

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY

In re: HB 1290

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Stenographic report of hearing held
in Room 8 East Wing, Main Capitol
Building, Harrisburg, Pennsylvania

Thursday,
May 24, 1990
10:00 a.m.

HON. THOMAS R. CALTAGIRONE, CHAIRMAN
Hon. Kevin Blaum, Subcommittee Chairman on Crime
and Corrections

MEMBERS OF COMMITTEE ON JUDICIARY

Hon. Michael E. Bortner	Hon. Paul McHale
Hon. Michael C. Gruitza	Hon. Nicholas B. Moehlmann
Hon. Lois S. Hagarty	Hon. Jeffrey E. Piccola
Hon. David W. Heckler	Hon. John F. Pressmann
Hon. David J. Mayernik	Hon. Karen A. Ritter

Also Present:

David Krantz, Executive Director
Katherine Manucci, Majority Staff
Ken Suter, Republican Counsel
Mary Beth Marschik, Republican Research Analyst

Reported by:
Ann-Marie P. Sweeney, Reporter

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1 CHAIRMAN CALTAGIRONE: We'll open up the
2 public hearing on House Bill 1290 by the House
3 Judiciary Committee.

4 I'd like the members to please introduce
5 themselves from my left, we'll work our way around, and
6 the staff that are present.

7 REPRESENTATIVE PRESSMANN: Representative
8 John Pressmann, Allentown.

9 REPRESENTATIVE HECKLER: Representative
10 David Heckler, Bucks County.

11 REPRESENTATIVE BORTNER: Representative
12 Mike Bortner, York.

13 CHAIRMAN CALTAGIRONE: Representative Tom
14 Caltagirone, Berks.

15 REPRESENTATIVE MCHALE: Representative
16 Paul McHale, Lehigh County.

17 MR. SUTER: Ken Suter, Republican
18 Counsel.

19 REPRESENTATIVE PICCOLA: Representative
20 Jeff Piccola, Dauphin County.

21 CHAIRMAN CALTAGIRONE: We'd like to start
22 off the hearing today with remarks by the prime sponsor
23 of the bill, Mike Bortner.

24 And I'd like to mention to the committee
25 members and guests present that I'm going to have to

1 leave shortly. I have a class tour coming up with some
2 elementary students and they're expecting my presence
3 in the Rotunda, so as soon as David comes here I'm
4 going to have to leave, but please continue on with the
5 hearing and Mike will handle it.

6 REPRESENTATIVE BORTNER: Thank you very
7 much, Mr. Chairman.

8 My remarks are going to be brief, but
9 perhaps just if I could set a little bit of the
10 background for this legislation.

11 House Bill 1290 was introduced at the
12 beginning of this session. A similar bill had also
13 been introduced last session and the number of that
14 escapes me right now, but the legislation was similar.
15 When we introduced the bill again this term, we did
16 make some changes based on some suggestions, some input
17 that we had received following that first go-around
18 with the legislation.

19 The legislation is really the result of
20 the work of the Permanency Planning Task Force, which
21 has met and which continues to meet on a number of
22 issues concerning custody and visitation, partial
23 custody, issues involving children. We will hear from
24 -- the first witness will be one of my Common Pleas
25 judges, Judge Cassimatis, who is a member of that task

1 force and who has worked very hard on the issue.

2 We've solicited a lot of input from
3 around the State on the issue from advocacy groups who
4 support the legislation, from judges, and the survey
5 has been sent out to judges, and I'm sure Judge
6 Cassimatis will comment on that to a certain extent, on
7 how other judges, particularly those judges that are
8 dealing with children, have responded to the
9 legislation.

10 One of the things that I guess I was --
11 that brought my attention to this legislation was, I
12 guess, a recognition that presently siblings,
13 stepparents, even grandparents who may have had a very
14 close relationship with a child, do not have the right
15 to petition for custody, partial custody, or visitation
16 where there is a surviving parent. The other thing I
17 try to remind people of when they ask questions or look
18 at this legislation is that this legislation, and I
19 think this is important, does not require a court to
20 give any rights or to provide any access to a child to
21 anybody who would qualify as a psychological parent.
22 All this legislation does is merely allow them to
23 permit the court to consider their case on an
24 individual basis. In other words, it gives that person
25 standing to come into court and make their case. The

1 test is still the best interest of the child. That
2 doesn't change at all under the legislation.

3 There's been a lot written in the
4 literature recently on the changing status and the
5 changing relationship that people have to children. I
6 think this legislation recognizes that there are some
7 differences out there from the traditional nuclear
8 family. Ward and Fran Cleaver may exist out there, but
9 they certainly aren't as common as they have been over
10 the past, and this recognizes that as these
11 relationships change, perhaps the law may have to
12 change to meet the needs of children and psychological
13 parents as well.

14 I think with that, Mr. Chairman, I'd like
15 to turn it over to our witnesses who can speak more
16 directly to some of these particular issues.

17 Thank you.

18 CHAIRMAN CALTAGIRONE: Thank you.

19 We've had Representative Ritter and
20 Representative Hagarty join us. And we'll--

21 REPRESENTATIVE BORTNER: If I could just
22 point out one other thing, and I don't know if she
23 would care to make any comments now, Lois Hagarty, who
24 has joined us, has also worked very, very closely on
25 this legislation and is probably as much a cosponsor as

1 anything. So I'm glad Lois is here today as well as.

2 REPRESENTATIVE HAGARTY: Thank you, Mike.

3 No, I have no comments. I'm anxious to
4 hear the witnesses on it.

5 Thank you.

6 CHAIRMAN CALTAGIRONE: Judge, would you
7 like to lead off, sir?

8 JUDGE CASSIMATIS: Mr. Chairman and
9 members of the Judiciary Committee, I appreciate the
10 opportunity to be here and as it were present to you
11 the thinking of the Permanency Planning Task Force of
12 Pennsylvania in its urging your consideration of the
13 issues in this bill. It is to urge your support of the
14 best interest of the child standard in custody issues.
15 Lip service is always paid to the best interest test,
16 but the reality is that the vitality of its application
17 has been diluted, and in some instances even lost sight
18 of. To redress this problem in significant measure,
19 the Pennsylvania Permanency Planning Task Force
20 recommends passage of House Bill 1290.

21 The focus of House Bill 1290 is twofold.
22 First, to recognize the standing of adults with whom a
23 child has bonded, to be a party in that child's custody
24 case; and second, to abolish the presumption that
25 parents merit custody absent convincing or compelling

1 contraindications that such would not be in the best
2 interest of their children.

3 In Ellerby v. Hooks, a very, very
4 significant landmark case, a decision of our
5 Pennsylvania Supreme Court in 1980, Justice Flaherty,
6 in a concurring opinion joined in by Chief Justice Nix,
7 said the following -- perhaps I ought to set the stage
8 for you. In Ellerby v. Hooks, a young girl of 11 had
9 been living with her grandmother since she was less
10 than two years old. The father came in at age 11 and
11 wanted custody, and the court applied -- the trial
12 court did not apply the strict heavy burden of proof
13 case that a third person has in seeking custody as
14 against a parent and found custody for the grandmother.
15 The Superior Court reversed and said that a standard of
16 proof which a third person has against a parent which
17 is the traditional test which I enunciated earlier, and
18 they reversed the trial court's findings. The Supreme
19 Court then said the Superior Court was right, the test
20 they applied was the correct test and the test that the
21 trial judge applied was not correct, but on the
22 analysis of the facts, the child still should have been
23 with the grandmother.

24 So this shows you the kind of problems
25 you run into when you're dealing with third persons,

1 grandparents -- and that was before the Grandparent's
2 Amendment to the act -- and parents and burdens of
3 proof and how is it applied on given facts?

4 Now, Justice Flaherty wrote a concurring
5 opinion joined in by Nix in Ellerby and said, "The
6 legitimacy of determining custody by means of such a
7 presumption is questionable. Instead, we believe that
8 our court should inquire into the circumstances and
9 relationships of all parties involved and reach a
10 determination based solely upon the facts of the case
11 before the court. The same reasoning should apply when
12 the custody dispute is between parents and third
13 parties.

14 "The prima facie right here question
15 arose not as a property right but rather as a
16 reciprocal of the obligation to care for, support,
17 maintain, and educate one's offspring. Furthermore, it
18 was founded on the premise that the affection flowing
19 between those standing in the relationship of child and
20 natural parents surpasses that existing between a child
21 and any other person. Nevertheless, the underlying
22 tenor of the presumption reflects an archaic concept
23 that children are proprietary assets of parents.
24 Serious question may be posed with respect to the
25 soundness of that priorism, that mere biological

1 relationship assures solitude, care, devotion, and love
2 for one's offspring.

3 "Certainly when such closeness exists
4 parenthood would be a strong factor to be prominently
5 weighed in determining a child's best interest, since
6 effective parental affiliation is in itself a value to
7 the child. However, where a third person better
8 fulfills these needs or where other circumstances
9 indicate third-party custody to be preferable, the
10 courts, when exercising judgment as to a child's
11 welfare, should not be restrained solely by a
12 presumption.

13 "The view that parents have a prima facie
14 right to custody which will be forfeited only if
15 convincing reasons appear that the child's best
16 interest will be served by an award to a third party
17 should be replaced with a rule which would simplify and
18 clarify application of the best interest standards. By
19 clearly eliminating the presumption per se and
20 mandating that custody be determined by a preponderance
21 of the evidence, weighing parenthood as a strong factor
22 for consideration," and that was emphasized in italics
23 in the opinion, "custody proceedings would be
24 disentangled from the burden of applying a presumption
25 that merely beclouds the ultimate concern in these

1 cases - the determination of what affiliation will best
2 serve this child's interest, including physical,
3 emotional, intellectual, moral. And spiritual
4 well-being."

5 That's the end of the comment about
6 Ellerby.

7 The historical premise that the family is
8 the preferred social unit in our society retains its
9 vitality. Our highest value is that parents raise
10 their children in nuclear families whose membership is
11 the married couple and their dependent children.
12 Increasingly, however, children do not live in
13 traditional nuclear families. Quoting from Newsweek's
14 issue this past winter, spring, do you remember, on the
15 changing of the American family it had this to say:

16 "The divorce rate has doubled since 1965
17 and demographers project that half of all first
18 marriages made today will end in divorce. Six out of
19 10 second marriages will probably collapse." And as a
20 footnote, there were close to 7 million children living
21 in stepfamilies in 1985. Those are the latest figures
22 for which stepchildren figures were available from the
23 Census.

24 "One-third of all children born in the
25 past decade will probably live in a stepfamily before

1 they are age 18. One out of every four children today
2 is being raised by a single parent. About 22 percent
3 of children today were born out of wedlock; of those
4 about a third were born to a teenage mother."

5 Those are facts. That is the change that
6 is occurring in how families exist and the context in
7 which children are raised.

8 Children affected by these circumstances
9 often form attachments to adults outside of the
10 conjugal nuclear families to stepparents, foster
11 parents, and other caretakers. In such situation, the
12 child's needs for continuity and ultimate relationships
13 demands that the law provide the opportunity to
14 maintain important familial relationships with more
15 than one parent or set of parents.

16 How has Pennsylvania accommodated
17 children's relationships with nonparents, third
18 parties? Prior to the Custody and Grandparents'
19 Visitation Act, the law regarding visitation, let alone
20 custody, by nonparents was not well settled. Let me
21 give you a very brief summary from Burton's
22 Pennsylvania Child Custody Law.

23 "In an attempt to enunciate a standard
24 applicable to third-party visitation petitions,
25 Superior Court in Commonwealth Pa. Super Williams v.

1 Miller offered that, quote, 'When seeking visitation, a
2 third party must show reasons to overcome the parent's
3 prima facie right to uninterrupted custody. Since a
4 visitation decree is less intrusive than an order
5 granting full or partial custody,' the court noted that
6 'the third party's burden should be correspondingly
7 lighter. Thus, as the amount of time requested moves
8 the petition away from a visitation and closer to a bid
9 for custody, the reasons supporting the petition must
10 be increasingly more convincing.'

