

ARTICLES

PENNSYLVANIA'S EQUAL RIGHTS AMENDMENT LAW: WHAT DOES IT PORTEND FOR THE FUTURE?

*The Honorable Phyllis W. Beck and Patricia A. Daly**

INTRODUCTION

One might expect that Pennsylvania, one of the first states to amend its constitution to include an Equal Rights Amendment (ERA), would serve as a leader among states dedicated to the eradication of gender bias and the promotion of women's rights.¹ One might also expect that the reasoning and analysis of the Pennsylvania courts, given their task of interpreting one of the first state constitutional ERAs, would serve as a model for other state courts confronting their own newly-fashioned ERAs, particularly because there is no guiding federal standard to follow or from which to depart.²

The reality, however, is that Pennsylvania has not led the way in ERA law. Nor have its judicial pronouncements been embraced by other states.³ Rather, Pennsylvania has been cited as the prime example of a state whose ERA has *not* created the significant change predicted by the adoption of an ERA.⁴

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1. Pennsylvania's ERA was adopted in 1971. PA. CONST. art. I, § 28. Also passed in that year were ERAs in Illinois and Virginia. ILL. CONST. art. I, § 18; VA. CONST. art. I, § 11. Although Hawaii's ERA was adopted in 1972, its equal protection clause, adopted in 1968, was itself an ERA provision in that it prohibited, on the basis of sex, the denial of equal protection of the laws, the enjoyment of civil rights and discrimination. HAW. CONST. art. I, §§ 5, 21. See *infra* notes 120-21 for a discussion of how § 5 of the Hawaii Constitution was interpreted as precluding a law that sanctioned heterosexual only marriages.

2. The national effort to make the ERA part of the United States Constitution has been unsuccessful thus far. See *infra* notes 9-14 for a discussion on the failure to amend the United States Constitution to include an ERA.

3. See *infra* notes 100-107 and accompanying text for a discussion of the Pennsylvania Supreme Court's analysis on abortion funding and the ERA as compared to the analyses by the Connecticut, New Mexico and Texas courts.

4. Debra Baker, *The Fight Ain't Over*, 85 A.B.A. J., Aug. 1999, at 52, 55. Baker interviewed a number of persons on the current status of the federal ERA. In response to the question of whether a federal ERA necessarily includes changes in the area of abortion and gay rights, Baker wrote that "ERA advocates remain steadfast.... They note that Pennsylvania, which has a state equal rights amendment similar to the federal ERA, does not recognize same-sex marriage and has one of the most restrictive abortion laws in the country." *Id.* See also Honorable Phyllis W. Beck and Joanne Alfano Baker, *An Analysis of the Impact of the Pennsylvania Equal Rights Amendment*, 3 WIDENER J.

This Article examines the few recent and relatively insignificant Pennsylvania state ERA cases that have been decided in the last decade.⁵ It also focuses on two issues often raised in the context of the ERA: state funding for abortion, and same sex marriage.⁶ This Article raises the question of whether Pennsylvania's failure to effectuate marked change in these areas bolsters or undermines the ongoing, albeit beleaguered, effort toward a federal ERA.⁷ It also discusses the role other states may have in setting the national tone for adoption or rejection of a federal ERA.⁸

I. THE FEDERAL AND STATE DEVELOPMENT OF THE ERA

The movement to amend the United States Constitution to include an ERA began in the 1920s, but the nationwide surge did not begin until the early 1970s.⁹ It gained strong momentum throughout that decade, but by the early 1980s, it had all but perished.¹⁰ On June 30, 1982, the deadline for ratification of the ERA expired.¹¹ By that date the ratification tally was at just thirty-five states, three short of that necessary for passage.¹²

Simultaneous with the federal effort however, and primarily during the early 1970s, a significant number of states took up the ERA cause and various versions of ERAs were submitted to state legislative bodies and promptly ratified by voters, resulting in eighteen (18) new state constitutional "ERA jurisdictions."¹³ While the federal movement languished through much of the

PUB. L. 743, 744 (1994) (suggesting that Pennsylvania's state ERA has contributed to "a relatively small change in the Commonwealth's social fabric").

5. See *infra* note 29 and accompanying text for a summary of Pennsylvania ERA cases decided during the 1990s.

6. See *infra* notes 96-107 and accompanying text for a discussion of Pennsylvania ERA cases involving abortion funding. See *infra* notes 125-34 and accompanying text for a discussion of Pennsylvania ERA cases involving same sex marriage.

7. See *infra* notes 15-19 and accompanying text for a discussion of the current federal ERA effort.

8. See *infra* notes 108-18 and accompanying text for a discussion of the treatment of the ERA in the context of abortion funding in Connecticut, Texas and New Mexico. See *infra* notes 119-22 and accompanying text for a discussion of Hawaii's treatment of the ERA in the context of same sex marriage.

9. The proposed amendment was first introduced in Congress in 1923 and was proposed in every Congress thereafter until 1971. National Council of Women's Organizations ERA Task Force, Equal Rights Amendment, available at <http://www.equalrightsamendment.org/era.htm> (last updated Dec. 21, 2001). In 1972 it was submitted to the states for ratification. *Id.*

10. *Id.* The proposed amendment had an original deadline of March 22, 1979. *Id.* In the fall of 1978, Congress extended the deadline to June 30, 1982. *Id.*

11. *Id.*

12. *Id.* States that ratified the federal ERA include: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

13. 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 3, app. 3 (3d ed. 2000). States that have adopted some version of an ERA

1980s and 1990s, those decades instead saw the development of law under the myriad state ERAs, which varied according to the issues raised in a given case and the precise amendment language of each state.¹⁴

