



## Divorce Mediation

House Bill 1260 Sponsor: George E. Saurman

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### Testimony

Rev. Leonard K. Maliska, Jr., M.Div., D.Min. Counseling

Christian Conciliation Services of Bucks County

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Director of the Christian Counseling Center Of Bucks County, Inc.

Board Member of the Pennsylvania Family Institute

# DRAFT

Statement of Dr. Leonard K. Maliska Jr.

To The Judiciary Committee of the House of Representatives of Pennsylvania  
Public Hearing Regarding House Bill 1260 - Divorce Mediation

April 16, 1992

## Introduction

Mr. Chairman, ladies and gentlemen, my name is Leonard (Lee) Maliska, and I am the Director of the Christian Counseling Center of Bucks County with home offices at 391 Dublin Pike, Dublin, PA 18917.<sup>1</sup>

~~I teach family counseling at both the New Jersey and Pennsylvania offices and am adjunct professor of a regional branch of Columbia Seminary in South Carolina. Since 1984 the Christian Counseling Center has offered marital counseling and mediation for conflict resolution. A registered fictitious name was originated to facilitate mediation services. The Christian Conciliation Services of Bucks County has operated mainly for mediating marital interim agreements and final marital settlements. Samples are submitted in the appendix. I am not a lawyer but an ordained minister/pastors with a Doctorate in counseling from Westminster Seminary in Philadelphia as well as a Masters of Divinity from Grace Seminary in Winona Lake, Indian and a Business Administration degree from Husson College in Bangor, Maine.~~

I wish to express agreement and disagreement with elements of House Bill 1260 which would grant to anyone who is able to solemnize marriages the ability to dissolve same.

## Abstract

It is my opinion that there will be widespread response to a possible or perceived intrusion of the separation of Church and State. With certain qualifications it is also my opinion that if a minister/pastor, justice of the peace, mayor or others qualified to solemnize marriages are to: a.) have marital and family counseling training; b: be qualified as a mediator; and c.) be certified on a regular basis on Pennsylvania Law as it pertains to matters concerning the elements of legal settlement, then there is no breaking of the "wall of separation". The minister/pastor is not being certified as a minister/pastor but the minister/pastor is, by choice, certified as a mediator. Any agreements emanat-

ing from mediation between the marital parties should be drafted and sent to the court with proper jurisdiction to be made an order of court. **The conclusion that I believe is within my theological understanding is that a minister/pastor should not be empowered as a civil law implementor to sign marital dissolution documents.** Divorce as a social problem is viewed by most pastors as serious enough problem that it is viewed as in to their conciliatory calling. A pastoral dissolution of marriage would be viewed as an oxymoron. In a bad to worst case scenario the door could be opened to widespread misuse, abuse, and charlatanism. It would rid the court of a domestic backlog but at the same time make us rival Nevada for quick divorces. A empower a pastor to submit a mediation agreement, final settlement, and a signed stipulation would rule out the above dangers and abuses. Severe misapplications could have a deleterious effect on what appears to be a sincere effort to right some of the traumas and wrongs experienced in prolonged and expensive court battles presently being waged in Pennsylvania Courts. The only winners seem to be the lawyers.

## **Background**

After many hours of counseling and mediation I have realized that whatever it was that law makers of Pennsylvania intended to be beneficial in no-fault divorce has been lost somewhere in the maze, complexity, overburdened, and busy court system. Once again in my opinion lawyers have capitalized on people in pain. Many social injustices get lost in what is purported to be a fair and just system.

Many marital parties have testified that they were too hasty.

A study of divorced couples with preschool children shows that after a year of divorce, 60% of men and 73% of women feel they made a mistake and should have tried harder to make marriage work. People have no idea how much anguish and stress is caused by divorce. (Dr. E Mavis Hetherington)

One judge expressed what I believe is the reality of life when it comes to divorce.

To call me a judge is something of a misnomer. I am really a sort of public mortician. In the past eleven years I have presided over the final obsequies of twenty-two thousand dead marriages. The trouble is this: I have buried a lot of live corpses. There was no sure way to discover and resuscitate the spark of life that surely remained in many of them. (A Judge of the Court of Common, Pleas. Toledo. Ohio)

Even children express their feelings:

Seventy-five percent of the teenagers in our country said, "It's too easy to get a divorce in the United States." Of those from divorce situations, 74 percent said that their own parents did not try hard enough.