11 "The court was also quick to note that
12 'the test was not intended to invite suits by
13 well-meaning strangers and that in such cases the
14 stranger's burden of proof would be extraordinarily
15 heavy. As such, some substantial prior contact or
16 blood relationship to the child would appear to be a
17 prerequisite to the grant of a visitation request.'

18 "A growing number of grandparents were
19 being affected by the divorces of their progeny and
20 were refusing to reticently fade out of the lives of
21 their grandchildren. The courts have had numerous
22 occasions to preside over grandparents' visitation
23 actions. In relation to other types of third-party
24 litigants, grandparents appear to have a decided edge
25 when seeking visitation because it had been noted that

1 there are benefits which devolve upon the grandchild
2 from the relationship with his grandparents which he
3 cannot derive from any other relationship.

4 "Moreover, in some cases the grandparents
5 filled the role of substitute parents for the child
6 during difficult times in the lives of the child's
7 parents and formed bonds of affection which courts were
8 hesitant to sever, particularly where the relationship
9 had been prolonged, beneficial and mutual."

10 I'm reading all this because you could
11 substitute for the words "grandparents" in there
12 "people or adults who have formed a bonded relationship
13 with a child." Exactly the same considerations are
14 involved.

15 "The Custody and Grandparents' Visitation
16 Act devotes three separate sections to visitation by
17 grandparents and great-grandparents. The first
18 involves the death of a parent, the second involves
19 divorce of the parents, and the third involves
20 grandparents and/or great-grandparents who have resided
21 with the child for a period of 12 months or more. In
22 all sections, a court may order visitation upon a
23 finding that the same will be in the best interest of
24 the child and would not interfere with the parent/child
25 relationship."

1 That's the end of that text comment.

2 With respect to third persons other than
3 grandparents, the law today is at a similar stage of
4 development as it was to grandparents before the
5 passage of the Custody and Grandparents' Visitation
6 Act. Increasingly, cases are decided on their merits
7 applying the burden of proof test enunciated in Ellerby
8 v. Hooks. None of these cases appear to discuss
9 standing. That is, the right of a third party to seek
10 visitation, partial or majority custody of a child.
11 Just as it was appropriate to enact the Custody and
12 Grandparents' Visitation Act, it is now appropriate to
13 afford to nonparents, third parties with whom the child
14 has formed strong attachments, the same standing as was
15 accorded grandparents.

16 The Permanency Planning Task Force
17 recommends as well that in appropriate circumstances
18 where the best interest of the child dictates that even
19 majority custody be permitted to the third party.

20 Let me illustrate by two cases I had
21 personally in the context of Juvenile Court. In the
22 first, a young girl was raised from a few months after
23 birth until about age 7 by her paternal aunt. The
24 relationship was solid and the child was doing well.
25 The mother was never involved, the father was serving a

1 lengthy sentence in a State correctional institution.
2 As the father got out of prison on parole, he wanted
3 custody of his daughter. He had never really seen her
4 and his contacts were not more than a greeting card and
5 birthday cards and perhaps Christmas, very irregularly
6 sent. The aunt couldn't understand why she had to
7 engage a lawyer at her expense to contest the father's
8 effort, let alone the whole issue of her heavy burden
9 of proof and how the father sending a few cards now and
10 then might be construed by a court as negating any
11 intent on his part to abandon or terminate his parental
12 relationship.

13 In the second case, a father, upon his
14 divorce from the mother, got custody of his young boy.
15 He remarried. For a significant part of that young
16 boy's life his stepmother was his primary nurturing
17 parent. During the boy's early adolescence, the father
18 left their home and also left custody of his son with
19 the stepmother. Later, he wanted custody of his son,
20 who wanted to remain with the stepmother. In fact, the
21 stepmother was a much more stable person and the boy
22 had a very positively, mutually satisfactory
23 parent/child relationship.

24 In both of these cases, majority custody
25 was given to the third persons - the aunt in the first

1 and the stepmother in the second. It could be done in
2 the context of the Juvenile Court jurisdiction. In a
3 broader, plain custody case the outcome might have been
4 different.

5 The Permanency Planning Task Force
6 conducted a survey among Juvenile and Orphan's Court
7 judges, Children and Youth administrators, and member
8 agencies of the Pennsylvania Council of Children's
9 Services. Let me tell you the context in which that
10 survey arose. As Representative Bortner said, House
11 Bill -- I think it was 1600--

12 REPRESENTATIVE BORTNER: 1600.

13 JUDGE CASSIMATIS: --was the first bill
14 that was presented and the Permanency Planning Task
15 Force and the Juvenile Court Judges Commission sought
16 comments on this from practitioners in the field -
17 judges and others - and there was feedback that there
18 were some weaknesses in it. There seemed to be general
19 support for the concept, but the extent of the support
20 was uncertain. You never know when you get feedback
21 like that are you only hearing the negatives and are
22 the people who are for it not responding?

23 So this led to the Permanency Planning
24 Task Force conducting a survey, and the survey was
25 conducted among, as I said, the Juvenile and Orphan's

1 Court judges -- Orphan's Court judges because they are
2 involved in the termination of parental rights in
3 adoption proceedings -- Children and Youth
4 administrators, and also member agencies of the
5 Pennsylvania Council of Children's Services. The
6 survey shows overwhelming approval of the enactment of
7 legislation to provide, one, for legal status of
8 psychological parenthood in some form, 83.9 percent to
9 16.1 percent. A significant majority, 71.4 percent to
10 28.6 percent, supported placing psychological parents
11 on the same footing as biological or legal parents so
12 far as burden of proof is concerned.

13 Those two findings, I suggest to you, are
14 incredible, when you have the people who are working in
15 the field are saying by 84 to 16 percent that
16 psychological parenthood ought to be accorded some
17 legal status in custody proceedings, and secondly, when
18 you get 71 to 29 percent saying the burden of proof
19 footing ought to be the same for biological parents and
20 psychological parents. There were other conclusions in
21 the survey. I think copies have been provided to you
22 and you can see the results.

23 As a result of the survey, the Permanency
24 Planning Task Force decided to fine tune its definition
25 of psychological parenthood and the original bill

1 provided that an adult who had spent 12 months with the
2 child evidencing genuine care and concern for the child
3 and for whom the child evidenced genuine care and
4 concern and whose relationship with the child began
5 with the consent of the parent of the child or pursuant
6 to an order of court and that existed for 12 months,
7 was aloft to kick in psychological parent standing. As
8 a result of the survey, most of the comments about the
9 precise wording and definition of psychological parents
10 were concerns about the length of time involved, and so
11 what the Permanency Planning Task Force did was to go
12 back and study the literature on this, and your
13 committee, Representative Bortner, was also provided
14 with a report from Bob Geoffrey which he gave to the
15 committee, to the subcommittee, and as a result of
16 that, it broke down this length of time into two
17 categories, recognizing the different biological senses
18 of time that children have. Where a child who was
19 three years of age or younger at the time of placement,
20 then the period of time is 12 months with the
21 psychological parent, and where the child was three
22 years of age or older at the time of placement, then
23 the requirement is for at least 24 months of time with
24 the psychological parent.

25 I might comment at this point, I was

1 going to comment on this at the end. I think it's kind
2 of unfortunate that we've used the word "psychological
3 parent". "Psychological parent" or "psychological
4 parenthood" has some baggage on it where you can see
5 some of the first appellate court cases that deal with
6 this almost giving it the back of their hand. In fact,
7 I've had judges who do a lot of work in this field tell
8 me that they avoid using the words "psychological
9 parent" when they're deciding cases on really the basic
10 fundamental issues that are involved - the bonding and
11 attachment that has occurred between the child and the
12 parent - because of this baggage that is attached to
13 the words "psychological parent". And I wish there was
14 some better word or words for it. I don't think you'll
15 find that the Permanency Planning Task Force is whetted
16 to these two words. If there were some better, more
17 descriptive words to do it that would convey the
18 meaning and intent, that would be fine and it would be
19 even preferable because it would not be carrying this
20 baggage, as I say.

21 In conclusion, the Permanency Planning
22 Task Force and House Bill 1290 does not seek or promote
23 the erosion of the quality or sanctity of parents'
24 rights in raising their own children in nuclear
25 families. As can be seen from House Bill 1290, it does

1 not have any application in an intact nuclear family.
2 What it does is to recognize that an increasing number
3 of children do not live in traditional nuclear
4 families. The reasons for this are familiar: More and
5 more parents obtain divorces resulting in single parent
6 families, or as divorced parents remarry, stepfamilies.
7 An increasing number of parents never marry. Children
8 affected by these circumstances often form attachments
9 outside their conjugal nuclear family to stepparents,
10 foster parents, and other caretakers.

11 And before the passage of the
12 Grandparents' Act we would have had grandparents in
13 there as well.

14 It is to enable the court to consider
15 such circumstances that third persons should be given
16 standing in custody cases if present the child's need
17 for continuity in intimate relationships demands that
18 the law provide the opportunity to maintain important
19 familial relationships with more than one set of
20 parents. Such recognition will allow children to
21 experience the continuity of familial relationships
22 that they need in the growing range of circumstances in
23 which these relationships are formed outside the
24 nuclear family.

25 This proposed legislation allows for a

1 wide variety of child custody arrangements, including
2 those currently available. It may suggest answers that
3 courts, more mindful of the best interests of the child
4 and of the absence of legal precedent, have already
5 reached. But the development of determinant principle
6 standards will provide a more stable foundation for
7 these decisions as in the case of grandparents.

8 Will this legislation, if enacted,
9 contribute further to the decline of the nuclear
10 family? It is unlikely that an approach that attempts
11 to accommodate more than one parent or set of parents
12 in a child custody arrangement will further weaken the
13 already vulnerable institution of the family. In fact,
14 the decline of the nuclear family seems more directly
15 related to economic and social factors than to legal
16 ones.

17 Quoting from the last sentence in the
18 Virginia Law Review article, the cite of which has been
19 given to your committee and I would urge all of you to
20 scan it if not read it if your time permits, "No
21 matter, once it is demonstrated that children with
22 certain parent/child histories experience more benefit
23 or less detriment from carrying on multiple
24 nonexclusive representing relationships than from being
25 restricted to exclusive ones, child custody law seems

1 an inappropriate tool for suppressing the decline of
2 the nuclear family. In this regard, the view that the
3 failure to make legal changes to correspond to social
4 change harshly punishes those who participate in the
5 natural evolution of society and is especially
6 compelling because the participants are not willing
7 ones."

8 If I may add a footnote. One of the
9 criticisms that I've heard from some of the judges is
10 that this is going to give another tool in the arsenal
11 that a couple will have as they fight and contest
12 marital issues such as property, support, and so on.
13 And they say if we give third persons' rights standing,
14 what we're going to do is to give, let's say the
15 stepfather, for example, an opportunity to come into
16 court and to say to the mother of the children, I'm
17 going to go into court under the psychological parent
18 bill and I'm going to seek custody, partial or total
19 custody, and use it as a lever to try and obtain
20 concessions on other marital issues. And some very
21 intelligent, well-thinking judges have that concern. I
22 understand there are some lawyers out there who have
23 those concerns. Obviously, it might be used for abuse
24 in such an area, but I would suggest to you that the
25 abuse that will occur if it is not passed will outweigh

1 any possible abuse that can occur from invoking it in a
2 particular case.

3 Judges more and more are seeing tactics
4 like this in custody cases. We are seeing it, for
5 example, in allegations of sexual abuse. I'm sure
6 you're well aware this is the new trend now in custody
7 cases to see more and more allegations of sexual abuse,
8 and yet no one is urging that we water down the
9 standards that we have developed in the law pertaining
10 to sexual abuse, and I would suggest we should not
11 water down standards recognizing third parties' rights
12 who have formed attachments with children because of
13 the possibility that it might be abused in certain
14 cases.