In 1997, the possibility of a federal ERA revival surfaced when three young lawyers wrote an article suggesting that ratification of the ERA remained viable despite its expiration in 1982.¹⁵ The authors' thesis was based on the fact that the Madison Amendment, which granted congressional pay raises, was ratified some 203 years after its submission to the states.¹⁶ Thus, if a two hundred-year ratification period could be deemed to satisfy the "sufficiently contemporaneous" requirement of the ratification process, then surely the ERA's not-quite-thirty-year journey to ratification would not preclude its ultimate adoption.¹⁷ The authors conceded that a major difference existed between the Madison Amendment and the ERA: the former had no expiration date, while the latter had both an original and extended time limit, both of which were long passed.¹⁸ They responded to the discrepancy by arguing that the time limit was inconsequential either because its placement in the proposing language of the amendment, rather than the text itself, makes it open to revision or because established precedent permits ratification of the ERA to be deemed "sufficiently contemporaneous" and therefore valid.¹⁹

Whether the ERA is officially back in the national spotlight is open to debate.²⁰ The National Council of Women's Organizations (NCWO) and the National Organization of Women (NOW) argue persuasively that it is.²¹ Recent proposals in Congress lend support to their position.²² Conservative groups,

since 1970 include: Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Rhode Island, Texas, Virginia, and Washington. *Id.* Both Utah and Wyoming provided for gender equality in their original constitutions. *Id.*

14. *Id.* Friesen makes the interesting observation that despite the variety in the texts of various state ERAs, there is a "great degree of uniformity in the case outcomes." *Id.* § 3-12.

15. Allison L. Held, Sheryl L. Herndon and Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 113 (1997).

16. *Id.* at 117.

17. *Id.* at 123-31.

18. *Id.* at 116.

19. *Id.* at 135-36.

20. See *infra* notes 21-24 for a discussion of the debate between the proponents and opponents of the ERA.

21. Both NOW and NCWO maintain internet websites dedicated to the ongoing effort to adopt a federal ERA. The NOW site, at <http://www.now.org>, gives a chronology of the ERA and provides information, both current and historical, on the movement. The NCWO site, at <http://www.equalrightsamendment.org>, provides similar information, as well as information regarding political activity, current legislative strategy and links to other sites. Yet another site, <http://www.ERACampaign.net>, describes itself as a "network of people all around the United States, supporting and/or working to achieve the addition of the Equal Rights Amendment (ERA) to our United States Constitution." The site provides an e-mail newsletter, the ERA Campaigner, and urges site visitors to join the Campaign Network. *Id.*

22. National Council of Women's Organizations ERA Task Force, Equal Rights Amendment,

such as the Eagle Forum led by Phyllis Schlafly, insist that the ERA is "dead and buried" and the material differences between it and the Madison Amendment cannot be overcome.²³ The truth may lie somewhere in between, but one thing is certain: in making their arguments, both proponents and opponents of the federal ERA can rely on the nearly three decades of activity by state courts and legislatures around the country addressing the ERA issues.²⁴

II. RECENT DEVELOPMENT IN PENNSYLVANIA'S ERA JURISPRUDENCE

In a 1994 article that traced the impact of Pennsylvania's ERA within the state, the authors explored the standard of review that the Pennsylvania Supreme Court applied in ERA cases, as well as the new amendment's scope of applicability.²⁵ Relying on surveys in the areas of domestic relations and insurance premiums, as well as changes to policy and procedure in various administrative agencies in the Commonwealth, the article concluded that the state ERA "played a significant role in the courthouse, in the legislature and in administrative bodies" throughout the Commonwealth.²⁶ In addition, the article suggested that "court decisions have equalized the burdens and benefits for men and women."²⁷ However, the article also concluded that the ERA did not markedly change the social fabric of the Commonwealth and, further, that the judicial decisions rendered under the ERA may have had the pragmatic effect of improving the condition of men more than that of women.²⁸

A review of the years since that article's publication reveals little, if any,

available at <http://www.equalrightsamendment.org/era.htm> (last updated Dec. 21, 2001). The web site sets out House Joint Resolution 40, at http://www.equalrightsamendment.org.h_j_res.htm, and Senate Joint Resolution 10, at http://www.equalrightsamendment.org.s_j_res.htm (both dated March 22, 2001), proposing an ERA to the United States Constitution. *Id.* Also posted is House Resolution 98, which requires the House of Representatives to take "any legislative action necessary to verify the ratification of the Equal Rights Amendment...when...an additional three States ratify the Equal Rights Amendment." *Id.* at http://www.equalrightsamendment.org.h_res.htm.

23. Eagle Forum, Memo on the Equal Rights Amendment 2000, available at <http://www.eagleforum.org/era/ERA99.shtml> (last visited Jan. 11, 2002). This website is maintained by Eagle Forum, a self-proclaimed "pro-family" organization established in 1972. *Id.* at <http://www.eagleforum.org>. Led by Phyllis Schlafly, the web site addresses a number of issues, including the ERA. In a piece entitled "Memo on the Equal Rights Amendment 2000," the dangers of a federal ERA are listed. *Id.* at <http://www.eagleforum.org/era/ERA99.shtml>. In a letter to the attention of Illinois legislators, Schlafly states: "It comes as a surprise that someone is trying to dig up the dead-and-buried ERA (Equal Rights Amendment) and pretend it's alive. Please don't be fooled." Phyllis Schlafly, Letter to Illinois Legislators, available at <http://www.eagleforum.org/era/2001/Era-il-2001.shtml> (April 27, 2001).

24. Indeed, both sides have relied on state ERA activity to support their positions. See *supra* notes 21-23 and accompanying text for a discussion of how ERA opponents warn against the "dangers" of a federal amendment while proponents note that little change has occurred in some states, such as Pennsylvania.

25. Beck & Baker, *supra* note 4, at 743-98.

26. *Id.* at 798.

27. *Id.* The equalization of burdens, however, has in some cases "resulted in the removal of preferential treatment afforded women in the criminal and civil areas." *Id.*

28. *Id.*

change. Most notable is the dearth of published opinions mentioning the amendment and the even smaller number of cases analyzing and applying it.²⁹ Of course, the lack of ERA case law in the late 1990s is not necessarily surprising. One naturally would expect that most of the significant changes emanating from the new amendment would occur shortly after its passage, certainly within the first two decades. But although the previous article detailed the noteworthy decisions of the twenty-year history of the state ERA, it also noted the lack of momentous decisions in the case law.³⁰ Research in other state ERA jurisdictions establishes that the reason Pennsylvania has not seen momentous decisions is not because momentous issues do not exist.³¹ In fact they do, and several other states, in both their courts and their legislatures, have wrestled with and resolved them.³² Pennsylvania's ERA jurisprudence, on the other hand, is notable not for its striking developments, but for its lack thereof.

