TESTIMONY OF ATTORNEY EILEEN D. YACKNIN BEFORE THE HOUSE JUDICIARY COMMITTEE DOMESTIC RELATIONS TASK FORCE JULY 15, 1997

Good morning, Representative Cohen and Representative Walko, and your staff members, including Julie Boyle.

Thank you so much for affording me this opportunity to discuss with you a couple of concerning present issues in the arena of domestic relations law, about which I am concerned, and for which I believe state legislation would be both appropriate and valuable.

I am a staff attorney at Neighborhood Legal Services Association, the organization which provides free civil legal services for impoverished persons residing in Allegheny, Beaver, and Butler Counties. This was my first job directly out of law school in September 1977, and it remains the only job I have held. Although a twenty-year employment record at a single job probably has become somewhat of an anomaly, my tenure evidences the commitment and the passion I feel towards the need to assist underprivileged, often desperately needy people in an arena in which they are mostly ignorant, and thus, enormously powerless.

Over the past twenty years, I have concentrated at one time or another in all the types of civil legal representation which we provide, although I have developed a strong interest in family law.

Most of the population we serve seek our help for a domestic relations problem of one sort or another. Thus, most of our clients--and I would venture to say, most of the general population as well--are exposed to the legal/judicial process for the very first time within the

framework of the family courts. Even law abiding citizens who would never otherwise have any reasons to step foot inside a courtroom are often thrust into the judicial jungle merely because the marriage or adult relationship in which they have participated has deteriorated, thereby necessitating outside intervention to resolve.

Unfortunately, throughout the past twenty years, the types of domestic relations cases for which we provide legal assistance has declined significantly, due, as you can imagine, to the enormous funding cutbacks which legal services organizations have suffered throughout the past two decades. We no longer represent people in divorces. Thus, poor persons who are both seeking divorces as well as those against whom divorces have been filed, are often left without any legal assistance, despite the fact that these cases often involve and affect significant property and alimony rights.

Similarly, we no longer have the resources to represent poor persons who are suing for child and/or spousal support--not to mention the persons who have been sued. Thus, many, many people in our region (and the state, as well), must navigate the judicial process for the purpose of seeking such essential financial assistance without the benefit of legal counsel.

Finally, we are unable to provide legal help to poor persons who are seeking partial custody or visitation with non-custodial children. These parents, too, are compelled to initiate and pursue the legal proceedings necessary to accomplish these goals, without the benefit of the very persons who are trained to provide assistance for these purposes.

Sadly, at present, N.L.S.A. has the resources sufficient to provide domestic relations legal representation to people only when they are involved in protcction from abuse cases, and in child custody cases, where a "snatch" of the client's child or children has occurred, or where a custody lawsuit has been filed against the client.

Thus, I would like to focus my remarks on issues relevant to child custody proceedings.

Although I am sympathetic to the concerns of the fathers who spoke before me, I respectfully disagree that the courts show a bias against fathers when resolving child custody disputes. Studies have shown that most such disputes, when resolved prior to an actual trial, do result in a grant of custody to mothers. Nevertheless, when disputes must be resolved by a judge, at trial, most such trials result in the award of custody to the fathers.

These studies were implemented following the adoption by most states in the early seventies of the "best interests of children" standard for determining custody disputes. In the days when equal rights of women was a hot topic for public debate, and when the effort to enact a federal ERA was on its way towards defeat, the family courts and the state legislatures nonetheless utilized these concepts for the purpose of attempting to equalize what was a perceived prejudice against fathers when it came to child custody dispute resolution. As a way to overcome the previously-recognized judicial doctrine of "tender years,"--which did afford a judicial presumption in favor of mothers, the courts and legislatures replaced that doctrine with a standard which, on the surface, eliminated such gender bias.

Certainly, a child's "best interests" was what the whole dispute was about, regardless of the sex of the person (and, until recently, the parent) to whom custody would be awarded. And certainly, in the best of all worlds--that legal framework for evaluating and determining a child's future custodial home--which must be one of the most difficult jobs a judge could ever face--is perfectly appropriate.

Nevertheless, this universal adoption of the "best interests" test, without more, resulted in the a new and distinct bias--this time, in favor of fathers. After about a half-dozen years of evaluating custody decisions decided under this standard, it became apparent to many in the field

that, on the whole, mothers lost custody of children much more often than at the rate by which fathers lost custody in disputed, litigated proceedings.

Why? Unfortunately, in the opinion of many, judicial decisions often reflected the "double standard" by which women in this society, for so long, have been--no pun intended--judged. While fathers who work every day outside the home and thus, provide for alternate child care are viewed as acting perfectly appropriately, mothers in similar situations have been viewed as neglecting their children, or inappropriately putting their careers first. Working fathers who can provide substantial material benefits to their children, including nice homes, summer camp, family vacations, and the things which all parents wish they could offer their children, are often viewed preferentially, in contrast to those mothers who have chosen to stay home with their children and thus are unable to provide their children the material benefits resulting from high household incomes. (Statistics reveal that, even when child/spousal support is paid by a husband following a divorce, the husband's standard of living typically increases significantly, while the wife's standard of living declines proportionally.)