15 (Whereupon, Representative Bortner
16 assumed the Chair.)

17 ACTING CHAIRMAN BORTNER: Thank you very
18 much, Judge.

19 The article you're referring to, the
20 Virginia Law Review, is the Bartlett article, is that
21 correct?

22 JUDGE CASSIMATIS: Yes. The article is
23 "Rethinking Parenthood as Exclusive Status: The Need
24 for Legal Alternatives When the Premise of the Nuclear
25 Family Has Failed."

1 ACTING CHAIRMAN BORTNER: I wanted to get
2 that reference on the record and also let committee
3 members know that I have that article, and perhaps some
4 other members do, too. It's a lengthy article but a
5 very comprehensive one.

6 JUDGE CASSIMATIS: It's the June 1984
7 issue of the Virginia Law Review, 70 Virginia Law
8 Review, pages 879 to 968.

9 ACTING CHAIRMAN BORTNER: Thank you very
10 much, Judge Cassimatis.

11 I have a couple questions of my own.
12 Some other members of the committee may have some as
13 well. I'm going to use my prerogative and ask a couple
14 first and then I'll move along to the other members.

15 BY ACTING CHAIRMAN BORTNER: (Of Judge Cassimatis)

16 Q. Judge, there is one thing I guess I would
17 like you to clarify, turning specifically to the
18 legislation, because I think there still may be some
19 confusion about it because there are kind of two
20 different provisions in the bill.

21 First question, does a psychological
22 parent, or is there a prerequisite that a parent --
23 that a marriage either be dissolved by divorce or that
24 one of the parents be deceased for the psychological
25 parent to have standing?

1 And secondly, and maybe you can comment
2 on the second part of the legislation, which deals with
3 partial custody under those two particular provisions?

4 A. The--

5 Q. Do you have a copy of the bill?

6 A. I do. I have it in front of me. What
7 I'm looking for is the present act, but I don't think I
8 need it.

9 By definition, the amendment does that
10 because an attachment of 12 months with the
11 psychological parent if the child's under age 3, or 24
12 months if the child's over age 3, could not occur if
13 that child remained in the nuclear family. So the
14 focus is on the child's relationship in the nuclear
15 family rather than, per se, the status of the parents.
16 And I would urge that that's where the focus ought to
17 be. I don't have the figures, but it occurs to me that
18 in the overwhelming number of cases where a child is
19 removed for those periods of time, the parents either
20 are separated, never were married, or are divorced.

21 Q. Are you comfortable with the two
22 distinctions of time, the 12-month and 24-month
23 periods?

24 A. Yes. We really worked on that, and I
25 think that is about, you know, should it be 11 months

1 instead of 12 months, should it be 25 months or 3
2 years? No. We think from the literature we've seen
3 and from the study that we made that these are
4 approximately the best times.

5 Q. That change was made following the survey
6 of the judges, is that correct?

7 A. That's correct.

8 Q. Because I noticed in the survey a number
9 of the comments focussed on the length of time and
10 suggesting making that longer.

11 A. That's exactly correct.

12 Q. So I suspect probably the statistics you
13 quoted would be even more favorable on this bill than
14 on the original House Bill 1600 of last session?

15 A. I would think so, since that was the
16 focus of a number of the objections.

17 Q. You mentioned the one point or started
18 talking about the one point that I have heard some
19 criticisms on, and that's this whole question of you
20 mentioned it being used as leverage in a divorce case.
21 It's even been brought to my attention, you know, as an
22 opportunity for a boyfriend or a paramour to use that
23 kind of as almost as harassment against a former
24 companion.

25 A. That's right.

1 Q. Is there any way, do you see any need to
2 further define that within the legislation or do you
3 see any way to build in any additional precautions?
4 Because clearly that's not the intent of the
5 legislation.

6 A. Certainly not, and it's not the intent of
7 the Permanency Planning Task Force to give standing
8 status to such claims.

9 I think that the safeguard against that
10 would be at the hearing itself as the court reviews
11 whether or not that boyfriend, for example, is in fact
12 a psychological parent within the definition. Did that
13 child evidence genuine care and concern for that
14 mother's boyfriend and was that reciprocated by
15 mother's boyfriend to the child? Those of you who've
16 practiced in custody law, you know those things get
17 smoked out pretty quickly. In fact, many of them when
18 they see that they are insistent in going to court they
19 even evaporate before going to court. It could be
20 urged, that's true, but the problem is it's still there
21 as a threat and requires the mother to take it that far
22 in order to dissipate that argument.

23 I think in balance that I would opt in
24 favor of the benefits of the bill from that if that is
25 viewed as a detriment.

1 Q. Of course, another thing to keep in mind
2 is that the time requirement would require that these
3 be fairly established relationships and would not
4 recognize at all some short two- or three-month or
5 six-month live-in arrangement.

6 A. Well, that's very true. I mean, if the
7 child is under 3 it has to be 12 months, and if the
8 child is over 3 it would have to have been 24 months.

9 ACTING CHAIRMAN BORTNER: Thank you,
10 Judge.

11 Lois.

12 REPRESENTATIVE HAGARTY: Thank you.

13 BY REPRESENTATIVE HAGARTY: (Of Judge Cassimatis)

14 Q. Thank you, Judge.

15 Let me state at the outset that in
16 sponsoring this legislation, Representative Bortner, I
17 felt that it was time for the General Assembly to give
18 serious concern to nonbiological parents and their
19 involvement in the continuing relationship of their
20 children. And in sponsoring it we thought, or I
21 certainly thought, that in taking the recommendations
22 of the Permanency Planning Task Force we should put
23 that before this committee certainly for their concern.

24 I am concerned though and don't agree
25 with the statement you made. You made the statement,

1 and I know that you feel very comfortable with it, but
2 I do not, that the presumption of the biological
3 parent, I guess what you said is that there should be
4 essentially no presumption that the biological parent
5 should be favored over another parent under these
6 limited circumstances when it is in the best interest
7 of the child. I'm not ready and I'm very uncomfortable
8 with removing the presumption of biological parenthood
9 under circumstances which I frankly feel are as broad,
10 and I think these are fairly broad in many instances,
11 and I ask you, in looking through this legislation,
12 because I did not feel that the legislation did it, now
13 as I look through it I see that there is a Section
14 5303(b), the last line in that section which deals with
15 sole custody says that "The court shall impose no
16 greater burden of proof upon the psychological parent
17 than that which is imposed upon a parent in a custody
18 proceeding," and I'm wondering, is that a reflection
19 then of the presumption that you're indicating?

20 A. Yes. That was intended to put them on
21 equal footing.

22 Q. Right. Is there anywhere else in this
23 bill that you believe that that -- that we would be
24 removing that presumption of biological parents?

25 A. No. That was the sentence that was

1 intended to deal with that issue.

2 Q. To do that. And so if I believe that we
3 should not be ever giving sole custody to a
4 nonbiological parent absent some reason to overcome a
5 presumption, you're indicating that the only section
6 that you think in this bill that does that is that?

7 A. That's correct.

8 Q. Okay. I guess my other discomfort is
9 when I think about the need for this, and I certainly
10 agree with you as far as the need to consider the best
11 interests of the child and continuing relationships, it
12 seems to me that we can go as far as standing, that we
13 can go as far as visitation, we can go as far as
14 partial custody. I don't ever see going as far as sole
15 custody absent some standard much closer to present law
16 with regard to compelling reason, and I'm wondering, do
17 you see that if I wanted to accomplish that that we
18 could accomplish that and still meet some of the goals
19 of the Permanency Planning Task Force?

20 A. (No response.)

21 Q. In other words, is there a middle ground?
22 I mean, I'm not comfortable with going as far as this
23 bill goes. I think this is revolutionary -- I
24 shouldn't say that -- with regard to sole custody of
25 nonbiological parents.

1 A. The aunt then in the case that I gave you
2 with the father who was in the -- you're not
3 comfortable with her maintaining majority custody, or
4 in the case of the stepmother who really raised that--

5 Q. Well, majority custody doesn't say sole
6 custody to me.

7 A. All right. Okay. I don't think where
8 you intend -- the word "sole custody," all right, if
9 that's the problem, that word of "sole custody" was not
10 intended to deny visits or partial custody to the
11 biological parent or any other person who may have
12 formed attachments to the child. So your point would
13 be well taken on 5303(b) where it says sole custody.
14 If you wanted to substitute the word "majority custody"
15 instead of "sole custody," I would suggest that that
16 would still accomplish the intent.

17 Q. I guess this is the case that concerns
18 me. You have a stepparent living with a child for a
19 period of whether it's one or two years, depending on
20 the age, and then that couple divorces. Is the
21 stepparent now, and let's say during that period of
22 time the biological parent, comfortable with the
23 relationship that had developed between the child and
24 the stepparent, has allowed that relationship to become
25 closer than the biological parent's relationship with

1 the child. At some time subsequent to the divorce, the
2 biological parent intends to resume a closer contact
3 and to again become the primary caretaker. Are we
4 jeopardizing then that biological parent's rights by
5 giving -- what this would do is equal footing on the
6 basis that it appears it is in the better interest of
7 the child at that point to be with the stepparent.

8 A. No. I think -- you say are we
9 jeopardizing? I think what we're doing is asking the
10 court to focus on the best interest of the child.

11 Q. To the exclusion of any interest of the
12 biological parent is what concerns me.

13 A. No, to the inclusion of any evidentiary
14 presumptions. Even Justice Flaherty, in that quote
15 from his concurring opinion, says that even with the
16 abolition of the presumption, the status of biological
17 parenthood should be accorded great consideration.
18 Just as we do now in custody cases, continuity of the
19 child's placement is afforded great consideration.

20 Q. So you're saying our differences, whether
21 it is a presumption or whether it is something accorded
22 great weight?

23 A. Right.

24 Q. And I guess what I'm uncomfortable with
25 is, and I think back to the adoption area, as the

1 sponsor of a number of pieces of adoption legislation,
2 it has always seemed to me though that we don't have
3 all the magic in determining parenthood and so we give
4 great consideration, give more than great
5 consideration, we give absolute rights, of course, in
6 terminating parental rights in the adoption area to
7 biological parenthood, and while I have a great respect
8 for the ability of our judges in deciding these
9 matters, but to suggest, I guess, essentially that only
10 a child's rights and best interests are to be
11 considered without any regard to the biological
12 parent's rights is the step I'm not prepared to make.

13 A. No, we're not saying not to consider the
14 biological parent's rights. That is a factor to be
15 accorded great weight. Great weight.

16 Q. But then we get into if we don't have a
17 presumption how much weight an individual judge gives
18 it.

19 A. That's right.

20 Q. Okay. So I go back the my question then,
21 is there some reason though to consider if we do not
22 remove -- or let me go back to other question. What do
23 you see is the presumption under present law that we
24 would be removing by this?

25 A. Reading to you from Ellerby v. Hooks, "In

1 child custody disputes between a parent or parents and
2 nonparent, nonparent bears burden of production and
3 burden of persuasion that best interest of the child
4 will be served by placing child in custody of nonparent
5 and nonparent's burden is heavy."

6 "Parents have a prima facie right to
7 custody which may be forfeited if convincing reasons
8 appear that the best interests of the child will be
9 served by awarding custody to someone else." And then
10 later on, "The parents have a prima facie right to
11 custody which will be forfeited only if convincing
12 reasons appear that the child's best interests will be
13 served by an award to the third party." Thus, even
14 before the proceedings start, the evidentiary scale is
15 tipped and tipped hard to the parent's side.

16 I think Ellerby v. Hooks is a classic
17 example of the problem you run into. Here you had the
18 trial court, the finder of the facts, applying a test
19 of no presumption in favor of the parents and coming
20 down with a finding that the best interests of the
21 child were being placed with the grandmother. Then you
22 have the Superior Court saying that test was wrong.
23 You've got to apply this test which I just read, and
24 then the Superior Court did that to the facts and said
25 those facts did not support the finding of the trial

1 court and set it aside. It goes up to the Supreme
2 Court, and seven judges on the Supreme Court said the
3 Superior Court's right on the burden of proof test they
4 applied but they were wrong in their analysis of the
5 facts on the application of the rule.