Since 1994, Pennsylvania courts have published less than one case per year discussing the state ERA. Among those few cases, the amendment was deemed relevant in less than half. In a majority of the cases, the courts expended little effort analyzing, discussing and developing ERA jurisprudence.

Most of Pennsylvania's 1990s ERA case law concerns family law, particularly marital property, custody and support. Even within these areas however, the decisions are less than dramatic and instead constitute not an expansion, but a refinement of established law. For instance, in *Depp v. Holland*,³³ a father sought to hold a mother in contempt for failure to meet her child support obligations. A Pennsylvania Superior Court panel held that the mother could not hide behind the "nurturing parent" doctrine in order to avoid payments.³⁴ The court found that the doctrine, which recognizes that a parent may not be attributed an earning capacity in the event he or she chooses to stay

29. This Article considers five Pennsylvania cases that discuss the ERA, only four of which were published opinions. See *infra* notes 37-83 and accompanying text for a discussion of these cases. Of the five, two granted relief based on the ERA. See *infra* notes 37-53 and accompanying text for a discussion of the application of the nurturing parent doctrine. See *infra* notes 58-59 and accompanying text for a discussion of the right of a female referee to work boys' basketball games.

In the remaining cases, the state ERA was discussed only because it was indicative of the changing status accorded genders, or because the ERA was found to be inapplicable or irrelevant. See *infra* notes 37-43 and accompanying text for a discussion of *Depp v. Holland*, 636 A.2d 204 (Pa. Super. Ct. 1994) (changing status accorded genders). See *infra* notes 67-68 and accompanying text for a discussion of *Wise v. Commonwealth*, 690 A.2d 846 (Pa. Commw. Ct. 1997) (ERA found inapplicable). See *infra* notes 69-83 and accompanying text for a discussion of *Espenshade v. Espenshade*, 729 A.2d 1239 (Pa. Super. Ct. 1999) (ERA found irrelevant).

30. *Beck & Baker*, *supra* note 4, at 744.

31. See *infra* notes 96-107 and accompanying text for a discussion of Pennsylvania ERA cases involving abortion funding. See *infra* notes 125-34 and accompanying text for a discussion of Pennsylvania ERA cases involving same sex marriages.

32. See *infra* notes 108-18 and accompanying text for a discussion of the treatment of the ERA in the context of abortion funding in Connecticut, Texas, and New Mexico. See *infra* notes 119-22 and accompanying text for a discussion of Hawaii's treatment of the ERA in the context of same sex marriage.

33. 636 A.2d 204 (Pa. Super. Ct. 1994).

34. *Depp*, 636 A.2d at 206.

home with young children rather than work, did not apply to the mother because she worked in the past and had accomplished her work in the home.³⁵ The result in *Depp* is of no great consequence as it merely addresses the application of the nurturing parent doctrine under a specific set of facts and so does not advance ERA jurisprudence in Pennsylvania.³⁶ However, the underlying facts of the case show the subtle but important changes that have occurred in family law as a result of the equal status accorded genders.³⁷

In a concurring opinion commenting on the evolution of the nurturing parent doctrine, Judge Tamilya noted the "fundamental revisions" that custody and support matters have undergone since passage of the state ERA.³⁸ He observed that based on those revisions, not only may a mother elect to remain at home to care for her child with no earning capacity assessed against her as a result, but also "it is likely that under the same circumstances, a father would receive the same treatment."³⁹

This very assumption became a reality when a father recently sought the benefit of the nurturing parent doctrine in *McCoy v. Breinich*.⁴⁰ The father's earning capacity, and that of the children's mother, had been set at \$700, although both parents made slightly less than that amount.⁴¹ The mother initially worked full-time outside the home, but moved to part time work so that she could stay home with an older child who lived with her; the older child was not the father's child and, consequently, the support order had no application.⁴² The father had married another woman with whom he had children.⁴³ While the children of his marriage were still quite young, he decided to stay home to care for them; in order to accomplish this goal, he worked only part time.⁴⁴ When the

35. *Id.* The court noted that the nurturing parent doctrine is not an absolute rule and relied on, among other things, the fact that the mother at one time ran a daycare facility out of her home. *Id.*

36. *Depp* was not brought or decided under the ERA; rather, its facts illustrate the changes wrought by the ERA. See generally *Depp*, 636 A.2d 204, 207 (deciding child-support issue without reference to ERA).

37. The facts in *Depp* reveal that significant change has occurred in family law as a result of the Pennsylvania ERA. For instance, the obligation of child support is shared equally by parents. See *id.* at 207 (rejecting mother's attempt to exempt her income from support calculations). See also *Conway v. Dana*, 318 A.2d 324, 326 (Pa. 1974) (stating that "[s]upport, as every other duty encompassed in the role of parenthood, is the equal responsibility of both mother and father."). Further, the calculation of support depends upon the earning capacity of each spouse. See *White v. White*, 313 A.2d 776, 780 (Pa. Super. Ct. 1973) (declining to limit support inquiry to earnings of one parent). Other changes that have occurred in the family law arena include the fact that husbands have an equal right to alimony pendente lite. See *Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974) (noting circumstances in which wife must provide support for husband). There is also no longer a presumption that household goods are owned by the husband. See *DiFloridio v. DiFloridio*, 331 A.2d 174, 178 (Pa. 1975) (commenting on joint ownership of goods).

38. *Depp v. Holland*, 636 A.2d 204, 207 (Pa. Super. Ct. 1994) (Tamilya, J., concurring).

