

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

* * * * *

House Bill 22
Nurturing Parent Doctrine

* * * * *

House Judiciary Subcommittee on Courts

Main Capitol Building
Room 140, Majority Caucus Room
Harrisburg, Pennsylvania

Wednesday, March 26, 1997 - 9:00 a.m.

BEFORE:

Honorable Daniel F. Clark, Majority Chairman
Honorable Jerry Birmelin
Honorable Craig A. Dally
Honorable Steven R. Nickol
Honorable Jere W. Schuler
Honorable Thomas Caltagirone, Minority Chairman
Honorable Harold James
Honorable Babette Josephs
Honorable Don Walko

--oOo--

ORIGINAL

KEY REPORTERS
1300 Garrison Drive, York, PA 17404
(717) 764-7801 Fax (717) 764-6367

1997-118

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ALSO PRESENT:

Karen Dalton, Esquire
Majority Counsel

Galina Milohov
Minority Research Analyst

Judy Sedesse
Majority Administrative Assistant

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25WITNESSESPAGE

Honorable Clark's opening remarks	4
Honorable Nickol's opening remarks	6
Harry J. Gruener, Esquire Chair, Family Law Subcommittee Pennsylvania Bar Association	44
Joel B. Bernbaum, Esquire Co-Chair, Family Law Committee Montgomery County Bar Association	61
Honorable Joseph A. Del Sole Superior Court of Pennsylvania	86
Richard K. Betts, President Domestic Relations Association of Pennsylvania	111
Catherine M. McFadden, Esquire Senior Master, Bucks County Court of Common Pleas	120
Ned Hark, Esquire Philadelphia Bar Association	136
Milton S. Savage, Jr., Esquire Immediate Past President The Barristers Association of Philadelphia	149
(Written testimony submitted on behalf of the Department of Public Welfare)	

1 CHAIRMAN CLARK: Good morning. I am
2 Representative Dan Clark. I am the chairman of
3 the judiciary committee's subcommittee on
4 courts. Today we are gathered to conduct a
5 public hearing on House Bill 22, which was
6 introduced by Steven Nickol.

7 By way of background, I am a
8 representative in the 82nd legislative district,
9 which is rural central Pennsylvania consisting
10 of all of Juniata County and part of Perry
11 County and part of Snyder County and part of
12 Mifflin County.

13 Focusing on House Bill 22 for a
14 minute, generally both parents have an
15 obligation to support their children. We have a
16 nurturing parent doctrine where a parent takes
17 care of a child at home while the earning
18 capacity of that parent need not be considered
19 in determining that spouse's support obligation.
20 That is not a per se rule. There are certain
21 criteria which are applied to any given
22 situation to see if the nurturing parent
23 doctrine will apply and to what extent.

24 This doctrine traditionally has been
25 applicable to the child when the parent who

1 nurtures that child, when the child is the child
2 of both parents. The issue that has arisen,
3 that arises in bringing this hearing to the
4 forefront is you have a divorce, a wife who has
5 remarried and she has a child of that second
6 marriage. The question is, does the nurturing
7 of that child of the second marriage relieve the
8 spouse from obligation to support a child from
9 the first marriage. I guess that
10 parenthetically we not assign an earning
11 capacity to that parent who is staying home and
12 nurturing the child of that second marriage for
13 the support of the child of the first marriage.
14 And that synopsis of the law and where we are
15 headed is certainly open to discussion today and
16 clarification from the legal scholars that are
17 going to testify before this committee.

18 I believe before we ask Representative
19 Nickol for his remarks I would like the members
20 of the committee to introduce themselves and
21 Representative Nickol will proceed. I will
22 start in the back row and go down here to my
23 left.

24 REPRESENTATIVE WALKO: I am Don Walko,
25 state representative from Allegheny County.

1 REPRESENTATIVE CALTAGIRONE: Tom
2 Caltagirone, democratic chair from Berks County.

3 REPRESENTATIVE DALLY: Craig Dally,
4 Northampton and Monroe Counties.

5 REPRESENTATIVE BIRMELIN:
6 Representative Birmelin. I chaired the other
7 subcommittee on the judiciary so I am here in
8 support of my other subcommittee chairman. I am
9 sure he doesn't need that but I am more here for
10 background. I represent Wayne County.

11 MS. DALTON: Karen Dalton, counsel to
12 the committee.

13 REPRESENTATIVE SCHULER:
14 Representative Jere Schuler, Lancaster County.

15 CHAIRMAN CLARK: Representative
16 Nickol, you may proceed.

17 REPRESENTATIVE NICKOL: Thank you, Mr.
18 Chairman.

19 First of all, my secretary asked me to
20 make a disclaimer with regard to the written
21 remarks. My computer froze up yesterday and I
22 did these myself last night. So I am
23 responsible for any errors or case changes that
24 you may see.

25 Like many other York Countians, I woke

1 up one morning last summer and was having my
2 first cup of coffee while reading the York Daily
3 Record when one article in particular grabbed my
4 attention. All around town the same article was
5 the primary topic of conversations. The
6 Pennsylvania Superior Court had just ruled in a
7 York County case that a divorced man, Jeff
8 Feeser, now with a second family, must pay
9 increased child support so his ex-wife, Donna
10 Frankenfield, now remarried, could stay at home
11 and nurture a child by her second husband. The
12 children from the first marriage were both of
13 school age.

14 The application of a court-made
15 doctrine called the nurturing parent doctrine in
16 this manner has created the unfair situation of
17 the working parent subsidizing a stay at home
18 parent's second family.

19 House Bill 22 was introduced to
20 overturn the decision. I feel that the
21 Pennsylvania courts should be limited from
22 applying the nurturing parent doctrine in the
23 way it was applied in this York County case. We
24 need to reinforce long-standing public policy
25 that both parents are responsible for the

1 support of their children.

2 Maybe I strongly relate to this case
3 because when I was married in 1976, I inherited
4 five sons from my wife's first marriage. Ten
5 and a half months later we added a daughter of
6 our own. When my youngest stepson entered
7 school, my wife and I decided she should remain
8 at home to care for our daughter. Sure; I could
9 have used extra money, but I personally find it
10 appalling that we could have asked the court to
11 order my wife's ex-husband, now with a second
12 family of his own, to pay additional support
13 because my wife and I decided she should stay at
14 home.

15 Talk about adding insult to injury;
16 the man lost his wife, saw her remarry, watched
17 as another man stepped in to raise the sons and
18 then the court says, could say, we can ask the
19 ex-husband to pay a little extra to support a
20 decision we made relating to the care of my
21 child. Ridiculous. It is no wonder that an
22 editorial in the same newspaper was headlined
23 "Court Beats up on Child's Non-Dad."

24 In the York County case, Jeff Feeser
25 was required to help support Mr. Frankenfield's

1 baby and could be required to dig deeper into
2 his wallet each time another Frankenfield is
3 born.

4 In my simple, non-legal way of
5 thinking I can sum this up as a case of who
6 should support Frankenfield's babies. I feel it
7 is obvious. Mr. and Mrs. Frankenfield have the
8 same obligation as all other parents to support
9 their own child.

10 Yes, I realize Mrs. Frankenfield's
11 decision to stay at home will impact on her
12 ability to support the children of her first
13 marriage. However, in deciding to create a
14 second family, this is a consequence of her own
15 choice. Mr. Feeser had no say in this decision
16 and should not bear any responsibility for the
17 financial consequences of Mrs. Frankenfield's
18 second family. After all, I understand that the
19 court will not consider the cost of Mr. Feeser's
20 second family in determining his support
21 obligations.

22 I will listen with great interest as
23 many of the experts in the field will justify
24 that the support of Mr. Frankenfield's child is
25 the obligation of his wife's first husband. To

1 date I have not found a single constituent to
2 support this conclusion.

3 Please note that my legislation will
4 not overturn the nurturing parent doctrine
5 itself but rather confirm it in statute. The
6 doctrine will, however, be limited to cases
7 where a parent is staying at home to care for a
8 child for which the working parent is obligated
9 to pay support.

10 I welcome this hearing to look more
11 deeply into this issue. Thank you for the
12 opportunity to appear before you in support of
13 House Bill 22.

14 CHAIRMAN CLARK: I thank you very
15 much, Representative Nickol. Would any members
16 on the panel have questions for Mr. Nickol
17 before we proceed?

18 Seeing none, I thank you and you are
19 certainly welcome to join us up here on the
20 panel --

21 REPRESENTATIVE NICKOL: Thank you, Mr.
22 Chairman.

23 CHAIRMAN CLARK: -- to consider the
24 rest of the testimony.

25 I might add, before we get into our

1 formal testimony that we did contact the
2 Department of Public Welfare and we asked them
3 to provide testimony to us today on this issue,
4 which they expressed some interest in. However,
5 they couldn't put their schedules together and
6 were unable to send a representative over to
7 testify in person to this committee, although it
8 is my understanding that they will have remarks
9 and will either submit those today or at a later
10 time.

11 With that, I would like to invite our
12 next witness, Robert E. Rains. He is a
13 professor of law and supervisor of the family
14 law clinic at the Dickinson School of Law.

15 Mr. Rains.

16 MR. RAINS: Thank you. Good morning.
17 With me this morning is my law student, Jennifer
18 Feitelberg, who has acted as a research
19 assistant in this matter and also spent a year
20 in our family law clinic.

21 I want to preface my remarks by saying
22 that I am not speaking for the Dickinson School
23 of Law or any of the various task forces and
24 committees to which I belong.

25 I was contacted, I suppose, six or

1 eight weeks ago by your staff counsel, Karen
2 Dalton, to look at actually predecessor bills;
3 actually earlier than that. We talked at some
4 length and kicked the idea around and I must say
5 at that time I was pretty much on the fence as
6 to whether I thought this would be good
7 legislation or bad legislation. And I spent
8 some time and with the assistance of Ms.
9 Feitelberg, came up with what I hope is useful
10 research for your committee. And I conclude now
11 that despite the equities that are on both sides
12 of this issue that I am opposed to House Bill 22
13 for a variety of reasons, which I will make
14 clear.

15 The first thing I did, of course, was
16 try to pass the bucket and see if somebody else
17 would do the research for me. I thought it
18 would be useful to see how the other states have
19 addressed this issue. I put Ms. Feitelberg at
20 work on our Lexus and West Law to try to do a
21 computer search to see if we could ascertain how
22 this issue is addressed in the other states.
23 What she put together, I had some input into it,
24 is a chart which is attached as Appendix 1 to my
25 testimony which to the extent that we can

1 ascertain reflects the rules from the various
2 jurisdictions.

3 I have to give you a couple of
4 caveats. Most states, while they do address
5 this issue are not nice enough to use the
6 phrase, nurturing parent doctrine. So that when
7 you type that phrase into the computer, you come
8 up short. So it is sometimes difficult to key
9 in the correct words to find out exactly what
10 the rule is in the various jurisdictions.

11 As those of you who practice or have
12 practiced law or have had the dubious pleasure
13 of going through family law courts yourself know
14 the rules of family law change with quite a lot
15 of frequency here in Pennsylvania and I am
16 confident that that situation is no different in
17 the 49 other states and the District of
18 Columbia. But Appendix 1 does represent our
19 best effort at this point to ascertain the rules
20 in the other jurisdictions.

21 If we had a couple more months with
22 nothing else to do, I am sure that we could do a
23 better job for you. That research to me
24 indicates that most but certainly not all states
25 have some variation of the nurturing parent

1 doctrine under some set of circumstances that
2 they will not impute earning capacity or they
3 will impute lesser earning capacity to a parent
4 who is staying home with a young child. Some
5 states actually define young child in terms of
6 age, which we do not under any of the cases in
7 Pennsylvania. Some states say 30 months; stay
8 home until the child is 30 months old.

9 As far as we can ascertain only a
10 minority of states have addressed the precise
11 issue which is contained in House Bill 22,
12 whether the nurturing parent doctrine can or
13 should be applied where a parent is staying home
14 by a child who is not the child of the other
15 party to the instant child support proceeding.

16 Some of those states have taken a
17 position akin to that in House Bill 22. In my
18 testimony on page 2 I cite a Colorado case which
19 is also cited in the appendix that states -- I
20 am sorry. The Colorado statute says that if a
21 parent is voluntarily unemployed or
22 underemployed, child support will be based on
23 the determination of potential income except if
24 the parent is caring for a child under the age
25 of 30 months for whom the parents owe a joint

1 legal responsibility. So there we have a
2 statutory enactment of the nurturing parent
3 doctrine but an exception. So it would not be
4 allowed in the situation you are addressing.

5 Now, more of the states take a
6 non-absolute view. There is a 1989 Delaware
7 Supreme Court decision which is cited in the
8 appendix in which the court says, actually in a
9 footnote, where a parent is caring for a young
10 child of a relationship other than that between
11 the parents in question, the obligation to
12 secure employment generally will not be waived.
13 So they take a position akin to House Bill 22
14 but it is not an absolute position. House Bill
15 22 would be an absolute prohibition.

16 As far as we can tell there are four
17 jurisdictions that have specifically addressed
18 the Frankenfield issue and have specifically
19 indicated that a parent may be deemed to be a
20 nurturing parent regardless of who the other
21 parent of that child is. In other words, the
22 situation in Frankenfield, that appears to be
23 the rule in California, in Iowa, New Jersey and
24 South Carolina.

25 Now, as far as we can tell there are

1 several other states, a majority of the states
2 that have the nurturing parent doctrine where we
3 cannot find either case law or statutory law
4 that specifically addresses the Frankenfield
5 issue either way.

6 If you do have questions on the
7 appendix, that is why I brought along Ms.
8 Feitelberg today. She is going to be my expert
9 on the multi-state analysis.

10 Having looked at the law in the other
11 states and having considered my own experience,
12 both in private practice for several years and
13 as a supervisor of our family law clinic for
14 what is going on to be many, many years, having
15 looked at the research data, census bureau
16 reports, et cetera, I want to speak today in
17 opposition of House Bill 22 for a number of
18 reasons.

19 My first and most serious reason is
20 that House Bill 22 is absolute. It does not
21 allow for any exception, regardless of the
22 circumstances. In other words, if the child of
23 the parent is nurturing is not the child of the
24 other party, that parent who -- let's face
25 facts, is normally going to be the mother -- a

1 sibling cannot be given nurturing parent status.
2 I am going to come back to these reasons
3 throughout. The rest of the reasons tend to be
4 fairly interrelated.

5 We know that statistically in the vast
6 majority of cases absent parents do not really
7 bear half the cost of raising their children.
8 We know that in the vast majority of cases that
9 the custodial parents are the mothers. And
10 because that is the situation, House Bill 22
11 would have an adverse economic effect generally
12 on women.

13 We also know that consistent with
14 these other realities stepfathers are already
15 bearing a substantial burden of supporting their
16 stepchildren. I believe that House Bill 22
17 could act as an impediment to marriage or
18 remarriage for the single mother, whether she is
19 divorced or never married, particularly if she
20 is of childbearing years and wants to form a
21 second family.

22 And lastly, in those situations which
23 already exist under the current case law in
24 Pennsylvania where we attribute an earning
25 capacity to the custodial parents of young

1 children who is normally the mother, under our
2 current case law we do not consider the
3 realistic cost to her of obtaining and
4 maintaining that employment, specifically the
5 cost of child care. So we attribute to her a
6 hypothetical income which, in many instances,
7 she could not realistically obtain.

8 Now, let me address these issues
9 seriatim. House Bill 22 allows for no
10 exceptions. If the child is not the child of
11 the other parent of the support proceeding, then
12 as I read House Bill 22, unless I am misreading
13 it, this law would state that we must attribute
14 earning capacity to that custodial parent, no
15 matter what the circumstances are.

16 So as House Bill 22 is currently
17 written, I suggest that nobody should vote for
18 it unless they believe that there could be no
19 set of circumstances in which it would be
20 appropriate not to attribute earning capacity to
21 that woman.

22 Now, under the current case law in
23 Pennsylvania the Frankenfield rule is not
24 absolute. If you will look through the
25 decisions of Superior Court in this issue,

1 Superior Court has recognized the nurturing
2 parent doctrine. But Superior Court has
3 certainly not said that every custodial parent,
4 easier for me to say mother because that is
5 where the statistics lie, is allowed to stay
6 home with young children and not have income
7 attributed to her. In Kelly versus Kelly and
8 Depp versus Holland, the Superior Court said no,
9 it was appropriate to deny nurturing parent
10 status under the facts of the case.

11 The first case in which the Superior
12 Court addressed the Frankenfield issue before
13 Frankenfield back in 1982 was the Bender
14 decision where the trial court had said, well,
15 she is a nurturing parent of this child by the
16 new relationship who wanted to attribute income
17 to her. On appeal Superior Court reversed and
18 remanded and said no, we never said that that
19 rule is absolute. So the court sent the Bender
20 case back for further proceedings.

21 I provided you with a couple of
22 examples in my written testimony and it
23 highlights something that is said in the
24 preamble to the bill that support matters
25 generally are complex and in each case, unique.

1 I have been supervising a family law clinic with
2 marvelous students and indigent clients for
3 about a decade and a half and I can tell you
4 that my experience is each case is somewhat
5 different than every other case.

6 Now, I applaud the effort that was
7 mandated by the federal government to set up
8 statewide guidelines to try to make some sense
9 out of support orders. And I was practicing law
10 in Dauphin County back in the days when the
11 support chart was different in Dauphin County
12 than in Cumberland County or Franklin County and
13 usually the dads were smart enough to get the
14 word on the grapevine and realize that they were
15 better off to move to a county with a more
16 favorable support chart. I don't think any of
17 us suggest we should go back to those days. But
18 I do think we have to be able to allow the
19 courts to look at the nurturing parent under the
20 circumstances of each individual case where
21 custodial parents are staying home with a young
22 child.

23 My first example involves a married
24 middle class couple with one child in which both
25 parents work. They get divorced. And by the

1 way, often in these situations we certainly run
2 into, in the first marriage dad was saying to
3 mom, I want you to stay home. That is my
4 bargain. I want you to stay home with the kids.
5 I think that is good and it is kind of funny how
6 they tend to change their tune when that first
7 marriage is unfortunately busted up and now she
8 wants to stay home with the child of the second
9 marriage.

