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Justice Brandeis in *Olmstead v. United States*, wherein the noted Justice stated:

To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.²³

In his admirable but possibly over-zealous and overbroad adherence to the spirit of these remarks Judge Mansfield may have severely restricted the legitimate operations of United States agents abroad in order to deny to the Government the fruits of this particular “poisonous tree.”

Joseph R. Farris

DOMESTIC RELATIONS—PENNSYLVANIA EQUAL RIGHTS AMENDMENT REVERSES THE COMMON LAW PRESUMPTION THAT THE HUSBAND, BECAUSE OF HIS SEX, SHOULD BEAR THE PRIMARY DUTY OF CHILD SUPPORT. *Conway v. Dana*, 318 A.2d 324 (Pa. 1974.)

Warren Dana petitioned for a reduction in the amount of his child support payments because his income had declined and also because his former wife had obtained employment and was therefore able to contribute to the support of their two minor children. Pursuant to his divorce, Dana had been paying \$300 per month child support. As a result of the decline in his income from \$12,400 per year to \$10,600 these payments constituted one-half of his entire net income. The trial court, in denying his petition, held that the father had the primary duty of support and therefore the mother's financial resources were not to be considered in determining the amount of his payments. The trial court also held that paying one-half of his net income as child support was neither confiscatory nor punitive in nature. The superior court affirmed the trial court decision, and appeal was taken to the Pennsylvania Supreme Court.¹ Prior case law had established a presumption

23. 277 U.S. 438, 485 (1928).

1. *Conway v. Dana*, 318 A.2d 324 (Pa. 1974).

that the father, on the basis of his sex alone, and without regard to the actual financial position of either parent, was primarily liable for the support of the minor children of the marriage. The supreme court in *Conway v. Dana* ruled that this presumption was no longer valid because of the recently passed equal rights amendment (ERA) to the Pennsylvania Constitution.² With this first judicial construction of a state ERA, the court summarily removed a long enduring rule of law. This decision forecasts the potential for even broader and more sweeping changes through an ERA to the United States Constitution.

It is significant to note that although a new constitutional amendment was required in Pennsylvania to attack sex-based discrimination in the law of domestic relations, other states, including Oklahoma, have achieved similar results without a constitutional amendment. Some courts have used the equal protection clause of the fourteenth amendment to attack sex discrimination. *Dana* suggests that the ERA will be far more effective than equal protection in attacking sex discrimination in general. The obvious reluctance and caution on the part of the courts in employing equal protection to attack sex-based discrimination has prompted increased support for the adoption of state and federal ERA's. Nonetheless, equal protection may continue to have some viability in this area.

Pennsylvania case law which placed the primary duty of child support upon the father³ is the common law rule followed in a majority of states.⁴ Since the primary duty of support is on the father, the financial position of the former wife is of little or no significance.⁵ This

2. PA. CONST. art. I, § 27. The amendment provides, "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

3. Commonwealth *ex rel.* Bortz v. Norris, 184 Pa. Super. 594, 135 A.2d 771 (1957); Commonwealth *ex rel.* Kreiner v. Scheidt, 183 Pa. Super. 277, 131 A.2d 147 (1957); Commonwealth *ex rel.* Silverman v. Silverman, 180 Pa. Super. 94, 117 A.2d 801 (1955); Commonwealth *ex rel.* Heller v. Yellin, 174 Pa. Super. 292, 101 A.2d 452 (1953).

4. H. CLARK, LAW OF DOMESTIC RELATIONS 488 (1968); *see, e.g.*, Kasbeer v. Kasbeer, 22 Ill. App. 2d 218, 159 N.E.2d 840 (1959); Parks v. Parks, 209 Ky. 127, 272 S.W. 419 (1925); State v. Sax, 231 Minn. 1, 42 N.W.2d 680 (1950).

5. McQuade v. McQuade, 145 Colo. 218, 358 P.2d 470 (1960) (the fact that the mother was self-supporting did not relieve the father of his primary duty of support for the children); Martin v. Martin, 251 S.W.2d 302 (Ky. 1952) (the fact that the former wife inherited \$100,000 was not allowed to be considered in determining the amount the husband should pay in child support); *cf.* Duncan v. Duncan, 146 So. 2d 255 (La. 1962) where the court held:

The principle that a father is primarily liable for the support of his minor children is too well established to necessitate comment. If a father under such an obligation voluntarily chooses to increase his financial obligations by

rule evolved in the early nineteenth century when a woman's sphere of activity did not range far outside the home. It was a time when women were to be "protected" by limiting their legal and economic obligations. Such an attitude has endured in the law long after the disappearance of any justifying circumstances. Pennsylvania chose the ERA as its vehicle for obtaining legal equality between the sexes.

