AN ANALYSIS OF THE IMPACT OF THE PENNSYLVANIA EQUAL RIGHTS AMENDMENT†

by Hon. Phyllis W. Beck*
and Joanne Alfano Baker**

TABLE OF CONTENTS

---

† A summary of this Article was delivered on September 18, 1993, at a symposium entitled "Securing Individual Rights Under the Pennsylvania Constitution," held at the Widener University School of Law, Harrisburg, Pennsylvania.

* Since 1981 Judge Phyllis W. Beck has been a member of the Superior Court of Pennsylvania. Initially appointed by Governor Thornburgh in 1981, she was elected statewide to a ten-year term in 1983 and reelected in 1993. Judge Beck assumed the judgeship after five years as Vice-Dean of the University of Pennsylvania Law School, where she also taught. Her route to the bench included a bachelor's degree from Brown University, magna cum laude, and a law degree from Temple Law School, where she was first in her class. She was the winner of the Pennsylvania Bar Association's Judicial Award and the American Judicature Society's Herbert Harley Award.

** Since 1986 Joanne Alfano Baker, Esquire, has been employed by the Superior Court of Pennsylvania. Ms. Baker is a summa cum laude graduate of St. Joseph's University and a cum laude graduate of the Villanova University School of Law. Prior to Ms. Baker's tenure with the court, she practiced corporate law at a major Philadelphia law firm and taught for several years at Villanova University School of Law and at the Fels Center of Government at the University of Pennsylvania. She has also authored several academic articles.

I. INTRODUCTION

Opponents of equal rights amendments (ERA) on both the state and federal levels have repeatedly charged that the adoption of ERAs would markedly change the social fabric of the United States. The Commonwealth has had twenty-three years of ERA experience. This Article examines that experience. The Article concludes that the ERA contributed to a relatively small change in the Commonwealth's social fabric, and that the change may have pragmatically benefited men more than women.

This Article analyzes the ERA in three sections. The first section reviews the courts' technical interpretation of the ERA, in terms of the standard of review and scope of applicability. The second section examines the legislative implementation of the ERA, and the third reviews recent judicial decisions based on the ERA.

In 1971 Pennsylvania adopted an equal rights amendment.[1] The amendment commands that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."[2]

---

[1] PA. CONST. art. I, § 28. The amendment was ratified by the voters of Pennsylvania on May 18, 1971, after having been introduced in the Pennsylvania House of Representatives on October 6, 1969, and passed by joint resolution of the General Assembly. Margaret K. Krasik, Comment, *A Review of the Implementation of the Pennsylvania Equal Rights Amendment*, 14 DUQ. L. REV. 683, 685 (1976). Although Utah and Wyoming had equal rights provisions in their constitutions from the outset, Pennsylvania was the first state to amend its constitution to include an ERA. Bartholomew v. Foster, 541 A.2d 393 (Pa. Commw. Ct. 1988), *aff'd*, 563 A.2d 1390 (Pa. 1989) (per curiam). It should be noted that for some time after the amendment became effective, it was mistakenly identified as Article I, Section 27 of the Pennsylvania Constitution and was even cited as such in some cases. *See, e.g.*, Commonwealth v. Santiago, 340 A.2d 440, 445 (Pa. 1975).

[2] PA. CONST. art. I, § 28. Approximately one-third of the states have also

Passage of the ERA raised important questions in regard to its impact on Pennsylvania law:[3] How would the amendment be interpreted and applied? Would its impact be limited to matters involving state action? Would its interpretation track the federal courts' analysis of the Equal Protection Clause in gender discrimination cases? Some of these questions have now been resolved, both through judicial interpretation and through legislative implementation of the amendment.

II. JUDICIAL INTERPRETATION OF THE EQUAL RIGHTS AMENDMENT

A. Standard of Review: Absolutist Interpretation

Shortly after adoption of the ERA, the Supreme Court of Pennsylvania signaled that it would interpret the ERA to mean that *no* distinction may be made under the law of Pennsylvania based solely on gender. This signal appeared in three cases decided by the supreme court within three years of enactment of the ERA.[4] Perhaps the clearest statement of the court's view was set forth in *Henderson v. Henderson*.[5] In *Henderson*, the court was faced with a challenge to the constitutionality of section 46 of the Act of May 2, 1929, which provided for the payment of alimony pendente lite, counsel fees, and expenses to the wife in a divorce action, but not

---

adopted equal rights amendments. *See* ALA. CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAW. CONST. art. I, § 3; ILL. CONST. art. I, § 18; LA. CONST. art. I, § 3; MD. CONST. art. 46; MASS. CONST. pt. 1, art. I; MONT. CONST. art. II, § 4; N.H. CONST. pt.1, art. II; N.M. CONST. art. II, § 18; TEX. CONST. art. I, § 3; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. VI, § 1. For the text of each of these amendments, see Bruce E. Altschuler, *State ERAs and Employment Discrimination*, 65 TEMP. L. REV. 1267, 1267 n.6 (1992).

[3] There is no official legislative history concerning the ERA; no committee report or recorded debate is available. Krasik, *supra* note 1, at 684-85. Thus, construction and implementation of the ERA began as a *tabula rasa*, with only the language of the amendment itself to serve as a guide.

[4] Henderson v. Henderson, 327 A.2d 60 (Pa. 1974); Hopkins v. Blanco, 320 A.2d 139 (Pa. 1974); Conway v. Dana, 318 A.2d 324 (Pa. 1974).

[5] 327 A.2d 60 (Pa. 1974).

to the husband. The *Henderson* court stated the absolutist view of the ERA with the following language:

> The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman. Thus, as it is appropriate for the law where necessary to force the man to provide for the needs of a dependent wife, it must also provide a remedy for the man where circumstances justify an entry of support against the wife. In short, the right of support depends not upon the sex of the petitioner but rather upon need in view of the relative financial circumstances of the parties.[6]

This statement in *Henderson* followed the court's similar pronouncements in *Conway v. Dana*[7] and in *Hopkins v. Blanco*.[8]

---

[6] *Id.* at 62. The *Henderson* court further noted that the legislature had already acted to amend section 46 to provide for the payment of alimony pendente lite, reasonable counsel fees, and expenses to a "spouse," presumably to remedy the conflict that existed between the former statutory provision and the ERA. *Id.*; *see also* Wechsler v. Wechsler, 363 A.2d 1307, 1310 (Pa. Super. Ct. 1976) (discussing the purpose of alimony pendente lite). The amended Act provided:

> In case of divorce from the bonds of matrimony or bed and board, the court may, upon petition, in proper cases, allow a spouse reasonable alimony pendente lite and reasonable counsel fees and expenses. If at any time, either before or after a final decree has been entered divorcing the parties, the spouse is in arrears in the payment of the alimony pendente lite, counsel fees and expenses so allowed, the other spouse or ex-spouse, as the case may be, may, by affidavit of default, upon praecipe to the prothonotary, obtain a judgment for such arrearages: Provided, That no such judgment shall be entered more than one year after a final decree is issued.

Henderson, 327 A.2d at 62 (quoting Act of June 27, 1974, No. 139, 1974 Pa. Laws 403).

[7] 318 A.2d 324 (Pa. 1974).

[8] 320 A.2d 139 (Pa. 1974). The *Hopkins* decision overruled Neuberg v.

In *Conway*, the court held that, to the extent prior decisional law had established a presumption that a father, solely because of his gender, was primarily obligated to support his children, such decisions must no longer be followed.[9] In *Hopkins*, the court held that if a husband were to be accorded a right to recover for loss of consortium, then the ERA commanded that a wife be accorded the same right.[10]

In each of these cases, the court adopted a straightforward and absolute approach to the interpretation and application of the ERA, construing it to mean that all distinctions in the manner that the law expressly treated men and women based solely on their gender, were impermissible. The court appears to have assumed that the mandate of the ERA was fulfilled by the elimination of such legal distinctions and the creation of perfect facial legal parity between the genders. Apparent throughout the court's commentary on the ERA is the view that the ERA was the result of certain social changes equalizing the positions of men and women, rather than an instrument of effecting such changes. The role of the courts was simply to bring the law up to date in recognition of these already extant societal changes. Thus, for example, in *DiFlorido v. DiFlorido*, the court eliminated the presumption that household goods are owned by the husband.[11] The court reasoned that the presumption was based on the outdated assumption that the husband had provided the funds for the purchase of household goods through his employment outside the home, whereas the wife worked in the home and contributed nothing toward the purchase of the goods.[12]

Bobowicz, 162 A.2d 662 (Pa. 1960). In *Neuberg*, the supreme court specifically refused to extend the right to recover for loss of consortium to a wife. *Id.* at 667.

[9] *Conway*, 318 A.2d at 326. The *Conway* court based its decision only in part on its perception that societal developments now included the recognition of the equality of the genders, as manifested in the ERA. The court also emphasized its desire to foster the best interests of children, long the ultimate goal of child support determinations, by calling upon the financial resources of both parents to provide for the children's support. *Id.*

[10] *Hopkins*, 320 A.2d at 141.

[11] 331 A.2d 174 (Pa. 1975).

[12] *Id.* at 178. *DiFlorido* is a significant decision, because it contained an

This approach to the ERA has been consistently followed by the supreme court and, to a large extent, by the intermediate level appellate courts since the enactment of the ERA. One early ERA case, decided by the commonwealth court, contains perhaps the broadest intermediate appellate court holding concerning the standard to be used in an ERA challenge. In *Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n*,[13] the Commonwealth brought suit against the Pennsylvania Interscholastic Athletic Association (PIAA), a voluntary, unincorporated association. PIAA's membership was comprised of public senior and junior high schools and some private schools. Its function was to regulate interscholastic competition among those schools in numerous athletic activities.[14] The Commonwealth asked the court to declare PIAA's bylaw providing "'[g]irls shall not compete or practice against boys in any athletic contest'" unconstitutional.[15] Although the Commonwealth alleged both federal and state constitutional violations, the court found it necessary only to consider the alleged ERA violation because it found the bylaw clearly unconstitutional on that ground.[16] The court rejected PIAA's claim that the separation of boys and girls in athletic activities was justified by the difference in physical abilities of the genders:

---

enlightened recognition of the value of nonmonetary contributions to the marital enterprise made by a wife who did not work outside the home. Having rejected the presumption of ownership in favor of the husband, the *DiFlorido* court further refused to determine ownership simply by tracing the funds used to purchase the goods. The court believed that such an approach would unfairly ignore the equal contribution made by the spouse who had contributed no funds, but rather made nonmonetary contributions. Instead, the court developed a new presumption that property acquired in anticipation of or during marriage and used and possessed by both spouses would be deemed to be held as entireties property. *Id.* at 178-80.

[13] 334 A.2d 839 (Pa. Commw. Ct. 1975).

[14] *Id.*

[15] *Id.* at 840 (citing PIAA Bylaws art. XIX, § 3(B)). Section 3(B) was rescinded by the PIAA Board of Control after the commonwealth court ruled that it was unconstitutional under Pennsylvania's ERA.

[16] *Id.* at 841.

> The notion that girls as a whole are weaker and thus more injury-prone, if they compete with boys, especially in contact sports, cannot justify the By-Law in light of the ERA. Nor can we consider the argument that boys are generally more skilled. The existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic. If any individual girl is too weak, injury-prone, or unskilled, she may, of course, be excluded from competition on that basis but she cannot be excluded solely because of her sex without regard to her relevant qualifications. We believe that this is what our Supreme Court meant when it said in *Butler*, that "sex may no longer be accepted as an exclusive classifying tool."[17]

This is clearly a statement of a purely absolutist interpretation of the ERA, in which the amendment is viewed as prohibiting all legal distinctions based on gender, even where a tenable argument can be made that the distinction is based on physical differences between the genders.[18]

In implementing the ERA, using the absolutist model, the Pennsylvania Supreme Court has used several techniques. The court eliminated certain presumptions of the common law. In criminal law, the court eliminated the doctrine of coverture, in which a presumption arose that a wife who committed a crime with her husband acted under her husband's coercion.[19] In civil law, the court eliminated the common-law presumptions that household goods were the property of the husband[20] and that, where a husband obtained his wife's property without adequate consideration, a constructive trust in that property was created in

---

[17] *Id.* at 843 (citation omitted) (quoting Commonwealth v. Butler, 328 A.2d 851, 855 (Pa. 1974)).

[18] *See* Swidzinski v. Schultz, 493 A.2d 93 (Pa. Super. Ct. 1985) (stating that the absolute prohibition of discrimination between the genders contained in the ERA was not meant merely to benefit women; therefore, it must now be presumed that wives are liable to the executors of their husbands' estate for funeral expenses, just as husbands have historically been presumed liable for wives' funeral expenses).

[19] Commonwealth v. Santiago, 340 A.2d 440 (Pa. 1975).

[20] DiFlorido v. DiFlorido, 331 A.2d 174 (Pa. 1975).

the wife's favor.[21] In addition, the supreme court has excised whole portions of statutes.[22] It has also interpreted statutes so as to make them applicable to both genders.[23] As will be more fully discussed below, broad-based action by the legislature in the late 1970s and early 1980s greatly assisted the courts in the process of equalizing the positions of the genders under statutory law.[24]

Some commentators have suggested that supreme court precedent concerning the interpretation of the ERA does not reveal a clear and consistent absolutist view.[25] They correctly point to isolated instances of apparent equivocation by the supreme court

---

[21] Butler v. Butler, 347 A.2d 477 (Pa. 1975).