39. *Id.*

40. *McCoy v. Breinich*, 782 A.2d 1065, No. 68, slip op., WDA 2001 (Pa. Super. Ct. July 12, 2001).

41. *Id.* at 2.

42. *Id.*

43. *Id.*

44. *Id.*

mother asked the court to raise the father's earning capacity, he opposed the increase and cited the nurturing parent doctrine to support his position.⁴⁵

The trial court considered the facts, particularly the choices of both mother and father, and held that the father was entitled to the benefit of the doctrine.⁴⁶ The trial court found that the father's sincere desire to stay at home and nurture the very young children of his marriage supported the doctrine's application.⁴⁷ The trial court also noted that although it found application of the doctrine "foreign to its understanding of the traditional role of a Father," it felt "constrained to afford equal benefit from it to [the father...just as it might be applied, were it the Mother...who sought its benefit."⁴⁸ In light of the facts and the applicable standard of review, the Superior Court panel found no error in the trial court's resolution of the case and permitted application of the doctrine to stand.⁴⁹

McCoy unquestionably serves the primary interest of the ERA, *i.e.*, gender equality.⁵⁰ However, it does so by permitting men to benefit from a legal principle historically geared toward women.⁵¹ In that context, it is similar to several other cases decided in the wake of the ERA in that it has the "pragmatic effect of improving the condition of men more than that of women."⁵² No doubt the condition of men in these circumstances warranted improvement; however, the *McCoy* decision, while fair, can hardly be placed in the column for advancement of women's rights.

There have been other cases decided in the last decade reinforcing the principle under the ERA that men and women will be treated equally.⁵³ In *Kemether v. Pennsylvania Interscholastic Athletic Association, Inc.*,⁵⁴ a federal district court held that the Association acted in violation of the state ERA by, among other things, refusing to refer the female plaintiff, a basketball referee, for employment in boys' basketball games.⁵⁵

45. *McCoy*, 782 A.2d 1065, slip op. at 4.

46. *Id.* at 3.

47. *Id.* at 4.

48. *Id.*

49. *Id.*

50. Obviously, gender equality does not mean only that woman are to be accorded all the rights that men enjoy, but rather that all persons, men and women, are entitled to the same rights.

51. Shortly after passage of the ERA, the validity of the nurturing parent doctrine was called into question. In *Commonwealth ex rel. Wasiolek v. Wasiolek*, a panel of the Pennsylvania Superior Court considered whether the ERA precluded application of the doctrine due to the amendment's clear mandate to "treat men and women similarly situated in a like manner." *Commonwealth ex rel. Wasiolek v. Wasiolek*, 380 A.2d 400, 402 (Pa. Super. Ct. 1977). The *Wasiolek* court considered the notion of gender equality in the context of the nurturing parent doctrine and ultimately concluded that the doctrine did not "run afoul of the E.R.A." *Id.* at 403.

52. Beck & Baker, *supra* note 4, at 798.

53. See *infra* notes 57-66 and accompanying text for a discussion of Pennsylvania ERA cases establishing equal treatment between men and women.

54. No. CIV. A. 96-6986, 1999 WL 1012948 (E.D. Pa. Nov. 8, 1999).

55. *Kemether*, 1999 WL 1012948, at *28. The *Kemether* court likewise found violations under Title VII, 42 U.S.C. § 2000e and Title IX, 20 U.S.C. § 1681. *Id.*

In *Porter v. Karivalis*,⁵⁶ the state intermediate appellate court held that a statute that made each spouse liable for the "necessaries" bills of the other spouse did not violate the ERA.⁵⁷ In *Porter*, a husband sought to avoid a debt for psychological services extended to his wife, arguing that the law that made him liable for the debt was unconstitutional under the ERA.⁵⁸ The court held otherwise, noting that the common law and the original statute made husbands liable for their wives' necessities debts, but did not impose the same responsibility on wives.⁵⁹ The amended statute, however, was gender neutral and mandated that a spouse was obligated to pay for the necessities debts of the other spouse.⁶⁰ The court found that this revised law, applicable in this case, did not violate the ERA but was enacted in response to the amendment.⁶¹ As such, it explicitly "distributes the benefits and burdens equally between the sexes [so that] there is no [constitutional] violation."⁶²

In another recent case attempting to stretch the equality concept of the ERA, a male prisoner sought to change state corrections department rules that allowed women to wear long hair, while preventing men from doing the same.⁶³ The Pennsylvania Commonwealth Court held that the ERA did not require such a change since the department's hairstyle regulations were reasonably related to legitimate "penological interests."⁶⁴

In *Espenshade v. Espenshade*,⁶⁵ a recent family law case from the

56. 718 A.2d 823 (Pa. Super. Ct. 1998).

57. *Porter*, 718 A.2d at 825-26. The common law doctrine of necessities "placed a legal duty upon only the husband to support his wife and children, and where he neglected this duty, one who supplied the necessities for their support was permitted to recover the cost in an action under common law, which raised an implied promise, on the part of the husband, to pay." *Id.* at 826 n.1.

58. *Porter*, 718 A.2d. at 825. See 23 PA. CONS. STAT. ANN. § 4102 (West Supp. 1991) (regulating proceedings in case of debts contracted for necessities).

59. *Porter*, 718 A.2d at 826 n.1. The predecessor statute, originally enacted in 1848, was at 48 PA. STAT. § 116.

60. *Id.* at 825. The law applies to "either spouse." 23 PA. CONS. STAT. ANN. § 4102.

61. *Porter*, 718 A.2d at 826.

62. *Id.*

63. *Wise v. Commonwealth*, 690 A.2d 846 (Pa. Commw. Ct. 1997).

64. *Id.* at 848. The Pennsylvania Commonwealth Court relied on the diminished civil rights accorded prisoners and on that basis applied a "reasonable relation" test to this ERA claim. *Id.* It adopted the rationale of a recent federal district court case, which reasoned that:

[P]enal authorities could reasonably conclude that the greater aggressiveness and disposition toward violent action frequently displayed by male prisoners makes institutional security, maintenance of internal discipline and prevention of homosexual attacks—penal goals which the hair regulation furthers—a much greater problem in men's prisons than in the women's correctional institution. Likewise the greater importance of personal appearance to women than men largely eliminates any hygienic problems with respect to long hair of female inmates. In short, there is a validating relationship between the varying behavioral patterns of the two sexes and the regulatory distinction between the sexes with respect to hair length.