The prime sponsor George Saurman has stated correctly:

"Both men and women have complained bitterly about a system which appears to be replete with inequity and where justice appears to have been replaced by an adversarial contest to see which party can inflict the greatest punishment on their estranged spouse."

### **Social Norms & Necessity**

The Christian Counseling Center sponsors a program called Fresh Start which is a seminar for ~~the separated and divorced.~~ The center also sponsors a support group each tuesday night. A recurring theme is one of personal, emotional, and financial abuses by lawyers and the findings of the court. Aside from their own self-serving bias, many of the stories are heart rending. The "system" needs to be sensitive to needs, realize the results of a crowded court, and consider the whole family it impacts. Dispassionate justice, in many cases, ends up not being evenhanded. The court has asked for and needs a mediation system and network. To involve church leaders as mediators who meet the general requirements seems almost analogous to pastoral care. While church leaders may attract or serve a smaller segment of the general community they may also be very socially involved in mediations where particular beliefs may neither be desired or relevant to the outcomes. Mediation is well within any definition of a Judeo-Christian ethic and more generally a pastoral responsibility. In my personal opinion mediation in conflict is a pastoral duty. Even for the most conservative pastor protection is an appropriate motive for involvement. Whether that duty includes dissolution of marriages I question. This mediation concept for pastors may not appear appropriate to many conservative Christian groups. As a member of such a ministerium I have experienced the reticence of many pastors to involve themselves in conflict resolution of this type. Those who choose to become mediators or not to should have that right. Living in accord with one's calling is mandatory. I believe that a pastoral mediation structure allows for a broader role in possible marital reconciliation and in the case of irretrievability damage control. Pas-

toral sensitive mediation despite the situation helps to minimize the trauma of the parties. Many pastors who would not otherwise be involved have referred congregational members to our mediation services. We in turn ask them to be part of the mediation team. A great learning experience.

It is my sincere opinion, both by practice and experience, that a pluralistic mediation system and network should be available. While this is so there are certain aspects of Bill 1260 that raise concerns for me.

### **Organization & Implications**

It appears that those who are qualified to solemnize marriages are able to negotiate issues of equitable distribution, spousal support, child support, child custody, alimony and alimony pendente lite, ~~without the training and qualifications mentioned in Section 3325, part (b) Qualifications of mediator.~~ This, if the case, would be detrimental to the mediation process. Any pastor or other person able to solemnize marriages according to the Pennsylvania Consolidated Statutes, includes local, state or federal judges or justices; mayor of any city or borough in the Commonwealth; or minister/pastor, priest, or rabbi of any regular established church or congregation. Section 3324 (a) (b) (c) seem separate from the conditions in Section 3325 (a) (b). In my opinion any ordained pastor should be required to, if he desires to mediate in such a fashion, request by application mediation training in a compatible organization and be required to be certified and recertified as a mediator having taken, or having access to those who are aware of domestic relations matters, training in the procedures used in domestic relations similar to training given those conducting domestic court Masters hearings.

The implication of bill 1260 seems to give an untrained clergy and others civil law capabilities. I must reiterate a former statement that any minister/pastoral certification must be for the purpose of mediating not to minister or pastor. If the explication is that the state will certify minister/pastors to implement civil law much objection will persist. Most minister/pastors regard state civil law as ratification of marriages performed. In such a vein many (most) would not want to usurp civil law by having the ability to ratify or solemnize divorce. By its appearance the bill gives members of the clergy the authority to determine matters of civil law. This unconstitutional aspect of the bill would be easily remedied by certifying pastors to mediate, if they choose, and then allowing the legal agreements to be introduced as mentioned in Section 3325 Part (c). For the bills success it would be recommended that

parties both be able to request mediation from a qualified pastor or others and that the court be able to assign pastoral mediation services without being perceived as breaking the "invisible wall of separation".

### Procedural Problems

Pastors by nature of their study usually have training in family counseling. They do not have training in mediation of civil law issues. Where it speaks of "trained in family counseling" is it correct to assume that pastoral training is adequate but for the others who have the right to solemnize marriages they would need additional training in this area?

