

# TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE

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## I. INTRODUCTION

Thank you for the opportunity to speak to you today about three important topics: child custody, family court reform, and economic justice for dependent spouses. As someone whose legal work and research have always focused on children and their interests, my primary focus in these remarks will be on the first two issues as they affect children. I want to highlight several themes. First, I will discuss what we know about children and divorce. This research leads me to several important recommendations to aid children through the process of divorce:<sup>1</sup>

1. The legislature should resist calls for a return to fault-based divorce under the guise of helping children by preventing divorce. Fault-based regimes will only further harm, not help, children. Pennsylvania should eliminate the quicker timeline currently given to fault-based claims for divorce over unilateral no-fault divorce actions.
2. Second, family court reforms can help parents cooperate in the best interests of their children. When parents are unable to do so, courts should act decisively to develop and implement final custody and visitation plans.
3. Third, Pennsylvania should retain its current standard for determining legal and physical custody. However, Pennsylvania should discourage relitigation of custody issues and ensure that child support levels are adequate to decrease economic hardship following divorce.

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<sup>1</sup>In developing this testimony and these recommendations, I am indebted to several individuals for their thoughtful advice and research assistance. I am especially grateful to Professor Jana Singer of the University of Maryland School of Law, Mary Hanna of the Temple Legal Aid office, Alicia Kelly, a graduate fellow in law at Temple University School of Law, Leslie Engle and Joni Berner, local family law attorneys, for their advice and expertise. I am also grateful to Heather Giordanella for her excellent research assistance. While I cite a number of references here, I found two recent publications especially helpful. Anna Davis, et al., *Mitigating the Effects of Divorce on Children Through Family-Focused Court Reform* (Abell Foundation, 1997) contains an excellent review of the social science literature on children and divorce and specific recommendations for family court reform. CENTER FOR THE FUTURE OF CHILDREN, *4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE* (1994) contains indepth articles on the many issues involved in divorce.

Finally, I will recommend that dependent spouses who have contributed to their families, particularly those who have done so for a long time, be considered eligible for a portion of the ongoing income stream earned by the partner who maintained a job and benefitted from the dependent spouse's support.

## II. CHILDREN AND DIVORCE

Many of us are disturbed by the high divorce rate of couples with children. While various studies point in different directions, there is no dispute that parental divorce places children at risk for numerous problems over a long period of time. These problems include emotional and behavioral problems, academic difficulties, teenage pregnancy, and difficulties forming long-term relationships with members of the opposite sex.<sup>2</sup> However, these are small, not great differences, and the detrimental effects of divorce are neither inevitable nor irreparable.<sup>3</sup> Three factors appear to be very important to children's adjustment: first, the level of parental conflict; second, the degree of economic hardship after the divorce; and third, the quality of parenting by both parents after divorce.<sup>4</sup>

Researchers agree that parental conflict often associated with divorce has a particularly harmful effect on children.<sup>5</sup> Parents who maintain high levels of conflict may be responsible for higher levels of anxiety and poor school performance among their children. When parental conflict is minimized, there are few differences between children from intact and divorced

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<sup>2</sup>See P. Lindsay Chase-Lansdale, et al., *The Long-Term Effects of Parental Divorce on the Mental Health of Young Adults: A Developmental Perspective*, 66 Child Development 1614, 1615 (1995); Paul R. Amato, *Life-Span Adjustment of children to Their Parents' Divorce*, 4 in THE FUTURE OF CHILDREN 143, 145-46 (1994); Joan B. Kelly, *Current Research on Children's Postdivorce Adjustment: No Simple Answers*, 31 Fam. & Conciliation Cts. Rev. 29, 1 (1993); Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 30 J. Am. Academ. Child Adolescent Psychiatry 349, 353-54 (1991).

<sup>3</sup>Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 THE FUTURE OF CHILDREN 143, 146-47 (1994). See also ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY AND MEDIATION 200 (1994); Joan B. Kelly, *Current Research on Children's Postdivorce Adjustment: No Simple Answers*, 31 Fam. & Conciliation Cts. Rev. 29, 31 (1993)(most children of divorce function within normal or average limits and are not as a group "disturbed").

<sup>4</sup>Anna Davis, et al., *Mitigating the Effects of Divorce on Children Through Family-Focused Court Reform* 4-7 (1997).

