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Legal Developments: The Status of The ERA Dr.

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Legal Developments

The Status of The ERA

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The ratification of the Equal Rights Amendment (ERA) is by no means an assured event. When the ERA was first passed by the Congress many States rushed to ratify the Amendment. Hawaii, by the way, was the first state to do so mainly because of the time zone differential. A total of 38 states is needed; to date, 30 have technically ratified it. Nebraska ratified the amendment and then later rejected it. The whole matter is in the courts now to determine if a state may override its own ratification. Of the 20 states left, four have not yet considered the amendment: Alabama, Arizona, Missouri and South Carolina. Sixteen more have *rejected* the amendment: Arkansas, Florida, Georgia, Illinois, Indiana, Louisiana, Maine, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Utah and Virginia.[1] Proponents of the ERA maintain that ten states will reconsider the "no" vote when those legislatures reconvene. Three of the four states that have not considered the amendment are Southern states and are expected to reject the ERA. If the Courts uphold Nebraska's nullification of its ratification and if three of the four states who haven't voted reject it, the ERA would pass *only* if Arizona and eight of the ten states reconsidering do ratify it. It is obvious that the ERA in in serious trouble.

Arguments Against the ERA

The somewhat recent negative status of the ERA can be attributed (at least in part) to an unfortunate backlash of anti-ERA forces. Groups such as the "Stop The ERA" are heavily funded and are very active at state levels. Such groups are quite vocal and rely mostly upon emotional scare tactics. A statement of their claims and an examination of the facts will serve to illustrate the point.

1. "An equal rights amendment is not even necessary since women have equal rights under the 5th and 14th amendments."

The Supreme Court of the United States has *never*, in any decision, declared women as "persons" entitled to equal protection under the 5th and 14th amendments. Even the November, 1971, decision that struck down an Idaho law which required that men be preferred over women in the appointment of estate administrators was not decided upon sex discrimination. The Supreme Court refused to consider that a presumption of illegality attaches to any sex-based classification. Instead, it held that the statute utilized an arbitrary method of achieving its goal of eliminating hearings and thus conserving time for probate courts![2] In March, 1972, the Supreme Court held that an Alabama ruling requiring a woman to take her husband's surname upon marriage was valid.[3] The Court affirmed the lower court in this case without opinion. These are only the recent cases that allow sex discrimination. Earlier cases have held that women cannot practice law,[4] that women can be excluded from jury service[5] and that women can be barred from attending a state-supported university (the latter decision was in 1960 but in 1938 it was held illegal to deny entrance to Negroes).[7] In addition, the 15th Amendment clearly did not apply to women as it took the 19th Amendment to grant the vote to women. Women are not now, nor have they been in the past, protected by the existing Constitution and its Amendments.

2. "The protective state labor laws would be struck down, much to the detriment of women."

This argument is ridiculous for several reasons. First, any laws protecting women from hazardous working conditions will be extended to include men; they will *not* be invalidated. Laws which "*deny* rights or restrict freedom of one sex . . . [will be] unconstitutional. Laws which *confer* rights, benefits and privileges on one sex would have to apply to both sexes equally, but would not be rendered unconstitutional . . ."[8]

Second, the so-called "protective" legislation has hindered, not protected, women. For example, the law which did not allow a woman to be a bartender unless she was the wife or daughter of the owner did not keep other women from scrubbing the barroom floors at night or from working at a very denigrating profession in the back rooms of that bar. The "protective" law of weight-lifting restrictions (at 35 pounds for women) was laughable because no one raised so much as an eyebrow when a mother carried around a 4-year-old child (who, if normal, certainly weighed at least 35 pounds). The "protective" restriction about women not being allowed to work overtime cut them out of lucrative time-and-a-half overtime pay. In addition, it did not prevent many women from working at two jobs at regular pay, so many women were, in effect, working overtime hours at regular time pay.