[22] *See, e.g.*, Adoption of Walker, 360 A.2d 603 (Pa. 1976) (invalidating section 411 of the Adoption Act providing that only the consent of the mother for the adoption of a child born out of wedlock is necessary).

[23] George v. George, 409 A.2d 1 (Pa. 1979).

[24] *See infra* notes 95-134 and accompanying text.

[25] *See, e.g*, Christina A. Longo & Elizabeth F. Thoman, Comment, Haffer v. Temple University*: A Reawakening of Gender Discrimination in Intercollegiate Athletics*, 16 J.C. & U.L. 137, 144 (1989); *see also* Haffer v. Temple Univ., 678 F. Supp. 517, 536 (E.D. Pa. 1987) (stating that the Pennsylvania Supreme Court had not yet clarified a standard for ERA claims).

Early commentators on the standard of review to be applied under the ERA also noted the opinion issued by the commonwealth court in *Percival v. City of Philadelphia*. In *Percival*, certain nonresidents of Philadelphia, who were forced to pay Philadelphia wage tax by virtue of their employment in the city, brought suit to protest the imposition of the tax. Specifically, they contested the issuance of writs of *capias ad respondendum* against them, arguing that the statute and rule governing such writs violated the ERA by exempting married women from arrest pursuant to such a writ. 317 A.2d 667, 668-69, 672 (Pa. Commw. Ct. 1974), *vacated on procedural grounds*, 346 A.2d 754 (Pa. 1975). Analyzing the ERA claim, the commonwealth court opined that the standard of review to be employed was somewhere between the rational basis test sometimes applied under the Federal Equal Protection Clause and an absolute bar on the use of gender as a basis for legal classification. *Id.* Applying this unclear standard, the court summarily concluded that the exemption from arrest on a writ of *capias ad respondendum* provided to married women did violate the ERA. *Id.*

The commonwealth court's order in *Percival* was ultimately vacated by the supreme court on procedural grounds. The court did not address the ERA claim, and, therefore, the commonwealth court's holding thereon cannot be considered to have any further precedential value. City of Philadelphia v. Percival, 346 A.2d 754 (Pa. 1975).

concerning the standard of review to be applied to ERA challenges. Two cases, *Fischer v. Department of Public Welfare* and *Commonwealth v. Butler*, are often cited to support this argument.[26]

In *Butler*, the court considered a challenge to the constitutionality of the sentencing scheme where men were to receive minimum sentences, thereby making them eligible for parole only after they had served their minimum sentences. The statute prohibited women from receiving minimum sentences, thereby making them immediately eligible for parole.[27] The court began its discussion of the ERA by reiterating the *Henderson* standard, stating that the ERA commanded that "sex may no longer be accepted as an exclusive classifying tool."[28] However, the court continued by analyzing whether there was any "rational basis" for the distinction the law drew.[29] Finding none, the court further buttressed its analysis by reference to gender discrimination cases decided under the Equal Protection Clause of the United States Constitution.[30] Ultimately, the court determined that the distinction drawn by the sentencing scheme was constitutionally impermissible, both under the ERA and the Equal Protection

---

[26] Fischer v. Pennsylvania Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985); Commonwealth v. Butler, 328 A.2d 851 (Pa. 1974).

[27] *Butler*, 328 A.2d at 853-59 (citing Act of July 25, 1913, No. 816, §§ 7-26, 1913 Pa. Laws 1311, *amended by* PA. STAT. ANN. tit. 61, §§ 551-591 (1964); Act of July 16, 1968, No. 171, § 1, 1968 Pa. Laws 349, PA. STAT. ANN. tit. 61, § 556 (Supp. 1974)). Before the decision in *Butler*, some of the long-standing disparities in the treatment of men and women under Pennsylvania's sentencing scheme had already been declared unconstitutional under the Fourteenth Amendment to the United States Constitution. Commonwealth v. Daniel, 243 A.2d 400 (Pa. 1968).

[28] *Butler*, 328 A.2d at 855.

[29] *Id.* at 856-57.

[30] *Id.* at 857-59 (citing United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Commonwealth v. Daniel, 243 A.2d 400 (Pa. 1968)).

Clause.[31] The absolutist model, however, was in part relied on by the court.

The second of these cases, *Fischer v. Department of Public Welfare*,[32] determined whether the funding provisions of the Pennsylvania Abortion Control Act of 1982,[33] which provided public funding for abortions only where the life of the mother was endangered or where the pregnancy resulted from incest or rape, contravened various provisions of the Pennsylvania Constitution, including the ERA.[34] The parties who challenged the Act contended that the funding restrictions violated the ERA, because they carved out one group of women, those whose lives were not endangered by the pregnancy but who nevertheless desired a medically necessary abortion, and refused public funding to them, whereas no group of men were refused public funding for any medically necessary procedure.[35]

---

[31] *Id.* at 856-58. The *Butler* court did not reverse the sentence of the male defendant who challenged the sentencing scheme but, rather, simply declared unconstitutional that portion of the sentencing statute that exempted women from minimum sentences. *Id.* at 859; *see also* Commonwealth v. Saunders, 331 A.2d 193 (Pa. 1975) (holding that a statute denying women access to minimum sentences violated the Equal Protection Clause). The decision in *Butler* prompted further amendments to the sentencing scheme, removing the language that prohibited imposition of a minimum sentence on a woman. *See* Krasik, *supra* note 1, at 689.

[32] 502 A.2d 114 (Pa. 1985).

[33] 18 PA. CONS. STAT. §§ 3201-3220 (1982).

[34] *Fischer*, 502 A.2d at 117-18. The Abortion Control Act was also alleged to violate the equal protection guarantees of Article I, Section 1 and Article III, Section 32 and the nondiscrimination provisions of Article I, Section 26 of the Pennsylvania Constitution. *Id.* The alleged violation centered on the Act's provision of funding to indigent women for the delivery of a child, while denying funding to those women for abortions in all but the most limited of circumstances.

The court rejected all of these arguments, pursuing the analysis found in federal case law that rejected such challenges to similar funding restrictions found in federal law. *Id.* at 118-20. Therefore, the court refused to interpret the guarantees of the Pennsylvania Constitution any more broadly than those provided under the United States Constitution.

[35] *Id.* at 124.

In responding to this argument, the supreme court once again quoted and reaffirmed the absolutist standard set forth in *Henderson* and cited to the numerous decisions in which the court had applied that standard to eliminate differences in the law based on gender alone.[36] The court, however, concluded that the Abortion Control Act did not offend the ERA, reasoning as follows:

> In this world there are certain immutable facts of life which no amount of legislation may change. As a consequence there are certain laws which necessarily will only affect one sex. Although we have not previously addressed this situation, other ERA jurisdictions have; and the prevailing view amongst our sister state jurisdictions is that the E.R.A. "does not prohibit differential treatment among the sexes when, as here that treatment is reasonably and genuinely based on physical characteristics unique to one sex."[37]

Alternatively, *Fischer* can be read as not relying on the ERA and, therefore, the court's discussion of the ERA can be viewed as dicta. The court found that because the Abortion Control Act did not use gender as a basis for distinction, the ERA was not implicated.[38] The court viewed the Act as distinguishing not between men and women but as distinguishing between women who chose to carry their pregnancies to term and those who chose to terminate their pregnancies.[39] Abortion was the perceived classifying basis of the Act, not gender. Although the Act's refusal to permit the funding of medically necessary abortions affected only women, this fact did not cause the court to alter its analysis.

Neither *Butler* nor *Fischer* should be regarded as expressing a significant change in the supreme court's view of the ERA. Although *Butler* suggests a standard of review applicable to ERA analysis that is less than the absolutist view stated in *Henderson*,

---

[36] *Id.* at 124-25.

[37] *Id.* at 125 (quoting People v. Salinas, 551 P.2d 703, 706 (Colo. 1976)); *see* State v. Rivera, 612 P.2d 526 (Haw. 1980); City of Seattle v. Buchanan, 584 P.2d 918 (Wash. 1978); Holdman v. Olim, 581 P.2d 1164 (Haw. 1978).

[38] *Fischer*, 502 A.2d at 125-26.

[39] *Id.* at 124-25.

the *Butler* court's brief consideration of whether there was any rational basis for the difference in the treatment of men and women under the sentencing scheme must be analyzed in the context of the entire opinion. *Butler* cannot fairly be viewed as a statement by the court that it would have found the scheme constitutional if there had been a rational basis for the distinction drawn. Clearly, the *Butler* court was only emphasizing the patently discriminatory nature of the sentencing scheme under review.

On the other hand, the *Fischer* court's apparent recognition that there may be circumstances where the law differentiates between the genders on the basis of physical characteristics unique to one gender and that such differential treatment is permissible under the ERA is more noteworthy. The court appeared to regard classifications based on physical characteristics unique to one gender as falling completely outside the scope of the ERA.

Although the analysis pursued in *Fischer* cannot be ignored, its impact should not be overemphasized. If *Fischer* carved out an exception to the absolutist standard, it did so only in cases where different treatment accorded to men and women was based on differences in reproductive anatomy. It must be remembered that the *Fischer* opinion itself reiterated and reaffirmed the absolutist *Henderson* standard. In fact, because the *Fischer* court had already analyzed the challenged section of the Act as not distinguishing on the basis of gender, or even on the basis of a physical characteristic peculiar to one gender, but on the basis of the decision to have an abortion, the court's further statements may technically be dicta.[40]

Moreover, *Fischer* arose in the sensitive context of the abortion question. It is evident throughout the opinion that the court's decisionmaking was heavily influenced by its perception of the public policy of the Commonwealth favoring childbirth over abortion, rather than by the policies expressed in the ERA.[41] It is entirely possible that the supreme court would be more receptive to an argument that a legal distinction that *purports* to be based on

---

[40] Haffer v. Temple Univ., 678 F. Supp. 517, 536 (E.D. Pa. 1987) (citing *Fischer*, 502 A.2d at 125).

[41] *Fischer*, 502 A.2d at 122 (stating "the obvious importance of the Commonwealth's interest in preserving potential life").

uniquely female physical characteristics, nevertheless, results in a deprivation of equal rights under the law for women if the argument were made in a case that did not involve the Commonwealth's policy favoring childbirth over abortion.[42]

B. Scope of Applicability

The question of how broadly the amendment is to be applied is of equal importance to the standard against which ERA challenges are to be measured. As in the case of the standard of review, some answers to this question have now been supplied. The ERA will not be limited in its application to cases involving challenges to "state action," as that phrase has been defined in federal case law.[43] However, it is not clear whether the ERA will extend to a purely private action.[44]

In this regard, the primary focus must be placed on the language of the amendment itself. The amendment dictates that

---

[42] In fact, the supreme court had earlier decided in *Cerra v. East Stroudsburg Area School District*, a case arising under the Pennsylvania Human Relations Act, that a discharge of a female employee purely because she was pregnant, i.e., a physical characteristic unique to one gender, was "sex discrimination pure and simple." 299 A.2d 277, 280 (Pa. 1973). The *Fischer* court attempted to distinguish *Cerra*, stating that unlike pregnancy, which can be analogized to certain physical disabilities experienced by men, there was no male analog to the decision to have an abortion. *Fischer*, 502 A.2d at 125-26. Nevertheless, *Cerra* suggests there may be other cases where classifications similar to the one analyzed in *Fischer*, although not involving abortion, will be regarded as unlawful gender discrimination.

Some commentators on the proposed Federal ERA have persuasively suggested that an equal rights amendment is not necessarily violated by a legal distinction honestly based on physical characteristics unique to one gender, and permitting such distinctions does not conflict with an absolutist application of an ERA. Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 889, 893 (1971). However, it is also cautioned that such distinctions may easily serve as subterfuges for unlawful discrimination. *Id.* at 894-95.

[43] *See, e.g.*, Georgia v. McCollum, 112 S. Ct. 2348 (1992).

[44] Hartford Accident & Indem. Co. v. Insurance Comm'r, 482 A.2d 542 (Pa. 1984); *see* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990).

equality of rights "under the law" shall not be denied or abridged but contains no express reference to governmental action. The language of the Pennsylvania ERA thus differs from that of the proposed Federal ERA, which commands that "'[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.'"[45]

The text of the amendment also differs from that used in many other states' ERAs. Although in some of these states the amendments contain the "under the law" terminology found in the Pennsylvania ERA,[46] many others expressly protect equality of rights only against action by the state.[47] Moreover, in several of those states where the amendment does refer simply to equality of rights "under the law," some courts or the state attorney general have nevertheless construed the amendment to apply only to governmental action.[48]

Early commentators on the Pennsylvania ERA appear to have assumed that the inclusion of the phrase "under the law" restricted the applicability of the ERA to actions by the state.[49] Somewhat surprisingly, the appellate courts of the Commonwealth did not have to face this issue until 1980. The issue arose in the context of a challenge to insurance rating practices by the automobile insurance industry, in which insurers charged lower rates for female drivers based on actuarial data allegedly indicating that young female drivers were involved in fewer accidents than their male counterparts.[50] In *Murphy v. Harleysville Mutual Insurance*

---

[45] Frontiero v. Richardson, 411 U.S. 677, 687 (1973) (alteration in original) (quoting H.R.J. Res. 208, 92d Cong., 2d Sess. (1972)).

[46] The ERAs of Maryland, Massachusetts, New Mexico, Texas, and Washington also employ the phrase "under the law." *See* Altschuler, *supra* note 2, at 1269-70.

[47] The ERAs of Colorado, Hawaii, Illinois, Louisiana, New Hampshire, and Virginia are expressly limited in applicability to government action. *Id.* at 1269.

