RESOLUTION OF THE PHILADELPHIA BAR ASSOCIATION FAMILY LAW SECTION IN OPPOSITION TO HOUSE BILL 1260 AND COMMENTS BY MICHAEL E. FINGERMAN, ESQUIRE

RESOLUTION IN OPPOSITION TO HOUSE BILL 1260

AND NOW, this fifth day of August, 1991, the Family Law Section of the Philadelphia Bar Association hereby opposes the passage of House Bill 1260 amending Title 23 (Domestic Relations) of the Pennsylvania Consolidated Statues and further providing for the dissolution of marriages by persons other than the Court and for mediation services. The Section opposes the granting of authority to persons outside of the Family Court system to grant a divorce or to assist the parties in resolving complex issues of equitable distribution, spousal support, child support, child custody, alimony and alimony pendente lite. The Section also opposes the establishment of a family mediation service to assist parties in resolving any controversy involving the issues of divorce, equitable distribution of marital property, spousal support, child support, child custody, alimony and alimony pendente lite, when the mediator is not an attorney or a Judge. While the Section does not oppose the concept of mediation in resolving any of the aforementioned issues, in order for the mediation to be most beneficial to the parties and in order to fully apprise them of their legal rights, the mediators should be attorneys or Judges who are experienced in family law and have completed a mediation training program.

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House Bill 1260 provides for two forms of mediation:

Section 3324 provides that, when requested by both parties, any person qualified to solemnize marriages and trained in family counselling may grant a divorce and assist the parties in resolving any ancillary issue, including equitable distribution of marital property, spousal support, child support, child custody, alimony and alimony pendente lite.

Section 3325 provides that, on motion of either party or the court, a court established family mediation service may assist the parties in resolving any of the ancillary issues. In this event, the mediator would have one of the following qualifications:

(1) A license to practice psychology in the Commonwealth of Pennsylvania or a Master of Arts degree in counselling, social work or marriage and family counselling; or

(2) Not less than five years of experience in family counselling; or

(3) Completion of a mediation training program approved by the American Arbitration Association or like organization and at least one year of experience in mediation; and

(a) Knowledge of the Pennsylvania Court system and the procedures used in Domestic Relations matters;

(b) Knowledge of other resources in the community; and

(c) Ongoing participation in a program of continuing education or training in mediation approved or offered by the American Arbitration Association or like organization.

Pursuant to Section 3325, the mediator shall be entitled to compensation not to exceed $200 per day. In addition, if the court finds that either party failed to make a good faith effort to mediate, the court may refer the parties to additional periods of mediation or find either party in contempt.

Finally, pursuant to either form of mediation, any agreement reached by the parties through mediation shall be reduced to writing, signed by the parties, and presented to the court for approval as a court order.

While the Family Law Section does not oppose the concept of mediation in resolving any of the foregoing issues, the mediators must be attorneys or Judges who are experienced in matrimonial law and have completed a mediation training program.

With regard to the grounds for divorce, if both parties agree that the marriage is irretrievably broken and consent to a divorce, the entry of a divorce decree (or approval of grounds in venues which do not automatically bifurcate) is never problematic. Accordingly, the alternative procedure to allow persons qualified to solemnize marriages to grant a divorce is, at best, unnecessary; however, at a minimum, the decision whether or not to bifurcate should only be made by a Judge, as even the decision whether or not to bifurcate may have severe practical and legal effects.

With regard to the ancillary issues pertaining to the parties' divorce, there is no requirement in the House Bill that the mediator be an attorney or Judge knowledgeable in matrimonial law or even that each party have independent legal representation to insure that her or his legal rights are being protected. It is imperative, for the protection of each party and the parties' children, that each party be fully cognizant of his and her legal rights and the legal and practical effects of any binding agreement. While both proposed sections provide for the approval of any agreement by the court, approval of an agreement by adults competent to contract should and will be pro forma. In any event, a court is simply unequipped to insure that each party is fully aware of the nature, extent and appropriate value of the "marital" assets, liabilities, income and all other relevant factors, and that each has been fully informed regarding the nature and extent of his and her legal rights and responsibilities.

