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FAMILY LAW AND THE PENNSYLVANIA EQUAL RIGHTS AMENDMENT

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I. INTRODUCTION

ON MAY 18, 1971, THE VOTERS OF PENNSYLVANIA adopted an equal rights amendment (ERA) to the Commonwealth’s constitution which states: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."¹ In 1978, the Assembly gave the ERA a legislative boost by enacting the Equalization Statute,² a law designed to eliminate any sexual discrimination apparent on the face of the Commonwealth’s existing statutes.³ This new law provides:

In recognition of the adoption of . . . [the ERA], 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.⁴

The ERA and the Equalization Statute, together with the judicial decisions interpreting them, have significantly affected the law of support,⁵ divorce,⁶ custody,⁷ and property rights,⁸ as well as that of many other family-related areas.⁹ This article will trace the development of case law and legislative policy which together have determined the impact of the ERA on family law.

II. SUPPORT

Following adoption of the ERA, change first came in the area of support. Traditionally, the courts have viewed the man in his role as husband and father as primarily responsible for the support of the


5. See notes 10-58 and accompanying text infra.
7. See notes 103-17 and accompanying text infra.
8. See notes 118-40 and accompanying text infra.
9. See notes 141-50 and accompanying text infra.
family, labeling this obligation "well nigh absolute." In the area of child support, for example, regardless of whether the mother had substantial assets or earnings of her own, the support obligation was placed squarely on the shoulders of the male parent. In the 1974 case of Conway v. Dana, however, the Pennsylvania Supreme Court applied the ERA to child support matters, holding that insofar as previous decisions suggested a presumption that the male parent, "solely on the basis of his sex without regard" for the actual circumstances of each party, was principally responsible for the financial support of minor children, they could no longer be followed. The court called such a presumption a vestige of the past and "incompatible with the present recognition of equality of the sexes." Finding support to be the equal responsibility of both parents, the court concluded that the obligation must be discharged in accordance with each party's capabilities.

While the Conway decision has had a significant impact on Pennsylvania's support law, its application of the ERA has neither imposed undue hardship on financially dependent women, nor caused calamitous deterioration of the family unit. Indeed, the courts have held that a parent may remain at home to nurture young children, and that this nonfinancial contribution will be considered in

12. See, e.g., Commonwealth ex rel. Yeats v. Yeats, 168 Pa. Super. Ct. 550, 553, 79 A.2d 793, 795 (1951) (fact that mother has independent income is a circumstance to be considered but does not bar compelling contribution from the father); Commonwealth ex rel. Firestone v. Firestone, 158 Pa. Super. Ct. 579, 581, 45 A.2d 923, 924 (1946) (it is not a defense to father's support obligation that custodial mother has independent means of support).
13. 456 Pa. 536, 318 A.2d 324 (1974). In Conway, appellant-father petitioned for a reduction of his child support order on the grounds that his yearly income had markedly decreased, while at the same time his former wife had obtained new employment. Id. at 537-38, 318 A.2d at 325.
14. Id. at 539, 318 A.2d at 326. The Conway court maintained that the state's primary concern in promoting the best interests and welfare of the child would not be fostered by preservation of the legal fiction that the father is necessarily the better provider. Id.
15. Id.
16. Id. at 540, 318 A.2d at 326.
17. See notes 22-37 and accompanying text infra.
18. See notes 19-21 and accompanying text infra. For a statement of legislative intent emphasizing the Commonwealth's commitment to the family as a basic unit in society, see DIVORCE CODE, Act No. 1980-26, § 102, 1980 Pa. Laws Serv. 50 [hereinafter cited as DIVORCE CODE].
allocating child support obligations. In deciding whether a parent will be required to contribute to the financial support of offspring and thus, practically speaking, to seek employment outside the home, the courts will balance several factors. While the court will consider and give significant weight to the parent’s wish to remain at home, the best interests of the child, and not the parent’s wishes, will control.

19. Commonwealth ex rel. Wasiolek v. Wasiolek, 251 Pa. Super. Ct. 108, 113, 380 A.2d 400, 403 (1977). In Wasiolek, an admittedly employable mother, who was seeking increased support for her three children from their father, appealed an order from the lower court requiring her to contribute financially to the support obligation. Id. at 110, 380 A.2d at 400.

20. Id. at 113-14, 380 A.2d at 403. The factors to be considered include: the age and maturity of the child; the availability and adequacy of those who might assist the custodial parent; and the adequacy of available financial resources if the custodial parent does remain at home. Id. at 114, 380 A.2d at 403.

The superior court has also held that “a wife, pursuing higher education which would give her access to better employment opportunities, need not contribute to child support until that education has been completed, even though she might have employable skills prior to completion.” Commonwealth ex rel. Giamber v. Giamber, 255 Pa. Super. Ct. 111, 114, 386 A.2d 160, 162 (1978). In the final analysis, however, the persuasive factor is what best serves the child’s interests. See id.; note 21 and accompanying text infra.

21. Commonwealth ex rel. Wasiolek v. Wasiolek, 251 Pa. Super. Ct. 114, 380 A.2d at 400. In an earlier case appealing a spousal support order entered against a husband during the couple’s separation period, the court considered the wife’s earning capacity in determining the fairness of the amount ordered where no children were involved. See White v. White, 226 Pa. Super. Ct. 459, 504, 313 A.2d 776, 780 (1973). The White court, however, expressed in dictum some reservation about applying a similar analysis of the wife’s earning potential in cases where young children are at home:

[There 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 the wish of the mother to give her children love and guidance. If the mother chooses to work, however, our courts have held that earnings may be taken into consideration in fixing the amount of a support order.]

Id. at 504 n.4, 313 A.2d at 780 n.4 (emphasis in original).

Wasiolek, while adhering to the expressed commitment to the best interests of the child, modified the White court’s dictum by holding that, although the parent’s assertion that the child’s interest is served by having a parent at home is “accorded significant weight,” the court is not strictly bound by such a contention. Commonwealth ex rel. Wasiolek v. Wasiolek, 251 Pa. Super. Ct. 108, 113-14, 380 A.2d 400, 403 (1977). Rather, Wasiolek held that a court should balance the several factors outlined in note 20 supra, always keeping in mind the best interests of the child. Id.

