WOMAN BUILDS A NEW HOUSE: FAMILY LAW AFTER THE ERA

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> Every wise woman buildeth her house; but the foolish plucketh it down with her hands.
>
> Proverbs, 14:1

Introduction

Much of the controversy surrounding the passage of the Equal Rights Amendment (ERA) is focused on domestic relations law. Women, the argument goes, would lose all of the protections built into the Anglo-American legal system for their benefit. These protections were designed to secure the viability of the family unit by assuring that women could safely continue in their roles as guardians of the family. Additionally, these protections guaranteed that the hand that rocked the cradle would not some day be outstretched for alms.

The law of domestic relations, when viewed in the narrow sense to include only those laws which govern the family in its formation, maintenance, and dissolution, does contain a network of inequalities between the sexes. These inequalities may be seen by some as benefits to women. However, the benefits were designed to balance the blatant disabilities of women and particularly married women contained in the other areas of the legal system, such as the law of torts, contracts, real property, and probate.

This article will deal only with the narrow areas of family law--marriage, divorce, alimony, child support and custody, paternity, and adoption. All fifty states have specific legislation covering these subjects. While many are similar, unless a Uniform Act is adopted, no two are alike. No attempt at an exhaustive catalogue of the statutes has been made. Instead, typical or illustrative statutes will be cited.

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Even without the ERA, the modern trend has been towards family laws that treat the spouses as equals. For example, the Uniform Marriage and Divorce Act has adopted a completely sex-neutral approach to state regulation of the formation and dissolution of the marriage contract. It is assumed throughout that Courts in interpreting the ERA will insist that legislation be sex-neutral, i.e. that sex will not be a factor. Sexual classifications, like racial classifications, should be viewed with suspicion. This would, of course, include statutes that weigh unequally upon men as well as upon women.[1]

Family law as it developed solidified the customs of another age. In many cases the customs have long since disappeared, but changes in legislation tend to lag behind changes in public attitudes. Passage of the ERA will afford to the states the well-needed opportunity to draft comprehensive family codes which accurately reflect modern institutions and mores.

THE BACKGROUND OF MODERN FAMILY LAW

At common law a married woman had no legal existence of her own. The merger of her legal identity into that of her husband's was based on the religious concept of unity of person. Her independent existence was suspended during the period of the marriage.[2] As proof, the wife took the husband's name. The husband took everything else.

The husband was the head of the family. He had the right to chose the mode and the place of living for his family. He was entitled to the use and occupation, as well as the rents and profits, from real property owned by his wife during the marriage.[3] Logic dictated that there be imposed on him a corresponding duty to support and nurture his wife and children.

The wife had the duty to follow her husband and make a home for him providing those services generally referred to as consortium.[4] Some states have enshrined these ancient interpersonal (as distinguished from property) rights into statute, and, in at least one of them, these

relationships may not be altered by agreement of the parties.[5] From this venerable allocation of and duties, modern family law grew.

MARRIAGE

All state codes include legislation governing the formation of a valid marriage contract. "Marriage being of vital public interest, is subject to the state and to legislative power and control with respect to its inception, duration and status, conditions and termination except as restricted by Constitutional provisions."[6]

The statutory requirements for a lawful marriage are simple. Generally states require a license issued by a duly authorized officer, a waiting period, a medical certificate, proof of age or written consent of the parents, and a ceremony. States which do not require all of the above typically dispense with the medical certificate or waiting period or both.

These statutes are riddled with sexual classifications. Sex bias begins with the act of applying for a marriage license, in that a handful of states require that the application be made in the county where the bride resides.[8] Even the medical certificate, where required, is not always free of sexual classifications. The State of Washington requires that only men respond to questions about venereal disease.[9] Colorado requires that only women be tested for rubella immunity.[10]

While these two statutes involve sexual classifications, it is clear that the ERA will forbid only the statute in Washington. There are no significant differences in the ability of the sexes to contract and transmit venereal disease. The Washington statute is based on Victorian precepts of female chastity. Obviously the wide public health benefit to be served by premarital medical testing for venereal disease should dictate that the Washington statute be extended to cover women to satisfy the ERA.