[48] *Id.* at 1271 (citing Cedillo v. Ewlin Enters., Inc., 744 S.W.2d 217, 218-19 (Tex. Ct. App. 1987), *writ denied*, 756 S.W.2d 724 (Tex. 1988) (per curiam); MacLean v. First N.W. Indus., 600 P.2d 1027 (Wash. Ct. App. 1979), *rev'd on other grounds*, 635 P.2d 683 (Wash. 1981); 63 Md. Op. Att'y Gen. 246 (1978); 68 Md. Op. Att'y Gen. 173 (1983); N.M. Op. Att'y Gen. 75-16, 59 (1975); N.M. Op. Att'y Gen. 75-74, 196 (1975)).

[49] *See, e.g.*, Krasik, *supra* note 1, at 709-10.

[50] *See, e.g.*, Murphy v. Harleysville Mut. Ins. Co., 422 A.2d 1097 (Pa.

Co.,[51] the superior court decided that the challenged action was purely private and, therefore, was not subject to review under the ERA.[52]

In *Murphy*, the superior court rejected the argument that the rating activities of the insurance industry should be considered state action because of the extensive state regulation imposed upon the insurance industry by the Casualty and Surety Rate Regulatory Act.[53] More importantly, the superior court found that a private cause of action was not cognizable under the ERA.[54] The court relied on decisions from Texas and Washington, where purely private actions were held not to fall within the scope of these states' ERAs that employed the "under the law" language found in the Pennsylvania ERA.[55] The *Murphy* court concluded that the Pennsylvania ERA was intended to prohibit "gender-based discrimination that emanates from the Commonwealth through its statutes, court rulings or official policies or through the egis of governmental action under the state action test, and does not prohibit actions that are solely private in nature."[56]

Super. Ct. 1980). The substantive question of whether the use of gender in setting insurance rates should be considered a violation of the ERA is considered separately. *See infra* notes 187-212 and accompanying text.

[51] 422 A.2d 1097 (Pa. Super. Ct. 1980).

[52] *Id.* at 1104.

[53] *Id.* at 1101-02 (citing 40 PA. CONS. STAT. ANN. §§ 1181-1186 (1947)). The court's analysis determining whether Hartford's action was state action was conducted in connection with the plaintiff's challenge to the rate filing under the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. In analyzing this question, the *Murphy* court emphasized that the challenged rating practices were not dictated by the Insurance Commissioner, nor even approved by him, but rather that the Insurance Commissioner had simply chosen not to exercise his statutory authority to disapprove the rates. *Id.*

[54] *Id.*

[55] *Id.* at 1102-04 (discussing Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922 (Tex. Ct. App. 1979); Junior Football Ass'n of Orange v. Gaudet, 546 S.W.2d 70 (Tex. Civ. App. 1976); MacLean v. First N.W. Indus. of America, Inc., 600 P.2d 1027 (Wash. Ct. App. 1979)).

[56] *Id.* at 1104. The *Murphy* court was careful to explain how that state action was a prerequisite to application of the ERA. This was consistent with many of the supreme court's decisions, arising purely in the context of private litigation, that certain common-law principles violated the ERA and could no longer be

The *Murphy* court struggled to demonstrate that its conclusion did not reduce the significance of the ERA or undermine its effectiveness as a means of eliminating gender discrimination. The court opined:

> If the Pennsylvania equal rights amendment only prohibits gender-based discrimination that is state-related, for what purpose was that provision enacted in 1971? We believe that the answer lies in the desire to effectuate a wholesale rather than a piecemeal change in those statutes which discriminate on the basis of sex, to serve as a general policy statement prohibiting future enactment of gender-based legislation, and to extend beyond the then-evolving, but somewhat limited, protection afforded by the United States Supreme Court in its interpretation of the equal protection clause of the fourteenth amendment to the federal constitution. . . . Thus, we do not believe that the Pennsylvania ERA is a meaningless shibboleth without form or substance. Rather, it has served as an effective

---

applied to determine purely private legal rights:

> In several cases, courts in this Commonwealth have struck down legal presumptions created through court precedent when those presumptions were found to discriminate on the basis of sex. Thus, in *Commonwealth ex rel. Spriggs v. Carson*, the supreme court struck down the judicially fabricated presumption that a child of tender years is best suited to remain in the custody of the mother, and in *Butler v. Butler*, the court abolished the presumption which held that a husband who purchases property and places it in an entireties estate is deemed to have intended to give one-half of the estate as a gift, whereas a wife in similar circumstances is presumed not to have intended a gift but instead is deemed to have intended to create a resulting trust in her own behalf.
>
> Although it may be argued that these cases involve discrimination of a private nature, such is not the case. Although invoked during a private cause of action, the offensive provisions had roots in the judicially created law of this Commonwealth. Thus, it is the source of the discriminatory provision that determines whether it arises "under the law" and not the context in which the provision is challenged.

Id. at 1104 n.12.

> and positive tool for achieving equal treatment under the law for our citizens.[57]

In a final footnote, the *Murphy* court foreshadowed the demise of its own holding by referring to the pending action brought by one private insurance consumer who had successfully challenged the male-female rate disparity in a proceeding before the Insurance Commissioner.[58] The action was brought under the antidiscrimination provisions of the Casualty and Surety Rate Regulatory Act.[59] Ultimately, the action would reach the Pennsylvania Supreme Court, under the caption *Hartford Accident & Indemnity Co. v. Insurance Commissioner*,[60] and would be the case in which the court decided that state action was not a prerequisite for the applicability of the ERA. A complete understanding of the factual and legal context of *Hartford* is crucial to determining the import of the supreme court's decision in the case.

The plaintiff in *Hartford*, Phillip Mattes, was a young man with a perfect driving record who had purchased automobile insurance from Hartford.[61] Mattes filed a complaint with the Insurance Commissioner challenging the Commissioner's failure to disapprove a rate filing by Hartford that resulted in Mattes' paying a higher rate for his automobile insurance than a woman of the same age would have paid.[62] The filing allegedly violated

---

[57] *Id.* at 1105-06 (citations omitted) (footnotes omitted).

[58] *Id.* at 1106 n.20.

[59] PA. STAT. ANN. tit. 40, § 1183(d) (1992).

[60] 482 A.2d 542 (Pa. 1984).

[61] *Id.* at 543-44.

[62] *Id.* The Rate Act specifically provides an individual insurance consumer the right to challenge a rate filing by making application to the Commissioner for a hearing thereon. PA. STAT. ANN. tit. 40, § 1185(b) (1992). After conducting a hearing, the Commissioner is charged with the responsibility of determining whether the filing violates the Act, and if it does, to declare the filing or any part thereof ineffective. *Id.*

More recently, the procedures governing approval of and challenges to auto insurance rate filings have been codified in the Motor Vehicle Insurance Rate Review Procedures Act, 75 PA. CONS. STAT. §§ 2003-2008 (1990).

subsection 1183(d) of the Rate Act, which provides that "[r]ates shall not be excessive, inadequate or unfairly discriminatory."[63]

The Commissioner agreed with Mattes, finding that Hartford's rate filing was "unfairly discriminatory" in light of the Commonwealth's public policy against gender discrimination embodied in the ERA.[64] Hartford brought a judicial challenge to the rate determinations by the Insurance Commissioner. The case was eventually appealed to the supreme court. In the supreme court, Hartford argued that the Commissioner had exceeded his statutory authority in disapproving the rate filing on several grounds. Hartford contended that the Commissioner should have limited his inquiry to whether the rates set forth in the filing were "actuarially sound," because any rate supported by actuarial data could not be *unfairly* discriminatory. Thus, Hartford argued that the Commissioner should not have looked to the policy underlying the ERA to construe the meaning of the Rate Act.[65]

The *Hartford* court began its analysis of the case by acknowledging and emphasizing the responsibility of the Insurance Commissioner, a government official, to assure that insurance rates comply with the mandates of the Rate Act. The court described the Commissioner's role as follows:

> [S]ection four of the Act requires every insurer to "file with the Commissioner every manual of classifications, rules, and rates, every rating plan and every modification of any of the foregoing which it proposes to use." 40 P.S. § 1184(a) (1971). The Commissioner must "review such of the filings as it may be necessary to carry out the purposes of this Act," 40 P.S. § 1184(c) (1971) and is empowered to disapprove, after a hearing, any filing which fails to meet the requirements of the Rate Act. 40 P.S. § 1185 (1971). Beyond this specific delegation of authority, the legislature has committed to the Commissioner the "full power and authority, . . . [and] duty, to enforce by regulations, orders, or otherwise, . . .

---

[63] PA. STAT. ANN. tit. 40, § 1183(d).

[64] *Hartford*, 482 A.2d at 547.

[65] *Id.* at 544, 546.

> the provisions of this Act, *and the full intent thereof.*" 40 P.S. § 1193(d) (1971).
>
> . . . .
>
> . . . The Rate Act evidences the clear legislative determination that the public welfare requires both statutory channeling of the ratemaking process and administrative scrutiny of the resulting rates. One of the principal justifications for governmental involvement identified by the legislature is the need to prevent "unfairly discriminatory" rates. To achieve that goal, the legislature has directly prohibited insurers from making "unfairly discriminatory" rates, and has entrusted enforcement of that prohibition to the Commissioner, and, if need be, to the courts. Thus the Rate Act, independent of any federal or state constitutional provision, proscribes "unfairly discriminatory" ratemaking by insurers in this Commonwealth and provides administrative and judicial remedies therefor.[66]

The court then applied basic principles of statutory construction to the Rate Act to determine whether the Act's own language and structure supported Hartford's interpretation of "unfairly discriminatory" as encompassing only those rates that discriminated between groups of insureds without sound actuarial support. The court, concluding that the Act did not support such an interpretation, then considered the Commissioner's reliance upon the ERA in rendering his decision.[67]

Once again, the court restated and reaffirmed the *Henderson* absolutist view of the amendment. Finding that the rating distinction in the contested rate filing was predicated upon traditional or stereotypical roles of men and women, the court held that the Commissioner had properly construed the prohibition of the Rate Act against unfair discrimination to include the mandate of the ERA.[68]

The *Hartford* court then responded to Hartford's final argument, that the ERA only restricted state action and that the

---

[66] *Id.* at 545-46 (second alteration in original) (footnote omitted).

[67] *Id.* at 546-47.

[68] *Id.* at 549.

challenged action in this case, the setting of rates by a private insurance company, did not fall within the definition of state action.[69] The court interpreted Hartford's challenge as raising the question of whether the Insurance Commissioner's action was subject to the "under the law" language of the ERA, and not as Hartford contended, that setting the rates constituted state action. The court opined:

> Further, the notion that the interpretation of this insurance statute involves the concept of "state action" is incorrect in this context. The "state action" test is applied by the courts in determining whether, in a given case, a state's involvement in private activity is sufficient to justify the application of a federal constitutional prohibition of state action to that conduct. The rationale underlying the "state action" doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law. The language of that enactment, not a test used to measure the extent of federal constitutional protections, is controlling.
>
> The text of Article I, section 28 makes clear that its prohibition reaches sex discrimination "*under the law.*" As such it circumscribes the conduct of state and local government entities and officials of all levels in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law. The decision of the Commissioner in a matter brought pursuant to the Rate Act is not only "under the law" but also, to the extent his adjudication is precedent on the question decided, "the law." The Commissioner, as a public official charged with the execution of the Rate Act and sworn to uphold the

---

[69] One commentator on the *Hartford* case has opined that if the federal-state action doctrine was held to apply to Hartford's action, that action probably could *not* be classified as state action. Daniel D. McDevitt, *State Action in Pennsylvania: Suggestions for a Unified Approach*, 3 EMERGING ISSUES IN ST. CONST. L. 87, 96 n.71 (1990).

> Constitution and laws of this Commonwealth, was constrained to conform his analysis of Hartford's rate plan and his interpretation of section 3(d) of the Rate Act to Article I, section 28.[70]

Although the *Hartford* court was clear in holding that the "state action" test employed in federal constitutional cases was not determinative of the applicability of the Pennsylvania ERA, the remainder of the court's language is not so easily construed. Certainly, it cannot blithely be assumed that the court's rejection of the state action test also constituted a decision that purely private action was within the scope of the ERA. In fact, some of the court's language belies such a conclusion. The court recognized that the ERA by its own terms is restricted to "sex discrimination '*under the law*'" and then interpreted that phrase as restricting the ERA to "the conduct of state and local government entities and officials of all levels."[71]

Because the court viewed the case before it as a pure challenge to the action of the Insurance Commissioner, a state official, in disapproving Hartford's rate filing, rather than as a challenge to the action of Hartford, a private company, in setting the rates in the first place, the court easily concluded that the ERA applied and that the Commissioner's reference to it in construing the Rate Act was not only proper but mandatory.[72] One commentator has

---

[70] *Hartford*, 482 A.2d at 549 (citation omitted).

[71] *Id.*; *see* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 799 (3d Cir. 1990).

[72] In this regard, *Hartford* can be distinguished from Murphy v. Harleysville Mut. Ins. Co., 422 A.2d 1097 (Pa. Super. Ct. 1980). The "key distinction" between these two cases as described by the lower court in *Hartford* was "the [Insurance] Commissioner's positive exercise of his authority under the statute, to disapprove rating schemes." Hartford Accident & Indem. Co. v. Insurance Comm'r, 442 A.2d 382, 385 (Pa. Commw. Ct. 1982). In contrast, the Insurance Commissioner in *Murphy* had not acted to approve or disapprove the rate filing. Therefore, the allegedly discriminatory rates were protected, because they were set by a private insurer. *Murphy*, 422 A.2d at 1097.

