creditor but shall not include a guarantor, surety, endorser, or similar party.

(d) Application means an oral or written request for granting, withholding, renewal, or extension of credit.

(e) Credit means the right granted by a creditor to an applicant to defer payment of a debt for, or incur and defer payment for property, goods, or services, or the requirement to pay security for property used or services rendered.

(f) Creditor includes, but is not limited to, any person, bank, banking organization, mortgage company, insurance company, financial institution, lender or credit institution, wholesale and retail merchants, public utility, landlord and renter, and landlord's and rental agent, to whom application is made, or who extends or arranges for granting, withholding, renewal, or extension of credit.

(g) Public assistance means any Federal, State, or local governmental assistance that provides a periodic income or income supplement, whether premised on need or entitlement. The term includes, but is not limited to, Aid to Families with Dependent Children, rent and mortgage assistance or insurance, Social Security, and Supplemental Security Income.

1.2. A creditor shall make all creditworthiness evaluations on an individual basis and shall not evaluate an application on the basis of aggregate statistics or assumptions relating to the applicant's race, creed, color, national origin, nationality, ancestry, marital status, sex, or physical handicap, except as allowed by these regulations.

1.3. A creditor shall not make any statements to applicants or prospective applicants which would, on the basis of the applicant's race, creed, color, national origin, nationality, ancestry, marital status, sex, or physical handicap, discourage a person from applying for credit or pursuing an application for credit.

1.4. Where a married person is entitled to use of credit under a credit line of the spouse or under a joint credit account, that person may have his or her name listed separately on the account.

1.5. Where a married couple applies for joint credit, a creditor may not discount or exclude from consideration in evaluating creditworthiness the income or assets of either spouse. Where a married couple applies for joint credit, a creditor shall evaluate the income and assets of each spouse without regard to the sex of the spouse with the larger income or greater assets. For example, a joint application wherein the wife earns $15,000.00 and the husband $10,000.00 annually shall be evaluated and considered the same as a joint application wherein the husband earns $15,000.00 and the wife $10,000.00 annually.

1.6. Where unmarried persons apply for joint credit and are willing to co-sign for any credit or credit agreement, a creditor may not discount or exclude the income or assets of any person willing to co-sign, nor refuse to allow such persons to co-sign, because the persons are unmarried.

1.7. A creditor shall allow a married person to request, receive, and maintain an individual separate account in his or her own name where the applicant seeks such account and is individually creditworthy. Therefore, if an applicant applies for an individual account a creditor may not request the applicant's marital status.

1.8. Notwithstanding section 1.7., a creditor may inquire as to the liability of an applicant to pay alimony, child support, or separate maintenance.

1.9. Notwithstanding section 1.7., a creditor may inquire of an applicant whether any income relied upon in the application is derived from alimony, child support, or separate maintenance. If the applicant discloses that he or she is relying in part or in whole on income from such sources, the creditor must then inquire whether such payments are received pursuant to a court order or a written agreement. If received pursuant to a court order, a creditor may not discount or exclude such income in evaluating the applicant's creditworthiness. If the payments are received pursuant to a written agreement, a creditor may consider such payments to the extent they are likely to be made. Factors that a creditor may consider in determining the likelihood of consistent payments include, but are not limited to, the length of time that payments have been received in the past; the regularity of receipt; the availability of procedures to compel compliance; and the creditworthiness of the payor.

1.10. A creditor may inquire whether any income listed in an application is derived from any form of public assistance, but the creditor must treat such income the same as the creditor treats income from wages or salary.

1.11. A creditor shall not request or use information about birth control practices or intentions concerning childbearing. Nor shall a creditor consider in evaluating the creditworthiness of an applicant aggregate statistics or assumptions relating to the likelihood of any group of persons to bear or rear children or for those reasons to receive diminished or interrupted income in the future. However, this does not preclude a creditor from requesting information about the number and ages of an applicant's present dependents, provided that such information is considered without regard to aggregate statistics or assumptions concerning the ability or willingness to work of those situated similarly to the applicant.