On the other hand, the Colorado statute is legislation based on a unique physical difference between the sexes. The connection between rubella (German measles) contracted in the first three months of

pregnancy and major birth defects, including blindness, deafness and mental retardation, is a well established medical fact. Therefore, since women are the child-bearers, it is not a violation of the principle of equal rights to require rubella tests for only women.[11]

The most significant area of sex discrimination in the law of marriage is found in those sections which prescribe the age at which persons may marry. There are three relevant ages to be considered here: the minimum age or the age below which a person cannot contract a valid marriage; the age of parental consent or the age at which a valid marriage can be contracted only if that the party has parental consent; and, the age of independent consent when a valid marriage can be contracted on one's own.

Typically the ages provided within this structure are lower for women. A woman can contract a valid marriage at a younger age than a man and she can marry without her parents consent at a younger age than a man. For example, in Alabama no male below the age of seventeen and no female below the age of fourteen can marry. A male between the ages of seventeen and twenty-one can marry, provided his parents consent, and a female between the ages of fourteen and eighteen can marry, provided she has her parents' consent. Males over age twenty-one and females over age eighteen can marry without this permission.[12]

The age differentials stem from ancient notions of puberty and maturity. At common law females at age twelve and males fourteen were deemed capable of contracting and consumating a valid marriage.[13] Although modern statutes establish ages that bear very little relation to puberty or the ability to consumate a marriage, a 1967 survey of the state marriage laws conducted by the Department of Labor showed that only ten states set the same minimum age for marriage for both sexes and only eighteen set the same age of independent consent.[14]

There has been little change in the minimum age requirements since 1967. However, in response to the lowered voting age, many

states have passed statutes and constitutional amendments providing that persons both male and female shall reach their majority at age eighteen. Consequently, about one half of the states now permit anyone over eighteen to marry without parental consent.[15]

This change--occurring independently of the ERA--is illustrative of the modern trend in family law to treat the spouses as equals.[16] The ERA will accelerate this trend by requiring that states equalize the age breakdown. States may either lower the ages for males, raise the ages for females, or fix an age between the current two ages as applicable for both.

An unusual and severely harsh statute is found in a few states. This statute provides that a male may not marry if he has been the inmate of an insane asylum or a home for the indigent within the five years immediately past, unless it can be established that he will be able to support a family.[17] This statute is based on an outdated view of the roles of husband and wife and would be stricken by the ERA.

The prize for the worst statute goes to New Hampshire. New Hampshire provides that no woman under the age of forty-five with a history of mental disease or disorder, or no man of any age (unless marrying a woman over forty-five) who has a history of mental disease or disorder, may marry unless first sterilized (or permitted by the Board of Health).[18] This statute is apparently sex-neutral since it ties its sexual classifications to the biological ability to reproduce. No comment is offered on the statute's ability to withstand Constitutional tests on other grounds.

GROUNDS FOR DIVORCE

There is no common-law of divorce. Anglo-Saxon law, which governed pre-Christian Britain, permitted divorce by mutual consent or on the grounds of the wife's adultery or desertion. The religious conversion of Britain brought with it the concept of marriage as a sacrament, and divorce as we know it disappeared until 1857. The

American colonies passed statutes to provide for civil divorce in their codes. Consequently, the modern grounds for divorce are purely statutory.[19]

The grounds provided by statute differ widely from state to state. Except where the Uniform Marriage and Divorce Act has been adopted, no two state statutes are alike. The grounds provided in the Uniform Act are entirely sex-neutral. The only ground for divorce is that "the marriage is irretrievably broken."[20]

States statutes following the old fault concept generally catalogue widely varying lists of conjugal wrongs which define the grounds for divorce. Very often included among these are sex-biased grounds. The sex-bias in these statutes stems from an outdated view of the roles of husband and wife. The laws then seek to define what constitutes culpable behavior in a marriage on the basis of this outdated view.

In surveying the state statutes there is an important distinction to be made between those grounds which appear with numerical frequency among the codes and those grounds which actually represent a major focal point for divorce litigation under the fault concept. In other words, although a particular ground may appear in almost all the fault-type statutes, complaints for divorce alleging that particular ground may in fact occur quite infrequently.[21] With this distinction in mind, it becomes highly unlikely that even the most commonly encountered sex-biased grounds for divorce represent a significant portion of overall divorce litigation.

The most common sex-biased ground for divorce is the failure of the husband to support his wife when able to do so.[22] Without a corresponding ground for divorce to enable a husband to sue for non-support, these statutes would not survive a test under the ERA.