In a few jurisdictions such as Iowa⁶ and the District of Columbia⁷ mother and father have been charged coequally with the duty of child support by statute rather than by case law. The Uniform Marriage and Divorce Act also takes the position that the support obligation is as much the responsibility of the wife as of the husband.⁸

a subsequent marriage, he must do so at his own risk and without impairment of the responsibility to his children. *Id.* at 256.

6. IOWA CODE § 597.14 (1950); *Spaulding v. Spaulding*, 204 N.W.2d 634 (Iowa 1973) (the court said: "Both parents are liable for the support of their children, not necessarily in equal shares but proportionately according to their ability to pay." *Id.* at 636.); *Addy v. Addy*, 240 Iowa 255, 36 N.W.2d 352 (1949) (the court said: "At common law and in most states the father is primarily liable for the support of his children. . . .

However in this state by reason of Code section 597.14, which provides the reasonable and necessary expenses of the family are chargeable upon the property of both husband and wife. . . ." *Id.* at —, 36 N.W.2d at 358.)

Professor Clark, in researching the Iowa cases under this statute, has expressed the opinion that in spite of this statutory equality most support orders still follow the common law rule, for in most cases the father is ordered to pay the support for the children. H. CLARK, *LAW OF DOMESTIC RELATIONS* 488-489 n.7 (1968).

7. 16 D.C. CODE ANN. § 16-916 (1973). In *Moezie v. Moezie*, Family Division No. D3535-71 (Dist. of Columbia 1973), noted in K. DAVIDSON, R. GINSBURG & H. KAY, *SEX-BASED DISCRIMINATION* 250 (1974). the court construed the statute:

Prior to 1970, the District of Columbia followed the common law rule regarding the responsibility of parents for the support of minor children. This rule placed the primary obligation for the support of minor children upon the father. In 1970, however, the enactment of 16 D.C. Code, Section 916(c) made the obligation a joint one of both mother and father. This court is of the opinion that this Section of the code, when read in light of its legislative history and in the context of the other changes made in the code at that time regarding family matters indicates a legislative intent to make the responsibility for support of minor children an equal one of mother and father. The logic of this conclusion is all the more compelling in view of the improved economic position of women generally in our society and especially of the mother involved here (who earns in excess of \$17,000 per annum) as well as the more integral role women play in family fiscal affairs. This Court therefore feels no hesitancy in reaching a result similar to that reached by other jurisdictions with statutes similar to 16 D.C. Code, Section 916(c) and will order that Mrs. Moezie pay monies toward the support of her minor children in the custody of the father.

Id. at 254.

8. UNIFORM MARRIAGE AND DIVORCE ACT § 309, noted in K. DAVIDSON, R. GINSBURG, & H. KAY, *SEX-BASED DISCRIMINATION* 278-279 (1974), provides:

Section 309. In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:

The Pennsylvania Supreme Court in *Dana* agreed with the trial court's finding that the burden of support had become onerous for the husband due to a reduction in his income. But the supreme court expressly noted that this situation, standing alone, was not so oppressive and unfair that a denial of the husband's request for relief warranted a finding of an abuse of discretion.⁹ However, the court said, since the effect of the ERA was to require that the wife's increased financial resources be considered, and since it was questionable whether the lower court's decision reflected her increase, a reconsideration of the case was necessary. The supreme court felt that "Combining the decrease in the father's income along with the additional income resulting from the mother's recently acquired employment provides a sufficient change in circumstances to warrant a modification of the original order."¹⁰

A question remains whether a change in the financial condition of only one party could ever constitute sufficient grounds for modification. Some cases suggest that such unilateral change is not sufficient,¹¹ but other cases hold that a change in the father's financial position alone will justify a modification, provided the deterioration or improvement is *substantial or material*. There are no definitive standards for substantial or material,¹² but if the ruling in *Dana* is to be followed,

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- (1) the financial resources of the child;
 - (2) the financial resources of the custodial parent;
 - (3) the standard of living the child would have enjoyed had the marriage not been dissolved;
 - (4) the physical and emotional condition of the child, and his educational needs; and
 - (5) the financial resources and needs of the non-custodial parent.

9. Warren Dana paid \$300 in child support from a net salary of \$600. The Pennsylvania Supreme Court held that these facts constituted insufficient grounds for modification without even commenting on the prior contradicting case of *Commonwealth ex rel. Bush v. Bush*, 170 Pa. Super. 382, 86 A.2d 62 (1952), cited in appellant Dana's Brief. That case held that a support order of \$225 was too high and should be reduced to \$180 where the father's monthly salary was \$655. Brief for Appellant at 12, *Conway v. Dana*, 318 A.2d 324 (Pa. 1974).

