Testimony of Howard M. Goldsmith, Esquire
before House Judiciary Committee's Public Hearing
On House Bill 1723 Pertaining to Presumptive Joint Custody
March 16, 1998 - Harrisburg, Pennsylvania

Good morning. My name is Howard M. Goldsmith. I am an attorney in Philadelphia, practicing family law. I am presently Chair of the Pennsylvania Bar Association Family Law Section, a member of the Supreme Court Domestic Relation Procedural Rules Committee, a fellow in the American Academy of Matrimonial Lawyers and past Chair of the Philadelphia Bar Association Family Law Section. I have also lectured extensively in the area of family law, I am past Chair of the Family Law Section Custody Committee in Philadelphia. I have tried many custody cases representing both men and women. My Curriculum Vitae is attached for your convenience.

I have reviewed House Bill 1723 and discussed it with many of my colleagues. I am opposed to this Bill for many reasons. I will attempt to highlight the most important of those reasons. House Bill 1723 seems to put more of a mandatory requirement on our judiciary to make certain findings. I have found, with the many cases that I have tried in custody, that one area where the judiciary has, for all intent and purposes, done a good job is in the custody area. The courts hold that the best interest of the child standard is the most important criteria in a custody decision. Each custody case is fact sensitive and must be decided on the facts presented to the court. It is very difficult to make a hard and fast rule with reference to determination of custody cases because of this strong fact sensitive nature of each case.

Looking at the Bill specifically, I see that there have been certain changes to Section 5302 titled Definitions. Some of these new definitions I have trouble understanding. For example, the joint custody definition speaks of joint legal and physical custody and the parties' obligation to exchange information concerning the health, education and welfare of the minor child. It then talks about allocated, apportioned or decreed with reference to the parents conferring with one another in the exercise of decision-making rights, responsibilities and authority. In my experience, if the court orders joint legal custody which in the ordinary case the court does order, I think the definition presently in the Statute is quite clear regarding each parent's rights concerning that child. Problems arose years ago

with reference to legal custody in that if one parent was awarded primary physical custody of the child the non-custodial parent would go to a school or educational institution, or to the doctor or to any other health care provider and at times was turned away without the information that was requested because that parent did not have primary physical custody. I think legal custody clarifies and gives the parent the right to get that information, and I have not had any problems with non-custodial parents receiving information they request concerning schooling, medical and other matters that are important to the child's well being. However, these new definitions seem to meld into one another. First, we have joint custody then we have joint legal custody and that has changed somewhat in that there is nothing mentioned about major decisions concerning the child, only decreed

between the parents decision-making rights, responsibility and authority relating to the health, education and welfare of a child. We have to be practical and the practicalities of the matter are that people who are getting divorced, during the divorce and after the divorce are not always cooperative with one another and in many cases the child becomes a pawn. I think one of the biggest problems with this Act is that it presumes that either the parties will be cooperative with each other or that the parties will be forced to be cooperative with each other due to the court's decree. It does not happen. It is not true. What will happen is that both parents have the same rights and, therefore, one parent will take the child to one doctor and the other parent will take the child to another doctor for

the same problem. One parent will get medicine from one doctor, the other parent will get different medicine from another doctor. It becomes a competition. I firmly believe that there must be primary physical custody for one in order that one parent has the primary responsibility for the child. I personally have no preference for the father or the mother, it depends upon the fact situation. However, one parent must have some primary responsibility for the child. I think that it is extremely healthy and important for the child. It is healthy for the child and instills standards and normalcy in the child's life. That is not to say that the other parent should be cut out from the loop of the child's life. For just this reason, the Act presently reads "legal custody" and gives both parents the right to share in major decisions concerning the child. Everyday decisions

should be handled by the parent that has custody of the child at that time. If the primary custodian does not have custody and that child is with the non-primary custodial parent, then that parent will take on the onus of taking the care of the child and making decisions concerning the child's well-being while the child is with that parent. The terms we use now are primary physical custody and partial physical custody. Those terms are quite clear and definitive. I think that it is a mistake, again, to use terms such as joint physical custody and talk about significant periods of time with the child. The definition of shared custody has been changed somewhat by joint physical custody and, again, I think the Act pushes too hard to reach results which are more easily reached by much simpler definitions. Looking at Section

