STATEMENT OF ALBERT MOMJIAN, ESQUIRE
AT THE FULL HOUSE JUDICIARY COMMITTEE
PUBLIC HEARING HELD IN NORRISTOWN, PENNSYLVANIA
ON MAY 12, 1998 WITH REFERENCE TO HOUSE BILL 1723
(VEON-PRESUMPTIVE SHARED CUSTODY

I would like to express my appreciation to the members of the Committee for allowing me this opportunity to comment on House Bill 1723. Moreover, I commend the Committee for its diligence in proposing new and important custody legislation. Of all of the legal work done by divorce lawyers throughout the Commonwealth, the most important aspect of our practice is the handling of custody disputes between separated or divorcing parents. Moreover, in most divorce matters, economics take a back seat to the importance of the resolution of custody issues between parents. The Commonwealth of Pennsylvania has always promoted, in its legislation and decisional law, the best interests of children and continuing efforts made by the Legislature to improve the state of custody law in Pennsylvania should be applauded.

My public remarks will be limited. I have taken the liberty of attaching to this written statement my additional and specific comments relating to House Bill 1723. These comments reflect my personal views and are intended to communicate to the Committee thoughts that I have on specific provisions of the proposed legislation. I make those comments for the Committee's consideration and with the hope that some of them may assist the Committee and members of its staff in making changes to the proposed legislation which will be helpful.

First, as the Committee knows, the Domestic Relations Committee of the Joint State Government Commission has been working diligently on a total overhaul of current custody law. Many of the issues raised in House Bill 1723 are also covered, in one form or the other, in what the Domestic Relations Committee is considering. I am not sure how the legislative process works and how it should relate, if at all, to the important work being done by the Custody Subcommittee of the Domestic Relations Committee. However, my hope would be that the two groups could get together and collate their ideas so that what finally comes before the legislature is representative of the work product of those sponsoring House Bill 1723 and those lawyers and judges who have been working for several years to shape the overhaul of custody legislation in Pennsylvania. It would be inappropriate, in my respectful opinion, for this Committee to endorse House Bill 1723, in one form or the other, and to have House Bill 1723 become the law of the Commonwealth, only to have the Legislature later consider other proposed legislation intended to make comprehensive changes in Pennsylvania's custody law.

With respect to House Bill 1723 itself, over and above the specific comments which are appended to my written statement, I would like to make the following comments:

1. The proposed legislation defines "joint legal custody" as the state in which parents or parties share decision-making rights relating to "health, education and welfare of a child." I prefer the current definition of legal custody which is the "legal right to make major decisions affecting the best interests of a minor child, including but not limited to medical, religious and educational decisions."

2. On a personal basis, I am not a fan of "presumptions" in family or divorce matters. For that reason, I am somewhat uneasy about the "rebuttable presumption" provided in proposed Section 5303. Nonetheless, to the extent that the Committee wants to favor joint custodial arrangements between parents, perhaps I should become a fan of "rebuttable presumptions" in this area.

3. In the factors set forth for the court's consideration in Section 5303, I note that while the factors are non-exclusive, as they should be, there is no express factor that in appropriate cases, the preference of a child ought to be considered.

4. In the area of counselling and mediation, in the APA guidelines for child custody evaluations in divorce proceedings, Guideline 7 makes it clear that the professional should avoid "multiple relationships". There are ethical considerations which the Committee should consider that may place qualified professionals in a position of compromise inconsistent with their own ethical requirements.

5. While counselling under Section 5305 is a good thing, the mandate of "requiring" parents to attend counselling sessions can present a practical nightmare in terms of costs, time and delay. I don't know what the solution is on an issue as difficult as this one but call to the attention of the Committee how expensive divorce proceedings currently are and the payment of qualified counsellors is going to be a problem in many cases which divorce lawyers handle and where there is hardly enough money for the litigants themselves, let alone for mandatory counselling.

6. I support the concept of parenting plans to be submitted to judges who may make decisions in custody cases. This is a good way of making parents focus in on exactly what it is that they want for their child.

7. Finally, with respect to Section 5310 which deals with the modification of any order for the custody of a child of a marriage or adoption, consideration should be given as well to custody orders dealing with non-parents and unmarried parents.

Again, I am grateful to the Committee for allowing me to appear before it today, however briefly, to express my views on the good objectives being sought by the Committee in proposed House Bill 1723.

Respectfully Submitted,

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COMMENTS WITH RESPECT TO PROPOSED
CUSTODY LEGISLATION -- HOUSE BILL 1723

(1) 1723 revises § 5302 ("Definitions") to state, *inter alia*, that "[a]n award of joint legal and physical custody obligates the parties to exchange information concerning the health, education and welfare of the minor child."

