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COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY, SUBCOMMITTEE ON COURTS

In Re: House Bills 722, 723, & 724

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Stenographic record of hearing held in Hershey
Public Library, Hershey, Pennsylvania,

Tuesday,
April 27, 1999
9:30 a.m.

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HON. DANIEL F. CLARK, SUBCOMMITTEE CHAIRMAN

MEMBERS OF HOUSE OF REPRESENTATIVES

Hon. Timothy F. Hennessey Hon. Joseph Petrarca
Hon. Dennis Leh Hon. Rod Wilt

Also Present:

James G. Mann, Majority Counsel
Beryl Kuhr, Minority Counsel

ANN-MARIE P. SWEENEY
3606 Horsham Drive
Mechanicsburg, PA 17055
717-732-5316

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1 SUBCOMMITTEE CHAIRMAN CLARK: Good morning. My
2 name is Representative Dan Clark. I am the Subcommittee
3 Chairman of the Subcommittee on Courts, and today is the
4 time and place advertised to receive testimony on House
5 Bills No. 722, 723, and 724. The prime sponsors of those
6 bills are Representative Rod Wilt and Representative
7 Dennis Leh, and to start the hearing, I would like them to
8 introduce themselves and give us some opening comments on
9 their introduction of these pieces of legislation.

10 REPRESENTATIVE WILT: Good morning, Mr.
11 Chairman. Thank you, Dan, members of the subcommittee and
12 their staff that are here at the hearing this morning.

13 As the Chairman mentioned, I'm State
14 Representative Rod Wilt of the 17th District, which
15 includes parts of Mercer and Crawford Counties in western
16 Pennsylvania. Before continuing with my remarks, I want
17 to thank the committee and the subcommittee, the Chairman
18 of the Judiciary Committee, Representative Tom Gannon, and
19 their staff for holding hearings on these bills and taking
20 up such a controversial issue in this legislative
21 session. It's my hope that the subcommittee and
22 ultimately the full committee will review the legislation
23 and ultimately report a bill out for a vote on the House
24 floor that balances the best interests of the child and
25 fundamental fairness to persons who have been wrongfully

1 named as the father of a child born during a marriage, and
2 I believe that the bills that we're here to talk about
3 today accomplish these goals.

4 This legislation was originally drafted last
5 session to address the concerns of a constituent of mine,
6 Robert Amrhein, whom you will hear from later in this
7 hearing, and Mr. Amrhein is from Atlantic, Pennsylvania,
8 Crawford County. Shortly after the end of a brief
9 marriage, Mr. Amrhein discovered that the child born
10 during the marriage was simply not his. In subsequent
11 court hearings, the Crawford County Court of Common Pleas
12 Judge Gordon Miller believed that under the circumstances,
13 Mr. Amrhein should not be held responsible for a child
14 that was not his, but he stated that the law would not
15 allow him to release Mr. Amrhein from the child support
16 obligation. In fact, in his own words, Judge Miller
17 stated that he was required to follow the law, quote,
18 "contrary to common sense and strong scientific proof,"
19 end quote. These bills were introduced during the last
20 legislative session, keeping in mind that common sense and
21 accepted scientific methods of determining paternity,
22 among those methods DNA testing.

23 A few months after introducing the bill,
24 Representative Dennis Leh and I began working together on
25 the issue and I found that this is not an isolated issue

1 but there are literally hundreds, perhaps maybe thousands
2 of people in similar circumstances to Mr. Amrhein's and
3 Representative Leh's constituent. Just think about that
4 for a moment. Despite irrefutable scientific evidence
5 that proves the paternity of a child, masses of people
6 have been told they must shoulder responsibility for a
7 child that they did not father.

8 Under the existing common law doctrine, a child
9 born during a marriage is presumed to be the child of the
10 husband and a product of the marriage, regardless of the
11 circumstances. This presumption of paternity can be
12 rebutted only after showing by clear and convincing
13 evidence that: A, the husband did not have access to the
14 to the wife at the time of conception; or B, that the
15 husband was physically incapable of procreation at the
16 time of the conception of the child. And the presumption
17 applies whenever an intact family exists. The court-made
18 law also provides a husband who holds out a child as his
19 own and accepts that child into his home may be forever
20 barred from challenging the paternity of the child.

21 And at this point I believe Representative Leh
22 would like to show the members or give the subcommittee
23 members a brief overview of House Bills No. 722, 723 and
24 724.

25 REPRESENTATIVE LEH: Thank you, Representative

1 Wilt.

2 Mr. Chairman, members of the Subcommittee on
3 Courts and all the people represented here today in the
4 audience, they sort of sound like route numbers, the House
5 Bill numbers. I'm Representative Dennis Leh. I represent
6 the 130th Legislative District, which is in eastern Berks
7 County. The three bills before the subcommittee today are
8 all variations of the same theme. All the bills
9 statutorily repeal the common law doctrine on the
10 presumption of paternity of children born during a
11 marriage and replace this common law doctrine with bright-
12 line rules for the courts to apply. Our legislation
13 expands the means by which a husband or a wife can rebut
14 the presumption of paternity by a showing of either of the
15 following: The wife was engaged in an extramarital affair
16 at the time of conception of the child; or, the husband
17 voluntarily completes a blood test which determines that
18 the husband could not be the father of the child.

19 The bill also creates bright-line rules for when
20 the presumption of paternity of children born during a
21 marriage exists and clearly establishes when a person
22 would be prevented from bringing a challenge to paternity,
23 commonly referred to as an estoppel relief.

24 As you review this legislation and listen to the
25 testimony of the witnesses today, Representative Wilt and

1 I urge you to keep in mind the following declarations
2 enumerated in the bills. These findings and declarations
3 are as follows:

4 --That the overriding public policy of this
5 Commonwealth is that a child born during a marriage shall
6 be presumed to be the issue of the husband.

7 --Marriages which continue to function as family
8 units should not be destroyed by disputes over parentage
9 of children conceived during the marriage.

10 --A third party should not be allowed to attack
11 the integrity of a functioning family unit, and that
12 generally members of that unit should not be allowed to
13 deny their identity as parents.

14 --That the common law rule followed by the
15 Pennsylvania courts is an ancient concept that fails to
16 conform to modern day reality and current scientific
17 methods of determining parentage; and.

18 --That the General Assembly declares that the
19 purpose of this act is to displace common law rule
20 relating to the presumption of paternity for a child born
21 during a marriage and give the courts of this Commonwealth
22 statutory guidance to resolve disputes over paternity for
23 children born during a marriage.

24 Again, Mr. Chairman, I want to thank you for
25 holding these hearings and for the opportunity to address

1 this committee.

2 SUBCOMMITTEE CHAIRMAN CLARK: Thank you.

3 REPRESENTATIVE LEH: If you have any questions,
4 I would be happy to try to answer them.

5 SUBCOMMITTEE CHAIRMAN CLARK: Thank you,
6 Representative Leh, Representative Wilt.

7 The first panel to testify before the
8 subcommittee this morning will be Robert Amrhein, Gerald
9 Miscovich, and Mr. Miscovich's attorney, Neil Hurowitz.

10 Mr. Amrhein.

11 MR. AMRHEIN: Good morning, ladies and
12 gentlemen. My name is Robert Amrhein. I would like to
13 thank you for allowing me to speak about a law that is
14 very unfair to all parties concerned. I have a DNA test
15 proving that 100 percent I am not the biological father of
16 a child. But due to the fact that I was married to the
17 mother at the time of conception, I am required to pay for
18 this child. As you know, the law reads that the husband
19 of the mother is presumed the father of the child.
20 Because of this old law, I am being forced to incur
21 tremendous expense and hardship due to this law.

22 This law requires that I have to pay for someone
23 else's child because I was married to the mother. Why am
24 I made to suffer not only financially but also mentally
25 because my ex-wife had an extramarital affair and she

1 became pregnant with a child? All of our court systems
2 are cracking down on the deadbeat dads. In my case I'm
3 being made to pay for a deadbeat dad's child. It's very
4 upsetting to me that this man has no obligation nor
5 responsibility and is able to live his life normally while
6 I must struggle to make ends meet.

7 Due to the fact that my ex-wife applied for
8 public assistance, they required her to file with the
9 Domestic Relations section of Crawford County. When she
10 filled out her application, she was directed by her intake
11 or caseworker to file for spousal support against myself
12 and child support against the baby's father. When the
13 Domestic Relations hearing officer, David Pickens, heard
14 the case, my ex-wife admitted multiple times in that
15 hearing that she had an extramarital affair and that there
16 was no way I was the father. When asked why she stated
17 this, it was because she had a DNA test proving that the
18 child was not mine. Mr. Pickens found that no spousal
19 support would be granted due to the fact that she had
20 openly admitted in the hearing that she had an affair with
21 another man and that the presumption had been overcome:
22 The child was not the product of a marriage.

23 At that time, the father of the baby was ordered
24 to pay child support. As an added note, this man never
25 denied having sexual relations with my ex-wife in this

1 hearing. The named father of the baby knew of the
2 paternity law and appealed the Domestic Relations ruling
3 to the Court of Common Pleas in Crawford County. A few
4 months later, Judge Gordon Miller presided over this
5 case. Again he heard the facts of the case. First, my
6 ex-wife and I were still legally married at the time of
7 birth, although the marriage was not healthy. Second, she
8 admitted that she had a two-year sexual affair with this
9 man. Third, she's the one that insisted on having the DNA
10 test to determine who the actual father is. Fourth, just
11 like she did in the hearing with Domestic Relations
12 hearing officer, she said that there was no way I was the
13 father of this child, and she had proof of it, although it
14 was never allowed to be entered into evidence. Fifth,
15 there was no intact family unit to protect. And sixth and
16 finally, my ex-wife did indeed want the father to pay for
17 what was his.

18 We all know how this hearing ended up. I am
19 forced to pay for this child and the true father has no
20 obligations, nor as it stands will he ever be held
21 accountable for his actions. Although before ruling in
22 this case Common Pleas Judge Gordon Miller stated, and I
23 quote, "Isn't all of this unfair to the mother and her
24 husband? How do we explain this to the child when readily
25 acceptable scientific evidence proves that a boyfriend of

1 the mother is the father of the child? But the law
2 declares otherwise. Shouldn't the child know who his
3 father is? Shouldn't the real father be held accountable
4 to pay support? Should the mother's husband bear a
5 lasting liability for someone else's child when his wife
6 commits adultery?" Judge Miller also states, "I believe
7 the law cries out for some change, but I cannot change
8 it."

9 This child is the one who will suffer. He will
10 not have a dad to take him fishing or to ball games. He
11 will suffer because a piece of paper says that his mother
12 was married. This keeps him from knowing his true
13 father. He suffers because our courts are saying, if your
14 mom committed adultery, that's okay, her husband will pay
15 for it.

16 The mother of the child, my ex-wife, suffers
17 because she made an error in judgment. She had an
18 extramarital affair with another man and became pregnant.
19 She admitted to this and insisted on having a DNA test to
20 prove who the true father of her son was. My ex-wife
21 wanted to do the right thing and make the true father
22 pay. Why am I made to suffer? Because I happened to be
23 married to the mother at the time of birth. I am made to
24 suffer because I've tried to get on with my life, and
25 because of the financial hardship it's made it very

1 difficult. I have suffered and am still suffering great
2 mental anguish and strain because our courts are not being
3 fair. I was taught by my parents that as long as I tell
4 the truth, the truth would set me free. I am made to
5 suffer because of a piece of paper hindering the truth to
6 be stated. I suffer because my ex-wife was having a
7 sexual affair with another man.

8 You, the citizens of Pennsylvania, also suffer
9 because you were raised to tell the whole truth and
10 nothing but the truth, but in this case the truth is never
11 told. We teach our children to take responsibility for
12 their actions, but what about married adults? We must
13 never discriminate against any person, but here in our
14 courts it's okay to discriminate against me because I was
15 married at the time. You, the great citizens of
16 Pennsylvania, have a court system that says it's okay to
17 have an extramarital affair and you may produce all the
18 children you want to, but the husband of the mother must
19 pay for it.

20 But guess who does not suffer one day? The true
21 father of the child. The true father, the deadbeat dad,
22 he never has to pay a dime. He never has to admit to the
23 truth nor take any responsibility for his actions. DNA
24 testing is used to prove rape, murder, but not paternity
25 of a child born during a marriage, even if the mother

1 confesses to an affair. Why?

2 The mother of the child admitted in having
3 sexual relations with another man at the time of
4 conception. The mother of the child also insisted on
5 having a DNA test done to prove paternity of the child,
6 and I indeed failed this test. But because of the law, I
7 am still made to paid for this child.

8 Let's not forget the child. I believe the
9 rights of the child are completely ignored. The best
10 interests of the child are not considered. No
11 consideration is given for the value of knowing the true
12 father of the child. This child will have no father.
13 What is morally, ethically, and legally proper to the
14 child? That answer must be that the child has the right
15 to know his true father, and he should pay child support
16 for the child.

17 This putative father is taking advantage of the
18 law and the child as well, and society, which has an
19 interest in assigning responsibility where it truly
20 belongs. This child should have at least had the
21 opportunity of knowing his truth father. Even if the
22 wishes of the mother are ignored, she wanted this man to
23 take responsibility for their child, not me. Now, if my
24 ex-wife and I were not married, the Commonwealth of
25 Pennsylvania, along with the Domestic Relations department

1 of Pennsylvania, would demand paternity testing. Why am I
2 different from a man that is not married? Why does a
3 piece of paper keep the truth from being set straight in
4 the courts?

5 What our court system is saying is if you have
6 an adulterous relationship and a child is conceived, the
7 true father will never have to support the child in any
8 manner. So what our courts are saying is adultery is
9 okay. This law is an ancient concept that fails to
10 conform with modern day reality to face facts: wives and
11 husbands do have extramarital affairs. Some of those
12 result in creating a life. What I am asking for is these
13 people be held accountable for their actions.

14 Please reconsider this law in all regards to all
15 parties. Please do not discriminate against someone who
16 is married versus someone who is not married. We're
17 begging you to change the law. Please make people
18 accountable for their actions. Please allow and demand
19 DNA testing when paternity is in question.

20 Thank you for allowing myself to bring this
21 injustice to your attention.

22 SUBCOMMITTEE CHAIRMAN CLARK: Thank you, Mr.
23 Amrhein, for your testimony. And we've had another House
24 member appear. I would like him to introduce himself. I
25 would like to welcome him this morning.

1 REPRESENTATIVE HENNESSEY: Thank you, Mr.
2 Chairman. My name is Tim Hennessey. I'm from Chester
3 County and the southeastern part of the State.

4 SUBCOMMITTEE CHAIRMAN CLARK: Thank you.

5 Mr. Miscovich.

6 MR. MISCOVICH: Well, good morning, and thank
7 you all for the opportunity to share with you today how
8 the presumption of paternity has affected my life and the
9 lives of my family and friends. The current form of this
10 law has caused us all many years of anguish, broken
11 dreams, and frustrations.

12 I'm 36 years old and I've been employed by the
13 same company as a computer programmer for the past 15 years
14 I met my ex-wife Liz during my last year of college.
15 After three years of knowing each other, we were married.
16 Liz secured a very good job as a legal secretary. Eight
17 months into the marriage, Liz informed me that she was
18 pregnant. I was shocked, since we were carefully using
19 birth control. I asked her, "How could this be?" She
20 said that we must have had an accident and that the birth
21 control must have failed. It was only a couple of years
22 later that I did find out that there was indeed an
23 accident, but it wasn't mine.

24 A boy was born in December 1987. In October
25 '89, I experienced another shock. I came home from work

1 one day to find that Liz had completely emptied our house
2 and moved out with the child. I couldn't believe it. She
3 never once told me that she was leaving. She left a note
4 behind saying that she would be filing for divorce. The
5 plan of living happily ever after was quickly coming
6 apart. I convinced Liz to go to marriage counseling
7 sessions, but to no avail. I was crushed. Just one year
8 later, in December, our divorce was final.

9 As part of my divorce, I paid \$300 each month
10 for child support and had normal visitation. In early
11 '91, my life was getting more hopeful and I started a new
12 relationship with my fiancée, Maryann. She was truly an
13 inspiration and motivating force to me.

14 We were engaged Thanksgiving weekend of '91. We
15 very much wanted to have children of our own, and we
16 talked that weekend about the characteristics that our
17 children might have. Maryann, a registered nurse, pointed
18 out that because my eyes are blue, and so are Maryann's,
19 that our children would have blue eyes. This is what's
20 known as Mendel's Law of genetics. Soon after the
21 discussion, Liz brought the child over to my house for a
22 visitation. Maryann bent down to give the boy a hug, and
23 when she stood up she noticed that Liz also had blue eyes,
24 but the child had brown eyes. Maryann knew that this
25 wasn't my child. It was impossible for two blue-eyed

1 parents to make a brown-eyed child.

2 Maryann anguished for three weeks about what to
3 do. She researched Mendel's Law just to be sure. She
4 tried to find other logical explanations, but none could
5 be found. Maryann knew that she had to tell me the truth,
6 but didn't know how. She consulted a child psychologist
7 about the situation. Remember, this should have been a
8 very happy time for us. We were just engaged less than a
9 month.

10 On Christmas Eve '91, Maryann showed me the
11 information about Mendel's Law. I couldn't believe what I
12 was reading. I wasn't sure what to do about the
13 relationship with the child, but I was sure that I
14 couldn't be a father to him. I was a victim and so was
15 the child. It was devastating to realize that Liz
16 fraudulently represented this child to me as being mine.
17 The child was just under four years old. I felt
18 humiliated and betrayed.

19 I wanted to have scientific documentation before
20 approaching Liz. It seemed logical to me that if a woman
21 could use DNA testing to prove that a man was the father,
22 then I would be able to use DNA testing to prove that I
23 was not the father. I also had blood tests to make sure
24 that I was not exposed to the AIDS virus or other sexually
25 transmitted diseases. Everything turned out fine, but why

1 should a faithful and caring husband have to worry about
2 such things? The stress was unbearable. I had many
3 sleepless nights, couldn't eat, suffered from depression,
4 and lost a lot of weight.

5 I had the DNA testing in January, and in March
6 the results came back. Although I had almost three months
7 to get used to the idea, it was still hard to see it in
8 black and white. I was 100 percent excluded as being the
9 father of this child. After some searching, we contacted
10 a lawyer from Philadelphia who took my case. Little did
11 we know that we were all embarking on a seven-year battle
12 that would lead us to the U.S. Supreme Court. While I was
13 waiting for the legal paperwork to be served, we found out
14 that Liz was secretly planning to move to Texas.