The Wasiolek court stated that allowing a nurturing parent to remain at home would not violate the ERA, as long as the decision was made on sexually neutral grounds. Id. at 112-13, 380 A.2d at 402-03. Emphasizing this point, the court explained: “It would surely be ironic if by its support order a court were to dictate that a parent desert a home where very young children were present when the very purpose of the order is to guarantee the welfare of those same children.” Id. at 113, 380 A.2d at 403 (footnote omitted).

The argument of the parent wishing to remain at home becomes less persuasive, however, as the child matures. Id. at 113 n.3, 380 A.2d at 403 n.3. See also Commonwealth ex rel. Kaplan v. Kaplan, 236 Pa. Super. Ct. 26, 30-31, 344 A.2d 578, 580-81 (1975). In Kaplan, a working mother, who was seeking increased support from her 12-year-old child’s father, had turned down higher paying jobs which would have required her to work farther away from home. Id. While granting some increase in support based on the father’s increase in salary, the
In equalizing child support responsibilities pursuant to the ERA, courts do not, however, impute to a woman who has chosen the traditional role of homemaker, the same earning capacity as her husband who may have more vocational skills and experience. Rather, the courts look realistically at all factors affecting her ability to contribute.

Pennsylvania's approach to spousal support parallels that in the area of child support, applying similar guidelines with some differences, however, in the underlying principles. For example, in White v. White, the superior court indicated that in spousal support cases, on the issue of the employability of the spouse seeking support, consideration must be given to the amount of time the wife has been out of work during the marriage. The court seemed to recognize that a spouse who has been out of the job market for a considerable period of time may find it more difficult to obtain employment than a spouse who terminated his or her employment shortly before support proceedings or immediately after a separation. Further, the court noted that employability means more than just the availability of work—i.e., it should take into account the relative skills of the spouse, the spouse's health and stamina, and the presence or absence of children in the home for whom the spouse as custodial parent might have responsibility. All of these factors should be considered and measured together with the duration of unemployment experienced by the spouse seeking support.

court rejected the mother's assertion of the need to be near her child and, in figuring her contribution, considered the higher salary she could be earning. Id.

23. Id.
25. 226 Pa. Super. Ct. 499, 313 A.2d 776 (1973). In White, a husband, who allegedly deserted his wife, successfully challenged a support order. Id. at 504-06, 313 A.2d at 780. The wife was voluntarily unemployed, and the couple had no dependent children. Id. at 500, 504, 313 A.2d at 778. The court found that an order requiring the husband to support his employable wife fully was confiscatory, and that the support law was not intended to so penalize a spouse or impose such confiscatory orders. Id. at 504-06, 313 A.2d at 780, citing Commonwealth ex rel. Haimowitz v. Haimowitz, 221 Pa. Super. Ct. 364, 367, 292 A.2d 502, 504 (1972).
26. 226 Pa. at 505 n.5, 313 A.2d at 780 n.5.
27. Id.
28. Id.
29. Id. at 505, 313 A.2d at 780. For a discussion of the court's consideration of the contribution of a parent staying home with a child, see note 20 and accompanying text supra.
In child support cases especially, a court must determine the mother's earnings or earning capacity. 31 If she has neither, the obligation of support may continue to rest with the father. 32 If, however, the mother has earnings or earning capacity, the ERA mandates that both parents contribute proportionally to the support of their children. 33 However, the ERA clearly does not require parents with unequal financial abilities to contribute on an equal basis. 34 Rather, the amount of contribution will be based on the parents' respective financial capacities. 35

Consider the situation where both the mother and father have been divorced and their only child, who resides with the mother, requires $5,000 per year for support. In determining the measure of support which each parent should contribute, the court must consider the relative earnings or earning capacities of the parents and their respective personal needs. 36 In this illustration, assume that the mother's net available income is $10,000 per year, and that the father's net available income is $15,000 per year. If each parent reasonably requires $10,000 per year for personal needs, the father would have the sole obligation of supporting his child, notwithstanding the ERA. It would be unreasonable to apportion the support obligation solely on the ratio of the mother's net earnings to the father's

32. In the traditional family structure, since the father generally assumes the role of "bread winner," he will normally be obliged to provide support; however, where the father has no such earning potential, he will be relieved of the support obligation. See Costello v. LeNoir, 462 Pa. 36, 41, 337 A.2d 866, 868 (1975) (father who was injured and on public assistance held financially unable to contribute to the support of his daughter).
35. See cases cited note 34 supra.
36. The reasonable personal need of the parents is one consideration which may place a ceiling on the amount of support which they can be expected to pay. While a parent is expected to make some personal sacrifices in supporting the child, the amount of support must not be so high as to be confiscatory or act as a penalty. Conway v. Dana, 456 Pa. 536, 538, 318 A.2d 324, 325 (1974); Shapera v. Levitt, 97 Pa. Super. Ct. 447, 451-52, 394 A.2d 1011, 1013 (1978).

net earnings without considering personal expenses, and the ERA does not dictate such a result.\textsuperscript{37}

The support provisions of Pennsylvania's new Divorce Code\textsuperscript{38} apply much the same approach as that set out in the case law discussed above. In essence, the new law codifies the factors courts had previously determined should be considered.\textsuperscript{39}

Adoption of the ERA has also caused judicial reexamination of statutorily created procedural rights in the area of support. For example, in Commonwealth ex rel. Stein v. Stein,\textsuperscript{40} a husband attacked the constitutionality of the Act of 1907\textsuperscript{41} which created an in rem right to seize and sell a husband's or father's property in order to satisfy a support judgment.\textsuperscript{42} The statute, by its terms, created procedural rights for only the wife and the child.\textsuperscript{43} Rather than nullify the entire law, the Pennsylvania Supreme Court, in Stein, read its provisions to allow reciprocal remedies for either spouse seeking to enforce support orders.\textsuperscript{44} The court found justification for this exten-

\textsuperscript{37} See Commonwealth ex rel. Berry v. Berry, 253 Pa. Super. Ct. 268, 272-73, 384 A.2d 1337, 1340 (1978). In Berry, the wife appealed the lower court's decision which had reduced the husband's support payments based on a consideration of the parties' relative expenses. Id. at 270-71, 384 A.2d at 1338. On the question of the comparative obligations of the parties, the court stated: It seems to be appellant's position that under the Equal Rights Amendment parents are to be liable for support based strictly upon a comparison of their respective incomes rather than their overall financial positions. Quite to the contrary, however, the amendment demands that a court, in considering the proper support order to impose upon the parents, must assess each party's overall capacity to discharge his or her obligation of child support.