5303, it instructs the court to award joint custody as the norm and the court is not permitted to award anything but joint custody unless it finds that joint custody is not in the best interest of the child. The problem is the court must litigate every case completely in order to make a determination that joint custody should not be awarded. There were some studies back in the 1970's and 1980's, one specifically by Judith Wallerstein, a Ph.D. in Psychology in California, that was accepted all over the country that shared custody was the way to go between parents. So, in the late 1970's and early 1980's the court was recommended to grant shared physical custody. The courts quickly saw that that was <u>not</u> the way to go; it did not work; there were problems in awarding shared physical custody in most of the cases. Judith Wallerstein has now reversed herself. After

studies of the cases that were awarded shared custody, she has now come out and indicated that that is not the norm and that the courts should not award shared custody as a presumption. Shared custody causes too much relocation of the child, and it prevents a parent from relocating even when this would be advantageous to all involved.

I call your attention to the Pennsylvania Family Lawyer, Vol 19 No., an article on Joint Custody: The Pendulum Swings written by Thomas M. Mulroy, Esquire, a family lawyer from Pittsburgh who discusses Wallerstein's prior recommendations for the Court's adopting a shared custody attitude and now her findings that shared custody is not the best way to go.

We have to understand that in cases where shared custody is going to work, the parents live quite close to one another and they cooperate with one another. Many of those cases never reach court because the parents are able to work their differences out without the intervention of court. Once the parents turn to the courts for help in their custody disputes, they are in an adversarial proceeding. I know mediation has been recommended in the custody area and being a member of the Supreme Court Domestic Relations Procedural Rules Committee we have been studying mediation rules. However, mediation only works, again, where both parents are cooperating, you cannot force two people to cooperate, it does not work. Therefore, Section 5303 which requires a rebuttal presumption that an award of joint custody is in the best interest of the child is totally inaccurate.

I do not think that such presumption is valid under any circumstance. What we are saying is that both parents are equal in stature to take care of the child. Each has the same ability, the wherewithall and the desire to take care of the child and that is the only motivation. We have to realize that there is other motivation in obtaining shared custody with the children, and that is support. If there is shared custody, then one parent does not have to pay support to the other parent. To require a court to go through factors in order to decide that shared custody is not what should be awarded does not make much sense. In many cases a parent will ask for shared custody and really will not mean shared custody. That parent wants additional time with the child. So, I am totally against a shared custody presumption.

The Statute goes further and requires a parenting plan to be proposed by the parents. Very few parents are capable of proposing parenting plans that are in the best interest of the child; ordinarily the parenting plans are in the best interest of the parent proposing it. When the courts hear custody cases and listen to psychologists, social workers and counselors testify, the reason that the courts themselves are ultimate determiner of facts is that individuals testifying on behalf of either side are going to testify advantageously to the side that has called them. We also have another point that we must consider; the courts of Philadelphia County and Allegheny County, the two biggest counties, have a tremendous number of cases before them yearly. To require courts to make extensive findings and to require parenting plans in all of these cases would be

a burden that these courts courts could not handle. The courts are already over-burdened with many, many cases and spend most of their time hearing custody and support cases. To require these additional findings and additional requirements would be an unreasonable burden on our judiciary.

I have to disagree with Section 5304.1 concerning joint custody and child support. If, in fact, joint custody means joint legal and physical custody, joint means together and joint means sharing, I don't think there is any choice but to state on the record that there must be an adjustment in the support since there is no non-custodial parent, both parents are custodial, and if the joint custody becomes equal then, by virtue of the fact that joint custody is equal, it

would, in and of itself, constitute a sufficient reduction in the support. The Supreme Court Domestic Relations Procedural Rules Committee has been laboriously working on a formula with reference to this very subject. It certainly is unfair for a parent who has a child fifty percent of the time to have to pay the full support order; by virtue of the definition, if there is joint custody and it is equal there should be an adjustment. I do not understand the reason to include the wording "joint custody shall not be decreed exclusively for the purpose of effecting child support". I know no reason a court would decree joint custody for that particular purpose.

