Testimony on Proposed Amendment to House Bill 2267

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Thank you for the opportunity to speak about the proposed amendment to House Bill 2267.

If enacted, this amendment would place Pennsylvania within a growing group of states that have authorized their courts to order the payment of child support obligations out of a deceased obligor's estate. Generally speaking, the jurisdictions that have given this authority to their courts may be broken down into two groups: 1) a group, probably the larger of the two, whose courts have found that a generally worded support statute implicitly confers on the courts the authority to order post-mortem child support, and 2) a group of states that has enacted legislation specifically authorizing their courts to make such orders. Any jurisdiction that permits such orders has changed the common law rule that, with some variation, prevails in Pennsylvania.

The traditional common law rule was that the duty to pay child support ended on the death of the obligor. At one time, there were good and valid reasons for this rule. At the time that the rule evolved, fathers were invariably given custody of their children. The rule regarding post-mortem child support arose from the presumption that a father who had physical custody of a child would both provide for the child during his lifetime and

would also form a close enough bond with the child that he would make provision for the child in his will. No thought was given to getting support from the mother because everyone "knew" that women were unable to provide financial support.

Over the centuries, the theoretical underpinnings of the rule have eroded. Fathers are no longer invariably awarded custody of their children. Mothers have an equal obligation to support their children. Because the rationale behind the rule has largely disappeared, many states have abandoned the rule.

Pennsylvania apparently retains the common law rule, although there are few recent court decisions that reaffirm the rule. In fact, no Pennsylvania appellate court appears to have directly addressed this issue since 1959. In 1959, the Pennsylvania Supreme Court noted that "a father, in the absence of a contract, has no legal obligation to support his children after his death . . . ." In re Fessman's Estate, 126 A.2d 676 (Pa. 1959). The court also held, however, that the general rule against post-mortem support did not apply if the parents had contracted to provide such support. So the rule in Pennsylvania appears to be that a parent's estate is under no obligation to support a child after the parent's death, but that the obligation may be undertaken by agreement of the parties.

As noted above, the situation is different in other states. In a majority of states, courts have held that they are empowered to order post-mortem support unless a statute specifically forbids such orders. These courts have reached this result on the authority of

statutes that do not specifically permit such awards, but are cast in sufficiently broad terminology to allow this interpretation. Jurisdictions where courts have interpreted a general support statute as authorizing the award of support against the estate of a deceased parent include New Hampshire, Virginia, Wisconsin, and New Jersey. Perhaps the most recent court decision permitting post-mortem support based on a general statute is a 1997 case from Vermont. In Knowles v. Thompson, 697 A.2d 335 (Vt. 1997), the court was faced with a support statute that provided, in part, "the court shall order either or both parents owing a duty of support to a child to pay an amount for the support of the child . . . ." The court found that such a general grant of authority sufficed to permit an award of post-mortem support.

It is conceivable that the present Pennsylvania support statute, 23 Pa. C.S. sec. 4321, could be interpreted to permit awards of post-mortem child support. The relevant language of the statute simply states that "[p]arents are liable for the support of their children who are unemancipated and 18 years of age or younger." That language is sufficiently broad that many state courts would construe it to permit post-mortem child support awards.

It is unlikely, however, the Pennsylvania courts would construe the statute to permit such awards. Pennsylvania courts have traditionally been reluctant to find new support duties where "no legal duty has been imposed by our legislature." Blue v. Blue, 616 A.2d 62 (Pa. 1992). While broad language might accomplish the desired result in other

jurisdictions, it is unlikely to do so in Pennsylvania.

In addition to the states that have construed broad grants of authority as empowering their courts to award post-mortem support, some states have enacted specific statutory authorization for such awards. At least six (6) states have adopted the Uniform Marriage and Divorce Act's provision in this regard. The Uniform Act, in section 316(c) provides that "[u]nless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child [are not terminated] by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump sum payment, to the extent just and appropriate in the circumstances." This provision has been enacted either verbatim or in substantially similar language in Arizona, Colorado, Illinois, Minnesota, Missouri, Montana and Washington. The section was at one time the law in Kentucky but has since been repealed. In addition to those states adopting the Uniform Marriage and Divorce Act, at least one other jurisdiction, Indiana, has enacted legislation specifically providing that child support obligations do not terminate on the death of the child. California also has a statute allowing such orders, but only in cases where the child would otherwise receive public assistance or is institutionalized.

The policies in support of this amendment outweigh countervailing policies.

First, this amendment is consistent with the purpose of child support: to provide for children's needs during their minority or until they are emancipated. See Susan L. Thomas, Annotation, Death of Obligor Parent as Affecting Decree for Support of Child," 14 A.L.R.

5th 557 (1994). Those needs are unaffected by the death of the obligor. This amendment recognizes that the duration of the support should be correlated with children's minority rather than with the obligor's death.

The interests of the child should be paramount. Hornung v. Estate of Lagerquist, 473 P.2d 541 (Mont. 1970). During their minority, children depend on their parents to provide them with food, clothing, shelter and medical care; parents have a duty to meet those needs. In the event of family dissolution, a non-custodial parent's obligation to meet those needs continues through child support payments. Because the death of that obligor parent does not extinguish the child's needs, child support payments should be paid from the obligor's estate.

A second policy favoring this amendment is an interest in the child not becoming dependent on the state. This dependence may arise if child support payments terminate upon the obligor's death and the surviving parent depended on those support payments to provide for the child's needs. Without those support payments, that parent may have to turn to the state for assistance. The continuation of child support from the obligor's estate would eliminate this financial reliance on the state.