15 Because of Liz's choices, true parental bonding
16 never had a real chance to develop. First, she left me
17 when the child was 22 months old, forcing me to become an
18 every-other-weekend father. Second, she lived with two
19 other men between the time she left me and the child was
20 4. Third, her plan to move out of State demonstrated that
21 she did not value any relationship between the child and
22 myself. And lastly, the fragile bond was dealt a final
23 blow when I learned the truth.

24 I told the child in a loving way that I was not
25 his father and I broke off visitation. This was the

1 hardest thing that I ever had to do, but it had to be
2 done. There was no way to sugarcoat the facts. I wanted
3 the child's life to be one based on truth. I also knew
4 how uncomfortable it was to be with the child during the
5 three months while I awaited the DNA results. I couldn't
6 continue my ex-wife's charade any longer.

7 Coincidentally, in preparation for a move, Liz
8 sued me for more support. All these things overlapped,
9 and Liz was served papers in late March 1992. Her
10 reaction wasn't what I expected. She was actually furious
11 at me for finding out the truth. She has never shown any
12 remorse for her infidelity or tried to explain it in any
13 way. It was devastating and humiliating to share this
14 discovery with my friends and family, especially with my
15 parents and grandparents. This was their first
16 grandchild.

17 An agreement was drawn up between my lawyer and
18 Liz's. It basically stated that I wouldn't have any
19 parental rights or responsibilities. Things looked
20 optimistic for a settlement, and Maryann and I planned our
21 wedding date. On three separate occasions the lawyers
22 finalized the documents, but Liz would never sign them.
23 Maryann and I then decided to postpone the wedding until
24 the paternity issue was resolved.

25 The support order was never finalized, and

1 during the summer of 1993, Liz suddenly picked up and
2 moved across the State. In September of 1993, she filed a
3 support action against another man. By May of 1994, the
4 results had come back and he was not the father either.
5 Sometime later she quit her job, went on public
6 assistance, went back to school, and then filed another
7 support action against me. This started a long, drawn out
8 legal battle.

9 In August 1995, I was ordered to pay \$537 a
10 month for a child that wasn't mine, which I didn't accept
11 as mine, and who I hadn't seen in over three years. At
12 the Domestic Relations meeting, I denied paternity and
13 presented the DNA test results, but they were ignored. I
14 walked out totally bewildered as to why I was being held
15 liable. I was already an emotional victim in the
16 situation, but now I was a financial one as well. The
17 State was actually rewarding my ex-wife with support for
18 her adulterous relationship. She had stepped outside our
19 marriage and had chosen to be with another man. Why
20 should I be held responsible? This child was not the
21 result of our marriage, as the presumption implies.

22 We immediately applied for a hearing. Because
23 of the presumption of paternity, the county court refused
24 to acknowledge the DNA test and would not allow a
25 hearing. This is why legislative changes are needed. I

1 was the husband and therefore the father, period. I was
2 in effect given an 11-year sentence concerning a matter
3 that I had no choice in. Is this really justice? Where
4 is the mother's and the biological father's
5 responsibility?

6 We appealed to Superior Court, and once again
7 there was no hearing and no recognition of DNA evidence.
8 During this time I even had a sterility test done.
9 Imagine how Maryann and I felt, hoping that I was sterile
10 in order to overcome the presumption, while at the same
11 time hoping to have children of our own someday.

12 We filed an appeal to the Pennsylvania Supreme
13 Court, and in December of 1998 we received an evenly
14 divided decision. It was a 3 to 3 tie, which meant that
15 the lower court's decision was upheld. We are now
16 applying to the U.S. Supreme Court.

17 I should note that Liz has remarried and gotten
18 on with her life. Why should I incur more of an
19 obligation to provide for her child than the real father?
20 Perhaps the stepfather, whom the child now lives with and
21 who is now married to the mother, should provide the
22 support.

23 I hope you can see from my story how the
24 presumption of paternity has affected me. To this day
25 Maryann and I are still not married, and I've changed my

1 mind about having children. I still suffer from
2 depression. My attitude toward my work has also changed.
3 I hate going to work to make money for a woman that
4 betrayed me and continues to use me. I would rather give
5 the money to a charity. At least I would be making a
6 choice. There are days when the stress is so much that I
7 even feel that life is not worth living. I've become
8 cynical of our justice system. The State is excusing men
9 who impregnate married women from any responsibility by
10 putting the burden on the woman's husband. Accountability
11 and responsibility are being misplaced. It appears to
12 simply be more convenient to make the husband
13 responsible.

14 I stand before you representing not only myself
15 but also other men that are in this situation. Since my
16 plight has been publicized, some of these men have
17 contacted me, and with their permission I have included
18 letters at the back of my testimony. Many of these men
19 just don't have the means to fight this. I've been looked
20 upon to lead this crusade. It's seldom that people have
21 an opportunity to make a difference and correct a wrong.
22 Many of these men share feelings of humiliation and
23 hopelessness, feelings of being taken advantage of. Some
24 of them cannot find a lawyer to take their case. They
25 cannot afford to have a new family while paying for

1 someone else's. While most of the ex-wives are remarried,
2 the men cannot go on with their lives.

3 One man had to move back home in order to afford
4 paying the child support. Another man expressed how
5 difficult it would be to ask a new woman in his life to
6 accept a child that is not his. Yet another man is paying
7 for three children that were born during his marriage. He
8 recently learned that none were his children. His ex-wife
9 remarried the biological father of the two children, yet
10 the ex-husband still has to pay. She has agreed to reduce
11 the support money somewhat, providing he keeps her
12 infidelity a secret; otherwise, she has threatened to go
13 after more support. In the meantime, he's faced to come
14 up with answers to questions, one of which his 7-year-old
15 daughter recently asked. She asked, "Why do I look more
16 like my stepfather than my dad?"

17 It's stories like these that explain why I'm
18 here. I feel a deep sense of responsibility to myself and
19 to others to bring this issue to a fair and just
20 conclusion. The easy decision would have been just to not
21 fight presumption. The path I've chosen has been much
22 more costly. I've incurred over \$60,000 in legal fees and
23 paid about \$40,000 in support. Liz's legal fees have been
24 paid for by the taxpayers.

25 Maryann and I have had many sleepless nights

1 worrying about court proceedings, newspaper interviews, TV
2 appearances, et cetera. Lately, every day involves
3 working on this case. Why do we do it? It is a matter of
4 principle and simple justice. We believe that good people
5 let evil things prevail in this world because they don't
6 stand up and speak out. We're choosing to speak out.

7 Several different issues will certainly come up
8 today, and I would like to share a couple of my thoughts
9 regarding them. The first is in regards to if a man
10 should be estopped from denying paternity. Having a time
11 limit for estoppel defies truth and justice. All the
12 woman simply has to do is live her lie for X amount of
13 time and she's home free. A time limit may actually
14 encourage men to have the testing so that they are not
15 estopped later. How is a man supposed to know he's being
16 deceived? If the man has no idea, he's not going to
17 question it until the truth comes out, and then it will be
18 too late for him. Maybe a time limit for estoppel would
19 be okay if it can be overcome based on fraud, duress, or
20 material mistake of fact or misinformation.

21 No matter what, a law can't make a man act like
22 a father once the truth is known. Forcing a man to
23 continue to pay will only add to the injustice and make
24 the situation one of resentment. A woman can go after a
25 man for support up until the child is 18. Why can't an

1 innocent and unknowing man be relieved of paying support?

2 Public policy should not condone nor reward
3 extramarital affairs by making husbands pay while real
4 fathers get off scot-free. Women should not be given the
5 incentive to engage in this form of reproductive fraud.
6 The husband would be more likely to continue some sort of
7 positive relationship with the child if he wasn't held
8 responsible.

9 You might wonder how accepting a child in this
10 case is any different than adoption or a child conceived
11 through advanced fertility methods. The difference is one
12 of choice. The concept of informed consent is discussed
13 in written testimony provided by Dr. Linda Palmo, a child
14 psychologist. If there's no informed consent, then the
15 relationship is based on fraud and deceit, and the man
16 should be able to challenge paternity anytime, but once he
17 finds out the facts, what I call point of knowledge, there
18 should only be a short time for him to take action.

19 How many of you would like to have such a life
20 choice made for you? Relating the concept of informed
21 consent to the medical field, how would you feel if a
22 medical procedure were performed on yourself or a loved
23 one without anyone being informed? Having informed
24 consent is like having consensual sex versus being raped.

25 My second point was I believe I'm being held

1 responsible out of convenience, and the term "best
2 interest of the child" is being used to justify it.
3 Consider these points: If you randomly sample the general
4 public, I think you'll find that almost every single
5 person would agree that the responsibility should lie with
6 the mother and the man that produced this child. The only
7 people that seem to be against us are the agencies and
8 bureaucracies whose industries thrive on just ending it
9 simply and getting some support somewhere, even if it's
10 misdirected. You may or may not know that there are
11 federally funded incentive programs based on performance
12 measurements involving paternity and support matters. The
13 more the State collects, the more money they can get from
14 these Federal incentive payment pools, as they're called.

15 The State can also qualify for additional
16 funding and grant money to keep these industries going.
17 I've already paid \$40,000 in support, and if this
18 continues until the child is 18, I'll pay another
19 \$45,000. How would any of you like to have to bear such a
20 burden for something that you had no choice in? For every
21 man like myself, my support payments probably make up for
22 three, four, maybe five true deadbeat fathers that they
23 don't even bother or can't pursue. They don't bother to
24 pursue people in jail or on welfare themselves. They know
25 they can't get anything, and that this would affect their

1 numbers. In my case, they have a body paying, and close
2 enough is good enough. Are they really pursuing the best
3 interests of the child, or are they pursuing their own
4 best interests while forsaking justice and truth?

5 My third point is there has to be some recourse
6 to hold these women and biological fathers accountable,
7 and for men like myself to reclaim damages. Maybe we
8 should be allowed to sue the mothers and biological
9 fathers. If she refuses to name the father, then maybe
10 she should have to bear the entire responsibility
11 herself.

12 My fourth point is why did the State lift the
13 presumption in my case, only to come back later and hide
14 behind it? If you remember, my ex-wife did have another
15 man tested. The State was obviously going after another
16 man for support and paternity determination. Once they
17 chose to pursue this man, they admitted that I wasn't the
18 father. Only when that test came back negative on the
19 other man did they invoke the presumption.

20 My fifth point was that these children still
21 have fathers. The mother simply has to do what she should
22 have done from the beginning: go after the true father.
23 The child is actually being denied from knowing his real
24 father. Children of adoptions and situations like mine
25 sometimes spend lifetimes searching for their real

1 fathers. And they certainly would want and need to know
2 their medical histories. This information would be
3 critical for his own well-being, as well as the well-being
4 of his children someday.

5 And my final point, I know this point is a bit
6 absurd, but bear with me. If the State wants to continue
7 to pursue this concept of best interests of the child,
8 maybe we should make divorce, foster parenting, and
9 adoption illegal. It could be argued that these things
10 are not in the child's best interests. Ignoring the
11 scientific facts of my case is just as absurd. We should
12 be basing our decisions on what we have learned from these
13 kinds of situations: that truth and honesty is best.
14 What kind of lesson are we teaching these children by
15 concealing the truth? Ultimately, the truth will come
16 out. And when it does, haven't we just shown the child
17 how to avoid responsibility by assigning it
18 inappropriately?

19 I would like to challenge you to change this
20 terrible presumption of paternity common law. Include in
21 the final version of the law the ability for myself, and
22 all men that are being deprived justice, to admit DNA
23 evidence and other facts to disprove paternity. I look
24 forward to the conclusion of my journey towards justice.

25 Thank you again.

1 SUBCOMMITTEE CHAIRMAN CLARK: And we thank you.
2 Mr. Hurowitz.

3 MR. HUROWITZ: Good morning. My name is Neil
4 Hurowitz, and I have been Mr. Miscovich's lawyer for the
5 past seven years. I want to comment on key facts which
6 will more fully explain why he is seeking to overturn this
7 archaic presumption of paternity. Involved in this case
8 is also the human drama which speaks to the very basis of
9 what constitutes an intact family and what is truly in the
10 best interests of the child.

11 Mr. Miscovich learned through DNA evidence 1 1/2
12 years after his marriage was destroyed that he was not the
13 biological of the 4-year-old child. At that time, he
14 agonized and searched his soul as to how to handle the
15 horrible dilemma that he was dealt through no action of
16 his own. He questioned how he could balance living the
17 ultimate lie of his nonpaternity with that of being a
18 concerned father teaching this child values of truth and
19 responsible behavior, while at the same time knowing that
20 he would be lying to the child if he told the child that
21 he was the father when in fact he was not.

22 Mr. Miscovich further asked himself, "How can I
23 be a participant in perpetrating the lie that was created
24 by my ex-wife through her irresponsible extramarital
25 activities?"

1 The most essential unit of society is the
2 family. What constitutes a family? What is a parent and
3 what intrinsic responsibilities does a parent owe his or
4 her child? These questions are as old as time itself from
5 the days when we left the cave and joined together to form
6 a society, a community of citizens founded together by the
7 mutual needs of survival and eventually by the moral laws
8 for the common good.

9 A family cannot be sustained and maintained if
10 its foundations are built upon the shifting sands of
11 fraud, theft, and deception. Justice may be blindfolded,
12 but she is not short-sighted, stupid, or close-minded. To
13 allow laws concerning paternity which date back to 1569,
14 almost 430 years ago, to continue to set the standards of
15 paternity and paternal responsibility makes as much sense
16 as going to a doctor and learning that you require a CAT
17 scan and microsurgery to maintain and preserve your
18 health, and then telling the doctor, oh no, I must be only
19 treated utilizing the medical gold standard available in
20 1569, so forget even the X-rays and antibiotics, ether, et
21 cetera, bring out your leaches and let's begin.

22 Ridiculous, absurd? Absolutely. But no more so
23 than adhering rigidly to the paternity laws that exist
24 today.

25 Each case must be allowed to be decided on a

1 case-by-case basis so that the presumed father is afforded
2 all his rights guaranteed under the 14th Amendment of our
3 Constitution, and allow all such cases to be heard in a
4 court of law, which hearings were denied Gerald
5 Miscovich.

6 Our judicial system has relied upon DNA results
7 to identify defendants in murder, rape, and other criminal
8 matters. DNA has been used to clearly identify the bones
9 of the Romanov family through the DNA gathered from Prince
10 Philip of England. If the sacred ground of the Tomb of
11 the Unknown Soldier in Washington can be dug up and the
12 remains accurately identified more than 25 years later so
13 that the airman who was buried there can be returned home
14 for a family burial, if convicts sitting on death row
15 having been found guilty by a jury of their peers and
16 sentenced to life or death by a judge can be freed from
17 prison solely on DNA evidence, then it flies in the face
18 of all rational foundations of our society about to enter
19 the 21st century to rely upon the medieval presumptions
20 dating back to the 16th century.

21 At the end of the 20th century, science has
22 advanced to the point of being able to determine with
23 certainty whether a man is the biological father of a
24 child. If it is wrong and against the due process clause
25 of the United States Constitution to allow a paternity

1 determination to be made without considering any evidence,
2 to deprive men such as Gerald Miscovich of a hearing and
3 their substantive rights not to have their property used
4 for the support of another man's biological child is
5 scientifically and morally wrong.

6 Application of the present day presumption
7 without a hearing under the guise of preserving an intact
8 family, and in this case there was no intact family, often
9 results in one man ultimately paying support for another
10 man's child and being subject to incarceration if he fails
11 to pay the support. Such a result denies a man of his
12 property and liberty in the literal sense and clearly is
13 not the intent of the 14th Amendment of the Constitution
14 of the United States.

15 Pennsylvania requires that the father of a child
16 born out of wedlock be positively identified through
17 genetic testing. A mother receiving public assistance is
18 compelled to name the biological father. If she names two
19 men who are precluded as the father, then her welfare
20 benefits are terminated, although the child's benefits
21 continue. However, the same standard in making a positive
22 determination of a father of a child born during wedlock
23 is not applied. Thus, the Commonwealth has unwittingly
24 created two classes of children and two classes of
25 fathers.

1 The creation of two classes of children in
2 support cases, specifically post-high school education
3 costs, has already been addressed in this Commonwealth and
4 has been found to be unconstitutional. Two classes of
5 fathers has been created when DNA testing and other
6 scientific evidence is used in determining paternity of
7 the putative father of a child born out of wedlock, but
8 the same testing and procedures are denied the presumptive
9 father of a child born during the marriage.

10 The unforeseen result of this presumption
11 creates a class of men, who by the very existence of the
12 marriage contract, is precluded from challenging the
13 parentage of children born during the marriage, and yet
14 affords the unmarried man the due process right to defend
15 allegations of fatherhood through genetic testing.

16 Isn't the real concern of the Commonwealth to
17 limit the amount of taxpayer dollars that pay for the
18 support of the Commonwealth's children? In this context,
19 the most expeditious road is to continue to apply the
20 presumption and disregard scientifically proven genetic
21 testing that will positively identify the true father. By
22 the Commonwealth continuing to perpetrate the myth of the
23 presumption of paternity, the Commonwealth has become part
24 of the conspiracy to aid and abet the adulterous mother in
25 her deception and infidelity. In fact, a continuation of

1 the presumption creates two classes of mothers - the
2 welfare mother who stands to lose her personal welfare
3 benefits if she fails to positively identify the child's
4 true father, and a married mother who is rewarded by
5 remaining silent, having no obligation to name the child's
6 biological father.

7 When all of the arguments have been made about
8 what is in the best interest of the child, preventing
9 trauma to the child, not labeling him a bastard, the
10 bottom line in continuing to follow the presumption is
11 that the man married to the mother is the obvious target
12 to pay the child's support. Instead, the real target
13 should be the mother, who should be obligated to name a
14 child's biological father as a prerequisite to any support
15 application. The Commonwealth's procedure awards
16 infidelity of a wife within the marriage and punishes both
17 the presumptive and the putative father by denying them an
18 opportunity to know whether they are the child's
19 biological father. The illogical absurdity of what this
20 presumption has created is that a man in a social
21 situation would better be advised to seek out a married
22 woman to consort with than a single woman, because as the
23 current law stands, should the married woman conceive, he
24 is shielded from any financial responsibility, and there
25 is no procedure compelling her to come forward and

1 identify the true father. But should he foolishly spend
2 the evening with a single woman and she conceives a child,
3 then the full weight of the law falls upon him to undergo
4 genetic testing to disprove that he is the biological
5 father. In summary, procedural due process is afforded to
6 unmarried men in paternity disputes, while the same
7 procedural due process rights are denied a
8 husband-presumed-father in paternity issues arising during
9 a marriage. This is what the law has created.