In the sections where it speaks of certain information being "inadmissible" as evidence I believe ~~that any agreements, oral or written, should be admissible evidence in the case of a mediatorial break-~~down. As stated, "unless both parties agree otherwise", should be assumed in the original mediation agreement. (See Appendix)

I believe that setting compensation that can not exceed \$200.00 a day antiquates the Act and does not consider variables that may be part of differing mediatorial organizational structures.

In Section 3325 Part C "returning the case to its regular docket", appears to assume that a petition of divorce has already been entered prior to mediation. In many cases that is not so. If the implication is as I imagine that assumption should be removed. It should be possible to make a request for mediation from the court prior to any decision to petition for divorce. Many times separation or interim agreements are agreed upon long before a petition for divorce is entered. Flexibility along with the seriousness of the court involvement both need to be part of the process. Presently mediation has no court imposed weightiness attached to it.

Case: Looking to the Court for relief, Mother filed a Petition to Enter the Marital Settlement Agreement as an Order of the Court, and later a Petition for Contempt. A hearing was held .... on both Petitions, the sole issue being custody. Mother argued that the Marital Settlement Agreement should be entered as an Order of the Court, and that the parties were bound by the arbitrator's (by previous agreement) decision to award her custody. Father agreed that the Marital Settlement Agreement should be entered as an Order, but argued that the provision of the Agreement calling for binding arbitration was against public policy as far as the issue of custody was concerned. .... The court summarily brushed aside two agreements on custody stating it was against *public policy*. The case is under appeal. **(Bill 1260 or revision is very important to mediation.)**

Agreements both mediated or arbitrated must have the strength and finality that is spelled out in Bill 1260. In the case mentioned above the final paragraph of the appeal is penetratingly appropriate to the discussion here today.

If the entry of the...arbitrated Agreement as an order of court was not against public policy as to the custody provisions contained therein, then it follows that the trial judge's excision of those custody provisions from the Agreement must be reversed, since the Agreement was an integrated whole.

The court in this case became part of the problem that Rep. Saurman speaks. People under the present attitude of many courts are unable to enforce agreements negotiated in mediation and then drafted by legal professionals. Bill 1260 or a revision will spell out clearly the boundaries of agreements and clear up arbitrary decisions by judges who may innocently become part of the problem. In ~~the case mentioned a very poor mother and a stubborn father have spent over \$10,000. In another case~~ a father has had to pay \$60,000 to protect constant attacks by a mother who really doesn't want him to see the children. Horror stories are not difficult to find. We need similar to Bill 1260.

### **Conclusion**

I believe that mediation services of Bill 1260 almost have two faces. 1.) A clergyman with all the rights of a civil law master in domestic court. 2.) A court run system that each local will regulate. In the first case the latitude granted to pastors, etc., is too broad and if not merged with the first the second is too narrow. Pastors will not accept the enforcer of civil law. They should be given, if chosen, the means to exercise conclusive mediation and arbitration if necessary. The traditional pastoral ministry will find Bill 1260 repugnant on its face. As conflict resolver and mediator a traditional pastor may desire the opportunity of being involved. Most, even myself, would only be involved to protect the family from a court system that is adversarial, costly, slow, brutally unfair in many cases, and family emotional trauma. A real mediator will neither be involved in order to obtain more friends or make money but rather to minister to hurting people. The clergy that would be motivated by monetary matters and easy divorce scare me. That potential is in Bill 1260.

In the appendix I have included a sample mediation/arbitration contract, a stipulation that is signed by both parties prior to mediation, and a court fee structure. The most expensive mediation we have done has not exceeded \$1000.00 less court fees and document preparation. In our method, if requested by the parties, we will include a final board of three. The purpose is to resolve a matter that mediation was unable to negotiate. The parties agree to abide by the board finding and to have the agreement submitted to the court. The court cooperation to this date has been meager. One case has gone from a mediation settlement to six years of court action.

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Thank you for letting me appear before you today.

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The Christian Counseling Center of Bucks County is a 501 (c) (3) non-profit corporation sponsored by twenty five area churches. The Center sponsors branch offices in six different locations in Bucks and Montgomery County and New Jersey.