<sup>5</sup>Janet R. Johnston, *High-Conflict Divorce*, in 4 THE FUTURE OF CHILDREN 165 (1994); ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY AND MEDIATION 205 (1994).

families.

Children are also harmed by post-divorce economic hardship. Economic hardship forces children to move away from familiar schools, surroundings, friends and family members. Their custodial parent, most often the mother, often must return to work or increase her work hours to earn enough money, as well as assume complete responsibility for maintaining a home. These increased responsibilities reduce her energy for parenting just when her children's needs increase. She may also be under great stress from the new financial concerns. These financial difficulties are responsible for a large percentage of the negative impact of divorce on children.<sup>6</sup>

Third, children need positive parenting post-divorce, ideally from both parents. While the primary custodial parents' mental health and ability to maintain positive and consistent parenting is most essential to children, the research also suggests that children benefit from maintaining loving, consistent and supportive relationships with their other parent.<sup>7</sup>

For children, divorce doesn't happen the day divorce papers are finalized. It begins with their parents' increased conflict during marriage, continues throughout the immediate period of separation and divorce, and follows them throughout their childhood and young adulthood. Research demonstrates that our laws and court system can ameliorate the effects of divorce if they implement policies to reduce parental conflict, enhance post-divorce economic security for children, and improve the ability of parents to parent effectively and cooperatively after divorce.

### III. RECOMMENDATIONS

What measures can help children by reducing parental conflict, enhancing post-divorce economic security for children, and improving parents' ability to parent effectively and cooperatively after divorce?

#### A. RETAIN AND EXPAND NO-FAULT DIVORCE

First, most urgently, the legislature should resist the dangerous and misguided calls for a return to a fault-based divorce system. These calls are based on the erroneous assumption that eliminating no-fault divorce will keep parents together. Instead, fault-based divorce is more likely to increase greatly the animosity between divorcing parents and reduce the possibility that divorcing parents will cooperate in the future. Not only should the Pennsylvania legislature retain no-fault divorce, but it should eliminate its current preferential treatment of fault-based

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<sup>6</sup>John H. Grych & Frank D. Fincham, *Interventions for Children of Divorce: Toward Greater Integration of Research and Action*, 111 Psychol. Bull. 434 (1992).

<sup>7</sup>Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 in THE FUTURE OF CHILDREN 143, 145-46 (1994); Joan B. Kelly, *Current Research on Children's Postdivorce Adjustment: No Simple Answers*, 31 Fam. & Conciliations Cts. Rev. 29 (1993).

divorce claims. The current scheme only encourages parents who want a quick divorce to engage in high levels of destructive conflict.

A return to a fault-based system of divorce will not benefit children. First, we must recognize that divorce is not the problem; the problem is that one or both parents do not wish to reside together or share their lives. The stunning rise in the divorce rate actually preceded the advent of non-fault divorce in most states, and divorce rates have even fallen slowly since they peaked in the early 1980's.<sup>8</sup> Forcing people to remain separated rather than divorced will only complicate their lives and the lives of their children.

Let's be clear about how a fault-based divorce system works. It doesn't make anyone sit down and ask how to proceed in the best interests of their children. Instead, it requires the partner who wants to terminate the marriage to produce the most damaging evidence possible concerning the other partner's conduct. It requires divorcing parties to say bad things about each other, to humiliate each other in court filings and testimony.<sup>9</sup> This highly emotional, negative process is harmful to children while it is happening and does not provide fertile soil for parental cooperation when all of the mudslinging is over.

Rather than eliminate no-fault divorce and bring back fault-based divorce, I believe that Pennsylvania should retain no-fault divorce. In addition, right now, when only one party wants a divorce, he or she must wait two years unless the party proceeds on fault grounds. Therefore, a party who wants a divorce quickly has an incentive to seek the more divisive fault-based divorce.<sup>10</sup> This incentive should be eliminated. All divorces should be subject to a one year waiting period following separation.

