STATEMENT OF MARK R. ASHTON, ESQUIRE

CHAIR, PA. BAR ASSOCIATION FAMILY LAW SECTION

Good Morning;

Chairwoman Delozier, Chairman Briggs, and committee members, I'm Mark Ashton, Chair of the Family Law Section of the Pennsylvania Bar Association. I represent approximately 1,000 attorneys who are members of the Family Law Section and will be impacted by HB 1250. We appreciate the opportunity to appear before you today to provide feedback as to our grave concerns regarding HB 1250.

We know that lawyers don't attract much affection in our society although much as Americans love to hate lawyers, we have the highest concentration of them of any country in the world. Americans hate lawyers but they do love to litigate.

If you are a Pennsylvanian who loves to litigate either in the company of a lawyer or alone, the changes proposed in HB 1250 offer a feast of opportunities. That is because the bill as drafted entirely changes the landscape of how support obligations are imposed. Of equal, if not greater concern is that the bill works from a reference to "basic needs", a term not defined in this proposed legislation or elsewhere in the body of domestic relations law.

It is axiomatic that for so long as people have lived together, they have often found it preferable to live apart. This was true in ancient times and it was true when Pennsylvania became independent in 1776. The law at that time and today remains that where a spouse leaves another without justification the law allowed alimony; the amount "being settled at the discretion of the ecclesiastic judge on consideration of all the circumstances of the case. 1 Blackstone, Commentaries 421. At common law, it was said merely that the amount was to be "proportioned to the rank and quality of the parties." Id. The right to alimony was incorporated in Pennsylvania's first divorce law in 1785. Section X of the Act states:

"....If any husband shall either maliously abandon his family or turn his wife out of doors or by cruel and barbarous treatment endanger her life, or offer such indignities to her person, as to render her condition intolerable ...it shall be lawful for the Supreme Court ....to grant the wife a divorce from bed and board; and also to allow her such alimony as her husband's circumstances will admit, so as the same does not exceed the third part of the annual profits or income of his estate or of his occupation or labour."

The one-third rule prevailed in Pennsylvania for two centuries. It was not a rule without exception. Awards were always in the Court's discretion. *Breinig v. Breinig* 26 Pa.

161 (1856). *Shoemaker v. Shoemaker,* 5 District 449 (1896). See Freedman, Law of Marriage & Divorce in Pennsylvania Section 438 (1957).

The factors to be evaluated in making the award have been the subject of many cases decided before Pennsylvania became a no-fault jurisdiction in 1980. Awards were measured by wife's necessities, husband's ability to pay , the separate estate of the wife, the character, situation and surrounding of the parties "are all to be considered in determining a fair and just amount which the husband should pay to maintain the wife " Freeman, Section 452 fn. 11 citing *Hartje v. Hartje* 39 Pa. Super. 490, 497 (1909). However, the amount seems to have retained a one-third cap right down to the date the Divorce Code was amended in 1980. See *Wechsler v. Wechsler,* 242 Pa. Super. 356 (1976). The Court's discretion and references to ability to pay, need, character, situation and surroundings are still found in the appellate law after divorce became "no fault." See *Orr v. Orr,* 315 Pa. Super,. 168,171 (1983); *Litmans v. Litmans,* 449 Pa.Super. 209 (1996).

In 1985, the landscape changed at the behest of Congress. In 1984, Congress enacted the Child Support Enforcement Amendments of 1984 (CSEA). By this act, Congress required the states to put teeth into their child support laws and strengthen their enforcement powers, even as to non-Title IV-D families. This act effectively broadened the scope of federal regulation by insisting that states pass laws imposing defined rules for the imposition and collection of child support. The law also insisted that states promulgate child support guidelines.

Pennsylvania responded to this federal mandate with Act 85. It's key provision was 23 Pa.C.S. 4322 stating that: "Child and spousal support shall be awarded pursuant to a Statewide guideline as established by general rule of the Supreme Court, so that persons similarly situated shall be treated similarly. The guidelines shall be based upon the reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support." The statute then stated that primary emphasis in devising guidelines was to be placed upon the net incomes and earning capacities of the parties. 23 Pa. C.S. 4322 (a).

State guidelines were not promulgated until 1989. Importantly, from the beginning of the "guideline" era, the statute and the associated Supreme Court rules have stated that the guidelines are a rebuttable presumption and that awards may be tailored to "unusual needs, extraordinary expenses, and other factors" warranting special attention. 23 Pa.C.S. 4322. But if deviation occurred, the statute mandated that the reasons for the deviation were to be on the record (meaning "explained" by the court) on the basis that the guideline result was "unjust or inappropriate." 23 Pa. C.S. 4322(b). Five years later the Supreme Court ruled in *Ball v. Minnick,* that the guidelines were not merely a suggestion but a rule to be rule to be followed absent clearly specified reasons meriting deviation. 648 A.2d 1192 (Pa. 1994) In 1998, the Supreme Court issued rules describing nine factors that should be considered when deviation is sought. Pa.R.C.P. 1910.16-5. See also 1910.16-1(c)(2),

The guidelines were to be reviewed every four years. 23 Pa.C.S. 4322(a). The Supreme Court of Pennsylvania asked its Domestic Relations Rules Committee to assist with formulating guidelines and for many years the Committee has engaged an economist to review data provided principally by the U.S. Department of Agriculture to assess the

reasonable needs of children in households with net earnings ranging from $950 to $30,000 per month.