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MEDIATION/ARBITRATION CONTRACT

THIS AGREEMENT, made the \_\_\_\_\_ day of \_\_\_\_\_, 1991 by and between \_\_\_\_\_ [hereinafter referred to as "Husband"] and \_\_\_\_\_ [hereinafter referred to as "Wife"].

As a result of diverse unhappy differences, ~~difficulties have arisen between the parties resulting in~~ their separation. The parties desire to settle all differences between them in a Christ-like manner. They have sought the intervention of the Christian Conciliation Service of Bucks County to help them resolve this matter.

The Christian Conciliation Service of Bucks County [hereinafter referred to as CCS] desires that the parties reconcile, and that, their family be restored. The CCS will help and assist the parties to that end. However, should a reconciliation not be possible, then the CCS will appoint a Representative of CCS, in this case, \_\_\_\_\_ [hereinafter referred to as "Representative"], who will serve as a mediator/arbitrator and who will mediate and, if necessary, arbitrate the outstanding issues relating to applicable actions: equitable distribution, alimony, alimony pendente lite, support and/or maintenance (child and spousal), custody/visitation, counsel fees, costs and expenses. Accordingly, if the parties cannot be reconciled, then the parties hereby agree that their domestic dispute, claim or

controversy which has arisen between them will be mediated by the Representative in a series of private meetings between the parties and the Representative. If the domestic dispute, claim or controversy cannot be resolved by mediation, then the parties shall submit to the authority of the Representative and the dispute, claim, or controversy shall be arbitrated by the Representative. In the event the dispute, claim, or controversy is not resolved after mediation, resulting in a ~~written agreement between the parties~~ (hereinafter referred to as "Agreement"), that the parties agree shall be final and binding upon them and which may be entered as a judgment by any court having competent jurisdiction; then the Representative shall arbitrate and decide all issues in accordance with fair Christian principles to the best of the Representative's abilities and he shall thereafter render a written decision (hereinafter referred to as "Determination").

The parties agree, in advance, that if all issues cannot be successfully mediated, then both parties will abide by the Determination of the Representative. The Determination of the Representative shall be final and binding upon the parties, and judgment upon said Determination may be entered by any court having competent jurisdiction. Otherwise stated, both parties recognize that their signatures to this Agreement indicate their willingness to be bound by the terms of the Determination of the Representative.

Both parties are represented by counsel: Husband by \_\_\_\_\_ and Wife by \_\_\_\_\_.

Both parties acknowledge that they have had an opportunity to review the terms of this Mediation/Arbitration Agreement, and the effect thereof, with their respective attorneys.

Both parties enter the mediation/arbitration process in good faith. They are fully committed to the process and to the full intent of abiding by the Determination of the ~~Representative and to not resort to legal proceedings at any~~ time regarding any issue covered by the Representative's Determination or the parties' Agreement, whichever culminates the process. The parties agree that the Agreement and/or Determination shall become an Order of court incorporated by reference into any resulting divorce decree and not merging therewith.

The parties agree that unless it is specifically provided for in the Agreement and/or Determination, neither party shall institute any litigation against the other party to alter, modify or vacate any of the terms or provisions of the Agreement/Determination at any time.

The parties agree to abide by the provisions of the Agreement and/or Determination, whichever results, and thereafter release the other party forever from any claim against the other party whether arising under the laws of Pennsylvania, any other state, Commonwealth or Church in the United States or any other country. It is fully understood

that the Agreement and/or Determination is in lieu of and in full settlement and satisfaction of any and all of Wife's rights against Husband or Husband's rights against Wife for any past, present, or future claims on account of equitable distribution, alimony, alimony pendente lite, support and/or maintenance (child and spousal), custody/visitation, counsel fees, costs, expenses or any other such claim. It is further specifically understood and agreed that the payments, transfers, and/or considerations that will result from the Agreement and/or Determination will comprehend and discharge any and all such claims by Wife against Husband and Husband against Wife and are in full satisfaction and in lieu of Husband's and Wife's past, present, and future claims against each other on account of equitable distribution, maintenance, support (both child and spousal), alimony, alimony pendente lite, custody/visitation, counsel fees, costs and expenses, and any other charge of any nature whatsoever pertaining to any divorce proceeding which has been made or may be instituted by Wife or Husband in any court of the Commonwealth of Pennsylvania or any other jurisdiction.

