TESTIMONY OF

Neighborhood Legal Services Association
and
The Pennsylvania Coalition Against Domestic Violence

HOUSE BILL 1260 - MARRIAGE DISSOLUTION SYSTEMS

House Judiciary Committee Hearing
April 16, 1992
Harrisburg, Pennsylvania

Offered by:

Lorraine Bittner, Esq.
Chief Attorney, Family Law Unit
Neighborhood Legal Services Association
928 Penn Avenue
Pittsburgh, PA 15222
412/255-6700

Barbara J. Hart, Esq.
Staff Counsel
PCADV
524 McKnight Street
Reading, PA 19601
215/373-5697

Good morning, Chairman Caltagirone, members of the House Judiciary Committee and staff.

Neighborhood Legal Services and the Pennsylvania Coalition Against Domestic Violence appreciate this opportunity to offer testimony on House Bill 1260. House Bill 1260 propounds a fundamental reform of the system of jurisprudence in the Commonwealth of Pennsylvania relating to marriage dissolution. Therefore, it requires very close scrutiny and cautious consideration. In this testimony we will first examine the outcomes of the sweeping 1980 amendments to the Divorce Code of the Commonwealth. Then we will examine the accessibility of legal process for resolution of divorce issues, primarily economic claims and custodial arrangements. Finally, we will offer our evaluation of whether the alternative dispute resolution processes posed by H.B. 1260 will offer effective solutions to the problems confronted by poor and economically dependent spouses and children in divorce courts in the Commonwealth.

Divorce Reform Outcomes.

The rate of divorce in America has doubled since the 1950's. National data indicate that most women and children suffer a sharp decline in their standard of living as a consequence of divorce. (Weitzman, 1985) The Bureau of the Census reports that in 1988 of the 16.5 million ever-divorced women, only 5.3 million, or 31.8%, received a settlement of marital property. Likewise, of the 19.3 million ever-divorced or currently-separated women, only 16.8% were awarded spousal maintenance or alimony. (Lester, 1990) Except for short-term rehabilitative or compensatory awards, studies show that courts have almost entirely stopped awarding alimony, even where

marriages have been of long duration and wives are unable to adequately provide for their own economic needs. (Pennington, 1989) Since women remarry at only about 60% of the rate that men do, the households of women after divorce are typically supported by one income rather than potentially by two. (National Center for Health Statistics, 1982)

Experts predict that as many as 60 per cent of the children born in the 1990's will live in a single-parent family, usually mother-headed households, before they reach the age of 16. (Furstenberg & Cherlin, 1991, at 45-46) Tragically, "most fathers, in time, withdraw from parental responsibilities (after divorce). . . . (Some) men see parenting and marriage as part of the same bargain -- a package deal; it is as if they stop being fathers as soon as the marriage is over. . . . Moreover, fathers who remarry are less likely to see their children. Over time, the vast majority of children (of divorce) will have little or no contact with their fathers." (Furstenberg & Cherlin, 1991, at 36-38)

Divorced fathers not only abandon their parental responsibilities, they often abandon their financial obligations. "Loss of the father's income can cause a disruptive, downward spiral in which children must adjust to a declining standard of living, a mother who is less psychologically available and is home less often, an apartment in an unfamiliar neighborhood, a different school and new friends. This sequence of events occurs at a time when children are greatly upset about the separation and need love, support and a familiar daily routine." (Furstenberg & Cherlin, 1991, at 71)

Research reveals that the two circumstances associated with the well-being of children after divorce are that (1) the mother is an effective, economically

viable parent, providing nurturing, predictable living patterns, and consistent expectations in discipline and (2) the children are not exposed to continual conflict between the parents. Financial abandonment by fathers sharply intrudes upon the capacity of the mother to be an effective parent. (Furstenberg & Cherlin, 1991)

This is the legacy of divorce law and court practice over the last 12 years in the Commonwealth and across the country. The sharp change in the divorce law in 1980 significantly reduced barriers to divorce. Yet, the law did very little to protect vulnerable spouses and children from financial abandonment and descent into poverty.

Divorce is inevitable. It is not our position that legislation should now create barriers to divorce in order to keep fathers or economically advantaged spouses in marriages that are irretrievably broken. The law cannot re-construct marriage. But it certainly can better construct the economic and parental consequences of divorce.

Access to the Courts.

The most critical problem confronting economically dependent spouses and children in the divorce arena is the lack of access to the courts of the Commonwealth in order to prosecute their economic claims. Resourceless spouses must pay for a judge, as well as counsel, or forsake any claim to marital assets, financial equity or alimony. In very few judicial districts have the courts acted to avail dependent spouses access to the courts without the prepayment of costs for the hearing officer or judge. The courts of this Commonwealth are accessible to corporations, landlords, and people

prosecuting damages for neighborhood vandalism without pre-payment or subsequent payment of adjudicatory costs; yet, because they cannot pre-pay the adjudicatory costs, the courts are not accessible to dependent spouses, usually women, who seek economic justice in the context of divorce.