Finally, we must get the message through that while the state will not require mudslinging to obtain a divorce, neither do one's responsibilities as a family member end upon divorce. Except for the occasional divorce that is sought after only a short marriage without

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<sup>8</sup>Proponents of fault-based divorce argue that no-fault divorce laws caused the higher divorce rates that began in the 1960's. However, there is a consensus among researchers that no-fault divorce reform had only a weak, if any, correlation with the rising divorce rates of the 1960s and 1970s. See, e.g., Martin Richards, *Divorce Numbers and Divorce Legislation*, 26 Fam. L. 151 (1996).

<sup>9</sup>There is a large amount of evidence that under fault-based schemes, the parties often colluded to fabricate the necessary grounds for divorce. Sanford N. Katz, *Historical Perspective and Current Trends in the Legal Process of Divorce*, 4 in THE FUTURE OF CHILDREN 44, 46 (1994). While this may demonstrate more parental cooperation than is readily apparent, it certainly does not further public confidence in the judicial system.

<sup>10</sup>Lawyers are advised to consider proceeding on fault grounds when "the goal is to accelerate the progress of the case." PENNSYLVANIA BAR INSTITUTE, FUNDAMENTALS OF FAMILY LAW (1997).

children, divorce with children cannot be the clean break that so many envision. Divorce is not the end of the family relationship, but an alteration to that relationship. Parents must continue to work together as parents under the vast majority of custodial arrangements. Spousal support and alimony may keep the former spouses in touch apart from children. Marriage with children is a permanent commitment. Even though the marriage ends, the commitment to parent children together and ensure financial stability for all family members does not end.

## **B. EDUCATE YOUNG ADULTS AND CHILDREN ABOUT MARRIAGE AND PARENTING**

Fault-based divorce is the wrong answer to the right question: why are so many parents divorcing? We ask divorce and custody law to do much more than is possible. If we want to prevent divorce, we can't focus on divorce law. Instead, we must look much earlier. We must start in elementary and secondary education. Instead of leaving marital relationships and parenting to the public arena of popular culture and the private arena of the family, we must treat them as topics of learning and discussion, like history and science. We are all familiar with the popular culture notion of love as instant gratification. As a society, we must contest this misleading vision and teach young people the skills of longterm commitment. We must also teach all students the fundamentals of child development. Understanding early on what children require may help parents cope with the often overwhelming demands of parenthood without turning on each other.

In addition, I support recent calls for waiting periods and incentives for couples who seek a marriage license to participate in pre-marriage classes. For those without resources or access to free or low-cost programs through religious institutions or other non-profits, the state should provide support to ensure that everyone has access to these classes. We should also be attentive to supporting programs, for example through evening classes run by local school districts or family mediation services, that help couples cope with the challenges of marriage and parenting. These preventive measures do, I believe, have the potential to reduce the divorce rate. They may also reduce rates of child abuse, which is often caused by parents' frustrations and lack of understanding of children's needs and capacities. We need non-stigmatizing ways to encourage couples to obtain assistance before their marriage is on the verge of a breakup. We need to support a culture of marriage and commitment to children, not by penalizing those who falter, but by supporting and educating those who choose to venture down those challenging paths.

## **C. WHAT COURTS CAN DO TO ASSIST CHILDREN DURING DIVORCE**

Because those who seek divorces must pass through the judicial system, the courts can serve as a focal point for the development of programs designed to aid all members of the family. No one reform standing alone may be successful; it is important that the range of services I recommend be provided together. These services include: mandatory parenting education programs, support groups for children; mediation; and requiring parenting plans; and expedited proceedings. In addition, the responsibilities of attorneys in family law cases should expressly include consideration of the best interests of the children involved. Judicial selection

and assignment should be designed to encourage continuity and expertise. Finally, I join others here today in urging the legislature to adopt, at least in experimental form, a unified family court system.

## 1. Parenting Education Programs

There are over 500 parent education programs nationwide related to children and divorce. Three states require all separating and divorcing parents to attend, while thirteen others authorize courts to implement these programs.<sup>11</sup> These programs vary widely. Here I will highlight one model that has gained strong support, but there are many programs from which the state legislature or local courts could choose.