\textsuperscript{38} See Divorce Code, supra note 18, §§ 501-507.

\textsuperscript{39} Id. The new Divorce Code sets forth criteria for determining alimony which include most of the considerations examined in the support cases applying the ERA. For further discussion of alimony under the new Code see notes 66, 76 & 135-40 and accompanying text infra.

\textsuperscript{40} For an analysis of the new Code's impact in general, see Gold-Bikin & Bounick, supra note 24.


\textsuperscript{42} 487 Pa. at ___, 406 A.2d at 1383. The Act of 1907 provided in pertinent part:

Whenever any man has heretofore separated, or hereafter shall separate, himself from his wife or children, without reasonable cause, or whose whereabouts are unknown, and, being of sufficient ability, has neglected or refused or shall neglect or refuse to provide suitable maintenance for his said wife or children, proceedings may be had against any property real or personal of said husband necessary for the suitable maintenance of the said wife or children; and the court may direct a seizure and sale, or mortgage, of sufficient of such estate as will provide the necessary funds for such maintenance; and service upon the defendant shall be made as in other actions.


\textsuperscript{43} 487 Pa. at ___, 406 A.2d at 1383.

\textsuperscript{44} Id. at ___, 406 A.2d at 1387. The court noted that in considering the Act's constitutionality, it was necessary to bear in mind the court's own authority "to make sensible and
sion in the Equalization Statute and in case law dealing with statutory exclusions against specified classes. The supreme court, however, refused to consider whether such judicial extension would be found constitutionally satisfactory if the discrimination were part of a criminal statute.

The superior court, on the other hand, has addressed the problem of arguably discriminatory criminal laws and the ERA, specifically in the area of criminal nonsupport legislation. An example of one such law which the superior court has considered is a Pennsylvania statute which provides for a quasi-criminal support proceeding which is available to children and wives against husbands and fathers. Despite the fact that its benefits are available only to wives and children, the statute withstood an ERA challenge brought by a husband prosecuted under it in Commonwealth ex rel. Lukens v. Lukens. The court justified its decision on the availability to husbands and fathers of reciprocal civil support statutes.

Practical adjustments in conforming current laws to the requirements of the constitutional mandate: , 45 id. at , 406 A.2d at 1386.
46. 487 Pa. at , 406 A.2d at 1386, citing 1 PA. CONS. STAT. ANN. § 2301 (Purdon Supp. 1979). Justice Nix, writing for the majority, noted that the Equalization Statute demonstrates that the legislature does not favor nullification, but rather, prefers equalization of laws found repugnant to the ERA. For the pertinent language of the Equalization Statute, see text accompanying note 4 supra.
47. 487 Pa. at , 406 A.2d at 1386.
48. See 18 PA. CONS. STAT. § 4321 (1978) (willful separation or nonsupport is misdemeanor of the third degree); id. § 4322 (support may be obtained by wife or children of man who abandons family, with criminal enforcement mechanisms available after summary proceeding); note 49 infra.
49. 18 PA. CONS. STAT. § 4322 (1978). The statute provides, inter alia, that a wife or child, deserted by a husband or father, may commence a quasi-criminal action through the district attorney's office, have the husband or father arrested, and have him brought before the court for a hearing. Id. The court may then issue a support order and imprison the husband or father until he complies with the order. Id. The court may also issue a writ of execution against the defendant's property. Id. The procedure is intended to provide a mechanism for the indigent wife or child to petition for support without having to retain private counsel. See Gold-Bikin, Support, in FAMILY LAW PRACTICE 126 (1979) (Pennsylvania Bar Institute Basic Legal Practice Course).
51. 224 Pa. Super. Ct. at 229, 303 A.2d at 523. The court in Lukens referred to the Act of June 24, 1937, 62 PA. STAT. ANN. § 1973 (repealed in part, 1976 Pa. Laws 953), which created a civil remedy allowing the courts to order a husband, wife, child, father or mother of an indigent person to provide support. 224 Pa. Super. Ct. at 229, 303 A.2d at 523. The court considered this statute as the counterpart to the criminal statute in question and concluded: "Since such a reciprocal arrangement exists under our support statutes, we hold that, while there may not be mathematically precise equality, these statutes create a substantial right to support for both sexes. Therefore, they do not deny rights based on the impermissible classification of the sex of the individual." Id. (emphasis in original).
Whether such a decision is consistent with the spirit of the ERA may certainly be questioned. Indeed, one member of the superior court, Judge Spaeth, has suggested that Conway and certain United States Supreme Court decisions have "depriv[ed] Lukens of much of its force."52

Another criminal statute provides a penal sanction for non-support.53 Under its provisions, a person is guilty of a misdemeanor of the third degree if he deserts and does not support his wife and or children, leaving them destitute and wholly dependent.54 This law is seldom used in family support cases and, thus, there has been little judicial consideration of its constitutionality;55 however, based upon Judge Spaeth's observations, there would seem to be some question as to whether it could withstand an ERA challenge.56

It appears, then, that unlike what has occurred with respect to the imposition of the support obligation in civil cases, in the area of criminal and quasi-criminal nonsupport statutes, the effect of the ERA is unclear. Cases such as Stein and Lukens offer little guidance as to when courts will strike down a statute completely under the ERA, or when they will apply the Equalization Statute and extend a law's provisions.57 Because of this uncertainty, the final determination of the validity of such statutes is still very much open. However, such a determination may be of only academic value, since the use of criminal proceedings in family law matters has fallen into general disfavor.58

54. Id. § 4321(a). The statute provides that:

[a] person is guilty of a misdemeanor of the third degree if he, being a husband or father, separates himself from his wife or from his children or from wife and children, without reasonable cause or willfully neglects to maintain his wife or children, such wife or children being destitute, or being dependent wholly or in part on their earnings for adequate support.