10 But getting back to the first example,
11 they get divorced. The child remains with the
12 mother because we know that is where the odds
13 are. She now has a new marriage and she has a
14 new baby. That baby is born with a severe
15 impairment, whatever it is. I used the example
16 of Down's syndrome. That new baby's physical
17 and mental condition is such that it is now
18 reasonable for her to stay home and she also may
19 have an extremely difficult and expensive time
20 trying to find appropriate alternative care for
21 that child. Do we really want to mandate the
22 court to attribute to her an earning capacity in
23 that situation?

24 My second example is probably a much
25 more common example statistically. A lower

1 income couple, they were never married. They
2 had a child. Maybe they never even were living
3 together. He departs and now we, the taxpayers,
4 are supporting mom and the child through our
5 largess, through the system that up until
6 earlier in this month was called AFDC, Aid to
7 Families with Dependent Children, but it has now
8 been renamed TANF, Temporary Assistance for
9 Needy Families. And the money which the father
10 of that first child is paying is going to hardly
11 recompense us, the taxpayers, because through
12 our generosity we are paying to support his
13 child. And we have now eliminated in
14 Pennsylvania something called the welfare pass
15 through program, you may be familiar with it,
16 where part of that money originally was paid
17 added on to welfare grant. That no longer
18 happens. So that all the money that the obligor
19 parent pays in that situation goes to defray the
20 expenses of welfare. That child turns five but
21 now mom has a baby by a second man and the
22 father of the first child goes to court and
23 says, I should have a reduction. I should have
24 a reduction in my child support because my kid
25 is now five years old. I want you to ask

1 yourself two questions. What is the real
2 earning capacity of a single mom on welfare with
3 a five-year old and an infant. Secondly, if the
4 court is required to reduce the first father's
5 child support payments, who is harmed. We are
6 harmed, the taxpayers who are supporting his
7 child in a way he is not really doing. So my
8 first and most fundamental opposition to House
9 Bill 22 is the absolute nature of it.

10 I am going to run through more quickly
11 my other points of opposition. Every statistic
12 I read, and I gave you one aside from the U.S.
13 Census Bureau in point number two in my points
14 of opposition, indicate that absent parent child
15 support awards and child support payments -- and
16 those are not the same thing -- do not really
17 cover half the cost of raising a child. I guess
18 the weekend before the last I was at the Sports
19 Authority with my teenage son buying a pair of
20 sneakers. And if any of you haven't done that
21 recently for a teenage child, just take a look
22 at the support charts and figure out how many
23 pairs of sneakers you can get at the current
24 price of sneakers out of a typical monthly
25 support order.

1 Third, we know statistically that most
2 custodial women, most custodial parents are
3 women and that is even more true with younger
4 children. So to the extent that this bill would
5 give a break to normally the non-custodial
6 parent at the expense of the custodial parent
7 with a young child, we should not kid ourselves.
8 It is going to have an adverse effect on women.
9 The statistical abstract for the United States
10 indicates that the number of fathers with
11 children has increased over the last couple of
12 decades but is still a very small percentage of
13 custody arrangements. So in most instances
14 child support flows from father to mother. So
15 if we lower child support, in most instances we
16 are going to penalize the moms in favor of the
17 dads.

18 And those figures, I submit to you,
19 would be even more lopsided when we are dealing
20 with very young children, the children who are
21 the subject of the nurturing parent doctrine.
22 We see again and again in our clinical work that
23 a mom with a newborn, there are newborns,
24 one-year olds, two-year olds, they are almost
25 invariably with the mother. Yes; once in a blue

1 moon we see a very young child with a father.
2 We have seen those cases. Usually something is
3 pretty wrong with the mom. There is something
4 wrong in her household that has led to that
5 situation. We could all argue as to whether
6 this is the way life should be. I am talking
7 about the way life is.

8 Next, we know that because of the
9 reasons that I have already stated, stepfathers
10 are already paying a lot of the freight for
11 their stepchildren. I think any man who marries
12 a woman who is bringing children to that
13 relationship would have to be kidding himself if
14 he believes that he is not going to end up
15 paying directly or indirectly a very significant
16 percentage of the cost of raising those
17 children.

18 I think that what is behind House Bill
19 22 is a fear of the opposite effect, that in
20 fact, now the natural father is subsidizing the
21 child of the stepfather. I think the statistics
22 belie that notion and I certainly don't want to
23 put Representative Nickol on the spot, but I am
24 guessing that most stepfathers know or quickly
25 learn that the amount of money that is coming

1 into their household from the absent father does
2 not begin to cover the real cost of raising
3 those kids.

4 My fifth point I will admit is a
5 little more theoretical, that House Bill 22
6 would be, could act as an impediment to a single
7 mother's marriage or remarriage, particularly if
8 she is of childbearing years. Very often when
9 she is of childbearing years she and her
10 husband, her new husband as the case may be, are
11 going to want to form their own family. They
12 are going to have their own babies. She may
13 have stayed home during her prior relationship.
14 Now she wants to do that again. She is going to
15 find an automatic diminution of the child
16 support. So that now if she was in the labor
17 market, she is out of the labor market, and the
18 amount of money coming in from the absent father
19 is still less. This cannot be conducive to
20 remarriage and we know statistically, and
21 statistics are very stark, that single moms with
22 kids are at very high risk of poverty and we see
23 it again and again in our clinical work.

24 Finally, my last point and I guess it
25 is really more in opposition how we attribute

1 earning capacity now under the law than a
2 specific opposition to House Bill 22. When we
3 attribute earning capacity to a woman who is
4 staying home with children, there is nothing as
5 I read the cases and it is certainly as our
6 local courts supply the cases, which allows any
7 kind of offset for the realistic cost that she
8 is going to have to bear, or she and her new
9 husband, if she has one, will have to bear of
10 child care. It is all very well and good to say
11 she shouldn't have had another baby. She should
12 go out and she should work and at minimum wage,
13 but the kids are there. I don't think most of
14 us like the idea of a three-, four-, five-year
15 old staying home unattended. In fact, that
16 could lead to criminal charges, child abuse
17 charges under the Child Protective Services law.
18 But even if the kid is in elementary school, I
19 don't know how many of us would be content to
20 have a first, second, third or fourth grader
21 coming home to an empty house in the afternoons.
22 Realistically, if she is going to have a 40-hour
23 workweek attributed to her, I believe that the
24 courts should offset against that theoretical
25 attribution of earning capacity the realistic

1 cost that she would have to incur in order to
2 have that job.

3 Under our current child support
4 guidelines that are in our rules of court, there
5 are provisions once there is child care, once
6 somebody is actually working to divide up the
7 cost of child care. But when we have the
8 situation where we are attributing a theoretical
9 earning capacity to that custodial parent,
10 usually the custodial mom, we really don't have
11 anything to say we should offset against what it
12 would realistically cost her to go out and work.

13 Ms. Feitelberg's appendix will show
14 you that various states have addressed that
15 problem and have written either into their laws
16 or through cases a recognition of the actual
17 cost that she would bear if she had to work.
18 And I have actually appended a Montana Supreme
19 Court decision which talks about that very
20 issue.

21 So having thought about this and
22 realizing that there are absolutely,
23 Representative Nickol, equities on both sides of
24 this issue, I think the better part of valor is
25 to allow the Superior Court to continue to

1 evolve this case law. It is not absolute, does
2 not absolutely require that in all circumstances
3 she be given nurturing parent status. We may
4 not each and every one of us agree with each and
5 every decision of courts. I don't think that is
6 realistic. But because, primarily because House
7 Bill 22 being absolute prohibition, I would urge
8 you to reject it.

9 Thank you.

10 CHAIRMAN CLARK: Thank you very much,
11 Professor Rains, if I might ask you a few
12 questions.

13 Some of your testimony is probably
14 dislike or non-support of this bill is how the
15 courts currently apply laws such as the earning
16 capacity and also your disagreement with the
17 support charts currently in existence which you
18 think set up an unlevel playing field from the
19 beginning. Is that a fair assessment?

20 MR. RAINS: I do have a problem with
21 the support chart but I am not here asking this
22 committee to revisit the support chart. I
23 believe that if you are going to address
24 statutorily the issue of earning capacity in
25 this situation of a parent who stays home with a

1 young child, then I would urge you, number one,
2 don't take an absolute approach as HB 22 would
3 take; and number two, consider writing into the
4 law some consideration of the realistic cost of
5 child care.

6 CHAIRMAN CLARK: Have you ever seen a
7 domestic relations office use a support chart to
8 come up with a figure and then say, what does it
9 cost a month for child care, split that in half
10 and add that on to the figure that was
11 determined from the support chart? Is that a
12 common practice?

13 MR. RAINS: That is common practice in
14 the situation where there are actual child care
15 expenses and it is mandated by the child support
16 rules, the way that they are currently written
17 in the Pennsylvania rules of court. But we
18 really don't have anything akin to that in this
19 situation where she is not working and we are
20 attributing a hypothetical earning capacity to
21 her. I don't believe that you are going to find
22 anything in those child support rules that say
23 yes, but offset against that what it would cost
24 you to do that.

25 What we run into is the court saying

1 well, fine, she should go out and find a job, 40
2 hours a week at minimum wage. That is great to
3 say but what is she supposed to do with these
4 kids.

5 CHAIRMAN CLARK: I guess maybe the
6 crux of our consideration of this legislation
7 is, I guess, the underlying premise that, number
8 one, when a decision is made by a couple to have
9 a child, an additional child, that first child
10 necessarily suffers, probably financially and
11 also maybe through care, emotional support, et
12 cetera, just from the fact that now those
13 parents have additional children to support and
14 those parents have additional children to take
15 care of. So I think that is a decision that the
16 parents have made inherently when they decided
17 to have another child. I know not all of those
18 decisions are preplanned or are the number of
19 children preplanned.

20 MR. RAINS: That certainly is the case
21 with our clientele.

22 CHAIRMAN CLARK: Well, I have 21-month
23 old twin girls. One was planned; not two were
24 planned.

25 I guess the second thing, when you

1 open a plan to a situation and you make a
2 decision that the wife will stay at home, again,
3 there is a trade off there, number one
4 financially to the family unit and probably to
5 the first child financially. However, you feel
6 that you more than make that up through the
7 emotional support that you provide all of your
8 children by being at home and being there. And
9 I think that when these decisions are made,
10 particularly in the second family, I think those
11 parents maybe need to take a more realistic
12 approach as to, number one, the effect on the
13 existing children and the economic effect and I
14 think that figured into that equation should be
15 the fact that maybe the support obligation will
16 be increased for the child of a previous
17 marriage because this mother has gone to work.

18 MR. RAINS: I would like to elaborate
19 on one of the points you said. There are
20 certainly secondary benefits to the older child
21 if mom now stays home for some period of time
22 with a younger child. If that older child is
23 elementary school years, normally there is not
24 going to be a very huge gap in the ages,
25 although sometimes there is. I think we might,

1 most of us agree that there are benefits to that
2 child of having a mom to come home to in the
3 afternoon after school, as opposed to going to
4 child care or being a latchkey child. So there
5 are benefits that flow to that child of the
6 prior relationship which may not be economic in
7 nature.

8 CHAIRMAN CLARK: Thank you very much.
9 Any additional questions?

10 Representative Schuler.

11 REPRESENTATIVE SCHULER: Thank you,
12 Mr. Chairman.

13 Good morning, professor. Thank you
14 for coming. I am not a lawyer so I am a layman
15 that got into the judicial committee somehow.

16 CHAIRMAN CLARK: And we are glad to
17 have you here.

18 REPRESENTATIVE SCHULER: Well, I guess
19 Birmelin and I are here to keep some semblance
20 of order.

21 MR. RAINS: To keep us honest.

22 REPRESENTATIVE SCHULER: Well, I think
23 they are all honorable gentlemen; at least I
24 hope so.

25 My question is, it is hard for the man

1 on the street to understand this logic to have a
2 man, could be a woman, but a man in this case
3 who pays for someone else's child. That is hard
4 for me to explain to the man on the street. If
5 I go back to good old Lancaster County and bring
6 this rationale back there, they will say,
7 Schuler, you are out in left field without a
8 glove, something wrong. It is very difficult.

9 But I do have this comment. Really
10 when I look at this whole situation, it looks
11 like it is a matter of choice. In the case of
12 Representative Nickol, he made a choice. He
13 accepted the responsibility. That is his
14 choice. The mother who has another child to her
15 husband, or may not be her husband, that is a
16 choice. Now, why should I have to pay for a
17 choice that she made of which I had no control,
18 had no background in the whole issue? Why am I
19 helping to pay for a choice that she made that
20 may be a poor choice?

21 That is the whole issue I see here.
22 You made reference to an adverse effect upon the
23 mother. I think it was here, page 3, adverse
24 economic. Well, really in a sense doesn't it
25 have an adverse economic effect on the former

1 husband? Isn't that an issue here?

2 And my big issue, you said it may be
3 an impediment to marriage. That is probably
4 true. But is it not opening up a situation of
5 abuse where we have more children and more
6 children knowing that the ex-husband is going to
7 have to pay? I mean, we had that problem in
8 welfare. That is why we got into some of the
9 legislation we have. I want to hear your
10 comments.

11 MR. RAINS: As you were speaking I
12 pulled out from my pile of cases the
13 Frankenfield decision itself. In Frankenfield
14 initially the amount, I believe, was \$56. It
15 was raised to \$70 a week. I know it is the
16 perception on the street that we are requiring a
17 man to pay for another man's child. For those
18 of you who are parents, and I have two teenaged
19 children, you might want to ask yourself whether
20 \$70 a week is really putting so much money into
21 that second household that it more than pays for
22 the support of his child and now there is some
23 great budget surplus for the child of the second
24 marriage. I just don't think that that is
25 realistic. I know it is the perception.

1 My point is that the money really
2 flows in the other direction in most cases. I
3 am not saying in all cases but most cases it is
4 really the stepdad who has virtually no legal
5 rights to the stepchildren who is directly or
6 indirectly paying for the support of the
7 stepchildren rather than vice versa.

8 And I don't know what we can do with
9 the support charts. The bottom line is there is
10 not enough money to go around in the first place
11 in many, many of the situations. But I just
12 don't believe it is realistic to think that
13 absent parents, usually absent fathers under our
14 support guidelines are paying so much money in
15 that mom and stepdad are getting rich and
16 getting some bonus out of it. I don't think
17 that that is the reality of it. It is not the
18 reality that I see.

19 REPRESENTATIVE SCHULER: You are
20 probably correct. I am not that well versed on
21 the support charts and that type of thing, but
22 that may be another issue, another problem. I
23 don't know if that answers my question, about
24 why I should have to pay for someone else's
25 child, but you are probably correct. The amount

1 that the parent does pay for support is probably
2 not sufficient in many cases, not all cases.

3 MR. RAINS: So that, indeed, he is not
4 paying for someone else's child. He is paying a
5 portion for his own child.

6 REPRESENTATIVE SCHULER: Well, I won't
7 argue that he should be paying a portion for his
8 own child but raises the question of why I
9 should pay for someone else's child which I had
10 no influence, no responsibility for the new
11 child coming on to the scene. It just seems
12 beyond my sense of reasoning. Somewhere I lost
13 it.

14 MR. RAINS: If we accept your premise
15 that the support is paying for someone else's
16 child, then we probably all agree that was
17 unfair.

18 REPRESENTATIVE SCHULER: Aren't we?

19 MR. RAINS: And I am not accepting
20 your basic premise and the reason I am not is
21 because of finances. If you look at the
22 statistics I cite from the census bureau, the
23 amount of money that comes in from the absent
24 parent, and I want to say on behalf of the men
25 here that it is even worse when the absent

1 parent is the mother, is only a tiny fraction of
2 the money that comes into the household where
3 the child is living. So that it is not enough
4 to pay for that man's child or that woman's
5 child from the prior relationship. So there
6 isn't anything left over to support the
7 stepchild. That is not the reality.

8 But if we have that situation, let's
9 say we had that situation because of the
10 different incomes of the parties that were
11 involved. Under our current case law, our
12 current case law is not absolute. It is
13 discretionary and the courts have the discretion
14 to say no; in this situation we are not going to
15 allow the nurturing parent doctrine to attach.

16 There is a case that Ms. Feitelberg
17 found for me from another jurisdiction where the
18 nurturing mom was a medical doctor where she was
19 making 100,000 a year and she had worked when
20 her children were born of the first marriage.
21 And suddenly she wants to stay home with the
22 kids from the second marriage and the courts, I
23 think appropriately, said we are imputing income
24 to you; in fact, we are imputing a lot of income
25 to you. That result could perfectly well have

1 happened under the current state of law because
2 of the discretionary nature of our courts'
3 decisions in the area of nurturing parent
4 doctrine.

5 REPRESENTATIVE SCHULER: Thank you
6 very much, professor.

7 CHAIRMAN CLARK: Representative
8 Nickol.

9 REPRESENTATIVE NICKOL: Thank you. I
10 appreciate your testimony, even though critical.
11 But throughout much of your testimony I had the
12 impression we are tilling with different
13 windmills, that most of your comments were
14 directed at the child support guidelines, which
15 my bill doesn't touch. And your deep anger over
16 those and the unfairness of the system which I
17 may concur with you in, justifies that we get an
18 additional dollar from the working parent to
19 support a child that was not of his own
20 creation, that it is justified because the
21 system is wrong. And I kind of challenge that
22 as a reason to oppose this legislation.

23 I must say that when I married a woman
24 with five children, it was not the unanimous
25 judgment of my family that I was sane. But I

1 was surely not kidding myself that I would not
2 have to pay more than half the support for those
3 children. It was an obligation I undertook with
4 my eyes open and I don't regret the decision.
5 We have been married 20 years which defied the
6 estimates of most of the people at the time that
7 I got married.