One model project, called P.E.A.C.E., Parent Education and Custody Effectiveness) is located in nine New York counties. This program, primarily staffed by volunteer lawyers and mental health professionals, includes education about the legal process of divorce and separation as well as its financial and emotional impact on parents and children. An important focus of the program is how parents can help children cope with the major changes in their family life. Parents have responded well to this program, and many parents who attended only under duress later reported that they believed that other parents should be required to attend this program. Some of the concepts that participants have reported finding most helpful are: information about shared custody; learning to focus on the child's best interests; learning to communicate; how to cope with single parenthood; the importance of cooperation; and how to give their child a normal life postdivorce.<sup>12</sup>

While parenting education programs like P.E.A.C.E. will not solve all problems associated with divorce, they are an important part of a comprehensive approach to aiding children. Evaluations of programs across the country do show that they are effective in increasing problem solving skills, reducing relitigation rates, and directing parents away from damaging custody battles.<sup>13</sup>

In addition, these classes, which include information about the legal process of divorce, may be essential for the great number of persons who file for divorce and custody pro se. In Philadelphia, such filings constitute 80% of the docket, and while there are some volunteer programs, such as Kids Cap, that advise pro se litigants, most unrepresented persons in family court proceedings do not receive any assistance. Parent education classes can be an important

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<sup>11</sup>Andrew Schepard, et al., *The Push for Parent Education: Blueprints for Helping Families Cope with Divorce*, 19 Fam. Advocate 52 (1997).

<sup>12</sup>Andrew Schepard, et al., *The Push for Parent Education: Blueprints for Helping Families Cope with Divorce*, 19 Family Advocate 52 (1997).

<sup>13</sup>Anna Davis, et al., *Mitigating the Effects of Divorce on Children Through Family-Focused Court Reform* 16 (1997).

part of meeting the needs of pro se litigants.

The state legislature should require all local courts to develop a mandatory parenting education program and provide adequate funding for these programs to reach all divorcing parents and to evaluate their effectiveness.

## **2. Support Programs for Children**

Support programs for children can be based in schools, courts or other community centers. The goals of these programs are to help children feel like they are not the only ones going through this difficult process, to help children recognize and work through upsetting issues related to the divorce, to develop coping strategies for handling difficult feelings and family interactions, and to improve parent-child communication.<sup>14</sup>

These programs should be tailored to the developmental levels of the participating children. The Marriage Council of Philadelphia operates an extensive program here in Philadelphia.<sup>15</sup> We should look more closely at their model and those used in other jurisdictions to identify a menu of approaches from which different localities can choose. The state legislature should provide funding for local governments, school districts, courts, and nonprofit community groups to establish and evaluate the effectiveness of the various approaches selected.

## **3. Mediation**

In mediation, a neutral third party encourages parties to reach a mutually agreeable settlement of their dispute. Mediators help divorcing parents identify the issues that must be resolved, vent their emotions, clarify what is most important to them, and find points of agreement between them. A mediator can also raise concerns that children might have that the parents should address in their settlement.<sup>16</sup> Mediation emphasizes cooperative decision-making -- just the kind of decisionmaking that parents need to be able to do in order to benefit their children after their divorce.<sup>17</sup>

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<sup>14</sup>See, e.g., Neil Kalter, et al., *School Based Developmental Facilitation Groups for Children of Divorce: A Preventative Intervention*, 54 Am. J. Orthopsychiatry 613 (1984).

<sup>15</sup>Sherry Farmer & Diana Galaris, *Support Groups for Children of Divorce*, 21 Am. J. Fam. Therapy 40 (1993).

<sup>16</sup>Anna Davis, et al., *Mitigating the Effects of Divorce on Children Through Family-Focused Court Reform* 16 (1997).

<sup>17</sup>See Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 Fam. & Conciliation Cts. Rev. 373 (1996); Sanford N. Katz, *Historical Perspective and Current Trends in the Legal Process of Divorce*, 4 THE FUTURE OF CHILDREN

Mediation is currently being widely used throughout the country. I am not aware of how extensively it is used outside Philadelphia. Temple University School of Law participates in a small program here in Philadelphia that, unfortunately, reaches relatively few of the parents in family court. While in 1996 the state legislature passed legislation that permits courts to establish mediation programs, it has not provided needed funding to make these programs widely available.<sup>18</sup>

Pennsylvania should require divorcing parents to engage in comprehensive mediation concerning both custody and financial issues unless domestic abuse or other allegations make mediation inappropriate. While once again, mediation does not cure all problems resulting from divorce, it does appear to reduce parental conflict and future relitigation of issues. Both men and women express satisfaction with the mediation process, perhaps because unlike litigation, it provides both parents with the opportunity to obtain some of the outcomes that matter most to them.<sup>19</sup> The state must ensure that mediation resources are available to parents who participate.