These are just some of the factors upon which too many, mostly male, judges based their custodial decisions, in increasing numbers, following the adoption of the "best interests" standard, and which led to the bias in favor of men, despite the supposed neutral objectivity of that legal principle.

In 1981, concerned about the prejudicial manner in which family judges seemed to have defined the framework for determining a child's best interests, the West Virginia Supreme Court enunciated the "primary caretaker" preference in child custody disputes. The court mandated that custody should be awarded to the parent who had been the primary caretaker in the family, so long as such parent was not unfit to continue parenting.

This new legal principle thus imposed a specific duty upon the family courts to evaluate the past caretaking responsibilities incurred by each parent during the time in which the family was intact, and grant a specific preference to those who had carried out those responsibilities in the past. Although the "best interests" standard remained operative, the "primary caretaker" preference was added as an essential factor which did not discriminate on the basis of sex, to be considered in determining those best interests.

In Pennsylvania, the "primary caretaker" preference doctrine has travelled a bumpy road. In 1982, a panel of the Superior Court, in Comonwealth *ex rel.* Jordan v. Jordan, 448 A. 2d 1113 Pa. Super. 1982), similarly adopted this preference as a factor to be considered when evaluating a child's best interests in custody proceedings. Nonetheless, not all courts have followed suit, and, in many cases, the decisions reveal that the "primary caretaker" preference is simply ignored as a factor.

I should note that, in Allegheny County, the Family Division judges, which, not just in my opinion are among the brightest, most respectful, and best judges on the local bench, routinely consider the "primary caretaker" for purposes of determining child custody disputes. Nevertheless, the vast array of cases in which this factor is either ignored or used for distinct ends, makes obvious that, in order to establish uniform application of this more objective method by which to evaluate a child's best interests, legislation would be greatly helpful.

A growing number of states, including Washington (the first), which, by statute, gives the "greatest consideration" in custody disputes to the parent with the strongest relationship to the child, New Jersey, and Minnesota have adopted legislation which requires judges to evaluate this factor when considering a child custody dispute.

I ask that this committee study these, and other similar state statutes, and consider the

implementation of a similar law in Pennsylvania. I believe strongly that such legislation will greatly assist both litigants and judges in making very painful decisions in a responsible manner.

The issue of custody will always be contentious and divisive between the litigants, and it is to alleviate these tensions, for the betterment of the family situations, that Judge Baer has implemented a mandatory mediation system in Allegheny County. I share my hope that such mediation, when accomplished in a respectful and educated manner, will reduce the amount of litigation which presently arises in family disputes. Although I have certain reservations about the effectiveness of mediation, I applaud Judge Baer and the other Family Division judges for their innovation in this regard, inspired by the goal we all share, to help divided families deal with child custody disputes in the most positive ways possible.

Obviously, any time a family dispute can be resolved by frank negotiation and honest compromise, is cause for celebration. Decisions successfully accomplished in this fashion are more likely to be maintained--or modified as needed--without constant bickering and battling. Such decision making, removed from the combative attorneys, will ultimately be far less expensive than litigation before a judge.

Nevertheless, as an advocate for the poor, I am concerned that the costs of mediation are prohibitive for our clients, and for all people who would be financially eligible for our services. Unless waived by the Court, each parent or party in a custody, partial custody, or visitation dispute must pay the $100 mediation fee, the $40 parenting class fee, and $15 for each child age 6 or older, to also attend a session concerning the effects of, and how to cope with, family custody disputes.

I cannot emphasize strongly enough that such fees impose an enormous financial burden

on poor people, who already are overburdened by their poverty, and who, so often, are living on the fringe, unable to afford anything but the bare necessities of life.

Mediation, and the concomitant costs, are required in nearly every type of custody/partial custody/visitation dispute which visits the court. Unless these costs are paid in advance, or specifically waived by a judge, the dispute cannot and will not be permitted to go forward.

In anticipation of the problem of litigants unable to afford these costs, the Family Division judges created a procedure by which poor parties may request a judge to waive the fees. However, this procedure, which, due to NLSA's inability to represent the vast numbers of people who come in contact with this system, must be carried out pro se, by the litigants, themselves, is procedurally complex and, as it turns out, not uniform in effect.

Despite the fact that NLSA clients are able to acquire *in forma pauperis* status automatically, without resort to court order, if an NLSA lawyer files the appropriate papers, such *in forma pauperis* status does not likewise automatically result in a waiver of mediation costs. NLSA lawyers must affirmatively file petitions on behalf of their clients for this purpose, and then seek a court order waiving the fees.

As I stated earlier, NLSA presently handles very few of the sorts of domestic relations cases in which financially-eligible, poor clients often find themselves entangled. However, over the past years, we have established a panel of lawyers willing to take some of the cases we can't, *pro bono*. These lawyers are few and far between, and are frequently unwilling to handle cases if they involve additional time consuming and complicated tasks. Just as with NLSA lawyers, these *pro bono* attorneys are now required to file petitions with the court seeking a waiver of mediation costs, simply to initiate actions, or simply to be able to defend actions filed against these clients.