8 But I have to challenge your
9 assumption, your statement. I think you are
10 reaching for things when you say that House Bill
11 22 is an impediment to remarriage. Do you
12 really feel that when someone like myself enters
13 into a marriage with stepchildren that they are
14 doing it with full, based on the fact they can
15 have a child and have the former spouse support
16 the child? Do you think it has, do you really
17 think that is a meaningful deterrent to second
18 marriage; that is the only reason people get
19 married to a woman with children of a previous
20 marriage, so that they can enjoy that additional
21 support?

22 MR. RAINS: I did indicate when I
23 reached that point in my testimony that that was
24 my most theoretical objection because in my
25 experience, I am married. Most people don't do

1 a very fine cost benefit analysis before they
2 enter into marriage. They don't review the
3 domestic relation laws of their state, much less
4 the other states to which they might move over
5 the next 20 years. So it is rather theoretical.

6 We do know this. We do know that
7 single moms with children do have a hard time,
8 that it probably is not as easy, I would submit,
9 for a single mom with five children to get
10 remarried as a single woman with no children,
11 that there may have been reasons which
12 fortunately did not pan out why all your friends
13 and relations were telling you that that was a
14 mistake. A woman with young children bring a
15 certain baggage into a marriage and it is a
16 difficult situation for her and it is a
17 situation which is highly correlated with
18 poverty in our country.

19 So do I really think that most people
20 entering into marriage will review your
21 legislation before they act? No, they don't.
22 It is a theoretical impediment. The impediment
23 is already there to the woman with children and
24 particularly the woman with young children. And
25 the fact is that in many cases, I gather as in

1 your own but I am not clear in my recollection,
2 in many cases if she is of childbearing years
3 the new husband will want to have children by
4 her, his own children, if you will. And to me
5 then it does add unfairness, particularly in the
6 situation we see; many of those cases where the
7 first husband was rather insistent that she stay
8 out of the job market when she stay home with
9 his kids. But now all of a sudden he is saying,
10 why doesn't she go out and get a job.

11 Your bill would not allow the courts
12 to delve into what was, if you will, the social
13 contract between the initial husband and wife,
14 what was the deal. Maybe she turned aside
15 educational opportunities, employment
16 opportunities, took herself out of the job
17 market which, if she reenters, she is going to
18 have to reenter at a lot lower. She won't have
19 had the step increases or promotions she might
20 otherwise have had. He told her all along, stay
21 home and be the good old fashioned Ozzie and
22 Harriet style mom to my kids. But now, all of a
23 sudden, he is saying, well, gee whiz, my kids
24 are five years old. You should go out and work.
25 I think it is appropriate that our courts should

1 look at what the deal was, what the relationship
2 was. The current law allows them to do that.

3 REPRESENTATIVE NICKOL: Well, it is
4 different subsidizing an Ozzie and Harriet
5 relationship if you are Ozzie and your wife is
6 Harriet, it is a little different when your wife
7 is remarried to another man and has a child from
8 that marriage. I am not looked upon, I don't
9 believe, by many people as a macho sort of guy.
10 But the thought of going to court to ask my
11 wife's ex-husband to support our decision for
12 her to stay home with my child would have been a
13 true test of manhood.

14 Thank you.

15 MR. RAINS: Thank you.

16 CHAIRMAN CLARK: Thank you, Professor
17 Rains. We are running a little behind schedule.
18 I think what we will do with the next two
19 witnesses is have them both come up and testify
20 and then the members of the committee can
21 question both of them. We are primarily doing
22 that because they are both, one is a chair and
23 one is the co-chair of the family law
24 subcommittee of the Pennsylvania Bar
25 Association.

1 So the next individuals to testify
2 will be Harry J. Gruener, Esquire, chair of the
3 family law subcommittee of the Pennsylvania Bar
4 Association and Joel Bernbaum, co-chair of the
5 family law subcommittee of the Pennsylvania Bar
6 Association. Mr. Gruener and Mr. Bernbaum.

7 MR. GRUENER: Chairman Clark, I will
8 try to be brief so that you can catch up on your
9 time. I will try not to be repetitive.

10 Thank you for inviting me to speak on
11 behalf of the Pennsylvania Bar Association
12 family law section. I have been a practicing
13 attorney for 26 years in Pennsylvania since my
14 graduation from Pitt. My practice has been
15 concentrated in the area of family law since
16 1980. I am a partner in a Pittsburgh law firm
17 concentrating in the area of family law. I am a
18 member of the Allegheny County Bar Association.
19 I am a past chair of its family law section. I
20 am also a member of the joint state advisory
21 committee established to recommend amendments to
22 the divorce code, which our work is ongoing.
23 And I am currently chair of the Pennsylvania Bar
24 Association family law section representing over
25 1800 family lawyers in the Commonwealth of

1 Pennsylvania. I write a regular column in the
2 Pittsburgh Legal Journal on family law and I
3 have written and lectured extensively in and out
4 of the commonwealth. I was told I had to say
5 all those things. Bear with me.

6 I want to also tell you that I
7 appreciate specifically the fact that the
8 section in the particular case was consulted by
9 the legislature and I appreciate the fact that
10 we are consulted on matters like this.

11 As I said, we have over 1800
12 practicing lawyers in the Commonwealth of
13 Pennsylvania. I think it is significant for you
14 to know, too, that these 1800 ladies and
15 gentlemen represent both men and women so they
16 do not represent a particular special interest
17 one way or another. In my practice I represent
18 probably 50 percent men and 50 percent women.
19 So I think we have a little more balanced
20 perspective on what the law ought to be; at
21 least I hope we do.

22 In January of 1997 the family law
23 section of the PBA conducted its winter meeting
24 in Pittsburgh. At that time the officers and
25 council of that body conducted an extensive

1 review of the contents of HB 22. The bill had
2 been disseminated to all members of the council
3 and all officers of the section prior to the
4 meeting so that they could have some reflective
5 thought.

6 I must tell you that the debate was
7 spirited and obviously the bill was
8 controversial. That might surprise
9 Representative Nickol. That might surprise some
10 of the other of you whose common sense does say
11 to them, gee, you know, on the surface it is
12 really seductive to think that we would not
13 outlaw this type of situation. Why would we
14 have this, quote, subsidy of a second family by
15 the first, let's say, father, although in all of
16 my testimony I need to be gender neutral. But I
17 must say that I agree with Professor Rains.
18 What we see most of all is we see mostly mothers
19 still being primarily custodial parents; some by
20 court order, some by default. And we still see
21 fathers largely being the payers. So we will
22 use the Jeffrey Feeser type case.

23 At the conclusion of the discussion,
24 however, the Pennsylvania Bar Association family
25 law section took a position that was

1 subsequently presented to the board of governors
2 of the Pennsylvania Bar Association and they
3 have authorized me today as chair to appear
4 before this committee to present that position
5 on the behalf of the section. And a copy of the
6 resolution of the section as approved by the
7 board of governors is attached to your materials
8 for your file.

9 The testimony that I am offering today
10 does not necessarily represent my personal views
11 because, as a matter of fact, I wrote an article
12 in the Pittsburgh Legal Journal on Jeffrey
13 Feeser's case called The Novel Notions of
14 Nurturing and the alliteration aside, basically
15 what I said was that I disagreed with the result
16 in that case based upon the record as I saw it.

17 However, I am here today to represent
18 the view of the section which I share from the
19 standpoint that I don't believe that all court
20 discretions should be removed and House Bill 22
21 does that. I have rarely seen in my practice in
22 the area of family law absolute rules or
23 presumptions work. We have a tender years
24 presumption in custody for many, many, many
25 years and that was, it was a presumption that a

1 child of tender years belonged with mother.
2 That presumption was pernicious. It was
3 difficult to overcome and it ended up being
4 applied in horrendous fact situations.

5 Absolute rules in the area of family
6 law are dangerous. They are wrong and they
7 should not be implemented. The court's
8 discretion is extraordinarily important and when
9 Professor Rains said to you the only reason you
10 should vote for this bill is if you cannot
11 conceive of a single circumstance where you
12 would render a decision in a case denying the
13 extension of the nurturing parent doctrine to a
14 second family and then decide that you were
15 going to go into chambers and throw up.

16 If you can think of no case where the
17 application of this would be repugnant, then I
18 think you should vote for the bill. Absolutes,
19 however, in family law are dangerous because you
20 cannot believe the course of human endeavor in
21 family law. What people do to each other, what
22 they say and how they conduct themselves is so
23 varied and with so many permutations, it is
24 critical that courts retain discretion. I think
25 in this particular case that is what was done.

1 Now, there are abuses of discretion.
2 There will be cases that you don't like. But
3 when you remove that discretion, what you are
4 saying is there will never be a circumstance
5 where this should be applied to be fair to both
6 parties. House Bill 22 would codify the
7 nurturing parent doctrine and that has been
8 first recognized all the way back in 1977, and I
9 have given you the citation in the statement
10 which is the Wasiolek case.

11 In that case, of course, the mother
12 was nurturing the children of the marriage. It
13 was interesting to note, however, that those
14 children were ages seven, nine and eleven. One
15 only has to read the newspapers today to decide
16 that perhaps it is wrong also to impose any
17 bright line rule as to when you are supposed to
18 stop nurturing. Adolescents are pretty
19 dangerous when they are left home alone. And
20 yet what we like to think is the nurturing
21 parent should stop nurturing when the child goes
22 to school, when the child is six, when the child
23 is seven, when the child is nine.

24 Perhaps what we need then is if we
25 need House Bill 22, then maybe we need an

1 absolute rule as to when someone is no longer
2 allowed to nurture even the children of the
3 marriage. I doubt that any of you would
4 probably want to do that. You probably would
5 want to let the court take testimony as to
6 whether or not the child being nurtured is a
7 special needs child. Is the child afflicted
8 with Down's syndrome, as Professor Rains'
9 example was, or is the child emotionally
10 disturbed. The Superior Court recognized in
11 that particular case, however, that an
12 unemployed parent may make a substantial
13 non-monetary contribution to the children.

14 The first case to address the issue of
15 whether the doctrine should be extended to where
16 the child being nurtured is not the child of the
17 support order was Bender. My gosh, that was in
18 1982. So this law has been with us now for a
19 long period of time. In that case the father
20 had primary custody of the only child to his
21 marriage to mother and mother then had another
22 child by another man and chose to stay home with
23 that child. At the support hearing mother
24 attempted to rely on the nurturing parent
25 doctrine. The trial court found that nurturing

1 any child is dispositive. In other words, they
2 applied, they are saying absolute again,
3 absolute rule. The trial court said why, you
4 are staying home with the child. You have no
5 support obligation. The Superior Court reversed
6 that decision and they remanded it and they said
7 no, no, that is only one factor. You need to
8 consider many factors in setting a support
9 order, not just whether she is nurturing or what
10 child she is nurturing.

11 The court made it clear that many
12 factors went into deciding a support order and
13 some of those factors, of course, are the age
14 and maturity of the child, the availability of
15 other child care, the adequacy of financial
16 resources and the feasibility of part-time work,
17 the nurturing parent's work history, has this
18 person ever worked, do they have an earning
19 capacity or is it fictitious.

20 You know, many times some of your
21 questions to Professor Rains were talking about
22 subsidizing the family. You know, a lot of
23 these nurturing parents are women who have no
24 job skills. They have no earning capacity.
25 When the court sits there and says well, look,

1 we are sorry that you have a mongoloid child and
2 we are sorry that you would like to stay home
3 with that child but, you know what, and we know
4 incidentally no matter what we do in this
5 courtroom you are going to stay home with that
6 child because you want to and because you need
7 to and because you can't afford to have anyone
8 else take care of a special needs child. But
9 you know what we are going to do; we are going
10 to engage in a fiction. We are going to pretend
11 that you have earning capacity. We are going to
12 pretend that you can go get a job and make
13 minimum wage. We are going to pretend that you
14 can make a thousand dollars a month. We are
15 going to reduce the other man's support
16 obligation to the other child of the family
17 which is his child because we are going to
18 pretend that you have that income.

19 Now, what kind of Hobbesian choice is
20 that in a very, very, very difficult situation
21 where the facts cry out for the court to
22 actually take a look at and value that
23 nurturing. And it is not every case that the
24 court does it. As Professor Rains pointed out,
25 there are two cases in his material where an

1 effort to nurture another person's child turned
2 down as a reason not to work. Also the case
3 that he cited from Colorado, we can all envision
4 a case where someone has an extraordinary
5 earning capacity. They have a great track
6 record. They have worked for years. Suddenly,
7 they decide that they are going to nurture. The
8 question then becomes for the court once again,
9 gee, what are the equities here; how can we
10 balance them; what are the facts of this case.

11 The trigger for House Bill 22 seems to
12 have been the Feeser case, which came along in
13 1996, although it did not change the law. House
14 Bill 22 would codify that doctrine and include
15 that mandate that the child being nurtured be
16 the child of the parties. Well, I would say and
17 I said in my written materials this issue is
18 timely, I have to tell you, with the number of
19 divorced couples who remarry and begin second
20 families. Those who practice family law are
21 seeing this issue surface. There is an
22 additional and there is always a tension,
23 incidentally, in the law between the parent who
24 decides to stay home and nurture a child and the
25 payer who feels that he is being robbed because

1 he has to now contribute continued child support
2 to his original child. There is also an
3 additional tension between the father of the
4 second child and the father of the first child
5 where the mother is the same person. The second
6 husband, you know, has no duty to support that
7 child of the first marriage but we all know that
8 he does and we all know from the statistics and
9 what we were cited before that he does.

10 What we do know is that, and what the
11 section of the family law bar, I think, has
12 recognized is that tension exists and that when
13 and where to apply the nurturing parent doctrine
14 is, in fact, sensitive. The extent to which
15 House Bill 22 would remove the discretion from
16 the court, which is in section C, in deciding
17 what circumstance to apply the doctrine, that is
18 where the section opposes the bill. The family
19 law section of the Pennsylvania Bar Association
20 does not oppose in appropriate cases a result
21 that would be urged by Representative Nickol in
22 all cases. There are many cases in which
23 Representative Nickol's feeling that he is
24 outraged when he reads in the paper that Jeffrey
25 Feeser is required to pay more support because

1 his ex-wife had the audacity to have another
2 child and he didn't have any part in that
3 decision. The Feeser case may well be a case
4 where the nurturing parent doctrine should not
5 be extended. I don't know that. I haven't
6 reviewed the entire record. When I wrote the
7 article on it, I even said I wished I had the
8 entire record because you need to know all of
9 the facts. And it may be that there are cases
10 like the two that were cited by Professor Rains
11 where the extension of that doctrine would be
12 repugnant to the man on the street in Lancaster
13 or the man on the street in Pittsburgh, for that
14 matter.

15 The court needs to have that
16 discretion, however, to decide that. House Bill
17 22 takes that away. The sense of the section
18 was and is that nurturing children of tender
19 years is often laudable and it represents sound
20 public policy. I am not sure we want to
21 discourage that. I am not sure we want more
22 home alone children. I am not sure we want more
23 situations where somebody is compelled to work
24 at a menial job or worse yet, is imputed an
25 earning capacity that may not exist.

1 The section believes that there may be
2 certain limited fact patterns which would permit
3 and which would merit the imposition of the
4 doctrine where the child to be nurtured is not
5 the child for whom support is sought. The
6 section also believes, and I think that this is
7 important, that the appellate courts of the
8 commonwealth have historically, at least since
9 1982, demonstrated thoughtful restraint in the
10 application of the doctrine and the trial court
11 should be able to continue to weigh the
12 individual circumstances in deciding when to
13 apply the doctrine.

14 The section believes that the court in
15 Feeser did a proper analysis. Whether the
16 result was correct or not under the facts, I
17 don't know that, but they did a correct analysis
18 and that Feeser should remain the law in the
19 sense that it permits the court to exercise
20 discretion.

21 The section believes that it would be
22 wrong to put nurturing in the same category as
23 an intentional voluntary reduction in income to
24 avoid child support. And let me just review
25 that for a second and then I will finish you

1 with some technical amendments that I think you
2 should consider if you are going to go ahead and
3 urge enactment of Bill 22.

4 We have certain doctrine in
5 Pennsylvania that relieves a parent from their
6 child support obligation. We already have that.
7 It is not controversial. Someone, for example,
8 through no fault of their own, loses their job.
9 That is regarded as an involuntary diminution of
10 income. They didn't want to lose their job, and
11 we give them support relief. Someone suffers a
12 horrible injury and loses their earning
13 capacity. We allow for that.

14 What we do not allow for are voluntary
15 diminutions of earning capacity where someone
16 intentionally takes themselves out of the labor
17 market with a bad motive and that motive is to
18 shirk their duty to pay child support. The
19 question is whether or not you want to do what
20 House Bill 22 does, and that is in every single
21 case put the parent who decides to stay home and
22 nurture a second child in the category and in
23 the same category as the person who voluntarily
24 and intentionally and with bad motive reduces
25 their earning capacity to avoid support

1 obligation.

2 I submit to you that if the evidence
3 adduced in court is that is why the person is
4 staying home to nurture the second child, the
5 court can exercise its discretion to deprive
6 that party of that privilege. But in those
7 circumstances where the nurturing of the second
8 child is in every fair minded person's mind a
9 legitimate and maybe even compelled. Don't
10 forget when you ascribe an earning capacity to
11 somebody, that doesn't mean the money is coming
12 into the house. Where is that money going to
13 come from that you have taken when you have
14 reduced the first guy's child support
15 obligation. In a case where you decided that
16 the woman didn't do anything wrong, she is, a
17 matter of fact, doing something very laudable in
18 those limited circumstances.

19 Now, in the event that the legislature
20 should desire to enact House Bill 22 the section
21 also noted that there were various amendments to
22 the present language that in their view would be
23 mandatory. If you have a copy of House Bill 22
24 there, I think these amendments are important.