1.12. A creditor shall not discount or exclude from consideration in evaluating the creditworthiness of an applicant any income received from part-time employment.

1.13. A creditor shall not require the signature of an applicant's spouse or any other person if the applicant is individually creditworthy for the amount of credit sought, except if the application is for joint credit or if the applicant is relying upon the income of the spouse or other person in the application.

1.14. If an applicant seeks to rely upon property in order to establish creditworthiness, or if a creditor has a policy of requiring security from every applicant for credit regardless of the applicant's creditworthiness for the credit without such security, a creditor may require the signature of a person who owns or who along with the applicant owns the security, on an instrument necessary, or reasonably believed by the creditor to be necessary, to make the property offered as security available to satisfy the debt in the event of default. Examples include any instrument to create a valid lien, pass clear title or waive inchoate rights. However, a creditor who obtains such signature of the other person upon this security instrument shall not require this person's signature upon the applicant's credit application, credit account or credit contract. A creditor shall not require that the guarantor or surety be the spouse of the applicant or that the property used as security be owned in whole or in part by the spouse.

1.15. A creditor may not request any information concerning an applicant's spouse or former spouse, except if:

(a) the spouse will be permitted to use the account; or

(b) the applicant is relying on the spouse's income as a basis for repayment of the credit requested; or

(c) the applicant is relying upon alimony, child support, or separate maintenance payments received pursuant to a written agreement; or

(d) the spouse will be contractually liable on the account. However, a spouse is not deemed contractually liable on the account because he or she has signed an instrument making property or collateral which he or she owns in whole or in part available to satisfy the debt in the event of default under section 1.16.

1.16. A creditor may request an applicant to list any account upon which the applicant is liable and to provide the name and address in which such account is carried. A creditor may also ask the names in which an applicant has previously received credit. However, a creditor shall inform the applicant that the applicant can present - and the creditor shall consider - any information tending to indicate that such credit history does not accurately reflect the applicant's willingness or ability to repay. For example, an applicant can present information that problems in a previous joint account were not caused by the applicant.

1.17. A creditor shall inform an applicant that the applicant can present - and the creditor shall consider - any information concerning previous or existing credit accounts reported or listed only in the applicant's spouse's name which may reflect upon the applicant's ability and willingness to repay the credit requested.

1.18. A creditor shall not refuse or deny an application for credit solely or predominately because the applicant has no credit history or credit rating.

1.19. A creditor shall not prohibit an applicant from opening and maintaining an account in a birth-given first name and surname that is the applicant's birth-given first and surname, or the spouse's surname, or a combined surname.

1.20. A creditor shall not take any of the following actions regarding an applicant who is contractually liable on an existing credit account on the basis of a change in the applicant's name or marital status:

(a) require a reapplication; or

(b) change the terms of the account; or

(c) terminate the account.

However, a creditor may require an applicant to reapply because of a change in marital status where the credit granted was based on income earned or assets owned by the applicant's spouse if the applicant's income alone at the time of the original application would not support the amount of credit currently extended.

1.21. Where an application is incomplete respecting matters that the applicant can complete, the application shall not be deemed complete and the creditor shall make a reasonable effort to inform the applicant of the incompleteness and shall allow the applicant a reasonable opportunity to complete the application.

1.22. Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by -

(a) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(b) giving written notification of adverse action which discloses (i) the applicant's right to a statement of rea-

sons with sixty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained.

A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

1.23. A creditor must retain all records, papers, letters, documents, and information regarding any application on which adverse action was taken for twelve months after notification of applicant of such action. A creditor who uses a computerized or mechanized system need not keep written copies of documents if it can regenerate the precise text of the documents on request. In addition, any creditor that has notice that it is under investigation or is subject to an enforcement proceeding or is the party charged in a complaint for an alleged violation of the Law Against Discrimination must retain all the information and records required above until it receives notification of final disposition of the matter.

1.24. These rules shall expire at a date five years from the date of adoption.