Id. at 849 (citing *Poe v. Werner*, 386 F. Supp. 1014, 1020-21 (M.D. Pa. 1974)). The *Wise* court did not elaborate on how the hair regulation furthered goals of security, discipline and prevention of homosexual attacks.

65. 729 A.2d 1239 (Pa. Super. Ct. 1999).

Pennsylvania Superior Court, a man attempted to convince the court that recent ERA decisions supported his position. In an effort to assert the validity of a fraudulent contract with his ex-wife, he argued that the trial court took a "paternalistic" approach to the matter because of the wife's gender.⁶⁶ The husband insisted that the court, rather than relying on the plain language of the agreement signed by the wife, instead considered her "economically disadvantaged and generally uninformed, uneducated and readily subjected to unfair advantage in [a] marital agreement."⁶⁷ With the advent of the state equal rights amendment, argued the husband, the courts in Pennsylvania formally "discarded [such] 'paternalistic presumptions' and with them the test upon which previous [marital] agreements had been judged."⁶⁸

In *Espenshade*, the couple was divorced and an alimony order obligated the husband to pay the wife a monthly amount.⁶⁹ After nearly two years of satisfactory payment, the husband asked the wife to sign an agreement reducing his alimony obligation.⁷⁰ The sole purpose for this "paper agreement" was to lessen the husband's appearance of debt in order to convince his bank to award him a mortgage.⁷¹ The couple orally agreed that despite the addendum, the amount of the alimony payments would remain the same.⁷² However, after the husband was successful in acquiring the mortgage, he decreased the alimony payments in accordance with the addendum, prompting his wife to then file a contempt action.⁷³ Over the husband's objections, the trial court permitted the wife to present evidence to establish the purpose for the addendum and the oral agreement between the parties to disregard it.⁷⁴ The trial court found that the husband was not entitled to the decrease and the husband filed an appeal.⁷⁵

The Superior Court panel rejected the husband's ERA argument and found that that the trial court did not consider the parties' "sexual, economic or educational positions" in reaching its result.⁷⁶ It further found that the husband's conduct, which it characterized as "deceitful" and a "betrayal," was

66. *Espenshade*, 729 A.2d at 1248.

67. *Id.*

68. *Id.* The husband relied on the rationale espoused in *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990), a case considering the validity of a pre nuptial agreement. *Espenshade*, 729 A.2d at 1248. In *Simeone*, the Pennsylvania Supreme Court held that prior decisions addressing the issue "rested upon a belief that women are not knowledgeable enough to understand the nature of contracts they enter." *Simeone*, 581 A.3d at 165. The state ERA required that "protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having" were simply "no longer viable." *Id.*

69. *Espenshade*, 729 A.2d at 1240.

70. *Id.*

71. *Id.* The husband promised his wife that the amount of alimony payments would continue as before and that he would destroy the addendum "as soon as he obtained financing for his home." *Id.*

72. *Id.*

73. *Id.* at 1249.

74. *Espenshade*, 729 A.2d at 1242-43.

75. *Id.*

76. *Id.* at 1248.

objectionable under the law, regardless of the parties' genders.⁷⁷

While the *Espenshade* case makes only a passing reference to the ERA, and does so by finding that the amendment and its interpretative law were not relevant, its holding establishes that the ERA will not operate to eradicate the laws of fraud and misrepresentation that protect both men and women in the Commonwealth.⁷⁸ Further, although the case law interpreting the ERA clearly directs that neither gender may be "coddled" in the context of contract law, it does not translate into the denial of fundamental rights under traditional contract theories.⁷⁹

The Pennsylvania ERA cases of the 1990s do not tackle significant issues; they merely refine the parameters of the ERA in the Commonwealth. In that sense, they accomplish even less than the case law of previous decades.⁸⁰ Although the ERA jurisprudence of the 1970s and 1980s failed to result in many momentous women's rights decisions, the amendment was a significant litigation vehicle in some areas of the law. For instance, in those decades the courts addressed various issues in an ERA framework, including pre- and ante-nuptial spousal agreements,⁸¹ support⁸² and insurance premium ratings.⁸³

Perhaps most significant is the fact that those early cases developed the standard to be applied in ERA cases⁸⁴ and the amendment's scope of applicability,⁸⁵ both of which affected every ERA case that followed. In that context, Pennsylvania has earned a reputation as an "absolutist state," that is, one that "condemn[s] virtually all classifications on the basis of sex . . . with exceptions allowed only when compelled by physical differences between males and females."⁸⁶ But despite this strong sounding language, no stunning issue in terms of the advancement of women's rights has reached the Pennsylvania courts in the last decade.⁸⁷ Instead, the most significant state ERA cases of the 1990s

77. *Id.* at 1248-49. The *Espenshade* court ruled that the husband's conduct was illegal whether the parties were "any combination of man or woman, tycoon or pauper, savant or imbecile." *Id.* at 1249.

78. The holding in *Espenshade* is based on traditional notions of contract law. *See id.* at 1240-49 (considering intent of parties, consideration, illegal purpose and parol evidence rule).

79. *Simeone* was not interpreted in the manner Mr. Espenshade requested; that is, not all prenuptial agreements are valid simply because they have been signed. *Simeone* itself held that full and fair disclosure must be made. *Simeone*, 581 A.2d at 167. Later case law has held that such disclosure includes notice of relinquishing any statutory rights. *See, e.g., Adams v. Adams*, 607 A.2d 1116, 1119 (Pa. Super. Ct. 1992), *appeal denied*, 619 A.2d 699 (Pa. 1993) (holding that proper notice includes notice of rights relinquished).

80. *See generally* Beck & Baker, *supra* note 4 (discussing advances made by state courts after passage of ERA).