6 Q. Well, I'm more comfortable with getting
7 around the presumption than I am with changing the
8 presumption for all cases.

9 Do you think then, I think I may have
10 asked you, it seems to me though that we still would
11 make some progress by -- would there be no standing
12 currently for visitation absent this of a nonbiological
13 parent and a nongrandparent?

14 A. The law right now is about the same place
15 it was with grandparents.

16 Q. So there would be no standing?

17 A. Well, there are. I can show you cases
18 where status have been given to third parties in
19 custody cases seeking visitation or otherwise and the
20 issue was not discussed. On the other hand, we had a
21 very interesting case recently, Webber v. Webber, which
22 is a Superior Court panel decision, and I suggest that
23 the holding is correct, where parents refused to let
24 their minor daughter visit an adult daughter, this was
25 an older sibling of the child who was living under

1 circumstances the parents didn't approve.

2 Q. I read that case. I had a family law
3 practitioner send that to me.

4 A. Okay.

5 Q. And that was a compelling case to do
6 something, I thought.

7 A. Well, I'm not sure, because what the
8 Superior Court said was that this older daughter does
9 not have legal standing to come into court as against
10 the family where the mother and father are living
11 together, and we as a court are not going to second
12 guess those parents' rights in deciding where that
13 child is going to visit or whom it's not going to
14 visit. And there is nothing in the bill we're
15 proposing that affects that.

16 Q. Okay, now, in that case if those parents
17 had been split up, are you suggesting that there would
18 have been standing for the older daughter?

19 A. Well, yes. In fact, the court says in
20 footnote number 2, "We have been unable to discover any
21 Pennsylvania cases where visitation or partial custody
22 actions have been entertained absent, 1, a divorce or
23 separation; 2, the death of one of the natural parents
24 who would ordinarily have protected the petitioner's
25 visitation privileges; 3, a delinquency or dependency

1 proceeding; or 4," and this is significant because this
2 mirrors what we are proposing here, "a situation where
3 the petitioner had physical custody, whether through
4 court order or informally."

5 Q. So are you suggesting then that if we
6 simply wanted to give standing to nonbiological parents
7 to bring petitions for visitation or less than majority
8 custody we don't need this bill?

9 A. I think the law is getting there, just as
10 it was for grandparents. But why not come down and
11 give a clear legislative pronouncement? We see in some
12 of these cases, I don't want to take the time to find
13 them, we'll see language by the courts: "We don't have
14 any legislative directives in this area," and so here's
15 a chance for you to do it. It wasn't necessary for you
16 to do it -- you, the legislature -- to do it in
17 grandparents. The law was evolving there. So it would
18 basically be the same thing here.

19 Q. No, I'm comfortable with doing it if
20 there is a need to do it to go that far. I'm just not
21 comfortable with removing a presumption of the
22 biological parent.

23 A. These are severable issues.

24 Q. I guess that's the whole thrust of -- I
25 think I now understand--

1 A. I started out my remarks by pointing out
2 to you that the focus of the bill is twofold - to
3 recognize the standing of adults with whom a child has
4 bonded to be a party in that child's custody case.
5 That's the one issue. The second issue is to abolish
6 the presumption of burden of proof. They are
7 severable.

8 Q. Okay.

9 A. However, as I told you, the
10 recommendation of the Permanency Task Force is on both
11 and the survey results are more on the first issue but
12 still significant on the second issue as well.

13 Q. I understand. Thank you, Judge.

14 A. Sure.

15 REPRESENTATIVE HAGARTY: Thank you.

16 CHAIRMAN CALTAGIRONE: Representative
17 McHale.

18 REPRESENTATIVE McHALE: Thank you, Mr.
19 Chairman.

20 ACTING CHAIRMAN BORTNER: Acting.

21 REPRESENTATIVE McHALE: Thank you, Acting
22 Mr. Chairman.

23 BY REPRESENTATIVE McHALE: (Of Judge Cassimatis)

24 Q. Judge, let me indicate as we open that I
25 was extremely pleased to hear the questioning by my

1 colleague, Representative Hagarty, because her
2 viewpoint as articulated within the last 10 or 15
3 minutes is identical to my own. I have considerable
4 sympathy for the position that you advocate, but I'm
5 afraid that the position that you presented to the
6 committee goes just a couple of steps too far. You're
7 moving in the right direction, but the concept
8 contained in the bill, in my opinion, travels too far
9 down the road, and I think that's essentially what
10 Representative Hagarty was indicating by the thrust of
11 her questioning.

12 Let me just ask a couple of questions to
13 clarify my own familiarity of existing law.
14 Representative Bortner indicated during his opening
15 statement, as I understood it, that present law does
16 not allow standing to a third party who is seeking
17 custody under the circumstance where there is a
18 surviving parent, and I heard you just say a few
19 minutes ago that probably a more accurate description
20 of existing law is that there is some uncertainty as to
21 the nature of standing under that circumstance. Could
22 you comment briefly on that?

23 A. Yes. There are cases, as I say, where
24 you will find third persons coming in and being awarded
25 certain custody rights as against a parent over the

1 opposition of the parents and the issue of standing is
2 not discussed.

3 Q. And I think what you're asking for,
4 again, if I understand your response earlier, is some
5 statutory clarification--

6 A. Yes.

7 Q. --of standing on that issue?

8 A. Yes.

9 Q. I think that's correct.

10 A. Yeah.

11 Q. I fully support you in that effort. I
12 believe that in that context the concept of a
13 psychological parent and the granting of standing to
14 come into court and to seek custody or visitation is
15 entirely appropriate, and I think we in the General
16 Assembly can provide, as you request, meaningful
17 clarification as to the standing of a third party under
18 those kinds of conditions. So I'm with you up to that
19 point.

20 Now, when based on the case law, murky
21 though it might be, that you just cited, when a third
22 party under existing law comes into court over the
23 opposition of a biological parent seeking either
24 custody or visitation, what is the test to determine
25 whether or not the petition of that third party should

1 be granted?

2 A. It is the burden of proof, as I read
3 those quotes from--

4 Q. I think you used the phrase "convincing
5 reasons," and you indicated, I think, in earlier
6 answers that it is a fairly heavy burden?

7 A. Yeah, that's what the courts have said.
8 You'll recall that where the dispute is between just
9 two parents it's a preponderance of the evidence. And
10 on the other hand, when it is with third parties, they
11 speak of the prima facie right to custody which may be
12 forfeited if convincing reasons appear. Convincing
13 reasons.

14 Q. All right, that was the operative phrase
15 that I picked up as well in your earlier testimony.

16 Now, you cited a somewhat tortured path
17 taken by the Ellerby case taken to the Pennsylvania
18 Supreme Court, and I realize that at various stages
19 over the trial and appellate levels it was by no means
20 clear what the final outcome of the law would be,
21 however, as I understood your earlier answers, under
22 existing law as interpreted definitively by our Supreme
23 Court, the third party, using the current test, did in
24 fact receive custody, is that correct?

25 A. Yeah. It was the grandmother.

1 Q. Is that not proof that existing law, as
2 ultimately defined by the Supreme Court in Ellerby,
3 does in fact work to provide custody in appropriate
4 cases to a third party? I realize that that final
5 result was by no means certain as the case wound its
6 way up through the appellate process, but ultimately
7 doesn't the holding in that case, as defined by the
8 Supreme Court, cut against your position?

9 A. Yeah, but at what cost? At what cost in
10 terms of length of time, of uncertainty as to the
11 outcome of the case, what was happening age wise to
12 that child who was, what was it, 11? And I don't know
13 how fast that moved, but I would expect it was at least
14 a year or two years from the time of the initial
15 hearing until the Supreme Court reversed and reinstated
16 the trial court's.

17 Q. I'm sure that in Ellerby that was a very
18 difficult process of litigation for the individuals
19 involved, but what I'm getting at now is having gone
20 through that process, albeit at a great cost to the
21 litigants in Ellerby v. Hooks, the Supreme Court now
22 has pretty clearly defined both the test and the
23 permissible outcome in appropriate cases. Doesn't that
24 precedent provide some considerable guidance to the
25 trial courts?

1 A. Well, they didn't make new law in Ellerby
2 v. Hooks.

3 Q. Well, they pointed out to the trial judge
4 that he should not make new law.

5 A. Yes. Right. That's a prerogative they
6 assume for themselves. So the law was there and was
7 very, very clear from previous cases.

8 Q. And in fact under the ultimate--

9 A. In in re Hernandez, if you'll recall, was
10 a case which before that had very definitively set
11 forth what the standards of proof were.

12 Q. What I'm getting at is without being
13 critical of the trial judge in this case, and I have no
14 idea who it was, would it not have been possible under
15 existing law for that trial judge, had he been able to
16 predict with accuracy what the Supreme Court would
17 ultimately decide, to have applied the current test and
18 produced the same result that he had originally
19 proposed?

20 A. Yes. Let me address that point.

21 Q. Please do. I don't mean to--

22 A. No, no. Let me address that point and
23 something that troubles me.

24 Q. Yes.

25 A. And it's the issue of intellectual

1 honesty. We have, in effect, in custody cases three
2 burdens of proof - preponderance of the evidence to
3 clear and compelling reasons, whatever it is under the
4 Juvenile Act, and somewhere a little lower than that is
5 the absent compelling reasons for third persons. Now,
6 a judge, in his or her analysis of the facts, can apply
7 those standards and marshal the facts and the findings
8 of facts in a way that will satisfy whichever burden of
9 proof he or she is applying, not unlike I was telling
10 you the judge friend of mine who says, "I no longer use
11 'psychological parenting' in my opinions. I don't want
12 all the baggage that comes with that."

13 So a judge, knowing that this is the
14 burden of proof, is going to marshal the facts in a way
15 that meets the burden of proof. And I would hope that
16 the legislature would not force judges to have to do
17 that in order to reach decisions, that instead of
18 marshalling facts to suit whatever burden of proof they
19 have to meet because they want to compel a certain
20 result rather they will apply the test and then marshal
21 the facts.

22 Q. I appreciate that and that's a very
23 candid description of what I think really happens. Of
24 course, the other alternative is for the judge to
25 impartially apply the law, and that is to imply the law

1 even if it reaches a result that he wishes he did not
2 have to reach. That, too, is one option, probably one
3 in theory that ought to be applied.

4 Now, under the Grandparents' Custody and
5 Visitation Act, when a grandparent comes in and seeks
6 custody over the opposition of a biological parent,
7 what is the test in that case? What burden must the
8 grandparent meet?

9 Q. I think they have a third party test
10 because the grandparent amendment doesn't deal with the
11 burden of proof, so they still have to meet the third
12 party test.

13 Q. I guess this goes to the heart of what
14 Lois was addressing earlier. The concept of
15 psychological parent is one that I think is long
16 overdue, and I think that we can in the legislature and
17 should in the legislature provide statutory credence to
18 that concept in recognition of changing circumstances
19 in our society, but I share the misgivings that Lois
20 articulated in terms of taking that concept to the
21 point where the psychological parent is on the same
22 footing, to use your phrase, as biological parents.

23 Would it be possible, under the standard
24 as proposed in House Bill 1290, for a good parent, a
25 good and loving parent, to lose custody to a third

1 party under the circumstance where a court would, in
2 good faith, conclude that although that parent is and
3 would likely be a good parent that some third party
4 could provide a better environment for the child?

5 A. Yes. Unfortunately, we have situations
6 like that happening. We might have a young mother
7 who's on drugs and is very unstable and the child is
8 removed and is in custody of foster parents for two,
9 four, five, seven, eight years. Mother, meanwhile,
10 straightens up her act, she gets off of drugs, she goes
11 back, gets her high school diploma, becomes a very
12 dependable, stable person. She wants her child back.
13 Now, what are we going to focus on, the good deeds of
14 the mother, or are we going to focus on the best
15 interest of the child?