Parties should be under an obligation to share such information whether they have joint *physical* custody or not. Even if they don't have joint *legal* custody, they should share such information unless there is a specific court determination that information should not be shared. That is the present state of the law under 23 Pa.C.S.A. § 5309, and will continue to be the law under the proposed revisions to § 5309. In fact, the proposed revisions to § 5309 make it even more clear that information should be shared unless the court determines otherwise. Therefore, this revision to § 5302 is unnecessary and could be misleading.

(2) Revised § 5302 also states in the section on "joint legal *and* physical custody" (emphasis added) that "unless allocated, apportioned or decreed, the parents or parties shall confer with one another in the exercise of decision-making rights, responsibilities and authority."

Under current law, this requirement to confer with one another is part of joint legal or shared legal custody. However, in the proposed revision, it is stated outside the definition of "joint legal custody." This may be confusing.

(3) The definition of "joint physical custody" in revised § 5302 provides that it is a "state in which the court has entered an order awarding each of the parents significant periods of time [with the child]." It then states that "[j]oint physical custody shall be shared by the parents in such a way as to assure a child of frequent and continuing contact with both parents."

If "joint physical custody" is a state ordered by the court, then the custody shall be shared as directed by the court. Therefore, "frequent and continuing contact with both parents" should be part of what is ordered by the court. Again, the proposed legislation might be drafted more clearly.

Given the definitions of "joint physical custody" and "partial physical custody," and given the fact that "primary physical custody" is not defined although frequently used, it is possible for parents to have joint physical custody with one parent having "primary physical custody" and the other parent having "partial physical custody." The use of "partial" and "primary" physical custody should be clarified. It may be useful to include a category of "equally shared physical custody." If so, how would "equally shared" custody impact on child support decisional law?

(4) § 5303 provides that there shall be a presumption in favor of "joint custody." This apparently means a presumption in favor of joint legal *and* physical custody.

The presumption in favor of joint *legal* custody probably makes sense. My experience has been that there is a de facto presumption in favor of joint legal custody when two parents are the parties in a custody action.

The presumption in favor of joint *physical* custody doesn't seem to mean much given that under the proposed legislation, joint physical custody would simply be a "state in which the court has entered an order awarding each of the parents significant periods of time [with the child]." "[S]ignificant periods of time [with the child]" could mean every other weekend from Friday to Sunday and every Wednesday night for dinner--or even less, depending on a judge's interpretation. There could be considerable battles over the meaning of "significant periods of time." If the intent of the legislation is to have a more specific presumption, or to provide real guidance to courts, the proposed legislation falls short. Even if a presumption of at least every other weekend and Wednesday night for dinner is desired, the legislation is not clear.

(5) Revised § 5303(a.1)(5) states that in making an order for custody, partial custody or visitation the court should consider, *inter alia*, "the ability and intent of each parent to facilitate joint custody access as well as arrange geographic convenience or readily available transportation as this relates to practical considerations of physical parenting."

This provision is difficult to understand. Also, should one of the non-exclusive factors include the preferences of a child, when appropriate?

(6) Revised § 5304.1 states, *inter alia*, that "joint custody shall not by itself diminish or increase the responsibility of each parent to provide for the financial support of the child."

This provision essentially dodges the important issue. The courts have made it fairly clear that anything short of 50-50 shared physical custody does not change the obligation of the parent with less time with the child to provide support. The important question is what happens when physical custody is equally shared. There seems to be a split of authority on this issue, and I believe it is a significant problem in non-*Meltzer* cases. Some courts say that you take what each parent would owe the other if that parent had primary custody and have the parent earning more pay the difference to the other. Other courts say the parent earning more pays half the difference. If both parents have earning capacities, the drop in child support can be dramatic when physical custody goes from 40% to 50%.

(7) Revised § 5305 provides for mandated counseling unless the parties have agreed to a custody award (in which case counseling is discretionary). The provision also mandates that the court consider the recommendations of the counselors prior to making a sole or joint custody award.

I see a few potential problems with this provision. First, there may be cases where counseling is inappropriate. For example, in cases where one parent is in prison or has been found to be a spousal or child abuser.

Second, the provision does not state how many sessions may or shall be mandated. Because the counseling apparently is to occur before a custody decision is rendered, I can foresee a problem if a court mandates unlimited counseling as an alternative to

granting a hearing and rendering a decision (*e.g.*, as might have happened in the Cohen case in Lackawanna County). I don't have a problem with the idea that the counseling can be unlimited after a custody decision is rendered.

Third, as proposed, the court shall consider the recommendations of the counselors before awarding sole or joint physical custody. Essentially, the counselors are going to be cast into the role of evaluators. There is a provision in the American Psychological Association's *Guidelines for Child Custody Evaluation in Divorce Proceedings* that conflicts with the concept of giving counselors dual roles as counselors and evaluators. I have attached a copy of the provision from the *Guidelines*. It may make sense to allow a court to order counseling in which the counselors also serve an evaluative function, but it should not be done lightly. It is possible that some psychologists may object to being cast in dual roles or may raise concerns about their professional ethical obligations. Although psychologists sometimes do participate in court-mandated counseling in which they report to the court, oftentimes the reporting is limited (*i.e.*, limited to whether the client attended sessions).