55. See Hess v. Hess, 71 D. & C.2d 299 (C.P. Allegheny 1974). In Hess, the court relied on Lukens to uphold the constitutionality of § 4321, referring to the Lukens court's language approving the whole Act of 1939. Id. at 301.
56. See note 52 and accompanying text supra.
57. See notes 40-52 and accompanying text supra.
III. Divorce

Comparison of Pennsylvania’s new Divorce Code\textsuperscript{59} with the statutory structure it replaced\textsuperscript{60} dramatically demonstrates the impact which the ERA has had on this area of family law. The new Code has rendered moot many issues addressed in cases applying the ERA to the law as it previously stood.\textsuperscript{61} Nevertheless, that case law offers sound guidance in interpreting and applying the new Code, since many of its provisions may be understood as legislative responses to those decisions. In addition, the ERA analysis of the prior case law will still be instructive in deciding cases which arose prior to the new Code’s July 1, 1980 effective date.\textsuperscript{62}

Under the old divorce law, adoption of the ERA had its greatest impact on three basic doctrines of Pennsylvania divorce law: alimony pendente lite,\textsuperscript{63} divorce from bed and board\textsuperscript{64} and selection of the marital home.\textsuperscript{65}

A. Alimony Pendente Lite

While the 1980 Divorce Code makes alimony pendente lite available to both spouses,\textsuperscript{66} the old law provided that this benefit was available exclusively to the wife.\textsuperscript{67} In two post-ERA decisions, Weigand v. Weigand\textsuperscript{68} and Henderson v. Henderson,\textsuperscript{69} the superior court considered the impact of the ERA on the old “wives only” law.

\textsuperscript{59} Divorce Code, \textit{supra} note 18, §§ 101-802.


\textsuperscript{61} See notes 66-102 and accompanying text infra.

\textsuperscript{62} Divorce Code, \textit{supra} note 18, § 802.

\textsuperscript{63} See notes 66-76 and accompanying text infra.

\textsuperscript{64} See notes 77-89 and accompanying text infra.

\textsuperscript{65} See notes 91-98 and accompanying text infra.

\textsuperscript{66} See Divorce Code, \textit{supra} note 18, § 502.


\textsuperscript{68} 226 Pa. Super. Ct. 278, 310 A.2d 426 (1973), \textit{reversed}, 461 Pa. 482, 337 A.2d 256 (1975). In \textit{Weigand}, a husband, ordered by the court to pay counsel fees for the divorce action initiated by his wife, appealed the order on the grounds that the fees were excessive and that the court did not allow him to question his ex-wife on disbursement of substantial sums previously paid to her. 226 Pa. Super. Ct. 280, 310 A.2d at 427. The superior court never reached these questions but, rather, raised the question of the ERA \textit{sua sponte}, finding that the law which entitled women only to receive alimony pendente lite, counsel fees, and costs in a divorce action was unconstitutional. \textit{Id.} at 280-81, 310 A.2d at 427.

In Weigand, the superior court recognized that the statute granting alimony pendente lite only to the wife violated the ERA and, thus, the court declared the law unconstitutional. The Pennsylvania Supreme Court later reversed on procedural grounds, but in reversing, the court did not question the superior court’s constitutional analysis. In Henderson, the supreme court expressly acknowledged the existence of the constitutional conflict between the “wives only” statute and the ERA to which the Weigand court had reacted. By then, however, the legislature had remedied the discrimination with the passage of a law that mooted the appeal before the Henderson court. Nevertheless, the supreme court made clear that it viewed the legislative action as a response to a patently unconstitutional statute.

It appears certain, then, that the legislature failed to amend the statute to eliminate the bias against males, the law would not have survived a constitutional challenge based on Pennsylvania’s ERA or, for that matter, on the fourteenth amendment to the United States Constitution. Pennsylvania’s new Divorce Code reflects this precedent, incorporating the old act’s amended provision granting alimony pendente lite, counsel fees, and expenses to either spouse.


71. See 461 Pa. 482, 484, 337 A.2d 256, 257-58 (1975). The court concluded, however, that the issue of constitutionality was not properly before the superior court, for the question had never been raised or briefed by the parties. Id.

72. 458 Pa. 97, 327 A.2d 60 (1974). In Henderson, the supreme court considered the appeal of a husband who had been ordered by the trial court to pay a security deposit for payment of costs in a pending divorce action. Id. at 99, 327 A.2d at 61. The superior court had split evenly on the matter, thus leaving the common pleas court’s decision intact. Id. In a lengthy dissenting opinion to the superior court’s per curiam affirmance, Judge Spaulding expressed his conviction that the law which provided for payment of the enumerated monies only to the wife was violative of the ERA and should be declared unconstitutional. 224 Pa. Super. Ct. at 182-90, 303 A.2d at 544-48 (Spaulding, J., dissenting).

73. See Pub. L. No. 139, § 1, 1974 Pa. Laws 403 (current version at DIVORCE CODE, supra note 18, § 502). There is some question as to whether this legislative action was actually necessary in light of the subsequent passage of the Equalization Statute, which might have allowed for judicial extension of the law’s benefits to the excluded class. See 1 Pa. Cons. Stat. Ann. § 2301 (Purdon Supp. 1979); notes 2-4 & 40-47 and accompanying text supra.