Nevertheless, in a decision following on the heels of *Hartford*, the Superior Court of Pennsylvania determined "that *Murphy* must now be viewed as no longer followed with respect to its analysis of the E.R.A." Welsch v. Aetna Insur. Co., 494 A.2d 409, 412 (Pa. Super. Ct. 1985). In *Welsch*, although the

suggested that because *Hartford* never expressly extended the ERA to purely private action, the opinion can be construed as meaning that the ERA restricts the conduct of private parties only "where the defendant provides a necessary public service, derives benefits from the state, has traditionally been subject to significant [state] regulation, and is alleged to be infringing on important constitutional values."[73]

The *Hartford* court's approach to the question of whether the federal constitutional state action requirement is relevant in construing the Pennsylvania Constitution has been praised as an approach that focuses analytical attention where it should be—on the text of the Pennsylvania constitutional provision. The argument is made that the federal state-action doctrine has no logical place in interpreting any portion of the Pennsylvania Constitution, because the text of the constitution itself contains no limiting reference to action by the state.[74]

The supreme court has not specifically addressed the scope of the ERA since *Hartford*. In the only decisions applying *Hartford*, one from the commonwealth court and one from the superior court, the full import of the decision has not been clarified. The first such case, *Welsch v. Aetna Insurance Co.*,[75] was factually and procedurally similar to *Murphy* in which the question of state action was originally addressed.[76] The plaintiffs' class, male drivers under the age of thirty-one who purchased automobile insurance, filed an action in the court of common pleas asserting that the Insurance Commissioner should have disapproved Aetna's allegedly discriminatory rate filing. *Hartford* was decided while *Welsch* was pending, and the superior court relied on it to

---

facts were virtually identical to those presented in *Murphy*, the court held that the ERA applied to a case where allegedly discriminatory rates were filed by a private insurer and became effective without any action by the Commissioner. *Id.*

[73] John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees*, 21 RUTGERS L.J. 819, 888 (1990). This standard has many of the indicia of state action under the traditional state action test in the federal courts.

[74] McDevitt, *supra* note 69, at 97, 103-10.

[75] 494 A.2d 409 (Pa. Super. Ct. 1985).

[76] *See supra* notes 51-58 and accompanying text.

determine that state action was not necessary for the ERA to apply. The court, however, ultimately affirmed the trial court's dismissal of the action on the ground that the Insurance Commissioner had exclusive jurisdiction to decide the issues raised.[77]

The second such case, *Bartholomew v. Foster*,[78] decided by the commonwealth court, was an action seeking a declaratory judgment brought by a minor male driver and his parents, who were the insureds under an automobile policy issued by Erie Insurance Group.[79] Petitioners sought to enjoin the Insurance Commissioner from enforcing a new subsection in the Rate Act that provided:

> "This section [,which prohibits unfairly discriminatory rates,] shall not be construed to prohibit rates for automobile insurance which are based, in whole or in part, on factors, including, but not limited to, sex, if the use of such a factor is supported by sound actuarial principles or is related to actual or reasonably anticipated experience; however, such factors shall not include race, religion or national origin."[80]

The legislature enacted this section in response to the supreme court's decision in *Hartford*. The statute countermanded that decision insofar as the decision concluded that gender could not be used as a basis for the setting of automobile insurance rates. Section 3(e), quoted above, mandated that the prohibition of "unfairly discriminatory rates" in section 3(d) should not be construed to prohibit the use of gender as a rating classification.

The petitioners in *Bartholomew* contended that new section 3(e) violated the ERA. Erie Insurance Group, and several other insurers who were permitted to intervene, argued that the ERA did not apply, because in setting rates the insurance companies were

---

[77] *Welsch*, 494 A.2d at 413.

[78] 541 A.2d 393 (Pa. Commw. Ct. 1988), *aff'd*, 563 A.2d 1390 (Pa. 1989) (per curiam).

[79] Bartholomew v. Foster, 541 A.2d 393 (Pa. Commw. Ct. 1988).

[80] *Id.* at 394 (quoting PA. STAT. ANN. tit. 40, § 1183(e) (1986)).

acting privately and, therefore, no state action was involved. The insurance companies again raised the state action question.[81]

The *Bartholomew* court summarily rejected this argument by simply referring to the *Hartford* court's holding that state action was not a prerequisite to application of the ERA. The *Bartholomew* court concluded that "[a]ccordingly, any action authorized by a Pennsylvania statute must not run afoul of the Pennsylvania Constitution."[82] The court then proceeded to consider and accept petitioners' challenge to section 3(e) and to declare the section unconstitutional.[83]

Although the supreme court affirmed *Bartholomew*, it did so by an evenly divided court and without opinions. Clearly, no significant precedential status can be accorded the affirmance. In any event, *Bartholomew* did no more than declare what must be considered the obvious. The claim involved a challenge to action taken pursuant to a statutory provision that expressly sanctioned drawing distinctions on the basis of gender. If this is not to be considered action "under the law," to which the ERA applies, then what is?

In summary, the principles of federal state action are not applicable in interpreting the ERA. The ERA will be triggered only if the actor makes a decision "under the law." The full meaning of "under the law" awaits future development. It appears doubtful that the ERA will encompass strictly private action.

III. LEGISLATIVE IMPLEMENTATION

Very little has occurred in the past ten to fifteen years in the way of outright revision to the statutory law of the Commonwealth to bring it into conformity with the ERA. Nevertheless, some mention of the legislative implementation of the amendment in the decade immediately after its passage is necessary to an understanding of the judicial implementation of the amendment in more recent years.

---

[81] *Id.* at 396.

[82] *Id.* at 397.

[83] *Id.* at 397-98.

Immediately after the ERA was incorporated into the Pennsylvania Constitution, an effort was made by the Governor and the Attorney General of the Commonwealth to cleanse both the statutory law and the regulations governing the conduct of the government and its agencies of gender discriminatory provisions, whether directed at men or women. The Attorney General issued a long line of opinions in which extant discriminatory provisions and policies were declared invalid or in which future governmental actions were directed to be in conformity with the ERA. For example, the Attorney General directed that the Liquor Control Board could no longer issue or renew liquor licenses to anyone who discriminated on the basis of gender in either employment or service to the public, and further authorized the Board to suspend or revoke existing licenses that had been issued to persons engaging in such practices.[84] Similar directives were issued to the Insurance Department.[85]

Other opinions concerning gender discrimination in employment within the Commonwealth's agencies and departments were also issued, including opinions discontinuing the prohibition of a parole officer of one gender being assigned to a parolee of the other gender[86] and the prohibition of young women between the ages of twelve and twenty-one being employed as news carriers.[87] The Attorney General further directed the Pennsylvania State Police to stop implementing its long-standing requirement that applicants to the state police force be at least five-feet-six-inches tall, because the requirement excluded large numbers of average height women.[88] In other important rulings, the Attorney General opined that a married woman may use her birth name for purposes of voter registration[89] and obtaining a driver's license.[90]

---

[84] *See* Pa. Op. Att'y Gen. 55 (1974). The opinion also discussed "discrimination because of race, color, religious creed . . . or national origin." *Id.* at 217.

[85] *See* Pa. Op. Att'y Gen. 75-42 (1975).

[86] *See* Pa. Op. Att'y Gen. 150 (1972).

[87] *See* Pa. Op. Att'y Gen. 71 (1971).

[88] *See* Pa. Op. Att'y Gen. 57 (1973).

[89] *See* Pa. Op. Att'y Gen. 72 (1973).

[90] *See* Pa. Op. Att'y Gen. 62 (1973).

In addition to these and other actions by the Attorney General, in 1975, Governor Milton J. Shapp charged the Pennsylvania Commission for Women with the task of undertaking a thorough review of the statutory law of Pennsylvania and recommending legislative revisions necessary to implement the ERA.[91] The Commission determined that much needed to be done. The statutory law was replete with instances of blatant gender discrimination. Ultimately, the Commission recommended that twenty-six bills be passed in order to fully implement the amendment.[92] The results of these efforts are evident in the Commonwealth's current statutory scheme.

The areas affected by the revisions that resulted from the Commission's work included, among others, intestacy[93] and taxation.[94] However, the most important development in the statutory implementation of the ERA, and the one that has perhaps had the greatest impact in reducing the amount of specific statutory amendment and litigation necessary to implement the ERA, was

---

[91] PENNSYLVANIA COMM'N FOR WOMEN, NEWS 1 (1975).

[92] Nancy G. Thompson, Pennsylvania's Commissions for Women: From the Sixties to the Nineties (1991) (unpublished M.A. thesis, Penn State University (Harrisburg)).

[93] For example, the intestacy laws formerly provided that a husband who willfully neglected or refused to support his wife for a period of one year or more prior to the wife's death forfeited any right or interest in the wife's real or personal estate. In 1976, as part of the implementation of the ERA, this section was amended to apply to neglect or failure to support by either spouse. *See* Act of July 9, 1976, No. 135, 1976 Pa. Laws 551, § 5 (current version at PA. STAT. ANN. tit. 20, § 2106 (1993)).

[94] For example, earned income tax provisions formerly defined "domicile" as "the place in which a man has voluntarily fixed the habitation of himself and his family." In 1976, the definition was amended to provide, in part, "[d]omicile is the voluntarily fixed place of habitation of a person." Act of July 15, 1976, No. 210, 1976 Pa. Laws 1047, § 1 (current version at PA. STAT. ANN. tit. 53, § 6913 (1993)).

In addition, certain provisions regarding the collection of delinquent taxes allowed for the collection of a tax owed by a married woman from her husband. This was amended in 1978 to allow the tax collector to attempt to collect tax owed by a man from his wife, although primary liability for the tax was placed on the taxpayer who actually owed the tax. Act of Oct. 4, 1978, No. 177, 1978 Pa. Laws 933, § 2 (current version at PA. STAT. ANN. tit. 53, § 6919).

the passage of what is commonly known as the Equalization Act.[95] This Act, titled "Equality of rights based on sex," was enacted in 1978 and provides:

> (a) General rule.—In recognition of the adoption of section 28 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that where in any statute heretofore enacted there is a designation restricted to a single sex, the designation shall be deemed to refer to both sexes unless the designation does not operate to deny or abridge equality of rights under the law of this Commonwealth because of the sex of the individual.
>
> (b) Public appointments.—All references to sex in requirements for appointments to public agencies or public positions shall be construed to require appointment without reference to sex. However where the legislative intent is expressed that both men and women shall serve on a public agency or in public positions, the agency or positions shall not be composed of a membership wholly of one sex.
>
> (c) Employment benefits.—Where employment benefits authorized by statute, including pensions, death or disability payments or other similar benefits, are to be paid upon the death or disability of the employee, any designation of beneficiary which is restricted to a single sex shall be deemed a reference to both sexes.
>
> (d) Other employment rights.—All other statutes affecting employment which contain a designation restricted to one sex shall be deemed to refer to both sexes unless the designation does not operate to deny or abridge equality of rights.[96]

---

[95] 1 PA. CONS. STAT. ANN. § 2301 (1993).

[96] *Id.* This important change in Pennsylvania law followed a similar enactment in which the legislature, as part of the Statutory Construction Act, directed that when construing Pennsylvania statutes, "[w]ords used in the masculine gender shall include the feminine and neuter." 1 PA. CONS. STAT. § 1902 (1975). In Commonwealth v. Vagnoni, 416 A.2d 99 (Pa. Super. Ct. 1979), the superior court applied this section in rejecting an ERA challenge to

The most important aspect of the Equalization Act is subsection (a), wherein the Act directs that certain single-gender statutory designations be "equalized" by construing that designation as both genders.[97] Prior to enactment of the Act, commentators had suggested a variety of ways to deal with statutes that either conferred a benefit or imposed a burden on one gender alone and, therefore, violated the ERA. Generally, it was suggested that the court evaluate the initial intent of the legislature in enacting the law and then determine whether, given that intent, the legislature would itself have eliminated the law entirely or extended it to deal with its constitutional infirmity.[98]

The Pennsylvania Supreme Court followed this approach in *Commonwealth v. Butler*.[99] The court found a violation of the ERA in the Pennsylvania sentencing scheme that prohibited minimum sentences for women and struck that provision instead of extending it to apply to both genders.[100] The court reasoned that the legislative intent underlying the sentencing scheme revealed that the exemption of women from minimum sentences was a

---

the section of the Crimes Code that provided that "[a] person is guilty of a misdemeanor of the third degree if he, being a parent, willfully neglects or refuses to contribute reasonably to the support and maintenance of a child born out of lawful wedlock, whether within or without this Commonwealth." 18 PA. CONS. STAT. ANN. § 4323(a) (1972) (repealed 1978). The defendant in *Vagnoni*, a man convicted under this statute, argued that its use of the pronoun "he" indicated that the statute applied only to fathers, and therefore violated the ERA. The superior court found no constitutional defect because the above-quoted section of the Statutory Construction Act mandated that "he" be construed to mean "he" and "she." *Vagnoni*, 416 A.2d at 100; *see also* Commonwealth v. Rebovich, 406 A.2d 791 (Pa. Super. Ct. 1979); Commonwealth v. Baggs, 392 A.2d 720 (Pa. Super. Ct. 1978).

Despite the dictates of the Statutory Construction Act, recently, the legislature has specifically amended the Workmen's Compensation Act by replacing the designation "workmen" with "worker" throughout the Act. 77 PA. CONS. STAT. ANN. §§ 1-1603 (1992 & Supp. 1993), *amended by* Act of July 2, 1993, No. 44, 1993 Pa. Laws 190.