Furthermore, for all these poor clients, whether or not represented by counsel, the outcome of these petitions is not uniform. The Family Division judges do not automatically waive the costs, even if the client is so poor that they are financially eligible for legal services representation. Sometimes, the judges will require the clients to pay at least a portion of the costs. These amounts vary from judge to judge, and from case to case. Moreover, it is now expected of lawyers to give notice of a request for fee waiver to the opposing side, so a judge can determine whether the opposing party has the financial wherewithal to pay the costs waived on behalf of the other party--even though the moving party has no legal interest in seeking the payment of funds from the other side.

Although I have no specific information concerning the outcomes of these petitions presented by unrepresented indigent parties, I would venture to suggest that the judges may be harsher, and impose greater financial burdens on those who do not have lawyers to advocate for them.

Moreover, the procedures enacted to deal with persons who do not pay the mandatory costs, and those who do not pay them within the deadlines imposed by the courts, are themselves quite harsh. A person who files a custody/partial custody action is prohibited from proceeding with the action until that person's share of the fees are paid, or waived. A person who is sued is then notified that s/he must pay his/her share of the costs by a certain date, or be subject to contempt proceedings, for failure to pay.

I have heard, although admittedly not directly, about at least one instance in which a young, poor woman was unable, and thus, failed to make the payments by the deadline as required. Thereafter, she failed to appear at a hearing scheduled to determine why she failed to do so. Consequently, she was arrested on a Friday afternoon, leaving her minor children without

her for the weekend, until she was permitted to appear in court on the following Monday, in order to explain that she simply did not have the funds available to make the required payments.

With all due respect to the Family Division judges, I believe that they simply did not anticipate the vast numbers of clients who clearly cannot afford to pay the high costs of this program. Although the Judges have required the mediators to take one *pro bono* case for every three paid cases, the Judges are, quite appropriately, concerned that the numbers of waived fee cases will exceed the number of mediators able and willing to handle the *pro bono* cases. The Judges, quite appropriately, are concerned that the program will not generate sufficient funds to pay for the mediators, if too many of these costs are waived.

Nevertheless, the financial constraints of the mediation program cannot and should not be used as a basis for subjecting impoverished domestic relations litigants--even those who are involuntarily before the courts as defendants--to costs which they simply cannot afford to pay.

Several years ago, in Allegheny County, the Family Division started to impose all the costs of home studies and psychological evaluations on each of the litigants in child custody proceedings, even upon those who clearly could not afford to pay them. If a party could not pay, then the judges would not allow the case to proceed. N.L.S.A. was compelled to threaten legal action to terminate this policy, contending that, depriving our indigent clients of their right to access to the courts, by imposing this extreme financial burden upon them as a precondition to such access, was unconstitutional. The Family Division then acknowledged that its policy was problematic, and agreed to waive the costs for all NLSA clients, or all those were income-eligible, but represented by *pro bono* attorneys.

This is the only appropriate solution. Clients who are eligible for free civil legal representation by our agency--whether they are represented by us, as sometimes is the case, or by

a *pro bono* attorney, or even if they are pursuing their own actions *pro se*, should not be financially punished by their clear inability to pay the costs of gaining access to the courts.

The state legislature has already recognized, by its *in forma pauperis* rules, that people who are so poor that they qualify for legal services representation, cannot afford to pay for the costs of such civil litigation, and thus, their obligation to do so is automatically waived. Likewise, the legislature can help these desperately poor people who are now subject to the mandatory mediation procedures, by allowing them an automatic waiver of these very high costs.

Especially if the legislature is interested in expanding mandatory mediation statewide, it must recognize and address the problem of imposing these costs on people who simply cannot afford them, as a precondition to these people's right to obtain relief from the very system created to afford relief. If poor people cannot obtain the help they seek because they cannot afford it, they will have no reason to utilize the procedures which our society has developed to resolve disputes in a civil fashion.

I am certain the Family Division judges of Allegheny County would be delighted if the legislature would allocate funds to pay these costs which my clients, and those whom I cannot represent, cannot afford. But beyond that, this system must provide for a way to allow very poor people to address their domestic relations disputes within the judicial process, without imposing such an unfair, and often impossible, financial burden upon them. Although mandatory mediation may turn out to be a very valuable tool for dealing with domestic relations disputes, it will result in much harm to a part of our population which, perhaps, more than most, have a great need to resolve differences within the judicial process.

Something must be done to ensure that all poor people who come before the Family Courts for relief and help, will have the opportunity to request such help. The legislature, if not

the courts, must establish an automatic waiver of the minimum $140 costs involved in each child custody dispute presently filed in Allegheny County.

As others have said, poor people have so little over which to fight in domestic relations disputes, they go for the kids. If this system is going to work for the kids, in an attempt to find a method to most positively address their best interests, then this system must not intimidate poor people to the extent that they cannot take advantage of the system.