10 A marital misconduct is a defense to any alimony
11 and spousal support claim under the Divorce Code. What
12 better proof does one have of marital misconduct than
13 genetic testing that proves a wife conceived a child with
14 other man? It is my interpretation, as an experienced
15 practitioner in this field, that the Divorce Code would
16 allow proof of adultery through scientific DNA evidence
17 that a child born during the marriage is not that of the
18 husband. Therefore, a DNA test is admissible to defend a
19 wife's claim for spousal support and alimony. So a blood
20 test that will prove that the husband is not the father of
21 the child is admissible to defend a wife's claim for her
22 support but not to refute her claims for child support.
23 The colossal inconsistencies in how the doctrine of the
24 presumption of legitimacy is applied has tortured and
25 distorted the application of the law. The myth of calling

1 a man a father when it is scientifically proven that he is
2 not must be abolished.

3 In House Bills No. 722, 723, and 724, I am
4 suggesting that third parties must be allowed to challenge
5 the paternity of a child regardless of the impact on the
6 marital unit. As Bernadette Bianchi, a licensed social
7 worker in the Commonwealth of Pennsylvania, employed by
8 Pennsylvania Council of Children's Services, testified on
9 April 12, 1999, before the Senate Judiciary Committee on
10 Senate Bill No. 516, she stated: "The interests of the
11 child, who is actually the center of the controversy,
12 cannot be overlooked in these discussions.

13 "The reactions of those individuals who were
14 allowed to live their childhood, even adolescence and
15 adulthood, believing that the parents who raised them were
16 those who had genetic connections only to discover by
17 accident, in anger or long overdue disclosure, the
18 realities of their biological heritage are clearly
19 documented in adoption related literature."

20 Also, David M. Ellis, an M.D., a Fellow of the
21 American Academy of Child and Adolescent Psychiatry,
22 states that, "Children require a foundation of trust and
23 dependability from their parents. Even though situations
24 may be upsetting temporarily to a child, for a child to
25 find out later in his life that he was lied to by the

1 people he trusted the most can be catastrophic and
2 devastating." He continues, "The long-term results of
3 dependable trust far outweigh the temporary upset that
4 would come when a parent avoids truth in order to spare a
5 child the hurt."

6 At a recent meeting on February 9, 1999, of the
7 Forensic Child Psychiatry Study Group, which is a group of
8 eminent psychiatrists, psychologists, judges and
9 attorneys, the group unanimously voted against the
10 upholding of the presumption of paternity and believe that
11 Mr. Miscovich not be labeled the father when he is not.
12 And I spoke at that meeting, and one of the psychiatrists
13 stood up and said that, I am a scientist as well as a
14 psychiatrist, his name is Donald Rahe, and he stated that,
15 telling the child that a man is his father who is not his
16 father is a scientific law, and if we lied in science we
17 would have no other science, and we cannot tolerate it.
18 He also made another statement that they're studying now
19 that children have sensors, as he called it sensors, and
20 they know after a while who their true parents are. Now,
21 that study is still going on, but it's an interesting
22 concept.

23 I totally agree with and I both support Ms.
24 Bianchi's and Dr. David Ellis's findings and support their
25 views that third parties must have the right also to

1 challenge the paternity and participate in the proceedings
2 to determine the child's parentage.

3 I am further suggesting that the committee
4 consider the following changes in the proposed language of
5 House Bill No. 722. First, all references to "blood test"
6 in the bill should read "DNA tests." There are several
7 types of blood tests, and DNA tests are, without a
8 question, the most scientifically accurate. So while we
9 use the term "blood test" in the past, I would request
10 that that be changed to now read DNA tests, which will
11 conclusively determine that the husband could not be the
12 father of the child.

13 Second, Section 5102.1(b)(4), which states that
14 the husband voluntarily complete a blood test, should now
15 read that the husband and child must complete the DNA
16 testing--just testing the husband will not complete that
17 test--to determine whether or not the husband is the
18 child's biological father. To leave the testing to the
19 discretion of the husband effectively precludes the wife
20 and a third party from challenging the parentage of a
21 child born during a marriage if the husband-presumed-
22 father refuses to submit to the DNA test. Again, as Ms.
23 Bianchi testified, third parties must have the right to
24 challenge the paternity and participate in the proceedings
25 to determine the child's parentage.

1 Until a mother identifies the true biological
2 father, child support will not be awarded. These are some
3 of my further suggestions. All new support filings at
4 which paternity is an issue and filed after the effective
5 date of the act and the presumptive father overcomes the
6 presumption of paternity and has already paid child
7 support, the mother shall be obligated to reimburse that
8 party for all moneys previously paid. Just as the
9 Commonwealth compels the welfare mother to name the
10 biological father, and failing to do so loses her own
11 assistance, this requirement is a further impetus to
12 compel the mother, the married mother, to name the true
13 biological father. In those cases where the parties
14 remain legally married, any application by mother for
15 spousal support, alimony pendente lite--or what we call
16 temporary alimony--shall be denied. In the event the
17 parties are divorced and the former spouse is paying
18 mother alimony, alimony shall be immediately terminated.

19 Next, with regard to Section 5102.1(c), the
20 language regarding the applicability of the presumption is
21 problematic in House Bills No. 722, 723, and 724 as
22 proposed. Restricting the applicability of the
23 presumption to the timing of the child's birth while the
24 husband and wife cohabit further confuses the issue.
25 Take, for example, a child who was born three months after

1 the party's marriage. Obviously, the child was conceived
2 prior to the marriage. It is absurd to conclude that the
3 husband, by virtue of the marriage contract, is deemed to
4 be the child's father merely because the timing of birth
5 occurred during the marriage. What I propose is that the
6 presumption apply only if there is a probability that the
7 child was conceived during the period of marriage and that
8 the husband or wife are cohabiting and engaging in
9 intimate sexual relationships during the time.

10 The doctrine of estoppel set forth in
11 5102.1(d)(1) shall be eliminated. The pursuit of the
12 truth and the child's right to know should not be
13 subordinated to the doctrine of estoppel. There should be
14 no estoppel on the quest for the truth and the child's
15 right to know. There is no time limit in the search for
16 truth. Therefore, estoppel must be abolished. However,
17 if the legislature will require an estoppel provision in
18 any bill that is ultimately passed, then the Commonwealth
19 must order the DNA testing of both the child and the
20 husband who is the presumed father of a child born during
21 the marriage at the time of that child's birth. So I am
22 stating that if, to accentuate the importance of this, if
23 estoppel is accepted by this panel and the House and
24 hopefully the Senate, that DNA testing be ordered at the
25 time of the birth, and then within 60 days of the date of

1 the mother and the presumed father's receipt of the
2 laboratory test results, a party must file a formal
3 paternity challenge, if it's going to be challenged. In
4 this way all parties are put on notice that paternity is
5 at issue within months of the child's birth and all
6 parties will have a reasonable opportunity to timely
7 challenge the father/child relationship.

8 I've just learned, after writing this, that
9 indeed the State of Florida, there are at least nine
10 hospitals which are now requiring DNA testing at the
11 child's birth and has been very successful to ward off
12 child snatching, swapping of babies, misidentification of
13 babies, and also the paternity issue.

14 While this testing necessarily raises issues
15 regarding the cost of conducting these sensitive tests and
16 privacy issues, these concerns can be adequately
17 addressed. For example, consideration should be given to
18 utilizing moneys from State IVD funds, increasing filing
19 fees for support actions, as well as increasing the birth
20 certificate application fees. Just some ideas. There is
21 also the possibility that private insurance may cover all
22 or a portion of the lab fees. Although the privacy issue
23 could not be overlooked, the Commonwealth's overriding
24 concern is not to have the State pay unwillingly for the
25 support of children when the appropriate father can easily

1 be identified and held accountable for the child's
2 financial support.

3 In recognition of the established relationship
4 that may have developed between the presumed father and
5 child, in the event the presumed father is found not to be
6 the child's biological father, I would support the
7 advocacy of a stepfather/child relationship where
8 visitation and ongoing contact continue between the child
9 and this new class of stepfathers. However, I do not
10 believe that the Commonwealth should impose a legal
11 support obligation upon the stepfather. Any financial
12 assistance by the stepfather should be voluntary.

13 There should be an additional provision covering
14 parties such as Gerald Miscovich who were denied a hearing
15 to rebut the Commonwealth presumption of paternity. Any
16 actions for support involving an issue of paternity in
17 which a party was denied a hearing, as was Gerald, upon a
18 common law presumption shall have the right to file a
19 petition to re-open that support proceeding within 60 days
20 of the effective date of the act. Any party who is
21 precluded as the biological father in any such proceeding
22 shall not be entitled to reimbursement for any child
23 support paid through the date of that determination and
24 shall not be entitled to reimbursement for attorneys fees
25 and/or court costs incurred in re-opening the underlying

1 support matter. Again, these suggestions would only apply
2 to men in Gerald Miscovich's position. Further, any child
3 support obligation should be vacated upon a court's final
4 determination that the applicant is not the child's
5 father.

6 As a final thought, the legislature has already
7 enacted the Uniform Act on Blood Tests to determine
8 paternity, which expressly permits the use of blood tests
9 in any case where paternity is a relevant issue, and I
10 cite the source of that act. This act specifically
11 provides that: "Effect on presumption of legitimate
12 situation.--The presumption of a legitimacy of a child
13 born during wedlock is overcome if the court finds that
14 the conclusions of all the experts as disclosed by the
15 evidence based upon the tests show that the husband is not
16 the father of the child."

17 Why is the common law presumption superceding
18 the expressed wording of the statute allowing the
19 admission of scientific evidence to determine paternity?
20 That's not the way the law is supposed to work. Statutes
21 supercede common law, and I'm suggesting that this House
22 of Representatives should conduct a separate study to
23 answer this query.

24 I would further recommend for this committee's
25 study and review the Illinois statute, and I give the

1 citation, permitting the child, the natural mother, or a
2 man presumed to be the father to bring an action to
3 declare the nonexistence of the parent and child
4 relationship.

5 I'm also recommending to the legislators the
6 review and study of an excellent 27-page Dickinson Law
7 Review article entitled, "Challenging the Paternity of
8 Children Born During Wedlock: An Analysis of Pennsylvania
9 Law Regarding the Effects of the Doctrines of Presumption
10 of Legitimacy and Paternity by Estoppel on the
11 Admissibility of Blood Tests to Determine Paternity."
12 This was written in 1996. In this Law Review article, at
13 page 990, the author articulates the dilemma we face:

14 "Whether the Pennsylvania courts or Legislature
15 elect to modify the existing doctrines or eliminate them
16 completely, it is evident that some change is necessary.
17 Until either body act, 'justice' will become an obsolete
18 term to the parties challenging the paternity of a child
19 born during wedlock."

20 I fully concur. I appreciate the opportunity to
21 appear today, present my views to this very, very
22 important proposed legislation. Good day.

23 SUBCOMMITTEE CHAIRMAN CLARK: Representative
24 Wilt has one quick question for you, then we would like
25 Thomas Travers to join your panel and pick up his

1 testimony.

2 Representative Wilt.

3 REPRESENTATIVE WILT: Thank you all for your
4 testimony so far.

5 Attorney Hurowitz, you mentioned on page 9 of
6 your testimony about this concept of having DNA testing at
7 the time of birth when paternity is in question. In your
8 client's case, however, until he was made aware of genetic
9 law as it relates to eye color, he had no idea to even
10 think that paternity was an issue at that point. I want
11 to just clarify for the record what you're after here. Is
12 it simply in those cases where a man may believe he may or
13 may not be the father of the child that DNA testing be
14 done at birth at that point, or are you simply stating
15 that DNA testing be done at birth all the time?

16 MR. HUROWITZ: I am suggesting it be done all
17 the time if the doctrine of estoppel is still accepted by
18 this body. That's my alternative. I believe the doctrine
19 of estoppel is archaic and it just layers on the lies and
20 afflictions that have been existing in this Commonwealth.
21 I mean, obviously, what it says is that in Gerald's case,
22 the child was four years old when he found out. And there
23 are those who would say, well, the doctrine of estoppel
24 should apply because for four years Gerald thought this
25 was his son and the son thought this was the father.

1 Therefore, the myth of even though he's not the father, he
2 is the father, exists. I am saying abolish it and let
3 truth prevail, even if the child is 17 years of age let it
4 prevail, but if this panel and the members of the House
5 decide that they want to maintain this doctrine, then the
6 only way to follow the truth is to order and mandate DNA
7 testing at every birth. The child is tested anyway, blood
8 tests are taken. This is not a painful situation. That's
9 my answer in those cases. Jerry is too late for that.
10 That's why I had a separate suggestion to remedy Jerry,
11 who has fought such a great battle, and men like him.
12 There should be a separate section to allow him to have
13 his hearings.

14 REPRESENTATIVE WILT: Yeah, I think just to be
15 clear that these bills do include up to five years, so
16 when Mr. Miscovich found out within four years, I think he
17 would be -- that scenario would still apply under this
18 law. Provided that your suggestion, and we do want to
19 move on, but provided that your suggestion that he be
20 permitted to go back because he was denied a hearing, go
21 back and open up his case because he was denied that
22 hearing.

23 MR. HUROWITZ: Yes, and with all great respect,
24 and I am pleased that I was asked to come here and express
25 my views, I don't agree with the five years. Five years

1 and one day would throw all those other men out.

2 REPRESENTATIVE WILT: And I appreciate that.
3 Sometimes this is the art of the possible, and we're
4 trying to find out through your testimony and the
5 testimony of others what's possible. So thank you.

6 SUBCOMMITTEE CHAIRMAN CLARK: Thank you.
7 If you gentlemen could make room for Mr.
8 Travers, we'll have him join you.

9 And we've had another member of the House attend
10 our hearing. Would you introduce yourself.

11 REPRESENTATIVE PETRARCA: Thank you, Mr.
12 Chairman. Joe Petrarca from Westmoreland County.

13 SUBCOMMITTEE CHAIRMAN CLARK: And while Mr.
14 Travers gets seated, Mr. Hurowitz walked off. I was going
15 to say, I don't want to put words in your mouth, but is it
16 safe to say that you feel in the best interest of a child
17 to know their true biological father as soon as possible?

18 MR. HUROWITZ: Without a question, in all my
19 research and searching my own soul, talking to
20 psychiatrists, reading documents, just recently, as an
21 illustration--

22 SUBCOMMITTEE CHAIRMAN CLARK: Okay, well, that's
23 why you're suggesting have a paternity test as soon as the
24 child is born because it's in the best interest of the
25 child to know its true biological father as soon as

1 possible, and that's as soon as possible?

2 MR. HUROWITZ: That's my position, yes.

3 SUBCOMMITTEE CHAIRMAN CLARK: Thank you.

4 Thomas Travers has joined your panel and he will
5 now present his testimony to us, and you may slip off
6 there.

7 MR. HUROWITZ: Thank you very much.

8 MR. TRAVERS: Thanks for having me here today.
9 I would like to tell my story and how I've been affected
10 by the current law that's been in place.

11 I was married in May of 1996. In April of 1997,
12 my wife left me for another man. It was a difficult
13 period. Shortly after, I began to move on with my life.
14 In January of 1998, she had a child which she said was
15 mine. I knew it couldn't be. In March of 1998, I had a
16 DNA paternity test performed in which I was excluded as
17 the father of this child with the probability of 100
18 percent. Later on that year in October, I had a divorce
19 hearing and was granted a divorce on the grounds of
20 adultery.

21 One thing to keep in mind, to this day I have
22 never seen the child, made any attempt to see the child.

23 In April of 1998, I appeared in Domestic
24 Relations for spousal and child support hearing. I was
25 informed by the Domestic Relations office that they were

1 representing the interests of the Department of Welfare.
2 At this hearing I presented to the master my DNA results.
3 He dismissed the spousal support and ordered my ex-wife to
4 name the child's father, which she did, and also file a
5 complaint against him, which she did. Both the master and
6 the Domestic Relations worker explained to me at that time
7 that I would have to appear in court when the other man's
8 case was called and at that point my case would be
9 dismissed. They apologized to me but assured me that a
10 support order wasn't going to be entered.

11 In October of 1998, I was summoned again to
12 appear for what I believed was to have my case dismissed.
13 At that hearing a Department of Welfare attorney called
14 the case against the other man who was named, read his DNA
15 results, which were negative, and dismissed his case.
16 About a half hour later she called my case. She argued
17 that the DNA was irrelevant and an order must be entered
18 against me, based on the assumption of paternity.

19 I was never told of the other man's results or
20 the Department of Welfare's intentions to come back after
21 me. I requested and received a continuance. In December
22 of 1998 I hired a new attorney who presented evidence of
23 past cases that allowed DNA results into evidence. The
24 master ruled in my favor. The Department of Welfare and
25 my ex-wife demanded a new trial in front of a judge,

1 although they made no arguments, presented no evidence at
2 this current trial.

3 Legally, that's where I am at today. I am
4 awaiting a trial date. Although there's been no child
5 support entered against me, it's been a real hollow
6 victory for me. I've spent nearly \$10,000 fighting this,
7 and I still have a very costly trial in the very near
8 future. My ex-wife, of course, has been provided by free
9 legal representation by the Department of Welfare. The
10 thing that scares me is that they're always going to be
11 able to outspend me. And from what I'm hearing, it's just
12 a matter of time before they find a court that's going to
13 rule in their favor. They have twisted and manipulated
14 manipulated a 400-year-old law to their benefit and the
15 benefit of their client. Both the Department of Welfare
16 and my ex-wife have known since March of 1998 that this is
17 not my child, and they have known all along that there is
18 no intact family to try to protect. Without any changes
19 in the current law, I'm not real optimistic about my
20 chances. Sooner or later I'm going to be in the boat that
21 these other gentlemen are.

22 One point I would like to get across is there's
23 more at stake to me than just a wage attachment. I still
24 have goals of remarrying one day and starting a family of
25 my own. I have no children. I would like to raise a

1 family of my own. I'm not a very young man or very
2 wealth. I bring home a little over \$400 a week. If the
3 Department of Welfare and my ex-wife are successful using
4 the current law, a couple of things are going to happen,
5 and I'm probably never going to be able to financially
6 support a family of my own. And the second thing is that
7 the child that's in question, my ex wife's child, is going
8 to be denied ever being able to know who his father is.

9 I've heard a lot of different discussion about
10 the best interests of the child, and in reality when I was
11 going through this process in the courts where these
12 determinations are made, that never seems to be an issue,
13 the child's psychological state or how this is going to
14 impact upon a child, it's all about the wage attachment.
15 I don't understand, I mean, the child can't speak. What I
16 don't understand is who has decided that \$200 a month or
17 \$300 a month or \$527 a month is more important and is in
18 the better interest of that child than knowing who its
19 father is? Somebody has decided, and I don't know where
20 that was decided, but I don't understand it.