Mediators should be instructed to encourage parents to consider their children's best interests in their agreements and ensure that no party uses threats or other coercive techniques to force agreements on the other party.

#### 4. Parenting Plans

Another device for helping parents focus on their parenting responsibilities that Pennsylvania should test and evaluate are mandatory detailed parenting plans. These can be used in conjunction with mediation or an adjudication of custody. A parenting plan requires parents to submit, either jointly or individually, a detailed plan for residential care, decisionmaking authority, transportation, and needed services such as health care.<sup>20</sup> Thus, rather than containing a general provision for "reasonable visitation," a parenting plan would specify which holidays and summer vacation time children will spend with each parent.<sup>21</sup>

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46, 53-55 (1994).

<sup>18</sup>23 PA. C.S.A. §§ 3901-3904.

<sup>19</sup>Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 Fam. & Conciliation Cts. Rev. 373, 379 (1996).

<sup>20</sup>Anna Davis, et al., *Mitigating the Effects of Divorce on Children Through Family-Focused Court Reform* 28 (1997); Robert Tompkins, *Parenting Plans: A Concept Whose Time Has Come*, 33 Fam. & Conciliation Cts. Rev. 286 (1995).

<sup>21</sup>Joan B. Kelly, *The Determination of Child Custody*, 4 in *THE FUTURE OF CHILDREN* 121, 132-33 (1994).

Parenting plans are a relatively new device that are not yet supported by a great deal of social science research. However, they appear promising if used in conjunction with parent education programs and mediation, and the legislature should establish experimental programs requiring parents to submit parenting plans in several localities across the state and evaluate their effectiveness.

## **5. Expedite Divorce and Custody Proceedings**

The matters that send parents to court over custody and other divorce-related issues are often important to resolve quickly if the parental conflict is not to damage children. The courts must be adequately staffed to ensure that lengthy waiting periods for both temporary and final custody and other orders affecting children are ended. This is especially important for temporary orders which are requested at an extremely confusing and difficult time for children. I do not have any statistics about these waiting periods, but in my conversations with family law attorneys in preparation for this testimony, the subject of lengthy waiting periods and the damage these waits inflict on children and families was frequently mentioned. Many attorneys remarked that often the exact custodial arrangement mandated by the court is less important than having a quick and final arrangement so that children can settle into their new routines with as little uncertainty and disruption as possible. The state should provide additional funding to ensure that there are enough judges and masters to move these case quickly to final resolution.

## **6. Attorneys in Family Law Cases Should Have Responsibilities to Involved Children**

The traditional model for client representation is of zealousness on behalf of the attorney's client and no one else. No where in the Pennsylvania Rules of Professional Conduct are attorneys required to consider the welfare of third parties. In fact, the comments to Rule 1.2 expressly tell lawyers to "defer to the client regarding such questions as . . . concern for third persons who might be adversely affected."

I believe that Pennsylvania courts should adopt the American Academy of Matrimonial Lawyers' voluntary Standards of Conduct. In particular, the Standards urge lawyers to consider the effects of their actions, and those of their clients, on the rest of the family.

The Standards liken the attorney's relationship to the children to the relationship between an attorney for a trustee or fiduciary and the beneficiaries to whom the fiduciary's obligations run. The Standards state:

One of the most troubling issues in family law is determining a lawyer's obligations to children. The lawyer must represent the client zealously, but not at the expense of children. The parents' fiduciary obligations for the well-being of a child provide a basis for the attorney's consideration of the child's best interests consistent with traditional adversary and client loyalty principles. It is accepted doctrine that the attorney for a trustee or other fiduciary has an ethical obligation to the beneficiaries to

whom the fiduciary's obligations run. To the extent that statutory or decisional law imposes a duty on the parent to act in the child's best interests, the attorney for the parent might be considered to have an obligation to the child that would, in some instances, justify subordinating the express wishes of the parent. For example, 'If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. For this analysis to be of benefit to practitioners, however, a clearer mandate must be adopted as part of the ethical code or its official interpretations.'<sup>22</sup>

Thus, Standard 2.23 states: "In representing a parent, an attorney should consider the welfare of children," and Standard 2.25 states that "[a]n attorney should not contest child custody or visitation for either financial leverage or vindictiveness." The standards also advise an attorney to refuse to assist in vindictive conduct and to avoid actions that would increase the emotional level of the dispute. The Comments advise lawyers to "attempt to convince the client to work toward family harmony or the interests of the children. Conduct in the interests of the children or family will almost always be in the client's long term best interests."