Fourth, apart from the problem of finding an adequate supply of qualified counselors/evaluators, having a counselor/evaluator in every case may be a financial problem. In Philadelphia, perhaps the majority of litigants are unrepresented. Many litigants are of limited financial means. Who is going to pay for counselors for these litigants? Even in cases where the litigants have more substantial assets and incomes, how should costs be apportioned?

Fifth, there is much literature in psychology that coerced treatment typically has very few benefits.

(8) Revised § 5306 also has a requirement that parties prepare parenting plans for implementation of a custody order, with some detail on what parenting plans should include.

This provision has merit. It appears that these parenting plans are to be submitted after the court has decided that joint custody is appropriate. It may make sense for the parties to submit proposed parenting plans before the court renders its decision.

(9) Revised § 5306 provides that the court may order mediation to assist the parents in producing parenting plans. Also, if the parents fail to submit an agreed-to parenting plan, the court is to consult with the mediator before producing the plan.

First, how does this work in conjunction with the court-ordered counseling? Is it in addition to the court-ordered counseling?

Second, is the mediator to be a lawyer or mental health professional, or can the mediator be either?

Third, all of the same concerns apply to court-ordered mediation as apply to court-ordered counseling in paragraph (7) above.

Fourth, the provision that the court shall consult with the mediator is inconsistent with the recently enacted mediation privilege statute. It also is inconsistent with what I understand are the rules propounded by most mediation organizations. I believe, although I may be wrong, that mediation is supposed to be kept separate and apart from litigation and only agreements are to be submitted to the court.

(10) Revised § 5306 also includes a provision that orders should be specific enough regarding responsibility for physical control to allow enforcement by law enforcement authorities (§ 5306(b)) and a provision allowing the court to designate a parent as a public welfare recipient (§ 5306(c)).

I don't see a problem with these provisions from the perspective of a family lawyer.

(11) Revised § 5309(a) expands the scope of the information to which each parent should have access by stating that each parent shall have access to "any other information that the other parent has or has access to."

This may or may not be overbroad. One parent could use this provision to harass the other parent for minute details of life in the other parent's household; then again, each parent should have schedules for extracurricular activities and other information that would be covered by this catch-all provision. I suppose that the information provided should at least be limited to "any other information concerning the health, education and welfare of the child which the other parent has or to which the other parent has access."

(12) Revised § 5309(d) apparently is designed to strengthen the clear implication of § 5309 that both parents shall have access to a child's records unless the court orders otherwise.

I think the revised § 5309(d) simply emphasizes what was previously implied by § 5309 and certainly is acceptable as revised.

(13) Revised § 5310 clarifies that it applies to orders for custody of the child of an adoption not just of a marriage.

The revision doesn't state that it applies to orders for custody when the parents are unmarried or where the parties are not parents. I think it should simply apply to any order for custody.

(14) Revised § 5310 also adds a statement that orders may be modified to orders for sole custody as well as to shared custody.

"Shared custody" was removed from the definitions section (§ 5302). Because that is the case, revised § 5310 should remove the reference to shared custody. I think the revised provision should simply say "may be modified at any time."

(15) Revised § 5310 also adds that orders may be modified "to reflect changes in circumstances which make the prior custody order insufficient or ineffective."

It can be argued that by virtue of this provision, orders may *only* be modified when there are "changes in circumstances which make the prior order insufficient or ineffective." Thus, the party seeking modification must first prove a change in circumstances that renders the current order insufficient or ineffective. This is a substantial change to current

law, which does not require a party to prove a change in circumstances. Such a change may or may not be desirable. Practically speaking, most courts would not want to modify an order without some evidence of a change in circumstances and a problem with the current order.

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May 12, 1998

Guidelines for Child Custody Evaluations in Divorce Proceedings

7. The psychologist avoids multiple relationships. Psychologists generally avoid conducting a child custody evaluation in a case in which the psychologist served in a therapeutic role for the child or his or her immediate family or has had other involvement that may compromise the psychologist's objectivity. This should not, however, preclude the psychologist from testifying in the case as a fact witness concerning treatment of the child. In addition, during the course of a child custody evaluation, a psychologist does not accept any of the involved participants in the evaluation as a therapy client. Therapeutic contact with the child or involved participants following a child custody evaluation is undertaken with caution.

A psychologist asked to testify regarding a therapy client who is involved in a child custody case is aware of the limitations and possible biases inherent in such a role and the possible impact on the ongoing therapeutic relationship. Although the court may require the psychologist to testify as a fact witness regarding factual information he or she became aware of in a professional relationship with a client, that psychologist should generally decline the role of an expert witness who gives a professional opinion regarding custody and visitation issues (see Ethical Standard 7.03) unless so ordered by the court.