16 Q. Well, my concern is that the hypothetical
17 you use is still loaded against the good parent.
18 You're still talking about a parent who was or is a
19 drug abuser. Let me give you an example that truly
20 fits the concept of a good parent, or a potentially
21 good parent. And I think this, too, comports with
22 changing realities in our society.

23 A young man and a young woman meet, fall
24 in love, engage in physical relations, and a pregnancy
25 occurs. The pregnancy was obviously unplanned, but the

1 couple decides that they truly do love each other,
2 would like to make a lifetime commitment, and they
3 marry. They're 19, 20 years of age. They have
4 insufficient funds to buy their own home at that stage
5 in their lives, so they move in with the young man's
6 parents. Tragically, a year after the marriage the
7 husband is killed in an automobile accident. At that
8 point you have, let's say, a 20-year-old woman with a
9 newborn child. She's a good and loving mother, but her
10 in-laws become convinced, in equally good faith, that
11 they can provide a better home ultimately for their
12 grandchild.

13 Everybody goes to court in a custody
14 proceeding. You have a 20-year old woman who became
15 pregnant out of wedlock, has no visible means of
16 support, although perhaps she's doing everything she
17 can to find employment, and she stands before a judge
18 of the Court of Common Pleas in an effort to keep her
19 child, when on the opposite side of the courtroom you
20 find a middle class husband and wife perhaps 45 years
21 of age, the grandfather has a solid income, owns a
22 home, is a pillar of the community, and the judge has
23 to decide on equal footing who will get custody of the
24 child.

25 Now, I think that's a realistic

1 hypothetical. I'm concerned that in that case the
2 older, established pillars of the community who love
3 their grandchild will be able to obtain custody over
4 the opposition of a truly loving and good mother.

5 A. In your hypothetical the child had lived
6 with the mother, right?

7 Q. Yes. She lived with them all in the same
8 home.

9 A. Oh, they all lived in the same home?

10 Q. Yes. They moved in with the husband's
11 parents shortly after they got married. So you have a
12 mother now, and we can shift the timeframes to meet the
13 test in the bill. That really doesn't reflect on the
14 issue that I'm raising. You have a mother who's never
15 been a drug abuser, who is a good and loving mother,
16 who is engaged in difficult litigation with good and
17 loving grandparents who happen to be older, established
18 pillars of the community, and who, as I read it under
19 House Bill 1290, would stand as equals in the courtroom
20 in opposition to this young--

21 A. Equal so far as burdens of proof are
22 concerned, but under your fact scenario I, as a judge,
23 would have no difficulty in awarding custody of that
24 child to the mother under this bill. If the mother is
25 meeting, she was there evidencing genuine care and

1 concern for the child, the child evidenced genuine care
2 and concern for her, she was there all the time, we
3 have the fact that she is a biological parent to be
4 accorded great significance.

5 Q. Judge, if this bill were to become law, I
6 would hope that the hypothetical case that I described
7 would come before you, because I can tell you in front
8 of many other judges, good judges, men and women of
9 conscience in this State, the result would be the
10 opposite where you would have pillars of the community,
11 45 or 50 years of age, the evidence would be
12 overwhelming in terms of economic circumstances they
13 could provide a physically more attractive environment
14 for the child. The mother of the child would be, at
15 that point in her life, doing everything she could to
16 provide for superior fiscal circumstances but she
17 couldn't compete, at her age, with her in-laws.
18 Everybody would love the child. Clearly on one side of
19 the courtroom the parties would be able to provide a
20 physically more comfortable environment. Now, maybe in
21 front of you and maybe in front of most judges in this
22 State that 19- or 20-year-old woman would prevail, but
23 I think in many courtrooms she would not, and that
24 troubles me.

25 Let me present one other issue, if I may,

1 and forgive me for taking so much time. Could this
2 proposal as contained in House Bill 1290 result in a
3 situation where, again, a good parent who never would
4 have lost custody had she remained married lose custody
5 to a third party as a direct result of the fact that
6 she experienced a divorce and thereafter her former
7 husband died, or even a situation more difficult to
8 address, could she lose custody under circumstances
9 where there is a death of a husband during the
10 marriage? In other words, you have someone who, if we
11 could control divine providence, is a good parent in a
12 good marriage who never would have lost custody of her
13 child had her marriage continued through the rest of
14 her life find herself, at least in part, in the
15 situation where she would be in danger of losing her
16 child because she has experienced a divorce or she has
17 experienced the death of her husband and the provisions
18 of 1290 come into play?

19 A. Yeah. That, I suppose, could occur in
20 the context of this young couple who are living
21 together, married or not, but they are living in a very
22 wonderful relationship, raising the child and the
23 husband is killed in an automobile accident and the
24 mother is unable to maintain the child and her in-laws
25 offer to take the child and they take the child and the

1 mother may continue with visits in a very fine
2 relationship, and if those grandparents had that child
3 for 12 months before the child reaches age 3, or 24
4 months after the child attained age 3, in a custody
5 issue between the paternal grandparents and the mother,
6 this 1290 would apply and if the burden of proof test
7 were left in there, they would be on equal footing.

8 What it really comes down to is what
9 should be the polestar in custody cases? Is it going
10 to be the best interest of the child? That was my
11 initial opening statement, and that is what the
12 legislature has to decide. The courts have said it is
13 to be the best interest of the child.

14 Q. I think what that misses, though, Judge,
15 is this, if I can articulate it. I like to believe
16 that I'm a good parent. I have three children and I do
17 the very best that I can to provide them with the love
18 and support that any parent would want to provide. But
19 I don't fool myself into thinking I'm the best parent
20 in the world, and it concerns me that a good parent
21 could lose custody to a better potential parent where
22 the only or the polestar consideration is the best
23 interest of the child.

24 A. Since in re Stapleton, which I think is a
25 1942 case, came out of Dauphin County, the language I

1 forget, it's beautiful language, the function of the
2 law is not to take children from poor parents and to
3 give them to wealthier parents. It isn't even to take
4 them from parents who have less parenting skills and
5 give them to those who have better parenting skills,
6 and so on and so forth.

7 Q. But isn't that what happens?

8 A. I don't think so. Will you permit me to
9 tell you what a big problem a judge has when he goes on
10 the bench?

11 Q. Sure.

12 A. And that is he brings with him his middle
13 class morality and value system and he finds, or she
14 finds, that with a lot of the people and issues that he
15 has coming before him, Juvenile Court where I sat for
16 going on 13 years, and in custody court, not for 13
17 years, but we see a lot of those people whose value
18 system are different. The child may have been born to
19 parents who aren't married and maybe originally weren't
20 devoted to each other or to the child but later on,
21 through maturity or what have you, straighten out their
22 act. Drugs may or may not have been involved. I
23 remember when I first got on the bench I thought every
24 man who had long hair and an earring couldn't be
25 trusted. I wouldn't believe in them--

1 Q. I still have doubts about the earring.

2 A. --as being credible, and really it took
3 me about a year to overcome that gut reaction that this
4 guy is lying.

5 Q. Yes, but Judge, let me ask you a
6 question: What happened during that first year?

7 A. Well, I hope I didn't do any injustice.

8 Q. And I'm sure you tried not to, but for
9 some judges it takes more than a year. For some judges
10 it may take a lifetime.

11 A. But the point is, now, I wanted to bring
12 that into the context now that when I sit and I'm
13 deciding where a child should go I am not invoking my
14 middle class morality and virtue, except to the extent
15 that we uphold the sanctity of the family, but that's
16 statutory. The Juvenile Act says that, and we have
17 plenty to do it. I don't need middle class morality to
18 justify that.

19 We also have found, and this has been the
20 focus of the Permanency Planning Task Force, I don't
21 want you to think of that as being some ogre that is
22 coming out and looking for taking children from less
23 advantageous upbringing and put them into more
24 advantageous. In fact, the focus of the Permanency
25 Planning Task Force has been permanency planning for

1 children, and what we are finding out is more and more
2 that removing children from their homes isn't the
3 answer, that we ought to be devoting more resources and
4 more time to keeping them in their home. So it's
5 against that backdrop that the Permanency Planning Task
6 Force has come up that when the nuclear family has
7 failed, if we really mean to focus on the best interest
8 of the child, then let's do it. But if the nuclear
9 family has not failed, we are not second guessing those
10 parents.

11 Q. Well, in this case failure can be defined
12 as simply a death in a family, and I'm not sure that
13 that characterization is the best way to describe what
14 has really occurred. Judge, I've gone much too long as
15 it is, but let me just say this as kind of a closing
16 remark. Although I no longer practice in this area,
17 there was a time that I made an honest living as a
18 lawyer, and during that period of time I handled many
19 custody and visitation cases both on the trial and
20 appellate levels, and I always had a sick feeling in my
21 stomach whenever, because in a sense we compelled it,
22 whenever a good parent during the dissolution of a
23 marriage would lose custody to a better parent. That
24 was the best the law could do, but it clearly was not a
25 result that left anyone feeling good. It certainly

1 didn't leave me with a feeling of satisfaction. The
2 law did what it had to do in light of the facts of the
3 case.

4 A. You know, may I say, presumptions make a
5 judge's job easier. When we had, you know, the best
6 interest of the child test will be served by putting a
7 young child in with the mother--

8 REPRESENTATIVE HAGARTY: We should have
9 never changed that.

10 JUDGE CASSIMATIS: When I first came on
11 the bench, that was the law. You know, we didn't have
12 any custody cases in those days because everyone knew
13 what the law was. Trying to get a child away from the
14 mother was impossible. Well, then the Supreme Court in
15 Spriggs v. Carson, York County case, changed the law.
16 Suddenly everyone was coming in for custody. Now, it
17 would have been easier, the law would be more certain
18 had we continued that presumption, and yet I don't
19 think anyone's urging we go back to that.

20 Q. Sure. And, Judge, I appreciate that.
21 What you're doing here is advocating a position that
22 you believe, in good faith, would not only be sound
23 public policy but in fact make your job tougher, and I
24 appreciate the disinterested ability on your part to
25 make that kind of judgment, because I'm sure that

1 ultimately when it ends up in your court it's not
2 something you're anxious to face. The presumption
3 would and does make your job easier.

4 But what I was getting at is this, as it
5 is difficult in a typical divorce proceeding to grant
6 custody in favor of a better parent over the opposition
7 of one parent who is, in all other respects, a very
8 qualified, competent, and loving individual, I think
9 that it is possible, and this comes right back to the
10 misgiving voiced by Representative Hagarty, that if we
11 go as far as 1290 would like us to go, we would see
12 circumstances where a good parent would, in fact, lose
13 parent to a better third party, and that troubles me
14 because I believe that the presumption is more than an
15 evidentiary matter, it reflects a value judgment,
16 perhaps even a constitutional judgment, regarding the
17 relationship between a parent and child.

18 And so I'm with you as far as statutorily
19 recognizing the concept of a psychological parent. I
20 agree with you insofar as creating a clear statutory
21 recognition of standing. I might even be willing to
22 re-examine the prima facie preference of the biological
23 parent in the context of visitation, but when it comes
24 to custody, I think my views are identical to
25 Representative Hagarty's, that's just a little too far.

1 A. Yeah, and in response, if I may repeat, I
2 see these issues as severable, without taking back
3 anything I said in support of them, I see them as
4 severable and I would urge that if the only way the
5 bill is going to move is without the burden of proof
6 changing or with a watering down effect, I think that
7 the issue of giving status and standing to
8 psychological parents alone merits consideration.

9 Q. I agree with you completely and at least
10 as far as that distance down the road I'll be there in
11 support of your position.

12 A. Thank you.

13 ACTING CHAIRMAN BORTNER: Thank you.

14 Representative Heckler.

15 REPRESENTATIVE HECKLER: Thank you, Mr.
16 Chairman.

17 Your Honor, I wanted to apologize or at
18 least explain, first of all, during I think the most
19 chilling part of your testimony when you were referring
20 to some of the statistics which we all know much too
21 well about the dissolution of the nuclear family in our
22 country, some of us may have been smiling. One of our
23 members is contemplating matrimony and I think--

24 REPRESENTATIVE RITTER: Not
25 contemplating. It's too late for contemplation

1 anymore.

