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Recent Developments: Domestic Relations—Effect of Equal Rights Amendment on Child Custody Decisions. Md. Const., Declaration of Rights Art. 46.

DOMESTIC RELATIONS—EFFECT OF EQUAL RIGHTS AMENDMENT ON CHILD CUSTODY DECISIONS. Md. Const., Declaration of Rights art. 46.

Until election day in November, 1972, the fundamental principle regarding child custody in Maryland divorce proceedings appeared to be well settled: a non-adulterous mother was a preferred custodian to the father.[1] On that day, however, the electorate ratified the Equal Rights Amendment[2] to the Maryland Constitution, which stated, in essence, that "[e]quality of rights under the law shall not be abridged or denied because of sex."[3] The Maryland Court of Appeals will now have to measure the impact this will have, *inter alia*, on child custody proceedings.

There would have been little problem in making this determination had the United States Supreme Court, in *Reed v. Reed*,[4] resolved that sex-based classifications were "suspect" under the fourteenth amendment. However, since it did not, and since the federal ERA is presently in danger of either being defeated or growing irretrievably stale in legislative pigeonholes,[5] the Maryland Court of Appeals will not be afforded the luxury of looking to the United States Supreme Court for guidance in the near future.

The problem is compounded further by the fact that there is no legislative history behind the Maryland amendment,[6] as Maryland House Bill 687 (the proposal actually ratified by the Maryland electorate) simply adopted what is termed the "standard version"[7] of the equal rights legislation. However, inasmuch as the Maryland amendment is essentially identical to the federal proposal,[8] the

1. Cornwell v. Cornwell, 244 Md. 674, 224 A.2d 870 (1966); Palmer v. Palmer, 238 Md. 327, 207 A.2d 481 (1965); Glick v. Glick, 232 Md. 244, 192 A.2d 791 (1963); Townsend v. Townsend, 205 Md. 591, 109 A.2d 765 (1954).
2. The Equal Rights Amendment will hereinafter be referred to as the ERA.
3. MD. CONST., DECLARATION OF RIGHTS, art. 46, § 1. Section 2 merely provides for the referendum. Act of May 26, 1972, ch. 366, [1972] Laws of Md. 1225.
4. 404 U.S. 71 (1971); *see* Hoyt v. Florida, 368 U.S. 57 (1961); Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971). *See also* Bayh, *The Need for the Equal Rights Amendment*, 48 NOTRE DAME LAW. 80, 87 (1972).
5. Washington Post, Feb. 7, 1973, § A at 1, col. 3. Twenty-one of the twenty-three states ratifying the amendment by January 1973 did so within six months after March 22, 1972, the date it passed the Congress.
6. OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, MEMORANDUM TO MARYLAND COMMISSION ON THE STATUS OF WOMEN, LIST OF SECTIONS OF MARYLAND ANNOTATED CODE WHICH MAY BE AFFECTED BY THE ADOPTION OF THE PROPOSED EQUAL RIGHTS AMENDMENT TO THE UNITED STATES AND MARYLAND CONSTITUTIONS 5 (Sept. 19, 1972).
7. Martin, *Equal Rights Amendment: Legislative Background*, 11 J. FAM. L. 363, 372 n.26 (1971). For no apparent reason, Maryland's version has reversed the order of "abridged" and "denied."
8. The following comparison is offered to show the substantive identity of the two:
Federal, § 1: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." 1972 U.S. CODE CONG. & AD. NEWS 835. H.R.J. Res. 208, 92d Cong., 2d Sess. (Oct. 12, 1971) and S.J. Res. 8,

legislative history of the federal amendment is therefore directly applicable to the Maryland enactment.

The effect of the ERA on child custody cases turns on two questions: 1) whether Congress intended current "protective" laws to coexist with, or be destroyed by, the ERA; and 2) whether Congress intended there to be any exceptions to an absolute ban on legislative or common law sex-based classifications.