25 First section, 4322.1 (a) (2), this is

1 in the part of the bill that purports to codify
2 the nurturing parent doctrine. This is an
3 inaccurate description of the nurturing parent
4 doctrine. Just because a parent is nurturing
5 that parent is not necessarily relieved of a
6 support obligation which is what that provision
7 provides, as that parent may have substantial
8 unearned or passive income from investments,
9 rents, inheritance, gifts or income producing
10 trusts. There are many, many sources of income.
11 So to say because you are nurturing you have no
12 support obligation is simply wrong and that
13 needs to be, in our judgment, deleted.

14 Further, since the law of the
15 commonwealth provides that the assets owned by a
16 party are to be considered in fixing support,
17 there will be cases where a party deemed to have
18 no earning capacity will, however, own
19 substantial assets and they must be considered
20 in determining the support obligation. So that
21 is another reason why I think that that section
22 needs to be deleted; also, a second, for the
23 same reason.

24 If you look at section 4322.1 (b) (2)
25 (ii) -- that is 4322.1 (b) (2) (ii) -- that also

1 must be deleted for the same reason. The
2 nurturing parent may have a duty of support even
3 where no earning capacity is attributed for the
4 same reasons that I brought up before.

5 Finally, it is suggested that section
6 4322.1 (c) which is the section which brings us
7 altogether today should be amended to clarify
8 that the doctrine does not apply to a child but
9 rather it applies to a nurturing parent. So I
10 have suggested in the written materials --
11 rather the section has suggested in the written
12 materials two alternatives as to how that
13 section should read.

14 If you all decide that you are going
15 to recommend this absolute, my first suggestion
16 is, quote, this section shall apply only where
17 the child being cared for in the home by the
18 purported nurturing parent is a child for whom
19 support is sought. Or in the alternative, it
20 could state, quote, this section shall not apply
21 to the parent of a child being cared for in the
22 home of a parent if the child is not the child
23 for whom support is sought.

24 It is a little convoluted and I
25 understand why the original draft, I think, was

1 not as clear as it should be. I hope that this
2 will be of some help to you.

3 Basically that is the position of the
4 section of family law, the family law section of
5 the Pennsylvania Bar Association. I thank you
6 not only for consulting us and hope you will do
7 so in the future. We would love to be able to
8 make suggestions. We think we know something.
9 We don't always.

10 I thank you very much for your
11 patience in listening to me today.

12 CHAIRMAN CLARK: We thank you very
13 much for your testimony, Attorney Gruener. Now
14 we will receive testimony from Joel Bernbaum.

15 MR. BERNBAUM: Yes.

16 CHAIRMAN CLARK: He is the co-chair of
17 the family law subcommittee.

18 MR. BERNBAUM: I will use my
19 colleague's and friend's microphone. I am sure
20 you won't mind.

21 I too, Mr. Chairman, want to thank you
22 for the invitation to be able to testify before
23 you and your committee this morning.

24 I am a practicing family lawyer in
25 Montgomery County, Pennsylvania. I have been so

1 for approximately the last 20 years. A portion
2 of my practice was initially in Chicago,
3 Illinois where I practiced for over eight years
4 preceding 1985, at which time I returned to my
5 hometown of Philadelphia, joining the firm of
6 Astor, Weiss & Newman. I am proud that my
7 former colleague and partner is now a member of
8 our supreme court.

9 For the past year I have been a
10 partner in a firm in Plymouth Meeting,
11 Pennsylvania. Our practice concentrates in
12 family law and also for the past three years I
13 have been chair of the family law committee of
14 the Montgomery Bar Association, former member of
15 the council of the PBA family law section and a
16 founder of the Southeastern Pennsylvania family
17 law council which is comprised of the five
18 county chairs of the family law committee of
19 Montgomery, Philadelphia, Bucks, Chester and
20 Delaware counties.

21 When I received the invitation, I
22 solicited comments from members of my family law
23 committee in Montgomery County as well as
24 members of the family law council, and
25 surprisingly we had an interesting response of

1 approximately 40 percent of our members. I will
2 not take up undue time today to reiterate what
3 was so eloquently enunciated by my colleague but
4 I would like to draw attention to certain items
5 and possibly clarify and reiterate those items
6 that we feel are important.

7 We overwhelmingly would recommend that
8 this area be left to the trial appellate courts.
9 As Harry has told you, this law has evolved
10 since 1977 and I use the word "evolved." We
11 believe that the trial courts and the appellate
12 courts are better suited to modify, amend or
13 apply the law as necessary based on the changing
14 factors of our society and the parties brought
15 before the courts.

16 Certainly 20 years ago the families in
17 question in our family courts were in different,
18 I would say greatly different circumstances than
19 have been before the courts today. You have a
20 greater number of working, where both parents
21 work in a family unit. You have a much more
22 mobile society and you have many other factors
23 that have come to the front in the last 20
24 years. To enable legislation as absolute as
25 this would bring a roadblock to any future

1 amendments or applicable application of this law
2 which I think would be important. The
3 overwhelming majority of our members feel that
4 this is an area that is better left to the
5 courts because they have been evolving this law
6 since 1977.

7 If the legislation does get enacted,
8 we concur with what my colleague has expressed
9 as our points with these additions and
10 clarifications. To subject children of second
11 relationships, because it is not just
12 necessarily second marriages or prior marriages
13 but children of other relationships other than
14 the parties that are before the court in the
15 support matter is to create, I believe, a second
16 class of children.

17 And the preamble to this act certainly
18 is commendable and I think that we all agree. I
19 have a four year old myself at age 48. We all
20 agree that family values and nurturing families
21 and allowing parents to stay at home to care for
22 their children is most important. But to say
23 that children of other relationships are not
24 entitled to support, are not entitled to
25 appropriate relief, I think is questionable. I

1 think it creates the second class and probably
2 is unconstitutional. I don't think that is what
3 this legislation was intended to do.

4 It also could create a hardship
5 whereby you are going to increase the rolls of
6 welfare. I think that to create the fiction of
7 an earning capacity to a party who has no
8 realistic earning capacity and then lowering the
9 support that that parent is going to receive
10 only points the way towards welfare. I don't
11 think that is what this legislation was intended
12 to do.

13 The limitation in subsection C is the
14 main focal point of our objection. We do not
15 believe in, as again, Harry eloquently said, the
16 absolute rule of law. It does not allow for the
17 learned discretion of the trial courts and the
18 appellate courts to decide what should be
19 appropriate under different fact patterns. The
20 rule of absolute, especially so in family
21 courts, is just not advisable and has not borne
22 out in the history of case law to be something
23 that should be done.

24 The unearned income issue is the last
25 point I would like to make. Again, this was the

1 overwhelming majority of issues addressed to me
2 in my capacity as chair. The act as presently
3 constituted does not allow for the basic tenet
4 of support law, which is to take a look at
5 whether or not the party has unearned income in
6 addition to earned income. You may, by Act 22,
7 have a situation where you have a party who has
8 because of the application of the act deemed to
9 have no earning capacity and no duty of support
10 with a million dollar trust fund. If you talk
11 about inequities, there is one that is clearly
12 brought to front by this situation. The act
13 must address that issue. The support guidelines
14 and all of the law addressed in child support
15 issues clearly address unearned income as a
16 factor to be considered. We urge you to look at
17 that strongly in an attempt to modify in the
18 event you see fit to go forward with the act as
19 expressly constituted.

20 I once again thank you for the
21 opportunity and it has been my pleasure to
22 address these issues on behalf of myself and my
23 colleagues.

24 CHAIRMAN CLARK: Thank you very much
25 for your testimony.

1 Are there any questions for either or
2 both of these gentlemen? We will start with
3 Representative Nickol.

4 REPRESENTATIVE NICKOL: In Mr.
5 Bernbaum's testimony, I think you adequately
6 summed it up that starting in 1977 this law has
7 evolved. Would you agree that the evolution has
8 been from Wasiolek through Frankenfield to
9 actually broaden the obligation of working
10 parents?

11 MR. BERNBAUM: It is my opinion that
12 the application has not been broadened. Most of
13 the language of the act was relevant in the
14 first case that we both, Harry and I cited, the
15 Wasiolek case. Most of those factors were
16 brought right from that case. I don't think the
17 application has broadened. In fact, recently in
18 the last two or three years there have been
19 certain cases -- I don't want to get into a case
20 law discussion this morning, but if you want to
21 we can. But I think in the past three or four
22 years the doctrine has not been applied in
23 several cases under different fact patterns.

24 So I don't think the doctrine has
25 broadened and I think that the trial and

1 appellate courts have shown that they are able
2 to apply this doctrine under different fact
3 patterns. That has been consistent with the
4 first case law in 1977. There is a quote that I
5 like especially which I put in my testimony and
6 it basically is quoted from the Frankenfield
7 case where it says the court made a point in
8 that case that a trial court is free to consider
9 making an exception to this rule by establishing
10 an earning capacity whenever a parent chooses to
11 stay at home with a minor child. In other
12 words, the court is basically saying we have
13 made exceptions and we will continue to make
14 exceptions. What we are not going to do is
15 blindly apply the doctrine in every
16 circumstance. I don't feel that there has been
17 a broadening of the application of the doctrine.

18 CHAIRMAN CLARK: Representative
19 Schuler.

20 REPRESENTATIVE SCHULER: Thank you,
21 Mr. Chairman.

22 This is just a scenario and I don't
23 know the answer and that is why I am asking you.
24 You are the legal people and this is a learning
25 experience for me.

1 Let's run through this scenario. A
2 woman marries husband A. They have two
3 children. She decides during -- and they get
4 divorced. And during the divorce proceeding she
5 decides she wants to stay home and nurture these
6 children. The father then, his payment is based
7 on this nurturing factor by the courts?

8 MR. GRUENER: His payment is based
9 upon the support guidelines which are in effect
10 across the Commonwealth of Pennsylvania and --

11 REPRESENTATIVE SCHULER: But is there
12 a difference if she stays home?

13 MR. GRUENER: Well, there is a
14 difference if she stays home if she could go out
15 and earn money. He will pay more if she doesn't
16 have any earning capacity.

17 REPRESENTATIVE SCHULER: Let's assume
18 she doesn't, so he pays more?

19 MR. GRUENER: He pays more. If she
20 doesn't have any earning capacity, then he would
21 pay more whether she was nurturing or not. It
22 is a situation where she has earning capacity
23 and says to her husband, I would rather stay
24 home and take care of these kids rather than go
25 out and work, even though we know I could work.

1 And the court since 1977 has said, well, we
2 value that nurturing. We will let you do that.
3 You can't do it forever but we will let you do
4 it. So he pays a higher amount of money than if
5 she was bringing money into the house.

6 REPRESENTATIVE SCHULER: Okay. That
7 is what I wanted.

8 MR. BERNBAUM: Excuse me. I would
9 like to add a small part and I am remiss because
10 I didn't bring the guidelines here. I think it
11 would be important for every one of you to look
12 at the state guidelines for child support and
13 there are grids in those guidelines. It is very
14 interesting to note and I will use the example
15 from the top of my head. Harry will, I am sure,
16 correct me and I hope he will because I don't
17 want to misspeak.

18 If you take an average wage earner of
19 \$25,000 to \$30,000 in this commonwealth, so his
20 net income will be between \$15,000 and \$20,000
21 and you take the nurturing, purported nurturing
22 parent who may have income of zero, if this
23 doctrine is applied, or let's say \$1,000, even a
24 modest income of \$10,000 or \$15,000 a year. I
25 believe if you look at the application of the

1 guidelines, the difference between that
2 nurturing parent having a zero income and a
3 thousand dollars income a month will net, the
4 difference in child support is negligible. I
5 would tend to think that it would be less than
6 \$50 a month difference.

7 So what I am saying is, let's not lose
8 sight of the practical application of the
9 guidelines in these circumstances. It is one
10 thing and we strongly believe in what our
11 testimony is here, but when you take the
12 practical application of the guidelines in the
13 circumstances, the difference between a stay at
14 home parent earning \$1,000 or zero is almost
15 negligible when you apply the guidelines.

16 REPRESENTATIVE SCHULER: Let me
17 continue then. The same woman, after the
18 divorce she marries B. They have a child and
19 under the existing law, A then increases
20 depending on a court decision but it is possible
21 that his payment would be increased since she is
22 staying at home.

23 MR. GRUENER: Jeffrey Feeser's payment
24 was increased because he earns more money and
25 they still were not able --

1 REPRESENTATIVE SCHULER: That was
2 brought out.

3 MR. GRUENER: They still were not
4 computing an earning capacity to her. That was
5 Mr. Feeser's objection. His objection was, my
6 kids are now nurtured; why don't you go to work.
7 She said, well, because I have an infant.

8 REPRESENTATIVE SCHULER: But I wasn't
9 aware that Mr. Feeser's salary had increased.
10 Was she asking for more payment based on his
11 increase, not because she had another child?

12 MR. GRUENER: No. He was seeking a
13 modification downward. That is how it started.
14 He came into court and said, even though I earn
15 more money, I want to pay less child support
16 because now my child was nurtured; my child is
17 old enough; go to work. She said well, I have
18 an infant, or whatever she had. He said, that
19 doesn't matter; go to work. And the court said
20 in that particular case, as you all know, that
21 she was entitled under those facts. And I don't
22 have all the facts of Feeser. Judge Del Sole
23 would have many more which you will hear this
24 morning because he sat on the case. I didn't
25 have the record and I wasn't a counsel of record

1 in the case. It came from York County.

2 But what I can read in the opinion on
3 those facts, the court simply said that this is
4 a particular circumstance where we are not going
5 to make an absolute rule that you cannot nurture
6 the next child. But they obviously had to look
7 at a lot of other factors. The reason Mr.
8 Feeser's support went up was because he was
9 earning more money than what he was when the
10 first child support order was set.

11 REPRESENTATIVE SCHULER: That money
12 was used for his two children?

13 MR. GRUENER: Right.

14 REPRESENTATIVE SCHULER: Not
15 necessarily the third child?

16 MR. GRUENER: Right. But Mr. Feeser's
17 child support obligation also, and I think what
18 Joel said, it is important for you to recognize
19 the tolerances we are talking about here. And I
20 understand this isn't a committee to look at
21 guidelines. But if she goes out and earns \$100,
22 his child support might go down \$5. You really
23 have to kind of look at the reality of what
24 numbers we are talking about here. Mr. Feeser's
25 child support obligation went from \$56 to \$75 or

1 \$72 or whatever it was, and that is because she
2 had the audacity to want to nurture the next
3 child.

4 REPRESENTATIVE SCHULER: But let's
5 assume his salary didn't go up.

6 MR. GRUENER: Well, his child support
7 then would remain the same. He simply would not
8 have received a reduction.

9 REPRESENTATIVE SCHULER: I understand
10 that. But he would not be required to pay more
11 money because she had another child?

12 MR. GRUENER: No. No. No. That is
13 not why he was required to pay more money. His
14 argument was --

15 REPRESENTATIVE SCHULER: Well, not
16 Feeser, just another Mr. A. And she had a child
17 by another husband. He is not responsible for
18 that. His salary didn't go up. Everything is
19 status quo?

20 MR. GRUENER: Yes, stays the same.
21 But his complaint is that his child support
22 should go down.

23 REPRESENTATIVE SCHULER: Well, I know
24 that. Forget Feeser, just Mr. A.

25 MR. GRUENER: That is Mr. A's

1 argument, too. Everybody's argument is, you had
2 a new baby; my kids are nurtured; go to work and
3 reduce my support.

4 REPRESENTATIVE SCHULER: Then the
5 argument is the definition of nurture.

6 MR. GRUENER: Oh, yes. But of course,
7 House Bill 22 doesn't want to talk about that
8 and I am kind of glad because, once again, I
9 think the question of nurturing has got to be a
10 fact sensitive question.

11 REPRESENTATIVE SCHULER: Thank you
12 very much.

13 CHAIRMAN CLARK: You gentlemen are
14 basically telling us that in the Feeser case the
15 wife didn't have that much of an earning
16 capacity so even if something had been assigned
17 to her, it may not have had a great effect on
18 this, or she didn't have the type of work
19 history of a stockbroker or a doctor or a lawyer
20 or something like that?

21 MR. BERNBAUM: Just from the amount of
22 child support the assumption would be that
23 neither of these parties were a high wage
24 earner. So by applying the guidelines as
25 expressly constituted, I don't think would have

1 had any impact at all.

2 And the other thing, Mr. Chair, you
3 raised a very interesting issue and I was remiss
4 at not stating. We also have to look at the
5 fact that we have more people, whatever the
6 phrase you want to use it, but they work out of
7 their houses, telecommuting. You have all these
8 types of aspects that they are not out of the
9 house. They have an earning capacity within the
10 confines of their house and that is the converse
11 of this. But it is certainly a factor that this
12 act did not contemplate and should contemplate.
13 So that is something to consider.

14 CHAIRMAN CLARK: So the Feeser case
15 could very well have been different and the
16 nurturing parent doctrine may not have been
17 applied had she been a stockbroker or something
18 like that regardless of the past, regardless of
19 whether she nurtured in the first marriage or
20 not?

21 MR. BERNBAUM: That is correct.

22 CHAIRMAN CLARK: And had she decided
23 regardless of what happened in the first
24 marriage that she was now going to stay home and
25 therefore reduce her income substantially or

1 eliminate, the court had discretion to say well,
2 we are going to, we understand that you want to
3 stay home; however, you are giving up
4 substantial amount of income here. We are going
5 to assign an earning capacity to you and Mr.
6 Feeser's support may have gone down.

7 MR. GRUENER: Well, yes. That has
8 happened in some other cases, two of them that
9 Professor Rains cited.

10 But just to give you the actual facts
11 because it will only take a second; in 1992 Mr.
12 Feeser was paying \$70 a week for child support.
13 It was in 1994, two years later that he went in
14 to seek a reduction and he went in to seek a
15 reduction on the basis that you should not be
16 permitted to stay home and nurture somebody
17 else's kid; you should go to work. The court
18 determined in this case that his net monthly
19 income was \$1480 a month. That is what Mr.
20 Feeser earned. They also determined that the
21 mother's earning capacity was \$1371 and some
22 change. And on the basis of those figures an
23 order was entered which reduced Mr. Feeser's
24 obligation from \$70 down to \$56 per week.