Concerning counseling, we've tackled that subject many times. When I was Chair of the Custody Committee in the Philadelphia Bar Association, I had to go California on business. Judge Edward

Rosenberg who has worked very hard to promote mediation and counseling asked me to go to the courts in Los Angeles and observe their counseling and mediation program. I did so and it was excellent. However, their mediators were Ph.D's who were salaried employees paid $45,000.00 a year back in the 1970's, and who were available during the entire day to discuss with individuals any problems that arose. Also, it is almost impossible to require parents to attend counseling sessions. I do not think it is necessarily a reason to deny custody on the basis that the parent would not go to counseling with the other parent. There are too many cases where each parent now has another life, or they never even were married to start with, and they are not really interested in each other. Their only connection is the child.

Even though they go to these counseling sessions, little value comes of it. I realize some people are happy with counseling and it does a lot for them, and coincidentally probably helps the children; however, I think in most cases the mandatory requirement of counseling is just another burden on the courts - an expensive one. I think to make counseling mandatory is a mistake in that it would cause an undue burden on the court system and financial hardship.

Section 5306 discusses the requirement that after joint custody award is made, the parents submit a parenting plan. Since joint custody is presumptive, I think we are back to the same thing as before. Many parents have no ability to prepare a parenting plan, nor do the courts have sufficient resources for mediation in order to help them to produce a plan. We then require the courts to make a plan if,

in fact, the parents do not. The requirements of a plan are difficult to accomplish. For example, Section 5306(3), the child's personal care and control, including parenting time, holidays, vacations and child care is very difficult. It is often impossible to lay out exactly what vacation you are taking. I do not know how extensive this parenting plan is supposed to be but based on the criteria it seems very comprehensive.

The other interesting issue is the receipt of public welfare, Section 5306(c) gives the court the right to designate one of the parents as a public welfare recipient. I wonder what happens to the other parent if he or she also is in the need of public welfare.

Looking at Section 5309(d), I see no problem with that provision as long as the parent is one who does not abuse the records that they receive. It's not always in the child's best interest to allow a non-custodial parent to receive all records. Many individuals that push these provisions do not realize how many people use provisions like this to antagonize the custodial parent.

In closing, I would just like to say that I truly hope this committee scrutinizes the law as it is and the written materials that are available with reference to joint physical custody. As I have previously said, there are many cases where both parents will attempt to do the same thing for a child with different doctors and with different dentists, and with different schools, and compete with one another while the child is in the middle. It is easy to say that if

that happens the courts can step in and prevent any problems, but the courts, again, are over-loaded and at times cases do not get into court for several months. During that period of time, not only is the child totally torn emotionally, if the child does not get proper care there could be harmful physical and psychological repercussions, and serious social conflicts are going to occur in the child's life, as well. I think that in most cases there should be a primary physical custodial parent and a partial physical custodial parent because the most important person in this matter is the child and the <u>child's best interest</u> should be the only concern of the courts and the legislature.

I respectfully suggest that this proposed legislation should be defeated.

Thank you very much for your time.

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CURRICULUM VITAE

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DATE OF BIRTH:	March 22, 1942
MARITAL STATUS:	Married
CHILDREN:	One
EDUCATION:	Temple University, 1960-61
	Graduate of Rider College, 1965 B.S. in Business and minor in Real Estate and Insurance
	Graduate of Dickinson School of Law, 1968 J.D. Degree
ADMITTED TO PRACTICE:	United States Supreme Court United States Court of Appeals for the Third Circuit United States Court of Appeals for the Federal Circuit United States Court of Claims United States District Court for the Eastern District of Pennsylvania Pennsylvania Courts
MEMBERSHIP IN PROFESSIONAL ASSOCIATIONS:	Fellow of the American Academy of Matrimonial Lawyers American Bar Association Pennsylvania Bar Association Philadelphia Bar Association Family Law Section of the American, Pennsylvania and Philadelphia Bar Associations

American Arbitration Association
American Trial Lawyers Association
Pennsylvania Trial Lawyers Association
Philadelphia Trial Lawyers Association
Member of the Pennsylvania Society
Member of National Admission Procedure Committee of the American Academy of Matrimonial Lawyers
Member of VIP Program, Philadelphia Bar Association

ADVANCED TRAINING:

Received a Certificate of Achievement for successfully completing an advanced training course given by the American Academy of Matrimonial Lawyers on serving as an Arbitrator in Matrimonial Matters.
June 16-19, 1994.