Evaluation of H.B. 1260.

A proponent of the legislation might argue that the bill was crafted to provide opportunities for expeditious resolution of economic and custodial issues in divorces; not access to the courts, but access to an alternative system that would avail the parties of an opportunity to resolve these critical issues. While the new marriage dissolution industry authorized by this legislation does create an alternative to access to the courts, we contend that it is an alternative that will ill-serve children, dependent spouses and society. We base this conclusion on the following:

- H.B. 1260 almost totally deregulates the marriage dissolution process. It moves divorce into the private sector, subject only to the disciplines of competition and the market economy. It promotes economic opportunism. Deregulation has become quite popular in the past ten years. Deregulation has not been kind to consumers. There is no reason to believe that it will be different in the divorce arena.

- Literally hundreds of inexpert people may join the ranks of the marital dissolution industry as a consequence of H.B. 1260. This legislation provides that any district justice, any former or retired judge, any federal court judge or magistrate who is a resident of the Commonwealth, any mayor of a city or borough or any clergy person from any church or

religious congregation can hang out a shingle to offer divorce dissolution services as long as they claim to have some type of family counseling training at some point in their careers, even though they know nothing about the economics of divorce or the circumstances which promote the successful adjustment of children after divorce. There is no requirement that non-mediator dissolution practitioners be minimally conversant with domestic relations law.

- H.B. 1260 would create a system that is devoid of standards, be they legal, moral, economic or therapeutic. Without standards, training, accountability, scrutiny and, frankly, protection of vulnerable spouses, any divorce dissolution process, particularly one unrelated to and outside of the law and unconstrained by legal precedent as the systems this legislation would generate, will deprive vulnerable spouses and children of even the most rudimentary justice.

- There is no provision in the legislation that will lend integrity and accountability to the divorce mills predictably engendered by this legislation. This legislature has recently been asked to evaluate the current system for holding the judiciary accountable because the public alleges that too many, if only a few, judges in this Commonwealth act outside of the law and according to their own biases or to promote their own financial interests. Judges are required to honor the statutes, case law and standards of judicial ethics of the Commonwealth. If they deviate from these guidelines and precedents, they must offer rationale for their deviation. Deviation must comport with higher standards of justice than those incorporated in the current codes, case law or ethics to withstand the

scrutiny that may legitimately be brought to bear in evaluating judicial conduct. There is no provision for this type of scrutiny and accountability in the marriage dissolution systems proposed in this legislation. Yet, marriage dissolution practitioners will be accorded judicial immunity no matter how capricious, unjust or biased the product of their labors.

- There is nothing in Pennsylvania law that prohibits any divorcing couple from going to a private mediator or clergy person and working out the terms of an agreement on all of the issues enumerated in H.B. 1260. If couples voluntarily go to a mediator or a dissolution practitioner, that person can help them reach an accord which can then be presented to the court for incorporation in a divorce decree. It is true that the professional assisting in development of such agreements would not have the significant protection of immunity from liability should they act in such a way as to jeopardize the interests of either party; nor should the uninformed, untrained, unaccountable practitioners that could offer these services pursuant to this legislative initiative.

- Child and spousal support are issues for private dissolution proceedings or mediation pursuant to this proposal. There is no provision that the private dissolution practitioner or the mediator must facilitate support outcomes that comport with the state support guidelines or offer rationale for deviation therefrom. Neither is there provision that the courts may reject an agreement that deviates significantly from the guidelines without a rationale therefor.

- This bill does not provide for the appearance of an attorney or an advocate in the private dissolution or mediation sessions. States with the most experience at alternative dispute resolution in the context of divorce permit the participation of attorneys and advocates. In fact, mediators in Maine report that they would not want to conduct mediation without attorneys or advocates to help the parties understand their respective interests and to negotiate effectively.

- Alternative dispute resolution should be voluntary. Carol Bruch, Dabney Miller, Elizabeth Bennett, Barbara Hart and others offering testimony before the Senate Judiciary Committee on August 29, 1989 on S.B. 229, related to custody mediation and most professional mediation associations are in consensus that alternative dispute resolution processes should be voluntary. Section 3325(c)(2) of this legislation anticipates a non-voluntary, coercive process. A person who may not have chosen mediation may potentially be incarcerated indefinitely if he or she is deemed by a mediator not to be participating in "good faith," yet under Section 3325(c)(3), the person brought before the court and identified by the mediator as someone who has failed to mediate in "good faith" would not be able to share with the court the reason for his or her unwillingness to compromise or negotiate or otherwise cooperate in the mediation process. This is an unconscionable Catch 22 and would fundamentally deprive the person of substantive due process.