Each party, after said Determination and/or Agreement is rendered, will have the right to dispose of his or her property by Last Will and Testament or otherwise; and each of them agrees that the estate of the other, either real or personal, shall belong to the person or persons who would

have become entitled thereto, as if the decedent had been the last to die.

The parties agree that should any dispute regarding the enforcement of the provisions of the Agreement/  
Determination or breach thereof occur, the parties shall return to the Representative or a Successor as appointed by CCS. The Representative shall assist the parties in an attempt to reconcile said dispute within a thirty (30) day period. ~~If the parties are still in disagreement after thirty~~ (30) days, then the Representative shall arbitrate the dispute and make a ruling which shall be binding on the parties.

If a change of circumstances arises in the future and one party seeks to modify the Agreement/Determination, then that party shall request a meeting with the Representative. The Representative shall first try to mediate the "issue" between the parties. If mediation is unsuccessful, the Representative shall arbitrate the matter in a manner consistent with the terms of this Agreement. If the Representative decides to make no change, then the petitioning party shall be responsible for all fees and costs set forth in the Agreement (relating to a party who institutes any litigation or attempts to change the subject Agreement/  
Determination). If the Representative approves the change, then it shall apportion the responsibility for costs between the parties.

It is specifically agreed that once the Agreement is

executed by the parties, or the Determination rendered by the Representative, if either party institutes any litigation attempting in any manner to change the terms of said Agreement/Determination (without first following the procedures set forth above), for good and sufficient and mutual consideration, the parties agree that said party who so institutes litigation or any other effort to alter, modify or vacate any or all the terms of the Agreement/Determination shall be responsible to the other party for the following:

A. All legal expenses sustained by the other party in defending said action as well as his/her own legal expenses;

B. The payment of all costs incurred by the other party as well as his/her own costs.

Shall any party breach the terms and provisions of the Agreement/Determination and the other party, at the direction of the Representative, must institute litigation in a court of law or equity to enforce same, then the party so breaching shall be fully responsible for the attorney's fees and costs of the non-breaching party and payment shall be made to said non-breaching party within five (5) days of the conclusion of the proceeding.

Should any litigation arise or be instituted by the parties hereto, then this Mediation/Arbitration Agreement, as well as the Agreement and/or Determination, shall be admissible into evidence without testimony of any individual

presenting same, by either party, and shall be accorded great weight in any court of law or judicial or quasijudicial forum.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

Witness:

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WITNESS

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WITNESS

**STIPULATION**

The parties to this Stipulation are \_\_\_\_\_ and \_\_\_\_\_, husband and wife. \_\_\_\_\_ and \_\_\_\_\_ have committed to mediate their marital differences under the guidance of Dr. Lee Maliska; they have begun, but not completed, an overall separation agreement.

In consideration of their mutual covenants herein, \_\_\_\_\_ and \_\_\_\_\_ hereby stipulate that all agreements reached in the course of mediation/arbitration with Lee Maliska, which pertain to matters which are now or in the future may be before the Domestic Relations Division of the Montgomery County Court of Common Pleas, shall be entered as appropriate Orders of said Court.

WITNESS:

\_\_\_\_\_

\_\_\_\_\_ Date

WITNESS:

\_\_\_\_\_

\_\_\_\_\_ Date





# Christian Counseling Center of Bucks County

Bailiwick Office Campus, Suite 16/Doylestown, PA 18901/(215)345-8707

## COSTS / FEES

### Court Fees - Bucks County

Divorce	\$ 149.50
Claim for Property	55.00
Custody	55.00
Alimony	55.00

### Legal Fees

Mediation Contract	150.00
Marital Settlement	400 - 500.00
Preparation of Divorce Complaint	125.00
a) Equitable Distribution	25.00
b) APL & Costs	25.00
c) Alimony	25.00
Preparation of Custody Complaint	125.00
Preparation of Support Complaint	125.00

July, 1991