Second to nonsupport in numerical frequency as a fault-type ground divorce is the pregnancy of the wife by a man other than the husband at the time of the marriage.[23] This statute poses more complex

problems of analysis under the ERA. There is no doubt a moral element here reflecting older views of female premarital unchastity which constituted at least one justification for this statute. If morality alone were the rationale, clearly this statute would fail any court test under the ERA.

However, a challenge to this statute under the ERA would strike from the very heart of equal rights. No state grants to a wife a corresponding ground for divorce on finding that her husband fathered a child prior to the marriage. No doubt this disparity grew out of the differing obligations and duties that husband or wife would have under a pre-ERA legal system with regard to children conceived out of wedlock by the opposite spouse. A wife would have no legal obligations at all towards offspring fathered by her husband outside her marital union.

The husband on the other hand might very well be obligated to support the child which he did not father during the entire period of its minority since children born of a marriage are presumptively legitimate.[24] The ERA would under its best interpretation not permit such a widely disparate view of obligations based on nothing more than traditional sex roles. There is no reason why a woman should not be equally obligated to provide for the separate children of her spouse under the same conditions as her husband would be.

The balance of the sex-biased grounds for divorce are insignificant numerically and probably inconsequential judicially. They do however have a certain historical interest. Montana, for example, permits a wife to divorce a husband who has repeatedly made false accusations against her chastity, without a corresponding ground to afford relief to a husband whose honor has been called into question by his wife.[25] Virginia allows a husband to divorce his wife on the ground of her prostitution prior to the marriage if it were not known to him at the time of the marriage. No corresponding ground is provided for the wife.[26]

Somewhere short of absolute divorce is the ancient remedy of divorce a mensa et thoro, or divorce from bed and board. When divorce a vinculo was unobtainable at law, the Ecclesiastical Courts of England devised this half-way solution to marital problems. An action for divorce a mensa et thoro produced an adjudication of the support and custody obligations of the parties and an authorization for husband and wife to live separate and apart. It did not of course permit the parties to remarry.[27]

Although the modern trend is to dispense with this remedy entirely,[28] the remedy does still exist in most states. Typically the grounds for divorce from bed and board follow the grounds for absolute divorce. The most significant sex bias in this otherwise significant area is that in some states only a wife may bring such an action.[29] If these statutes are to continue in force, then clearly the ERA will require a cause of action to be granted regardless of sex.

CUSTODY OF CHILDREN

The law governing the custody of minor children is heavily sex-biased in favor of women. The issue of child custody is most frequently tried in marital litigation. When a custody contest involves a natural parent (of either sex) and a third party (of either sex) the universal rule is to favor the natural parents.[30] The sex-bias assumes an important, if nor pivotal position, when the contest for custody is between a husband and a wife.

The preference for mothers in child custody cases turns the ancient common-law precepts upside down. At common-law a father had a nearly absolute right to the custody of his minor children. He was entitled to their earnings and society. The law viewed them as his property. A father could be deprived of his right to custody only where he was corrupt or represented a danger to the child.

The preference for the mother is a judicial creation since most custody statutes are couched in sex-neutral language.[31] Some

states statutes clearly announce their sex bias.[32] However, this is the exception and not the rule. The judicial preference for mothers in custody cases is so strong that it really is a rule of law. One survey showed that in ninety percent of all custody cases the mother was awarded custody.[33] If the survey had been expanded to include uncontested divorces where husbands simply acquiesced without a contest, the proportion of custody awards to mothers would no doubt soar higher still.

Florida law presents a good example of the development of the rule of preference for the mother. Florida originally followed the common law rule that a father had a superior right to the custody of his children. This rule was abolished by judicial decision in 1941.[34] The Florida Court began instead to ask the question of how the best interests of the child were to be served. Cases applying the "best interests of the child" standard repeatedly ruled that the best interests of the child would be served by placement with the mother. This interpretation of the standard became a firmly entrenched rule of law. The result was a rule in Florida that a mother was presumptively entitled to custody of minor children unless she was found to be unfit.[35]

In 1971 Florida adopted a local version of the Uniform Marriage Act's sex-neutral custody section. However, it was clear that a sex-neutral custody statute alone would be insufficient to redress the imbalance in light of the state's case law. Therefore the legislature went further and added, "Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody."[36]

The ERA should have the effect of extending the Florida rule across the nation. The present sex-neutral statutes found in the majority of the state codes can remain unchanged. What will be changed are the judicial presumptions and constructions that interpret these statutes. Courts will be called upon to consider all relevant factors

rather than myths, prejudices and customs.