81. Beck & Baker, *supra* note 4, at 776-86.

82. *Id.* at 787-93.

83. *Id.* at 793-97.

84. *Id.* at 745-55.

85. Beck & Baker, *supra* note 4, at 755-66.

86. FRIESEN, *supra* note 13, at § 3-2.

87. *See supra* note 29 and accompanying text for a summary of Pennsylvania ERA cases in the 1990s.

have come from jurisdictions other than Pennsylvania.⁸⁸

There are two "momentous" issues connected with the ERA: abortion funding and same sex marriage.⁸⁹ Pennsylvania's ERA case law on these topics is limited in the case of the former and non-existent in the case of the latter.⁹⁰ In fact, regarding the question of whether a federal ERA would necessarily legitimize gay and lesbian marriage or make mandatory abortion funding, Pennsylvania is cited as proof that it will do neither, since Pennsylvania does not recognize same sex marriage and has "one of the most restrictive abortion laws in the country."⁹¹ Despite Pennsylvania's relative inactivity in these areas, both issues have been at the forefront of 1990s ERA jurisprudence in other states.

III. STATE FUNDING FOR ABORTION

The Hyde Amendment is part of a federal statute providing for the appropriation of federal government funds over the course of a fiscal year.⁹² Among many other provisions, the Hyde Amendment includes the grant of federal funds for abortions in three strictly limited circumstances, that is, when an abortion is necessary to save the mother's life or in the case of rape or incest.⁹³ The United States Supreme Court has ruled that a state's federally subsidized medical assistance program, commonly known as Medicaid, must adhere to the Hyde Amendment restrictions in its disbursement of federal funds, but "is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable."⁹⁴ Thus, the primary basis for attacking state abortion funding laws in the context of a state ERA is to challenge state provisions that refuse to fund abortions performed pursuant to medical necessity.⁹⁵

In 1984, some thirteen years after the adoption of the ERA in Pennsylvania, several women brought an action in the Pennsylvania Commonwealth Court challenging the constitutionality of a soon to be enacted state abortion funding

88. See *infra* notes 96-134 and accompanying text for a discussion of the ERA and its impact on issues concerning abortion funding and same sex marriage.

89. Clearly, the issue of same sex marriage is not a women's rights issue alone; adoption of same sex marriage laws would benefit both men and women equally. In any event, because gender is inextricably tied to the issue, same sex marriage has been raised as a gender issue and so is challenged on the basis of constitutional provisions prohibiting gender discrimination. See *infra* notes 119-34 for a discussion of same sex marriage cases under state ERAs.

90. See *infra* notes 100-107 and accompanying text for a discussion on Pennsylvania ERA cases involving abortion funding. See *infra* notes 125-34 and accompanying text for a discussion of Pennsylvania ERA cases involving same sex marriage.

91. Baker, *supra* note 4, at 95.

92. Harris v. McRae, 448 U.S. 297, 302 (1980).

93. *Id.* at 303.

94. *Id.* at 311 n.16.

95. While the *Harris* court rejected a federal constitutional challenge to abortion funding, it rather explicitly framed the issue for subsequent state challenges by suggesting that states were "free" to fund medically necessary abortions. *Id.*

law.⁹⁶ The matter, *Fischer v. Department of Public Welfare*,⁹⁷ ultimately found its way to the state supreme court and the justices considered, among other things, whether the laws violated the ERA.⁹⁸ The court characterized the plaintiffs' argument as follows:

Finally, appellants contend that the statutory classification between pregnant women who choose to give birth, and pregnant women who choose to have an abortion, somehow offends the Equal Rights Amendment of the Pennsylvania Constitution, Article I § 28. Their argument is based upon the contention that all medically necessary services for men are reimbursable, while a medically necessary abortion, which by its nature can only affect women, is not reimbursable. They contend therefore that "the state has adopted a standard entirely different from that which governs eligibility for men."⁹⁹

Although the *Fischer* court appeared to recognize that the plaintiffs were challenging the different standards applied to men and women in the context of "medically necessary" procedures, it did not consider the matter in that light. Instead it held that the basis for distinction within the law was not gender, but abortion, a procedure that only women can have due to physical characteristics unique to their sex.¹⁰⁰ As a result, the court viewed the statute not as according varying benefits to men and women, but rather as according varying benefits to different classes of women.¹⁰¹ Because the law was based on a "unique facet" of women, *i.e.*, the fact that they give birth, the distinction was not based on sex.¹⁰²

The *Fischer* court's refusal to address the issue in the "medically necessary procedure" construct made clear its position on abortion funding and the ERA. In this instance, Pennsylvania's "first in time" ERA status did not make it "first in change." And the existence of the state ERA did not operate to grant women, in this case indigent women, payment for a medically necessary procedure.¹⁰³

Less than a year after *Fischer*, a Connecticut court accepted the very same argument rejected by the Pennsylvania Supreme Court.¹⁰⁴ In the 1990s, it

96. The case was brought by a group of plaintiffs with varying interests and included a taxpayer, several medical assistance recipients who desired abortions, a clergyman, organizations that provide abortions, and an organization that counsels rape victims. *Fischer v. Dept. of Pub. Welfare*, 502 A.2d 114, 116 n.2 (Pa. 1985).

97. 502 A.2d 114 (Pa. 1985).

98. *Fischer*, 502 A.2d at 124-26. The *Fischer* court also considered the law in light of state equal protection principles and the non-discrimination clause. *Id.* at 119-23.

99. *Id.* at 124 (citing Appellant's Brief).

100. *Id.* at 125.

101. *Id.*

102. *Id.* at 126.