21 All these people have testified how they're
22 concerned for the child, whether it be family court
23 attorneys, the Department of Welfare, the day is going to
24 come, if they're successful and I'm declared the father of
25 this child and responsible, the day is going to come 15

1 years from now, or maybe 20 years from now, this child is
2 going to come to me saying, you're my father, and I'm
3 going to pull out the DNA results and say, no, I'm not.
4 And I know what question is going to come from that child
5 next: Well, who is my father? There's not going to be a
6 family court lawyer there to answer that question. The
7 Department of Welfare isn't going to be there to answer
8 that question, nor Domestic Relations. It's going to be
9 me, and I'm not going to have an answer for it. And I
10 think it's my opinion that this best interest of the child
11 is being used. There is a lot of folks with their own
12 agenda. If I were a family court lawyer, I don't think
13 I'd want this law real simple and clear cut, because
14 that's going to be the end of very complicated and very
15 simple paternity and child support cases.

16 Like I said, it's my hope that the law is
17 changed and it will benefit me. But again, I don't think
18 this is an issue of my rights versus this child's rights.
19 The child can't speak right now, I can. But if I'm named
20 the father of this child by the courts and held
21 responsible, the child is a victim too. It's just going
22 to be 15 or 20 years before it can speak out. Thank you.

23 SUBCOMMITTEE CHAIRMAN CLARK: Thank you very
24 much, Mr. Travers.

25 MR. TRAVERS: That's Travers, E-R-S.

1 REPRESENTATIVE WILT: We apologize. We were
2 taking it off of the Senate committee agenda.

3 MR. TRAVERS: And I gave it to them over the
4 telephone.

5 SUBCOMMITTEE CHAIRMAN CLARK: It's nice to see
6 the Senate is not infallible.

7 MR. HUROWITZ: May I make a statement, a very
8 short statement?

9 SUBCOMMITTEE CHAIRMAN CLARK: Sure.

10 MR. HUROWITZ: I didn't clarify that the reasons
11 for taking the DNA tests at the time of birth is to avoid
12 the bonding issue, which we didn't have enough time to get
13 into today, which is part of what Mr. Travers is talking
14 about, this best interests of the child, so you learn
15 before the child can speak and before the child really
16 takes on any kind of bonding situation. That's a key
17 issue as to why the consideration for the DNA tests at the
18 time of birth should be held.

19 SUBCOMMITTEE CHAIRMAN CLARK: Any questions of
20 this panel?

21 Representative Wilt.

22 REPRESENTATIVE WILT: Thank you, Mr. Chairman.
23 I would like to clarify something that Mr. Amrhein said in
24 his testimony, and that is that his wife readily admitted
25 in court that he was not the father of the child, and

1 could you perhaps explain for the members here, Mr.
2 Amrhein, how that scenario played out and what Judge
3 Gordon Miller ruled as a result of that?

4 MR. AMRHEIN: After the Domestic Relations
5 hearing where the other man was ordered to pay child
6 support, he appealed to Common Pleas court. My case was
7 drawn by Judge Gordon Miller of Crawford County. While
8 under oath on the witness stand, my wife admitted in open
9 court to having a two-year affair with this man. For the
10 past two years, she had an ongoing sexual relationship
11 with the other man. When the trial was over, and Gordon
12 Miller read his verdict, he had said to me that I agree
13 with you, you should not have to pay child support, but
14 the law says there are only three ways to overcome the
15 presumption, as Representative Wilt alluded to in the
16 beginning, that is nonaccess, impotency, and sterility.
17 They were the only three presumptions that are now
18 acceptable in a court of law. Even though my wife
19 admitted to, and she is the one that demanded to have the
20 paternity tests done, it still was inadmissible and Judge
21 Miller said right there in the courtroom, I agree with
22 you, but the law says that I have to find this way.

23 Now, if one of your Common Pleas court judges is
24 telling you, sir, you're right, but I cannot rule in your
25 favor because, A, my decision is going to be overturned by

1 Superior Court; and B, the law says I have to rule this
2 way even though you're right, it just defeats all logic.
3 How can you be right and still lose?

4 REPRESENTATIVE WILT: Thank you, Mr. Amrhein. I
5 appreciate it.

6 REPRESENTATIVE LEH: Just a comment in response
7 to Attorney Hurowitz's statements about DNA testing
8 mandated at birth. I guess the only concern I have, and
9 believe me, it's few and far between times that I find
10 myself sharing some of the concerns that the ACLU has, but
11 the ACLU has expressed some concerns that this might be
12 giving government too much power, collecting some sorts of
13 data banks and making information known to whatever party
14 may seek to have that information, whether it's the
15 government itself, whether it's insurance companies, and I
16 only state this, I agree with where you want to go and
17 what you're trying to do with that, and I'm more or less
18 torn between really what might be in the long-term best
19 interests of everybody, and I kind of agree with you that
20 I think probably estoppel should be abolished rather than
21 mandating DNA tests, which at this point I'm not really
22 sure how we can protect, that is DNA testing does result
23 in taking people's property somewhat, and I guess I do
24 share some concern about really how we protect that.

25 MR. HUROWITZ: And I think that's a very

1 insightful concern. But as I understand it, there can be
2 a one-dimension to that DNA testing where no other
3 information has to be gleaned from that. And I know
4 you're probably aware that England has been holding these
5 banks of information on suspected criminals and convicted
6 criminals as low a crime as shoplifting, not that that's
7 not serious, all the way up to murder and everything else,
8 terrorism and everything you can imagine, and they have
9 solved thousands and thousands of crimes because of this
10 bank on DNA testing. And the one side is they're only
11 interested in the identification process, not the other
12 concepts of family heritage as to medical problems and
13 longevity and insurance problems, and I think with careful
14 supervision and docketing and watching it, it can be
15 done. But I would triply emphasize that I'm in favor, as
16 you have stated, with abolishing the myth of estoppel.

17 REPRESENTATIVE LEH: I just always have become
18 concerned, and I've seen it before in my time up here,
19 that we tend to solve one problem, realizing later on that
20 we've created a far larger one.

21 That's all, Mr. Chairman, thank you.

22 SUBCOMMITTEE CHAIRMAN CLARK: Representative
23 Hennessey.

24 REPRESENTATIVE HENNESSEY: Thank you, Mr.
25 Chairman.

1 Attorney Hurowitz, would you apply the same
2 standard in a situation where a child was 16 and
3 essentially had 2 more years of looking to entitlement for
4 child support and where a 16-year bond had been created
5 with the husband and the putative father, and in a
6 different situation where a child was just born and the
7 infidelity was just discovered? I guess what I'm
8 searching for is when does the bond that's created over
9 the years between a father or the presumed father of the
10 child outweigh the harm to a man for paying support for a
11 child which is not his biologically?

12 MR. HUROWITZ: That's one of your threshold
13 questions, and it's a very powerful question you've
14 asked. I can answer it in two ways. Yes, I do believe
15 even if that child is age 16 and there probably was
16 bonding, but I'm going to say that, because I question
17 this whole concept of bonding, however, I point to a very
18 interesting disclosure that was made several weeks ago on
19 public TV when Bobby Darren, the great singer, "Mac the
20 Knife," and a lot of us are still young enough to
21 remember--

22 REPRESENTATIVE HENNESSEY: I'm old enough to
23 remember that.

24 MR. HUROWITZ: He died in his late 30s or early
25 40s on the top of the charts, and his son was on national

1 television, I think his name is Todd Darren, an adult
2 himself, who said that he believed the most important
3 reason that his father died, the most important factor
4 that caused his death was when he learned later in life
5 that his sister was really his mother, and his mother who
6 he thought was his mother was really his grandmother. And
7 when he found that out later on in life, he didn't give
8 what age, but we seem to believe it was his 30s, he could
9 not accept it, and as the son said, it destroyed my
10 father. And even though he had rheumatic fever as a child
11 and that may have been the final cause of his death, he
12 personally believed it was that revelation.

13 Now, there have been all types of articles about
14 adults who have found out who the real parents were and
15 had a grave impact on their lives. Yes, it is much harder
16 when someone is 16. I raised it to the Supreme Court of
17 Pennsylvania, I question when we were discussing bonding,
18 you're not bonded just because the child is born or just
19 because you spent a few years. We have to go into a
20 hearing as to what is bonding. For instance, is it
21 bonding when a man returns every night in a drunken state
22 and beats his wife and maybe beats his son, has that son
23 really bonded with the father? I don't think anyone would
24 say that there is a bonding. That's another reason why I
25 believe hearings must be held.

1 So your question of course, when you have a 16-
2 year-old, it is so much harder than a 2-year-old or a 5-
3 year-old, but if we're going to pursue the truth and what
4 is in the best interests of this individual entirely in
5 his long run, not just the immediate shielding of it, we
6 must tell him the truth.

7 REPRESENTATIVE HENNESSEY: Until such time as
8 the law would be changed to allow or require DNA testing
9 in every case upon the birth of a child, would a prudent
10 person then, would a prudent husband always simply not pay
11 support or force some kind of problem in the marriage that
12 his wife has to sue for support so that he could then
13 demand testing under the statute and find out whether or
14 not he's the father? I mean, don't we at some point have
15 to meet that question that a father who has perhaps no
16 reason to suspect infidelity at all says, well, the
17 quickest way to get this decided is I'm going to either
18 move out or I'll simply just stop paying support, and then
19 DNA testing will be ordered by the courts and we'll find
20 out whether I'm the father, I think that I probably am,
21 but I sure would like to have that confirmation.

22 MR. HUROWITZ: That's another great question. I
23 don't personally believe that most men, and I have no
24 statistical survey to answer it, who have loved the child,
25 the child is 14, 15, whatever age, just because he's

1 getting a divorce from the mother would challenge whether
2 he's the father. Yes, some men do.

3 REPRESENTATIVE HENNESSEY: Okay, that really
4 wasn't my question. I'm saying in every case upon every
5 birth until we have a law that requires DNA testing in
6 every case, would a prudent man say, I don't know whether
7 this is my child, I have no reason to suspect infidelity,
8 but let me get DNA testing now because, my God, if I don't
9 I could be forestalled later on, or some different
10 standards might be applied to me when the child is 15.

11 MR. HUROWITZ: I don't believe that would
12 happen. First of all, we have similarities in facial
13 features. In many cases the child looks like one, the
14 other, or both. Sometimes we don't have that, by the
15 way. In Mr. Miscovich's case, he did not have that. But
16 the child looked a lot like the mother. So would I think
17 that would happen? No, I do not. Could it happen? I
18 think there would be some lap over that that could
19 happen. Look, there are men out there now that have used
20 their children as pawns, their natural children, just to
21 get back at their wives, and vice versa.

22 So as has been stated, I think Representative
23 Wilt said it, we do create problems. Representative Leh,
24 whatever, one of the Representatives did say we do present
25 problems when we pass legislation when we have courts come

1 down with decisions, but we want to appeal to the majority
2 of people as much as possible. So there would be some of
3 that, yes, but I think a small minority.

4 REPRESENTATIVE HENNESSEY: Okay. One final
5 question. I don't know whether or not you've provided the
6 panel, this panel, and the committee copies of the briefs
7 that you've filed in the Superior and Supreme Courts, but
8 it might be helpful to be able to look at this issue not
9 just from one side but from your side and also the
10 mother's side, so we see what issues and how they're
11 defined as the case was presented to those two courts.
12 Could you provide those to us?

13 MR. HUROWITZ: Are you requesting both sides or
14 just Mr. Miscovich's side?

15 REPRESENTATIVE HENNESSEY: No, I think both
16 sides, if you could get those for us.

17 MR. HUROWITZ: How many copies would you like?

18 REPRESENTATIVE HENNESSEY: Well, if you just get
19 us one copy, we'll get other copies made.

20 MR. HUROWITZ: I would be happy to do that. I
21 need a few days and I'll supply that.

22 REPRESENTATIVE HENNESSEY: Okay, thank you very
23 much.

24 Thank you, Mr. Chairman.

25 REPRESENTATIVE WILT: Mr. Chairman, before we

1 dismiss the panel, I would just like to say in front of
2 them that as this issue was raised last Session and gained
3 momentum with the inclusion of Representative Leh's coming
4 on and us working together on a bill, that I've gotten
5 letters from judges from three or four different counties
6 saying how difficult a situation they are in having to
7 deny the facts in a case and having to render a decision
8 otherwise, and I think we're here today as evidence that
9 there is a movement towards bringing this issue to some
10 sort of conclusion legislatively to give the courts and
11 the judges who serve on those courts the opportunity to
12 rule based on truth and not on a different presumption,
13 whether that's bonding, best interests of the child, who
14 has the deepest pockets, or whatever.

15 So I thank you all for being here. I think
16 you're here in front of the legislative branch of
17 government, but I know that the judicial branch of
18 government is also looking for some resolution to this
19 challenge, so I want to thank all of you and I appreciate,
20 and I can tell from the look in your eyes as you gave your
21 testimony that it's not the easiest thing in the world to
22 do, and I thank you for sharing your stories with us.

23 SUBCOMMITTEE CHAIRMAN CLARK: I thank you all
24 very much.

25 Now the committee will take a 5-minute break

1 before we hear from our next individual to testify, and
2 that's Robert W. Gutendorf, and he is from GeneScreen,
3 Inc. He is an Associate Lab Director.

4 (Whereupon, the proceedings were recessed at
5 11:10 a.m., and reconvened at 11:20 a.m.)

6 SUBCOMMITTEE CHAIRMAN CLARK: We're ready to
7 hear testimony from Robert Gutendorf, who is the Associate
8 Lab Director with GeneScreen. You may proceed.

9 MR. GUTENDORF: My name is Bob Gutendorf. I'm
10 Associate Laboratory Director of GeneScreen. I've been in
11 that position since really 1982, been involved in genetic
12 testing as it relates to paternity evaluation since 1976.
13 I've been involved from a standpoint of paternity testing
14 as it evaluates whether or not an individual is the father
15 or not of a particular child, I've been involved in other
16 types of genetic testing as it relates to transplantation
17 work. I have, as part of my credentials, been assigned or
18 appointed as an inspector for the American Association of
19 Blood Banks, which is the major accrediting body for
20 genetic testing laboratories that are involved in
21 paternity analysis. As an inspector for that body, I go
22 to paternity testing laboratories, inspect them to see if
23 they comply with procedures and protocols that are going
24 to make for basically a good test.

25 Going to these variety of laboratories certainly

1 has given me an overall view of the different techniques
2 of DNA technologies available for DNA testing for
3 paternity, and I guess because of that I'm here to testify
4 as an expert witness. My company, the one I'm employed
5 by, which is GeneScreen, I am from the Dayton facility,
6 has additional facilities in Dallas and Sacramento,
7 California. As a laboratory, we are one of the largest
8 performing testing in the United States and perform in
9 excess of 75,000 paternity tests on an annual basis. So
10 as I proceed, certainly I'd like to make it informal so
11 that if the panel does have any questions as we're
12 talking, please feel free to interrupt me and clarify any
13 point that you may have a need to clarify, and we'll
14 proceed from there.

15 Starting by what is DNA testing, DNA testing
16 stands for deoxyribonucleic acid. As a little historical
17 point, testing prior to, oh, 1978, 1979 in the United
18 States could only be used as exclusionary evidence. So
19 the testing that was available was basically red cell
20 testing, which is blood typing. Some red cell enzymes,
21 serum proteins, and in early 1970s tissue typing, or HLA
22 typing, became available. Up until I stated, late '70s,
23 this testing could only be used as exclusionary evidence.
24 With the advent and more common utilization of the tissue
25 typing, or HLA typing, we then had the ability to more

1 easily discriminate between individuals, and the courts
2 recognized that this could be actually used to not only
3 exclude falsely accused men but also to include them in a
4 high probability that that individual, having the
5 necessary genetic information, could father the child.

6 As we proceed further down a technology
7 pipeline, we've evolved into DNA testing, much more
8 powerful, has the ability to exclude in excess of 99
9 percent of falsely accused men, and in those situations in
10 which an alleged father is not excluded, we come up with
11 probabilities of paternity in excess of 99 percent on a
12 basically, that's all you get, it's either greater than 99
13 percent or zero percent alleged fathers excluded.

14 So DNA is deoxyribonucleic acid. It's the
15 genetic material of which we are all composed. So that we
16 have DNA that is common to all of us that codes for
17 genetic information, tell us to have two ears, a nose,
18 blue eyes, brown eyes, and that genetic information, in
19 conjunction with DNA that doesn't have a nonfunction, is
20 utilized to identify individuals.

21 One of the things that I gave in my testimony as
22 an example was car models, okay? We can look at a
23 specific manufacturer - General Motors, Ford, Chrysler -
24 we can look at a specific color of car, we can look at
25 accessories of that particular model, engine size, whether

1 or not it has a CD or sun roof. Each one of these car
2 characteristics specifies a more and more precise
3 identification of that automobile. The same can be said
4 with regards to DNA typing. DNA typing goes through a
5 series of genetic marker analysis, each one more and more
6 specifying the identity of an individual.

7 One of the things that I noticed when I came in
8 here this morning is that, you know, most of the men in
9 the room are wearing suits, you know some of them are
10 gray, some of them are blue, but you know, the broad term
11 is, one, we're men and we're all wearing suits. Well,
12 then you look at some of the men, they have different
13 colored shirts on. Some of them may be button down, some
14 of them may not. But then you notice, getting more
15 specific about each of the men in the room, everybody has
16 on a different tie. So this is an identifying
17 characteristic for the men in this room that would specify
18 a more specific individual or identity of that particular
19 individual.

20 So when we talk about DNA testing, we're doing
21 the same thing. We get to the situation where we can
22 collect a sample from an individual, and we can collect it
23 by a variety of different fashions. Certainly we
24 discussed or it was discussed in the hearing today that
25 blood tests could be utilized, and certainly blood is a

1 source of DNA material, but it's more commonly performed
2 using what's referred to as a buccal swab. Basically,
3 it's a foam type swab (showing) that we utilize that is
4 noninvasive. You're taking cheek cells from the inside of
5 the cheek (demonstrating), and that allows us to do DNA
6 testing in a very specific way to determine parentage on
7 an individual. The samples can also be done from deceased
8 individuals, they can be done from blood spots. If you're
9 talking about crime scenes, that is also certainly a
10 source of DNA material.