2 REPRESENTATIVE HECKLER: I see. Well,
3 then you won't have any second thoughts.

4 REPRESENTATIVE McHALE: The marriage has
5 to move forward. The Governor already accepted the
6 invitation.

7 REPRESENTATIVE HECKLER: I see. So
8 statistics notwithstanding, at least some of us will go
9 on undaunted.

10 And I also took some comfort from your
11 comments, having a soon to be 18-year-old son who just
12 showed up with a pierced ear, I have some confidence
13 that he is still essentially sound, but looking at his
14 ear drives me crazy, notwithstanding.

15 In any event, and I'm not sure how I
16 would feel were he to appear before me under oath, as
17 he frequently does.

18 REPRESENTATIVE HAGARTY: Is your wife a
19 Notary?

20 REPRESENTATIVE HECKLER: At any rate, I
21 thought we needed to lighten things up after Paul's
22 comments.

23 What I would like to get to, Your Honor,
24 I hear with my legislator's ear the suggestion that
25 these two concepts that are embodied in this bill may

1 indeed end up being severable if you can't get this
2 committee, which is known to be -- I hesitate to use
3 the "L" word -- but at least progressive and insightful
4 to buy into an elimination of the presumption in favor
5 of the biological parent. I think that the likelihood
6 of the House as a whole doing so is even less.

7 However, it occurs to me that it does
8 make sense to address this issue, address the issue of
9 how judges are to evaluate these matters, and I think
10 that may be one of the difficulties. We are invading
11 an area that has been the province of case law. That's
12 a fine thing for the legislature to do from time to
13 time, but I'm not sure if we've been sufficiently
14 complete, and I wondered if one of the things that you
15 and the committee might consider would be amendments
16 which would articulate a standard, perhaps articulate
17 the present status of all of the standards, but at any
18 rate articulate a standard which would apply in those
19 situations where we are recognizing standing, where we
20 are giving standing to a nonbiological parent, and
21 perhaps articulate a standard that would be somewhat
22 lower than would otherwise be the case, that that might
23 be an approach which would allow everybody to have some
24 level of comfort because, frankly, I suspect that
25 judges will, that there is tucked away in our minds,

1 just as women, I think, still have pretty much of a leg
2 up in custody of at least infants and children of very
3 tender years.

4 REPRESENTATIVE HAGARTY: Because men
5 don't want those.

6 REPRESENTATIVE HECKLER: That's probably,
7 and, you know, there are certain biological barriers,
8 so far as I'm concerned, that's true, but also, and I
9 think Paul's comments were very much on point. I'm
10 sure I have been a less than exemplary parent, but I
11 have hung in there and by virtue of my biological
12 relationship I manage to deal with things like ear
13 piercings and retain an involvement, and I think that
14 we recognize that that's the case and that I think
15 judges will, as human beings, have nestled in their
16 minds in cases of especially the cases of some of the
17 hard hypotheticals that Paul cooked up recognize that
18 that mother--

19 REPRESENTATIVE McHALE: Considered, not
20 cooked up.

21 REPRESENTATIVE HECKLER: --that mother is
22 not going to be bereft of her child by the folks who
23 may have more dollars and a better lifestyle to present
24 to the court. And that being the case, it may be that
25 it would be appropriate for us to articulate that in

1 some way and that it might make this legislation more
2 satisfactory all around.

3 That's all I have. Thank you.

4 ACTING CHAIRMAN BORTNER: Any questions?

5 JUDGE CASSIMATIS: Could I just make a
6 reaction on the presumption that a child of tender
7 years is better cared for by his mother? The cynics
8 say that test is now alive and well, it's called now a
9 continuity test.

10 ACTING CHAIRMAN BORTNER: Judge, I want
11 to thank you very much for your testimony, which has
12 been, as I anticipated, very, very enlightening, very,
13 very good for the committee.

14 If I could just, sort of as the prime
15 sponsor of the legislation, make a comment or two. I
16 do share, and I guess in this kind of area I have sort
17 of resigned myself to the fact that there is probably
18 very little way to resolve all these competing issues
19 because they are in fact that and they do involve some
20 judgments. It does strike me, though, that kind of
21 inherent in the argument for maintaining a burden of
22 proof is almost a concept that you've got some sort of
23 proprietary or ownership interest in your child, even
24 to the exclusion of all other considerations, including
25 the best interests of the child. And I guess getting

1 back to your last comment, it does seem to me that the
2 bottom line question is do we focus on the rights of a
3 parent or do we focus on the best interests of the
4 child, and I think I am probably more willing, with
5 some mixed feelings, to come down on the side of
6 putting that focus on where I think it should be the
7 best interests of the child, and I am not in favor of
8 allowing courts or requiring courts in this or in other
9 areas to go through a bunch of legal gymnastics to get
10 to what may seem to be a good result. And I think
11 clearly in the case you pointed out that's what
12 happened. The Supreme Court looked at the facts, they
13 decided what result they wanted to have and they
14 ignored the law. And I guess as long as we sort of
15 agree with the conclusion that they come to or the
16 decision, that's okay. I don't know that I want the
17 Supreme Court ignoring the law. I would rather have
18 them follow the law that the people that are elected to
19 make the law tell them.

20 But again, thank you very much for your
21 testimony. I'd like to follow up with you on some of
22 these issues that were raised today and talk about
23 perhaps refining the bill and refining some of the
24 issues.

25 JUDGE CASSIMATIS: Thank you all very

1 much. The comments were very enlightening.

2 ACTING CHAIRMAN BORTNER:

3 Okay, my next witness, is Joan Rupp
4 present?

5 (No response.)

6 ACTING CHAIRMAN BORTNER: Is Dr. Dunsmore
7 present?

8 Dr. Dunsmore.

9 REPRESENTATIVE HAGARTY: There are two of
10 them.

11 ACTING CHAIRMAN BORTNER: Oh, excuse me,
12 Dr. Richard Dunsmore and Dr. Lillian Dunsmore.

13 DR. R. DUNSMORE: Yes. We had planned
14 that I would start.

15 ACTING CHAIRMAN BORTNER: Drs. Dunsmore.
16 You can present your testimony in any fashion you care
17 to.

18 DR. R. DUNSMORE: Acting Chairman,
19 members of the Judiciary Committee, and friends, Dr.
20 Lillian Dunsmore and I are pleased to be invited here
21 today to provide testimony and support of Bill 1290.
22 We recently retired after 32 years of private practice
23 in internal medicine. During those years we frequently
24 witnessed the anguish of psychological parents who were
25 denied access to children when it was clearly in the

1 best interest of these children. Further, we saw the
2 deleterious effects experienced by the children who
3 were removed from a stable and loving environment. The
4 chaos in their lives produced hostility, despair and
5 confusion, rendering them incapable of love or trust
6 and providing fertile ground for the development of
7 anti-social behavior, as well as drug addiction.

8 The present law presents no provision for
9 psychological parents, relying instead on reunification
10 with the natural parents, and this undoubtedly accounts
11 for the statistics that one out of every six children
12 who are physically and sexually abused are again
13 exposed to the same insult when returned to their
14 previous environment. Had Bill No. 1290 been in effect
15 in 1988, it would have spared Dr. Lillian and I untold
16 hours of anguish, legal fees exceeding \$150,000, but
17 more importantly, spared our granddaughters the
18 psychological scars which they manifest.

19 In our naivete, we were totally unaware
20 of the drug and alcohol abuse that involved our son and
21 daughter-in-law. They were constantly in debt, as well
22 as in legal difficulties. When we removed them from
23 the house we had purchased for them in Florida, the two
24 of them, with their infant, Jennifer, were given a home
25 with us in Coatesville, Pennsylvania, in 1984. They

1 were provided with food, shelter, clothing, but most
2 importantly, with love.

3 Our second granddaughter, Allison, was
4 born in November of 1985, and with the exception of one
5 year she has lived with us all of her life. During
6 that one year she lived 20 miles away in a house that
7 we had purchased for our son and daughter-in-law,
8 however we met with the children every day and they
9 spent their weekends with us.

10 In March of 1988, their mother abandoned
11 the children, first living in a commune and then moving
12 to Florida, her native State. The children came to
13 live with us and have remained with us to this day.
14 Now, two years later, the mother is making overtures to
15 regain custody of the children. We have physical
16 custody and have been made foster parents. However, we
17 are continually faced with court appearances because
18 Chester County Children and Youth Services insists on
19 reuniting the youngsters with their mother. She is 29
20 years old and is currently living with a 19-year-old
21 boy.

22 Historically, the court's philosophy
23 reflects current society's focus on the nuclear family,
24 but we feel the old system where family members provide
25 the necessary love and care were far superior to the

1 present concept of reuniting the good with the bad.
2 Ultimately, the extended family concept should be
3 incorporated into the law to protect the children. To
4 this degree, open adoption may well be the answer to
5 protect the day-to-day stability needs for children.
6 Further, we feel that children should be placed with
7 the most reliable and stable guardians, with the
8 protected rights of the natural parents for appropriate
9 visitation. If grandparents or psychological parents
10 had more standing in the courts, it could well
11 alleviate the workload of Children and Youth Services,
12 which is currently mandated to reunite the children
13 with natural parents. We fit the category of both
14 psychological parents as well as grandparents who have
15 provided for our grandchildren since they were 2 and 4
16 years old. They are now 4 1/2 and 6 1/2.

17 The current passage of this act at this
18 time will not solve our predicament because Children
19 and Youth Services work under the Juvenile Act and not
20 under the Shared Custody Act. Nonetheless, we feel it
21 is extremely important to appear before you in hopes
22 that children and psychological parents be spared the
23 agonizing distress that we have experienced over the
24 last two years.

25 Thank you very much.

1 ACTING CHAIRMAN BORTNER: Ma'am, why
2 don't you both present your testimony before we go to
3 questions?

4 DR. L. DUNSMORE: Mr. Chairman, members
5 of the Judiciary Committee, I echo my husband's words
6 and concerns relating to psychological parents.
7 Although alarmed at the turn of events in our
8 granddaughters' lives, we are thankful that we were
9 able to step in at a most critical time and rescue them
10 from the depths of despair. It was most heart
11 wrenching putting the little one to bed saying, "Mommy
12 doesn't want me. Do you want me?" The 4-year-old had
13 screaming nightmares for months, reliving the sexual
14 and physical abuse to which she and her younger sister
15 were subjected to by their mother's 16-year-old brother
16 when in the care of their mother.

17 In time, we were able to stabilize them
18 and give them security and a structured environment
19 while we gave them the love and attention that they
20 needed. The court and agency professed to be
21 interested in the best interests of the child. With
22 both a Dependency Act, the Private Custody Act, the
23 policy would appear to promote the children's
24 relationship with the natural parents regardless of the
25 consequences. With the limited directives such as this

1 from the legislature, I say God help us all.

2 In the Interim Report to the President
3 and Congress, the National Commission on Children said,
4 and I quote, "Serious questions are raised about the
5 reach and effectiveness of existing public and private
6 sector policies and programs to support the children
7 and their families." The Commission further states,
8 "Drugs and alcohol use by parents, as well as
9 drug-related crime and violence, are as much a threat
10 to children as the use of drugs by the children
11 themselves."

12 Senator John Rockefeller, the Chairman of
13 this Commission, continues: "This is a personal
14 tragedy for the young people involved and a staggering
15 loss for the nation as a whole. Too many are reaching
16 adulthood unhealthy, illiterate, unemployable, and lack
17 both a moral direction and a vision of a secure
18 future."

19 Our society has deteriorated to the
20 extent where one out of every two marriages ends in
21 divorce, where one out of every four children is being
22 raised by a grandparent, where the incidence of child
23 abuse has attained unbelievable proportions, and where
24 one out of every six children that is abused is
25 reabused.