The law of child custody, perhaps more than any other area, points out the need for a new analysis of legal relationships defined by family law. The best interpretation of the ERA would require a careful look at the reality of a given family situation. Judges and legislators must not be allowed to rely on social customs as a subterfuge for preserving the ancient and often outworn legal relationships that the ERA seeks to overturn.

Courts must make the distinction, for example, between child bearing and child rearing. The former is a unique physical characteristic of the female. The latter is a social responsibility discharged best when shared by male and female, but dischargeable by either male or female alone should the necessity arise. There is no logic or justification for Courts ruling that the best interests of the child are always served by placement with the mother.

CHILD SUPPORT

Common-law imposed upon the father the duty to support his children. His support obligations were the natural corollary of his rights as natural custodian and guardian of his offspring. All American jurisdictions follow the common-law rule to the extent of laying the primary duty of child support before the male.[37]

The common law rule solidified the tradition-honored view of the male--that of provider for his family. So thoroughly entrenched is this construct of the family that all child support statutes in some way reflect its existence and proceed to sex-bias thereby. The ERA will only realize sex-neutral child support laws when the traditional view of the male role is disregarded completely.

The criminal law represents the harshest means through which the states seek to impose sex roles upon individuals. All states make it a crime for a father not to support his children. Some state codes are completely silent on the mother's support obligations. Most states

do make it a crime for a mother to fail to support her children but usually with qualifications.[38]

The Model Penal Code attempts to provide a sex-neutral criminal support statute, but fails because it defines the duty to support a dependent with reference to a legal obligation to provide for that dependent.[39] If the legal obligation to support a dependent comes from the common law, then the statute is sex biased and must fail the test under the ERA.

The adjudication of the obligation to support one's children occurs most frequently not in the criminal courts but in the civil courts in actions for divorce or separate maintenance. Originally the civil statutes providing for child support followed the common law model and placed primary liability on the father. Some still do.[40] However, following the modern trend to treat the spouses as equals in family litigation, many states have passed what purport to be sex-neutral provisions as part of these divorce codes.

These statutes may fail the test of sex-neutrality in the same manner as the Model Penal Code. The Florida statute, for example, reads:

> In a proceeding for dissolution of marriage, the Court may at any time order either or both parents owing a duty of support to a child of the marriage to pay such support. . . .[41]

The question to be decided in determining the Constitutionality of these statutes under the ERA, will be "Where is the referenced duty defined?" If the duty descends from the uneven obligation imposed by the common law or the state criminal law, then these modern statutes too must fail.

Perhaps the easiest and most satisfactory solution to the problem presented by the modern statutes would be a simple declaration, either legislative or judicial, that men and women are equally obligated to support their children and that only inability relieves one of that obligation.

INTERSPOUSAL SUPPORT OBLIGATIONS

The legal duty of the spouses to support one another, like the duty of parents to support their children, derives from the common law definitions of familial obligations. Again, just as with child support, the duty of interspousal support is enforced through coexistent civil and criminal support statutes in the state codes.

Courts generally do not interfere with the financial arrangements of an on-going family unit.[42] Therefore, the question of the spouses' duty to support one another is most frequently tried as an adjunct to marital litigation when the family unit has broken down. Although all states have criminal nonsupport statutes, the most important legal method for enforcing inter-spousal support obligations is in civil litigation for divorce or separate maintenance.

The civil support obbligation--alimony--grew out of the recognition by the Ecclesiastical Courts of a man's duty to support his wife. Alimony descends from the support awards granted in actions for divorce a mensa et thoro.[43] These support awards were and still are in addition to outright grants of property. All states provide for some form of alimony award to a wife on the dissolution of the marriage.[44]

Because a wife had no common law duty to support her husband, there is no similar award to a husband unless specifically authorized by statute.[45] The theory of alimony is that it enables the wife to stay home and care for young children even where the children are the subject of a separate divorce decree. In cases where there were no children, alimony insured that the wife did not have to turn to the public for support. The idea was to maintain the family with minimum social and economic disruption from the dissolution of the marital union.[46]

The theory perhaps made sense in a different age when the marital unit rarely consisted of two working partners or when a woman's earnings rarely constituted a significant portion of the family's income. However, even under the older economic structure, the theory of maintaining

one who could not maintain herself was not often carefully followed.

