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SECTION

Representative Cohen, Representative Walko and members of the House Judiciary Committee Domestic Relations Task Force, thank you for the opportunity to appear before you. My name is Carol S. Mills McCarthy. I am an attorney and have practice in the area of domestic relations for nearly 22 years. For the last 12 years my practice has been exclusively in the area of domestic relation. Currently I serve as an officer of the Allegheny County Bar Association Family Law Section, as secretary, and Chair the Children's Issues Committee of that Section. I also serve on the council of the Pennsylvania Bar Association Family Law Section and co-chair it's Gender Bias Committed. The following remarks represent my thoughts and opinions on the area of domestic relation reform and do not represent the position of the ACBA Family Law Section.

In contemplating the issues your committee seeks to address, it occurred to me that I believe that the legislature and our courts do very well in many areas and these should not be reformed. In the years that I have practiced in this field, I have seen many reform efforts, starting with the reform from a fault system to a no-fault system. I have also noticed that there have been many times where legislative reform was sought to bring about change because of someone's or some group's bad experience in a family court proceeding. However, I would like to request this Committee to consider not reforming that which works well, rather than making a reform because their is a popular theory that reform is necessary. Therefore, in these comments I would like to address areas where reform is being touted as the answer where it is my opinion it is not. I then would like to suggest a few areas where I do see reform as needed.

There have been many recent articles proposing the end of no-fault divorce. No-fault divorce in some circles is being depicted as the root of all of society's current evils. However, as a practitioner under the fault and no-fault system, I submit that it is not the law that needs to be changed. Although it would be silly to deny that divorce can have a negative effect on families and therefore a ripple effect on society the solution is in better economic solutions of divorce. The concerns now raised about children growing up in poverty or without two loving parents is not solved by forcing people to remain in a miserable relationship. Rather, it seems that perhaps the solution is a societal one of emphasizing commitment to family rather than self and carrying out responsibilities rather than walking away. These are not problems that legislative can solve, unless we are to start legislating value. At best, perhaps we should make marriage harder rather than divorce.

I have seen 55 year old women who are devastated to learn that the last 30 years of marriage where they have honored their promise to love honor and obey by washing the dirty clothes, cooking the meals and cleaning dirty diapers while putting up with his boring boss' jokes (and hands) can end because he has decided that he wants another younger family or just does not want to spend the retirement years together. The solution is not to make him prove that she has made his life burdensome and intolerable and he is the innocent and injured spouse or that she has committed adultery. The solution is insure that she has enough resources to go on with her life, including funds to get the professional help needed to learn to adjust to this change in life.

The fact is that I have also seen the consequences of forcing people to be miserable for the rest of their lives. Most marriage do not fail because of a specific incident such as infidelity. Rather they fail because people have changed, or they realize that perceived shared goals and values are not shared. To make people stay in that kind of misery not only hurts them but hurts those around them. In some instances, that can be the cause for child abuse or spousal abuse - physical or emotional. That does not solve the problem.

Another area where I often hear a cry for reform is the shortening of the separation period. I strongly disagree with this. In part, this is due to the consequence of no-fault divorce being able to be unilateral. Again, I do not think that making fault be the only basis for divorce is the solution. However, the 55 year old spouse described above, needs time to get used to the mental and economic changes facing her. I cannot tell you the number of times client's have told me they had no idea that their spouse was so unhappy with the marriage they would actually walk out. While not forcing someone to remain miserable is a good idea, it is also a humane idea to give the other spouse time to adjust.

Another area of reform I have heard of is making family court's a special area of the law that operates on less of an adversarial system or has special criteria to be qualified to practice or be a judge. While it is true that certain aspects of this area of the law lends itself to non-adversarial solution, such as the current requirement for mediation in custody, at some point a legitimate dispute can arise - just like who was at fault in the car accident. The members of society who believe that the rules of law apply and who come to the court to resolve their dispute, i.e., believing that the best interest of the child will be served by living with him or her, should have the same opportunity as the citizen who comes to the court to resolve who was a fault for the accident.

Within this context, and perhaps at first blush someone contrary to, I would like to say that our current approach to custody with the requirement of education/mediation is a model for this state. The adversarial approach when it comes to children is harsh. Therefore, Judge Baer's and our other family court judges efforts to reduce the harshness of that reality in the form of mandatory mediation and education orientation is a

great way to address the issue. The court has put alot of effort into creating a sensitive system. Further, it has maintained it's promise to make changes as needed - whether it be materials that reference mother/father rather than parent or in how the procedure will work. Although there still remains several unaddressed areas, the court's willingness to make changes causes many practitioners to believe that the system intimately will be a benefit.

This brings me to one of the three areas of reform I would like to suggest. The first is the essential need for more resources for domestic relations. No amount of legislation can make a divorce case go faster if there are not enough judges to hear it. As a family lawyer I have had to learn how to try a case in 20 minutes that other practitioners would have several hours to present. The end result is that the public I serve, my clients, feel that they did not get a full and fair hearing. This makes them unhappy with the law and they seek reform. In reality, the fact is that more people are exposed to the law and the court system in family court than any other. Although I know this means money, if people are going to feel that the law is fair and reasonable for them, then they need to have time to present their case in court. This requires more judges, masters and hearing officers, who are the finders of fact.