1 We are psychologically bonded to our
2 grandchildren, as they are to us. They have expressed
3 a desire to remain with us, all of which has fallen on
4 deaf ears. A return to their mother, who two years ago
5 abandoned them, returns them to an immoral environment,
6 to an environment that subjects them to a high risk of
7 sexual abuse, and to an educational wasteland. Given
8 this option, these little girls could indeed be flushed
9 into the sewers and become one more statistic for the
10 nation's children in trouble.

11 Bill 1290 would certainly help to stem
12 the flow of deterioration in children's welfare and
13 rights. Those who currently act as the psychological
14 parents of these children do so out of love,
15 compassion, and unselfishness. Their contributions and
16 resources should be nurtured, not dismissed, by gun
17 barrel vision of legislature, courts, and agencies.
18 Senator Rockefeller says, "Give children the time and
19 the attention they need for a good start in life." I
20 would add, a country is only as good as its educated
21 people.

22 Bill 1290 is desperately needed to
23 perpetuate the stability and love a little child needs
24 in life. Please consider quickly the passage of this
25 bill into law so that children may enjoy the happy

1 childhood that they so richly deserve.

2 Thank you.

3 ACTING CHAIRMAN BORTNER: Thank you.

4 Questions?

5 Representative McHale.

6 REPRESENTATIVE McHALE: Thank you for
7 your testimony.

8 I know you were present during the
9 earlier dialogue that took place when the previous
10 witness testified, and my heart goes out to you under
11 the circumstances that you described, and if I
12 understood your testimony correctly, you indicated that
13 over a long period of time, with regard to the conduct
14 of your daughter-in-law, there were serious questions
15 of drug abuse, is that correct?

16 DR. L. DUNSMORE: Yes.

17 DR. R. DUNSMORE: Proven.

18 DR. L. DUNSMORE: Proven, yes.

19 REPRESENTATIVE McHALE: Proven
20 allegations of drugs abuse.

21 DR. L. DUNSMORE: And alcohol.

22 REPRESENTATIVE McHALE: That there was a
23 real question of sexual abuse with regard to your
24 granddaughters, is that correct?

25 DR. L. DUNSMORE: That's correct.

1 REPRESENTATIVE McHALE: That for lengthy
2 periods of time, I gather, she had little or no contact
3 with the grandchildren, with her children, your
4 grandchildren.

5 DR. L. DUNSMORE: When she abandoned
6 them, there was absolutely no communication for seven
7 months, and then suddenly on a card would come, and
8 then there would be a hiatus again of maybe another two
9 months, and then maybe another little card would come,
10 and then finally she decided that she wanted custody of
11 these children, the motives being very nefarious. And
12 she continues with alcohol abuse, and sending them back
13 to Florida with her would certainly place these
14 children at an extremely high risk of abuse.

15 MR. R. DUNSMORE: I would just like to
16 add, if I may a second, the Children and Youth Services
17 provide her with airplane transportation up and a free
18 lawyer for the court cases, as well as a motel room.
19 They also send a social worker down to Florida with the
20 children to visit with her where she's living with her
21 boyfriend in an apartment and each occasion there has
22 been something new, but we still hear that under the
23 present act that the judge is telling us that the
24 burden is always to put the child back with the mother.
25 Now, the mother and father are separated, the father

1 has been, our son, has been in no condition, and he
2 admits it, to take any parts. He would like us to have
3 custody, as a matter of fact.

4 REPRESENTATIVE McHALE: Well, I guess the
5 concern that I have is this: Quite clearly, based on
6 the facts as you've related them, if the children were
7 to go with their mother they would be at high risk, and
8 I think it's equally clear, based on at least the
9 version of facts that you've given to us, that she's a
10 bad parent and that the environment for the children
11 would obviously be a negative environment in which the
12 daughters could be raised, particularly when compared
13 to what you have to offer in a loving environment,
14 supportive environment for your grandchildren. What
15 bothers me about the bill as it's currently drafted is
16 it goes beyond the situation of a bad parent to
17 encompass the situation of a good parent. This bill
18 would not eliminate the prima facie preference given to
19 parents when they are proven to be bad. This would
20 eliminate prima facie preference in all cases, whether
21 or not the parents were good or bad, and it's that
22 point that concerns me.

23 If your daughter-in-law had been a good
24 and loving parent, had she never been involved in drug
25 abuse, had there been no allegations of sexual abuse of

1 the children, had she been a nice, normal person who
2 loved her children and who wanted to care for them,
3 would you have ever brought a custody proceeding?

4 DR. L. DUNSMORE: No.

5 DR. R. DUNSMORE Absolutely no. This is
6 why we purchased the house for them, an automobile, why
7 we paid their bills.

8 DR. L. DUNSMORE: In short, we tried to
9 keep the family together, doing what we could the
10 entire, what was it, three, four years that they were
11 up here in Pennsylvania.

12 REPRESENTATIVE MCHALE: If we took the
13 step that in part was advocated by the previous witness
14 and made it clear that third parties who are
15 psychological parents have standing to bring custody
16 actions against a biological parent but we maintained
17 some preference with regard to the right of custody on
18 behalf of a biological parent so that the net result of
19 that would be you could clearly go to court to
20 challenge the custody of the natural parent but you
21 would still have to show by convincing reasons that the
22 best interest of the child would be served by an award
23 of custody to a third party, i.e. we would continue to
24 recognize the special bond between a good parent and a
25 natural child while providing an opportunity under the

1 law to deny custody to the bad parent in favor of more
2 loving and supportive third parties, would that be
3 enough to satisfy you?

4 DR. R. DUNSMORE: I personally feel that
5 you've changed from biting the bullet to biting a piece
6 of chewing gum. I think it would reverse back to where
7 we are now. In fact, rather than taking away the
8 advantages of a psychological parent, I would rather
9 you did away with the whole previous child act and go
10 back to where we were, what, 35, 40 years ago. That's
11 my personal opinion.

12 REPRESENTATIVE McHALE: I guess the
13 question I'm asking--

14 DR. R. DUNSMORE: But some modification.

15 REPRESENTATIVE McHALE: Should a good
16 parent have an advantage of any sort--

17 DR. R. DUNSMORE: A good parent should
18 have the children. No question about it.

19 REPRESENTATIVE McHALE: Well, let me ask
20 that, if I may, sir.

21 My question is, should a good parent have
22 any advantage under the law when involved in a custody
23 dispute with a third party? The situation you have
24 described involves a bad parent. This bill does not
25 distinguish between good and bad parents, as it is now

1 drafted. It eliminates that prima facie preference for
2 all biological parents when involved in a custody
3 dispute with a psychological parent. So my question to
4 you is, in light of the fact that you have experienced
5 a very traumatic, very sympathetic, and lengthy fight
6 with a bad parent, and you present very compelling
7 arguments in that context, my question to you is,
8 should a good parent have any advantage under the law
9 when involved in a custody dispute with a third party
10 who meets the definition of psychological parent as
11 contained in the bill? Does a good parent deserve any
12 special advantage?

13 DR. R. DUNSMORE: I don't want to prolong
14 this but I feel that we keep talking about good parents
15 and bad parents and we're not talking about children
16 and where they're going. And I think the well-being of
17 the child is the whole importance. It's the only
18 reason that Dr. Lillian and I came. I would feel very
19 sorry for a good parent who is headed downhill, but I
20 don't see that that has any consideration of the child;
21 or if it does have, I would certainly feel that the
22 court would say this is a good parent and naturally
23 show a certain bias. I don't think you can put that
24 into law, but I may be incorrect.

25 REPRESENTATIVE McHALE: All right. I

1 thank you for your response. I proposed the line of
2 questioning that I did because I think the specific
3 facts of your case are compelling, and in fact in my
4 view if I were a judge and we clarified your right of
5 standing and we clarified your opportunity to challenge
6 the custody of a natural parent in light of the
7 information that you have provided to this committee, I
8 would readily find convincing reasons to deny custody
9 to a natural parent, a natural parent whom you
10 indicated had a drug problem, had an environment in
11 which the children were subjected to potential sexual
12 abuse, who had, in your words, Doctor, abandoned the
13 children for an extended period of time. Once we made
14 it clear under the law that you had the right to
15 challenge the custody of a natural parent, I would find
16 little difficulty in concluding that there were indeed
17 convincing reasons to give you custody of the children.
18 My concern with House Bill 1290 is it would eliminate
19 the advantage currently under the law for good parents
20 as well as bad parents without distinguishing between
21 the two, and I think Representative Heckler may well
22 have proposed an appropriate middle ground where we
23 grant you standing and where under certain
24 circumstances a test somewhere between the prima facie
25 preference and the convincing reasons test would be

1 articulated, but where we would not across the board
2 eliminate by statute the recognition of a special
3 relationship between a good parent and that parent's
4 child.

5 I don't know if I've made that clear, but
6 I hope that Representative Heckler may well be able to
7 come up with language that would literally not throw
8 the baby out with the bath water, where we would
9 address the difficult situations involving parental
10 misconduct such as those that you've described without
11 adversely affecting the interest of a truly good
12 parent.

13 DR. R. DUNSMORE: Sir, if you ran for
14 judge, I'd vote for you tomorrow.

15 REPRESENTATIVE McHALE: I did, and I hope
16 you did.

17 DR. L. DUNSMORE: Better still, would you
18 like to come to court with us tomorrow?

19 REPRESENTATIVE McHALE: I don't want to
20 prejudice in any way a case that's pending in the
21 courts, but you have presented very compelling facts
22 that would indicate, at least to me, that there are
23 indeed convincing reasons to deny a bad parent custody
24 and in the alternative award custody, for convincing
25 reasons, to good and loving grandparents. In an effort

1 under the law to help people positioned such as
2 yourself, I would hate to see us inadvertently and
3 adversely affect the interests of some other parent who
4 truly was a good and loving parent and for whom I think
5 there ought to be some special advantage under the law,
6 that special advantage recognizing not the property
7 interest, because I think there is none between a
8 parent and child, but the very special loving,
9 constitutionally protected relationship between a
10 parent and child. In my view, only under the most
11 compelling circumstances should we involuntarily take a
12 child away from a parent, and it seems to me in the
13 case that you've described those compelling
14 circumstances are indeed present.

15 Thank you, Mr. Chairman.

16 ACTING CHAIRMAN BORTNER: Thank you.

17 Representative Heckler.

18 REPRESENTATIVE HECKLER: Thank you, Mr.

19 Chairman.

20 I just would really like to make sort of
21 the additional observation, partly in response to one
22 of Representative Hagarty's earlier comments, I may not
23 have understood clearly, I think the case that you have
24 described to us strikes me as the strongest reason for
25 this legislation. I am much more concerned that in the

1 appropriate case an alternative adult be able to assert
2 the right to, and again, I get fumbled up with the
3 terms, sole custody is not appropriate anymore. I
4 think it's majority. Actually, I hadn't heard that
5 term before but I don't practice in this area of law
6 anymore either. I thought it was principal, physical
7 custody, and whatever the other is, but that more than
8 simply maintaining relationships through visitation
9 where there is what Paul describes as a bad natural
10 parent, biological parent, there needs to be the right,
11 first of all, the standing and the realistic ability of
12 another interested adult or adults who will promote the
13 best interests of the child to intercede and to get
14 physical custody of that child, probably subject to
15 visitation by the natural parent, but that that, in the
16 appropriate case, should be authorized. And Lois, I
17 wasn't quite sure whether you were--

18 REPRESENTATIVE HAGARTY: I didn't ask to
19 be recognized but when David's done, I would like to
20 comment.

21 REPRESENTATIVE HECKLER: I'm finished.

22 ACTING CHAIRMAN BORTNER: Representative
23 Hagarty.

24 REPRESENTATIVE HAGARTY: Thank you.

25 I'm concerned, you started out by saying

1 that this would not affect -- this law does not affect
2 your situation, and what concerns me and brings to
3 mind, I had a judge from Montgomery County, Judge
4 Brody, say to me probably five years ago that she was
5 very concerned about the fact, just as you said, that
6 in our Juvenile Act, I guess, the standard is so
7 clearly in favor of reunification that she felt that in
8 cases where there was, and she had a specific case that
9 she was concerned about where there was specifically
10 sexual and physical abuse, that the standard in law was
11 so clear that she felt that we were putting children
12 back into situations in which there was just obvious
13 risks of repeated abuse. And it concerns me that we
14 think that we are correcting those situations by
15 addressing this and that if this committee, I at that
16 time evaluated her concern and there was another bill,
17 I don't remember what it was, that was moving through
18 the legislature that was going in kind of the opposite
19 direction that she wanted and it was my feeling that we
20 were not prepared to change, and that's a difficult
21 standard to think about changing.