In practice, awards of alimony are tied to the wife's behavior during the marriage. In some jurisdictions a wife will be awarded alimony only if she is found by the Court to be free of fault for the marital breakdown.[47] The reward and punishment aspect of alimony alone would seem to be sufficient reason to overhaul the institution, but the ERA will not necessarily eliminate this aspect of the law of alimony.

The ERA will eliminate those alimony laws which favor one spouse over the other in defining inter-spousal support obligations. The Uniform Marriage and Divorce Act[48] is a good model for states to follow. The Uniform Act views the family as an economic unit that received income and contributions of varying kinds and fixes post-marital obligations on an assessment of that particular economic unit. Fault is specifically not a relevant consideration. The relevant considerations, which are enumerated in the Act, include the financial resources of the party seeking maintenance, the time necessary to acquire the education or training to become self-supporting, the standard of living during the marriage, the duration of the marriage, the age and emotional stability of the party seeking maintenance, and the ability of the other party to pay.

There is a pervasive air of days-gone-by surrounding the statutes which define the criminal penalties for failure to support a spouse. All states make it a crime for a man to fail to support his wife. A typical nonsupport statute will generally make it a crime for a man to fail to support his wife and children and a crime for a woman to fail to support her children.[49] Where a wife is criminally liable for the nonsupport of her husband, the liability is generally qualified to include only those husbands who are incapacitated or infirm.[50]

Moreover, there is a strong implication in many of the statutes that the wife need not seek employment even to support an infirm husband. The Oklahoma statute is an interesting example. Oklahoma provides that a husband must support his wife out of his separate property, the

community property, or by his labor. A wife on the other hand must support a husband only out of her separate property or the community property and then only when the husband is infirm and has no estate of his own.[51]

The extremely uneven support obligations found in the majority of the states will simply not withstand a test under the ERA. If criminal nonsupport statutes are to be kept, they must define obligations on the basis of the economic reality of the family unit. As with child support statutes, tradition-worn customs and sex roles cannot be permitted as the starting premise or else the whole purpose of ERA will be subverted.

PATERNITY AND ADOPTION

The most poignant sex discrimination in the family laws of the states falls not upon women but upon men. A man who tries to assert his rights to a child fathered by him out of wedlock will find himself very often without any legal means available to protect his claim to a legal relationship.

The laws of paternity and bastardy are of ancient lineage. An illegitimate child was defined at common law as a child born and begotten out of wedlock.[52] The status of the child deemed illegitimate was so completely disabling that the law indulged every possible presumption of legitimacy. The child born of a valid marriage was therefore nearly always held legitimate.[53]

However, once the child was born to an unmarried woman the status of illegitimacy was irrevocably conferred upon it. The child was filius nuluis, child of nobody; and short of an act of the sovereign, there was no legal mechanism for legitimation. The child and the father enjoyed no rights in one another's society or property.

Later as the law developed, a putative father could be compelled to support the child. As early as 1576 the Elizabethan Poor Laws created a bastardy proceeding which judicially established filiation between father and child and compelled the father to support the child.[55] Modern paternity proceedings descend from the old bastardy proceedings.

They are civil or quasi-criminal in nature. The important aspect of these statutes is that the mother or the state is the moving party. In states that follow this model, there is no other judicial proceeding through which a father can affirmatively establish his paternity.[56]

The harshness of the common law rule that forever conferred the status of illegitimacy upon a child has been alleviated somewhat by modern law. All states now hold that the subsequent intermarriage of the mother and father legitimates the child.[57] Some states provide that acknowledgement or recognition of the child will legitimate it.[58] After the child is legitimated, the legal relationship is that of parent and child.

Analysis of these statutes reveals that what was once intended as a protection now remains as a serious disability. No doubt the strict rules for legitimation were intended, at least in part, to protect innocent men from claims being laid to their names and estates by immoral women. The result is that in most jurisdictions a putative father has no legal right to his child at all even though the relationship with the mother and the child had more closely approximated a family unit than a casual illicit liason.