10. 318 A.2d at 326-27.

11. *Green v. Green*, 232 Ark. 868, 341 S.W.2d 41 (1960) (the expenses of the husband's new family on remarriage *together with* the wife's increased financial condition warrants a modification of the support decree); *Goldring v. Goldring*, 94 Cal. App. 2d 643, 211 P.2d 342 (1949); *Hensinger v. Hensinger*, 54 N.W.2d 610 (Mich. 1952) (the court hinted that if the husband's income had declined instead of remaining the same, he would have been entitled to modification of support if this factor could have been coupled with the wife's increase in income).

12. *Sandler v. Sandler*, 165 N.W.2d 799 (Iowa 1969) (a net increase of \$825 in the husband's income *and* the fact that the child had entered college justified a support increase from \$47 to \$75 per month); *Bryant v. Bryant*, 102 N.W.2d 800 (N.D. 1960) (a decrease of the husband's income from \$1,250 per month to \$1,100 per month did not constitute a substantial enough reduction in income, in light of his total income, to

Pennsylvania may well require more than 50% of net income to go for child support before a modification will be granted solely on the basis of one party's changed financial position.

Oklahoma, while claiming to follow the common law rule for support obligations, has actually established a coequal liability for the support of the children through its case law. There is no specific statement by the Oklahoma Supreme Court to this effect, nor is there much probability that Oklahoma is ready to order a wife to pay support, but it is certain that Oklahoma does consider the financial circumstances of the wife as a key factor in modifying a decree for support. From this point of view, the Oklahoma cases are in line with *Dana* although the result has been achieved through case law rather than an ERA.

As early as 1917, Oklahoma placed the duty of child support upon the husband.¹³ This duty has been periodically reaffirmed in subsequent case law. In *Green v. Green*,¹⁴ citing *Yahola v. Berryhill*,¹⁵ the Oklahoma Supreme Court stated that the court's power of supervision over the welfare of children is founded in equity, rather than law. The court also stated in *Green* and *Yahola* that the father's primary duty of support for his children was enforceable by statute¹⁶ as well as common law.

In the 1969 case of *Walsh v. Walsh*,¹⁷ the Oklahoma Supreme Court again affirmed the presumption that the father bears the primary duty of support. Yet the court modified the severity of this rule by taking cognizance of the wife's inheritance, and lowering the amount of the husband's support order.¹⁸ In *Walsh*, the wife cited Minnesota,

justify a modification of the decree); *Beard v. Beard*, 380 S.W.2d 730 (Tex. Civ. App. 1964) (the husband's financial condition had been changed substantially; however the change was brought about through remarriage, which cannot affect the duty to his children).

13. *Ahrens v. Ahrens*, 67 Okla. 147, 169 P. 486 (1917) (in discussing the effects of a contract of separation on a subsequent divorce, the court said: "This woman could not by contract relieve Mr. Ahrens of his obligation to his baby children, which the contract unqualifiedly attempted to do.")

14. 309 P.2d 276 (Okla. 1957).

15. 180 Okla. 637, 71 P.2d 968 (1937).

16. These cases do not cite to a particular statute, but it can be inferred that they refer to OKLA. STAT. tit. 10, § 4 (1971) which provides:

The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability.

17. 460 P.2d 122 (Okla. 1969).

18. The supreme court held that the trial court had not abused its discretion in lowering payments from \$450 to \$325 per month, where the wife's financial condition was substantially enhanced as a result of an inheritance even though the husband, paying the support, was also better off financially than when the support order had been entered. *Id.*

Florida, and Kentucky cases to bolster her argument that the primary duty of support is on the father, and therefore the mother's improved financial condition should not be considered in calculating the amount to be paid by the father. The court rejected this reasoning and chose to follow such states as California and Kansas, where the improved financial position of the wife is one of many factors to be considered in deciding whether or not grounds for modification exist.¹⁹

In *Walsh* the court also stated that the modification of child support orders came within the discretion of the trial court, and that its decisions were to be governed by considerations of justice and equity. Thus, by holding that the wife's financial condition is relevant in setting the amount of support, and by injecting equitable policies into this determination, the supreme court has made it possible for an Oklahoma district court to declare that equity and the best interests of the child require that the wife share the duty of support coequally with her former husband. In this way the Oklahoma court, without benefit of an ERA, has softened, if not removed, the presumption that the husband, because of his sex, is the party most able to provide support.