As to the first question, it is clear beyond any doubt that Congress intended the ERA to be destructive of any special legal protection of women. This is seen from the fact that three of the four major campaigns for passage of the ERA were defeated by the chaotic debate caused by proposed riders thereto which provided that "this article shall not be construed to impair any rights, benefits, or exemptions . . . conferred by law upon persons of the female sex."[9] Further, when the federal ERA did finally pass the Congress, it was in the wake of an 82 to 9 rejection of Senator Sam Ervin's similarly protective rider.[10]

Thus it is clear that, not only was Congress acutely aware of the conflict between protective legislation and the ERA, but moreover that it expressly and overwhelmingly rejected an attempt to save that protection. The conclusion is accordingly inescapable that any common-law or statutory presumption[11] favoring the female parent is void to the full extent that it is based on an impermissible sexual distinction, the second of the determinative questions.

The commentators on the sex-based classification problem all appear to adhere to the rule that *no* classification is to be made on the basis of generally-accepted-as-true sexual stereotypes. Ruth B. Ginsburg, a leader of the Women's Liberation movement and a professor of law at Rutgers University, states, "With few exceptions relating to personal

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92d Cong., 2d Sess. (Mar. 22, 1972) are the resolutions enacted by the respective Houses of Congress.

Maryland, sec. 1: "Equality of rights under the law shall not be abridged or denied because of sex." MD. CONST., DECLARATION OF RIGHTS, art. 46, § 1, Act of May 26, 1972, ch. 366, [1972] Laws of Md. 1225.

Section 2 of the federal ERA provides for Congressional enforcement of § 1, and § 3 allows for a two-year delay before the amendment takes effect (unlike its Maryland counterpart).

9. 96 CONG. REC. 870 (1950). *See also* 99 CONG. REC. 8973 (1953); 116 CONG. REC. 36,300 (1970).
10. 118 CONG. REC. 4554 (daily ed. Mar. 22, 1972).
11. The judicial branch being as fully an arm of the government as is the legislative, it must follow that common law, or judicially-created, special protections are as impermissible as statutory ones. Brown, Emerson. Falk & Freedman. *The Equal Rights Amendment: A Constitutional Basis for Equal Rights For Women*, 80 YALE L. J. 871, 953 (1971) (quoted in text accompanying note 24 *infra*) [hereinafter cited as Brown]; Comment, *The Effect of the Equal Rights Amendment on Kentucky's Domestic Relations Laws*, 12 J. FAM. L. 151, 152-53 (1972); Note, *The "Equal Rights" Amendment—Positive Panacea or Negative Nostrum?*, 59. KY. L. J. 953, 982 (1971).

privacy and physical characteristics unique to one sex, the constitutional mandate would be absolute if the [equal rights] amendment is adopted."[12]

An extensive Yale article on this subject[13] is in accord with the above view, and gives, by way of example, wet-nursing and sperm banks as proper subjects for the physical-difference theory of differentiation,[14] and includes bathrooms, living quarters, and police searches as proper subjects for the (*Griswold v. Connecticut*[15]-oriented) privacy theory.[16] Declaring that, "In short, sex is a prohibited classification,"[17] this article explained that: "the constitutional mandate must be absolute. The issue under the Equal Rights Amendment cannot be different but equal, reasonable or unreasonable classification, suspect classification, fundamental interest, or the demands of administrative expediency. Equality of rights means that sex is not a factor."[18]

A pre-*Reed* article in this same area summarized the problem aptly when the author characterized sex-based classifications as "simply a matter of traditional notions concerning sexual roles and capabilities," then called for "more realistic" distinctions.[19] Although this article also called for application of the *Shapiro* v. *Thompson*[20] strict scrutiny test rejected by the Supreme Court in *Reed*, it made a persuasive argument therefor:

> Most sex-based classifications, in contrast, are, like racial classifications, the result of long standing professional decisions concerning the abilities or worth of a group. Neither latitude for local legislative experimentation nor considerations of financial resources are involved. Justification must rest on a factual finding that one sex, as a class, possesses distinct abilities, needs, and life style which differentiate itself to a sufficient degree that a legislature can reasonably be said to be classifying on the basis of natural group attributes.[21]