11 When a DNA test is performed, each and every
12 time it starts with an identity process from a chain of
13 custody standpoint, so that you're going to take pictures
14 of these individuals, these individuals are going to have
15 to normally show up with some type of photo ID so they can
16 have positive identification on the parties involved. You
17 are going to take information with regards to names, dates
18 of births, Social Security numbers. You're going to take
19 a photograph so that there are certainly times when an
20 individual may come in, they may have a photo ID, you take
21 a photograph of them at the time that the samples are
22 collected, it may not be that individual that the mother
23 has claimed to be the father of the child. So that is
24 certainly criteria for having positive identification of
25 these parties, which is probably a good reason if genetic

1 testing is going to be done in a marriage situation, that
2 there be some established chain of custody so that, you
3 know, the father isn't taking in someone that may
4 actually not be related to him just to get out of paying
5 child support. There are certainly some internal controls
6 there with regards to actually having common alleles that
7 you would expect if they are related, but if they're not
8 related and it's just pulling someone off the street and
9 you're just testing the alleged father or the alleged
10 father and the child or the husband and the child,
11 certainly that child can be excluded without the proper
12 identity procedures being followed in a test procedure.

13 The variability of the DNA, and certainly DNA is
14 utilized because it is the most powerful of the tests, the
15 variability comes from the fact that there are different
16 fragment sizes of DNA or different alleles between
17 individuals. We certainly inherit these characteristics
18 from our parents, and we talked about, or it was talked
19 about earlier in the hearing about Mendelian genetics, and
20 basically what is occurring, and this is just a single
21 chromosome that is being utilized for representation, is
22 that you have a mother, the mother will make eggs, and
23 into each of her eggs will go one-half of her genetic
24 material. As humans, we have 23 pairs of chromosomes, so
25 that we would have 23 single chromosomes going into each

1 of the mother's eggs, the same thing for the father. The
2 father would donated genetic information, half into each
3 of his sperm. Of course, when the egg of the mother and
4 the sperm of the father unite, we've created a child in
5 which half the genetic information comes from the child --
6 or I'm sorry, to the child from the mother. The remaining
7 genetic information in the child must come from the
8 biological father (indicating on overhead projector). The
9 basis of any analysis in paternity testing is the
10 question, does this genetic information that's in the
11 child that had to come from the biological father present
12 in the alleged father? And that alleged father could be
13 certainly the husband, it could be certainly someone that
14 is outside of the marriage situation.

15 If we were to look at an analysis and just a
16 routine analysis and what it would look like in the
17 laboratory situation is that this particular slide, and
18 it's the one that you have in your testimony handout,
19 shows inclusionary evidence and exclusionary evidence.
20 We're looking at two alleged fathers. DNA results in
21 pieces of DNA, either a DNA fragment or a DNA allele which
22 is inherited genetically from one generation to the next.
23 So in a paternity inclusion we have a DNA fragment that
24 the mother and child share in common. We then have the
25 remaining DNA in the child that must come from the

1 biological father. In this particular case alleged father
2 number one has that genetic information.

3 Exclusionary evidence in that type of situation
4 which is depicted looking at alleged father number two, we
5 have the same mother and child pair. Mother and child
6 share the top DNA allele. The remaining allele in the
7 child, this bottom fragment, has to come from the
8 biological father. Well, as you can see, there's nothing
9 that matches up with this particular child, so this
10 alleged father would be excluded.

11 Now when we look at genetic systems, we're
12 certainly looking at more than just one genetic system,
13 and there are different types of DNA tests available. If
14 you're looking at some of the more powerful DNA tests
15 referred to as RFLP, or Restriction Fragment Like
16 Polymorphisms, you may be looking at three or four
17 different genetic systems. If an exclusion occurs, you
18 have to have exclusionary evidence found in at least two
19 different systems. The systems have to be independently
20 inherited, which means that they're on different
21 chromosomes. If you're talking about inclusionary
22 evidence, you're talking about probabilities of paternity
23 in excess of 99 percent. If you're talking about other
24 types of DNA, more commonly referred to as PCR based
25 testing, PCR is a technology that amplifies the DNA that's

1 present. That DNA looks at short tandem repeats, or STRs,
2 little pieces of DNA that have DNA repetitive units, in
3 different system number of repeat units differ in the size
4 and the migration of a DNA fragment within a nigerose gel,
5 and we certainly won't necessarily belabor that particular
6 point.

7 When we talk about the timeframe for a report to
8 be issued from the time that the sample would be collected
9 and arrive in a laboratory to the time that a report is
10 issued, we're normally talking two to three weeks.
11 Samples are routinely collected noninvasively using these
12 swabs, and most laboratories doing genetic testing are
13 utilizing swabs, so that I would say 98 percent of the
14 testing is by some type of swab, whether it be cotton,
15 dacryon, or foam. The cost of the testing again ranges
16 from private cases, which would be \$600 per trio, trio
17 being alleged father, mother, and child. Certainly at the
18 county or State level, and certainly we do testing for a
19 variety of counties certainly some here in Pennsylvania
20 that we've done either historically or presently, costs
21 range anywhere from \$150 to \$300 per trio. And again,
22 that's based on volume, volume discounts, other cost
23 factors that may be involved, may be more costly to do a
24 county in a remote area as opposed to one that is more
25 accessible to someone that is going to collect the

1 samples.

2 I guess one of the things that I would like to
3 show you which may help you in the decision, or at least
4 give you some insight into the issue today, is regarding
5 surnames. This is an old study that we did back in '87.
6 It was one in which we looked at 1,084 cases consecutive,
7 and what we looked at is what is the exclusion rate for
8 these various trios based on the name, either the surname
9 or the first name? Now, this first group, and of course
10 after it was completed then we analyzed the data to see if
11 it was statistically significant. And when we say
12 statistically significant, we want to show that the data
13 is not due to chance alone. So that there's something
14 going on here. This first group was tested, there were 94
15 trios, there were 39 exclusions, and we had an exclusion
16 rate of 41.5 percent. And these individuals were all with
17 the same surname, which would be indicative of a married
18 situation in which a divorce proceeding or rocky marriage
19 is going on and they're having testing.

20 Group number two is where the alleged father and
21 the child have the same surname. There were 74 cases,
22 number of exclusions were 29. Again, a situation where
23 the mother has for some reason given the child the last
24 name of the alleged father.

25 Group three is the situation where the child's

1 first name and first name only was the same as the alleged
2 father or some variation. For example. If it's a boy,
3 although the father's name is John, the mother names the
4 boy John. If it's a girl, might name the boy Johnetta.
5 We did 55 of those cases, we had 8 exclusions. An
6 exclusion rate of 14 1/2 percent.

7 All have different surnames, and the fifth group
8 was the mother and child only have the same surname, as
9 you can see that is the bulk of the testing, which would
10 be the most common situation where you're dealing with
11 paternity testing of an alleged father not married to the
12 mother, a mother and child. Of course the key down here,
13 "AF" equals "alleged father," "M" equals "mother," and
14 "C" equals "child."

15 After statistical analysis was done, it was
16 shown that groups number one and number two were
17 statistically significant in the fact that they had higher
18 exclusion rates than what would be expected, the normal
19 exclusion rate to be, and group number three had lower
20 than expected exclusion rates. In 1987, most of this
21 testing was by red cell and HLA testing, and our exclusion
22 rate was only around 27 percent. DNA, and when we say an
23 exclusion rate of 27 percent, that means 27 percent of all
24 the men that we tested in the laboratory would be
25 excluded. Today with DNA, which is a much more powerful

1 test, your exclusion rate is actually higher, it's around
2 30 or 31 percent, sometimes 32 percent. So you are
3 routinely excluding 32 percent of the men that come in for
4 testing indicate that they were falsely accused. Applying
5 the same type of I guess extrapolation, we would expect
6 that these divorce cases also have higher rates of
7 exclusion because you're able to identify more falsely
8 accused men or falsely presumed husbands than you were in
9 1987.

10 So these two groups, group one and group two,
11 sort of give importance to the fact that we have a
12 situation in which we have higher exclusion rates in those
13 individuals that are having a rocky marriage.

14 So with that, I will open to any questions that
15 you may have. You know, we can exclude alleged fathers.
16 We have two men, it's no problem sorting them out. Yes.

17 MR. MANN: Thank you, Mr. Chairman.

18 Mr. Gutendorf, there's an old saying that goes,
19 even if you're one in a million, there are a thousand
20 people in China just like you. The question I'm trying to
21 get to is, if we exclude fathers, are we going to include
22 to what degree of certainty? I looked through your
23 testimony and we didn't say, say, 1 in a million, 1 in 10
24 million. Is there a number you can assign to that?

25 MR. GUTENDORF: Let me clarify that by saying

1 that the genetic tests are not going to -- exclusionary
2 evidence is absolute, because you're finding it in
3 multiple systems. Inclusionary evidence you're never
4 going to get to 100 percent, and the reason that you never
5 get to 100 percent is because those genetic markers are
6 not unique entirely to you. For example, your parents
7 have genetic information that they share with you. So
8 your genetic information doesn't exist in a vacuum.

9 Using the examples of the ties, when you bought
10 that tie at wherever, Kauffman's maybe, there were other
11 ties on the rack that looked just like it. So the DNA
12 material, the genetic information in and of itself, is not
13 unique to you. There is other DNA in the population.

14 Now, there are a couple of criteria that have to
15 be looked at. Routinely if you're talking a 99.8
16 probability of paternity, there's only 1 man in 500 that
17 also would have that necessary genetic information. And
18 99.8 is not an uncommon probability of paternity. Either
19 is 99.9. Probably more importantly the question is, yes,
20 this man has the necessary genetic information, but did he
21 also have sexual relations with the mother? So that the
22 DNA material or the DNA evidence that is presented at a
23 hearing or a trial is one that is taken in context with
24 all the other evidence. So if you live in Washington
25 State and you've never been to Pennsylvania and the mother

1 here is claiming that you're the father of the child, no
2 sexual relation has occurred, so you can't be the father
3 biologically. Genetically, as far as power of the tests,
4 we can distinguish between any individuals doing enough
5 testing, with the exception of identical twins. That's
6 the only, by definition those individuals have the same
7 genetic information, so that you can't distinguish between
8 them genetically.

9 I have a story, but I'll tell it off record.

10 SUBCOMMITTEE CHAIRMAN CLARK: To perform your
11 test, is the mother a necessary element?

12 MR. GUTENDORF: The mother is not a necessary
13 element. What you normally do, certainly she's an
14 important element from the standpoint that you'd like to
15 have her in the mix because you know what her maternal
16 contribution is to the child. Because you know what the
17 maternal contribution is, you then know specifically what
18 the biological father had to donate to the child. What
19 happens, and we do certainly a number of motherless
20 cases. I'm going to Chicago tomorrow to testify in a
21 trial in a motherless case, you end up doing more genetic
22 testing. It's more costly to the laboratory, but it
23 certainly can be done given that you're doing additional
24 testing, you're still going to end up with probabilities
25 in excess of 99 percent and it's going to be as reliable

1 in its ability to discriminate between true fathers and
2 nonfathers.

3 SUBCOMMITTEE CHAIRMAN CLARK: Thank you.

4 Representative Hennessey.

5 REPRESENTATIVE HENNESSEY: Thank you, Mr.

6 Chairman.

7 Mr. Gutendorf, occasionally you see tests that
8 come back and say somebody is 70 percent likely to be the
9 father of the child, or 80 percent. If DNA testing is as
10 precise as you say, how does that happen? Because even in
11 the 99 percent level, as Mr. Mann was just asking, in
12 America that might mean that there's half a million people
13 out there who are -- you know, thousands and thousands of
14 people who could be the father.

15 MR. GUTENDORF: Sure. I would say
16 historically 70 percent was run across when you had old
17 technology. So if you looked at HLA and red cell testing,
18 maybe serum enzymes, red cell enzymes, serum proteins, you
19 could occasionally run into situations in which, boy, you
20 got a nonconclusive or you got something less than 95
21 percent, and it's really noninformative. But with the
22 advent of DNA testing, and certainly it became
23 commercially available in '87, then really you have
24 eliminated that lower probabilities. So probabilities now
25 because of the DNA testing that can be done, the extent of

1 the DNA testing that can be done, and some of the more
2 powerful DNA systems that can be looked at, probabilities
3 with nonexcluded men should always be greater than 99
4 percent. If they are not, then you need to look at
5 another laboratory.

6 REPRESENTATIVE HENNESSEY: But even if it was 99
7 percent, that 1 percent means that--

8 MR. GUTENDORF: 99 percent is 1 in 100 men that
9 would not be excluded by the test.

10 REPRESENTATIVE HENNESSEY: And if you have 60
11 million men, that would mean 600,000 men that could be
12 fathers.

13 MR. GUTENDORF: Well, that bought the same tie
14 at Kauffman's but didn't go home with the same woman at
15 Kauffman's that you were shopping with. So it's part of
16 the evidentiary procedure. It's part of the evidence.

17 You know, certainly if the county agencies, the
18 State agencies, want to pay for a degree of certainty,
19 99.9999 percent, the laboratories can do that testing.
20 But based on the fact that much of the testing, what the
21 requirements are and the situation that's involved, you're
22 not going to get 99.9999 percent for \$75 a person. Maybe
23 \$80 dollars a person, but not \$75.

24 REPRESENTATIVE HENNESSEY: Could you put that
25 last chart that you had up back on the screen?

1 MR. GUTENDORF: Was that this one?

2 REPRESENTATIVE HENNESSEY: The correlation.

3 That was it, yeah. In all of the cases that you've
4 surveyed here, these are cases where there's been some
5 allegation or some petition for support, so that we're
6 talking in a sense in distressed situations or distressed
7 marriages in the top categories, right?

8 MR. GUTENDORF: Yes.

9 REPRESENTATIVE HENNESSEY: It struck me that
10 where the child's first name was the same as the alleged
11 father, you know, once you've used genetics, there's not a
12 whole lot of other choices available, so that the next one
13 might be Ann or Barbara, how meaningful is that
14 correlation? And it's really, the title says the
15 exclusion rates are based on the names. It's really not
16 basing it on, it's just trying to correlate. That's not
17 scientific testing.

18 MR. GUTENDORF: Well, the testing is scientific
19 in the fact that we did genetic testing and then we split
20 these thousand-plus cases into different groups based on
21 what the names were.

22 REPRESENTATIVE HENNESSEY: Right, so the number
23 of exclusions is scientific, but the rest is just sort of
24 interesting information about how that related to the
25 surnames or the first names, right?

1 MR. GUTENDORF: Correct. But it did break
2 things down into different categories, so that if they all
3 have the same surname, and again, it's of interest, it's
4 scientific, it's statistically significant, and from
5 looking at individuals who all had the same surnames, the
6 exclusion rate was certainly higher, which you would maybe
7 expect in a divorce proceeding with, you know, normally
8 someone doesn't request a genetic test if, you know,
9 they're not worried about infidelity.

10 REPRESENTATIVE HENNESSEY: Right. So that if we
11 were to try to compare it with the universe of married
12 people, then that percentage would probably come
13 plummeting down?

14 MR. GUTENDORF: Oh, absolutely. Absolutely.

15 REPRESENTATIVE HENNESSEY: So it's related just
16 to the--

17 MR. GUTENDORF: These are contested.

18 REPRESENTATIVE HENNESSEY: --the distressed
19 situations that we were talking about?

20 MR. GUTENDORF: Correct.

21 REPRESENTATIVE HENNESSEY: Okay, that's all I
22 have, Mr. Chairman.

23 SUBCOMMITTEE CHAIRMAN CLARK: Are there any
24 additional questions?

25 REPRESENTATIVE LEH: Just one comment. It's not

1 a question.

2 SUBCOMMITTEE CHAIRMAN CLARK: Representative
3 Leh.

4 REPRESENTATIVE LEH: Just for the sake, I guess,
5 of everybody who may see this, I'm assuming, and if I'm
6 assuming correctly, that a birth mother and a child will
7 always have those two lines?

8 MR. GUTENDORF: Birth mother and child, if the
9 child is related to the birth mother, will have matches.

10 REPRESENTATIVE LEH: With the exception of a
11 surrogate mother?

12 MR. GUTENDORF: With the exception of a
13 surrogate mother, or if the child has been switched at the
14 hospital. We've been involved in that type of testing
15 where we're trying to actually do some testing for a
16 hospital in Kentucky in which they think they may have had
17 babies switched.

18 REPRESENTATIVE LEH: That's all, thank you.

19 SUBCOMMITTEE CHAIRMAN CLARK: Representative
20 Wilt.

21 REPRESENTATIVE WILT: Mr. Gutendorf, I want to
22 thank you for being here. I'm one of the people
23 responsible for starting this discussion, I guess.

24 To follow up on a question that Representative
25 Leh had with the previous panel that we had, is there some

1 way to limit the amount of information concerning privacy
2 issues? Once I put my data on this swab, is there some
3 measure of confidentiality based on what we're looking for
4 that your company or companies like you provide to courts
5 or members of the -- whoever?

6 MR. GUTENDORF: Certainly. And one of the
7 things that certainly confidentiality issues are ones that
8 we're all concerned about. You know, it was mentioned
9 about the hospital. At the hospital level, they're
10 collecting samples from the child and from the mother
11 right away. They're going to determine blood type on the
12 child, they're going to determine blood type on the
13 mother. They're going to do bilirubin tests on the
14 child. Probably the safety in the issue, certainly in our
15 laboratory, the DNA isn't kept forever. It's maintained
16 for at most a year and then it's destroyed. From a
17 situation of the DNA results themselves, they are not
18 going to be useful to any insurance companies, for
19 examples, any type of disease diagnosis or disease
20 prediction from those type of results. It's not going to
21 be informative in that fashion. So I think there's a
22 certain amount of safety there.

23 If you're going to establish a permanent data
24 base on this particular individual using a certain number
25 of genetic markers, again, it would be an identity type

1 issue and not necessarily any type of health or
2 information that insurance agents or insurance companies
3 could use. You know, certainly you're probably at more
4 risk from an identity standpoint if when you were born,
5 they collected a blood spot and kept that forever, because
6 that would basically be something that could be utilized,
7 as we know more and more about DNA, certainly about health
8 case reasons.

9 REPRESENTATIVE WILT: But just as a general
10 statement, I guess is it fair to say that companies like
11 GeneScreen understand and appreciate the confidentiality
12 and privacy issues that may be in play?

13 MR. GUTENDORF: Yes, we do.

14 REPRESENTATIVE WILT: Thank you for being here.
15 I appreciate it.

16 SUBCOMMITTEE CHAIRMAN CLARK: Okay, if there's
17 no additional questions, we certainly want to thank you
18 for your testimony.