74. The supreme court, after discussing the purpose and effect of the ERA, noted that subsequent to the filing of the appeal under consideration, the legislature had amended the statute in question to allow for alimony pendente lite and expenses to either spouse. 458 Pa. at 101, 327 A.2d at 62, citing Pub. L. No. 139, §§ 1-2, 1974 Pa. Laws 403 (current version at DIVORCE CODE, supra note 18, § 502). Responding to that legislative action the court stated: “The section is obviously adopted to meet the constitutional conflict that existed between the former section and the new Equal Rights Amendment.” 458 Pa. at 102, 327 A.2d at 62. The trial court’s order that the husband pay a security deposit was reversed and the matter was remanded for reconsideration in light of the amended section. Id.

75. See U.S. CONST. amend. XIV; Orr v. Orr, 440 U.S. 268, 283 (1979). In Orr, an Alabama statute granting alimony to wives but not to husbands was found to violate the equal protection clause of the 14th amendment to the United States Constitution. Id.

76. See DIVORCE CODE, supra note 18, § 502; note 67 supra.
B. Divorce From Bed and Board

Divorce a mensa et thoro (AMET), or as it is more commonly known, divorce from bed and board, was a right created by statute which allowed a wife, and solely a wife, to bring an action to permit her to live apart from her husband without penalty under certain specified circumstances.77 Alimony was available to a wife who had been granted a divorce AMET.78 In Weigand, the superior court considered this apparently discriminatory statute as well, striking it down as unconstitutional along with the alimony pendente lite statute.79 The court reasoned that because divorce AMET afforded an action exclusively to women, it must, therefore, have abridged the rights of men in Pennsylvania solely on the basis of their sex.80 Thus, the court concluded that the statutory provision should “fall in the light of the [ERA].”81 Like the superior court’s holding on alimony pendente lite in Weigand, however, this finding, too, was reversed by the supreme court on the same procedural grounds.82 Similarly, as with the issue of alimony pendente lite, the supreme court, in reversing, never questioned the superior court’s constitutional analysis of the divorce AMET provision.83 Therefore, the superior court’s reasoning was thought to be sound, at least until passage of the Equalization Statute84 and the supreme court’s decision in George v. George.85

77. PA. STAT. ANN. tit. 23, § 11 (Purdon 1955) (repealed 1980). Unlike divorce a vinculo matrimonii (divorce from the bonds of matrimony), divorce from bed and board does not sever the marital union; rather the parties remain husband and wife. However, divorce AMET grants the parties a legal separation in situations where conditions make it improper or impossible for them to live together (e.g., cruelty and adultery are grounds for divorce AMET). See id. The statute in Pennsylvania provided as follows:

Upon complaint, and due proof thereof, it shall be lawful for a wife to obtain a divorce from bed and board, whenever it shall be judged, in the manner hereinafter provided in cases of divorce, that her husband has:
(a) Maliciously abandoned his family; or
(b) Maliciously turned her out of doors; or
(c) By cruel and barbarous treatment endangered her life; or
(d) Offered such indignities to her person as to render her condition intolerable and life burdensome; or
(e) Committed adultery.

80. Id. at 281-82, 310 A.2d at 428.
81. Id.
82. 461 Pa. at 485, 337 A.2d at 257. See notes 70-71 and accompanying text supra.
83. See 461 Pa. at 494, 337 A.2d at 257-58; A. Momjian & N. Perlberger, supra note 77, § 3.5.2.
In *George*, instead of finding the divorce AMET statute unconstitutional under the ERA, the supreme court applied the Equalization Statute to the law and extended its provisions to cover either spouse.\(^86\) These two developments (the passage of the Equalization Statute and the supreme court’s decision in *George*) gave new life, albeit temporary, to this formerly important tool of matrimonial lawyers.\(^87\) The new Code has repealed the provisions for divorce from bed and board,\(^88\) thereby excising this ancient action which traced its roots to ecclesiastical law.\(^89\) This absolute repeal makes sense in view of the more liberal provisions for absolute divorce afforded by the new Code.\(^90\)

**C. Choice of the Marital Home**

One antiquated aspect of Pennsylvania family law has survived despite its clear discriminatory nature—*i.e.*, the “choice of the marital home” doctrine.\(^91\) This doctrine provides that “the choice of the marital home is the husband’s if made in good faith.”\(^92\) Therefore, if a wife refuses to move with her husband, she has failed to comply with a duty and could be charged with desertion in a divorce action.\(^93\)

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86. *Id.* at —. 409 A.2d at 3. The *George* court maintained that passage of the Equalization Statute precluded a finding of unconstitutionality and mandated extension. *Id.*

87. A decree of divorce from bed and board allowed for payment of spousal support or permanent alimony. See note 78 and accompanying text *supra*. While the provision would not permit remarriage, issuance of such a decree did not prevent the spouse from seeking an absolute divorce at a later time. Further, in instituting the suit for absolute divorce, the spouse could allege the same marital offense which was the basis of the prior divorce from bed and board. A. *FREEDMAN* & M. *FREEDMAN*, *supra* note 67, § 363. Thus, the divorce AMET provided a flexible and useful tool with which a practitioner could negotiate.


89. See A. *MOMJIAN* & N. *PERLBERGER*, *supra* note 77, § 3.5.1; note 77 *supra*.


91. See A. *MOMJIAN* & N. *PERLBERGER*, *supra* note 77, § 3.2.7.


While the new Divorce Code has liberalized divorce in Pennsylvania by allowing no-fault actions, some fault grounds have been retained.\textsuperscript{94} Therefore, the marital home doctrine could be important in a case where a wife refuses to move with her husband and will not consent to a bilateral, "irretrievable breakdown" divorce.\textsuperscript{95} In such a situation, the husband can pursue a divorce after one year, instead of three as one of the no-fault provisions would require.\textsuperscript{96}

It can be argued that the doctrine violates the ERA, and that it would not be likely to withstand a properly raised challenge. In fact, in \textit{Smith v. Smith},\textsuperscript{97} the Pennsylvania Superior Court indicated its belief that the doctrine would be striken if properly presented before the court.\textsuperscript{98}

\section*{D. Summary}

This brief analysis of the interplay of the ERA and the law of divorce in Pennsylvania prior to passage of the new Code demonstrates that the Commonwealth's courts have been sensitive to sex discrimination in this area and have taken affirmative steps to eradicate it.\textsuperscript{99} These positive judicial developments were, however, surpassed by long-pending but, nevertheless, dramatic legislative action in the form of passage of the 1980 Divorce Code.\textsuperscript{100} The new Code mandates far-reaching and decisive steps in eliminating sexism.\textsuperscript{101} However, conspicuous discrimination remains in areas unchanged by the new law and, as yet, untouched by modern judicial decisions—areas such as the choice of the marital home doctrine.\textsuperscript{102} The practitioner should be aware of the potential effectiveness of the ERA as a tool to excise these final traces of stigmatizing sexual stereotypes which remain embedded in Pennsylvania laws.