22 But if we're concerned about the
23 situations where there's been removal of a parent and
24 what that standard should be before the parent can
25 reunite, we really, as a committee, ought to look then

1 at that separate Juvenile Act because I just don't
2 think that this addresses those situations. And so for
3 Paul's and David's concern about where there's a bad
4 parent seems to me where there's been actual removal,
5 we have a very clear, we don't have to define bad
6 parent, we have a very clear act that occurred by order
7 of court and that the situation that you're expressing
8 cries out again for need to look at what that standard
9 should be before the court reunites.

10 ACTING CHAIRMAN BORTNER: I'm not sure I
11 -- I guess the point is though, I mean, at what point
12 do you recognize the rights of another party to come in
13 and make a case, make an argument that they can better
14 provide, that the best interests of the child require
15 or call out for them assuming parental responsibility?

16 REPRESENTATIVE HAGARTY: Well, I guess my
17 concern, Mike, is that what we're seeing, and if Judge
18 Cassimatis were here, he could probably better tell us
19 how he would interpret this case in the light of the
20 bill, but what concerns me is that I think that what's
21 happening realistically is that Children and Youth, and
22 that's what I understand is happening in your case, the
23 Children and Youth recommendation is given very strong
24 weight. They are under a whole separate act under
25 which they must put reunification first, you know, I

1 hesitate to say at almost all costs, but that's how
2 it's being interpreted. And so that whatever we do
3 with this, I mean, maybe -- I'm not sure it's going to
4 affect what is going to be, you know, a Children and
5 Youth recommendation which is given serious weight by
6 the judge and a whole separate standard. So my only
7 point is I think we have to address that law.

8 REPRESENTATIVE MCHALE: Mike, I think
9 Judge Cassimatis very perceptively divided this into
10 distinct issues, related but distinct issues. The
11 question is simply when can they come into court? I
12 happen to agree with you on that point. I think the
13 concept of psychological parent should be recognized to
14 the extent that when someone meets that test we provide
15 open access to the courtroom so that their case can be
16 presented. The more difficult question is what
17 standard should be applied once they arrive in the
18 courtroom?

19 ACTING CHAIRMAN BORTNER: I understand.

20 REPRESENTATIVE MCHALE: And on that issue
21 I am much closer to Lois than I am to you because it
22 seems to me that when the psychological parent comes
23 into the courtroom and can establish, as apparently
24 these folks can, that the natural parent cannot provide
25 a loving, safe, nurturing environment, that as against

1 that bad parent, for convincing reasons, custody should
2 be given to the grandparents, but when those
3 grandparents come into the courtroom based on the
4 standing principle that I fully support and it turns
5 out that the natural parent is in fact a good and
6 loving parent, but that the argument is the
7 grandparents might conceivably be better, then it seems
8 to me the good parent deserves a certain benefit under
9 the law reflecting a biological and loving tie between
10 that parent and natural child. And as I see it right
11 now, House Bill 1290 does not distinguish between the
12 mother as described in this instance who has suffered
13 or experienced, engaged in, drug abuse and the mother
14 who, for instance, is a completely normal, loving and
15 nurturing parent, and I think that distinction has to
16 be drawn under whatever bill we finally consider.

17 ACTING CHAIRMAN BORTNER: The only point
18 I would make is, I mean, they are two issues, but to
19 give somebody access and then create a burden that is
20 impossible to meet, you know, by point number two
21 you've defeated point number one, and that's the issue
22 I think that we want to--

23 REPRESENTATIVE HAGARTY: I think we want
24 to debate this between us at another time. I mean, I
25 could respond again, but it seems to me maybe we ought

1 to, if we want to debate it, do that at a separate time
2 than in front of the witnesses. I just feel that we're
3 debating.

4 ACTING CHAIRMAN BORTNER: All right.

5 Does anybody have any other questions?

6 (No response.)

7 ACTING CHAIRMAN BORTNER: Thank you very
8 much.

9 DR. R. DUNSMORE: Thank you.

10 DR. L. DUNSMORE: Thank you for inviting
11 us.

12 ACTING CHAIRMAN BORTNER: Thank you very
13 much.

14 On the agenda is Joan Rupp. Is Joan Rupp
15 present?

16 (No response.)

17 ACTING CHAIRMAN BORTNER: The only other
18 person that appears on the agenda in front of me is
19 Lynn Gold-Bikin. I don't believe she is here. Does
20 anybody know if she is going to be here or has any
21 materials to present or distribute?

22 MR. SUTER: She was supposed to have
23 somebody read her testimony.

24 REPRESENTATIVE HAGARTY: Well, we can do
25 that in the privacy of our office.

1 ACTING CHAIRMAN BORTNER: Is there
2 anybody here to present testimony that is not on the
3 agenda or does not appear on the agenda but made
4 arrangements to testify?

5 (No response.)

6 ACTING CHAIRMAN BORTNER: Kathy, this is
7 the complete agenda as far as you know?

8 MS. MANUCCI: (Indicating in the
9 affirmative.)

10 ACTING CHAIRMAN BORTNER: Okay. I would
11 thank all of the witnesses that are still here, other
12 interested parties that attended -- yes, Ma'am?

13 MS. HOLLINS: My name is Sandra Hollins.
14 I come from California. I have an interest in the
15 proceedings here and may I ask one question? How do
16 you define, sir, a good, a better, or a bad parent? I
17 understand a good parent because you clarified that by
18 stating loving. That implies the parent would look
19 after the physical, mental, emotional, educational, and
20 every other aspect of the child's life. What is the
21 distinction between a better parent who could not --
22 who is equally as loving, if not more loving, and could
23 provide as perhaps an improved, if better be a
24 redundant term, how do you define, how do you make that
25 distinction between good and better? I know what a bad

1 parent is. Please.

2 REPRESENTATIVE McHALE: Sure, I'd be
3 happy to.

4 Well, your initial question, Ma'am, was
5 how do you define a bad parent?

6 MS. HOLLINS: I know how to define a bad
7 parent. I want to know the difference between a good
8 loving parent and a better loving parent.

9 REPRESENTATIVE McHALE: And that requires
10 a very difficult value judgment such as those made
11 every day in our Courts of Common Pleas when two
12 parents decide to dissolve their marriage, and that's
13 the tragic circumstance that I was talking about
14 earlier. In the years where I practiced in this area
15 of the law, I very rarely saw divorces involving good
16 and bad parents. What I saw more often, much more
17 often, were circumstances where two basically decent
18 persons had concluded that their marriage should not
19 continue, and two good people decided, through the
20 legal process, to dissolve their marriage, and
21 thereafter that decision compelled the courts in
22 custody matters to choose not between a good person and
23 a bad person, but in the best interests of a child
24 between a good and perhaps a better parent in terms of
25 the environment that might be provided to the child.

1 And what that comes down to usually is an evidentiary
2 hearing where the mother and the father come into the
3 courtroom and present evidence for evaluation by the
4 judge as to the quality of the environment that each
5 could individually provide, and the judge is then
6 obligated to make what requires a Solomon-like judgment
7 as to not who is good or bad but who, often by a very
8 narrow margin, can provide the better environment.

9 The situation described by our two
10 previous witnesses is a situation where the decision is
11 much easier, where you have a parent who is a drug
12 abuser, perhaps a child abuser, who has abandoned the
13 child or children for extended periods of time. In
14 that case the choice between the parent and the other
15 parent or the parent and a third party is much easier
16 to make. The more difficult situation is the typical
17 situation where you have two good people who dissolve
18 their marriage and then based on evidence provided by
19 each a judge has to decide which, in the best interest
20 of the child, is the better environment in which the
21 child can be raised.

22 MS. HOLLINS: Sir, but the question here,
23 I believe, is standing.

24 REPRESENTATIVE McHALE: No, Ma'am.

25 MS. HOLLINS: Yes, sir. As I understand

1 House Bill 1290, I think when you were describing in
2 your scenario you described, as I said, you used those
3 terms "good" and "bad," or excuse me, "good" and
4 "better".

5 REPRESENTATIVE McHALE: Ma'am, if I could
6 clarify, I think there was virtual unanimity on the
7 committee, certainly including me, that on the question
8 of standing, psychological parents, as defined in the
9 bill, should have the ability to come into court to
10 present their case.

11 MS. HOLLINS: I see.

12 REPRESENTATIVE McHALE: I believe that --
13 let me say this for the record and for Representative
14 Bortner's sake.

15 MS. HOLLINS: Please.

16 REPRESENTATIVE McHALE: I think this bill
17 is an excellent step in the right direction, and I
18 think Representative Bortner has done some ground
19 breaking work here to respect, and appropriately so,
20 the rights of psychological parents. I think that the
21 definition of a psychological parent in the bill is a
22 good one.

23 MS. HOLLINS: Thank you.

24 REPRESENTATIVE McHALE: And I think that
25 the judge who testified earlier is correct that

1 statutorily we need to make it clear that psychological
2 parents have the right to go to court and seek custody.
3 The question, at least as I sensed it on the committee
4 today, did not involve standing. I had little
5 difficulty concluding that indeed psychological parents
6 should have standing. The much more troubling question
7 is once standing is the granted and psychological
8 parents come to court challenging the custody of a
9 natural parent, should they, under all circumstances,
10 stand as equals or should they come to court with a
11 recognition that there is some advantage under the law
12 granted to a biological parent?

13 The case that was provided by our two
14 previous witnesses described a circumstance where by
15 any objective measure a parent who engages in drug and
16 child abuse is a bad parent, and if House Bill 1290
17 abolished the prima facie preference to a parent under
18 circumstances where he or she could be shown to be a
19 drug abuser and a child abuser, I would have no
20 difficulty with that at all, though I think current law
21 may already address that issue.

22 What bothers me about House Bill 1290 is
23 it does not distinguish between good parents and bad
24 parents. Even if you have, by definition, a good
25 parent in the courtroom fighting a custody battle with

1 equally loving grandparents, for instance, there is no
2 preference whatever shown. Indeed, the current
3 preference under the law is abolished by 1290 with
4 regard to the good parent, and I think under the law we
5 have to draw the distinction between a bad parent who
6 is perhaps not deserving of any special preference and
7 a good parent who is. And that's what I was getting
8 at.

9 ACTING CHAIRMAN BORTNER: Thank you.

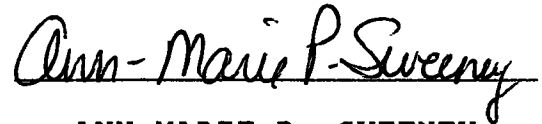
10 MS. HOLLINS: Thank you.

11 ACTING CHAIRMAN BORTNER: I'm going to
12 exercise my prerogative here and adjourn the hearing
13 and you can continue this. I just see no need for the
14 court reporter to keep taking down the testimony.

15 Thank you very much, and the hearing is
16 adjourned.

17 (Whereupon, the proceedings were
18 concluded at 12:13 p.m.)
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1 I hereby certify that the proceedings and
2 evidence are contained fully and accurately in the
3 notes taken by me during the hearing of the within
4 cause, and that this is a true and correct transcript
5 of the same.

6
7 

8 ANN-MARIE P. SWEENEY
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