Frederick Cohen, Esq.
1617 J.F.K. Blvd.
Philadelphia, PA 19103

TESTIMONY FOR MARCH 13, 1998
BEFORE THE HOUSE JUDICIARY COMMITTEE

Good morning. I thank you for the invitation and the opportunity to address this Committee. I come here this morning with a long and varied history and background in the Domestic Relations area. After I was admitted to practice in 1961, I gradually began focusing upon the matrimonial field as a specialization and have since worked in numerous capacities. I was the Chair of the Philadelphia Bar Association Divorce Committee in 1980, the year that the new Divorce Code was enacted. In 1981, then Chief Justice O'Brien appointed me, together with 33 other members to a newly established Domestic Relations Committee of the Supreme Court. Since that time, I have served as the Chair of the Pennsylvania Bar Association Family Law Section, as a member of the Board of Directors of DRAP (Domestic Relations Association of Pennsylvania); as an officer of the Pennsylvania Joint Family Law Council, and as President of the Family Law Doris Jonas Freed Chapter of the American Inns of Court. I am a fellow of the American Academy of Matrimonial Lawyers and a fellow of the International Academy of Matrimonial Lawyers. I now serve as a Support Master or Support Conference Officer for the Montgomery County Court of Common Pleas and I am Of Counsel to the Philadelphia law firm of Obermayer Rebmann Maxwell & Hippel. I am a member of the Advisory Committee on Domestic Relations Law to the Joint State Government Commission, which is a bicameral group enjoying the support of both the Pennsylvania Senate and the House. I emphasize these

organizational affiliations because it must be abundantly clear that any opinions I express today are not necessarily reflective of any of those organizations but rather are my individual ideas, thoughts and opinions, which may or may not be reflective of any of those organizations. And now that I have taken entirely too much of the time to which was allotted to me for my introduction, let me briefly address some points which I believe to be of some significance.

We have come a long way in the field of matrimonial law due, in large measure, to the industry, interest and commitment of our legislators. Today's hearings are an example of that dedication. For all you have done, I say "thank you". The issues that I would like to bring to the table are twofold - but at the same time very much related as both involve achieving economic justice for the dependent spouse. They are as follows:

1. Use of existing agencies in coordination and conjunction with each other - you have in place a Joint State Government Commission which is a united effort of both the Senate and the House and which includes an Advisory Committee on Domestic Relations Law. That group includes representation from the legislature, judges from the appellate courts as well as the trial courts, lawyers from various communities across the state, and representatives of other disciplines. As a member, I can vouch for the hard work and conscientious effort being exerted by that Committee, and I might add, contributed without compensation nor any recognition whatsoever. The singular most important "pitch" that I can make today is to urge the continued use of this Committee by the legislature. Perhaps, where feasible, you could call upon them to review proposed legislation. As an example of what could, and did happen without prior review, let me briefly make some references to Act 58 of 1997 (House Bill No. 1412). While I recognize that much of that legislation was necessitated by federal mandate in order to secure IV-D funding, many of the provisions could have benefited by prior review and comment before it was enacted

into law. Section 3701 of that Act dealt with alimony and changed existing law regarding marital misconduct that occurred after separation. The prior statute provided that such post-separation misconduct "shall not" be considered by the court. In the new bill, the "shall not" was deleted and the word "may" was inserted. That was compounded by Section 3702(B) dealing with alimony pendente lite and spousal support which provided that all of the relevant factors set forth pertaining to alimony had to be considered, thereby making the permissive provisions of fault as in alimony consideration into a mandatory provision when it came to alimony pendente lite and spousal support. What a terrible state of affairs. The public outcry was immediate and loud.

In response, Senate Bill 1087 of 1997 was drafted and introduced eliminating both of these unfortunate provisions from Act 58. I am informed that Senate Bill 1087 is speeding through both Houses. It is interesting, however, that we may be left with the dilemma of having those two undesirable provisions remaining effective law for the period from January 1, 1998 until such time as the effective date of Senate Bill 1087.

However, Act 58 contains yet other ill conceived provisions that have yet to rear their heads, but most certainly will. For example, Section 4342(f) reads as follows: "Hearsay exception. For proceedings pursuant to this section, a verified petition, affidavit or document and a document incorporated by reference in any of them which would not be excluded under the hearsay rule if given in person is admissible in evidence if given under oath by a party or a witness." In other words, any document attached to a petition or affidavit is not subject to a hearsay objection even though the preparer is not presented for cross examination. The statement of any witness, any medical report or any self-serving document can now simply be attached to a petition or affidavit and be exempted from a hearsay objection. I must admit, for a practicing lawyer, I am truly bothered by such a statutory provision.