\textsuperscript{94} \textit{Divorce Code}, supra note 18, § 201(a).
\textsuperscript{95} Id. § 201(c)-(d).
\textsuperscript{96} Compare id. § 201(a)(1) with id. § 201(d).
\textsuperscript{98} See id. at 288, 340 A.2d at 553. In \textit{Smith}, the husband was granted a divorce grounded on desertion when his wife refused to move with him from Harrisburg to his new pastorate in Scranton. \textit{Id.} Although not raised in her brief, at oral argument, the wife raised constitutional questions of due process and equal protection to challenge the "choice of the marital home" doctrine. \textit{Id.} Responding to the wife's constitutional arguments, the court called them "obviously thought provoking," but found that because she had "totally failed to make any such arguments" before the oral argument stage, it could not consider them. \textit{Id.}
\textsuperscript{99} See notes 66-87 and accompanying text supra.
\textsuperscript{100} See \textit{Divorce Code}, supra note 18, §§ 101-802. For a complete analysis of new Code's provisions and impact, see Gold-Bikin & Rounick, supra note 24.
\textsuperscript{101} See generally Gold-Bikin & Rounick, supra note 24.
\textsuperscript{102} See notes 91-98 and accompanying text supra.
IV. CUSTODY

Because of the Court's concern with the special policy considerations in the area, application of the ERA to child custody law has been limited and has produced some confusing results. The "tender years doctrine" represents one such area of controversy.103 For almost two centuries,104 Pennsylvania courts have viewed the natural mother as the parent better suited to have charge of a child of tender years.105 The tender years doctrine, although discriminatory on its face, had been a most persistent presumption in family law.106 In 1972, however, the superior court diluted the force of the presumption somewhat, stating that it was "merely the vehicle through which a decision respecting the infant's custodial well-being may be reached where factual considerations do not dictate a different result."107

In Commonwealth ex rel. Spriggs v. Carson,108 a 1977 case, the Pennsylvania Supreme Court criticized the application of the tender years doctrine even as a procedural vehicle in custody cases,109 questioning the legitimacy of a presumption predicated upon traditional or stereotypical roles of men and women in a marital union.110 The

103. See Commonwealth v. Addicks, 5 Binn. 520 (Pa. 1813). The tender years doctrine created a prima facie rule that the mother was entitled to custody of her natural children of tender years absent compelling reasons to the contrary. A. MOMJAH & N. PERLBERGER, supra note 77, § 5.1.1(b)(1).

104. Commonwealth v. Addicks, 5 Binn. 520, 521-22 (Pa. 1813). The court first enunciated the tender years doctrine in Addicks, holding that a mother, who had been divorced by the father on grounds of adultery and who had married her paramour in violation of a statute prohibiting such a marriage during the life of her former husband, should nevertheless retain custody of her two young children. Id.

105. Id. The Addicks court reasoned: "It is to [the children], that our anxiety is principally directed; and it appears to us, that considering their tender age, they stand in need of that kind of assistance, which can be afforded by none so well as a mother." Id. at 521. Two years later, when the children's ages were thirteen and nine years respectively, the court granted custody to the father, noting that the children no longer were of the tender ages which require a mother's attention. Commonwealth v. Addicks, 2 Serg. & Rawl. 174, 175-76 (Pa. 1815). See also Commonwealth ex rel. Minnick v. Wilson, 159 Pa. Super. Ct. 230, 232, 48 A.2d 27, 28 (1946); Commonwealth ex rel. Stark v. Stark, 94 Pa. Super. Ct. 86, 88 (1928); Commonwealth ex rel. Keller v. Keller, 90 Pa. Super. Ct. 357, 359 (1927). See generally Annot., 70 A.L.R.3d 262 (1976).


109. Id. at 299-300, 368 A.2d at 639-40.

110. Id. at 299, 368 A.2d at 639.
court cautioned against uncritical application of the tender years doctrine and found it offensive to the Commonwealth's constitutionally mandated policy of equality of the sexes.\textsuperscript{111} The opinion in \textit{Spriggs} on this point, however, received the approval of only three justices,\textsuperscript{112} thus reducing its precedential value.

In 1978, the superior court again discussed the tender years doctrine in \textit{Sykora v. Sykora},\textsuperscript{113} indicating that it gave the rule greater weight than the supreme court had given it in \textit{Spriggs}.\textsuperscript{114} Nevertheless, the \textit{Sykora} court acknowledged that the \textit{Spriggs} decision had "tempered" the doctrine to some degree.\textsuperscript{115}

While not in direct conflict, \textit{Spriggs}\textsuperscript{116} and \textit{Sykora}\textsuperscript{117} indicate some lack of harmony in applying the spirit, if not the letter, of the ERA to the area of child custody. In view of this dissonance, it seems clear that the Pennsylvania Supreme Court will have to deal more definitively with the tender years doctrine in the near future.

\section*{V. Property Rights}

In the area of property rights, the ERA has helped to eliminate two outdated common law presumptions—one dealing with household goods purchased during the marriage,\textsuperscript{118} and the other with gifts between spouses.