25 That is what we are talking about

1 here, ladies and gentlemen. We are talking
2 about the difference between 56 and 70. Now,
3 then, what finally happened was, of course, they
4 went through various stages of the proceedings
5 and ultimately his support obligation ended up
6 \$76 per month. So his support obligation went
7 up -- I am sorry, per week. His support
8 obligation went up 6 bucks a week based on the
9 fact that he was earning a little bit more money
10 in '94 than he was in '92, and based on the fact
11 that she was nurturing instead of bringing in
12 the \$1300 that the court found she could bring
13 in.

14 So this was a case where the court
15 determined that she had an earning capacity and
16 excused her from exercising that while the child
17 was being nurtured.

18 CHAIRMAN CLARK: So let me clarify
19 that a little bit. In '92 there was no second
20 marriage and a child of the second marriage?

21 MR. GRUENER: I think that is correct.

22 CHAIRMAN CLARK: There was earning
23 capacity for Mr. Feeser of \$1400 a month range;
24 Mrs. Feeser --

25 MR. GRUENER: That was in 1994. The

1 record doesn't disclose what the original
2 support order was based upon in terms of
3 incomes.

4 CHAIRMAN CLARK: Okay.

5 MR. GRUENER: We don't know what they
6 were earning in '92.

7 CHAIRMAN CLARK: Well, there was
8 determination that she had an earning capacity
9 of \$1371 a month which the court excused her of
10 because of her nurturing this child of the
11 second marriage. The crux of the issue is that
12 was her and her second husband's decision and
13 and whether the court should have continued to
14 assign that value to her because of that
15 decision which Mr. Feeser had no control. So
16 that is the crux of the issue in the
17 legislation.

18 MR. GRUENER: That is exactly right.
19 The second child in this case was born October
20 of '94 so obviously since the case went in in
21 1994, we were talking about a newborn. And Mr.
22 Feeser came in and said, our kid, Kirsten, who
23 was born in 1988, so that would have made her
24 how old -- seven, six or seven years old. So
25 what Mr. Feeser did is he came into the court

1 and said, our kid is six and is going to school
2 and so therefore, go to work.

3 CHAIRMAN CLARK: She should go back
4 and make that \$1371 a month?

5 MR. GRUENER: Exactly. Right. She
6 said, I have a newborn and introduced whatever
7 evidence that she could introduce to justify
8 that determination and therefore because Mr.
9 Feeser was now earning a little bit more money,
10 his support went up, which is why I am sure the
11 newspaper article was very good. As I put in my
12 article, Mr. Feeser has experienced the thrill
13 of victory and the agony of defeat. Here is a
14 guy who went in and got a reduction in the first
15 instance. He won his case the first time
16 around. When the court took a little closer
17 look at the facts, he came out owing a little
18 bit more money. He went into court thinking he
19 was going to get a reduction and that is why he
20 was there.

21 CHAIRMAN CLARK: And that reduction
22 was from \$70 down to \$56?

23 MR. GRUENER: That is right.

24 CHAIRMAN CLARK: So the, not applying
25 the nurturing doctrine his support was \$56?

1 MR. GRUENER: That is correct.

2 CHAIRMAN CLARK: Applying the
3 doctrine, his support was \$70 plus he made a
4 little more money?

5 MR. GRUENER: Right.

6 CHAIRMAN CLARK: So applying the
7 doctrine or not applying the doctrine in this
8 particular case was \$14 a week?

9 MR. GRUENER: That is right.

10 MR. BERNBAUM: But point out, I think
11 we can make an assumption again, the difference
12 on mother's side was that from zero, which would
13 have been the \$70 result to the \$1300 which
14 would have resulted in the \$56 result. So by
15 her having an earning capacity of \$1300, the
16 child support was only reduced by \$20 a week.
17 So you can see the guidelines application is
18 fairly nominal in this situation. Whether she
19 earns zero or \$1300, the difference between that
20 was \$56 or \$70.

21 CHAIRMAN CLARK: And the only thing
22 you gentlemen may be overlooking is \$20 a week
23 out here in rural Pennsylvania is a fine line.
24 It may be even in York and Lancaster, but
25 particularly where I come from. There have been

1 tremendous disputes over less than \$20 a week.

2 MR. GRUENER: Let me give you another
3 example. Let's assume for a moment that Mr.
4 Feeser made a million dollars a year. Let's
5 assume his wife has an earning capacity of \$1300
6 a month. And let's assume that the newborn
7 child is afflicted. She makes a decision that
8 she is going to stay home. He makes a million
9 bucks a year and comes in and insists upon a
10 reduction because she should go to work. I
11 submit to you that under those circumstances you
12 would look at House Bill 22, if were you a
13 judge, and say look, lady, I have no
14 alternative; you have to go to work. Your child
15 support is going to go down.

16 CHAIRMAN CLARK: Well, you are going
17 to look at that support order and you are going
18 to say, Mr. Feeser is a millionaire, you are
19 paying \$60,000 a month, we will lower that \$20 a
20 week and makes the \$60,000 at \$20 a week to
21 replace her 1371.

22 MR. GRUENER: Well, it wouldn't be \$20
23 a week on \$60,000.

24 CHAIRMAN CLARK: No, her; her. You
25 are saying her capacity to earn was 1371.

1 MR. GRUENER: Right. I am saying in
2 that particular case her earning capacity
3 doesn't matter whether she is nurturing or not.
4 The question is whether or not there is any
5 public policy at all here to encourage nurturing
6 in the circumstance that I tried to give you
7 which admittedly is an extreme one where you
8 have a special needs child and you have plenty
9 of money on the obligor's side to pay child
10 support. The question becomes whether or not
11 then we are going to say well, you are going to
12 be charged with that income.

13 MR. BERNBAUM: The final point I
14 want -- I agree with you. I am not belittling
15 the \$20 a week by any means. I was trying to
16 show the ratio between what the nurturing parent
17 could earn versus the difference in support and
18 the point I was making is that \$20 a week is
19 very important and it could mean the difference
20 between that stay at home parent being on public
21 assistance or not. Losing that \$20, if the
22 application of the doctrine was upheld, could
23 mean the difference between that mother going on
24 welfare or not and that is the point that should
25 be avoided more than anything else.

1 CHAIRMAN CLARK: It is important to
2 both people to look at those economic
3 situations.

4 Any additional questions?
5 Representative Dally.

6 REPRESENTATIVE DALLY: Thank you, Mr.
7 Chairman.

8 You spoke today about the litigation
9 involving this issue and how case law has
10 evolved. I am just curious as far as private
11 practice is concerned how often you see this in
12 private practice in terms of resolving support
13 cases outside of litigation and what effect this
14 legislation would have on settlement discussion.

15 MR. GRUENER: Well, I see it fairly
16 often, although what I am seeing I don't think
17 is particularly unusual. I am seeing more and
18 more and more people not having the luxury of
19 nurturing anybody and what I have got is a lot
20 of two working people in the family and a lot of
21 surrogate child care of good and bad nature.

22 So would it have an impact on
23 settlement discussions? Well, in the routine
24 guideline case, it wouldn't have an overwhelming
25 impact. It would have an impact similar to

1 Jeffrey Feeser's. In the big number cases, it
2 probably wouldn't have a great impact, either,
3 since in the example I gave, I think the wife's
4 earning capacity is a throw away and anybody who
5 said that she should not under those
6 circumstances stay home and nurture a special
7 needs child no matter who the father is, I think
8 is just wrong. But that is a policy. So I
9 think it would have some minimal impact on the
10 guideline cases. If you were to pass this, I
11 think it would be, once again, not permit the
12 court to inquire into why the nurturing was
13 going on.

14 MR. BERNBAUM: I agree with Harry and
15 in most of that. I see an increase because the
16 nature of the families are changing and I see
17 increases in these issues being raised because
18 the divorce rate has pretty much leveled out at
19 50 percent. But now you have people remarrying,
20 people having second families and I think that
21 is on the increase. So therefore, by sharing
22 numbers you are going to see more and more of
23 these types of issues. I think the impact is
24 probably going to be nominal in that sense.

25 But I think it would probably increase

1 the potential petitions filed if this act is
2 passed as presently proposed because of section
3 C. I think you are going to get people who will
4 use that to fan the flames, continue to fan the
5 flames of resentment that they have that their
6 ex-spouse, he or she is paying some support for
7 some ex-spouse's child that he or she doesn't
8 want to do.

9 So the result may not be of a great
10 impact but I think it will initiate some
11 additional litigation which I think is
12 unnecessary and for that reason alone I think it
13 is something to be looked at.

14 REPRESENTATIVE DALLY: Thank you.

15 CHAIRMAN CLARK: I would like to thank
16 both of you gentlemen for taking the time and
17 coming to testify in front of the committee and
18 giving us the long and the short of this issue.
19 We appreciate it greatly.

20 The next individual we have before the
21 committee today is the Honorable Joseph A. Del
22 Sole of the Superior Court of Pennsylvania.

23 JUDGE DEL SOLE: First, I want to say
24 that I thought that I would respond to
25 questions. I feel somewhat responsible for you

1 all being here because of some sense or current
2 opinions that I have written in some cases.

3 I would like to talk a little bit
4 about the nurturing parent doctrine because I
5 believe it is a very vital and viable concept
6 within our law. And historically it is my view
7 that a parent who stayed home and cared for the
8 children of the marriage after there was a
9 separation or divorce was actually satisfying a
10 support obligation by being the nurturing
11 parent. That was the initial concept of how
12 this doctrine came to pass, at least from my
13 understanding of it. It is a very valid and
14 vital performance of parental duty of a parent
15 to care for children, particularly under the
16 circumstances of young children and others.

17 Where I found some difficulty with the
18 concept of the nurturing parent doctrine was not
19 in its application where the child, was not in
20 the application in those situations where the
21 child for whom support is being sought was the
22 child was being nurtured. In my view, the
23 nurturing parent was actually satisfying a
24 support obligation by the very nature of being
25 the parent that is there to care for the child.

1 It meets a societal need and it meets a human
2 need which we all know to be vital.

3 The difficulty arose in the Atkinson
4 case where my dissent appeared, was to what
5 extent a nurturing parent doctrine can be used
6 to provide an escape of a parent where the
7 support is for a child who is not being
8 nurtured. In the Atkinson case, if you recall
9 the fact pattern, after the parties had divorced
10 the child was living with the father. Mother
11 remarried and had a child with her new husband.
12 Father filed for support against the mother of
13 the first child and was denied support on the
14 basis that the mother got to apply the nurturing
15 parent doctrine, not for nurturing the child for
16 whom support was sought but for nurturing a
17 child unrelated to the relationship between her
18 and her former husband.

19 It seems to me that in that situation
20 we do not necessarily want to create a scenario
21 where we require a parent who is staying at home
22 caring and nurturing a small child that they
23 must necessarily go to work. By the same token,
24 I think we have to accept the fact that there is
25 a very strong economic advantage in many cases,

1 of course, depending on the circumstances, for
2 that parent to be home and nurturing that child
3 and that economic value to that new family unit
4 should be considered in some way to structure a
5 support arrangement, if possible, for the child
6 of the previous marriage.

7 If we take the reverse situation,
8 which I discussed in Atkinson, and think about
9 it this way: Parents divorce, children remain
10 with mom, father remarries, has a child with his
11 new wife, was working but now because of his new
12 wife's economic circumstances it is not
13 necessary for him to work and he now says, I am
14 nurturing a child of this new marriage. Should
15 he get the benefit of the nurturing parent
16 exception to deny the duty or obligation of
17 support, and I don't think so.

18 But what I am going to say about the
19 bill is I think the bill should provide some
20 guidance, if you are going to pass this, as to
21 what a court may want to consider and not make
22 it exclusive, but what a court may want to
23 consider in fashioning any award of support
24 where the nurturing parent doctrine comes into
25 play where the child being nurtured is not the

1 child for whom support is being sought or not a
2 child of the marriage or the prior relationship
3 for whom support is being sought. In those
4 situations you may want to look at what was the
5 past history of the parties during their
6 marriage; did the one spouse stay home and
7 nurture the children; is it unrealistic to think
8 that that person would stay home and nurture
9 children of the new marriage; what is the
10 earning capacity and what are the needs.

11 The final analysis we have to keep is,
12 and the polestar of any of our discussions, the
13 needs of the children, both the children of the
14 prior marriage and the children of the new
15 relationship. That really requires a lot of
16 discretion.

17 I would also suggest that with regard
18 to the first portion of the bill under section
19 4322.1 (b) that there be consideration to which
20 actually recognizes that a parent who is
21 nurturing a child is satisfying an obligation of
22 support. That section of the bill, as I
23 understand it, deals with applying the doctrine
24 for children for whom support is being sought.
25 I think a parent that stays and nurtures a child

1 given correct circumstances for that is
2 providing support. It may not be direct dollar
3 support but certainly the economic or certainly
4 the emotional and familial support that is vital
5 to the proper development of children. So that
6 we should not think of it as a doctrine that
7 excuses a support obligation but we should
8 consider it in its total context with families.
9 And a nurturing parent does provide a form of
10 support, not necessarily the economic dollars
11 support but certainly the support that the child
12 needs to develop and grow into the kind of
13 person that we all would like our children to
14 be.

15 With regard to applying the, or
16 excluding the nurturing parent doctrine under
17 subsection C, I think that if we are going to
18 consider this statute, you might want to
19 consider how does the support establish the
20 support obligation for that nurturing parent.
21 We look at things like prior incapacity,
22 economic value of the parent that is staying and
23 nurturing to the new family unit, the needs of
24 the new family unit, particularly the children.
25 We have heard the discussion of special needs

1 child, things like that. So it is not
2 necessarily a, we are not going to exclude the
3 potential that there would be no support payment
4 but there are guidelines about what the courts
5 can and should look at to decide whether a
6 nurturing parent exception for a child that is
7 not, for whom support is not being sought should
8 be considered.

9 CHAIRMAN CLARK: Thank you very much,
10 Judge. If we could bring this down to a point
11 in our discussions here, we have generally
12 speaking an obligation for both parents to
13 support a child?

14 JUDGE DEL SOLE: Right.

15 CHAIRMAN CLARK: When it is a child of
16 both of them, one may provide dollars and the
17 other one may provide nurturing. On that second
18 marriage and that child growing older out of the
19 nurturing stage, so to speak, at that point in
20 time considering the obligation of both parents
21 to support, then they both will be assigned a
22 monetary value?

23 JUDGE DEL SOLE: That is done in
24 cases, yes.

25 CHAIRMAN CLARK: And then when the one

1 parent says I am going to nurture a child to a
2 second marriage, they don't have a physical
3 dollars but that earning capacity, so to speak,
4 is still used because it is a choice of theirs
5 to withdraw from the work force and nurture this
6 child of the second marriage. And that is the
7 essence of where we are going here and, of
8 course, the courts interpreting and applying the
9 law that way.

10 JUDGE DEL SOLE: Well, the few cases,
11 the few recent cases that have come up, in both
12 cases the nurturing parent doctrine for a child
13 of a second marriage; in other words, the
14 nurturing was for the child of the second
15 marriage. In both of those cases, Atkinson and
16 the Feeser case, the court did not enter an
17 order requiring support for the children of the
18 first marriage. But we do have to -- I mean,
19 the two cases arose in different circumstances.
20 In the Atkinson case, of course, the child of
21 the first marriage was living with the father
22 and he filed a support claim against his former
23 wife, the mother, seeking support and she
24 claimed and was granted a relief from the duty
25 of her obligation of support because she was

1 nurturing a child in a new marriage.

2 In the Feeser case, children of the
3 first marriage were living with the mother. The
4 father was paying support. She had at least an
5 established earning capacity, I think about 1300
6 a month. But he was not permitted any reduction
7 or modification in his support obligation
8 because she was nurturing a child of her second
9 marriage.

10 We do have to accept, I think, that in
11 the second case, the Feeser case, that mom was
12 providing some support beyond, for the children
13 of her first marriage because they were living
14 with her. There is a value. It is more of an
15 intangible value where the children are residing
16 with the parent and that parent is, in fact,
17 providing parental supervision for those
18 children.

19 If I have misstated your question;
20 maybe I misunderstood your question. The two
21 cases I am aware of so far have allowed the
22 nurturing parent doctrine to be applied where
23 the nurturing is for children not of the prior
24 marriage. And in one circumstance the children
25 were living with the father and the other, they

1 were living with mother and there was no change
2 in the support or no credit for the, with
3 respect to the nurturing, person claiming
4 nurturing parent and in the support obligation.

5 CHAIRMAN CLARK: Would that Atkinson
6 case be read that the court did apply an earning
7 capacity but they found that it was nil or of no
8 consequence?

9 JUDGE DEL SOLE: In the Atkinson case,
10 as I recall the fact pattern there was no prior
11 history of a, established on the record, of an
12 earning capacity for Mrs. Atkinson, the former
13 Mrs. Atkinson and yes, that could be. The
14 question then is whether the courts should under
15 some circumstances try to establish what is the
16 economic value to this new family unit for a
17 parent who remains at home. I believe that when
18 you -- and it is more traditionally the wife
19 than the husband. It could be either. I
20 believe that that parent who stays home and
21 cares for the child and maintains the family
22 unit is providing a vital economic service to
23 that family unit. There is an economic value.
24 In some of these cases it may be extremely
25 difficult to assess or it may be extremely

1 difficult to secure any support because of
2 limited means of the people involved, the
3 limited economic income of the people involved.

4 CHAIRMAN CLARK: In the Feeser case
5 they had at least an earning capacity for the
6 wife in the \$1300 a month range. They didn't
7 take that into consideration at all in that case
8 or they just said because of the nurturing
9 parent doctrine we are going to assign her
10 earning capacity as zero?