#### **7. Develop Judicial Selection Mechanisms to Foster Expertise and Continuity in Family Courts**

While not all jurisdictions have family courts, I encourage the legislature to provide some mechanism by which judges can run for positions of those family court divisions that do exist. Other localities should consider the benefits of a family court division. Right now, judges rotate through family court divisions, and often judges who sit in family court would prefer a different caseload. It would be better to ensure that those judges who deal with these difficult family issues have a real interest in them and can develop an expertise in them.<sup>23</sup>

#### **8. Unification of Family Court Proceedings**

I join others here today in recommending a unification of family court proceedings. Other jurisdictions have experimented with various methods of ensuring that families with family

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<sup>22</sup>AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY: STANDARDS OF CONDUCT 26-27 (1991).

<sup>23</sup>Under any assignment scheme, all judges who hear family law cases should receive ongoing education concerning the applicable law and child development concepts. Curriculum should include discussion of such issues as separation anxiety, continuity in relationships, and children's needs during and after divorce. This education is especially important because of the wide discretion judges are given in fashioning custody orders. Joan B. Kelly, *The Determination of Child Custody*, 4 THE FUTURE OF CHILDREN 121, 136 (1994).

law cases receive needed services and unification of proceedings if there is more than one type of proceeding involving the same family. I am especially concerned that matters involving dependency proceedings be unified with other court proceedings.

For example, Baltimore City has implemented a number of steps to coordinate services to families.<sup>24</sup> First, a Case Coordinator reviews every domestic relations case in which minor children are involved to coordinate referrals to various helpful services. The coordinators also seek outside funding to improve the court-related services offered and creates links with community resources that support families.

The court has also created mechanisms for expediting cases and for unifying issues such as domestic violence and child abuse proceedings. This permits judges to make their decisions with a fully developed factual and legal record. Those who represent parents and children in these various proceedings can describe how time consuming, emotionally exhausting and confusing these various proceedings can be. This approach seems especially well-suited for experimentation in Philadelphia which already has a family court division and such a high level of unrepresented litigants.

#### **D. Substantive Provisions of Law Affecting Children in Divorce**

##### **1. Custody Modifications**

Pennsylvania courts have interpreted 23 Pa. C.S.A. Sec. 5310 to permit courts to modify custodial arrangements whenever it is in the child's best interests to do so. Prior to 1988, parents could seek modifications to custodial arrangements only if there was a material change in circumstances. This new standard encourages parents who are unhappy with initial custodial arrangements, or who wish to harass their former spouse, to continually refile petitions for custody modifications. This relitigation is harmful to children because it increases parental conflict and creates uncertainty in children's lives. Custody should be modified only where there has been a material change in circumstances, and judges should be vigilant to ensure that modification petitions are not used as forms of harassment.<sup>25</sup>

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<sup>24</sup>Anna Davis, et al. *Mitigating the Effects of Divorce on Children through Family-Focused Court Reform* 31-32 (1997).

<sup>25</sup>The changing developmental needs of children should, however, qualify as a material change of circumstance where the current plan has been in place for several years and the child's needs have changed substantially. A preliminary report by a court-appointed expert may inform courts as to when such custody modifications should be permitted. Joan B. Kelly, *The Determination of Child Custody*, 4 *THE FUTURE OF CHILDREN* 121, 133 (1994).

## 2. Adequate Child Support

It has been widely reported nationally that the economic status of children postdivorce is often reduced dramatically, and that many children are placed at risk by postdivorce economic hardship.<sup>26</sup> Pennsylvania must ensure that its child support guidelines are adequate to care for children and that child support is actually collected.