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12. Speech by Ruth B. Ginsburg, Southern Regional Conference of the National Conference of Law Women, Oct. 1, 1971, in *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAM. L. 347, 361 (1971) (footnote omitted).
13. Brown, *supra* note 11.
14. *Id.* at 893. *Accord*, Bayh, *The Need for the Equal Rights Amendment*, 48 NOTRE DAME LAW. 80, 81 (1972); Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VALPARAISO U. L. REV. 281 (1971); Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 225 (1971); Speech by Ruth B. Ginsburg, *supra* note 12.
15. 381 U.S. 479 (1965).
16. Brown 901.
17. *Id.* at 889.
18. *Id.* at 892.
19. Comment, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 NW. U.L. REV. 481, 501 (1971).
20. 394 U.S. 618 (1969).
21. Comment, *supra* note 19, at 498.

Turning now to the impact of the foregoing on child-custody law, it is apparent that the presumption that a mother should have the children is a classic sexual stereotype in that, *generally*, non-adulterous mothers are assumed to be the ones who should keep the house and raise the children rather than the bread-winning fathers:[22] this is exactly what the ERA has outlawed.[23] Certainly, whatever reasonable standards or elements the courts will formulate in determining the preferred parent for custody cannot conceivably qualify under the privacy exception. Further, the only sex-based preference which could possibly withstand the unique-physical-difference test would be perhaps one based on breast-feeding, which, of course, is so ephemeral in nature as to require only interlocutory treatment in any case.

The Yale article addressed this subject directly:

> In most states there is no statute favoring one parent or the other; rather, preference for the mother or father exists as a result of judicially created presumptions in favor of the mother for girls and young children and in favor of the father for older boys.
>
> The Equal Rights Amendment would prohibit both statutory and common law presumptions about which parent was the proper guardian based on the sex of the parent.[24]

Similar sentiments are expressed in numerous other sources[25] on the subject, and there does not appear to be a shred of authority at serious variance with that set out above.[26]

Finally, there remains the question of what considerations should guide the court in making custody determinations in light of the ERA. Of course, the central concern of the entire problem is already deeply entrenched in the law: the best interests of the child.[27] Unfortunately,

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22. Dorsen & Ross, *The Necessity of a Constitutional Amendment*, 6 HARV. CIV. RIGHTS-LIB. L. REV. 215, 221 (1971); Eastwood, *supra* note 14, at 285; Kurland, *The Equal Rights Amendment: Some Problems of Construction*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 243, 248 (1971); Comment, *"A Little Dearer Than His Horse": Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260 (1971).
23. "Sex is an impermissible category by which to determine . . . the custody of children . . . ." Emerson, *supra* note 14, at 225. Bayh, *The Equal Rights Amendment*, 6 IND. L. REV. 1, 17 (1972); Brown 953; Eastwood, *supra* note 14, at 303; Sedler, *The Legal Dimensions of Women's Liberation: An Overview*, 47 IND. L. J. 419, 432 (1972); Note, *supra* note 11, at 982.
24. Brown 953 (footnote omitted).
25. *See generally* sources cited notes 14 and 23 *supra*.
26. Depending on the construction given to one statement of the author, a contrary view may have been set forth in Weaver, *The Equal Rights Amendment, Part III—The Practical Effects*, 57 WOMEN LAW. J. 17, 19 (1971); however, Ms. Weaver cited no authority.
27. *E.g.*, Mullinix v. Mullinix, 12 Md. App. 402, 409, 278 A.2d 674, 678 (1971); DeGrange v. Kline, 254 Md. 240, 243, 254 A.2d 353, 354 (1969); Ouellette v. Ouellette, 246 Md. 604, 608, 229 A.2d 129, 131 (1967); Melton v. Connolly, 219 Md. 184, 188, 148 A.2d 387, 389 (1959).

the component considerations of that vague phrase have been so dwarfed by the pro-motherhood presumption as to defy cogent analysis;[28] however, some standards have been suggested,[29] and, of course, case law will indicate to some extent the legal acceptability of these various tests.