11 JUDGE DEL SOLE: As I recall the fact
12 pattern, and I was on the panel when that case
13 was on appeal, as I recall the fact pattern,
14 initially the hearing officer in the trial court
15 level determined an earning capacity for mom and
16 had adjusted support based on that earning
17 capacity. Exceptions were found and the trial
18 judge then said no, we are going to apply the
19 nurturing parent doctrine because she is not
20 working. So that eliminated any adjustment in
21 the father's support because of potential
22 earning capacity of mother, but then increased
23 his support based on some increased earnings he
24 had. So that was affirmed on appeal.

25 So because of her nurturing her child

1 from her more recent marriage she was not
2 required to effect a support payment in any way
3 given the circumstances of that case.

4 CHAIRMAN CLARK: I guess my hope was
5 that the courts were applying an earning
6 capacity but they were just finding that to be
7 zero.

8 JUDGE DEL SOLE: As I understand the
9 facts in that case that she was, it was
10 determined that she had an earning capacity
11 about \$1300 a month.

12 CHAIRMAN CLARK: They forgave that?

13 JUDGE DEL SOLE: And Mr. Chairman, I
14 can't tell you, I cannot sit here and tell you
15 how they arrived at that. It may have been
16 prior earnings. But that was forgiven, yes,
17 because she was not working. She was staying at
18 home caring for this new child.

19 It is a tough balance. I don't envy
20 you this job because it is a tough balance to
21 determine economic support versus the desire to
22 have a parent who is providing the nurturing for
23 children and that is a very difficult situation.
24 I think if any legislation, if any is
25 forthcoming, must permit a lot of discretion

1 let me rephrase the question to just make sure I
2 understand it, Representative.

3 If we are looking at a situation where
4 in a new marriage, let's say, that the former
5 wife is claiming the nurturing parent exception
6 and in the new marriage the new husband is
7 financially well off; does the court look at his
8 earnings to determine what her support payment
9 should be for a prior child. The answer is no.
10 The courts do not look at his earnings because
11 he has no obligation to support the children of
12 his current wife from a prior marriage.

13 But the realities are somewhat
14 different in this regard. Many times those
15 children are living in the environment in which
16 his economic abilities have created, where you
17 have the children are with the mother from the
18 first marriage and they are living in an
19 environment that is enhanced by her new
20 husband's income. They are getting the benefits
21 from that income and that is one of the things
22 that we may want to consider if the children
23 from the first marriage are living with the
24 father and the mother has remarried and has a
25 husband who is of economic means.

1 Then I would suggest that the courts
2 could, they have not but they could look at the
3 economic value to this new family unit of her
4 remaining nurturing parent for the new children
5 and make some determination of what a reasonable
6 allocation of support should be.

7 But to specifically look at a new
8 spouse's earnings, be it husband or wife, and
9 say we are going to base a support payment on
10 the earnings of or earning capacity of a new
11 spouse, we can do that. They are not, those
12 children are not the responsibility of that new
13 parent. But in reality stepparents provide a
14 vital role in the lives of many children in the
15 commonwealth and to extent that there is
16 economic, a large economic increase or income
17 from the new spouse, those children benefit by
18 it. They don't have two homes. The kids are
19 living in the one house.

20 So there is an economic benefit
21 realized, but the courts won't look at the new
22 husband's earnings and say because he is making
23 \$100,000 a month, you are going to have a
24 support payment of 5,000. We don't do that.

25 REPRESENTATIVE NICKOL: Thank you.

1 CHAIRMAN CLARK: Representative
2 Schuler.

3 REPRESENTATIVE SCHULER: Good morning,
4 your Honor.

5 JUDGE DEL SOLE: Good morning.

6 REPRESENTATIVE SCHULER: Thank you for
7 attending today. I have one question, Mr.
8 Chairman.

9 I think I know what nurturing means.
10 Is there a legal definition for nurturing? Who
11 determines when nurturing is taking place? Who
12 decides when it ends? Does the court do that?

13 JUDGE DEL SOLE: There is no specific
14 legal definition for nurturing. There is no
15 statute that says you can be a nurturing parent
16 during the times from birth to, say, age six or
17 from age birth to age ten. I mean, it is a very
18 fact specific case you can have and all children
19 need nurturing. We have this. Parents nurture
20 the children throughout their lifetime and with
21 adult children, I still realize that once you
22 are a parent, you are a parent for the rest of
23 your life. Sometimes it ain't fair. But by the
24 same token there is no legal definition as to
25 when it starts, when it stops. It is very fact

1 specific.

2 REPRESENTATIVE SCHULER: What do you
3 mean by fact specific?

4 JUDGE DEL SOLE: Each case. Each case
5 stands on its own merits. In other words, you
6 can have a parent, for example, with a ten-year
7 old child who is a special needs child, say, I
8 just cannot engage in gainful out of the home
9 employment because the needs of this child or
10 this family are such that it really requires a
11 parent to be at home. And that would be fully
12 understandable.

13 I haven't seen a case but it would not
14 surprise me to see one where you have a parent
15 with children that are maybe high school age or
16 middle school age who has a large earning
17 capacity that says well, no, I am going to stay
18 home and care for my children and the court
19 says, wait a minute; these children are at a
20 point in their lives where your being home for
21 most of the day when they are not home is not as
22 necessary for the nurturing responsibilities of
23 the parent.

24 REPRESENTATIVE SCHULER: But it is
25 possible? That is what I was getting at.

1 JUDGE DEL SOLE: Well, I haven't seen
2 a case like that but I could envision that.

3 REPRESENTATIVE SCHULER: That would be
4 left to the sole discretion of the presiding
5 judge?

6 JUDGE DEL SOLE: Right. And on appeal
7 our scope of review is very limited. We have to
8 see if there is an error of law or an abuse of
9 discretion that affects the outcome. Most of
10 the trial judges are able to very reasonably
11 justify their findings in cases of that type.
12 They do an excellent job on it.

13 REPRESENTATIVE SCHULER: When you
14 mentioned a child with a disability, I could
15 understand. But a child who is 16 and is
16 working, I don't know if that is nurturing
17 anymore. That would be left to the discretion
18 of the judge to make the determination?

19 JUDGE DEL SOLE: Yes.

20 REPRESENTATIVE SCHULER: Thank you,
21 Judge.

22 Thank you, Mr. Chairman.

23 CHAIRMAN CLARK: Judge, in this Feeser
24 case, the present judge could have easily
25 assigned earning capacity to her, his previous

1 spouse, and lowered his support of \$56?

2 JUDGE DEL SOLE: Could have, yes.

3 CHAIRMAN CLARK: Representative Dally.

4 REPRESENTATIVE DALLY: Thank you, Mr.
5 Chairman. Good morning, your Honor.

6 From your testimony this morning it is
7 my understanding that in the Atkinson case your
8 dissent was based partly on the fact that you
9 were dealing with a non-custodial parent seeking
10 protection of the nurturing parent doctrine as
11 opposed to what we are talking about in the
12 Feeser case where you have a custodial parent
13 that is seeking relief under that doctrine. Is
14 that where the distinction lies in the two
15 cases?

16 JUDGE DEL SOLE: That is the factual
17 distinction between the two cases. I would have
18 to go back and look at the record in the Feeser
19 case to see whether the nurturing claim was
20 being made for the children of the first
21 marriage and for the child of the second
22 marriage. As I understood it, I think it was
23 the child of the second marriage was the child
24 for whom the custodial parent was saying, I am
25 staying home and nurturing this child as opposed

1 to children of the first marriage.

2 But we have to, I mean, I really think
3 we have to accept the fact that a parent who
4 stays home and nurtures children is providing
5 support. Admittedly, it is not dollars and
6 cents support but it is vital support for the
7 children and that would be a legitimate
8 substitution for specific dollars.

9 REPRESENTATIVE DALLY: Based upon your
10 testimony you mentioned that each case is fact
11 sensitive, fact specific, so you weren't
12 advocating that the statutory provision which
13 would provide a bright line rule, so to speak,
14 that the nurturing doctrine doesn't apply in a
15 case where there are children of a second
16 marriage?

17 JUDGE DEL SOLE: Well, I have in the
18 opinions that I have written, the dissent in
19 Atkinson and concurring opinion in Feeser was
20 that I am not sure that the nurturing parent
21 exception should specifically apply where the
22 child for whom support is being sought is not
23 the child for whom the exception is being
24 sought. But I think the courts have to have
25 sufficient latitude to adjust in that scenario,

1 given the fact pattern that comes before the
2 court.

3 I mean, I never know how members of
4 this body can, in designing legislation,
5 anticipate the needs of 11 million citizens in
6 the factual permeations that they find
7 themselves in. So that if you are to say that
8 the nurturing parent doctrine cannot apply where
9 the support is, where it is being claimed for a
10 child who is not the subject of a support order,
11 then I think you have to also, or should, I
12 shouldn't say have to but should consider how
13 you would instruct the courts in general to make
14 the determination of what factors to consider in
15 arriving at some type of support accommodation
16 as a result of that.

17 And if in Feeser part of that
18 nurturing is also benefiting the children of the
19 prior marriage, then I think that is a factor;
20 as in Atkinson, it was not. That may be a
21 factor. There is the economic value of the
22 services for this new family unit. Again, there
23 are a lot of different ways that it can be done.
24 But it seems to me that it is something that we
25 don't want to stop parents from nurturing

1 children and by the same token all parents have
2 an obligation to support their children and that
3 is a very difficult balance. I don't envy you
4 trying to do that.

5 REPRESENTATIVE DALLY: Thank you.

6 CHAIRMAN CLARK: If I could clarify
7 that last point, then the nurturing parent
8 doctrine in your mind shouldn't be prohibited on
9 the second marriage for the child who is not the
10 subject of the court order. However, there
11 should be maybe additional factors which the
12 court should consider in applying that doctrine
13 and to what extent they apply the doctrine?

14 JUDGE DEL SOLE: Yes. And I think the
15 primary factor would be the needs of the
16 children of both families. I mean, our whole
17 polestar and all of these considerations and
18 decisions has to be what is best for the
19 children and how do we achieve that, given the
20 nature of our society today. And sometimes we
21 are successful and sometimes we are not
22 successful. We hope to be successful all the
23 time but it is a difficult path to travel.

24 CHAIRMAN CLARK: Are there any other
25 factors that come to mind that you might want to

1 zero in on, this situation where the nurturing
2 parent doctrine is applied to a child who is not
3 the subject?

4 JUDGE DEL SOLE: I can think of none
5 quite frankly. I think that given the courts
6 the opportunity that they do not, if they are
7 going to exclude -- let me rephrase that. If
8 they are going to say that you don't get the
9 benefit of the nurturing parent exception for
10 support, the court should at least consider the
11 value of that nurturing to the new child and
12 also the economic value of the family unit, any
13 past earning capacity and things of that nature
14 when the court is trying to fashion a remedy in
15 this support situation.

16 CHAIRMAN CLARK: I thank you very much
17 for your appearance today and your enlightening
18 testimony.

19 JUDGE DEL SOLE: I thank you. I just
20 said to Ms. Dalton another opinion in another
21 case which you may want to consider at some
22 point down the road, and that is the Estate of
23 Hahn case. I don't know if you are aware of
24 that but that was a somewhat unique situation
25 where after a divorce the children resided with

1 father and the father remarried. Father died
2 and the children were then returned to their
3 mom. Father had made no provision in his will
4 for the children and when mom sought to seek
5 support against the estate of the father, it was
6 disallowed.

7 Our court's majority opinion said
8 there was no legislative authority to permit the
9 court to fashion a support order against the
10 estate of the deceased parent. I think that
11 that is something that this body may want to
12 consider. I know it is not related to the
13 nurturing parent doctrine, but it does seem to
14 me that there should be some way under those
15 kinds of circumstances that a deceased parent's
16 estate might be at least considered to be viable
17 for some type of support payment for the
18 children of the decedent.

19 CHAIRMAN CLARK: Did that gentleman
20 die with or without a will?

21 JUDGE DEL SOLE: I believe he died
22 with a will because there was nothing in the
23 record that reflected to us, at least as I
24 recall it, that there was some accommodation
25 made to the children which would have been so

1 under the attestation.

2 CHAIRMAN CLARK: So the will gave
3 everything to the second wife?

4 JUDGE DEL SOLE: Right. And that is
5 an area I think you might want to consider in
6 fashioning a remedy for children who generally
7 need support. And there are many things to be
8 considered. For example, if there were Social
9 Security benefits being paid; if there were
10 pension benefits they were entitled to. This
11 should all be considered in whether the court
12 wants to fashion some type of an award against
13 the estate of a deceased parent where no
14 provision is made for the children.

15 CHAIRMAN CLARK: Thank you very much.

16 JUDGE DEL SOLE: Thank you all.

17 CHAIRMAN CLARK: Let's all take a
18 five-minute break here.

19 (A recess ensued.)

20 CHAIRMAN CLARK: Our recess has
21 expired. We have added another member of the
22 judiciary committee joining these hearings.

23 Representative Josephs, if you would
24 like to introduce yourself before we proceed
25 with the other witnesses.

1 REPRESENTATIVE JOSEPHS: Thank you,
2 Mr. Chairman. I am Babette Josephs from the
3 182nd District in Philadelphia.

4 CHAIRMAN CLARK: And the next
5 gentleman to testify will be Richard K. Betts.
6 He is the president of the Domestic Relations
7 Association of Pennsylvania.

8 MR. SIMMONS: Thank you. Good
9 morning.

10 My name is Tony Simmons. I am
11 chairman of the legislation for the Domestic
12 Relations Association of Pennsylvania. Beside
13 me is Rick Betts. He is the director from
14 Cumberland County and also the president of the
15 Domestic Relations Association who will give
16 testimony regarding House Bill 22.

17 MR. BETTS: Thank you.

18 CHAIRMAN CLARK: Thank you very much.
19 Pull that mike a little closer.

20 MR. BETTS: My concession to age
21 recently acquired is reading glasses.

22 On behalf of the Domestic Relations
23 Association of Pennsylvania I would like to
24 express my appreciation to the members of this
25 committee for allowing us to comment regarding

1 our feelings concerning House Bill Number 22.
2 We also appreciate the fact that the verbiage
3 contained within the proposed bill recognizes
4 that support matters are generally complex by
5 nature and that the proper place for determining
6 the actual account of support owed lies with the
7 courts.

8 It should be noted that the nurturing
9 parent doctrine is not an absolute rule but
10 rather only one factor to be considered by a
11 trial court in determining whether to excuse a
12 parent from fulfilling their obligation towards
13 support. The court's purpose is to promote the
14 best interests of the child while recognizing
15 that the child support is a shared
16 responsibility between both parties.

17 This shared responsibility is an equal
18 responsibility based upon the parties' ability
19 to pay, which potentially includes each parties'
20 earning capacity. The needs of the children, as
21 always, must remain the fundamental basis for
22 proper decision making in the establishment of a
23 support obligation.

24 With all that in mind, the concern is
25 the potential that House Bill 22 could, in

1 effect, at best mitigate and at worst conflict
2 with recent legislation that has passed both the
3 house and the senate. Specifically, I am
4 referring to Pennsylvania's Common Sense Welfare
5 Reform Act 1996-35. The emphasis of the Welfare
6 Reform Act is to promote self-sufficiency and a
7 specific requirement of the parties receiving a
8 TANF grant is that they sign an agreement of
9 mutual responsibility. This requires anyone
10 receiving a grant to meet certain work and work
11 related activity requirements. These work
12 requirements may mandate that a party must,
13 after 24 months, average 20 hours per week on a
14 job or a work related activity. Is there not
15 the potential under this criteria of effectively
16 limiting the ability of a segment of the
17 population from attempting to invoke the
18 nurturing parent doctrine if they are under
19 other legislation passed required to perform
20 work related activities for a mandated number of
21 hours per week?

22 The goals of the legislature under
23 welfare reform have been to promote
24 self-sufficiency by mandating work activities as
25 an eligibility criteria as well as providing

1 incentives to work. I suggest that there might
2 be a perception by some parties that some
3 factions in society are precluded from invoking
4 the nurturing parent doctrine while others
5 simply by their place in society have the
6 ability to do so.

7 In polling representatives from DRAP
8 comments and questions concerning this
9 legislation were as follows: Should there be a
10 specific maximum age limitation placed on the
11 child to be nurtured; by what criteria is
12 maturity of a child measured; is the
13 legislation's intent to preclude a parent from
14 opting out of the work force as a convenient
15 move to abrogate support responsibilities; and
16 number 4, where placement is involved, and an
17 example is juvenile probation cases, do we not
18 want to ensure that parties will not have
19 another child merely as a way of eluding their
20 child support responsibilities for the child or
21 children in placement; number 5, can you go in
22 and out of the child nurturing status or is it a
23 one-time issue; number 6, is paragraph C
24 intended to preclude the application of the
25 nurturing parent doctrine towards children,

1 towards children of a second marriage, if so,
2 then the consensus in our organization is that
3 under most circumstances the father of a first
4 child should not be forced to pay more in child
5 support because the mother has chosen to have
6 another child in a different relationship. The
7 consensus is that under normal circumstances
8 this choice does not mitigate her responsibility
9 to any existing order for the support of the
10 first child.

11 I am not sure but Mr. Simmons
12 mentioned to me that we are kind of, we are the
13 last, second to the last act on the Johnny
14 Carson Show. We certainly followed some
15 illustrious people in their testimony. I would
16 ask if there are any questions you would like to
17 ask of us.

18 CHAIRMAN CLARK: Representative
19 Schuler.

20 REPRESENTATIVE SCHULER: Just one,
21 just your thoughts.

22 You mentioned in your questions, some
23 of the questions that you pose here, I think I
24 asked the Judge the same question; should we
25 have some definition of nurturing.

1 MR. BETTS: I believe that I am
2 probably going to espouse something similar to
3 what he said. I believe the more limitations
4 we, or the more we try to set a certain set of
5 criteria that this is what you follow, this is
6 what you get, the more you limit the ability to
7 make your decisions or the court to make their
8 decision based upon the different complexities
9 that are involved in each particular case and
10 the different nuances they may take in
11 proceeding through the courts.

12 REPRESENTATIVE SCHULER: But on the
13 other side of the coin, we leave the courts open
14 to a wide range of discretion. In my county it
15 may be this and in Pittsburgh, Allegheny may be
16 another.