19 MR. GUTENDORF: Thank you very much.

20 SUBCOMMITTEE CHAIRMAN CLARK: The next
21 individual to provide testimony to the committee is John
22 C. Howett, Jr., Esquire. He is a member of the Family Law
23 Section of the Pennsylvania Bar Association.

24 Mr. Howett.

25 MR. HOWETT: Chairman Clark, Representatives,

1 thank you for the opportunity to be here this morning.
2 I'm here as a representative of the Pennsylvania Bar
3 Association's Family Law Section, of which I'm a former
4 Chair, and as a representative of the Pennsylvania Chapter
5 of the American Academy of Matrimonial Lawyers, of which
6 I'm president-elect. I'm here in that capacity to make
7 one request and one request only. I'm also here as an
8 individual, and any views that happen to be expressed here
9 this morning as to the merits or demerits are those views
10 of myself without wearing my PBA or AAML hat, and I have
11 to make that clear to you.

12 The request in my official capacity is that if
13 at all possible, I would like you to delay any final
14 implementation of this legislation until such time that
15 the Section and the Academy can more thoroughly provide
16 some input, and that time I would suggest would be the end
17 of the summer, no sooner than that. I suggest that the
18 issue does not require immediate action and that it
19 deserves as much analysis and input as can possibly be
20 provided. The presumption has existed for many, many
21 years, and if it's to be altered, as is probably
22 appropriate, it only be altered after receiving the input
23 from the practitioners who labor regularly in this arena.

24 The Section and the Academy fully recognize that
25 the issue that you're addressing is one that is entirely

1 appropriate for the legislature to address, one of public
2 policy. But we respectfully request that the legislature,
3 that you all recognize that our members are active
4 practitioners who regularly represent both sides, or in
5 this instance often three sides, depending on the
6 particular case. As a group we don't have a particular
7 client and therefore a particular bent toward a given
8 outcome. And as a group we bring a great deal of
9 expertise and experience to the table. We ask for the
10 opportunity to provide that expertise and experience to
11 you.

12 As an individual, not as a representative of the
13 Family Law Section or the Academy, I believe that the
14 concept behind the House Bills No. 722, 723 and 724 is a
15 concept whose time has indeed come. I haven't formed an
16 opinion on the exact specifics of what I think the public
17 policy should be as to whether a third party, for example,
18 a supposed biological father should be able to assert his
19 claim in an intact marriage as opposed to the more limited
20 proposals in House Bills No. 772, 723, and 724, or at
21 least as I read it only allowing the husband and the wife
22 to obtain the scientific test. And I have not formed an
23 opinion as to the propriety of preserving an estoppel
24 provision, although if estoppel is to be preserved I think
25 that the language in the bill does a very admirable job of

1 dealing with the issues that have to be addressed in
2 estoppel.

3 I do agree, however, that the existing
4 presumption is based on concepts and principles that are
5 antiquated, long outdated, which should be changed. I
6 will certainly attempt to answer any questions that you
7 would have of me. I would close my statement only with a
8 quote from Abraham Lincoln that I thought was real
9 appropriate in addressing this issue. Lincoln said, "I'm
10 not an advocate for frequent changes in laws and
11 constitutions, but laws and institutions must go
12 hand-in-hand with the progress of the human mind as that
13 becomes more developed, more enlightened, as new
14 discoveries are made, new truths discovered, and manners
15 and opinions change. With the change of circumstances,
16 institutions must advance also to keep pace with the
17 times. We might as well require a man to wear still the
18 coat which fitted him when a boy as civilized society to
19 remain ever under the regimen of their barbarous
20 ancestors."

21 If you don't have any questions, I have done my
22 best to put you back on the proper time track, and if you
23 do, I'll be happy to try to answer them for you.

24 SUBCOMMITTEE CHAIRMAN CLARK: My one question is
25 your comments didn't include any thoughts on the best

1 interests of the child, and I was wondering if you did
2 have any thoughts on that as you listened to the testimony
3 this morning.

4 MR. HOWETT: I do not have any thoughts to
5 express on that. I don't mean to suggest by that
6 statement that the Section and the Academy wouldn't have a
7 position on that, but I'm not here to express any
8 particular position. The Academy and the Section has met
9 very briefly in a very limited conference call capacity
10 and I will tell you that the questions that came up were
11 very similar to questions that have been raised by you and
12 other legislators and Senators and members of the audience
13 here and a very broad variety of issues and some very
14 heated discussion on various issues like estoppel, for
15 example, sufficient to make it very clear that this is an
16 issue that in that group, where there are people that have
17 a great deal of knowledge and expertise and experience
18 with this problem, that there are issues that really need
19 to be discussed at length, and that opportunity simply
20 hasn't happened. And so questions, for example, as to the
21 best interests issue are ones that would be addressed in
22 that debate.

23 SUBCOMMITTEE CHAIRMAN CLARK: Any additional
24 questions?

25 Representative Hennessey.

1 REPRESENTATIVE HENNESSEY: Thank you, Mr.
2 Chairman.

3 Mr. Howett, would you care to take a stab at the
4 question I asked Attorney Hurowitz before, which is if you
5 take a 16- or 17-year-old who has assumed that the husband
6 was her natural father, his or her natural father, and
7 balance that against the alleged harm of paying for
8 another two years or less in terms of child support, how
9 would you draw or would you draw a distinction between
10 that kind of situation and the situation where the child
11 is newborn and the putative father finds out at that point
12 because he took testing that he could not be the father.
13 Can there be any kind of set standard or are we going to
14 just trust the bench to make decisions on a case-by-case
15 basis?

16 MR. HOWETT: I think it was Representative Wilt
17 that said earlier that some of what you have to do, and
18 I'm glad you are the ones that have to do it rather than
19 me, is the art of the possible, and the hypothetical that
20 you propose of the juxtaposition of a 16- or 17-year-old
21 and an infant certainly present different problems from
22 the human trauma that's involved in these issues. And so
23 if you ask me as Jack Howett as opposed to a
24 representative of the Section do I have a feeling about
25 it, yeah, I mean, my feeling is that it would be pretty

1 horrible to disrupt a situation where for 16 or 17 years a
2 child has believed that Joe Blow is his dad and Joe Blow
3 has believed that he is the father of the child.
4 Certainly in my opinion much more traumatic than that
5 occurring at infancy.

6 You know, one could certainly say given a year
7 or two left to pay support that many parents, many fathers
8 faced with that situation might well say, I wish I hadn't
9 known. I'd rather not know. I'd rather pay the support.
10 I'd rather have the relationship that I've developed. I
11 don't know. This is, from a human trauma standpoint, this
12 is a horrible, horrible issue that you all have to wrestle
13 with. Terrible. I'm glad, as I said to Representative
14 Clark earlier, I'm glad you guys are getting paid the big
15 bucks to make these decisions.

16 REPRESENTATIVE WILT: We'll have another hearing
17 on the bucks, on that issue.

18 Mr. Chairman, I have one.

19 SUBCOMMITTEE CHAIRMAN CLARK: Representative
20 Wilt.

21 REPRESENTATIVE WILT: I guess not a question --
22 I guess it is a question. You've asked that you'd like
23 time to have the Section review these bills and discuss
24 them. I guess what I would ask, maybe I'm perhaps on
25 behalf of Representative Leh also, that that discussion be

1 held relatively soon so that we may, as we begin to tackle
2 this issue, and I'm certainly not part of leadership and
3 don't know when this bill will be reported out of
4 committee, but if it is reported out over the summer we
5 would certainly like to take action on it before the end
6 of this session and perhaps when we get back to session in
7 the fall.

8 So as a question, do you think that that the
9 Family Law Section would have an opportunity in the next
10 three months to address this issue and render some sort of
11 opinion on the bills that we have before you today?

12 MR. HOWETT: The time period I had in mind was
13 actually about four months, and the reason that I suggest
14 that is because in a little less than three months the
15 Section and the Academy are both meeting in their annual
16 meeting and would have an opportunity to deal with the
17 issues if not in final fashion, in some much more
18 broad-based deliberative body than we've realistically had
19 to this point. What I envision happening is the
20 appointment of a group, committee, task force, something
21 like that, that would report to the body as a whole in
22 mid-July when both groups meet together and then be in a
23 position to have a report or something that can be
24 reported back to the legislature relatively shortly
25 thereafter.

1 But I would want to repeat what I said earlier,
2 that I recognize that this responsibility is one that is
3 very, very appropriately yours because it's a policy
4 decision and certainly a lot more issues go into it than
5 purely a matter of law. I don't mean to suggest that the
6 lawyers that I represent that I'm here representing today
7 would look at it only as a matter of law. I think we
8 recognize that there are an awful lot of human issues,
9 political issues and other issues that go into this, and
10 if you can't wait, that's your call. My suggestion or my
11 request is that there be some sit-back-and-take-good-heed
12 approach. And I realize this isn't something that's just
13 started cooking recently, it's something that's been going
14 on for a long time. The Supreme Court has obviously been
15 wrestling with it with great difficulty for a number of
16 years, and your decision may well be that the time is now
17 and we're not going to wait any longer for the Bar
18 Association, but you certainly have no obligation to do
19 that, I understand that. But we will move diligently. If
20 our timeframe fits with yours, great. I hope you'll take
21 what we have to say into consideration. I know you'll
22 take it into consideration.

23 REPRESENTATIVE WILT: Unlike the court system,
24 we are dealing with a timeline here, the timeline being
25 November 30 of 2000 if we want to have this bill before

1 the legislature and the Senate and Governor in this
2 session, so.

3 MR. HOWETT: That's certainly a reasonable
4 timeline.

5 REPRESENTATIVE WILT: That's what we're dealing
6 with, and the sooner we get to that, the better.

7 MR. HOWETT: I understand.

8 REPRESENTATIVE LEH: I would just like to echo
9 my colleague's comments and his sentiments, because it
10 sounded to me, and I'm assuming that you were speaking for
11 the Bar, it sounded to me as if you do realize there's a
12 problem with the present policy, something needs to be
13 done.

14 MR. HOWETT: Representative Leh, I would hope
15 that you would take that as my personal view.

16 REPRESENTATIVE LEH: Okay. You don't want to go
17 on record as--

18 MR. HOWETT: Well, I think that--

19 REPRESENTATIVE WILT: A good try.

20 MR. HOWETT: I think that the members of the Bar
21 recognize that there's a problem. Whether there is
22 unanimity, I'm sure there's not unanimity, but whether
23 there's a substantial majority that feels that there
24 should be a change along the lines of what 722, 723, and
25 724 are trying to do, I really wouldn't be capable of

1 rendering an opinion. My personal gut says, yeah, that
2 probably is the way, but that may be part of my personal
3 bias. That's the way I think it ought to be.

4 REPRESENTATIVE LEH: It's my hope that if the
5 Academy shares some of your acceptance, that it would act
6 a little bit more expeditiously, because as Representative
7 Wilt said, we do have a timeline in the legislature.

8 MR. HOWETT: I can pretty much assure you that
9 we will not be able to act any more quickly than mid-July.

10 REPRESENTATIVE LEH: And I also realize that I
11 wouldn't want you to act too fast in the sense that,
12 because just for the sake of the issue itself, as I had
13 mentioned earlier, if we do operate too quickly, we could
14 be doing more damage than any necessary good that should
15 come out of this.

16 MR. HOWETT: Right.

17 REPRESENTATIVE LEH: So John, thank you.

18 MR. HOWETT: Thank you.

19 SUBCOMMITTEE CHAIRMAN CLARK: Counsel Mann.

20 MR. MANN: Just a quick question. Mr. Hurowitz
21 made reference to a 1961 act referred to as Uniform Act of
22 Blood Tests to determine paternity and a specific
23 subsection that relates to presumption of legitimacy. At
24 the Family Law Section, has there been any debate as to
25 what this section actually means, since the Supreme Court

1 says it doesn't mean that it rebuts the presumption of
2 legitimacy?

3 MR. HOWETT: I would say that first there hasn't
4 been any debate, period, on this issue, other than in a
5 couple of brief conference calls that I've mentioned. My
6 personal feeling is that the court must hang up its
7 decision on the word "relevant," where it says the issue
8 of paternity is a relevant consideration. Because absent,
9 if you can't read that into the act from a judicial
10 standpoint, then it becomes almost impossible to say that
11 the court is paying any attention to the statute, because
12 the statute seems pretty clear. But when you say it is
13 not a relevant consideration because of a presumption or a
14 rebuttable presumption, then you can harmonize the
15 judicial decisions with the statute.

16 So certainly one approach is to amend that
17 section to make it clear that if it was your intent as a
18 legislative body to not have a presumption when this was
19 passed in 1961, then you're going to have to say something
20 further to say, we meant it before, we really mean it now,
21 and here's how we're going to change it just to show
22 that. But I don't know that that was the intent in 1961
23 when that law was passed. But I read the statute like you
24 do. It seems that unless you use something to harmonize
25 the decisions with the language, and I think the way you

1 do that is to say what "relevant," what is a relevant
2 consideration. And if you don't do that, then the statute
3 and the decisions are completely out of whack, just 180
4 degrees out.

5 SUBCOMMITTEE CHAIRMAN CLARK: Okay, we thank you
6 very much for your insight and testimony this morning and
7 into this afternoon, and as soon as the Family Law Section
8 comes up with something this summer, why we would
9 certainly be more than happy to receive it and consider it
10 and look forward to it.

11 SUBCOMMITTEE CHAIRMAN CLARK: Thank you very
12 much, Mr. Chairman.

13 SUBCOMMITTEE CHAIRMAN CLARK: Thank you.

14 The next individual to provide testimony before
15 the committee is Barbara Bennett Woodhouse. She is a
16 professor of law at the University of Pennsylvania School
17 of Law in Philadelphia. Good afternoon.

18 MS. WOODHOUSE: Good afternoon. I want to thank
19 you for the opportunity to speak with you about this
20 legislation. And it may be that I'm going to be here
21 providing some defense of our barbaric relatives of the
22 past and some words of caution about proceeding to enact a
23 statute that derogates from the common law without really
24 getting a good picture of what might occur. I have some
25 written testimony. If that's the appropriate thing to do,

1 I'll go through that testimony.

2 SUBCOMMITTEE CHAIRMAN CLARK: That's fine.

3 MS. WOODHOUSE: Okay. First of all, I'm a
4 professor of law. I specialize in family law, children
5 and the law, child welfare, and constitutional law. I've
6 been a member of the law faculty of the University of
7 Pennsylvania since 1988, a full professor since 1994. I
8 graduated from Columbia Law School, where I trained at the
9 child advocacy clinic. I clerked with Justice Sandra Day
10 O'Connor at the Supreme Court, and practiced for a few
11 years before going into the academic world. I'm also a
12 past president of the Association of American Law Schools
13 Section on Juvenile and Family Law.

14 The proposed bills revising the law on
15 presumption of paternity seem to me clearly to be intended
16 to right a perceived wrong - the plight of a man who
17 discovers he's been deceived into believing that he was
18 the biological father of a child born to a marriage.
19 However, I'm concerned that this may be a situation in
20 which hard cases make bad law. These proposals might have
21 serious unintended consequences, so my testimony will
22 address three major policy aspects of the proposed
23 legislation.

24 First, adverse systemic effects on the legal
25 system for managing the dissolution of marriages. Second,

1 inconsistencies with policies regarding establishment of
2 paternity in related settings. And third, the potential
3 impact on children whose paternity is placed in question.
4 I put the children third not because I think they are
5 least important, because I think they are actually most
6 important. I have just come from an advisory committee
7 meeting on adoption, the Joint Task Force on Adoption, and
8 there, as in family law in general, the best interests of
9 the child has been the guiding light.

10 Family law professors like myself teach that
11 marriage is not a private bargain but actually a contract
12 between a man, a woman, and society, conferring benefits
13 and creating burdens. Marriage is a contract that creates
14 a status. In marrying, individuals choose a mate in whom
15 to place their trust. The male knows that children born
16 during the marriage will be deemed his children. Both
17 spouses know they may be responsible for the debts of each
18 other, may have to support the other should one of them
19 become destitute, and may have many other burdens that
20 come along with marriage. While a wife's adultery might
21 be grounds for divorce, it has not traditionally been
22 grounds for bastardizing a child born into a marriage.
23 These rules evolve to balance fairness to the small number
24 of husbands who have been deceived with fairness to the
25 many innocent women and children who might be harmed by a

1 rule that opened the door to an angry husband's attack on
2 his wife's chastity and his children's paternity. This
3 rule also protects society by saying once you've chosen
4 your partner and married him or her, you have assumed a
5 risk that not everything will go as you planned and you
6 agree to take on certain responsibilities towards third
7 parties and toward society arising merely because you are
8 husband and wife.

9 This background is necessary to understanding
10 what I will call the hidden wisdom of many seemingly old-
11 fashioned common law rules. Before enacting statutes that
12 derogate from the common law, it's important to examine
13 the ways in which the common law has evolved to serve
14 important interests and policy values. The Pennsylvania
15 version of the presumption of paternity, as explained by
16 the Superior Court in Miscovich, allows a husband to show
17 he was impotent or did not have access to his wife, but it
18 does not allow a husband to rebut the presumption by
19 showing his wife committed adultery. This admission was
20 no accident, and it is not an anachronism. While accurate
21 blood tests were not available until recently, it has
22 always been possible for a man to put his wife's virtue on
23 trial.

24 Legislatures and judges, from the time of Lord
25 Mansfield, understood that the social cost of routinely

1 allowing husbands to attack their wife's fidelity in
2 attempt to disprove paternity was not worth the price.
3 Part of the bargain involved in marriage was a promise to
4 society and to the other spouse to assume the duties of
5 father to a child born to the marriage. A man who
6 distrusted his wife could not challenge the children born
7 to her one at time. He must stay married and accept all
8 of them, or divorce if he wanted to escape further
9 responsibility. This traditional rule protected the
10 social fabric made up of marital families as well as
11 protecting the interests of children in having a legal
12 father from the moment of their conception.

13 I'm proposing this as background for
14 understanding why we must be cautious in departing from a
15 traditional rule. First I'd like to talk about adverse
16 systemic impact. In evaluating my remarks, please
17 remember that I am describing how these laws might play
18 out in the generality of cases. We know from experience
19 that changing one rule can have broad systemic effects.
20 Expanding the bases for rebuttal of the presumption of
21 paternity will affect not just the rare cases such as Mr.
22 Miscovich's, but will also affect the way many, or even
23 most, divorce cases are litigated.