Finally, Title VII of the Civil Rights Act of 1964 outlawed these sex-defined "protective" laws. Unfortunately, they weren't completely eliminated because each woman had to litigate each law. The ERA would not require individual litigation but would require adherence by all States.

3. "Women will be drafted, thrown into combat and shot."

The United States no longer has a military draft. Women would be permitted to volunteer on the same basis as men. In World War II it was discovered that women effectively performed 75% of the military occupations. Women would be assigned to combat duty on the same basis as men: ability. If a woman was unfit she would no more be assigned to combat duty than would a color-blind, flat-footed man.

It sounds strange for people to be horrified over the thought of a woman soldier being killed in combat. Isn't it just as terrible for a male human being to be killed? Is it worse for a trained, equipped and armed American woman to be shot than for a Vietnamese female civilian who is not armed? Or a civilian baby who cannot even walk?

The major point the opponents overlook is that women are discriminated against in the armed services. Not only must they be high school graduates and subject to closer scrutiny than male volunteers,[9] they are barred from training which would qualify them for high-paying civilian jobs (airline pilot and air traffic controller, to mention only two). Instead, they learn typing, filing, shorthand, telephone operating, cooking, etc. — all low-paying occupations. A male serviceman gets a "dependency" allowance for his wife and children automatically; a women must prove her family's dependency. The wife of a military man automatically is eligible for medical and hospital benefits; a husband of a military woman is not entitled to an aspirin at a base hospital. Why should women be denied valuable training, opportunities and benefits?

4. "Women and children will be left homeless, defenseless, and probably hungry as the ERA will no longer require husbands to be liable for their support."

Again, this statement is invalid for several reasons. First, child support and alimony laws will not be invalidated: they will be extended to both sexes on the basis of ability and circumstances.

Second, the existing support laws do not apply in ongoing marriages:

> "Alarmists claim that the Equal Rights Amendment would change the institution of the family as we know it by weakening the husband's duty or marital support in an ongoing marriage. This concern is based on a misunderstanding of the role laws about support actually play. Many courts flatly refuse to enter a support decree when the husband and wife are living together. In most such cases the husband, as head of the family, is free to determine how much or how little of his property his wife and children will receive."[10]

Third, existing alimony laws are rarely applicable. "In this country permanent alimony is given in *less than 2% of all divorces* and then only where the marriage has been of long duration, and the wife is too old to be employable . . ."[11] In addition many states already have alimony laws that apply to both sexes.

Finally, existing child support laws leave the majority of divorced women with children supporting their children 100% and almost all divorced women supplying over 50% of the children's support.[12] One study[13] showed that only 38% of the fathers who were ordered to pay child support were in full compliance with the court order at the end of one year; 42% had no compliance and 20% had partially complied. At the end of ten years, only 13% were in full compliance, 79% had no compliance and 8% had partially complied. ("partial compliance" was defined as having made at least one support payment.) In effect, then, the vast majority of women who get custody of their children are burdened three ways: they must fulfill both parents' functions; they must provide the greater monetary support; and they must do so on a salary averaging 58% of their male counterparts'!

5. "If the ERA passes, men and women will have to share common bathroom facilities."

As ridiculous as this statement is, it is seriously stated by some. Of course the constitutional right of privacy will insure that men and women have separate bathroom facilities, segregated armed services quarters, that women suspects will be searched by policewomen, that male and female prisoners will have separate quarters, etc.

6. "All sex crime statutes will be invalidated."

Nonsense! Certain arbitrary sex laws will be invalidated (such as making a single man who has sexual intercourse with a married woman an adulterer but not a married man who has intercourse with a single woman). Prostitution statutes could no longer penalize only women, but their male partners as well. But certain crimes that can be committed physically by only one sex (rape, for example) will stay in the law.[14]

Benefits of the ERA

There are many other non-sensical arguments that deserve rebuttal but space does not permit doing so here. Instead, one can look (briefly) at the other side of the coin and see a few of the benefits of the ERA. First, the ERA will not affect private, personal family decisions. A woman can be a housewife if she wants to. The ERA applies only to *legal* restrictions or distinctions. Thus, a woman and her family can arrange their affairs in any way they see fit without the states' interference.