Further, in view of the fact that the ERA will undoubtedly multiply custody litigation in the future, there are certain forensic practicalities which must now be integrated into custody proceedings in order to avoid perjurious cross-accusations by the competing parents, the calling of twenty bishops by each side to testify as to parental acumen and ability, and the "snatching" of children at the outset of the marital dissolution so as to invoke the judicial presumption against a change in custody.[30] With an eye to the above, the following tests are suggested, in the relative order of their importance:

1) *Desire, vel non, of each parent to raise the child.*[31] This rule simply dictates that a child should not be awarded to a parent who does not wish to raise it, in the face of an expression of a contrary desire on the part of the other parent.
2) *Parental background (fitness).* Due largely to the practical considerations set out above, fitness can be determined greatly on the basis of external standards, and the credibility of the witnesses. These external standards include:
    a) corroborated and substantiated evidence of unfitness,[32]

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28. "The assumption that the mother is a better custodian was and is wrong from an historical, economic, sociological, and philosophical point of view." Podell, Peck & First, *Custody—To Which Parent?* 56 MARQ. L. REV. 51, 53 (1972) [hereinafter cited as Podell]. As to the amount of actual discrimination in practice at the trial level, see note 43 *infra*. As to the proposition that the mother is the preferred custodian in Maryland, *see* Oberlander v. Oberlander, 256 Md. 672, 676, 261 A.2d 727, 729 (1970); Kauten v. Kauten, 257 Md. 10, 11, 261 A.2d 759, 760 (1970); Glick v. Glick, 232 Md. 244, 248, 192 A.2d 791, 794 (1963). "[T]he mother is the natural custodian of *her* young." (emphasis added). Cornwell v. Cornwell, 244 Md. 674, 678, 224 A.2d 870, 873 (1966).
29. *See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1970) [hereinafter cited as UNIFORM ACT]; Foster, *Adoption and Custody: Best Interests of the Child?*, 22 BUFFALO L. REV. 1 (1972); Podell, *supra* note 28; Note, *Paternal Custody of Minor Children in Idaho*, 8 IDAHO L. REV. 345, 353 (1972) [hereinafter cited as Note].
30. The courts have drawn criticism for making custody decisions without the recommendations of a social agency or assistance from psychologists, psychiatrists, social investigators, etc. *See* sources cited note 29 *supra*.
31. UNIFORM ACT § 402 (1); Note 353, § A. *See* Dietrich v. Anderson, 185 Md. 103, 43 A.2d 186 (1945); Ross v. Pick, 199 Md. 341, 86 A.2d 463 (1952).
32. To avoid the twenty-bishops problem as well as the perjurious-accusations problem, the court should presume both parents to be perfectly fit to raise the children, and allow any corroborated evidence of unfitness to rebut that presumption. *Accord*, Note 353, § D. *See generally* Ferster v. Ferster, 237 Md. 548, 207 A.2d 96 (1965); Wirth v. Wirth, 192 Md. 21, 63 A.2d 312 (1949); Cockerham v. Children's Aid Society of Cecil County, 185 Md. 97, 43 A.2d 197 (1945).

b) the health of each parent,[33]
c) the education, training, and background of each parent,
d) the moral fiber of each parent, including traditional tests as to crimes of moral turpitude, adulterous behavior, unkempt personal habits, etc.,[34]
e) mental stability and temperament of each parent (the "fault" of the divorce could be considered here to the extent that it indicates irresponsibility, instability, etc.),[35] and
f) availability of each parent to raise the child (time at home).[36]

3) *Wishes of the children.* This should be weighed in accordance with the child's age and maturity, the strength of the child's preference, and whether this will result in a split custody situation.[37]
4) *Standard of living.*[38] This rule would give some preference to that parent best able to provide for the child, and would require consideration of both present and future earning power and/or access to financial resources.
5) *Disruption caused by custody change.*[39] This criterion would indicate that custody, once determined properly, should not be changed except for substantial alterations in the circumstances of the parties. This rule would be absolutely inapplicable as to custody achieved through the extra-judicial seizure of the children at the original separation of the parties, or through an award *pendente lite* (which is, of course, based on the barest of judicial inquiries), inasmuch as the former discourages any temporary agreement which the parties may make for the benefit of the children, and the latter would tend to perpetuate any original mistake for the sole reason that the mistake was already in existence.