While family law has historically been considered a "step-child" of legal practice and, to some extent, the court system, the reality is that especially since the passage of laws on "equitable distribution," matrimonial matters can and often do involve numerous complex issues. Would the legislature suggest that anti-trust; environmental; labor; real estate; will and trust; merger and acquisition; partnership dissolution; or even personal injury litigation be mediated between lay-persons either by agreement before a person qualified to solemnize marriages or

upon motion of either party or the court before a psychologist or Master of Arts in Social Work?

I recently met with a women who advised that she and her husband had reached an agreement whereby she would receive one-half of his profit sharing plan as a settlement of all ancillary issues relating to their divorce. Her husband explained to her that he had $1.5 million dollars in his profit sharing plan; the parties' marital home was worth $450,000; and there were mortgages against the home and other liabilities totalling $700,000. He would receive the other one-half of his profit sharing plan; the marital home; and would be responsible for all outstanding debts and liabilities. At first blush, therefore, it would appear that she had agreed to a reasonable resolution: a 60%-40% split of the marital assets in her favor. After obtaining further financial documentation, however, it was discovered that there were additional assets totalling close to $1 million dollars, and that notwithstanding her husband's assertion that considering the economy, his income was de minimus, his tax returns revealed that in the past three years his net (after-tax) income ranged between $350,000-$500,000 per year. Since the parties had been married for 24 years, the wife never worked outside of the home and instead, raised the parties' two children, the apparent "equitable agreement" was revealed to be outrageous-An "inequitable" property distribution, with no consideration of reasonable and necessary alimony.

As a more universal example, one can focus on one single item of property which is extant in the majority of matrimonial cases - defined benefit pension plans. Without independent legal representation, will the parties or mediator know that, in general, a defined benefit pension plan represents one-half of the employed spouse's total retirement benefits? For example, assume the wife's spouse is an AT&T middle-level manager, and someone actually obtains a benefit statement as of the appropriate date from the husband's employer, and someone actually hires an actuary to provide a proper and accurate valuation at the appropriate date of valuation based on the benefit statement, the wife will still miss sixty (60%) percent of the total value of the employee-husband's benefits, because she will miss (1) the COLA Value; (2) the AT&T Savings Plan; (3) the Employee Stock Ownership Plan; and (4) the Incentive Deferral Award Program.

Again, with regard to only one issue incident to a divorce - equitable distribution - are the parties and mediator knowledgeable and trained to deal with the myriad financial and other considerations necessary to make proper, informed, reasonable, just and equitable judgments, including, inter alia, with regard to tax ramifications; bankruptcy, pension, trust and estates, proprietorship, partnership and corporate laws; valuation issues including appropriate dates for valuation, accounting methods, and valuation of good-will and other intangibles; the income, capital gain, recapture, personal

bank account and the Wife receives the house, the Wife may be receiving considerably less if the parties or mediator have not considered brokerage commissions, state and local transfer tax, federal and state capital gains tax, and other settlement costs, all of which will be incurred upon the sale of the marital home.

With regard to child custody, the parties can only make informed decisions when they are knowledgeable of their legal rights, as set forth in over 200 years of case-law in this Commonwealth.

Finally, at least in the five-county Philadelphia area (i.e., Philadelphia, Montgomery, Bucks, Chester and Delaware counties), each county already has in place attorney "Masters" or "Conciliators" established by the common pleas court, which provide relatively expeditious and effective alternative dispute resolution mechanisms for some or all of the foregoing issues.

In view of all of the foregoing, it is respectfully submitted that House Bill 1260 not be considered for adoption as the law of the Commonwealth of Pennsylvania. To do otherwise would jeopardize the legal rights of all persons in the Commonwealth, including, but not limited to, those least able to defend themselves, the children of divorce.

Dated: April 8, 1992

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