A countervailing policy consideration may be concern about whether the continuation of child support after the obligor's death will deprive children of other assets from the obligor's estate. For example, the concern is whether the continued payment of support

from the estate might affect intervivos transfer of properties to the child or preclude the child from being named as a beneficiary on a life insurance policy.

The language of the amendment addresses this concern. The amendment provides that the amount of the child support payment will "be in reasonable proportion to the extent necessary for support of minor and unemancipated children in accordance with the amount available from the assets of the estate." Therefore, the court retains the discretion to reduce child support payments if the obligor's estate is compensating the child through other mechanisms.

A third and final policy consideration is the current structure of debtor/creditor relations after the debtor's death and its relevance to child support payments after the obligor's death. Currently, laws permit general creditors to enforce the payment of continuing obligations against the deceased debtor's estate. Similarly, the children of deceased obligors should enjoy at least the same right as creditors to continue to receive child support. Riley v. Riley, 131 So.2d 491 (Fla. App. 1961). Arguably, children have an even stronger interest than disinterested third-party creditors because of the family ties to the obligor-parent and children's dependence on that parent for necessities. This analogy to debtor/creditor relations also addresses the concern that a person should not lose the power of testamentary disposition. The argument is that the obligor would lose that power by being required to continue to pay child support after death. However, since the obligor has lost that power to third-party creditors, there is no reason that he should retain

that power over his children. In such situations, the welfare of the children should take precedence over the power of testatmentary disposition.

The proposed statute clearly promotes beneficial ends. However, there are some issues with the language of the proposed legislation that should be considered.

An initial issue centers on the equal protection requirement of the Pennsylvania Constitution. Courts in other jurisdictions have expressed concerns that awards of post-mortem support place children of non-intact families in a better financial position than children of intact families. These courts reach this conclusion because the parent in an intact family may legally disinherit a child while statutory provisions of the sort under consideration here effectively prohibit a parent in a non-intact family from doing the same. This argument is facially appealing and should be given particular deference given the Pennsylvania Supreme Court's decision in Curtis v. Kline, 666 A.2d 265 (Pa. 1995). However, the equal protection argument may be less compelling than it initially appears because of the right of a spouse in an intact marriage to elect to take against a will.

In an intact family situation, it is true that a parent may always disinherit a child. A parent may not, however, disinherit a spouse, because a surviving spouse always has a right to take against a will and thereby receive a share of the deceased spouse's estate. In addition, a surviving spouse will also have a legal obligation to support the minor children of the marriage. Thus, while it is true that a parent may disinherit children, part of the

deceased parent's estate will always be available for the children because of the surviving spouse's right to take against the will coupled with the duty to support the children.

In a non-intact family situation, the parents may disinherit not only the children, but also each other. A former spouse has no right to take against a will. Thus, without this legislation, children in non-intact homes are at a disadvantage because there is no guarantee that they will receive anything at all upon the death of a parent. Rather than giving these children rights that children of intact families do not enjoy, the proposed legislation simply corrects an existing imbalance.

One unresolved issue with the language of the proposed legislation is that it does not clearly state whether the law only applies in cases where there is a pre-existing child support order. The proposed statute states that "the obligation of an estate to pay child support shall continue." It is unclear whether the use of the word "continue" in this context indicates the need for a pre-existing child support order. Grammatically, the word "continue" modifies "obligation", and an obligation to support one's children may or may not arise out of a court order. The proposed language would permit interpretation of the statute to allow a court to order child support payment from the estate of a deceased parent when there is no pre-existing child support order.

If the goal of the legislation is to impose liability on the estate only in cases where there is a pre-existing order of child support, then language such as that employed by the Uniform

Marriage Dissolution Act might be appropriate. That Act provides: "Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are [not] terminated by the death of a parent . . .." Uniform Marriage and Dissolution Act, §316(c). This language makes clear that a support order must exist during the life of a parent before a court can impose any obligation on the estate of that parent.

As drafted, the proposed legislation limits the liability of estates to children who are both minors and unemancipated. This limitation creates a potential difference between the liability of the estate and the liability of a living parent. At present, parents of unemancipated adult children may be liable for support payments if the child remains unemancipated because of a physical or mental condition that arose before the child became an adult. Crawford v. Crawford, 633 A.2d 155 (Pa. Super. 1993). This rule prevails in a number of other jurisdictions as well as Pennsylvania. By limiting the estate's liability to children who are both unemancipated and minors, the legislation could create a situation where an adult child will receive support only until the death of the parent.

One difficulty in this area is that many adult unemancipated children receive SSI benefits. Support payments from a non-custodial spouse may not affect these SSI payments because the support payments are made in small periodic amounts. A large lump-sum payment from the estate of a deceased parent could potentially jeopardize the continued receipt of such public benefits. Presently, many attorneys place inheritances that could jeopardize the receipt of public benefits into special needs trusts. Assets placed in special

needs trusts do not disqualify the beneficiaries of the trusts from continuing to receive SSI benefits. Lang v. Commonwealth, Department of Public Welfare, 528 A.2d 1335 (Pa. 1991); 42 U.S.C. § 1396(p). If this legislation were to be redrafted to permit adult, unemancipated children to claim against the estate of a deceased parent, perhaps the courts could also be given the authority to create special needs trusts to shelter the income. Such a provision would give the children of non-intact homes the same protection enjoyed by children of intact families.

One final unanswered question concerning the proposed legislation is the effect of a deceased parent's will. Many parents from non-intact families will make provisions for their children in their will. The proposed legislation gives no guidance to the courts in dealing with such situations. It may very well be best to simply give this discretion to the courts. However, another possible resolution would be to create a statutory presumption that the parent's provision for the child, as contained in a will, meets the requirements of the statute.

Despite these concerns about some of the language of the proposed amendment, we support the principles and policies behind it.