I understand that Pennsylvania is currently revising its child support guidelines. I urge Pennsylvania to do its best to ensure that children, whenever possible, do not experience economic hardship following divorce. This may mean that judges need to take children's needs into consideration both in property divisions and in application of the child support guidelines. For most families, it is difficult to support two separate households. Support should be used, however, to help keep children in their homes and neighborhoods whenever possible, and to prevent any major dislocations in their lives.

In addition, division of the child support amount should not be tied to the number of days that a child resides with each parent.<sup>27</sup> A parent with limited income may resist shared custody if he or she worries that the child support award may then be so limited that it is impossible to provide a stable home for the child. In deviating from the child support guidelines in shared custody situations, courts must ensure that ongoing expenses, such as housing, are met, and should also look to which parent carries other ongoing expenses, such as clothing or lessons, that are not clearly tied to number of days in a particular home. It is important that Pennsylvania law clearly ensure both parents with shared custody adequate income to meet their children's needs so that financial concerns not prevent parents from agreeing to a shared custody arrangement that is otherwise in the best interests of their children.

Pennsylvania has taken steps to increase the percentage of child support that is collected. The state should be commended on its efforts and continue to review and evaluate its approach to ensure that child support is paid.

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<sup>26</sup>Jay D. Teachman & Kathleen M. Paasch, *Financial Impact of Divorce on Children and Their Families*, 4 THE FUTURE OF CHILDREN 63 (1994).

<sup>27</sup>Pennsylvania law states that "the support guidelines contemplate that the non-custodial parent has regular contact, including vacation time, with his or her children and that he or she makes direct expenditures on behalf of the children." Pennsylvania Rule of Civil Procedure 1910.16-5(m). See, e.g., *Coulter v. Coulter*, No. FD85-04620 (Ally. Cy. 1992) where a court reduced the child support amount by 20% where non-custodial parent spent 132 days per year with child.

## E. Economic Issues

I will now briefly discuss the economic issue of alimony for postdivorce spouses in Pennsylvania. Currently, the courts have discretion in awarding alimony which they deem reasonable, based on the "need" of the receiving spouse.<sup>28</sup> The Domestic Relations Act does provide a list of factors courts may consider in determining the "need" of the receiving spouse, including, for example, the standard of living established during the marriage, contributions by one spouse to the other's education, or the time necessary for one spouse to acquire sufficient education postdivorce.<sup>29</sup> Although some of these factors do look at spouses' contributions to their marriages, courts tend to focus only on the economic "need" of the postdivorce spouse and whether the spouse is self-sufficient by means of "appropriate employment."<sup>30</sup> Generally, alimony is awarded sparingly and is considered only a secondary remedy for spouses. Reluctance by courts to award alimony indicates that the alimony provision has failed to accurately account for women's contributions to their marriages.

Statistics show that a high percentage of postdivorce women and children experience sharp decreases in their standard of living, while men experience substantial increases in their standard of living.<sup>31</sup> Typically, women retain custody of children, increasing the cost of living for their households and limiting at least in some degree, women's ability to participate as fully as men in the workplace.<sup>32</sup> Child support only accounts for children's necessities and does not provide needed resources for maintaining a home.<sup>33</sup> These disparities indicate the importance of supporting women and children entering the postdivorce phase. Without a change in Pennsylvania's policy on alimony, this harmful decrease in women and children's standard of living will continue.

Under the alimony provision, alimony is not an entitlement for women. Even though the legislature has provided the means for courts to recognize contributions during the marriage, judicial focus on need alone continues to disadvantage many women and their children. The courts may believe that income belongs to the wage-earner, failing to evaluate sufficiently

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<sup>28</sup>23 PA. CONS. STAT. ANN. § 3701 (West 1991).

<sup>29</sup>23 PA. CON. STAT. ANN. § 3701.

<sup>30</sup>See June R. Carbone, *A Feminist Perspective on Divorce*, in 4 THE FUTURE OF CHILDREN 183, 190 (Spring 1994).

<sup>31</sup>See *id.* at 188. One study in California concluded that while men experienced a 42% increase in their standard of living, women experienced a 73% decrease in their standard of living.