17 MR. BETTS: That is correct.

18 REPRESENTATIVE SCHULER: So it works
19 both ways.

20 MR. BETTS: Yes. I certainly agree.

21 REPRESENTATIVE SCHULER: We assume
22 that judges are deciding cases, we assume, based
23 on fact.

24 MR. BETTS: That is correct.

25 REPRESENTATIVE SCHULER: That most of

1 them do allow variances in certain other cases.

2 That is all I have. Thank you.

3 MR. BETTS: Thank you.

4 CHAIRMAN CLARK: Representative
5 Nickol.

6 REPRESENTATIVE NICKOL: As point of
7 clarification, on your testimony when you state
8 that you feel that this legislation could have
9 some impact with regard to Pennsylvania Welfare
10 Reform Act, are you looking specifically at
11 paragraph C, the exception, or are you just
12 talking about the codification of what we
13 understand to be or trying to place into law;
14 what currently is the nurturing parent law
15 established by the courts? Is it the full
16 measure that you are questioning?

17 MR. BETTS: Yes. Yes, not limited to
18 section C.

19 REPRESENTATIVE NICKOL: Thank you.

20 MR. BETTS: I am not sure about how
21 often that might become a problem because in all
22 honesty, I see very few cases where this is, the
23 nurturing parent doctrine is an issue coming
24 across in my county. However, it may happen and
25 I just think the committee or the legislature

1 should be cognizant of that fact.

2 MR. SIMMONS: If I may, regarding the
3 Welfare Reform Act, presently after receiving
4 welfare, a custodial parent is not working and
5 there is no support income on an individual,
6 under the new support welfare reform act they
7 are requesting this individual to work a minimum
8 of 20 hours per week which would then basically
9 place income capacity on this individual. So it
10 may affect this doctrine.

11 CHAIRMAN CLARK: Mr. Betts, do these
12 issues, the nurturing parent doctrine, do they
13 first come up in front of the domestic relations
14 officer? Is that something that you try to deal
15 with and apply or not apply and assign an income
16 or earning capacity itself?

17 MR. BETTS: That is correct. And that
18 would vary by county whether that individual
19 that appeared is an attorney or whether that
20 individual is a professional in the field not
21 being an attorney. Either way it would come
22 through our office first and would then be by
23 necessity go before the court for a hearing de
24 novo should any party disagree. So ultimately
25 the challenge would be before the judge in that

1 particular county.

2 CHAIRMAN CLARK: So the domestic
3 relations officer would make a decision on this
4 and write that in the report as to why he
5 assigned an earning capacity or why he didn't?

6 MR. BETTS: That is correct. That
7 would have to be, they have to detail why they
8 are, why their determinations have been made.
9 That would be one of the criteria.

10 CHAIRMAN CLARK: The question would be
11 whether it is appealed or not?

12 MR. BETTS: That is correct.

13 CHAIRMAN CLARK: So we are asking the
14 domestic relations officer at the first level to
15 work through the nurturing parent doctrine in
16 this criteria?

17 MR. BETTS: Potentially that is
18 correct, yes.

19 CHAIRMAN CLARK: I don't see any
20 further questions. We thank you very much for
21 your time.

22 MR. BETTS: Thank you.

23 CHAIRMAN CLARK: The next individual
24 to testify before the committee is Catherine
25 McFadden, Esquire. She is the senior master of

1 the Bucks County Court of Common Pleas.

2 MS. McFADDEN: Good morning. Thank
3 you for permitting me to testify today.

4 I have listened with interest to some
5 very good witnesses who provided you with
6 information which I think is helpful and
7 reliable. I thought that perhaps the
8 information which I might provide would be just
9 from the perspective of a master who works with
10 people in child support as part of my job. We
11 do other things as well, but part of our job
12 involves working with people in child support.

13 I would like to echo one of the
14 comments that Judge Del Sole made. There are 11
15 million people or so in this state and there is
16 maybe 600,000 in my county and we see about
17 2,000 or 3,000 of them a year in my office.
18 There is a great diversity in families and the
19 life styles they choose. Different people make
20 different decisions about how to live their
21 lives, how to earn money, how to spend their
22 money and how to raise their children.

23 The nurturing parent issue or doctrine
24 is just one part of an argument that can be
25 raised in connection with child support. It is

1 an earning capacity argument. There are various
2 earning capacity arguments that could be made
3 that we have heard. Sometimes a spouse argues
4 that the other spouse is underemployed. He is
5 only earning \$50,000 a year, she says. He could
6 be earning \$100,000 a year. You should make him
7 pay support as if he were earning \$100,000 a
8 year.

9 Sometimes a person leaves work to take
10 advantage of an educational opportunity. And so
11 this spouse might argue, she could be earning
12 \$25,000 a year but here she is going to earn a
13 teaching degree instead. You should just
14 pretend that she is really earning \$25,000 a
15 year and set child support accordingly.

16 Sometimes it is very clear that a person has
17 left work to avoid paying support and that can
18 come up in connection with the nurturing care
19 issue. It can come up in connection with a
20 payer who quits work or is fired from work and
21 so forth.

22 So when I think of the nurturing
23 parent doctrine, it is just one part of a group
24 of arguments that people make and that we deal
25 with in family court. And how you decide, how

1 you make a decision in connection with those
2 arguments really does depend on all the facts
3 and circumstances of that particular case. In
4 some instances it makes no sense whatsoever for
5 a person to quit work and go to school. In some
6 instances it makes very good sense and to have a
7 flat rule that you can't quit work and go to
8 school or if you do that you would be charged
9 child support as if you were still working might
10 be a mistake because different people make
11 different decisions. Some of them are good and
12 some of them aren't and you need to look at the
13 particular case.

14 Application of the statewide support
15 guidelines provides the court system of families
16 with a great deal of predictability and
17 certainty in the law. And that is good. People
18 who know the likely result of their case if they
19 go to court are more inclined to settle a case
20 than to avoid the expense of litigation. That
21 is a benefit both emotional and financial for
22 them and it is a financial benefit for the court
23 system. Support cases are high volume work.
24 There are very, very, very many of them. And to
25 the extent that we can help people settle their

1 cases, we help the court system run smoothly.

2 Because the guidelines already provide
3 a great deal of certainty, it is possible to
4 have some reservations about adjustments in
5 support law which make support law even more
6 rigid. A risk already exists because the
7 guidelines are so easy to use that support cases
8 can be decided without listening to people and
9 basing the result, on fitting the result,
10 tailoring it to their particular case.

11 I attached to my materials, just so
12 you know, there are two things which are not at
13 all directly related to the nurturing parent
14 doctrine. I gave you the custody information
15 because I wanted to point to an area where it is
16 very hard to predict the result of a lawsuit.
17 Those cases in custody law, I think most people
18 would agree that the decision in a case should
19 be tailored to the particular facts and
20 circumstances of the case. And that occurs in a
21 situation where for most people custody
22 litigation is almost unaffordable.

23 In a study in our office we found that
24 about 75 percent of the people who come to
25 custody conferences earn \$30,000 a year or less.

1 So it is an area, I think of that as similar to
2 this area. There is uncertainty. We want to
3 protect people from having to litigate. We want
4 to have predictable results but sometimes you
5 can't do it. The age and alimony article is
6 offered just to show you the danger of making
7 generalizations of what is right and what is
8 wrong. In the age and alimony article it was
9 written because people have an idea that older
10 women from long-term marriages are the ones who
11 have the greatest need for alimony. If you look
12 at the numbers and the descriptions of the cases
13 in a more specific way, you find that frequently
14 it is the middle-aged people who have the
15 greatest need for alimony as opposed to the
16 older women. So my caution is not to generalize
17 too much from the Feeser case but remember that
18 there can be all different kinds of
19 circumstances.

20 If I had an ideal support law, it
21 would provide a high degree of certainty and
22 predictability. It would avoid misconceptions
23 and generalizations, and as Judge Del Sole
24 suggested, provide enough discretion to the
25 court to tailor the result to the particular

1 family. Thank you.

2 CHAIRMAN CLARK: Thank you. Are there
3 any questions of Ms. McFadden?

4 Representative Nickol.

5 REPRESENTATIVE NICKOL: Thank you. I
6 am curious. Could you describe just generally
7 for me how you apply support guidelines in cases
8 where there is a second family?

9 MS. McFADDEN: Well, the thing is when
10 you are finding incomes, you just look at the
11 charts. I mean, once you have the incomes, then
12 you can just look at the charts to make your
13 determination. I don't have my guidelines with
14 me, but if I recall correctly, there are
15 provisions in the notes following the charts
16 that tell you that you may consider other
17 support obligations of a parent. And I think
18 that there may be a limitation -- I don't
19 memorize these. I always check. There may be a
20 limitation on the amount of income that you can,
21 a ceiling which you can use for support.

22 REPRESENTATIVE NICKOL: Do you ever
23 apply the nurturing parent doctrine or exception
24 and how do you in those cases?

25 MS. McFADDEN: I cannot think of a

1 case that we had, which doesn't mean that we
2 haven't had one in 15 years, where it has been
3 an important point. But I have to say that when
4 I look back over our case load, it always occurs
5 the case that I didn't think we could ever have,
6 comes.

7 I have had cases where neither parent
8 worked and the family was extremely well off
9 because they lived off assets. I never thought
10 I would have to deal with a case like that. It
11 is just that things happen that I can't predict.

12 REPRESENTATIVE NICKOL: Are you
13 familiar with the facts in the Feeser case?

14 MS. McFADDEN: Yes.

15 REPRESENTATIVE NICKOL: My
16 understanding is that Mrs. Feeser was working
17 full time while Mr. Feeser's child was in her
18 care, preschool. In fact, the child was in day
19 care.

20 MS. McFADDEN: That is not my
21 understanding of that case. I could be wrong
22 and I don't have it here. It was my
23 understanding that Mrs. Feeser stayed home with
24 the child of the first marriage and that she did
25 that at her husband's request.

1 REPRESENTATIVE NICKOL: My
2 understanding is after the remarriage that Mrs.
3 Feeser --

4 MS. McFADDEN: Oh, after the
5 remarriage.

6 REPRESENTATIVE NICKOL: -- Mrs.
7 Frankenfield --

8 MS. McFADDEN: Oh, that could be.

9 REPRESENTATIVE NICKOL: -- was working
10 full time while the child was in day care and
11 that what instigated the case essentially was
12 that when the child went to school, Mr. Feeser
13 approached the court to have his support
14 obligation reduced because he was no longer
15 paying for child care, or day care. And that is
16 how the whole case got its start. And the trial
17 judge then reversed the domestic relations
18 office and applied the nurturing parent
19 exception with regard to the child from the
20 second marriage.

21 Have you ever had a similar situation
22 before you?

23 MS. McFADDEN: No.

24 REPRESENTATIVE NICKOL: Do you feel
25 that the, do you feel that they properly applied

1 the nurturing parent section of the case?

2 MS. McFADDEN: In a case like that, I
3 do. But I also think if you look at that case,
4 you can see. The case itself demonstrates the
5 differences and I think reasonable differences
6 of opinion that people can have. The conference
7 officer did not apply the doctrine. The trial
8 judge did apply the doctrine. Two of the three
9 Superior Court judges thought it was proper to
10 apply the doctrine. So it seems to me that this
11 is an issue where reasonable people can
12 disagree.

13 REPRESENTATIVE NICKOL: Do you feel
14 that cases of this nature that with a child of
15 the second marriage and nurturing parent
16 exception being applied, that maybe there are
17 other considerations that should be brought in
18 in making a decision in these cases other than
19 what is a very, in my mind, is a much more
20 simple case where it is a child of the couple
21 involved?

22 MS. McFADDEN: I am not sure I
23 understood your question. Is your question if
24 you are considering whether to apply the
25 nurturing parent doctrine when it is a child of

1 the second marriage involved, what
2 considerations might be appropriate?

3 REPRESENTATIVE NICKOL: Are there
4 additional considerations that might not be
5 appropriate if it is a child of the same
6 marriage?

7 MS. McFADDEN: I guess that the
8 considerations that I see as most appropriate
9 when you think about the nurturing parent
10 doctrine is what the two parties did during
11 their marriage; how long the woman has been out
12 of -- or man if it is a man, has been out of the
13 job market because there comes a point where
14 going back to the job market is going to result
15 in \$5.50 an hour and day care is 75 bucks a week
16 and it doesn't make sense; the health of the
17 children involved; the number of children
18 involved. Those are the things that spring to
19 my mind immediately that have to be considered.

20 I would also, if it were me, if it
21 were my case, be looking at both the families.
22 If the support payer is remarried and has a
23 child and his wife is at home taking care of
24 that child, it seems to me that that is a
25 consideration that would make me question his

1 argument that first wife shouldn't be at home
2 with the child of her second marriage.

3 REPRESENTATIVE NICKOL: Can you look
4 at that right now?

5 MS. McFADDEN: I think that you are
6 not prevented from looking at that right now
7 because we are dealing with case law.

8 REPRESENTATIVE NICKOL: Can you look
9 also at the, say, the income of the father of
10 the child of the second marriage in making a
11 determination?

12 MS. McFADDEN: In making a
13 determination about earning capacity of -- I
14 don't know the answer to that. It seems to me
15 to be pertinent.

16 REPRESENTATIVE NICKOL: Thank you.

17 CHAIRMAN CLARK: Representative
18 Schuler.

19 REPRESENTATIVE SCHULER: Thank you,
20 Mr. Chairman.

21 Ms. McFadden, just a question I have
22 been asking every one else; this question of
23 nurturing, you mentioned just here in this case
24 and if it was applied and confirmed.

25 MS. McFADDEN: Different people having

1 different opinions.

2 REPRESENTATIVE SCHULER: You said
3 that. But I think you are correct, that we have
4 no real definition of what this really means.
5 We call it a doctrine. I am a political science
6 major. We knew what the Monroe Doctrine was and
7 what some of these other doctrines were. This
8 one has me baffled.

9 Do you believe or think that we should
10 put up or organize some type of guidelines or
11 just what does it mean? I am not going to lie.
12 I want to know why.

13 MS. McFADDEN: The answer that I am
14 going to give to that question may be different
15 than the answer others would give you.

16 I am very comfortable with the absence
17 of a specific definition because in that
18 situation I feel like I have leeway to apply the
19 doctrine when people present a situation where I
20 think that is appropriate and to fail to apply
21 the doctrine if the situation is different.
22 When you make a very specific definition, then I
23 am concerned that there will be cases that I am
24 not going to be able to use the doctrine where I
25 would rather be able to use it. I am very

1 comfortable.

2 See, I know some people, different
3 people like different levels of certainty. I am
4 comfortable with the current level of case law
5 based facts and circumstances kind of approach.
6 That works in my office. If I have a case where
7 I am worried whether I should or whether I
8 shouldn't and it is a close call, I would sit
9 down with the other three masters in the office.
10 We would talk it over, talk it over with the two
11 attorneys in the case, if there were attorneys,
12 and I would feel comfortable. But other people
13 like a greater level of certainty.

14 REPRESENTATIVE SCHULER: Thank you.
15 Thank you, Mr. Chairman.

16 CHAIRMAN CLARK: Ms. McFadden, let me
17 ask you one question. As a master when you
18 render your decision or write an opinion, my
19 understanding is that then the judge of the
20 court will approve or not approve that report,
21 or recommendation or report.

22 MS. MCFADDEN: Right. You know, there
23 are two systems for these support decisions.
24 The one system uses the non-attorney conference
25 offices and then you get into de novo trial if

1 you object to the recommendation. A different
2 system uses lawyers to hold the hearing, the
3 trial, and if you object to that recommendation,
4 the recommendation that results after this
5 trial, then you get argument before the judge.

6 In my county for the most part we use
7 the first system. So you have an informal
8 conference and if you don't like the result,
9 then you get a de novo hearing with the judge.
10 I don't think you want more detail than that.

11 CHAIRMAN CLARK: I assume that as a
12 senior master where do you fit into this
13 process?

14 MS. McFADDEN: Most of our support
15 cases go through our support office. The
16 day-to-day, petitions to modify, petitions to
17 enforce, new cases, welfare cases, the masters
18 office gets support cases in two ways. We have
19 to deal with support often when we are dealing
20 with equitable division and alimony. It is just
21 an integral part of the financial circumstances
22 of a family. We also recently started a new
23 program. It is called the early intervention
24 program and in that program we pull cases into
25 the masters office for an overall global sort of

1 financial conference round about the time the
2 divorce complaint is filed.

3 What happens with the support system
4 right now is it is income based. It has got a
5 very narrow tight focus. If you separate and
6 someone files for support, you go to support
7 court. They look at your income. They look at
8 the charts to make a recommendation. You may
9 have a lot of related problems that aren't going
10 to get addressed at that time. There may be a
11 mortgage that is too high. You just can't pay
12 it. Neither of you can pay it. You can't live
13 separately and pay this mortgage. There may be
14 assets that one party is raiding or that the
15 parties need to use to pay the mortgage. There
16 may be interim counsel fees, usually discovery
17 issues.

18 We try to get the case on track so
19 that it doesn't fragment and have to go first to
20 support court and then special relief court and
21 then maybe into a discovery dispute. And so in
22 the context of that program that is also how we
23 deal with support.

24 CHAIRMAN CLARK: So your ultimate
25 report or recommendation to the judge may

1 discuss support and a number of other issues?

2 MS. McFADDEN: That is correct.

3 CHAIRMAN CLARK: And as a general rule
4 does the judge approve or modify your
5 recommendations or are they pretty much accepted
6 as fine?

7 MS. McFADDEN: To answer that
8 question, in equitable division, over the past
9 seven, eight, nine years, about four percent of
10 the cases that actually appeared in our office
11 actually went to trial. You are talking about
12 such a small handful that I can say yeah. As
13 the support amounts generally they are approved,
14 but I am not sure that gives you any meaningful
15 information.