Conway v. Dana is the first case construing the Pennsylvania ERA, and it foreshadows the ERA's potential as a strong and powerful weapon in the fight against sex-based discrimination. In attempting to assess the impact of this case, it is important to understand why state or federal ERA's are now being utilized rather than existing constitutional safeguards such as the equal protection clause of the fourteenth amendment. The United States Supreme Court devised a two-tiered equal protection standard for testing the constitutionality of legislative classifications. A recent California case described this test:

We have followed the two-level test employed by the United States Supreme Court in reviewing legislative classifications under the equal protection clause. [Citations omitted.]

In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. [Citations.] On the other hand, in cases involving "suspect classifications" or touching on "fundamental interests," the court has adopted an

19. Cf. *Dodson v. Dodson*, 461 P.2d 937 (Okla. 1969) (the husband's increased expenses due to his subsequent remarriage were held to be a factor for consideration in modification of a support decree).

attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose.²⁰

Prior to the ERA, equal protection was the best available method of fighting sex-based discrimination in Pennsylvania. However it was not very effective since the Pennsylvania court had upheld state statutes which discriminated so long as the classifications were based upon ". . . reasonable and not arbitrary or capricious or unjustly discriminating differences. . . ." ²¹ Thus one can see that Pennsylvania had employed the reasonable classification test for equal protection rather than the suspect classification test which would subject a statute to close judicial scrutiny. Only California has declared classifications based upon sex to be inherently suspect.²²

The United States Supreme Court has consistently declined to declare sex a suspect legislative classification, and in a few cases it has employed the reasonable classification test. *Reed v. Reed*²³ concerned an Idaho statute which gave a preference to males in the selection of estate administrators. Chief Justice Burger, writing for a unanimous court, applied the reasonable classification test and declared that creating a preference merely to avoid hearings on the merits and to avoid intrafamily controversy constituted an arbitrary legislative choice, violative of the equal protection clause. Most recently, in *Frontiero v. Richardson*²⁴ four Justices stated that classifications based upon sex should now be declared suspect. However, the other four concurring Justices still refused to extend the strict test of equal protection that far. Three Justices, including the Chief Justice, in again declining to declare sex a suspect classification, held that it would be better for the

20. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 16, 485 P.2d 529, 538-39 (1971).

21. The statute referred to was the "Muncy Act" which provided for different length sentences for women than for men. *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968); see also *Adler v. Montefiore Hospital Ass'n of W. Pa.*, 311 A.2d 634 (Pa. 1973) (statutes which affect some groups of citizens differently than others are presumed to be constitutional if any state of facts will reasonably justify it. Only classifications based on alienage, race and nationality call for close judicial scrutiny); *McIlvaine v. Pennsylvania State Police*, 309 A.2d 801 (Pa. 1973) (notice was taken of the fact that four of eight United States Supreme Court Justices had declared sex to be a suspect classification in *Frontiero v. Richardson*, 411 U.S. 677 (1973), and the Pennsylvania court noted that this may be an emerging trend).

22. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971).

23. *Reed v. Reed*, 404 U.S. 71 (1971).

24. 411 U.S. 677 (1973).

people themselves to decide this issue by voting through their legislatures either for or against the ERA to the United States Constitution, than to have the Supreme Court make the choice for them on this controversial issue. Perhaps through these cases the Court has shown that equal protection will never become a clear-cut and reliable remedy to right the wrongs of sex discrimination. Many commentators have felt that the very make-up of the Supreme Court itself would prevent it from ever declaring classifications by sex suspect: "A Supreme Court apparently retreating from a period of activism and reform is unlikely to add women to the groups entitled to special protection under the fourteenth amendment."²⁵

Even if the Court should declare sex a suspect classification at some future date, the test of strict judicial scrutiny would still contain a possibly fatal weakness.

The suspect classification test provides a potential basis for more comprehensive protection against sex discrimination; under its operation, sex-based classifications would be considered "suspect" and subjected to strict judicial scrutiny. But because this doctrine allows the government to justify even a suspect classification by "compelling reasons," it would permit some classifications based on sex to survive.²⁶

Therefore the inference can be drawn that a constitutional amendment may indeed be necessary to completely outlaw *all* forms of sex discrimination.

In conclusion, *Dana* should convince any skeptics that an ERA will bring broad and immediate changes in the status of women under our present legal system. While equal protection has been effective in attacking sex-based discrimination in a few cases of obvious abuse, while hope has been held out that sex may be declared a suspect classification, and while states such as Oklahoma and Iowa, by case law and statute, have removed preferences based upon sex in the specific area of child support, nonetheless the equal rights amendment clearly offers more promise for the future than any of these methods as the best means of eradicating all forms of discrimination based upon sex.

Larry E. Evans

25. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 880 (1971).

26. Dorsen & Ross, *The Necessity of A Constitutional Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 216, 218 (1971).