Further, I find it particularly bothersome that we lawyers should be singled out for special punitive provisions in this support statute. Section 4355(2) provides a statutory directive to the Pennsylvania Supreme Court as follows:

> "The Supreme Court shall by general rule provide a procedure for the Court or disciplinary board to deny, suspend or not renew the license of an attorney who owes past due support in a manner comparable to the procedures set forth in this section."

Although the Act contains so many provisions that should have been reconsidered prior to passage, let me conclude by directing your attention to Section 4305(b)(10) which empowers a Domestic Relations Section, ". . . without the need for prior judicial order, . . ." to "issue orders in cases where there is a support arrearage to secure assets to satisfy current support obligation and the arrearage by:

i. Seizing periodic or lump sum payments,

ii. Seizing judgments or settlements,

iii. Attaching and seizing assets had the obligor held in financial institutions,

iv. Attaching public and private retirement funds,

v. Imposing liens on property, and

vi. Directing the sheriff to levy and sell other real or personal property.

In recognition of the horrors that could flow from the grant of such authority to act without judicial hearing, Subchapter D of the Act understandably concludes by stating that the court and the Domestic Relations section shall have immunity and not be subject to civil or criminal liability. I suspect that you can tell just how upset and concerned I am by this legislation.

2. That brings us to the second point in my presentment. Generalizations are indeed dangerous, but I believe that almost all of the claims that are subject to litigation in the Domestic

Relations area are well provided for. Generally, but with some recognized exceptions, I believe the public is pleased with most of the judicial procedures in place to deal with the custody and visitation of children, to deal with the disolution of the marriage and yes, even the division of assets designated as constituting a marital property. The statutory guidelines have gone a long way to provide predictability and fairness in dealing with the support of minor dependent children. So then, where is the bulk of the general public dissatisfaction with the status of Domestic Relations law? Well, from my vantagepoint, it seems that the only thing left is alimony, spousal support and alimony pendente lite for dependent spouses. Much of that dissatisfaction was resolved when the support guidelines were amended to provide that alimony pendente lite is to be treated the same as spousal support. Of course, the guidelines provide that for parties whose combined incomes fall within a certain range, the spousal support or APL payments are to be calculated on the basis of 40% of the difference if there are no children and 30% of the difference if there are children. That leaves us with but two unaddressed problem areas. The first is alimony where there are no directives whatsoever and it being an area where judicial decisions are simply all over the place. There is no predictability and no guidance either from the legislature or from the appellate courts. That is probably the singular most divisive and troubling open issue in the matrimonial law. The other open area involves those cases where spousal support and/or alimony pendente lite are to be calculated and awarded where the respective incomes of the parties are far in excess of the ranges provided by the guidelines. We now find ourselves in a bit of a quandary as to the path to take. Two drastically different approaches have arisen as possible yardsticks to guide the calculation in these areas. On the one hand, there is the Superior Court decision in Terpak v. Terpak, 697 A.2d 1006 (Pa. Super 7/16/97). That Court held that the correct approach would be the application of the guideline formulas of 30% and 40% to APL and spousal support

cases even where the income figures exceeded the guidelines. On the other hand, another panel of the Superior Court in Karp v. Karp decided December 27, 1996 calculated the payor's APL obligation using a combined standard of living and reasonable needs approach. There are those who argue that the provisions in Act 58 requiring consideration of the "factors" enumerated for alimony when confronted with calculating APL, has, in effect, operated as a legislative overruling of the decision in Terpak. Perhaps that is so but I suspect that if such were the effect, it was neither a considered nor an intentional result.

So are we out of the woods with the larger spousal support and APL cases? Unfortunately, no. The Supreme Court's Domestic Relations Procedural Rules Committee has met and issued Recommendation 48, which are their proposed amendments to the Rules of Civil Procedure 1910.16-1 through 1910.16-5 relating to the support guidelines. In their notes, they specifically address the conflict between the Terpak approach and the Carp method. That Committee's conclusion and recommendation is that the Terpak method should prevail and that the absolute percentage approach of Terpak should be applied because they reason that "the formula itself is not inherently unfair because it is used only to establish the presumptably correct amount of spousal support or APL." Lest it be overlooked, this still leaves us with absolutely no guidance either by any appellate court decision or by any legislative directive as to the appropriate approach to calculating ALIMONY. That tremendously important aspect of economic resolution in divorce cases is every bit as up-in-the-air as it ever was.

In conclusion, I would like to once again thank you for the opportunity to express my views.