[97] 1 PA. CONS. STAT. ANN. § 2301(a).

[98] Phyllis W. Beck, *Equal Rights Amendment: The Pennsylvania Experience*, 81 DICK. L. REV. 395, 405 n.68 (1977) (citing Brown, *supra* note 42, at 913).

[99] 328 A.2d 851 (Pa. 1974).

[100] *Id.* at 858-59.

departure from the general intent to provide for equal sentencing treatment for both genders.[101] Moreover, the court felt compelled to avoid the results that would follow a declaration of unconstitutionality and nullification of the statute mandating minimum sentences for male defendants, because this would rob the courts of all authority to sentence male offenders.[102]

Passage of the Equalization Act appeared to eliminate the need for courts to engage in an analysis of what the legislature would do if faced with the task of eliminating a perceived violation of the ERA in a particular statute. This occurred because the Act apparently constituted an express statement that the intent of the legislature is always to preserve the existing statutory scheme and to extend its application to be consistent with the ERA. However, when the first opportunity arose for the supreme court to construe the Act, which was within a year of its passage, the analyses pursued by the different justices revealed that the supreme court did not have a unanimous understanding of the significance of the Act.

In *Commonwealth ex rel. Stein v. Stein*,[103] a male defendant appealed from an order entered pursuant to two statutes that provided in rem remedies to a wife and her children against her husband for failure to support and that authorized execution against real property held by the parties as tenants by the entireties.[104] Because the statutes did not provide reciprocal remedies for a husband against his wife, the defendant in *Stein* alleged that the statutes violated the ERA and sought a declaration that they were, therefore, void. Justice Nix, author of the lead opinion, accepted the substantive argument, relying on the court's recent decisions

---

[101] *Id.* at 859.

[102] *Id.*

[103] 406 A.2d 1381 (Pa. 1979).

[104] *Id.* at 1382-83 (citing Act of May 23, 1907, No. 176, 1907 Pa. Laws 227, § 2, *amended by* PA. STAT. ANN. tit. 48, § 132 (1968), *repealed by* Act of Oct. 30, 1985, No. 66, 1985 Pa. Laws 264, § 3; Act of May 24, 1923, No. 238, 1923 Pa. Laws 446, § 1, *amended by* PA. STAT. ANN. tit. 48, § 137 (1968), *repealed by* Act of Dec. 19, 1990, No. 206, 1990 Pa. Laws 1240, § 6).

in *Henderson v. Henderson*[105] and *Conway v. Dana*,[106] which held that the rights and duties of married persons and parents to support applied equally to all individuals regardless of their gender.[107] Justice Nix found that a natural extension of this principle mandated that the remedies supplied by the law for failure to support must also apply equally to both genders.[108]

The more difficult question concerned the appropriate action to be taken to cure the perceived constitutional defect. Not surprisingly, the defendant argued for a declaration of unconstitutionality, because this would have required reversal of the imposition of the statutory remedies against him. Justice Nix rejected this view, but not through a simple application of the Equalization Act. Rather, he opined:

> [W]e must bear in mind the legislative purposes evidenced by the statute, the overall statutory scheme, statutory arrangements in connected fields and the impact on public need in determining the appropriate judicial response to an unconstitutionally underinclusive statute as well as our authority to make sensible and practical adjustments in conforming current laws to the requirements of the constitutional mandate.[109]

Justice Nix made reference to cases in which discriminatorily underinclusive federal statutes had been saved from nullification by judicial extension of the statutes' benefits to additional people, and to various Pennsylvania Attorney General opinions in which similar extensions of Pennsylvania statutes had been made specifically to implement the ERA.[110] Focusing on the statutes before him, Justice Nix noted that nullifying the statutes would frustrate the legislative purpose of extending remedies for

---

[105] 327 A.2d 60 (Pa. 1974).

[106] 318 A.2d 324 (Pa. 1974).

[107] *Stein*, 406 A.2d at 1385 (citing *Henderson*, 327 A.2d at 62; *Conway*, 318 A.2d at 326).

[108] *Id. Contra* Lukens v. Lukens, 303 A.2d 522 (Pa. Super. Ct. 1973) (holding that roughly reciprocal support rights of men and women were sufficient to meet requirements of ERA).

[109] *Stein*, 406 A.2d at 1386.

[110] *Id.*

nonpayment of support and concluded that extension of those remedies to men, as well as women, was the proper remedy. Almost as an afterthought, Justice Nix referred to the Equalization Act, commenting only that it "bolstered" the conclusion he had already reached.[111]

No other justice joined in the Nix opinion. Two justices concurred in the result. Justice Roberts authored a concurrence, joined by Justice Larsen, in which he stated that he would resolve the case purely on the basis of the Equalization Act and, therefore, avoid the constitutional issue entirely.[112] In other words, Justice Roberts would have applied the Equalization Act, construed the support remedy statutes to apply to men and women equally and, therefore, found no possible violation of the ERA. Chief Justice Eagen dissented on other unrelated grounds.[113]

The result in *Stein* left open the question of whether the Act would automatically extend to statutes that applied only to one gender, thereby eliminating the need for a constitutional analysis, as Justices Roberts and Larsen opined, or would be regarded as merely instructive or as one step in the analysis, as Justice Nix apparently viewed it. Only three months later, the court's decision in *George v. George*[114] quickly remedied this uncertainty. *George* was an appeal from a trial court dismissal of a wife's counterclaim in a divorce action. A husband had sued his wife for divorce from the bonds of matrimony and his wife counterclaimed for a divorce from bed and board (legal separation) under an act originally enacted in 1929.[115] The Act provided that a wife had the right to obtain a divorce from bed and board from her husband, but provided the husband no reciprocal right. The court summarily disposed of the case, holding:

> We believe the proper disposition of this case is to apply the statute in question in such a way as to read it as providing for reciprocity of remedies for spouses. A

---

[111] *Id.* at 1386-87.

[112] *Id.* at 1387 (Roberts, J., concurring).

[113] *Id.* at 1387-88 (Eagen, C.J., dissenting).

[114] 409 A.2d 1 (Pa. 1979).

[115] Act of May 2, 1929, No. 430, 1929 Pa. Laws 1237 (repealed 1980).

> finding of unconstitutionality is an alternative no longer available by virtue of 1 Pa. C.S.A. § 2301 . . . .[116]

Thus, *George* appears to have adopted the reasoning of Justice Roberts' concurrence in *Stein* in which the constitutionality of the challenged statute cannot be an issue, because the statute's applicability is automatically extended to both genders by the Equalization Act.

Care must be taken, however, that the threshold requirement of subsection (a) of the Equalization Act is not ignored. That requirement, in the concluding phrase of subsection (a), states that a designation in a statute restricted to one gender is *not* to be deemed to refer to both genders if the designation does not "operate to deny or abridge equality of rights under the law of this Commonwealth because of the sex of the individual."[117] Obviously, this last phrase quotes the language of the ERA itself and imposes an important restriction on the extension of gender-based statutory provisions. It says that such statutes are to be extended *only* if the single-gender designation violates the ERA. Thus, it is clear that a court must first determine whether the statute, read as expressly written, violates the ERA. If it does violate the ERA, then, and only then, is the defect to be cured through extension to both genders.

IV. RECENT JUDICIAL IMPLEMENTATION OF THE ERA: TOPICAL SURVEY

As the foregoing discussion illustrates, the scope and meaning of the ERA was extensively litigated in the first ten to fifteen years after its passage.[118] During that time, many of the common-law principles that rested on distinctions between men and women were either altered to render them gender neutral or were abandoned. The statutory law was largely cleansed of express gender-based distinctions. Moreover, given the supreme court's absolutist application of the amendment and the court's refusal to limit the amendment to state action, it appeared that the groundwork had

---

[116] *George*, 409 A.2d at 2 (citations omitted).

[117] 1 PA. CONS. STAT. ANN. § 2301(a).

[118] *See supra* notes 4-83 and accompanying text.

been laid for continuing productive litigation under the ERA. In fact, there has been far less ERA litigation in the last ten years. Nevertheless, a few important matters raising ERA issues have come before the courts and the manner in which the courts have resolved those matters bears analysis. The results, for women, have been decidedly mixed.

A. Domestic Relations

Not surprisingly, the area in which the ERA affected women the most is in the law of domestic relations and the rights of married and divorced women to property and support. Early ERA cases abandoned certain common-law presumptions that inequitably denied women the right to ownership of certain forms of property. For example, in the important case of *DiFlorido v. DiFlorido*, the supreme court rejected the presumption that household goods acquired just before or during marriage were the property of the husband and were his to retain upon divorce.[119]

---

[119] DiFlorido v. DiFlorido, 331 A.2d 174 (Pa. 1975). For a discussion of *DiFlorido*, see *supra* notes 11-12 and accompanying text. The checkered history of married women's rights to property under Pennsylvania law was recently summarized in *Howard Savings Bank v. Cohen* as follows:

> At common law, under the concept of coverture, husband and wife were considered one, but with the legal identity of the wife merging into that of her husband. Society presumed that it was the husband's duty to provide his wife with a home and the requisite household goods. Therefore, as married women were not legally capable of owning property in their own names until the nineteenth century, the husband owned the property, both real and personal.

Howard Sav. Bank v. Cohen, 607 A.2d 1077, 1082 (Pa. Super. Ct. 1992) (Cirillo, J., dissenting) (footnote and citations omitted). The court continued:

> In Pennsylvania, married women's rights were advanced under the Married Women's Property Acts. The Act of 1893 permitted married women to lease, sell, and own their real estate, but, also, stated that married women could not "execute or acknowledge a deed or other written instrument conveying or mortgaging her real property unless her husband joined in such mortgage or conveyance." The Act of 1957 equalized a married woman's rights with the rights of a married man: a married woman "shall have the same right and power as a married man to acquire, own, possess, control, use, convey, lease or

1. Antenuptial Agreements

One of the supreme court's most noteworthy recent decisions in the area of antenuptial agreements is *Simeone v. Simeone*.[120] In *Simeone*, the court established a new standard for determining whether an antenuptial agreement is enforceable. A majority of the court perceived the old standard to be based upon negative stereotypical attitudes toward women and, therefore, inconsistent with the policy of the ERA.[121]

Prior to *Simeone*, this was an issue on which the modern court had not achieved a majority view, despite the existence of clear precedent in the 1968 decision of *In re Estate of Hillegass*.[122] In *Hillegass*, the court painstakingly defined the criteria by which such an agreement was to be evaluated.[123] Like many such cases, *Hillegass* arose as a petition by a surviving wife to take against her deceased husband's will, despite the fact that the parties had executed an antenuptial agreement providing that the wife waived her right to do so.[124] The agreement provided for a single inter

---

> mortgage any property of any kind, real, personal or mixed, either in possession or expectancy, or to make any contract in writing or otherwise, and may exercise the said right and power in the same manner and to the same extent as a married man."

Id. at 1082 n.4 (Cirillo, J., dissenting) (citations omitted).

[120] 581 A.2d 162 (Pa. 1990).

[121] *Id.* at 165.

[122] 244 A.2d 672 (Pa. 1968). Although *Simeone* did not expressly overrule *Hillegass*, the superior court observed in Hamilton v. Hamilton, 591 A.2d 720, 722 (Pa. Super. Ct. 1990), that *Simeone* had previously rejected the *Hillegass* approach.

[123] *Hillegass*, 244 A.2d at 675-76 (listing the criteria that the court defined).

[124] *Id.* at 673-74. Cases addressing the enforceability of antenuptial agreements commonly arise in one of two factual settings. First, as in *Hillegass*, the issue may arise when one spouse dies and the other attempts to exercise his or her statutory election to take against the deceased spouse's will despite an antenuptial agreement in which that right allegedly was waived. Second, as in *Simeone*, the issue may arise when the parties divorce and one or the other attempts to secure alimony, equitable distribution or other economic benefits permitted by divorce law despite an antenuptial agreement in which those rights have allegedly been waived.

vivos payment of $10,000 to the wife, which had already been made. The wife asserted that the agreement was unenforceable both because she had not been informed of the value of her husband's assets until after his death and because the agreement failed to make adequate provisions for her.[125] The *Hillegass* court enforced the agreement against the wife after setting forth the following standard:

> Parties to an Antenuptial Agreement providing for the disposition of their respective estates do not deal at arm's length, but stand in a relation of mutual confidence and trust that calls for the highest degree of good faith and a reasonable provision for the surviving spouse, *or* in the absence of such a provision a full and fair disclosure of all pertinent facts and circumstances.[126]

Twenty years later, the court accepted allocatur in *In re Estate of Geyer*,[127] a case that also involved a surviving wife's attempt to take against her deceased husband's will in contravention of their antenuptial agreement. The court's ostensible purpose was to correct an error by the superior court in construing and applying *Hillegass*. In fact, it appears that several members of the court were concerned more with modifying *Hillegass* than with clarifying it. In the plurality opinion, Justice McDermott accepted the underlying premise of *Hillegass* and many cases preceding it—that the marriage relationship differs materially from any other in that it is or should be marked by "'confidence and trust that calls for the highest degree of good faith.'"[128] He concluded that this difference mandated a correspondingly distinct and heightened standard of review of contracts between married or about to be

---

The same standards apply in determining the enforceability of both antenuptial and postnuptial agreements, regardless of whether the provisions challenged relate to the consequences of divorce or the death of a spouse. *See In re* Ratony's Estate, 277 A.2d 791 (Pa. 1977); Nitkiewicz v. Nitkiewicz, 535 A.2d 664 (Pa. Super. Ct.), *appeal denied*, 551 A.2d 216 (Pa. 1988).