Nowhere is this disability more evident than in the adoption laws. All states require the consent of both parents, or a legal equivalent thereof, before a legitimate child can be placed for adoption. However, for an illegitimate child in the majority of the states, the consent of the mother alone is sufficient. In other words, even though a man and a woman have maintained a stable family unit for a period of time, and even though the father supported and acknowledged the child or children as his own, the mother's consent alone would be legally sufficient to sever all family ties between parent and child.[59]

Those states which do require the consent of the father fall into two major groupings: those which require a father's consent where paternity has been established by a judicial proceeding,[60] and those which require consent if the child has been legitimated.[61] The inherent disabilities in both these patterns of statutes are clear. In the former,

if the state follows the model of the old bastardy proceeding, then there is no way for the father affirmatively to establish filiation judicially. In the latter, if the state does not provide for legitimation through acknowledgement or recognition, the father as a practical matter may be foreclosed from legitimating the child if intermarriage is impossible or even undesirable. Only one state requires the consent of the putative father.[62]

The ERA will remove those disabilities found in these statutes that are based entirely upon sex. The traditional justifications will clearly be invalid. There is no valid reason to deny to a father an affirmative right of action to establish his paternity.[63] A good model for such a statute can be found in Nevada where in 1969 the legislature created an "Action to Establish Parental Relationship" which is designed to establish filiation. The same nature of proof is available to a father in such a proceeding as to a mother in a bastardy proceeding.[64]

There is of course, a balance to be struck whenever the interests of an innocent child would be the major focus of post-ERA legislation. However, if the ERA has its desired effect and customary and traditional views are no longer the a priori of all child-oriented legislation, then the states can devise sex neutral legal mechanisms through which the real interests of a putative father can be protected.

MISCELLANEOUS DISCRIMINATIONS

The traditional area of the law of domestic relations contains various other discriminations that will be overturned by the ERA.

a. Name. In all states a woman upon her marriage takes her husband's name. This loss of identity comes from the ancient doctrine of unity of person.[65] The ERA will, of course, have to overturn this ancient rule. The state may have a legitimate interest in requiring family units to carry the same surname; however, this interest would not extend to requiring that the name carried be that of the husband. The easiest way to deal with this change would be to allow the couple to

choose a name and register the new name at the same time the marriage is recorded.

b. Domicile. At common law the domicile of the wife followed that of the husband. He had the right to chose the place of abode, and the wife had to follow if the choice was reasonable.[66] A wife's failure to accompany her husband was viewed in most jurisdictions as desertion giving grounds for a divorce action.[67] A post-ERA law of domicile will of course, discard the common law rule. There is no rational sex-neutral basis to assume that a wife must follow her husband. Where the concept of domicile remains important for other legal consequences, the Courts can apply the more meaningful test of actual contacts with the jurisdiction.

c. Emancipation. Almost all states provide that a single man and woman reach their majority at the same age.[68] However, many states also provide that marriage emancipates a minor.[69] Therefore, if the marriage age is lower for women, as it usually is, then a woman can also be emancipated at a younger age. This sex-biased disability will of course disappear when the disparate marriage ages disappear.

CONCLUSION

The Equal Rights Amendment will indeed build a new legal house for women. In the area of family law the changes may be much farther reaching on paper than they are in fact. This is an area where custom, tradition, and social convention have a much more direct and immediate effect on individual then legislation. Most people will chose to and follow the model of the family that they have learned from their parents.

The importance of the ERA is that these customs, traditions, and social conventions will no longer be the law. The accent will be on choice. Legislation which attempts to force people or institutions into traditional or customary sex roles will no longer be valid.

Individuals and family units will be able to develop and grow along the lines most satisfactory to them. When they must intersect with the laws of the State, then those laws will view the unit as a functional

entity, in terms of its own social and economic realities.

The ERA does not, as its most ardent disclaimers asserted, spell the end of the family as we know it. What it does spell the end to are serious legal disabilities that have no logical relationship to the modern family. It is no surprise to the student of family law that these disabilities weigh heavily on men and women. A sex-neutral family code is a legitimate goal soon to be realized under the ERA.

FOOTNOTES

1. For a good discussion of possible interpretation of the ERA, see The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L. J., 871 (Apr. 1971).

2. 1 Blackstone's Commentaries on the Laws of England, 422 (Cooley ed. 1884).

3. C. Moynihan, Law of Real Property, 52 (1962). The ancient property rights of the husband have now been almost entirely abolished by the Married Women's Property Acts. See Moynihan, supra, at 233.