24 Allowing rebuttal of presumption by evidence
25 that the wife was engaged in an extramarital affair brings

1 marital fault back to center stage, in conflict with the
2 trend to reduce resort allegations of fault. The State of
3 Pennsylvania, in modernizing its divorce laws, has
4 attempted to reduce the role played by fault. Under
5 current law, the incentive to raise charges of adultery,
6 whether true or false, has been minimized because the
7 legislature understood the conflict and hurt inflicted on
8 divorcing families and the high emotional and fiscal costs
9 of providing a forum for litigation of such charges. I
10 fear that these proposals would re-open the door to the
11 most destructive kinds of fault allegation -- marital
12 infidelity -- not only at the time of dissolution of the
13 marriage but up to five years after the child's birth.
14 This legislation would bring adultery back to center
15 stage, since a husband who could show his wife had had an
16 affair might be able not only to avoid alimony but also to
17 avoid child support. Many wives, threatened with exposure
18 of their infidelities, real or imagined, might decide to
19 give up claims for child support, rather than face such a
20 humiliating experience. As the legislation is written, a
21 man might refuse to agree to blood tests which could
22 conclusively prove his paternity, relying instead on
23 shifting the burden of proof to his wife by showing her
24 infidelity.

25 In addition, the proposals would have a lopsided

1 effect, creating an imbalance of power in what many have
2 called the divorce wars. Only husbands would have this
3 platform for raising issues of extramarital affairs. In
4 concern for a few men who have been deceived, we must not
5 lose sight of the many mothers who will be put at risk by
6 a new rule. As a social problem, the efforts of fathers
7 to avoid paying support far outweighs the problem these
8 bills are attempting to address. Far more divorced women
9 are surviving without sponsors from the fathers of their
10 children than are collecting support from men who are not
11 the fathers of their children. This change in the law
12 will make it more difficult for these mothers to obtain
13 support orders inexpensively and as a routine matter
14 should their husbands decide to rebut the presumption of
15 paternity.

16 Allowing rebuttal of the presumption in order to
17 demonstrate the truth about a child's paternity confuses
18 the fact of biological parentage with the law and policy
19 issues surrounding legal parentage. As the United States
20 Supreme Court commented in Michael H. v. Gerald D.,
21 biological and legal parenthood are two separate legal
22 issues. There are many situations in which the legal
23 parent of a child is not the biological parent. The
24 question of biological parenthood is a fact. The question
25 of legal parenthood is a combined question of fact and law

1 and involves profound issues of public policy. Courts
2 look not only at who is the biological father but also at
3 who is the social father. As case law and statutes on
4 establishment of paternity on estoppel, on equitable
5 adoption, on reproductive technology, and on adoption
6 illustrate, the identity of the legal father is determined
7 by examining many different facts: Has this man raised
8 the child, held the child out as his own? Does the child
9 know him as "Daddy"? Is his name on the child's birth
10 certificate? Has he agreed in a separation agreement or
11 been ordered by the court to pay child support? Has he
12 interfered with the child's relationship with his
13 biological father, creating a reliance interest? Was he
14 married or did he attempt to marry the child's mother? In
15 many reported cases a man who is not the biological father
16 but has played the role of social father has been able to
17 carry on his relationship and maintained his obligations
18 to a child he viewed as his own son or daughter because
19 the father/child relationship established during the
20 marriage was protected by the presumption of paternity.
21 These bills would appear to allow a woman whose husband
22 had accepted her child as his own to challenge his
23 parental rights to custody and visitation at divorce,
24 against his wishes, a result that is even more unjust than
25 the fate suffered by Mr. Miscovich. The argument that the

1 child benefits from knowing the truth does not prove that
2 the biological facts should outweigh all other facts
3 relevant to who is the child's legal father.

4 Allowing an action to disprove paternity of
5 children born during the marriage would place a new
6 roadblock in the way of getting to the most important
7 issues - protecting the best interests of children whose
8 families are split apart by a divorce. Modern divorce
9 laws have restructured the system around the best
10 interests of the child. Rather than encouraging parents
11 to fight over their spouse's past bad acts, the system
12 encourages them to plan for their children's future. If
13 these proposals became law, divorce attorneys would ask
14 whether any child of the marriage was under five years of
15 age and then would feel bound to advise the client of his
16 rights. Many men who would never have considered this
17 option will choose to have themselves and their children
18 tested to determine whether they were actually
19 biologically related. If the child is in the custody of
20 the mother, we can expect drawn-out battles would ensue
21 over permission to have the child tested and other
22 preliminary matters.

23 The drafters of the bills, aware of these policy
24 concerns, have attempted to meet them by retaining a
25 diluted presumption of paternity that applies only to an

1 intact family and by including nuances such as a 60-day
2 statute of limitations which begins to run when the father
3 discovered or reasonably should have discovered that he
4 was not the father of the child. I think these attempts
5 to ameliorate the possible impact raise many, many factual
6 questions that need to be addressed. For example, if a
7 man deserts his wife during her pregnancy, is she then
8 required to prove his paternity? Is a couple with careers
9 in two different cities an intact family? Does the
10 father's discovery date from the time when he first
11 suspected his wife was having an extramarital affair? The
12 date on which he received conclusive blood tests? The
13 date on which he expressed doubts about his paternity to
14 his spouse or a friend or a family member? I'm sure many
15 of you have constituents who would come to you quite
16 distressed if their 19-year-old daughter's husband had
17 deserted her while she was three months pregnant and she
18 was now forced to find him and collar him and establish
19 his paternity. I'm not sure that's a hypothetical that
20 you've played out in your own mind.

21 Hearings would be necessary to prove or disprove
22 allegations about what the father knew and when he knew
23 it. The issue of establishing paternity, which presently
24 is a nonissue for children of married parents, would now
25 be fair game for costly and time-consuming litigation with

1 the result that energy would be diverted from the
2 important work of planning for children's welfare.

3 The second area I'd like to discuss is the
4 inconsistencies with paternity laws in related context.
5 By allowing a blood test to be decisive of the issue of
6 parental status and attending rights and obligations,
7 these bills are inconsistent with constitutional
8 definitions of fatherhood and with evolving laws on
9 parentage and adoption. In cases concerning parental
10 rights, the United States Supreme Court has held that
11 parental rights and obligations are not merely a matter of
12 biology. A married father may have rights with respect to
13 children who are not his biological offspring, and a
14 biological father who has failed to establish a
15 relationship with his child, or to support the child, may
16 have no rights whatsoever.

17 By allowing a father five years to disclaim
18 paternity of a child he has taken into his home and held
19 out as his own, even if he has entered into a support
20 agreement, the proposals actually discriminate against
21 children of married parents, compared to children of
22 unmarried parents. One reason for encouraging marriage is
23 that children born to married women are given strong legal
24 protections of their rights to support, inheritance,
25 government benefits, and other family rights. Children of

1 unmarried mothers tend to be at a disadvantage. The rise
2 in births to unmarried women has created a serious policy
3 problem for lawmakers and courts: How to establish
4 paternity in the absence of a presumption of paternity.
5 States are reluctant to expend resources unnecessarily in
6 searching out and taking blood tests of men who might be
7 the fathers of these children. Studies have shown that
8 unwed fathers are most open to voluntarily taking on
9 responsibility for their children if they are asked at or
10 near the time of the child's birth to make a voluntary
11 acknowledgment. I know from participating in policy
12 meetings in Washington around issues of unmarried parents
13 that the problem of encouraging unwed fathers to take
14 responsibility has been a very important part of the
15 puzzle of insuring child support. A father who takes
16 certain steps, including consenting to have his name on
17 the birth certificate, paying child support, holding out a
18 child as his own and/or accepting the child into his home,
19 is treated as the father by government agencies and by
20 courts. Especially if a support order has been entered,
21 these fathers are barred from challenging the fact of
22 their paternity. In effect, the father is estopped from
23 raising the issue of paternity, or the paternity issue is
24 treated as a res judicata. Whether it is true or false
25 that the man is the biological father, it is too late for

1 him to challenge legal paternity. And I'm talking about
2 unmarried fathers who voluntarily accept responsibility.

3 By trying to correct one perceived unfairness,
4 these bills may create another. It is surely unfair to
5 allow a married man five years to challenge paternity of a
6 child born to his wife, while a single man who accepts
7 responsibility for a child born to a woman he never
8 married has no such opportunity to change his mind at a
9 later date. If fairness to fathers is our guiding object,
10 then all fathers whose paternity has not been conclusively
11 established by a blood test should have the opportunity to
12 re-open the question of paternity for five years after the
13 birth of a child. I believe that my example illustrates
14 that fairness to fathers is only one value at issue.
15 Fairness to children and the needs of society to finally
16 and efficiently establish who is the legal father also
17 weigh heavily in the balance of legislative policy. In
18 weighing the equities regarding unmarried fathers,
19 legislatures have drawn a balance that allows them to
20 challenge their paternity in a timely manner but binds
21 them once they have taken on the social role of father.
22 Married fathers, or more importantly the children of
23 married couples, should not be treated differently.

24 Finally, I would like to talk about the
25 potential impact on children whose paternity is placed in

1 question. A father's motion to rebut the presumption of
2 paternity is devastating to the child and to the father/
3 child relationship, and I want to emphasize that it's
4 devastating regardless of whether the child passes or
5 fails the blood test. Of all the traumas to which
6 children can be subjected, loss of a parent is perhaps the
7 most severe. As a society, we already are struggling to
8 find ways to minimize the sense of loss and disruption
9 experienced by children at divorce. Opening the door to
10 fathers and mothers seeking to reject the parent/child
11 relationship at divorce has the potential to compound this
12 damage. I recall a foster child who lived with me and who
13 had learned at age 8 or 9 in the context of a divorce
14 action that the man he knew and loved as his daddy was not
15 really his father. He never recovered and dreamed
16 constantly of his lost father, keeping alive the illusion
17 of a reconciliation that was never to come. A year after
18 he came to live with me I asked him what he would like if
19 he could have one wish. He answered, "I'd like to go home
20 and live with Mommy and Daddy." He meant his mother, who
21 had since remarried, and the man he still believed was his
22 father.

23 Accounts I have heard from adult law students
24 confirm my sense that a child never forgets and suffers
25 all his or her life from the trauma of parental

1 rejection. One very mature informant told me he has lived
2 for decades with the pain of having his father attempt to
3 get out of paying child support by disclaiming paternity.
4 Although this child actually passed, or at least did not
5 flunk the blood test, tests were far less conclusive in
6 those days, the trauma remained with him and shaped his
7 life. He knew that pass or fail, his father was telling
8 him that the relationship they have lived over the years
9 was meaningless and without value. As this student
10 stated, "He took me to the zoo, he came to my school play,
11 but none of it meant anything. He didn't care about me at
12 all." The relationship between the child and father was
13 never repaired. The legislature should think very
14 carefully before adopting a measure that would encourage
15 fathers to raise the issue of paternity at divorce.

16 Before attempting to balance the equity between
17 a man who feels betrayed and a child who feels betrayed,
18 the legislature should hear from experts such as my
19 colleague, Dr. Mimi Mahon from the University of
20 Pennsylvania Nursing School, who specializes in studying
21 children's grieving, and Dr. Annie Steinberg from
22 Children's Hospital, a pediatric psychiatrist who studies
23 trauma families.

24 In balancing the equities, it is wrong to punish
25 the child for the failures of judgment and intentional

1 deceptions of adults. Of all the players in these cases,
2 the only one who is entirely innocent and had no way of
3 avoiding the harm is the child. From the perspective of a
4 child as young as one year of age, the man he calls
5 "Daddy" is indeed his father. His relationship with the
6 man he knows as his father gives the child not only a last
7 name, which is part of that child's identity, but also
8 provides emotional and financial security. Just as an
9 adult invests in his emotions in building the parent/
10 child relationship, a child also invests. While a court
11 order cannot change biological facts, it also cannot
12 change the fact of a child's deep attachment to his
13 father. As this sad case illustrates, an adult is capable
14 of comprehending biological facts and human deception, but
15 a child is unable to comprehend that a man he has known as
16 his father is not his father. The child has the greatest
17 claim on the protection of the law.

18 If the legislature concludes that the
19 traditional presumption of paternity no longer serves its
20 purpose and must be altered, it should provide a modern
21 answer to a modern high technology problem. Any
22 legislation should establish a very short timeframe for
23 challenges. Since we are now able to establish paternity
24 with scientific certainty, parties should do it as soon as
25 possible to spare children unnecessary trauma. Any policy

1 adopted by the legislature should respect a child's sense
2 of trauma. Five years is simply too late to challenge the
3 father/child relationship. Any father who feels that
4 biological paternity is a crucial element with his
5 relationship with his child should raise the issue within
6 one year at most of the child's birth. Otherwise, it
7 should be considered waived.

8 Any legislation should dispense with alternative
9 modes of proving nonpaternity and rely only on DNA tests
10 or other state-of-the-art tests. The current proposals
11 jettison many of the safety nets of traditional
12 presumption but continue to include outmoded means of
13 showing nonpaternity. Instead of using a range of
14 potentially damaging and intimate evidence, such as
15 adultery, the legislature should adopt a policy that
16 permits all fathers, married and unmarried, to seek a
17 blood test to confirm or rebut the fact of paternity
18 within one year of the child's birth.

19 Finally, should bills be enacted relaxing or
20 doing away with the presumption of paternity, in the
21 interest of due process, a lawyer should be appointed to
22 represent any child whose presumptive father seeks to
23 challenge paternity either through blood tests or through
24 litigation. I should add to that also or whose mother
25 seeks to challenge paternity. Modern legislatures must

1 take the rights and interests of children into account.
2 As the Supreme Court has stated, the 14th Amendment is not
3 for adults alone. A child whose father seeks to disown
4 him is caught up in a proceeding that places his entire
5 future at risk. He or she may lose not only child support
6 but inheritance rights and property rights. Generally, we
7 presume that a father or mother has a child's best
8 interests at heart. Cases brought under any statutory
9 exception to the presumption of paternity are more akin to
10 contested adoption cases or cases raising doubts about
11 parental fitness than they are to ordinary custody cases.
12 In child protective cases and in contested adoptions, it
13 is routine to appoint an attorney and generally required
14 by statute or court rule. No parent, male or female,
15 should be able to take a child to a laboratory and obtain
16 a test for the purpose of disowning that child or of
17 disproving the other parent's paternity without some
18 protection being afforded to the child. A lawyer whose
19 duty is to represent the perspective and interests of the
20 child is necessary in order to protect the child's
21 rights. A lawyer or guardian ad litem can insure that
22 threats of litigation over paternity are not used to
23 extort concessions from custodial mothers and that the
24 issues of estoppel are fully briefed and litigated from
25 the child's point of view and with the protection of the

1 child's interests in mind.

2 In closing, my general recommendation is against
3 jettisoning the traditional rules in response to a single
4 high profile case without a comprehensive examination of
5 the collateral effects. The presumption of paternity has
6 served families and society well for many centuries,
7 assuring continuity and stability for children and their
8 families, and preventing divisive arguments that only harm
9 children. If reform is needed, then it should not be done
10 piecemeal in a way that creates inconsistencies and
11 injustices and places children at risk. Instead, we
12 should approach the problem systematically and propose a
13 new system that matches modern-day technology.

14 Thank you for your patience in my long and
15 teacherly delivery here.

16 SUBCOMMITTEE CHAIRMAN CLARK: We thank you very
17 much.

18 Are there any questions of Professor Woodhouse?
19 Representative Wilt.

20 REPRESENTATIVE WILT: Professor, thanks for
21 being here, and you've raised some points that we have
22 raised in our discussions in the formulation of this
23 legislation, and I guess I'd like to make it clear that a
24 lot of the points that you've raised are points that we
25 have raised as legislators who have been wrestling with

1 this over the last couple of years. But I would like to
2 make a couple of points, and that is that this definition
3 of best interests of the child is one that we could debate
4 until the end of time, because on one hand we have a law
5 right now that it seems to give a free pass to a woman who
6 has conceived a child during an extramarital affair and
7 then passed that child off as the child of her husband.
8 And when that happens, then tend to hide behind this,
9 quote, "best interest of the child." And I think that any
10 mother that holds a child out falsely to her husband as
11 their child is not acting on behalf of the best interests
12 of the child if in fact there is, as you related to in
13 your testimony, when property and inheritance are taken
14 into that consideration. If we're truly acting in the
15 best interests of the child, financial resources, you
16 know, should not factor into it.

17 And I don't mind your commenting, but I want to
18 make a couple more points, and I think this point needs to
19 be driven home, that we have, as a legislature, addressed
20 this issue of deadbeat dads in a way that I think is
21 perhaps in line with Federal law and regulation last
22 session which put a tremendous burden on many of our job
23 providers in this State, this Commonwealth, with
24 reporting, with tracking, with a very fine line between
25 privacy issues and locating and systematizing deadbeat

1 dads and the compensation due these parents. So I'm not
2 buying into the argument that we're taking away when we
3 just last session passed a bill that strengthens this
4 Commonwealth's resolve to not only locate deadbeat dads
5 but to hold their employers accountable for paying child
6 support, against the better wishes of many employers in
7 this Commonwealth, by the way. So I think that that point
8 needs to be driven home that we have addressed that issue
9 and we've tried to tie it down the best we could to meet
10 some of the challenges that you have so eloquently raised
11 before the committee here this morning.

12 MS. WOODHOUSE: I'd like to respond to both of
13 the points that you're making. The first point is an
14 important one that the mother is not acting in the best
15 interests of the child if she conceals the information
16 about the child's true paternity. I think that's clearly
17 right. The question is whether two wrongs make a right.
18 The child is certainly harmed by being led to believe that
19 someone is his or her father when that's not the case.
20 But that's why I propose a one-year opportunity for a
21 parent who was concerned to get that blood test. But
22 we're coming at this question now when in many cases where
23 the relationship is already established and the question
24 facing the legislature is whether it will authorize an
25 attack on the parent/child relationship that has been

1 established over the years of the child's childhood. So
2 we're asking not just which of the two parents acted
3 properly or improperly, but what would be the impact on
4 the child? So I think we have to shift away from arguing
5 about who did what to whom and focus on what it would mean
6 to children and families.

7 The other point I'd like to make is that I'm
8 trying to talk about a systemic effect, and I'll use one
9 hypothetical case to illustrate that. The presumption of
10 paternity meant that the husband of the woman who gave
11 birth was the father of the child. That was a legal
12 fact. And all of the mechanisms for going and collecting
13 child support would be operative against that person
14 because that person was the legal father of the child. If
15 you take this provision of the intact family and play it
16 through, you define the intact family as being together
17 when the child is born. Now, I think we all know that the
18 question is whether the people were together when the
19 child was conceived. Most of us could reach into our
20 neighbors, our family, certainly your constituents and
21 have many stories of women whose husbands left them before
22 the child was born. Those women would then be mothers of
23 children who had no identified legal father. I don't
24 think this is what you intend. Am I right?

