Testimony of

Harry J. Gruener, Esquire

Pennsylvania Bar Association

before

The Subcommittee on Courts of

the House Judiciary Committee

March 26, 1997

STATEMENT

To: The Honorable Members of the Subcommittee on Courts of the House Judiciary Committee.

Thank you for inviting me to speak on behalf of the Pennsylvania Bar Association Family Law Section. I have been a practicing attorney for twenty-six (26) years in Pennsylvania since my graduation from the University of Pittsburgh School of Law. My practice has been concentrated in the area of Family Law since 1980. I am a partner in the Pittsburgh law firm of Goldberg, Gruener, Gentile, Voelker & Horoho P.C. I am a member of the Allegheny County Bar Association and the past Chair of that Bar Association's Family Law Section. I am a Fellow of the American Academy of Matrimonial Lawyers and I am a member of the Joint State Advisory Committee established to recommend amendments to the Divorce Code of 1980. I am currently the Chair of the Pennsylvania Bar Association Family Law Section representing over 1800 family lawyers in the Commonwealth of Pennsylvania. I write a regular column in the Pittsburgh Legal Journal on matters of Family Law and I have written and lectured extensively in and out of the Commonwealth on family law issues.

In January, 1997 the Family Law Section of the PBA conducted its Winter meeting in Pittsburgh and at that time the Officers and Council of that body conducted an extensive review of the contents of House Bill 22. The debate was spirited and it was obvious that the bill was controversial. At the conclusion of the discussion the

Section took a position that was subsequently presented to the Board of Governors of the PBA who has authorized me to appear before this Committee to present that position on behalf of the Section. A copy of the Resolution and Report of the Family Law Section is attached to my written comments for your files. The testimony that I am offering today does not represent my personal views, but rather, represents the view of the Section.

House Bill 22 would codify the "nurturing parenting doctrine" first recognized in case law in 1977 in the case of Wasiolek v. Wasiolek, 380 A.2d 400 (1977). In that case a mother, who was trained as a secretary, decided to stay home to nurture three children ages 7, 9, and 11. The Superior Court recognized that doing so may well be in the best interest of children and that in such a situation the unemployed parent makes a substantial nonmonetary contribution to the children. The children being cared for by the mother in this case were the children of Mr. Wasiolek. The first case to address the issue of whether the doctrine should be extended to a circumstance where the child being nurtured is not the child of the support payor was Bender v. Bender, 444 A.2d 124 (1982). In that case father had primary custody of the only child of his marriage to mother. Mother then had another child by another man and chose to stay home with that child. At the support hearing, mother attempted to rely on the nurturing parent doctrine to excuse her from working. The trial court found nurturing any child to be dispositive and held that mother had no earning capacity. The Superior Court remanded the case holding that mother's

desire to nurture another child was only one factor in deciding whether she had a duty of support. The court made it clear that many factors went into deciding a support order and nurturing was a factor to consider even if the child being nurtured was not the child of the parties. In Atkinson v. Atkinson, 616 A.2d the court was again faced with the issue of caring for a child who was not the child of the parties to the action. Again, the Superior Court refused a strict approach and relied upon the discretion of the court. The majority pointed out that staying home to nurture a child is not akin to a voluntary reduction in earning capacity to defeat paying one's fair share. The court implied that under certain circumstances the decision to nurture another child may be quite legitimate and not tinged with bad motive. Judge Del Sole dissented.

The trigger for House Bill 22 seems to have been the case of Frankenfield v. Feeser, 672 A.2d 1347 (1996), although it did not change the law. House Bill 22 would codify the nurturing parent doctrine and include the statutory mandate that it not be applied where the child being nurtured is not the child of the parties to the support litigation. The issue is timely. With the number of divorced couples who remarry and begin second families, those who practice family law are seeing this issue surface often in child support litigation. A natural tension exists between the parent who decides to stay home and nurture a child and the payor whose child support for another, often older, child is impacted by that choice.