4. Consortium is generally defined as love, affection, companionship, society, and sexual relations. See Karczewski v. Baltimore and Ohio Railroad Company, 274 F. Supp. 169 (N.D. Ill. 1967).

5. See, Ohio Rev. Code §§ 3103.02, 3103.06 (Page 1963); Okla. Stats. Anno. §§ 32-2 (West 1971); S.D. Comp. Laws § 25-2-2 (1967).

6. Light v. Mequinniss, 156 Fla. 61, 22 So. 2d 455, 456 (1945).

7. See S.C. Code of Laws § 20-21; Md. Code Art. 62 § 9-11 (Michie's 1957).

8. See, Code of Ala., Title 34 § 9 as am'd 1953-276, 1961--708 (Michie's 1940); Fla. Stat. Ann. § 741.01 (West 1966); Ky. Rev. Stat. Anno. § 402.080 (Baldwin 1969).

9. Wash. Rev. Code. § 26.04.210 (Supp. 1970).

10. Colo. Rev. Stats. § 90-1-4, am'd 1971, H.B. 1081 (1963).

11. Cf: Ill. Anno. Stats. § 89-6(b) (Smith Hurd 1966); N.Y. Dom. Rel. Law § 13a.a. which require applicants to be tested for sickle cell anemia where relevant. Sickle cell anemic is a disease of Black people; therefore, the statutes set up a racial classification. However, given the fact that the classification is based on a physical characteristic of the race, it is doubtful that the classification would be viewed as Constitutionally impermissible.

12. Code of Ala., Title 34 § 4 (Michie's 1940).

13. H. Clark, The Law of Domestic Relations 77 (1968).

14. Citizen's Advisory Council on the Status of Women, Report of the Task Force on Family Law and Policy Appendix B at 62.

15. See, Code of Ga. Anno. § 53-204, am'd 1972, p. 196; Idaho Code Anno. § 32-202 am'd 1972, c. 68; Ky. Rev. Stat. Anno. § 402.210 (Baldwin 1969); Mont. Const. Act II § 14.

16. See also Uniform Marriage and Divorce Act, final draft (1970) § 203.

17. Pa. Stats. Anno. § 48-1 (Purdons 1940); Ind. Stat. Anno. § 44-205-208 (Burns 1965).

18. N.H. Rev. Stats. Anno. c. 457 § 10 (1955).

19. Clark, supra, at 281-283.

20. Uniform Marriage and Divorce Act § 303(2).

21. Professor Clark in his treatise indicates that adultery is the most common ground for divorce occurring in all states following the fault concept. However, desertion is the ground most frequently alleged in divorce actions in fault states. Professor Clark's analysis of the frequency of litigation on given grounds does not even include the most common sex biased grounds. Clark, supra, at 327-331.

22. See, Code of Ala., Title 34 § 22 as am'd 1947-487 (Michie 1940); Del. Code Anno. Titla 13 § 1522 (West 1953); Ind. Stats. Anno. § 3-1201 (Burns 1965); Mass. Gen. Laws Anno. c. 208 § 1 (West 1958).

23. See, Code of Ga. Anno. § 30-102, am'd 1972, p. 633; Mo. Rev. Stat. Anno. § 452.010 (Vernon 1949); Tenn. Code Anno. § 36-801.

24. Annot., 57 ALR2d 733 (1958).

25. Mont. Rev. Code. Anno. § 21-106 (1947).

26. Code of Va. § 20-91.

27. Clark, supra, at 420.

28. Fla. Stats. Anno. § 61.031 (West 1966).

29. Pa. Stats. Anno. § 23-11 (Purdons 1940); N.Y. Dom. Rel. Law § 200.

30. Clark, supra, at 584-585.

31. See, Alaska Stats. § 09.55.210 (Michie 1962); Ark. Stats. § 34.1211 (194); Hawaii, Rev. Stats. § 580-47; Mich. Comp. Laws Anno. § 552.391 (West 1967).

32. La. Stat. Anno. Civil Code art. 146 (West 1952); Code of Ala. Title 34 § 35 (Michie 1940); Cal. Civ. Code Anno. § 4600(a) (West 1970); Utah Code Anno. § 30-3-10 (1953).