103. The mere existence of a state ERA does not guarantee rights in any event. In what was likely a move to avoid the issue of abortion funding from reaching the courts, Rhode Island's ERA addressed the issue head on. R.I. CONST. art. I, § 2. Interestingly, its amendment was enacted over a decade after most other states and explicitly provides that its enactment shall not be construed to grant a right to abortion or the funding thereof. *Id.*

104. *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986).

continued to be successful under other state ERAs. In the 1998 case of *New Mexico Right to Choose/NARAL v. Johnson*,¹⁰⁵ the Supreme Court of New Mexico held that the state ERA required medically necessary abortions to be funded by the state like every other medically necessary procedure. In 2000, the Texas Court of Appeals reached the same conclusion in the case of *Low Income Women of Texas v. Bost*.¹⁰⁶

In each of these cases granting relief, the courts focused on the fact that while every medically necessary procedure requested by a man was covered, the same was not true for women.¹⁰⁷ Where a woman's continued health relied on a procedure terminating her pregnancy, state funding was denied.¹⁰⁸ Because such a decision "employ[ed] a gender-based classification that operate[d] to the disadvantage of women," it was subject to heightened scrutiny under the state ERA and so was required to be supported by a compelling justification.¹⁰⁹ Finding no compelling justification, either under the rubric of preserving the life of the unborn,¹¹⁰ maintaining health¹¹¹ or even as a cost-saving measure,¹¹² these courts held the state abortion funding restrictions violated the state ERA. Unlike Pennsylvania, other states that have examined the issue have faced it squarely and found violation of the ERA where funding for medically necessary abortions was denied.¹¹³

The limited case law on the issue of abortion funding and the ERA establishes Connecticut, New Mexico and Texas to be among the states which have interpreted their state ERAs in a broad manner.¹¹⁴ However, the path Pennsylvania has taken in defining its ERA demonstrates that the adoption of a state ERA does not necessarily prompt significant change.

105. 975 P.2d 841, 850-57 (N.M. 1998), *cert. denied*, Klecan v. New Mexico Right to Choose/NARAL, 526 U.S. 1020 (1999).

106. 38 S.W.3d 689, 697-03 (Tex. Ct. App. 2000). Review was granted in the Texas case on August 23, 2001. Just this summer Alaska joined the "medically necessary" rationale. *State v. Planned Parenthood of Alaska*, 28 P.3d 904, 908-13, 915 (Alaska 2001). The Alaska Supreme Court relied not on its state ERA, but on its state equal protection clause, thereby reaching the opposite conclusion of the United States Supreme Court in *Harris*. *Id.*

107. *See, e.g., Low Income Women of Tex.*, 38 S.W.3d at 697-98 (noting that discrepancy in healthcare between men and women was based on gender classification).

108. *Id.*

109. *New Mexico Right to Choose*, 975 P.2d at 855.

110. *Doe v. Maher*, 515 A.2d 134, 157 (Conn. Super. Ct. 1986).

111. *Id.*

112. *New Mexico Right to Choose*, 975 P.2d at 856.

113. Abortion funding in the context of medical assistance is not limited solely to state ERA jurisdictions. In Minnesota, a group of women, doctors and abortion providers were successful in striking down a statute that prohibited funding for therapeutic abortions. *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995). The case was based on the state's constitutional right to privacy. *Id.*

114. In this context, "broad" means that with the passage of an ERA, these states prompted significant change in abortion funding law that would have been impossible in the absence of an ERA.

IV. SAME-SEX MARRIAGE

A landmark decision from the Hawaii Supreme Court in 1993, *Baehr v. Lewin*,¹¹⁵ opened wide the national debate on same sex marriage when the court ruled that the state constitution precluded the state from denying same sex couples marriage licenses.¹¹⁶ The *Baehr* decision looked as though it would make Hawaii the first state to recognize the marital union of two persons of the same sex. Despite its significance, the ruling was short lived. In less than two years after the heterosexual only marriage law was invalidated, Hawaii voters passed another constitutional amendment granting to the legislature the power to reserve marriage to opposite-sex couples only.¹¹⁷ Alaska, a state that enacted its ERA in 1972, likewise passed a "heterosexual marriage only" amendment in 1998.¹¹⁸

Unlike in Hawaii, the 1990s did not bring a Pennsylvania court challenge seeking recognition of homosexual unions; rather, it brought passage of a law that reserved marriage for only "one man and one woman".¹¹⁹ Perhaps in anticipation of events in Hawaii, the law also provided that a same sex marriage validly entered into in another state is void within the Commonwealth.¹²⁰ Instead of being challenged on the basis of the ERA, the Pennsylvania state law prohibiting homosexual marriage has been relied on to deny rights other than or in addition to same sex marriage.

For instance, in *Constant A. v. Paul C.A.*,¹²¹ a lesbian mother sought expanded custody of her two children, but was denied relief by the trial court. A panel of the Pennsylvania Superior Court subsequently held that the trial court did not err in considering the mother's lesbian relationship and lifestyle in denying the request.¹²² Among other things, the majority relied on the fact that "homosexual marriages are not permitted and the relationship is not to be equated with heterosexual relations, notwithstanding the Equal Rights Amendment."¹²³

In addition to custody issues for biological parents such as those in *Constant A.*, the courts of this Commonwealth also have held same sex adoptions invalid,

115. 852 P.2d 44 (Haw. 1993).

116. *Baehr*, 852 P.2d at 68. The *Baehr* court did not rely on Hawaii's ERA, passed in 1972, to reach its decision. Instead it based its holding on the state's equal protection clause, which was adopted in 1968 and which operates essentially as an ERA because it precludes discrimination and the denial of civil rights based on sex. *Id.* at 69 (construing HAW. CONST. art. I, § 5.)

117. HAW. CONST. art. I, § 23.

118. ALASKA CONST. art. I, § 25.

119. 23 PA. CONN. STAT. ANN. § 1704 (West Supp. 2001). The statute provides, in part: "It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman." *Id.*

120. *Id.* "A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth." *Id.*

121. 496 A.2d 1 (Pa. Super. Ct. 1985).

122. *Constant A.*, 496 A.2d at 10.