Second, women can no longer be denied equal job opportunities in work they are capable of doing. Third, they will not be denied the chance to become educated or trained for any occupation they wish. Their only restrictions will be self-imposed or physical — just like men are restricted — not legal.

Fourth, a married woman will no longer be classified with "infants and idiots" and will be able to enter business without having to go to court for permission. She will have control over her assets and salary.

Fifth, she will be given credit on exactly the same basis as men without reference to her sex or marital status.

Sixth, the Social Security laws will apply equally to both sexes so that a woman's husband can collect on her account without having to prove dependency. In reality, the present system has penalized married working women.[15] In addition, all governmental pensions would treat both sexes equally. (Women currently pay more than men.) The same is true of insurance.

Finally, women will be "persons" in the eyes of the law. It should be a wonderful feeling to be considered a human being by one's government after 200 years of second-class citizenship. However, the ERA is in desperate need of support in 14 states. It is imperative that women in those states write their legislators urging immediate ratification: who wants to be a "non-person" another couple of centuries?

Author's Note: I am deeply indebted to the Honorable Martha W. Griffiths for two reasons: (1) as a woman, I am grateful Ms. Griffiths wrested the ERA out of Committee (where her less fair-minded colleagues had sat on it for 50 years) and worked so hard for its passage. (2) As a researcher, I am indebted to her for her material on the ERA, Women, Employment and Discrimination and for her referral to several valuable sources for future columns.

Footnotes

[1]Status as of October 8, 1973, per Senator Henry Jackson's office.

[2]*Reed v. Reed,* 404 U.S. 71 (1971).

[3]*Forbush v. Wallace,* F. Supp. (M.D. Ala., 1971), Aff'd. mem., March 6, 1972).

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marginal rate, with $50,000 taxable income before dividends or Subchapter S profits.

In addition to the rather substantial overall tax savings under the Subchapter S set-up, the electing shareholders would never have to worry about the penalty tax on unreasonable accumulations of earnings. And — another big plus — the shareholders would have immediate access to the cash.

Obviously, the intended dividend policy of the corporation is an important consideration. There can be no argument that the election is not for those who plan to use the corporation to build up a large estate and bail out the earnings without paying income taxes, which (at least at the present time) is possible under estate tax regulations.

Also, the cash flow position of the corporation should be taken into account, since the shareholders will be taxed on the income whether or not the corporation is in a position to pay out the earnings. Cash distributions are always considered to be from current earnings, except that payouts made within 75 days of the end of the corporation's year are considered to be out of the undistributed earnings and profits of the preceding year. Previously taxed but undistributed earnings can be paid out tax-free to the shareholders as long as the cash payment exceeds the earnings and profits of the year of distribution.

As previously mentioned, the corporation's operating loss is available to the shareholders. However, the deductibility on the shaeholders' returns is limited to their adjusted basis in the stock and their basis in any loans that they have made to the corporation. Therefore, it is important to maintain that investment basis if losses are likely. Once again, continuous review of an electing corporation's financial situation is an absolute "must". But then, which business can afford to go very long without accurate financial information under today's conditions? Not many!

Tax Planning Tool

There are many situations in which the election is useful, but two situations are particularly advantageous. One is income splitting among family members and the other is retirement.

Ownership of the corporation's stock can be shared with minor children who would be in lower tax brackets. Thus, part of the income is taken out of the major stockholder's high tax bracket. However, caution must be exercised in this situation, since the IRS has authority to reallocate the income among family members if compensation for services is unreasonably low to shift income into profits. The other trap — if the parents want to claim the children as dependents, they may have to meet the support test. But within reason, this approach can save quite a bit of tax.