In \textit{DiFlorio v. DiFlorio},\textsuperscript{120} the supreme court considered the issue of ownership after divorce of household goods acquired immediately prior to or during marriage which were used and possessed by both spouses during the union.\textsuperscript{121} The common law raised a pre-

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\item\textsuperscript{111} Id. at 300, 368 A.2d at 639-40.
\item\textsuperscript{112} Id. at 290, 300, 368 A.2d at 636, 640. Justice Nix wrote the opinion of the court in which Justices Roberts and O'Brien joined. Chief Justice Jones, along with Justices Eagan and Pomeroy, concurred in the result, with Justice Mandarino not participating in the consideration or decision. Id. Although the court based its holding on the superior court's abuse of discretion with respect to findings of fact, it also expressed dissatisfaction with the lower court's application of the tender years doctrine. Id. at 298-300, 368 A.2d at 639.
\item\textsuperscript{114} Id. at 403, 393 A.2d at 888-89. See notes 108-13 and accompanying text supra.
\item\textsuperscript{115} 259 Pa. Super. Ct. at 403, 393 A.2d at 888-89. The \textit{Sykora} court stated that "generally children should be raised together, and children of tender years should be with the mother. However, both rules are not absolute, and must yield to the paramount principle that the best interest of each individual child must be the determining factor." Id. (emphasis added). The court reconciled the \textit{Spriggs} decision by interpreting it as merely a limit on the strength of the presumption of the tender years doctrine, leaving intact the use of tender years as one consideration in determining what serves the best interests of the child. Id. at 403, 393 A.2d at 889.
\item\textsuperscript{116} 470 Pa. 290, 368 A.2d 635 (1977).
\item\textsuperscript{117} 259 Pa. Super. Ct. 400, 393 A.2d 888 (1978).
\item\textsuperscript{118} See notes 120-23 and accompanying text infra.
\item\textsuperscript{119} See notes 124-29 and accompanying text infra.
\item\textsuperscript{120} 459 Pa. 641, 331 A.2d 174 (1975).
\item\textsuperscript{121} Id. at 645, 331 A.2d at 176.
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sumption that household furnishings, in the possession of a husband and wife living together, were owned by the husband.\textsuperscript{122} Finding such a presumption to be in derogation of the ERA, the \textit{DiFlorido} court stated that since the law could not impose different burdens nor award different benefits purely on the basis of sex, the court must "unhesitatingly disregard the one-sided presumption" which had been imposed under Pennsylvania common law.\textsuperscript{123}

Similarly, in \textit{Butler v. Butler},\textsuperscript{124} the supreme court held that passage of the ERA voided the one-sided presumptions that had existed at common law regarding gifts.\textsuperscript{125} Under the common law as applied in Pennsylvania, when a husband purchased real or personal property with his own money and put such property in his wife's name or into an estate by the entireties, his actions created a presumption of a gift to the wife.\textsuperscript{126} The dichotomy arose because the wife's similar actions in paying for real or personal property and putting it in her husband's name or into an entireties estate gave rise to a rebuttable presumption that a trust was created in her favor, and that there was no gift to the husband.\textsuperscript{127} Responding to the obvious sexual bias inherent in this doctrine, the \textit{Butler} court created a uniform presumption that anytime either husband or wife contributes to the purchase of an item held by the entireties, such contribution is presumed to be a gift to the other spouse.\textsuperscript{128} Such a presumption is

\textsuperscript{122} \textit{Id.} at 648, 331 A.2d at 178. \textit{See also In re Estate of Mulligan, 426 Pa. 374, 376, 232 A.2d 758, 759 (1967); In re King Estate, 387 Pa. 119, 127, 126 A.2d 463, 467 (1956); Dura Seal Prods. Co. v. Carver, 186 Pa. Super. Ct. 425, 426, 140 A.2d 844, 845 (1958); \textit{In re Schwartz' Estate, 166 Pa. Super. Ct. 459, 462, 71 A.2d 831, 833 (1950); A. MOMJAN & N. PERLMAN, supra note 77, § 8.1.4(b). Such a presumption could be overcome by a showing that the wife paid for the household goods, inherited them, acquired them by gift, or that they were paid for jointly by husband and wife. \textit{Id., citing In re King Estate, 387 Pa. 119, 126 A.2d 463 (1956); Dura Seal Prods. Co. v. Carver, 186 Pa. Super. Ct. 425, 140 A.2d 844 (1958).}

\textsuperscript{123} 459 Pa. at 650-51, 331 A.2d at 179 (citations omitted). The \textit{DiFlorido} court also noted that the presumption originated in the marriage entity concept which considered the husband and wife to be one entity. \textit{Id.} at 648-49, 331 A.2d at 178-79. Since this concept was abrogated by the Married Woman's Property Act, \textit{Pa. Stat. Ann. tit. 48, § 32.1 (Purdon 1978)}, the court found that a presumption favoring the husband had no current justification. 459 Pa. at 648-49, 331 A.2d at 178-79. For an earlier decision which reached the same conclusion, \textit{see Fine v. Fine, 366 Pa. 227, 228-29, 77 A.2d 436, 436-37 (1951).}


\textsuperscript{125} \textit{Id.} at 527-28, 347 A.2d at 480.


\textsuperscript{127} 464 Pa. at 527-28, 347 A.2d at 481.
rebuttable only by clear and convincing evidence that the gift was
induced by fraud or duress.\textsuperscript{129}

Pennsylvania's 1980 Divorce Code has incorporated the modern
approach to property rights set forth in \textit{DiFlorido} and \textit{Butler} into its
provisions for equitable distribution.\textsuperscript{130} Under the Code, marital
property\textsuperscript{131} is to be equitably divided between spouses, taking into
account virtually any relevant factors, including a number specifically
set out in the statute.\textsuperscript{132} Notably, the new Code materially recognizes
the contribution made by a homemaker-spouse when it provides
for division of the marital property.\textsuperscript{133} It also makes allowance for a
certain degree of economic dependence by the homemaker-spouse
upon dissolution of the marriage.\textsuperscript{134}

In providing for alimony after absolute divorce,\textsuperscript{135} the new Code
again reflects the philosophy of the ERA by allowing for the financial
support of either spouse who is unable to maintain himself or herself
following dissolution of the marriage.\textsuperscript{136} Essentially rehabilitative in
nature,\textsuperscript{137} the alimony provisions of the Code recognize such factors
duration of marriage,\textsuperscript{138} contribution by one spouse to the education or increased earning power of the other,\textsuperscript{139} and contribution of the
homemaker-spouse\textsuperscript{140} in determining the award.