There are no similar data collected to determine the needs of a dependent spouse. And since state guidelines were promulgated the Supreme Court has never published how it decided upon the spousal support/alimony pendente lite formula. But it has been the same for 28 years. Support to a spouse is calculated differently if child support is involved from when it is not.

With children:

Obligor's earnings	$_____
Less: Obligee's earnings	$_____
Less Child support payable to Obligee	$----------
Equals	$_____ x 0.3

Without children

Obligor's earnings	$_____
Less: Obligee's earnings	$_____
Equals	$---------- x 0.4

Obviously, the 0.4 multiplier yields more than the one-third of income provision which dates back to 1785. But it first subtracts **the obligee's earnings before** imposing any support amount. A plausible explanation for the percentage change is that since Congress began to regularly tax income pursuant to the 16th amendment to the Constitution, it has granted obligors a deduction of any support paid to a spouse from income. It has also shifted that deduction so that the obligee now reports the support payment as income. In 1785 and until 1913 there was no regular federal income tax and the effect of that shift in taxation probably effectively reduces what an obligee receives to the historic one-third after payment of income taxes.

The language of the proposed bill refers to "basic" support. This is a new term to Pennsylvania law. Historically, support has been based on ability to provide and lifestyle. **The case law discusses "comfortable maintenance"** *Com ex rel. Milne v. Milne*, 29 A.2d 228 (Pa. Super 1943). **Other cases refer to support "equivalent to the standard of living" to which the obligee was accustomed."** *Com. ex. rel. Goodyear v. Goodyear*, 411 A.2d 550 (Pa. Super. 1980); *Com. ex rel. McGavic. v. McGavic*, 294 A.2d 795 (Pa. Super. 1972). But there is also case law stating that the awards are not intended to be confiscatory, or to effectively divide assets between the parties or to be ordered from party who is otherwise on public

assistance. *Com. ex rel. Shumelman v. Shumelman*, 223 A.2d 897 (Pa. Super. 1966); *Ford. v. Fitzgerald,* 422 A.2d 657 (Pa. Super. 1981)

So, in a sense, Pennsylvania has had a "guideline" for more than two centuries but that guideline has always been just that; a guideline and not a hard and fast rule.

In a pecuniary sense, the bar should welcome the proposed change in the law. Every support case would result in a trial as each case has unique facts and there is no precedent for how "basic" support, the term used in HB 1250 would differ from "reasonable" support or the guideline formula now in place. Today, I can tell any client with a reasonable degree of certainty how much support he or she will either receive or pay. Under HB 1250, I can assure them only that I will do my best at a trial to persuade the assigned judge or master that "basic" needs will be addressed. What is basic? It will depend upon the judge and the day so the same facts will produce different results across the Commonwealth. I have tried cases where a judge in Philadelphia has told me that my client in Centre County doesn't need much support because it is so inexpensive to live there.

Statewide guidelines took us away from that. It is consistent with what the legislature directed in 1985. It provides for uniformity across the state. It means that a carpenter making $90,000 a year in Philadelphia pays 30-40% as spousal support in Philadelphia County. That same carpenter might earn $60,000 a year in Erie County but the percentages are consistent. Except for those who are self-employed, the calculation is relatively easy to perform and can often be done without employing a lawyer. Perhaps most important to the integrity of the judicial system; the result is the same in every courtroom. That means, there better be a reason to litigate that can be explained.

Are there inequities that occur? Yes, there are. An obligor who is paid a lump sum severance or wins the lottery while his or her divorce is pending, receives "income" that is divisible under the support guidelines. This can and does produce windfalls and the current prescribed grounds for deviation do not make allowances for them. But, these are aberrations rather than daily problems and they do not merit a re-writing of the support law that has been long established.

In summary, we have an imperfect system but it produces uniform results that are easily ascertained. They save litigants thousands of dollars they would otherwise spend in trials and they save judicial costs by reducing the number of trials needed. While the guidelines are uniform, the law is clear that they are rebuttable. We submit that this is an area of domestic relations law where there is no need for a fix and that the fix under consideration is one which will profit the bar at the expense of your constituents. It pains me to say it, but these are litigation dollars that the bar is not looking to capture.

For these reasons, the Pennsylvania Bar Association opposes HB 1250. Thank you for affording the PBA this opportunity to address HB 1250 .