[125] *Hillegass*, 244 A.2d at 675.

[126] *Id.* (citing *In re* Estate of Gelb, 228 A.2d 367 (Pa. 1967); *In re* Estate of Kaufmann, 171 A.2d 48 (Pa. 1961); *In re* McClellan's Estate, 75 A.2d 595 (Pa. 1950); *In re* Whitmer's Estate, 73 A. 551 (Pa. 1909)).

[127] 533 A.2d 423 (Pa. 1987) (plurality opinion).

[128] *Id.* at 427 (quoting *Hillegass*, 244 A.2d at 675).

married persons. In fact, although recognizing that *Hillegass* did not require *both* a full and fair disclosure of pertinent facts *and* a reasonable provision for the other spouse, but rather just one or the other, Justice McDermott added the requirement that in every such case, the financial positions of the parties and the statutory rights being relinquished must be fully disclosed.[129]

Justices Zappala and Papadakos concurred, agreeing in principle with the *Hillegass* standard. They found that because the facts revealed a material misrepresentation by the decedent as to his assets, the agreement was void.[130] In contrast, Justices Nix and Flaherty both authored dissenting opinions in which they laid the groundwork for the eventual abandonment of *Hillegass*, which was to occur only three years later in *Simeone*.[131] Both dissenters viewed the *Hillegass* standard as arising from a stereotypical notion that, because women were financially dependent on their husbands and incapable of understanding the import of their own contracts, they were in need of the courts' protection against the possibility that their husbands would conceal the true nature of their assets and negotiate antenuptial agreements that deprived wives of a reasonable provision upon the husbands' death.[132] Justice Nix expressed the view that these assumptions were no longer valid and, further, violated the express policy of the

---

[129] *Id.* at 429-30.

[130] *Id.* at 430 (Zappala, J., concurring).

[131] *Id.* at 430 (Nix, C.J., dissenting); *see also id.* at 434 (Flaherty, J., dissenting) (finding it unnecessary to preserve special protections in an area of gender equality).

[132] *Id.* at 430 (Nix, C.J., dissenting). Chief Justice Nix supported his conclusion that gender-based distinctions had been the impetus for the development of the *Hillegass-Geyer* principles by referring to cases decided in the 1930s, 40s, and 50s, wherein the court had expressly stated its intention to protect the wife and insure her of a reasonable provision after either divorce or her husband's death. *Id.* at 431-32 (citing Barnhart v. Barnhart, 101 A.2d 904, 908 (Pa. 1954); *In re* Groff's Estate, 19 A.2d 107, 109-10 (Pa. 1941)). Although the Chief Justice acknowledged that the principles had always been expressed in gender-neutral language and had never been held to apply *only* to cases where women sought relief from antenuptial agreements, he nevertheless concluded that because the principles were historically grounded in gender discriminatory attitudes, they had no place in modern law. *Id.* at 433.

Commonwealth as stated in the ERA.[133] Thus, the dissenters would have held that antenuptial agreements should be evaluated under the traditional standards applied to all contracts, with no special recognition given to the fact that such agreements were executed between a husband and wife.[134]

Three years later, in *Simeone v. Simeone*, Justice Flaherty succeeded in achieving a majority adoption of the view he had expressed in his *Geyer* dissent.[135] Unlike prior cases, *Simeone* did not involve a challenge to an antenuptial agreement upon the death of a spouse, but arose in the context of a divorce between the contracting parties. The Simeones' agreement was executed literally on the eve of their marriage, which occurred in 1975, when the wife was a twenty-three-year-old nurse and the husband a thirty-nine-year-old neurosurgeon with substantial assets.[136] The agreement provided that if they should divorce, the wife would receive support payments totaling no more than $25,000. The wife did not have her own counsel and alleged that she had not seen the agreement before being asked to sign it and was not fully aware of the rights she was relinquishing. When the parties divorced in 1984 the wife sought alimony pendente lite in addition to the payments provided for in the agreement.[137]

Justice Flaherty, writing for the majority, rejected the standards established by prior case law, and opined:

> There is no longer validity in the implicit presumption that supplied the basis for *Geyer* and similar earlier decisions. Such decisions rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter. Society has advanced, however,

---

[133] *Id.*

[134] *Id.* at 431 (Nix, C.J., dissenting); *id.* at 435 (Flaherty, J., dissenting).

[135] 581 A.2d 162 (Pa. 1990). This shift in the attitude of the court can perhaps best be explained by a change in the court's constituency. In the years between *Geyer* and *Simeone*, Justice Hutchinson, who had joined Justice McDermott in *Geyer*, left the court and was replaced by Justice Cappy, who joined Chief Justice Nix in *Simeone*.

[136] *Id.* at 163.

[137] *Id.* at 164.

> to the point where women are no longer regarded as the "weaker" party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable. Quite often today both spouses are income earners. Nor is there viability in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements. Indeed, women nowadays quite often have substantial education, financial awareness, income, and assets.
>
> Accordingly, the law has advanced to recognize the equal status of men and women in our society. Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded. . . .
>
> Further, *Geyer* and its predecessors embodied substantial departures from traditional rules of contract law, to the extent that they allowed consideration of the knowledge of the contracting parties and reasonableness of their bargain as factors governing whether to uphold an agreement. Traditional principles of contract law provide perfectly adequate remedies where contracts are procured through fraud, misrepresentation, or duress. Consideration of other factors, such as the knowledge of the parties and the reasonableness of their bargain, is inappropriate. Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts. Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements.[138]

Justice Flaherty did not, however, jettison *Geyer* in its entirety. He specifically retained the requirement that a full and fair disclosure of the financial positions of the parties be made and that, absent such disclosure, a material misrepresentation in the

---

[138] *Id.* at 165 (citations omitted).

inducement for entering the agreement might be asserted.[139] Nevertheless, it is important to note that in allocating the burden of proof on this issue, Justice Flaherty also held that a presumption of full disclosure arises as to any agreement which provides that full disclosure has been made and a spouse who attempts to rebut this presumption may do so only through clear and convincing evidence of fraud or misrepresentation.[140]

In concurrence, Justice Papadakos agreed that the *Simeone* agreement should be enforced, not because he thought that the *Hillegass-Geyer* standard should be abandoned, but because he concluded that the facts of the case had met that standard. As to Justice Flaherty's reasoning, Justice Papadakos made the following impassioned response:

> I cannot join the opinion authored by Mr. Justice Flaherty, because, it must be clear to all readers, it contains a number of unnecessary and unwarranted declarations regarding the "equality" of women. Mr. Justice Flaherty believes that, with the hard-fought victory of the Equal Rights Amendment in Pennsylvania, all vestiges of inequality between the sexes have been erased and women are now treated equally under the law. I fear my colleague does not live in the real world. If I did not know him better I would think that his statements smack of male chauvinism, an attitude that "you women asked for it, now live with it." If you want to know about equality of women, just ask them about comparable wages for comparable work. Just ask them about sexual harassment in the workplace. Just ask them about the sexual

---

[139] *Id.* at 166-67.

[140] *Id.* at 167. Although the *Simeone* opinion does not expressly state that the retained requirement of full and fair disclosure includes disclosure of the statutory rights being relinquished, later superior court cases construed *Simeone* to require disclosure of these rights. *See* Adams v. Adams, 607 A.2d 1116, 1117 (Pa. Super. Ct. 1992); Karkaria v. Karkaria, 592 A.2d 64, 71 (Pa. Super. Ct. 1991). The superior court has also recently reiterated that the burden of proving a material misrepresentation in the inducement of the agreement is squarely on the party challenging the agreement in any case where the agreement states that full and fair disclosure has been made. Cooper v. Oakes, 629 A.2d 944 (Pa. Super. Ct. 1993).

> discrimination in the Executive Suites of big business. And the list of discrimination based on sex goes on and on.
>
> I view prenuptial agreements as being in the nature of contracts of adhesion with one party generally having greater authority than the other who deals in a subservient role. I believe the law protects the subservient party, regardless of that party's sex, to insure equal protection and treatment under the law.[141]

Justice McDermott, joined by Justice Larsen, dissented.[142] He substantially reiterated the position he had taken in the lead opinion in *Geyer* where he had emphasized the need for special review of antenuptial agreements, because they were executed by people in a relationship of the highest trust and confidence. Justice McDermott also rejected the majority's view that the long-standing principles of Pennsylvania law regarding antenuptial agreements were in any way grounded in the gender of the contracting parties or on assumptions concerning the abilities of women. Rather, he saw the special protections afforded by existing precedent, to the party to such an agreement who relinquished rights otherwise accorded them under the law, to have arisen from the special relationship between the parties, i.e., the marriage relationship.

Simeone is an unfortunate and ill-considered decision. It turns the ERA on its head, applying it to overturn common-law principles that had always applied equally to persons of either gender. Although these principles may formerly have operated largely to protect women, whose historical role in the marriage relationship was of subservience and financial dependency, the principles themselves were gender neutral. Thus, there was no need to eliminate them from the law, and they certainly did not run afoul of the ERA.

Similar ERA attacks on common-law presumptions that were historically based on a perceived need to protect women, but are expressly gender neutral, have been rejected by other Pennsylvania courts. For example, in *Margarite v. Ewald,* the superior court

---

[141] *Simeone*, 581 A.2d at 168 (Papadakos, J., concurring).

[142] *Id.* at 168-72 (McDermott, J., dissenting).

summarily rejected a challenge under the ERA to the presumption that a husband and wife own property as tenants by the entireties.[143] This presumption historically served to protect married women, who were legally prevented from owning their own property, from losing their homes to their husband's creditors.[144] The *Margarite* court nevertheless found no ERA impediment, because the presumption of tenancy by the entireties was explicitly gender neutral, operating equally to vest a right of survivorship in either husband or wife, depending only upon which spouse survived the other.[145] The court did not even consider voiding the presumption simply because its historic origins were grounded in the protection of women.

The commonwealth court has also been unresponsive to claims of ERA violations where the challenged legal principle is facially gender neutral. In one early ERA case, the plaintiff alleged that a section of the Unemployment Compensation Law, which denied benefits to persons who were not the "sole or major support of his or her family,"[146] denied equal rights to women. The alleged violation rested on the *effect* of the provision, which resulted in a denial of benefits to far more women, who were commonly the secondary income earner in the family, than men.[147] The court found no ERA violation, based simply on the fact that the law did not expressly distinguish between potential recipients of benefits depending on whether they were male or female, but based on whether they were the "sole or major support" of their family.[148]

---

[143] 381 A.2d 480, 482-83 n.4 (Pa. Super. Ct. 1977).

[144] *See* Howard Sav. Bank v. Cohen, 607 A.2d 1077, 1082 (Pa. Super. Ct. 1992) (Cirillo, J., dissenting).

[145] *Margarite*, 381 A.2d at 482-83.

[146] Gilman v. Unemployment Compensation Bd. of Review, 369 A.2d 895, 896 (Pa. Commw. Ct. 1977) (citing Act of Dec. 5, 1936, No. 1, 1937 Pa. Laws 2897, *amended by* PA. STAT. ANN. tit. 43, § 802 (1992)).

[147] Gilman v. Unemployment Compensation Bd. of Review, 369 A.2d 895 (Pa. Commw. Ct. 1977); *see also* Guinn v. Unemployment Compensation Bd. of Review, 382 A.2d 503, 505 (Pa. Commw. Ct. 1978) (finding no reason to overrule the holding in *Gilman* that the disproportionate effect of the statute did not cause it to be invalid).

[148] *Gilman*, 369 A.2d at 897-98. Although the *Gilman* court primarily analyzed the challenged provision under the Equal Protection Clause of the

Application of the ERA to overturn the gender-neutral principles involved in *Simeone* is inconsistent with both the language and policy of the ERA. The ERA commands that equality of rights under the law not be abridged or denied on the basis of gender.[149] There is no conceivable basis for concluding that a heightened standard of review for contracts between married persons, whether the contract is challenged by a man or a woman, contravenes this command. Contrary to prior case law where the ERA was applied evenhandedly to eliminate legal principles that either expressly benefited or burdened only one gender,[150] this application of the ERA appeared to be aimed at disadvantaging women. It would appear, as Justice Papadakos strenuously argued in his *Simeone* concurrence, that the majority of the court stretched to apply the ERA to remove what it saw as an unfair and unnecessary special legal protection for women.[151]

Indeed, even if one accepts Justice Flaherty's questionable perception of the great strides toward equality that women have taken,[152] it is readily apparent that this greater equality actually argues *against* elimination of the *Hillegass-Geyer* principles on ERA grounds. Assuming that, in contemporary society, married women are far less financially and otherwise dependent on their

---

Federal Constitution, it specifically stated that its conclusion that the law did not contain a gender-based classification also led to the conclusion that the law did not violate the ERA. *Id.* at 897 n.3. The court also noted that because there was no evidence that the provision *only* affected women, the court could not conclude that the provision was enacted with the *intent* of depriving women alone certain benefits and could not be struck down on that ground. *Id.* at 898.

[149] PA. CONST. art. I, § 28.

[150] *See, e.g.*, Butler v. Butler, 347 A.2d 477 (Pa. 1975); DiFlorido v. DiFlorido, 331 A.2d 174 (Pa. 1975). In both *DiFlorido* and *Butler*, the ERA violation was clear. In *DiFlorido*, the presumption of ownership of household goods by the husband clearly granted a benefit to men and imposed a burden on women, expressly distinguishing between them solely on the basis of their gender. In *Butler*, the presumption that a gift by a wife to her husband resulted in a constructive trust in her favor clearly granted a benefit to women and imposed a burden on men, again expressly distinguishing between them solely on the basis of their gender.