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33. UNIFORM ACT § 402 (5); Note 353, § B; *but cf.* Palmer v. Palmer 238 Md. 327, 207 A.2d 481 (1965).
34. UNIFORM ACT § 402 (5); Note 353, § F; Ferster v. Ferster, 237 Md. 548, 207 A.2d 96 (1965); Cockerham v. Children's Aid Society of Cecil County, 185 Md. 97, 43 A.2d 197 (1945).
35. UNIFORM ACT § 402 (5); Podell 61-63; Note 353, § B; Bryce v. Bryce, 229 Md. 16, 181 A.2d 455 (1962); Hild v. Hild, 221 Md. 349, 157 A.2d 442 (1960).
36. Podell 65; Butler v. Perry, 210 Md. 332, 123 A.2d 453 (1956).
37. UNIFORM ACT § 402 (2); Podell 57; Zell v. Zell, 12 Md. App. 563, 280 A.2d 22 (1971); Parker v. Parker, 222 Md. 69, 158 A.2d 607 (1960); Trenton v. Christ, 216 Md. 418, 140 A.2d 660 (1958).
38. Podell 64; Note 353, § C; Daubert v. Daubert, 239 Md. 303, 211 A.2d 323 (1965); Ross v. Pick, 199 Md. 341, 86 A.2d 463, (1952); Dietrich v. Anderson, 185 Md. 103, 43 A.2d 186 (1945).
39. UNIFORM ACT § 402 (4); Lippy v. Breidenstein, 249 Md. 415, 240 A.2d 251 (1968); Trenton v. Christ, 216 Md. 418, 140 A.2d 660 (1958).

6) *Compatibility of the interests of parent and child.*[40] This rule contemplates that some consideration should be given to the parent most willing and able to develop the child's natural ambitions and propensities; it essentially allows sex-based distinctions *to the extent that the individual parent and child comply with the traditional sexual stereotypes, if at all.* Since it is an individual evaluation in each case, it would not therefore run afoul of the ERA.[41]

CONCLUSION

In ratifying the ERA, the Maryland electorate has delivered a mandate to its government which, in the case of child-custody matters, demands that there be no discrimination on the basis of sex, be it *de jure* or *de facto*. The presumption that the non-adulterous mother should have the children has not thereby been merely neutrally ended, it has been made affirmatively illegal.[42] Accordingly, the Maryland Court of Appeals should not merely redefine and realign its standards as to child custody, it should further demand that the *de facto* discrimination heretofore practiced[43] be immediately ended.[44] "The judicial role must transcend social conditioning . . . ."[45]

40. UNIFORM ACT § 402 (3); Podell 64; Note 353, § A; Cornwell v. Cornwell, 244 Md. 674, 224 A.2d 870, (1966); Alden v. Alden, 226 Md. 622, 174 A.2d 793 (1961); Sewell v. Sewell, 218 Md. 63, 145 A.2d 422 (1958).

41. *Accord*, Barnard, *The Conflict Between State Protective Legislation and Federal Laws Prohibiting Sex Discrimination: Is It Resolved?*, 17 WAYNE L. REV. 25, 63 (1971); Brown 953; Emerson, *supra* note 14.

42. Emerson, *supra* note 14, at 229.

43. "The discrimination is apparent in these cases . . . ." Note, *supra* note 11, at 982. The sources vary on the actual percentage of time the mother is awarded custody at the trial level: 95%, Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L. J. 171, 189 n.47 (1971); 90%, Brown 953 n. 99; approximately 94% is admitted to by a trial judge in Hatten & Brown, *The Impressions of a Domestic Relations Judge*, 13 S. TEX. L. J. 250, 259 (1972). This is in the face of many jurisdictions having a statute prohibiting this discrimination as to custody. Brown 953. *See* note 28 *supra* and sources cited therein.

44. "[A] constitutional amendment . . . will compel the Supreme Court to adopt a standard of *active review* in evaluating classifications based on sex." (emphasis added). Comment, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1524 (1971). "A judge whose opinions on important questions of public policy reflect nothing more than his private estimate of public majority opinion is engaging in journalism, not jurisprudence." Johnston & Knapp, *Sex Discrimination By Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675, 747 (1971).

45. Johnston, *supra* note 44, as 747.