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TESTIMONY BEFORE HOUSE JUDICIARY COMMITTEE - AUGUST 29, 1995

Mr. Chairman, distinguished members of the Judiciary Committee, I thank you for the privilege of allowing me to present testimony before you today.

Although I have served as chairman of the Philadelphia Bar Association's Family Law Section and the Family Mediation Association of Delaware Valley, I present myself before you today as a family law attorney, a mediator and a concerned citizen interested in the welfare of our children. I am concerned about the devastating effect the breakup of a family has upon these innocent victims and the cost to them and society as a whole.

Judith Wallerstein, writer, researcher and family therapist, makes the point in her recent book "Second Chances" - she argues children, even adult children, pay a price when parents divorce or separate. When they pay that price, that is earlier or later in life, and how much they pay emotionally, is directly related to the method their parents chose to resolve disagreements and manage conflict over the children.

And managing conflict is what mediation is all about. William Ury, well known author of Getting To Yes - a primer on cooperative conflict resolution, reduces the methods available to three choices. He claims using power, adjudicating rights or focusing on needs and interests are the ways our society solves its problems.

The use of power has often resulted in child or spousal abuse and, of course, is unacceptable. What we have relied on exclusively is the process which allows our citizens to adjudicate

their rights in their children. This means parents go to war in a court of law in order to prove one is right the other is wrong. They carry over their distaste for each other into their discussion about their child's welfare. Most efforts to improve our system have been directed to making the procedure to try custody cases more user friendly through changes in the law or procedure.

And although the best judges and most enlightened court systems in our Commonwealth have attempted to focus on what is in the best interests of the child, the result suggests one parent is best and the other is not. One parent wins and the other loses and most of all the child is in the middle. And this result comes about in an era in history when our legislature has created no-fault divorces in recognition that not all marriages were made in heaven and meant to last. So with the best of intentions, even though change has been attempted, up until now parents are still forced into a forum that results in a win-lose outcome.

In the last 10 to 15 years, as the study of conflict resolution has developed, techniques have been identified which focus on needs and interests as contrasted to the rights of the parties involved. Translated this means that parents who are at war over their children, with the help of a trained neutral professional, can be guided into cooperative or collaborative problem solving and away from fighting over their children.

Senate Bill 432 provides the opportunity for courts to use mediation in custody cases. The bill (Section 3901(b)) permits the court to order parties to an orientation session. In effect it

says, courts you may screen all custody cases to determine their suitability for mediation. That is what happens in an orientation session.

The parties and the mediator assess the suitability of this particular case for cooperative problem solving, that is, mediation. Some cases must go to court, especially when there is ongoing domestic violence, or child abuse, or where the parents are so stuck in their positions that mediation cannot help.

Parenthetically paragraph (c) prohibits an orientation session if either party is the subject of a domestic violence or child abuse complaint. While the experts disagree (the State of Maine has had a task force deal with their issue) my belief is that all cases need to be screened for domestic violence in an orientation session and the mere existence of the filing of a complaint should not preclude mediation. The skilled screening of these cases will eliminate inappropriate cases. In any event, either party has the right to terminate mediation if it is not working or harm is threatened. The bill should be changed to reflect this.

But most cases that go to court today deal with issues of day-to-day parental management. Should Johnnie go with dad when dad hasn't shown interest in Johnnie since birth. Should Sally be with mom when mom is living with her boyfriend. What schools should the children attend or how many days a month with each parent.

My sole concern with the bill is the permissive language first permitting a court to establish a mediation program and permitting it to order an orientation. The successful programs nationally are

those which require a mediation program and an orientation as the key to the courthouse. Before litigation--mediation. For example, look to Florida, Maine, California, Texas or Virginia. All of these states require mediation of custody cases before litigation. I agree that no citizen should be deprived of his/her right to have these issues decided by a court if it turns out that mediation is inappropriate. And I am not arguing all cases are suitable for mediation. I am urging that cooperative techniques be used before competition breaks out.

The bill calls for the adoption of local rules regarding confidentiality and mediator qualifications. While each county should be able to choose its own mediators, it would be better if qualifications were standardized on a statewide basis, perhaps by the Supreme Court. Confidentiality is likewise an issue which cuts across all cases. I believe the Senate has already passed SB 619 granting the privilege of confidentiality to mediators. This body would be best advised to adopt that bill or a similar version of it.

The bottom line is make a mediation orientation session mandatory in custody cases and give the parents of our Commonwealth an opportunity to cooperate rather than litigate.