Although "good faith" provisions were initially included in mediation statutes in other states, because of the coercive nature of said provisions, those states recently authorizing mediation have rejected this type of

coercive provision because it undercuts the goals of mediation and is fraught with due process problems. Even though the Maine statute still incorporates the "good faith" language, the participant in mediation in Maine has the option to terminate mediation rather than continue if he or she concludes that the mediation process is not addressing his or her needs or requirements. H.B. 1260 does not provide the participant with the authority to exit from mediation when concluding that it is not a preferred dissolution process.

- Fraud, trick, coercion and conspiracy to create unjust and inequitable dissolution agreements will be encouraged; both because all of the communications related to the dissolution proceedings are deemed to be confidential and inadmissible as evidence in any subsequent legal proceeding unless the defrauding, coercing, tricking or conspiring spouse agrees to disclosure and because the legislation does not require that agreement be based in full financial disclosure and that the facts upon which any resolution is based are articulated in detail in the agreement. Often economically dependent spouses have no notion of the assets, liabilities, income or expectancies of the couple. Without such a mandate for disclosure, economic justice will surely be compounded by this alternative divorce dissolution system.

- H.B. 1260 does not authorize evaluation by the courts of the propriety of agreements presented to them either by the private dissolution practitioner or the mediator. Without such authorization, it appears that the authors intend that the court must endorse any order presented even if it is not based in law, justice or equity. Beyond this, H.B. 1260 would

largely eliminate judicial review by appellate courts because no record would be made, no stipulations as to the basis for each element of the agreement would be articulated, and no opinion would be offered as to the considerations of law and fact undertaken by the trial court in entering an order. Appellate courts evaluate whether the trial court or the court below has abused its discretion or misapprehended the law in propounding its order and opinion. Clearly, access to the judiciary is eviscerated irreparably by this proposal.

- This legislative proposal does not address the question of whether the private dissolution or the mediation system created by this bill should attend to the fact that domestic violence may occur in as many as 50 per cent of all marriages and that domestic violence often escalates at a time that a marriage is disintegrating. This omission is untenable and lends support to the allegation that the legislation is designed to facilitate abandonment rather than access to accountable divorce process.

A recent study commissioned by the State Justice Institute and conducted by the Maine Court Mediation Service in the report recently issued made recommendations, including the following:

* Participation in the mediation process must be voluntary and based on informed consent.
* Courts authorizing mediation must provide for a safe environment, the presence of third-party supporters, and the ability of the abused party to terminate mediation at any time.

* Agreements, if reached, must be based on full disclosure of information. . . . The facts upon which the agreement was based also must be included in the agreement.
* All domestic relations cases being considered for mediation must be screened for abuse. If the screening cannot be instituted, mediation services must not be offered.
* Mediation must be terminated if abuse occurs subsequent to screening or during the mediation process. (Maine Court Mediation Service, 1992)

In those states which have statutorily authorized mediation, codes or court rules now create waivers of mediation or exclude cases from mediation in the context of domestic violence or child abuse. (Maine, 19 MRS § 952; New Hampshire, RSA 458:15a; North Dakota, NDCC § 14-09.1-02; Oregon, ORS 107.179(3); Wisconsin, W.S. § 761.11(8) and (9).)

- H.B. 1260 privatizes divorce, moving it out of the public domain, outside of the realm of public policy, into private, non-competitive dissolution services. The public policy of this Commonwealth is that families should be preserved. If the family unit of economically dependent spouses and children is to be preserved and sustained upon divorce, marital dissolution processes must assure economic and social justice. The interest that the public has in justice related to the dissolution of marriages, let alone the interest that dependent spouses and custodial parents have in equitable distribution of marital assets and economic viability and that battered spouses have in safety and autonomy, will become marginalized and become subservient to the interests of the

marriage dissolutions systems that would surely emerge pursuant to the passage of H.B. 1260.

Conclusion.

For all of the above reasons, we are compelled to conclude that H.B. 1260 does not create effective alternatives to adjudication. We urge the Committee to reject this proposal. Furthermore, we request that you seriously address the access issue that we have articulated and compel the courts of the Commonwealth to provide economic and social justice for dependent spouses and children.

References

Furstenberg, Jr., F.F. and Cherlin, A.J. ***Divided Families: What Happens to Children When Parents Part.*** Cambridge, Massachusetts: Harvard University Press, 1991.

Lester. ***Child Support and Alimony 1987.*** U.S. Dept. of Commerce, Bureau of the Census. Current Population Reports, Special Studies, Series P-23, No. 167, June, 1990.

Maine Court Mediation Service. ***Mediation in Cases of Domestic Abuse: Helpful Option or Unacceptable Risk?*** The Final Report of the Domestic Abuse and Mediation Project. Belfast, Maine, January, 1992.

National Center for Health Statistics. ***Vital Statistics of the United States, 1978,*** Vol. 3 - Marriage and Divorce, 1982.

Pennington. "The Economic Implications of Divorce for Older Women." ***Clearinghouse Review,*** Special Issue, Summer, 1989.

Weitzman, L. J. ***The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America.*** New York: Free Press, 1985.