33. Drinan, The Rights of Children in Modern American Family Law, 2 J. Fam. L. 101, 102 (1962).

34. Randolph v. Randolph, 146 Fla. 491, 1 So. 2d 480 (1941).

35. Fields v. Fields, 143 Fla. 856, 197 So. 530 (1940); Nixon v. Nixon, 209 So. 2d 878 (3rd. DCA 1948), cert. denied, 213 So. 2d 623.

36. Fla. Stats. Anno. § 61.13(2) (West 1966).

37. See, Ky, Rev. Stat. Anno. § 405.020 (Baldwin 1969); N.D. Cent. Code Anno. § 14-07-03.

38. Yale L.J., supra, at 944.

39. Model Penal Code § 207.14 (Tent. Draft No. 9, 1959).

40. See, Idaho, Code Anno. § 32-740-10 (1947); Ind. Stats, Anno. § 3-1319 (Burns 1965).

41. See, Fla. Stat. Anno. § 61.12 (West 1966); Uniform Marriage and Divorce Act § 309.

42. Clark, supra., at 185-186, N. 148.

43. Clark, supra, at 420. The award of suit money or attorney's fees which is also widely provided for by statute also comes from the same tradition since Courts viewed the attorney as a necessary item included in the husband's support obligations.

44. See, Del. Code Anno. Title 13 § 1531 (West 1953).

45. Annot., 66 ARL2d. 882 (1959); Fla. Stat. Anno. 61.08, (West 1966); Alaska Stats. § 9.55.210 (Michie 1962).

46. Clark, supra, 441; Massey v. Massey, 205 So. 2d 1, (3rd. DCA Fla. 1967).

47. See, Code of Ga. Anno. § 30-210; Idaho Code Anno. § 32-706 (1947); La. Stat. Anno. Civil Code art. 160 as am'd Act 48 of 1964, (West 1952); Mont. Rev. Code Anno. § 21-139 (1947).

48. Uniform Marriage and Divorce Act § 308(b).

49. See, Md. Code Anno. art. 27 §§ 88, 89-96 (Michie 1957); Idaho Code Anno, § 18-401 (1947).

50. See, Ohio Rev. Code § 3103.03 (Pages 1953); N.D. Cert. Code Anno. § 14-07-03; S.D. Comp. Laws §§ 25-7-1, 25-7-5 (1967).

51. Okla. Stat. Anno. § 32-2 (West 1971).

52. 10 Am. Jur. 2d., Bastards § 1 (1963).

53. See, Clark, supra, at 156. The presumption of legitimacy could be rebutted at common-law only by a showing that the father was "beyond the four seas."

54. 10 Am. Jur. 2d, Bastards § 46 (1963).

55. Clark, supra, at 158.

56. See, Ariz. Rev. Stats. Anno, § 12-841 et. seq. (West 1956); Fla. Stats. Anno. §§ 742.011 et seq. (West); Nebr. Rev. Stats. § 13-113 et seq. (1943).

57. See, Fla. Stats. Anno. § 742.091 (West 1966).

58. Annot., 33 ALR2d. 732.

59. See, Conn. Gen. Stats. Anno. § 45-63 (West 1958); Idaho Code Anno. § 16-1504 (1947); Ky. Rev. Stats. Anno. § 199.500 (Baldwin 1969); Kans. Stats. Anno. § 59-21. Many of the states so holding do not even require that the putative father have notice of the pending adoption proceedings though the Constitutional validity of these statutes would already be questionable under Stanley v. Illinois U.S. 92 S. Ct. 1208, 31 L.Ed. 2d 551 (1972).

60. See, Code of Ala. Title 27 § 3 (Michie 1940); Ark. Stats. § 56-106 (1947); N.M. Stats. Anno. § 22-2-25, 26 (Allens 1953).

61. See, Dist. of Colum. Code Anno. § 16-304; Hawaii Rev. Stats. § 578-2; Md. Code Anno. art. 16 § 74 (Michie 1957).

62. Ill. Stat. Anno. § 4-9.1-8 (Smith-Hurd 1966).

63. Nev. Rev. Stats. § 41.530.

64. Blood groupings are the most common evidence in bastardy/paternity proceedings. Clark, supra, at 169.

65. See, note 2, supra.

66. See, note 4, supra.

67. Yale, L.J., supra, at 941.

68. But see Ark. Stats. § 57-103 (1947) which provides a man reaches this majority at age 21; a female at 18.

69. See, note 12, supra.