Another area that I believe needs to be reformed is the treatment of the economically dependent spouse. The Divorce Code currently spells out factors for division of property and the determination of amount and duration of alimony. As a practitioner representing both dependent and economically independent spouses, I have to say that either the courts do not get it or the legislature needs to spell it out more when it comes to alimony in particular. Frankly, to a large degree it seems to me that the cry for divorce reform in the elimination of no-fault is better directed toward this area. The economically dependent spouse, is the spouse who does not make a equal or greater income during the marriage. This is usually due to the fact that the parties elect that one spouse will stay home to raise the children. Then when divorce occurs the children need to continue to reside with the parent who has been providing their care. This is usually the economically dependent spouse. By extension, learning to provide better for the economically dependent spouse allows for a better life for the children residing with them.

The reality of our society is that in many marriages the mother/wife stays out of the work force to take care of the family: from laundry to educating the children. Although many mother work outside of the home now, even so the jobs they seek are ones that allow for the flexibility to accommodate family needs, and that usually means shorter hours and or lower salary. Therefore, when a marriage, that is also an economic partnership comes to an end we have to give credit, and more than society does in general, for the contribution of remaining out of the work force for the marriage.

However, this is not be applied as a gender issue, i.e., women get alimony and men do not, but rather for work done for the marriage in substitution of the climb up the "corporate" ladder. In other words, it does not matter if the husband stayed home to wash her clothes and do the grocery shopping while she climbed up the corporate ladder. What matters is that at the end of the marriage the years of service to the marriage that deprived him or her of increases in pay or contribution to a retirement must be adjusted. That is not to say that just because a spouse does not work outside of the home during the marriage that alone should grant him or her consideration. Again, this is an area of the law that must maintain it's ability to craft justice based on the facts of the case. Therefore, if she did nothing for the marriage, but it was because she was crippled with multiple sceloris soon after the marriage, then she gets alimony. But if it is a case where he decided, over her objection, to quit his \$100,000 a year job and go be a musician, who ends up never having a job, then the issue of doing for the marriage changes how relief should be granted. If we would consider the value to the marriage of the service of giving up opportunities to earn money and benefits and give appropriate credit for this, then the children who live with the economically dependent spouse, who is so because of such sacrifice, would also not suffer.

Our appellate courts now interpret the Code to require alimony to be a secondary remedy, and yet do not require the assets or income to be distributed so that both parties can fairly start a new life. This is one of the reasons that when the children live with the parent who has stayed out the work force to raise them and is therefore the economically dependent spouse of the marriage suffer from divorce. The suffering is not just because they see their parents fighting, but because they see the one parent they now live with struggling to make ends meet. The fact that is usually the mother is a society rule, not a court or legislative rule. Again, it can be either parent based on the facts of the case. If the legislature would add a requirement that takes this into consideration, a great ripple benefit in society would be felt. For example the legislature can add as a factor in property division and alimony, years of service to the marriage that reduce potential salary or benefits. In some instances, one of the assets we do not divide is the salary itself. Perhaps it should be considered an asset of the marriage. The refrain often made to these kinds of proposed changes is that is already in the Code. I submit if it is, the courts are not reading it as intended and the legislature needs to make it clear that the Code will grant compensation for the years out of the work force.

The last area of reform relates to the theory of a unified family court system, which locally we are trying to achieve with a one judge/one family system. I think that the basic concept behind this current move and the general call for unified family courts is correct. What I vehemently disagree with is one judge one family. The reality of it is that the judges hear the cases and decide peoples fate without benefit of a jury. That means

that if in motion proceeding the father is accused of sexually abusing the children, that the judges has now heard that claim about this litigant. If it later turn out to be untrue, does the suspicion of it and the impression that creates get removed in the judges mind? What about proceedings that occur, whether on custody or economic issues, before he is cleared, is not the taint of the accusation there. The reality is that our judges are human beings who might try to set aside the improper evidence or reactions to people, but cannot always do so. A further reality is that the emotional aspect of the parties divorce interferes with a rational approach such a court might expect. This is especially true in the early phases of the litigation. So the husband who tells the judge in the first proceeding that "she won't get a dime of my money" is not necessarily a deadbeat, but perhaps just upset because he caught her in bed with his best friend. Yet, this can leave a lasting impression with a judge.

I have a variety of suggestions for how to address the problem raised by the need for a unified family court. The issue is not just that you get a variety of different approaches if more than one judge hears the various disputes. The problem is that the fractured approach to how these cases are handled is costly and impractical to litigants. They come to court in one month to talk about support and another month to talk about custody and in the meantime there is a special hearing on who lives in the house. For the public, the immediate concerns are who pays what bill, how much money will I have to live one, who will live in the house, and when will the children be with each parent. To me this cries out for a "separation" proceeding. This might not be in one short proceeding (again going to the need for more resources), but access to the court within a reasonable period of time to address all the initial and interim issues. Several other suggestions have been made. For example, there should be different judges for custody and support. Alternatively, perhaps the system should be oriented to one part dealing with pre-trial type issues, i.e. advances against equitable distribution, and other for the final trial issues.

Once again, thank you for this opportunity. This is an area that impacts so widely and seriously on the citizens of this Commonwealth that the service you provide in listening to the public is greatly appreciated. Although the comments herein are mine, I can readily say on behalf of the Family Law Section of the Allegheny County Bar Association that we are willing to always assist in your legislative efforts in whatever fashion you choose.