APPOINTED LEGAL POSITIONS:

Appointed by the Supreme Court of Pennsylvania to the Supreme Court Domestic Relations Rules Committee,
Master Pro Tem,
Phila. Court of Common Pleas, Family Division
Member of the Specialization Committee, Pennsylvania Bar Association
Member of the Certification Committee, American Academy of Matrimonial Lawyers
Chair of the Handbook Committee, American Academy of Matrimonial Lawyers
Philadelphia Court of Common Pleas Custody Rules Committee
Philadelphia Court of Common Pleas Divorce Code Review Committee
Philadelphia Court of Common Pleas Support Guidelines Committee
Philadelphia Court of Common Pleas Local Divorce Rules Committee
Co-Chairperson Special Events/Bench Bar Committee - Family Law Section Philadelphia Bar Association 1985
Past Chairman of the Adoption Committee of the Family Law Section of the Philadelphia Bar Association

Member of Commission of Judicial Selection and Retention Committee of the Philadelphia Bar Association, 1987
Member of the Board of Governors of the Philadelphia Bar Association, 1988
Member of the Nominating Committee of the Board of Governors of the Philadelphia Bar Association - 1985

ELECTED LEGAL POSITION:

Chair of Pennsylvania Bar Association Family Law Section, 1997-1998
Treasurer of American Academy of Matrimonial Lawyers, PA Chapter, 1997-1998
Chair Elect of Pennsylvania Bar Association Family Law Section, 1996-1997
First Vice President of Pennsylvania Bar Association Family Law Section, 1995-1996
Second Vice President of Pennsylvania Bar Association Family Law Section, 1994-1995
Secretary of Pennsylvania Bar Association Family Law Section, 1993-1994
Treasurer of Pennsylvania Bar Association Family Law Section, 1992-1993
Member of Council of Pennsylvania Bar Association Family Law Section 1989 to Present
Executive Committee of the Pennsylvania Bar Association, Family Law Section
Past Chair Family Law Section of Philadelphia Bar Association - 1987
Past Treasurer of the Family Law Section of the Philadelphia Bar Association - 1985
Past Secretary of the Family Law Section of the Philadelphia Bar Association - 1984
Past Chair of the Adoption Committee of the Philadelphia Bar Association, Family Law Section

MEMBERSHIP IN CIVIC ORGANIZATIONS:

Member of Board of Directors of the Jewish Community Centers, (formerly the Jewish Ys and Centers of Greater Philadelphia)
Past President of the Jewish Community Center - Klein Branch - 1987 - 1990
Vice-President of the Jewish Community Centers, Klein Branch (formerly the Jewish Ys and Centers of Greater Philadelphia, Klein Branch) 1970-1986

Board of Trustees of the Jewish Community Centers, Klein Branch (formerly the Jewish Ys and Centers of Greater Philadelphia, Klein Branch)
Executive Board of the Board of Trustees of the Jewish Community Centers, Klein Branch (formerly the Jewish Ys and Centers of Greater Philadelphia, Klein Branch)
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LECTURES:

Lecturer in Family Law for Pennsylvania Bar Institute
Lecturer in Family Law for Pennsylvania Bar Association
Lecturer in Family Law for Philadelphia Bar Association
Lecturer - Philadelphia Custody Rules to the Hearing Officers - Philadelphia County
Lecturer - Divorce Master's Training Program - Family Law Section - Philadelphia Bar Association
Lecturer in Family Law - Civic Associations
Lecturer in the VIP program of the Philadelphia Bar Association

MISCELLANEOUS:

Past President of the Philadelphia Metropolitan Alumni of the Dickinson School of Law Alumni Association
Published articles on cases of interest
Who's Who in the East
Recipient of the Richard Pollack Memorial Award - Presented by Bustleton-Somerton Chapter of B'nai B'rith - 1990