In a retirement situation, Subchapter S can be a real life saver. An example is a situation where a considerable age difference exists between the shareholders, and one of them is ready to retire. Past services and contributions to the success of the enterprise have been pretty much on a par and there is a very definite moral obligation to keep the outgoing shareholder in spending money. Simple — he or she shares in the profits after salaries to the remaining active shareholders under a Subchapter S election.

What about the situation of a single shareholder? A little more complicated, but still a good possibility with the election. First of all, a really good manager must be found who can take over the business and continue to run profitably. The profits after the manager's salary can be a pretty nice retirement income for the retired shareholder. Naturally, the Social Security Administration is going to be a little cautious about this particular situation and will send out a field representative to ascertain that the shareholder has in fact retired from the operation. Some limited involvement will be permitted, such as 45 hours per month, and of course the shareholder can earn $2,400 per year (starting in 1974) without losing the Social Security benefits. The really important question will be the amount of time devoted to the business after retirement. The profits received from the business as an electing shareholder will be passive income and, therefore, they will not cause loss of Social Security benefits.

Where There's Sun, There's Shade

Two other nice aspects of Subchapter S: compensation paid to officers and shareholders will hardly be questioned as unreasonable unless there is a substantial difference in the number of shares held and services rendered.

Also, the Personal Holding Company income trap for corporations which derive their income from their shareholders' personal services is not an issue with the election — there can't be any avoidance of tax at the shareholder level!

The "shade" is in the area of qualified retirement income programs for shareholder-employees. Contributions to the plan are limited to 10% of compensation (rather than 15% as in a regular corporation) or $2,500 annually. However, the limitations are not quite as severe as they are for Keogh-type plans for self-employed people, since contributions made to the plan in excess of the above limits, even though taxable to the shareholders when paid in, are permitted to accumulate tax-free in the retirement fund. Upon distribution at retirement, the previously taxed contributions are, of course, received tax-free. Also, under proposed tax changes, the same limitations would apply to "owner-managers" of regular tax-paying corporations.

Get All the Facts — Know the Whole Story

This is the inevitable conclusion. The tax advisor of an electing corporation cannot afford to miss any actions taken or any events taking place in the business operation and in the stock ownership.

Taken as a whole, the provisions of Subchapter S are definitely an act of benevolence on the part of Congress, and the "traps" are clearly spelled out, in plain view and avoidable. And they should not scare anybody away from incorporation. There does not have to be a double tax!

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[4]There were several lower court decisions on this matter and two in the Supreme Court, none of which have been reversed.

[5]*Strauder v. West Virginia*, 100 U.S. 303 (1879). This same case held that it was illegal to exclude black men. See also *Hoyt v. Florida*, U.S., 1961.

[6]*Allred V. Heaton*, 364 U.S. 517 (1960).

[7]*ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938)

[8]Citizens' Advisory Council on the Status of Women, *The Proposed Equal Rights Amendment to the United States Constitution – A Memorandum*, U.S.G.P.O., Washington, D. C. (March, 1970).

[9]Testimony of Martha W. Griffiths before Subcommittee #4 of the House Committee on the Judiciary — The Equal Rights Amendment — H. J. Res. 208, March 24, 1971.

[10]*Yale Law Journal* (Vol. 80, No. 5) p. 945.

[11]Una Rita Quenstedt & Carl E. Winkler, *Monograph No. 1*, Support Committee of the Family Law Section, American Bar Association, quoting a California Judge, 1965. Emphasis added.

[12]See the excellent study by the Citizen's Advisory Council On the Status of Women (Department of Labor Building, Washington, D.C. 20210) *The Equal Rights Amendment and Alimony and Child Support Laws*, January, 1972.

[13]Nagel & Witzman, "Women as Litigants," *Hastings Law Journal*, November, 1971.

[14]Yale Law Journal, *op.cit.*

[15]Martha W. Griffiths, *The Equal Rights Amendment and Social Security*, undated memo.