25 REPRESENTATIVE WILT: I think what we -- I think

1 what I intended in drafting the legislation last year and
2 what Representative Leh and I have come together this term
3 and worked on, what we intend is to look at responsible
4 parties and hold them accountable for their actions. And
5 in doing that in a timely manner before any of, before any
6 irreparable harm is done to the child. And in your
7 testimony you made a statement that under the presumption
8 of paternity, a man must stay married and accept of the
9 children or divorce if he wanted to escape further
10 responsibility, and we know under today's law that they
11 don't escape further responsibility even if there is a
12 divorce because of the presumption of paternity clause.

13 MS. WOODHOUSE: In talking about the traditional
14 rule, I meant escape responsibility for any further
15 children born to that woman. In other words, divorce
16 would end that relationship, if the lack of trust showed
17 that--

18 REPRESENTATIVE WILT: And believe me, I have a
19 lot of compassion in this issue, which is why we decided
20 to take it up, and I understand where you're coming from,
21 but from the gentlemen who testified this morning, I think
22 if you sat on this side of the table and looked into their
23 eyes as they were reading their testimony, the pain of
24 knowing that they were deceived, the pain of not being
25 able to establish a relationship of that child for any

1 number of circumstances, maybe the wife removed the child
2 from the home and took off with them, but still being held
3 financially responsible from now until the child reaches
4 18 years old, at some point we have to allow, either
5 through legislation or the law, allow an out provision so
6 that people can get on with their life in a productive way
7 or begin their life anew in another intact family, in a
8 wholesome relationship based on mutual trust and
9 responsibility.

10 I get back to this point, and this is one I
11 can't get over, even though I realize that you've put a
12 lot of time and energy and emotion into your testimony,
13 and that is this: That I do not feel comfortable giving a
14 free pass to a woman who conceives a child outside of a
15 marriage, number one; or a free pass to that outsider who
16 came into that marriage and conceived a child with someone
17 else's wife. And the way the law reads today, both of
18 those circumstances hold true, and I think that's--

19 MS. WOODHOUSE: May I suggest, there are lots of
20 different ways to deal with this problem, and one of the
21 ways that the legislature could consider is to make the
22 biological father liable for child support without
23 destroying the parent/child relationship with the marital
24 father. There are a lot of different ways to get at this,
25 and that's what I meant when I talked about the difference

1 between biological effect and legal effect. By
2 terminating the parent/child relationship, first of all, I
3 know this is an argument that's going to rage because in
4 your mind, and you've had here testifying people who have
5 been harmed by being deceived by their spouse. I'd like
6 to refocus on the children. What happens to the children
7 in these cases? Do we need to destroy the parent/child
8 relationship in order to correct that wrong, or can it be
9 done in a way that does not impact so devastatingly on the
10 children?

11 The other point I would like to make is that as
12 a legislature, you cannot correct every injustice. And
13 I'll give you an example, one case that just drives my law
14 students wild is the case of the woman who separates from
15 her husband, he ends up on skid row, is in the hospital
16 and has huge hospital bills, enormous, and she has to pay
17 them. Now, that's because they're married. I throw that
18 out as an example where an individual case of injustice
19 exists because the system needs to be able to have the
20 consequences of being married play a role in defining
21 legal obligations.

22 REPRESENTATIVE WILT: That's very well said.
23 I'll conclude my remarks by simply saying that perhaps you
24 and Attorney Hurowitz, who preceded you in his testimony,
25 have arrived at the same conclusion from two very

1 different points of view, and that is perhaps we establish
2 that genetic bond at birth and allow the argument to play
3 out from there. And maybe there is no argument. Maybe
4 there is a very accepting parent that says, listen, I've
5 wanted to have a child, we haven't been able to, you had
6 the child from outside of the marriage, but I want to hold
7 this child out as my own, I want to make this work, and
8 away they go and live happily ever after. But still we
9 know from day 1 and not day 360 or day 5 year. So perhaps
10 you've arrived at the same conclusion from a couple of
11 different points of view. So I thank you, Professor
12 Woodhouse, for your testimony.

13 SUBCOMMITTEE CHAIRMAN CLARK: Representative
14 Leh.

15 REPRESENTATIVE LEH: Just some brief comments
16 here. I know in your remarks concerning the welfare of
17 the child, and we had two people who were to testify here
18 today who couldn't make it. One was Dr. Linda Palmo, who
19 is a counseling psychologist, whose testimony would have
20 contradicted yours, and I'm certain that you can provide
21 experts too.

22 MS. WOODHOUSE: Yes.

23 REPRESENTATIVE LEH: But we also had a social
24 worker here who would have testified likewise, and I guess
25 my comment is you can probably get experts from both

1 sides, and maybe we need to hear more of that. But as an
2 editorial comment toward your comments, with the exception
3 of some last words that you spoke in regards to
4 Representative Wilt's comments, through your whole
5 testimony, and I'm not taking you to task for this,
6 please. You're a professor. I have all the respect in
7 the world for you. I'm not even an attorney. However, I
8 was somewhat bothered by the fact that never once in your
9 written remarks did you use the word "justice" or "just."
10 It was "fairness." And I've always felt that laws,
11 although we use the concept fairness today, fairness is a
12 term that really is ill-defined, whereas and I don't think
13 you could insert "justice" in all those places where you
14 used "fairness." Because I think then the truth would be
15 exposed in the fact that we do have a problem and
16 something needs to be addressed because people, I mean, if
17 there's injustice in the world, and I realize you're
18 absolutely correct, the legislature, the Congress of the
19 United States, cannot right every wrong, and there is no
20 such thing this side of judgment day of perfect justice.
21 However, I think government has the responsibility to
22 provide a system that's as just as humanly possible. And
23 I feel today with regards to the knowledge of the DNA
24 tests, with regards to establishing paternity, that if we
25 don't do something to address this issue, we're falling

1 far short of justice. Because we now have the knowledge
2 to do it. Present law dealing with 16th century common
3 law evolved into what it was simply because of the
4 knowledge that was available, and that knowledge was very
5 limited.

6 Now I have to wonder though, if DNA testing were
7 knowledgeable then, how present law would have evolved,
8 and I'm sure it would have been quite different.

9 MS. WOODHOUSE: I think you're making an
10 excellent point about the need to revise laws to reflect
11 modern technology. My concern here is that you seem to
12 have, in attempting to strike a middle ground, introduced
13 a number of different mechanisms that would actually
14 undercut the objective. In terms of justice, I think
15 "justice" is a wonderful word. It's been banished from
16 law school curriculums, but I use it all the time.

17 REPRESENTATIVE LEH: It's almost been banished
18 from the legislature.

19 MS. WOODHOUSE: I often talk about the "J"
20 word. I say, I know we're not allowed to use the "J" word
21 in law school, justice is important.

22 I would like to focus the attention, however, on
23 the child's perspective, because there are three players,
24 actually four, if we include the community, because of the
25 systemic concerns about making sure we know who the father

1 is. We want to have somebody be the father. So for
2 example, my son is in the Army. If he goes off to Kosovo,
3 and God forbid something should happen to him, he leaves a
4 wife who is pregnant, under this bill, there is no father,
5 because it's not an intact family at the child's birth.
6 So I think we have to think of systemic concerns like
7 that.

8 But thinking about justice, Mr. Miscovich
9 suffered a terrible injustice, I think. But the child
10 also suffered a terrible injustice, and in balancing the
11 interests of the parties, in balancing the perspectives of
12 the parties, I think the law needs to protect children
13 above all from these injustices because the children have
14 no way of avoiding them. They are completely blameless.
15 So I don't disregard justice, but I want justice to be
16 looked at also from the perspective of the child.

17 SUBCOMMITTEE CHAIRMAN CLARK: Representative
18 Hennessey.

19 REPRESENTATIVE HENNESSEY: Thank you, Mr.
20 Chairman.

21 Professor Woodhouse, with regard to your
22 suggestion about a guardian ad litem to be appointed for
23 the child, are you suggesting that the statute also have
24 to have some sort of probable cause requirement before
25 blood tests could be ordered? Because without setting a

1 threshold like that, it would seem to me that appointing
2 an attorney to represent a child really doesn't get us
3 anywhere, because there would be no standard for that
4 attorney to argue. But it might make an awful lot of
5 sense if we have a probable cause standard so that we
6 don't have wildly made accusations of infidelity or
7 nonpaternity, at least without, we should at least have
8 some foundation or basis for these charges.

9 MS. WOODHOUSE: One way of dealing with this is
10 to have a probable cause standard before permitting the
11 blood tests, and in that connection you would also be able
12 to include the requirement of an attorney. I'm really of
13 two minds about that, because on the one hand it seems
14 appropriate that parties not be able to willy-nilly go out
15 and test their children, because children do find out.
16 They do find out. They know. And it's very, very
17 devastating to them.

18 On the other hand, it raises these questions
19 about extortion, about coercion and pressure that give me
20 some pause. But somewhere along the line, if a child's
21 paternity is going to be placed in question before a court
22 of law, that child should have an attorney, because in the
23 estoppel provision there are issues about the knowledge of
24 the parent. There should be a provision about the child's
25 best interests, whether this is in the child's best

1 interests, whether a serious injustice would be done to
2 the child, and someone needs to argue those from the
3 child's perspective.

4 REPRESENTATIVE HENNESSEY: One other
5 question. On page 7 you had indicated that towards the
6 bottom of the page that the child may lose not only child
7 support but inheritance and property rights. While that's
8 true as it relates to the husband in an intact marriage,
9 it's also true that the child could gain property rights
10 and support rights from the actual father, the biological
11 father, and in that sense I guess we're really giving
12 Hobson's choice here to decide whether or not the putative
13 father has more or less assets than the biological father,
14 and does society really want to get into that kind of a
15 balancing act, especially since it would seem to me that
16 rather than raising the financial obligations to some
17 level of supremacy, what we ought to be focusing on is
18 providing some sort of stability in a child's life,
19 because they are in their formative years and have to look
20 to somebody, if that person can just up and out. You
21 know, we may be creating much more harm than we're trying
22 to solve here.

23 MS. WOODHOUSE: The assumption that there is
24 going to be a father who can be identified is not always
25 true. It may be that the child is losing one father and

1 isn't going to have another father. And for that reason I
2 think the five years is a far too long period of time not
3 only from the perspective of the child's psychological
4 development, but from the perspective of locating the real
5 biological father. If we allowed people to wait five
6 years, when you think about why statutes of limitations
7 are created, they're created so that the cause of action
8 will happen while the evidence is fresh, while you can
9 find out, locate where this person is. And if you're
10 going to create an exception to the presumption against
11 paternity, it should be one that happens very soon, within
12 a year after the child's birth, to advance all of these
13 different objectives.

14 REPRESENTATIVE HENNESSEY: Thank you.

15 Thank you, Mr. Chairman.

16 SUBCOMMITTEE CHAIRMAN CLARK: Counsel Mann.

17 MR. MANN: Thank you, Mr. Chairman.

18 Professor Woodhouse, just a quick couple of
19 questions. How many jurisdictions in the United States
20 allow blood tests to rebut the presumption of paternity?

21 MS. WOODHOUSE: I don't know the answer to
22 that. I did want to comment, in fact, you had spoken
23 earlier about the confusion between the statute that
24 addresses blood tests and the presumption of paternity,
25 and I think that's something that needs to be clarified.

1 I think the interpretation that I heard from the witness
2 testifying here sounded correct, but there is a statutory
3 conflict there that needs to be clarified.

4 MR. MANN: The reason I bring that up is because
5 in Homer H. Clark Jr.'s The Law and Domestic Relations,
6 Second Edition, 1987, 12 years ago, two-thirds of the
7 States in the United States accepted blood tests to
8 determine paternity, and I wondered if that number had
9 increased since 1987.

10 MS. WOODHOUSE: Is that accepted blood tests to
11 determine paternity with respect to all children in
12 general or with respect to children not covered by the
13 presumption of paternity?

14 MR. MANN: To disprove a husband's paternity.

15 MS. WOODHOUSE: To disprove--

16 MR. MANN: To rebut the presumption.

17 MS. WOODHOUSE: Okay, to rebut the presumption.

18 MR. MANN: Yes.

19 MS. WOODHOUSE: I don't know whether the status
20 has changed. The Michael H. case involved California law
21 and upheld as constitutional the irrebuttable presumption
22 that California had in those circumstances. I haven't
23 really followed what's happened State by State in the time
24 since then.

25 MR. MANN: Okay, as it relates to Michael H., if

1 memory serves, there was a two-year period of estoppel in
2 Michael H. for the California statute for anyone who
3 challenged paternity?

4 MS. WOODHOUSE: I believe that's the case. It
5 was certainly shorter than five years.

6 MR. MANN: Okay, thank you.

7 SUBCOMMITTEE CHAIRMAN CLARK: You talked about
8 the concept of a biological father and then a social
9 father, and in instances where you have both. And I can
10 identify a biological father, and I think I can even
11 identify a social father, and you can attach consequences
12 to the biological father, but I don't know how you can
13 continue to make a social father be a social father, and
14 how is that issue addressed through this legislation?
15 Once the social father understands that he is not the
16 biological father, some natural tendencies take over, and
17 then he no longer becomes the social father either in many
18 cases.

19 MS. WOODHOUSE: Well, the courts have addressed
20 that kind of argument in cases involving equitable
21 estoppel or equitable adoption. There are cases in which
22 courts will hold that a person who is not the biological
23 father is going to be treated as the legal father because
24 of the relationship that has been established between the
25 child and that father, sometimes because the father very

1 much wants to preserve that relationship--I'm here using
2 the social father, the nonbiological father--sometimes
3 because the family has taken steps in reliance. For
4 example, the father who knows that the child is not his
5 biological child, is married to the mother, marries the
6 mother when she's pregnant knowing that it's not his
7 biological child, he's the presumptive father under our
8 current rule, and in a case like that should he be able
9 then to come forward and say, I've changed my mind about
10 this relationship, I want my name taken off the birth
11 certificate?

12 So I do think there are many instances in
13 someone who has taken steps to establish the parent/child
14 relationship will be precluded from later on denying it.
15 And particularly in courts of law, if there has been a
16 support order entered, usually that's treated as res
17 judicata collateral estoppel, because at some point we
18 have to stop litigating the issue of paternity.

19 SUBCOMMITTEE CHAIRMAN CLARK: Representative
20 Leh.

21 REPRESENTATIVE LEH: With regards, I just made a
22 comment to Representative Wilt here concerning what you
23 were saying there, and I don't think our legislation
24 prevents that. In other words, if a gentleman, if a man
25 entered into a relationship with a woman who's pregnant

1 and he knows it's not his, they get married and he takes
2 on that child, he's doing that as his own free will.
3 Nothing in this bill would allow him to get out of that.
4 I don't see that. However, with regards to the situation
5 and the scenarios that this bill is directed to get at,
6 men have been deceived by their wives.

7 MS. WOODHOUSE: The specific language that I
8 find very troubling, because it isn't precise, the 60-day
9 -- okay, "estoppel of Paternity Act. Notwithstanding
10 subsection (B), an action for paternity shall be estopped
11 and the presumption of paternity shall become irrebuttable
12 if there is clear and convincing evidence that the husband
13 openly holds out the child"-- by the way, if you have
14 clear and convincing evidence in one place, I think it
15 should be in the other places. I'm not sure if clear and
16 convincing evidence is the right standard.

17 REPRESENTATIVE LEH: One bill has that, the
18 other bill has a showing.

19 MS. WOODHOUSE: "that the husband openly holds
20 out the child to be his and receives the child into his
21 home, unless the husband disputes his paternity in a legal
22 proceeding within 60 days after the husband discovers or
23 reasonably should have discovered that he is not the
24 father of the child...."

25 Now, I was playing through scenarios in mind and

1 I thought a much more typical scenario is one in which the
2 father, the husband maybe never even asks that question
3 point blank. He knows that the woman he's marrying, maybe
4 she's pregnant with his child, maybe she's not, marries
5 her. I actually handled a case like this. The parents
6 have been divorced and the wife came to him, they had
7 still been seeing each other, the ex-wife came to him and
8 said I'm pregnant. He said, well, let's get married
9 again. I don't want this baby to be born without a
10 father. Never discussed who was the father. Did he know
11 at that point that he was not the father, or are we going
12 to look at the point in time when a blood test was taken
13 that conclusively shows that he's not the father? I think
14 it opens up the door to a lot of problems about
15 definitions of when a person, because you're saying
16 discovers or reasonably should have discovered.

17 I think these cases are awfully tough and very
18 factually complex. So the case of this father might well
19 be one in which he was not protected by the presumption.

20 SUBCOMMITTEE CHAIRMAN CLARK: Representative
21 Wilt.

22 REPRESENTATIVE WILT: I would just like to, as a
23 closing comment, thank you, Professor Woodhouse, for
24 testifying. I know it might be easy to feel like you were
25 walking into a lion's den. I hope we didn't make you feel

1 that way this morning.

2 MS. WOODHOUSE: I have classes with 100 law
3 students, so this is nothing.

4 REPRESENTATIVE WILT: I also want to thank Mr.
5 Amrhein, Mr. Miscovich, Mr. Hurowitz, Mr. Travers, Mr.
6 Gutendorf, and Mr. Howett also for testifying here this
7 morning, and I look forward to working with all the
8 parties involved, as well as my colleague Representative
9 Leh, in moving this piece of legislation forward. And
10 finally, I would like to thank the members of the
11 Judiciary Committee that are here - Representative
12 Hennessey and Representative Petrarca, and most
13 specifically Representative Clark, who serves as the
14 Chairman of the Committee on Courts. And I want to thank
15 everyone for attending. Mr. Chairman.

16 SUBCOMMITTEE CHAIRMAN CLARK: Thank you.

17 Thank you, and that concludes the hearing for
18 today, and I want to thank you all very much for
19 attending.

20 (Whereupon, the proceedings were concluded at
21 1:05 p.m.)

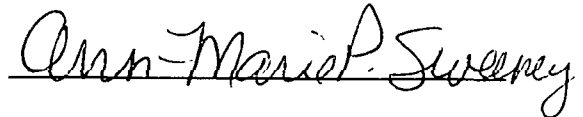
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1 I hereby certify that the proceedings
2 and evidence are contained fully and accurately in the
3 notes taken by me during the hearing of the within cause,
4 and that this is a true and correct transcript of the
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16
17 Ann-Marie P. Sweeney
18 3606 Horsham Drive
19 Mechanicsburg, PA 17055
20 717-732-5316
21
22
23
24
25