16 CHAIRMAN CLARK: Well, the point I am
17 trying to make is that this doctrine is being
18 applied by domestic relations officers and
19 masters more so than judges and many trial
20 judges.

21 MS. McFADDEN: That is correct, at the
22 initial level, the vast majority of the cases.
23 And you can see that from our equitable division
24 statistics. If we have done 2,000 cases in, I
25 don't know, two years, then the courts have only

1 seen about four percent of those cases in my
2 county, so the initial levels see the most
3 people.

4 CHAIRMAN CLARK: Then as a general
5 rule as you proceed up the appellate ladder, so
6 to speak, they are adopting your recommendations
7 because you have lived with the case, so to
8 speak.

9 MS. McFADDEN: I wouldn't like to say
10 that about my judges. I would like to say my
11 recommendations are well informed and well done.

12 CHAIRMAN CLARK: Thank you.

13 Are there any further questions of
14 this witness before we break for lunch?

15 Thank you very much.

16 (A luncheon recess ensued and the
17 hearing resumed at 1:10 p.m. as follows:)

18 CHAIRMAN CLARK: We are at this time
19 ready to reconvene our afternoon session with
20 our first witness, Ned Hark, who is with the
21 Philadelphia Bar Association.

22 Mr. Hark.

23 MR. HARK: Good afternoon and thank
24 you for the opportunity of having me here this
25 afternoon to present the testimony, my testimony

1 on behalf of the Philadelphia Bar Association.

2 My name is Ned Hark as introduced. I
3 am here this afternoon as a designee by Ann
4 Verber, who is the chair of the family law
5 section of the Philadelphia Bar Association. I
6 am the immediate past chair of that section. I
7 also serve currently on the board of governors
8 of the Philadelphia Bar Association and I am a
9 member of the council of the Pennsylvania Bar
10 Association family law section and I am a member
11 of the Southeast Pennsylvania family law
12 council.

13 And I presented my written testimony,
14 which you have heard all of the points from my
15 colleagues who testified this morning in
16 opposition to this bill. And rather than go
17 through each point that they have made, I want
18 to take the luxury of being at the end of the
19 list and trying to hit just some of the
20 highlights that they have raised.

21 In making my notes on hearing the
22 testimony that was presented this morning what
23 struck me was the question concerning what is
24 the nurturing parent and what is the definition
25 of a nurturing parent. And the fact that nobody

1 really could put his or her finger on that, it
2 is apropos and strikes right to the heart of the
3 issue that we are dealing with, such a complex
4 family situation, two-family situation in many
5 cases. When we are dealing with the nurturing
6 parent doctrine, that to take the discretion
7 from the court, take that fact finding process
8 away from the court and codify it would take
9 away the ability to define what a nurturing
10 parent is on a case by case basis.

11 My practice is in Philadelphia,
12 Pennsylvania with the law firm of Howard
13 Goldsmith, P.C. In Philadelphia we see a wide
14 diversity of cases which present on various
15 economic levels. Like Mr. Gruener this morning,
16 I represent both sides of this issue. On
17 Thursday I could be in court arguing one side;
18 on Friday be in court arguing the other side;
19 could be representing a man or a woman or vice
20 versa.

21 The point is we have the discretion
22 with the courts over the years in this doctrine.
23 We have heard recitation of the cases. We have
24 heard from Judge Del Sole this morning. These
25 cases are so fact sensitive and so fact complex

1 that to codify this law or to codify this
2 doctrine would serve to put an absolute rule on
3 cases which you can't do that. You have to look
4 at the totality of the circumstances and there
5 are so many circumstances which we have heard
6 of. As many as we have heard, there could be
7 additional ones; the determination of what did
8 these parties discuss, what were their plans
9 originally when they were married as far as
10 whether one spouse was going to remain home with
11 the children. There is the passive income issue
12 and not only the passive income issue, but there
13 could also be income which is derived by a
14 spouse in the home which is from active
15 employment. And this isn't employment outside
16 of the home, not if the spouse works inside the
17 home. And again, that goes back to the very
18 nature of my concern and the concerns that we
19 have heard from earlier today; that you must be
20 able to look at these cases, these issues on a
21 case by case basis.

22 In all the years I have been
23 practicing and an active member of bar
24 associations and family law sections, the
25 central focus has always been, or a large

1 portion of our focus has been protection of
2 children, protection of the rights of children.
3 And when we deal with the decision making
4 process that is at issue in this bill and in the
5 case which gave rise to this bill, we are
6 dealing with a decision as to nurturing a child,
7 and again I am using that word without a
8 definition but somebody who is going to remain
9 at home to care for the child and there is no
10 formula for that. It varies from neighborhood
11 to neighborhood, from county to county, from
12 family to family, from child to child, from
13 parent to parent.

14 To codify that law, to set down
15 guidelines would only serve as an injustice to
16 the children. To take that decision making
17 process out of the parents' hands and put it
18 into some law or statute would hurt the process
19 of protecting our children. The ones who will
20 suffer ultimately are the children in the cases.
21 The dollars and cents that we talked about and
22 the application of the guidelines, \$20, and \$20
23 could be a lot of money. \$20 could be a
24 significant amount of money and have an impact
25 upon people.

1 minute that we have never heard and there is no
2 such thing as the nurturing parent doctrine.
3 Doesn't the issue boil down to whether or not
4 the court is going to assign an earning capacity
5 to the parent, let's say, the former spouse who
6 is now on a second marriage and staying home
7 with the child from the second marriage?

8 MR. HARK: That is true. It boils
9 down to that. And in boiling it down to that,
10 there are again, you have to look at what the
11 parent who decides to stay at home, what did
12 they do during the first marriage; were they
13 working prior to the birth of a child from the
14 first -- and I am using marriage -- child of the
15 first relationship; if so, what was the decision
16 making process between the two parties, between
17 that person at the time and what they wanted to
18 do and what his or her motivation was and desire
19 to remain at home with the child. You could
20 have a situation where you have a professional
21 person who is foregoing a tremendous amount of
22 income and that could be looked upon as saying
23 well, you know, how could somebody give up a
24 profession or give up significant income each
25 year. And that could be looked upon negatively

1 as intent to dissipate or voluntary dissipation
2 of income or earning capacity.

3 However, if that person did that
4 before and made a conscious decision to take
5 several years from his or her profession or
6 their professional endeavors, then that should
7 be considered by the trier of fact; the decision
8 that was made initially in the first matter with
9 regard to the child care, with regard to
10 schedule of work.

11 Many people scale back their work.
12 Many people work a limited basis just to remain
13 in touch with what goes on. And in certain
14 professions, in certain jobs, if somebody takes
15 off three or four years from their profession,
16 from their responsibilities, they are going to
17 be at a disadvantage when they come back. So
18 their earning capacity is going to be lower.

19 So there is a myriad of considerations
20 that must be made and the trial court or the
21 master or whoever is hearing the testimony
22 making the judgment on the record, that person
23 must hear each one, each fact, and it is up to
24 whoever is presenting the case and the
25 presentation of the case to present those facts.

1 That is the only way you are going to determine
2 what was decided.

3 CHAIRMAN CLARK: So the committee
4 shouldn't get bogged down or hung up on saying,
5 we are going to or not going to apply the
6 nurturing parent doctrine to this and this and
7 this because getting caught up in that wording
8 really undermines the issue which is, are you or
9 are you not going to assign an earning capacity
10 to that parent or this parent.

11 MR. HARK: That would be in a sense
12 correct. The application of an earning capacity
13 thing is what we are dealing with. But it
14 doesn't necessarily have to end with the earning
15 capacity because of the consideration of other
16 income and other abilities to generate revenue
17 and bring money into the household where both
18 respective households are in their production --
19 production is a bad word -- in their
20 professional endeavors over their job related
21 endeavors and their economic structures. So you
22 can't really look at it that way. You have to
23 look at it again, as we have heard before, on a
24 case by case basis, the way the facts play out
25 in each case.

1 CHAIRMAN CLARK: Thank you.

2 Representative Nickol.

3 REPRESENTATIVE NICKOL: Thank you for
4 your testimony. As a non-attorney, I guess I
5 sometimes may struggle with a lot of what you
6 are discussing. As a non-attorney legislator, I
7 am used to dealing with statutes where we set
8 one rule for everyone and there is a lot greater
9 degree of predictability for an outcome.

10 What you are saying is that the
11 present system allows for a case by case
12 decision because all cases differ. If I came to
13 you as a client, could you then with any
14 certainty tell me, if I give you the facts of my
15 case, as to whether or not the nurturing parent
16 exclusion would apply?

17 MR. HARK: That is a good question.
18 And as an attorney I consider myself also to be
19 a counselor at law and it is incumbent upon me
20 when I am counseling you and advising you, I
21 have to draw upon experience on not only the
22 law, but experience on how these things, how
23 they play themselves out, and really reach into
24 the factual scenario that you have presented,
25 not only your current situation but the previous

1 situation to try to get some insight from you as
2 a potential client or as my client what
3 motivates the other party, what her station in
4 life is, what her new situation is like, the
5 second marriage or the second relationship that
6 she is in or subsequent one from you. All of
7 that has to come into play. Then it is my
8 judgment as to how you, how I am going to advise
9 you and how the case might play itself out.

10 A large portion of what I am going to
11 tell you will be my opening, we have heard of
12 the guidelines, my opening the book up and
13 looking at the chart and saying, here is what it
14 is if we give her an income and here is what it
15 is if it isn't. Then you have to take that
16 decision, you have to take that away and decide
17 whether or not we are going to proceed according
18 to the applicable case law.

19 So to make that judgment, it is a very
20 difficult call for an attorney. It requires
21 obviously knowledge of the law and knowledge of
22 the practicalities and applications of the law.
23 And that is something that, that is something
24 you get either through experience or through
25 general research. When I say research, that is

1 basically looking at what goes on county to
2 county and how issues are handled and from the
3 practical economics of it; are we fighting over
4 \$7.50 a week; how much child care comes into it.
5 There are variables.

6 REPRESENTATIVE NICKOL: So by the
7 length of your explanation there really is not a
8 great degree of certainty to present one book of
9 facts essentially as to what the outcome might
10 be.

11 MR. HARK: There is not a great degree
12 of certainty, that is correct. And a lot of
13 what we do, there is not a great degree of
14 certainty. As Ms. McFadden said, one of the
15 luxuries we do have are the support guidelines
16 which we are able to look at and get a good idea
17 as to what we are going to do and be able to
18 make recommendations to clients and settle cases
19 that way.

20 A large portion of what we do, we
21 heard about custody and that area of litigation,
22 is there is no absolute. It is going to be
23 discretionary and discretion of the court.
24 There is no checklist that we can go down and
25 say, this is what is going to happen.

1 REPRESENTATIVE NICKOL: The
2 interpretations vary considerably among counties
3 even?

4 MR. HARK: They might. They might
5 vary. They might vary drastically from
6 Philadelphia County to Lancaster County to
7 Allegheny County and in between. In the
8 southeastern part of the state which is where I
9 practice, I am going to have to look at how the
10 case is going to proceed and how it is going to
11 be, the economics of the case and where the
12 parties could end and how their jobs and their
13 potential income is going to be looked upon by
14 the court. And there are other situations which
15 might play into it as well. They may vary from
16 county to county, to answer your question.

17 REPRESENTATIVE NICKOL: So from your
18 perspective some decisions may be aberrational
19 in either direction in terms of the application
20 of this doctrine?

21 MR. HARK: Well, I would hope that
22 they wouldn't be aberrational. I would hope
23 that they would be --

24 REPRESENTATIVE NICKOL: That they
25 would all be consistent.

1 MR. HARK: Well, no. I would hope
2 that they would be well thought out decisions
3 with the application of the facts on the record
4 to the case laws that exist today presently.

5 REPRESENTATIVE NICKOL: Error is that
6 we have one rule for everyone and the error of
7 the courts, I feel, is that we have a different
8 rule for everyone. And I don't know that either
9 way is the best way.

10 MR. HARK: I am not so sure it would
11 be a different rule for everyone. It might be
12 the same rule, the same law applied differently
13 to fit the case, the case as it is presented.

14 REPRESENTATIVE NICKOL: Thank you.

15 CHAIRMAN CLARK: I don't believe there
16 are any additional questions. Thank you very
17 much.

18 MR. HARK: Thank you, sir.

19 CHAIRMAN CLARK: The last individual
20 to testify this afternoon will be Milton S.
21 Savage, Esquire. He is the immediate past
22 president of the Barristers Association of
23 Philadelphia.

24 MR. SAVAGE: Thank you very much.

25 Good afternoon. My name is Milton S.

1 Savage, Jr. As indicated, I am the immediate
2 past president of the Barristers Association of
3 Philadelphia, Inc. The Barristers Association
4 is an organization which represents the
5 interests of African-American lawyers from the
6 Philadelphia area and surrounding counties. The
7 Barristers is also a local affiliate of the
8 National Bar Association which represents
9 approximately 17,000 members from 84 affiliates
10 from around the world.

11 In addition to that, I am currently a
12 member of the executive committee of the family
13 law section of the Philadelphia Bar Association
14 and very active dealing with the Philadelphia
15 Bar Association, also with the Barristers family
16 law section.

17 As is Ned Hark, I am a family law
18 practitioner of eight years. The Barristers
19 regard itself as the companion association to
20 the Philadelphia Bar Association. I would like
21 to associate myself with all the remarks by Mr.
22 Hark and ask that the subcommittee accept my
23 written statement and grant an opportunity to
24 extend and revise my remarks as the legislation
25 develops.

1 I would like to highlight my statement
2 with a few points. I believe that House Bill 22
3 would create a situation of additional rule
4 making which we believe is not in the interest
5 of the public. We have two tracks of rules
6 here. One, we have the common law and it is the
7 position of the Barristers that the precedent
8 with regard to the nurturing parent doctrine is
9 well settled and its judicial validation is
10 found in the fact. The fact of the cases fall
11 both ways, particularly with regard to a
12 situation where there is a second child
13 involved.

14 Secondly, we believe that the public
15 opts for judicial adjudication as opposed to
16 ministerial handling of child support matters.
17 We believe that it is entirely appropriate for
18 child support matters to be determined by
19 statewide support guidelines. But in those
20 instances where you have blended families,
21 different residences and loco parentis persons
22 caring for children, we believe that it is
23 within the exclusive jurisdiction of the courts
24 to determine whether or not the nurturing parent
25 doctrine should apply and if it does apply, how

1 it should apply.

2 Additionally, we believe that House
3 Bill 22 if enacted would create the unintended
4 result of financial hardship on certain parties
5 if, in fact, by statute a party is ineligible
6 for child support. The clear answer to a
7 situation like that would be if a court has all
8 the facts before it and they fashion a rule or
9 an order that takes into account temporary
10 cessation of income or lack of income.

11 Additionally, we believe that House
12 Bill 22 enlarges the evaluation of imputed
13 income insofar as not including any income that
14 is earned while in the home. I am sure that the
15 panel has heard extensive testimony about
16 passive income and businesses in the home and
17 how it affects the ability of a homemaker or a
18 parent who lives at home to finance support of
19 the child or children.

20 Lastly, we believe that, again, the
21 courts have rendered equitable decisions with
22 regard to the nurturing parent doctrine. We
23 believe that to pass a statute such as House
24 Bill 22 would do no more than to create conflict
25 with existing laws and rules and also create

1 hardship on those parents who otherwise get
2 redress in the results of judicial discretion.
3 Thank you.

4 CHAIRMAN CLARK: Thank you.

5 Representative Schuler.

6 REPRESENTATIVE SCHULER: Thank you.

7 On your first page you say first the common law
8 of nurturing parent doctrine is well settled.
9 Would you explore that a little more with me?
10 What did you mean by that?

11 MR. SAVAGE: Well, there have been a
12 number of cases I have before me, the Kelly
13 case, and in all these cases the Kelly case and
14 its progeny, the Superior Court has laid out the
15 history of the nurturing parent doctrine for the
16 parties; how it applies; why it should apply. I
17 believe that that is the basis for my statement
18 that the nurturing parent doctrine is well
19 settled.

20 I know that the panel may be
21 struggling with the issue of, say, a parent
22 living at home with a child not of the union
23 that is subject of a child support petition. In
24 that regard I believe that the cases have come
25 down both ways with dealing with the ability of

1 that parent to earn income. But nevertheless, I
2 believe that the courts should have the
3 discretion to flush out all the facts as
4 presented and fashion an order which best
5 relates to that situation on a case by case
6 basis.

7 REPRESENTATIVE SCHULER: Your first
8 statement, you say that the supreme court laid
9 out.

10 MR. SAVAGE: Superior Court.

11 REPRESENTATIVE SCHULER: Would you
12 share a copy of that with the chairman?

13 MR. SAVAGE: Well, you have the Kelly
14 case.

15 REPRESENTATIVE SCHULER: We have it.
16 Thank you. Would you say that -- well, maybe
17 that is an unfair question to ask you. Maybe I
18 won't ask you.

19 I will stop there, Mr. Chairman.
20 Thank you.

21 CHAIRMAN CLARK: Are there any other
22 questions of this witness?

23 We thank you very much.

24 MR. SAVAGE: Thank you.

25 CHAIRMAN CLARK: And that concludes

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

the Subcommittee on Courts' hearing today on House Bill 22 which was prime sponsored by Representative Nickol. We thank everybody for coming today. We certainly appreciate your input. Thank you very much.

(Whereupon, the hearing concluded at 1:40 p.m.)

* * * * *

C E R T I F I C A T E

I, Marsha Hunter-Breen, Reporter, Notary Public, duly commissioned and qualified in and for the County of Montgomery, Commonwealth of Pennsylvania, hereby certify that the foregoing is a true and accurate transcript of my stenotype notes taken by me and subsequently reduced to computer printout under my supervision, and that this copy is a correct record of the same.

This certification does not apply to any reproduction of the same by any means unless under my direct control and/or supervision.

Dated this 22nd day of April, 1997.

Marsha Hunter-Breen (JB)

Marsha Hunter-Breen, Reporter
Notary Public

My Commission Expires:
May 17, 1999