[151] Simeone v. Simeone, 581 A.2d 162, 168 (Pa. 1990) (Papadakos, J., concurring).

[152] *Id.* at 165.

husbands, then clearly the principles now rejected by the court would operate even more equally to protect *both* financially dependent husbands and wives and would not raise even a hint of an ERA violation. Moreover, the elimination of these principles and the substitution of generally applicable tenets of contract law ignores a fundamental distinction between contracts made by people who truly deal at arm's length and have no relationship outside of their contractual one and contracts made by those who are or are about to be married, and who, as Justice McDermott indicated, have a confidential relationship that should give rise to special duties of honesty and fair dealing.[153]

In the final analysis, the court was in error in *Simeone*. It should have determined that the ERA was inapplicable to the common-law principles of prenuptial agreements, because those principles applied equally to men and women.

Simeone has been consistently, although perhaps reluctantly, applied by the superior court in several cases. For example, in *Hamilton v. Hamilton*,[154] Judge Wieand found an antenuptial agreement enforceable under *Simeone*, rejecting the wife's claim that she signed the antenuptial agreement under duress and that it failed to make a reasonable provision for her. Although recognizing the untenable position the wife was in when she signed the agreement, being only eighteen years of age, unemployed, and pregnant, Judge Wieand found himself "constrained" under the holding in *Simeone* to enforce the agreement against her.[155]

Simeone recently survived a challenge to its applicability in *Karkaria v. Karkaria*.[156] Had the challenge been successful, it would have made *Simeone* inapplicable in any case where enforcement of an antenuptial agreement resulted in the deprivation of rights granted under the Pennsylvania Divorce Code.[157] In

---

[153] *Id.* at 169 (McDermott, J., dissenting) (citing *In re* Estate of Gelb, 228 A.2d 367, 369 (Pa. 1967)).

[154] 591 A.2d 720 (Pa. Super. Ct. 1991).

[155] *Id.* at 721; *see also* Adams v. Adams, 607 A.2d 1116 (Pa. Super. Ct. 1992) (enforcing a postnuptial separation agreement signed by the wife without the advice of counsel despite its lack of a reasonable property provision for her).

[156] 592 A.2d 64 (Pa. Super. Ct. 1991).

[157] 23 PA. CONS. STAT. §§ 3107-3707 (1980).

Karkaria, a wife filed a complaint in divorce against her husband and sought equitable distribution, alimony pendente lite, counsel fees, and expenses under the Divorce Code. The husband argued that the parties had entered an enforceable antenuptial agreement in which they had both specifically waived all economic rights granted them under the Divorce Code. The trial court refused to apply *Simeone*, reasoning that in *Simeone* the antenuptial agreement had been entered into long before the enactment of the Divorce Code and, therefore, was specifically not affected by the Code.[158] In contradistinction, the agreement in *Karkaria* was entered into after the Code and should not be enforced to the extent that it violated the underlying public policy of the Code, which favored economic justice between divorcing parties.[159] The trial court ultimately concluded that the agreement was only violative of that policy insofar as it deprived the wife of a right to share in the assets that the husband had accumulated during the marriage through his pension and investment funds, which he had earned by working outside the home. The court reasoned that it was unfair to enforce the agreement's waiver of the wife's legal right to share in such assets, because to do so would contravene the policy of the Code, which recognizes the value of services performed in the home, in this case by the wife.[160]

On appeal, the superior court reversed. The majority emphasized that Pennsylvania law had long permitted and even encouraged the determination of property rights through marital agreements and that the Divorce Code evidenced a legislative intent to continue this policy.[161] Thus, it would appear that *Simeone* continues as the law of Pennsylvania, applicable equally to antenuptial and postnuptial agreements, no matter when they were executed and regardless of whether the challenged provisions relate to rights upon the death of a spouse or upon divorce.

---

[158] *Simeone*, 592 A.2d at 67.

[159] *Id.*

[160] *Id.* (citing 10 ALLEGHENY COUNTY DIVORCE DECISIONS 69 (Joel Fishman & Jeanne J. Bingman comps., 1988)).

[161] *Id.* at 68-71.

2. Support

One of the most far-reaching changes in Pennsylvania domestic-relations law that resulted from the adoption of the ERA was the imposition of a duty on separated and divorced mothers to contribute to the financial support of their children.[162] Although this change in the law occurred almost two decades ago, the important question to be examined now is how this application of the ERA has actually affected those mothers on whom the duty has been imposed. In other words, have Pennsylvania courts actually treated mothers and fathers equally under the law in determining who must pay and how much?

Prior to the ERA, the duty of supporting the family was primarily, and in practical reality, almost exclusively on the husband and father.[163] Although case law had long permitted a court to consider a working wife's separate earnings in setting the amount of support to be paid to her, there was no consideration given to what a nonworking wife might be capable of earning if she were to seek employment outside of the home.[164]

It was in the area of spousal support that it was first held that the earning *capacity*, as opposed to the *actual* earnings, of a wife must be considered in setting a husband's support obligation. In *White v. White*,[165] the superior court held that because a husband's spousal support obligation was based not only on his

---

[162] *See* Conway v. Dana, 318 A.2d 324 (Pa. 1974).

[163] Commonwealth *ex rel.* Bortz v. Norris, 135 A.2d 771, 773 (Pa. Super. Ct. 1957) (holding husband still liable for weekly support order even though he made an agreement with his wife to withdraw the court order); Commonwealth *ex rel.* Firestone v. Firestone, 45 A.2d 923, 924 (Pa. Super. Ct. 1946) (declaring that the duty of a father to support his child is absolute).

[164] Commonwealth *ex rel.* Borrow v. Borrow, 185 A.2d 605 (Pa. Super. Ct. 1962) (reducing husband's support order because his wife earned only eleven dollars per week less than him); Commonwealth *ex rel.* Yeats v. Yeats, 79 A.2d 793 (Pa. Super. Ct. 1951) (reducing child support order because mother had independent stream of income); *see also* Commonwealth *ex rel.* McNulty v. McNulty, 311 A.2d 701 (Pa. Super. Ct. 1973) (holding that even if wife is gainfully employed, the court will not reduce husband's alimony payment where he is not meeting his earning capacity because of voluntary job termination).

[165] 313 A.2d 776 (Pa. Super. Ct. 1973).

actual earnings, but also on his earning capacity, the wife's earning capacity must also be considered in fixing a support obligation.[166] However, the court recognized that many married women had been unemployed outside the home throughout their marriages and that this long absence from the job market must be considered in assessing their earning capacity.[167]

Because the parties in *White* had no children, the issue of the impact of child care responsibilities on a mother's earning capacity was not before the court.[168] Nevertheless, concern for the impact of its holding apparently prompted the *White* court to append a footnote addressing the relevance of the earning capacity of a mother who had custody of her children, as follows:

> [T]here are strong moral reasons and public policy considerations why the law should not *by implication* force a wife to seek employment when there are minor children at home. A mother has a moral, if not a legal right to choose to remain home with minor children and provide a home with the constant presence of a parental figure. The courts may not interfere with this wish of the mother to give her children love and guidance. If the mother chooses to work, however, our courts have held that her earnings may be taken into consideration in fixing the amount of a support order.[169]

The very next year, the Supreme Court of Pennsylvania decided *Conway v. Dana*,[170] in which the court applied the ERA to impose an equal duty of child support on mothers. The court specifically held that the amount of support required from each parent would be determined based on the "capacity and ability" of each to contribute.[171] The question that immediately faced the

---

[166] *Id.* at 780; *see also* Henderson v. Henderson, 327 A.2d 60 (Pa. 1974) (explaining that husbands have equal right to alimony pendente lite); McWilliams v. McWilliams, 537 A.2d 35 (Pa. Super. Ct. 1988).

[167] *White*, 313 A.2d at 780 n.5.

[168] *Id.* at 780.

[169] *Id.* at 780 n.4.

[170] 318 A.2d 324 (Pa. 1974).

[171] *Id.* at 326. In *Conway*, the father sought a reduction of his present child support obligation because his income had decreased while the mother had

trial courts applying *Conway* was how to calculate the earning capacity of a woman who had major custodial responsibility for her children and who, in many instances, had not worked outside the home or received any education or training for years.[172] Early critics of the *Conway* decision feared that it would result in the dispossession of the "transitional woman," the homemaker who had not worked in years.[173]

Of course, the primary source of guidance to trial courts was the long-standing body of case law that had established how to calculate a father's earning capacity. These cases required the court to consider not what a man could theoretically earn, but what he could realistically be expected to earn considering his health, age, mental and physical condition, and training.[174] This approach would now presumably apply equally to women.

Those cases did not, however, instruct trial courts as to exactly what was to be expected from custodial mothers under the *Conway* principle. In particular, the question was whether *Conway* and its ERA-based perception of gender equality effectively denied such women the right to stay home and raise their children by attributing earning capacity to them and thereby reducing the father's child support obligation to a level that forced mothers to earn their own separate income.

In *Commonwealth ex rel. Wasiolek v. Wasiolek*, the superior court answered this question with a qualified "no."[175] *Wasiolek* involved a mother, with custody of three young children, who,

---

secured employment outside her home. *Id.* at 325.

[172] *See, e.g.*, Commonwealth *ex rel.* Wasiolek v. Wasiolek, 380 A.2d 400 (Pa. Super. Ct. 1977).

[173] Beck, *supra* note 98, at 402-03, 415.

[174] Adams v. Adams, 563 A.2d 913, 916 (Pa. Super. Ct. 1989) (citing Commonwealth *ex rel.* Simpson v. Simpson, 430 A.2d 323, 326 (Pa. Super. Ct. 1981) (quoting Commonwealth *ex rel.* Malizia v. Malizia, 324 A.2d 386, 388 (Pa. Super. Ct. 1974))); *see also* Commonwealth *ex rel.* Berry v. Berry, 384 A.2d 1337, 1340 (Pa. Super. Ct. 1978) (determining that both parents' support obligations are to be fixed by considering their overall financial capacity, not just their respective incomes; ERA does not modify what is to be considered in determining financial capacity of a parent).

[175] Commonwealth *ex rel.* Wasiolek v. Wasiolek, 380 A.2d 400 (Pa. Super. Ct. 1977).

although previously employed as a secretary, had not worked outside her home for ten years. The father earned a substantial and steadily increasing income. The trial court, apparently unconvinced by the mother's testimony that she was unable to work outside her home and raise her three children by herself, ordered the father to contribute only a very small share to the mother's estimated living expenses.[176] The superior court reversed, finding a clear abuse of discretion and held:

> *Conway v. Dana* does not require that a court be insensitive to the reality of a nonworking parent's contribution to the welfare of a child. Our Supreme Court did not intend to create a *per se* rule that the custodian parent was obligated to work in all cases.
>
> . . . Once custody of a very young child is awarded, the custodial parent, father or mother, must decide whether the child's welfare is better served by the parent's presence in the home or by the parent's full-time employment. Hence, permitting the nurturing parent to remain at home until a child matures does not run afoul of the E.R.A.—our holding is based on sexually neutral considerations and on the best interests of the child. Of course, a court is not strictly bound by the nurturing parent's assertion that the best interest of the child is served by the parent's presence in the home. It is for the court to determine the child's best interest. But the court must balance several factors before it can expect the nurturing parent to seek employment. Among those factors are the age and maturity of the child; the availability and adequacy of others who might assist the custodian-parent; the adequacy of available financial resources if the custodian-parent does remain in the home. We underscore that, while not dispositive, the custodian-parent's perception that the welfare of the child is served by having

---

[176] *Id.* at 402-03. The mother estimated her weekly expenses to be $196. This did not include a housing expense, because the mother was temporarily living with her parents. The court ordered the father, who was earning over $19,000 a year, to contribute only $75 per week. *Id.*

> a parent at home is to be accorded significant weight in the court's calculation of its support order.[177]

In the majority of cases decided over the past fifteen years, this clearly stated standard of decision has been applied even-handedly. The superior court has been more than willing to take cognizance of those factors—such as the age and the health of a custodial mother—that have always been considered in fixing a father's earning capacity.[178] The court has also recognized that, in many cases, mothers have been out of the workforce for so long that even if they had previously worked, they are not presently capable of securing appropriate employment without first receiving supplemental education and training.[179] Finally, the superior court has been quick to respond to perceived abuses of discretion by trial courts in those instances where the court has effectively ignored the value of the contribution made by mothers who are at home caring for the parties' children.[180] In addition, some trial courts have overlooked the difficulties these mothers often face in obtaining substitute child care that would enable them to work.[181]

Recently, the superior court refused to accept the request of a custodial father that an earning capacity be attributed to his ex-wife who did not work outside her home.[182] The ex-wife had remarried and was engaged in the full-time care of her minor child

---

[177] *Id.* at 403. Of the three members of the *Wasiolek* panel, only two joined the majority opinion, and one of those, Judge Spaeth, concurred to state his view that on remand, the trial court was to balance the listed factors and might well find that the mother was at least able to secure part-time employment. *Id.* at 403-04 (Spaeth, J., concurring).

[178] *See, e.g.*, Smith v. Smith, 426 A.2d 1184 (Pa. Super. Ct. 1981).