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\item \textsuperscript{129} Id. In \textit{Butler}, the wife requested that a constructive trust be imposed upon funds which
she, at her husband's suggestion, had contributed to a joint account. Id. at 525, 347 A.2d at
479. Funds from this account were used to buy real property. Id. The court refused to impose
the trust, finding that the wife, who had handled the family finances, must have been knowl
edgeable about the transactions and could not have been the victim of fraud or duress as is
necessary for the imposition of a constructive trust. Id. at 529-30, 347 A.2d at 481. See also
\item \textsuperscript{130} \textit{Divorce Code, supra} note 18, §§ 401(d)-(j), 402.
\item \textsuperscript{131} The Code defines marital property as "all property acquired by either party during
marriage," with seven specific areas of exception. Id. § 401(e).
\item \textsuperscript{132} Id. § 401(d). The Statute specifies such factors as the length of the marriage; age,
health, socio-economic station, amount and source of income, vocational skills, employability,
estate, liabilities, and needs of the parties; contribution by one party to the education, training,
or increased earning power of the other; sources of income of each party; contribution of each
party to the acquisition or dissipation of marital property, including contribution as a
homemaker, the standard of living established during marriage; the economic circumstances of
each party at the time the property division becomes effective. Id. The list is illustrative, not
exhaustive, and additional factors will surely be added as family law litigators apply creative
imagination to the implementation of the new Code. Id.
\item \textsuperscript{133} Id. § 401(d)(7).
\item \textsuperscript{134} Id. § 401(d)(3), (10).
\item \textsuperscript{135} Id. §§ 501, 503, 504.
\item \textsuperscript{136} Id. § 501.
\item \textsuperscript{137} See id. § 501(e). The Code provides for a limitation to be placed on the duration of
alimony payments. Id. By its provisions, the statute appears designed to allow the spouse to
develop employability or to survive a period when employment is impossible, such as during
the nurturing of young children. See id. § 501(b), (c).
\item \textsuperscript{138} Id. § 501(b)(5).
\item \textsuperscript{139} Id. § 501(b)(6).
\item \textsuperscript{140} Id. § 501(b)(12).
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It appears, then, that the combined effect of the ERA and the new Divorce Code has brought marital property rights in Pennsylvania into harmony with the modern understanding of sex roles in society.

VI. OTHER AREAS

Passage of the ERA has significantly affected related areas of law as well. In tort actions, for example, the Pennsylvania Supreme Court has held that the ERA requires wives, as well as husbands, to have the right to recover for loss of consortium,\textsuperscript{141} a remedy traditionally reserved for the male.\textsuperscript{142} In Hopkins v. Blanco,\textsuperscript{143} the court explained: “Today a husband and wife are equal partners in a marital relationship, and as such, should be treated equally under the law.”\textsuperscript{144}

In another case, the Pennsylvania Superior Court judicially mandated equality in the application of the old criminal “neglect to support a bastard” statute.\textsuperscript{145} The court found that, although it was cast in the male gender and referred to the father, the old law encompassed both mother and father and, so applied, was not repugnant to the ERA.\textsuperscript{146} It should be noted that the same result would have been achieved by application of the Equalization Statute.\textsuperscript{147}

Finally, another statute which seems ripe for an ERA challenge is the act relating to debts incurred for “necessaries.”\textsuperscript{148} The law is definitely discriminatory on its face, allowing a creditor to obtain execution against a husband alone to satisfy a judgment obtained on a debt contracted in purchasing “necessaries for the maintenance of the family of any married woman.”\textsuperscript{149} Again, however, application of the Equalization Statute\textsuperscript{150} would save the provision.

\textsuperscript{141} Hopkins v. Blanco, 457 Pa. 90, 93, 320 A.2d 139, 141 (1974). In Hopkins, a wife brought a separate action for loss of consortium against her husband’s doctors whose alleged malpractice had resulted in his incapacity. Id. at 91, 320 A.2d at 140.
\textsuperscript{143} 457 Pa. 90, 320 A.2d 139 (1974).
\textsuperscript{144} Id. at 93, 320 A.2d at 141.
\textsuperscript{146} Commonwealth v. Baggs, 258 Pa. Super. Ct. 133, 137-38, 392 A.2d 720, 721 (1978). The Baggs court relied upon a Pennsylvania statute which provides, as a rule of statutory construction, that “words used in the masculine gender shall include the feminine and neuter.” Id. at 136, 392 A.2d at 721, quoting 1 Pa. Cons. Stat. § 1902 (1978). The word “he” in the criminal support statute was held by Baggs to include both feminine and neuter genders when construed with the word “parent.” 258 Pa. Super. Ct. at 137-38, 392 A.2d at 721.
\textsuperscript{149} Id.
VII. CONCLUSION

In less than a decade, Pennsylvania's equal rights amendment has had a remarkable impact on the status of family law within the Commonwealth. The constitutional mandate has been applied successfully to eliminate various unfounded sexual stereotypes that had been perpetuated in legislation and common law doctrines.

Initial fears that the ERA would destroy the family unit and would prove unduly harsh to either spouse have been shown to be unwarranted.151 Indeed, the ERA has generally been applied by the courts with admirable evenhandedness152 and with extraordinary sensitivity to the special problems inherent in the family law context.153 Thus, the ERA is working effectively—both through its application by the courts, and through its inspiration to the legislature—to eliminate institutionalized sexual discrimination and to bring archaic doctrines into harmony with the more modern understanding of sexual roles.

151. See notes 17-21 and accompanying text supra.
153. See notes 103-15 and accompanying text supra.