The Section has recognized that tension and has concluded that the issue as to when and whether to apply the nurturing parent doctrine is fact sensitive. Therefore to the extent that H.B. 22 would remove discretion from the court in deciding in what circumstance to apply the doctrine, the Section opposes the Bill. The sense of the Section was, and is, that nurturing children of tender years is often laudable and represents sound public policy. The Section believes that there may be certain fact patterns that would merit the imposition of the doctrine where the child to be nurtured is not the child for whom support is sought and therefore, to remove that discretion by statute would be improper. The Section believes that the appellate courts of the Commonwealth have, since Bender, supra., demonstrated thoughtful restraint in the application of the doctrine and that trial courts should be able to continue weigh the individual circumstances in deciding when to apply the doctrine. The Section believes that the court in Feeser did the proper analysis and that the law set forth in Feeser should remain in tact to the extent that Feeser preserves discretion. To the extent that the application of the doctrine to situations where the child being nurtured is not the child for whom support is sought would be patently unfair to an obligor, it was the conclusion of the Section that the court could, in those cases, refuse to extend it.

In the event that the legislature should desire to enact H.B. 22, the Section also noted that there were various amendments to the present language that would, in its view, be mandatory. First, Section 4322.1 (a)(2) must be deleted. This is an

inaccurate description of the nurturing parent doctrine. Just because a parent is nurturing that parent is not necessarily relieved of a support obligation as that parent may have substantial unearned and/or passive income from investments, rents, inheritance, gifts or income producing trusts. Further, since the law of the Commonwealth provides that the assets owned by a party are to be considered in fixing support, there will be cases where a party deemed to have no earning capacity will own substantial assets that must be considered in determining whether there exists a support obligation. Second, for those same reasons, Section 4322.1 (b)(2)(ii) must be deleted. The nurturing parent may have a duty of support even where no earning capacity is attributed. Finally, it is suggested that Section 4322.1 (c) be amended to clarify that the doctrine does not apply to a child, but rather, to a nurturing parent. It is suggested that the language be modified to state, "This Section shall only apply where the child being cared for in the home by the purported nurturing parent is a child for whom support is sought." In the alternative, it could be redrafted to state, "This Section shall not apply to the parent of a child being cared for in the home of the parent if the child is not the child for whom support is sought."

March, 1997 Harry J. Gruener

PENNSYLVANIA BAR ASSOCIATION

FAMILY LAW SECTION

Recommendation

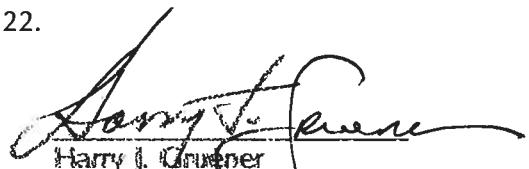
That the Pennsylvania Bar Association recommend to the Pennsylvania Legislature that House Bill No. 22 pertaining to the "Nurturing Parent Doctrine" NOT be enacted into law as it is presently drafted.

Report

House Bill 22 would add a new section to the Domestic Relations Code, Title 23 of the Pennsylvania Consolidated Statutes, for the purpose of placing a limitation on the case-made doctrine of the Nurturing Parent Doctrine. The Nurturing Parent Doctrine essentially provides that a custodial parent who chooses to remain out of the labor market to remain at home to nurture a minor child will be excused from exercising his or her earning capacity in contributing to the economic support of a minor child. In Frankenfield v. Feeser, 672 A.2d 1347 (1996) that doctrine was applied in a case where the child to be nurtured was the child of an ex-spouse's second marriage. The proposed legislation is designed to eliminate reliance on that doctrine in those situations where the child for whom support is sought is not the child being nurtured.

The Family Law Section of the PBA has been asked by a member of the legislature for their recommendation as to House Bill 22 and whether the Section would support said Bill. On January 17, 1997 officers and members of council of the Family Law Section conducted a full and complete discussion of the bill. After considerable discussion and deliberation it was unanimously decided that the Section would not support and/or endorse in anyway House Bill 22 as presently written. The primary objection to the bill was that it did not provide discretion in the trial court to decide whether or not to apply the doctrine to the facts in each case. The Council also concluded that it could not endorse the Feeser case to the extent that it may deprive the trial court of discretion in applying the doctrine on a case by case basis. The Council concluded that there may be limited factual situations where the doctrine should be applied even if the child being nurtured is not the same child for whom support is sought. No opinion, of course, was or is intended by this report to be expressed on any other or future bill that may be introduced on this subject, except that it is the position of Council that if the bill were amended to provide for discretion, there are various other amendments that would be required to the language in sections (a) and (b) of the bill as written in order for the Section to support the bill. If an acceptable bill were introduced, the Section would provide input on the suggested changes to (a) and (b) of the proposed statute.

Therefore, the Family Law Section makes the recommendation set forth above concerning the requested position of the PBA on House Bill 22.



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