123. *Id.* at 6.

even where the biological parent consents.¹²⁴ Among other things, the court relied on the fact that the parties could not marry.¹²⁵

In Hawaii, the issue of same sex marriage was confronted under the state constitution, approved via judicial determination and later outlawed by way of legislative action and voter ratification.¹²⁶ Ms. Schlafly uses Hawaii as an example of the dangers of a federal ERA, noting that gay marriage is one of the “mischievous results” a federal ERA would bring.¹²⁷ A spokesperson from NOW, meanwhile, reminds us that many states with ERAs, Pennsylvania among them, do not recognize same sex marriage.¹²⁸ Pennsylvania courts have not been called on to rule on the constitutionality of heterosexual only marriage under the ERA. But given their past history, it is unlikely that the courts will use the ERA as a vehicle to legitimize same sex marriage.¹²⁹

The issue of gay marriage has yet to be addressed on the national level. But the events that led to its initial approval and ultimate disapproval in Hawaii foretell the manner in which it could play out in the context of a federal ERA.¹³⁰

124. *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d 739 (Pa. Super. Ct. 2000) (*en banc*), *appeal granted*, 784 A.2d 119 (Pa. Aug. 8, 2001). The parties in this case were two lesbians who had been together as a couple for seventeen years. *In re Adoption of R.B.F.*, 762 A.2d at 740. Together they decided to have a family and one of them was artificially inseminated with donor sperm and gave birth to twin boys. *Id.* The biological mother's partner then sought permission to adopt the boys. *Id.* The court considered various provisions of the Adoption Act and held that the adoption was unlawful. *Id.* at 741-44.

125. *Id.* at 742. The court noted that under the law, a biological parent may consent to “the adoption of his child by his spouse.” *Id.* (construing 23 PA. CONN. STAT. ANN. § 2903 (West Supp. 2001)). However, established law prohibited persons of the same sex from being spouses; thus, there was no provision under the law to permit the adoption. *Id.* The majority concluded that the legislature, not the courts, should decide whether to expand the Adoption Act to include same sex partners. *Id.* Three judges dissented in *R.B.F.* They would have permitted the adoption to go forward. Judge Johnson, who authored one of the dissenting opinions, noted that the marriage laws were irrelevant in the case. *Id.* at 748-49 (Johnson, J., dissenting). Judge Todd, agreeing with Judge Johnson, pointed out that the case before the court was “unlike the typical domestic relations case involving acrimonious disputes in fractured families;” rather it involved “an unopposed adoption in a happy and intact family.” *Id.* at 751 (Todd, J., dissenting).

126. See *supra* notes 119-21 and accompanying text for a discussion of the legal history of same sex marriage in Hawaii.

127. Eagle Forum, Memo on the Equal Rights Amendment 2000, available at <http://www.eagleforum.org/era/ERA99.shtml> (last visited Jan. 11, 2002).

128. Baker, *supra* note 4, at 55.

129. The existence of a state ERA does not guarantee the right to same sex marriage, despite the rationale espoused by the Hawaii Supreme Court. In an early ERA case in Washington, the court of appeals held that the prohibition against same sex marriages did not offend the state ERA. *Singer v. Hara*, 522 P.2d 1187, 1194 (Wash. Ct. App. 1974). The *Singer* court found no impermissible sexual classification in its heterosexual only marriage law because “the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable form for procreation and the rearing of children.” *Id.* at 1195.

130. The absence of an ERA also does not preclude homosexuals from being afforded rights historically granted only to married persons. See *Baker v. State*, 744 A.2d 864, 869-99 (Vt. 1999) (holding that Vermont state constitutional common benefits clause required that same sex couples be afforded benefits and protections incident to marriage). Vermont now has a statutory scheme setting

Pennsylvania's role is unlikely to gain national attention.

CONCLUSION

Despite its status as a leader in the states' race to adopt an ERA, Pennsylvania has not become a leader in ERA law generally, nor has it issued bold rulings on two momentous issues often associated with the ERA movement.¹³¹ It appears that the state ERA still has not markedly changed the social fabric of the Commonwealth and, further, that the judicial decisions rendered under the ERA continue, at least in part, to have the pragmatic effect of improving the condition of men more than that of women.¹³²

However, the ERA provides both genders with tangible and intangible benefits. The primary tangible benefit is that with the amendment comes a stringent standard of review for gender discrimination claims.¹³³ The ERA imposes a standard of strict scrutiny or, even more rigorous, an absolutist standard.¹³⁴ While the application of these standards can produce a variety of results, the fact that an exacting standard is applied certainly benefits the gender-neutrality cause.¹³⁵

The intangible benefit of an ERA is perhaps most valuable. It is based on the fact that with an ERA we have formally recognized that as citizens, women and men are equal partners who share both the benefits and the burdens of society. This acknowledgment not only prompts the implementation of policies and approaches for the benefit of men and women,¹³⁶ but it becomes one of our core beliefs and with that defines us as a nation.

The issues raised here will undoubtedly continue to be debated, and decisions both judicial and legislative will continue to be made on the state level. Whether and to what extent the state law development will have an impact on the passage of a federal ERA remains to be seen.

out those rights. See 15 Vt. Stat. Ann. § 1204 (West Supp. 2001) (setting forth benefits, protections and responsibilities of parties to civil unions). In its nonexclusive list of benefits and protections, § 1204 includes rights under adoption laws. *Id.* § 1204(e)(4).

131. See *supra* notes 93-95 and accompanying text for a discussion of Pennsylvania's relative inactivity in the areas of abortion funding and same sex marriage.

132. Beck & Baker, *supra* note 4, at 745-55.

133. See FRIESEN, *supra* note 13, at § 3-2 (discussing standard of review for gender discrimination).

134. See *supra* note 90 and accompanying text for a discussion of Pennsylvania's "absolutist" standard under the state ERA.

135. See Beck & Baker, *supra* note 4, at 745-55 (discussing standard applied to ERA claims in Pennsylvania). See also FRIESEN, *supra* note 13, at § 3-2 (reviewing various standards applied in ERA jurisdictions).

136. See Beck & Baker, *supra* note 4, at 766-74 (acknowledging equality of men and women). The article outlines the legislative changes that took place in the wake of the ERA.