[179] Commonwealth *ex rel.* Giamber v. Giamber, 386 A.2d 160 (Pa. Super. Ct. 1978) (recognizing nonworking mother's need for further education before she can reenter workforce); *cf.* Commonwealth *ex rel.* Cragle v. Cragle, 419 A.2d 1179 (Pa. Super. Ct. 1980) (finding mother cannot voluntarily quit existing job and refuse to work at all in order to educate herself).

[180] *See* Soncini v. Soncini, 612 A.2d 998 (Pa. Super. Ct. 1992); Urban v. Urban, 444 A.2d 742 (Pa. Super. Ct. 1982).

[181] Atkinson v. Atkinson, 616 A.2d 22 (Pa. Super. Ct. 1992); *see also* Bender v. Bender, 444 A.2d 124 (Pa. Super. Ct. 1982) (reversing because the trial court did not consider the *Wasiolek* factors).

[182] *Atkinson*, 616 A.2d at 24.

of her second marriage. The court expressly stated that it would not permit the policies underlying the ERA to be perverted so as to deny a mother the right to care for her child, absent consideration of what marriage produced the child.[183]

Support is now calculated in almost every case by reference to the Support Guidelines adopted by the Supreme Court of Pennsylvania in 1989.[184] According to the guidelines, support is calculated based on the respective incomes of the parents. Under the guidelines, earning capacity is still a relevant inquiry in assessing the support amount.[185] Rule 1910.16-5 incorporates the concept of earning capacity into the guidelines and states the following method to determine earning capacity:

> (5) *Income potential.* Ordinarily, a party who wilfully fails to obtain appropriate employment will be considered to have an income equal to the party's earning capacity. Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity.[186]

The careful phrasing of this section of the guidelines makes clear that only a parent who "wilfully" fails to obtain "appropriate" employment will be charged with an earning capacity that can reduce the other parent's support obligation. Clearly, then, a custodial mother must not seek employment at all costs or accept menial employment which is inappropriate for a person with her educational level and accustomed to her position in life.

In sum, a survey of the appellate decisions that have refined the *Conway* principle of equal responsibility for support reveals a clear emphasis on the concept of fairness and equity, and on the considerations of the realities and responsibilities of a custodial

---

[183] *Id.*

[184] PA. R. CIV. P. 1910.16-1 to 1910.16-5. The Support Guidelines adopted by the supreme court are periodically adjusted to reflect the changing economy of the Commonwealth.

[185] *See* 23 PA. CONS. STAT. ANN. § 4322(a) (1991) ("In determining the reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support, the guideline shall place primary emphasis on the net incomes and earning capacities of the parties, with allowable deviations for unusual needs, extraordinary expenses and other factors . . . .").

[186] PA. R. CIV. P. 1910.16-5(c)(5).

mother's life. The appellate courts have made it eminently clear that trial courts are not to apply *Conway* in a manner that effectively denies divorced mothers the right to remain at home to raise their children, or to force women to reenter the workplace when they are simply not yet equipped to do so.

B. Insurance Premium Rating

Recent litigation concerning the ERA has also focused on the area of insurance premium rating. As a result of this litigation, the courts have determined that the use of gender as a rating factor in setting automobile insurance rates, a practice that results in lower rates for women, violates the ERA. The courts have not yet addressed whether the ERA prohibits gender-based rating in areas such as health and disability insurance, where gender-based rating commonly results in higher rates for women.[187]

The insurance industry had long used gender in setting automobile insurance rates, viewing it as an actuarially sound rating factor because of an alleged statistically lower rate of accidents involving vehicles driven by women.[188] Nevertheless, many view the practice as invalid discrimination, arguing that the use of gender is based on stereotypical notions of women and their social roles and characteristics, specifically including their driving patterns.[189]

This is the view ultimately adopted by Pennsylvania courts, at least in the area of automobile insurance rating. Several of the courts' decisions in this area have already been discussed in part II of this Article in the context of challenges to gender-based

---

[187] *See* Anne C. Cicero, Note, *Strategies for the Elimination of Sex Discrimination in Private Insurance*, 20 HARV. C.R.-C.L. L. REV. 211 (1985). One early attempt by a woman to challenge a gender-based rating in the area of disability insurance was dismissed at the preliminary stage on jurisdictional grounds. Bronstein v. Sheppard, 412 A.2d 672 (Pa. Commw. Ct. 1980).

[188] *See generally* Cicero, *supra* note 187, at 215 (stating that "lower automobile insurance prices for women reflect the industry's belief that women have fewer accidents").

[189] *See* David B. Abramoff, *Rating the Rating Schemes: Application of Constitutional Equal Protection Principles to Automobile Insurance Practices*, 9 CAP. U. L. REV. 683, 690 n.30, 700-02 (1980).

insurance rating wherein the courts were called upon to decide the important question of whether the state action doctrine applied to ERA analysis.[190]

In one of these cases, *Hartford Accident & Indemnity Co. v. Insurance Commissioner*,[191] a young male insured brought an action challenging the use of gender as a rating factor in setting auto insurance rates.[192] The plaintiff alleged that the use of gender resulted in young male insureds, including himself, paying premiums higher than those paid by young female insureds for the same coverage. He therefore contended that such a practice constituted clear gender discrimination.[193] The Insurance Commissioner agreed and refused to approve the gender-based rate filing.[194] On appeal, the supreme court held that the Commissioner had not erred in refusing to approve auto insurance rates that differentiated between insureds solely based on their gender.[195] The court found that the prohibition of "unfairly discriminatory" rates extended beyond a prohibition of rates that were actuarially unsound, and that the prohibition of unfair discrimination in rates also encompassed the ERA-mandated equal treatment of the genders "under the law."[196] The court also questioned the actuarial soundness of the use of gender as a rating factor, suggesting that the use of gender in calculating rates was based on outdated social stereotypes rather than on a real causal connection between the gender of the driver and the level of risk.[197]

The *Hartford* holding was rendered substantially ineffective when, one year after the court's decision, legislation amending the Rate Act was enacted.[198] The amendment consisted of the

---

[190] *See supra* notes 58-82 (discussing Hartford Accident & Indem. Co. v. Insurance Comm'r, 482 A.2d 542 (Pa. 1984); Bartholomew v. Foster, 541 A.2d 393 (Pa. Commw. Ct. 1988), *aff'd*, 563 A.2d 1390 (Pa. 1989) (per curiam)).

[191] 482 A.2d 542 (Pa. 1984).

[192] *Id.* at 544.

[193] *Id.*

[194] *Id.*

[195] *Id.* at 549.

[196] *Id.* at 546-48.

[197] *Id.*

[198] 40 PA. CONS. STAT. ANN. § 1183(e).

addition of a section specifically providing that the Act was not to be construed as prohibiting the use of gender in setting auto insurance rates, so long as the use of gender was supported by "sound actuarial principles" or was "related to actual or reasonably anticipated experience."[199] The constitutionality of this new provision was almost immediately challenged before the commonwealth court in *Bartholomew v. Foster*.[200] Once again, the action was brought by a young male insured. The plaintiff alleged that the new section of the Rate Act, which specifically allowed the use of gender as a rating factor, clearly violated the ERA.[201] The commonwealth court agreed, relying on the supreme court's reasoning in *Hartford*, and declared subsection 1183(e) of the Rate Act unconstitutional.[202] On appeal, the supreme court affirmed per curiam without opinion.[203]

---

[199] *Id.*

[200] 541 A.2d 393 (Pa. Commw. Ct. 1988).

[201] *Id.* at 395.

[202] *Id.* at 398.

[203] Bartholomew v. Foster, 563 A.2d 1390 (Pa. 1989); *see also* American Council of Life Ins. v. Foster, 580 A.2d 448 (Pa. Commw. Ct. 1990) (rejecting as unripe insurance association action seeking declaratory and injunctive relief from Commissioner's proposed "unisex regulations" disallowing use of gender as rating factor in any line of insurance; proposed regulations not yet formally adopted).

Although the Rate Act still contains subsection 1183(e), which the *Bartholomew* court declared unconstitutional insofar as it permitted the use of gender as a rating factor in setting auto insurance rates, the Insurance Commissioner has now adopted a policy providing for the elimination of the use of gender in setting auto insurance rates. *See* 31 PA. CODE § 65.1 (1988). The Commissioner's regulations are unclear regarding the permissibility of the use of gender in setting other types of insurance rates. Chapter 145 of the regulations, entitled Elimination of Unfair Sex or Marital Status Discrimination in All Insurance Contracts, provides that it "does not prohibit insurers from differentiating in premium rates between sexes where there is sound actuarial justification." 31 PA. CODE § 145.1 (1977). However, this provision is followed by a note suggesting that the provision is not to be construed to permit gender-based rating carte blanche, but rather simply to exclude it from the category of unfair insurance trade practices, which are the subject of Chapter 145. *Id.* (Notes of Decisions following Chapter 145.1 (citing Hartford Accident & Indem. Co. v. Insurance Comm'r, 482 A.2d 542, 554 (Pa. 1982))).

Men have successfully employed the ERA to secure more advantageous insurance rates by obtaining judicial prohibition of the use of gender in ratemaking for auto insurance.[204] However, more recent attempts by women to use the ERA to secure lower insurance rates have not proven as successful. For example, in a case decided by the commonwealth court in late 1988, the Pennsylvania National Organization for Women appealed a decision of the Insurance Commissioner.[205] The Commissioner had refused to find that it was unfairly discriminatory under the Rate Act or a violation of the ERA to set auto insurance rates without employing mileage as a rating factor.[206] The ruling of the Commissioner failed to reflect the fact that the Commissioner herself had found, as a fact, that women on average drive fewer miles than men, and that this difference in mileage resulted in women experiencing fewer accidents.[207]

The commonwealth court affirmed the Commissioner's decision.[208] First, the court found no violation of the Rate Act, because the court was unconvinced that lower mileage was reliably related to risk of loss and, therefore, could be considered a valid rating factor.[209] Second, the court rejected NOW's ERA argument, stating that the charging of uniform rates for men and women did not result in a subsidy to men through overcharges to women.[210] Rather, the court concluded that the rates in question were set without express distinctions based on gender and that NOW had not proven that in paying uniform rates women were bearing more than their fair share of the risk of loss.[211] Interestingly, however, the court also opined:

> The Commissioner found, based on the evidence and reasoning cited herein, that mileage is not an adequate

---

[204] *See supra* notes 49-83 and accompanying text.

[205] Pennsylvania Nat'l Org. for Women v. Commonwealth, Ins. Dep't, 551 A.2d 1162 (Pa. Commw. Ct. 1988).

[206] *Id.* at 1164.

[207] *Id.* at 1165.

[208] *Id.* at 1167.

[209] *Id.*

[210] *Id.* at 1166-67.

[211] *Id.* at 1167.

> basis for distinction in rates. It does not follow from this finding . . . that the Commissioner's approval of those rates effectuates a gender-based distinction. Indeed, there is no reliance on gender as a rate-setting factor, merely a decision to approve rates without utilizing a factor that, at best, would arguably benefit women.[212]

Thus, the commonwealth court appeared to conclude that the ERA would not have been violated even if NOW had demonstrated that rates set without regard to mileage resulted in a disproportionately greater premium expense for women. In other words, the court suggested that so long as rates are set without the use of gender as an expressed rating factor, then the ERA is not violated. This is despite the fact that those rates do not reflect other factors, demonstrably related to risk of loss, that would reduce women's premium expenses.

V. CONCLUSION

The Pennsylvania Equal Rights Amendment has equalized the positions of men and women under the law. As Chief Justice Nix of the Pennsylvania Supreme Court has recently stated, "The constitutional prohibition against sex-based discrimination is by now firmly rooted in the mortar of this Commonwealth."[213] Both the common and statutory law now stand as gender-blind testaments to the policy expressed in the amendment.

The symbolic value of the ERA cannot be underestimated. The public policy of the Commonwealth now demands gender equality. In order to foster that policy, the Pennsylvania Human Relations Act has provided individuals with an effective means of redress, particularly for gender discrimination in the workplace.[214] The Divorce Code of 1980, as recently amended,[215] mandates economic justice between the parties upon the dissolution of marriage.

---

[212] *Id.*

[213] McMillan v. McMillan, 602 A.2d 845, 848 (Pa. 1992) (Nix, C.J., concurring).

[214] PA. STAT. ANN. tit. 43, § 951 (1991).

[215] 23 PA. CONS. STAT. ANN. §§ 3101-3102 (1990).

The ERA has played a significant role in the courthouse, in the legislature, and in administrative bodies such as the Human Relations Commission. In addition, the Attorney General has issued a long line of opinions bringing gender equality to administrative agencies such as the Liquor Control Board and the Insurance Department.[216] His opinions have also mandated gender equality in employment in all state agencies.[217]

Court decisions have equalized the burdens and benefits for men and women. This has resulted in the removal of preferential treatment afforded women in the criminal and civil areas. For example, in the criminal law, preferential sentencing for women has been eliminated and in the civil area, women now have an equal obligation to support their children, and they are not afforded preference in custody matters. Furthermore, prenuptial agreements are treated like ordinary commercial contracts.

Despite these judicial and legislative actions, the ERA does not appear to have resulted in a marked change in the social fabric of the Commonwealth. In fact, those ERA-based court decisions that have equalized the legal burdens and benefits of men and women have probably had the pragmatic effect of improving the condition of men more than that of women. Thus, although the ERA has proven to be a useful tool in achieving greater equality in certain areas, and was therefore an unquestionably salutary addition to the law of Pennsylvania, the ERA has not impacted the lives of women in this Commonwealth nearly as broadly as might have been expected.

---

[216] *See supra* text accompanying notes 84-85.

[217] *See supra* text accompanying notes 86-91.