<sup>32</sup>See *id.*

<sup>33</sup>See *id.* at 196.

women's contributions to their husbands' careers.<sup>34</sup>

The advent of no-fault divorce eliminated traditional justification for postdivorce spousal support. Under the fault divorce system, courts would consider the innocence and guilt of both parties in determining alimony awards. Alimony was awarded to "innocent" wives, the amount being based on the married couples' standards of living and the "guilty" husbands' ability to pay.<sup>35</sup> Although the idea under fault divorce was to make the guilty spouse responsible for the family, that approach failed to provide adequate support for women and children.<sup>36</sup> Again, I speak against the return of fault divorce principles. Instead, I believe there are other equitable rationales the legislature should consider in addressing this problem.

Both spouses in a marriage have worked jointly to develop the assets and income for the family. Most women who become primary caretakers when married marginalize or delay their careers to provide domestic services for their families. Other women decide to forgo college when entering marriage. Women who take on primary domestic responsibility provide their husbands with the opportunity to complete their education and to enhance their careers.<sup>37</sup> Awarding alimony for a limited amount of time for women to acquire adequate education or training postdivorce does not always compensate women sufficiently because it fails to recognize women's domestic contributions. Women often have sacrificed the opportunity to develop their own careers with the expectation that they will benefit in the long term by investing their resources in their husbands' careers and their families.<sup>38</sup> At divorce, the husbands often possess the main "investment" of the marriage - their earning capacity. In contrast, wives have forgone career opportunities which often cannot be replaced in the job market.<sup>39</sup> Alimony based on "need" cannot sufficiently address this failed agreement between spouses.

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<sup>34</sup>*Id.* at 194.

<sup>35</sup>*See id.* at 187.

<sup>36</sup>*See id.* at 189.

<sup>37</sup>*Id.* at 191-92.

<sup>38</sup>See June Carbone, *A Feminist Perspective on Divorce*, in *THE FUTURE OF CHILDREN* 183, 185 (1994). "Women miss out on the rapid increase in earnings men experience in their late twenties and thirties, the peak childbearing years for women." *See also* Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *Geo. L. J.* 2227 (1994) (describing "dominant family ecology" in which men become the ideal worker while women become the family caregivers, enabling the men to enhance their ideal worker status).

<sup>39</sup>Jana Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 *Geo L. J.* 2423 (1994)(explains how economic justification for alimony takes into consideration women's contributions to marriage and discards stereotypes of the fault-based divorce system).

I propose that the legislature adopt an income sharing provision for awarding alimony to postdivorce spouses.<sup>40</sup> Income sharing compensates women for the labor and the sacrifice they contributed to their marriages and for the continued labor of rearing children postdivorce. It ensures that women and children will not suffer a sharp decrease in their standards of living. Since the courts have failed to consistently follow the factors the legislature provided for determining alimony awards, focusing instead on the economic "need" of postdivorce spouses, it is important to limit court discretion in some manner.

The legislature can restrict court discretion by implementing a formula to calculate a fixed amount of alimony to be paid to the receiving spouse for a specific amount of time. The formula could equalize to the extent possible the living standards of both men and women postdivorce, lessening the harsh impact divorce has on women and children. The duration of the award could reflect the length of the marriage or the dependency of children.<sup>41</sup> For example, the formula might add the two spouses' incomes together, subtract child support from the aggregate amount (to be awarded to the custodial parent as child support), then allocate a substantial percent of the resulting combined income to each spouse. The length of the marriage should be a significant factor in determining the amount of future income to which a spouse should be entitled.

If the legislature is not willing to consider a formula for calculating alimony, it should clarify the existing alimony provision. The legislature should emphasize to courts the importance of providing women and children with a comparable standard of living.

## CONCLUSION

I hope the Committee finds these recommendations, which emphasize reducing parental conflict, increasing financial stability for women and children following divorce, and encouraging parents to work cooperatively to effectively parent their children throughout the divorce and postdivorce periods, useful in their deliberations on the future of family law in Pennsylvania.

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<sup>40</sup>See June Carbone, *A Feminist Perspective on Divorce*, in *THE FUTURE OF CHILDREN* 183, 194-96 (1994). See also Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *Geo. L. J.* 2227, 2257 (1994) (explaining that income-equalization reflects the "dominant family ecology," which suggests income of the family is jointly owned).

<sup>41</sup>See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *Geo. L.J.* 2227, 2260-61 (1994) (suggesting duration of alimony to last as long as children's dependency and after dependency ends, a period equal to one year for every two years married).