COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
SUBCOMMITTEE ON FAMILY LAW

In Re: Senate Bill 95

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Stenographic record of hearing held in Room 140, Main Capitol Building, Harrisburg, Pennsylvania

Wednesday,
January 14, 2004
1:00 p.m.

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HON. PATRICK BROWNE, CHAIRMAN

MEMBERS OF HOUSE OF REPRESENTATIVES

Hon. Craig Dally
Hon. Kate Harper
Hon. Tim Hennessey
Hon. Kathy Manderino
Hon. Joseph Petrarca
Hon. Douglas Reichley
Hon. Don Walko

Also Present:

Karen Dalton, Majority Counsel
Judy Sedesse, Majority Administrative Assistant
Mike Rish, Democratic Executive Director
Beryl Kuhr, Democratic Counsel
Jane Mendlow, Democratic Research Analyst
Cathy Hudson, Democratic Staff

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SUBCOMMITTEE CHAIRMAN BROWNE: I want to convene the hearing for the Subcommittee on Family Law of the Judiciary Committee to gather testimony on Senate Bill 95, which makes various changes to the Domestic Relations Code. Senate Bill 95, as members are probably aware, is a product of the Advisory Committee on Domestic Relations Law of the Joint State Government Commission. The advisory committee was formed in 1993 pursuant to Senate Resolution 43. The Senate Resolution established the advisory committee and directed it to undertake a study of Domestic Relations Law with the duty of reporting to the General Assembly recommendations which could be implemented through legislation. Major provisions of Senate Bill 95, which is incidentally sponsored by Senator Greenleaf, Chairman of the Senate Judiciary Committee, deals with premarital agreements, bifurcation, and equitable division of marital property. I won't get into any more details on the bill, but I'm sure we will as part of this hearing.

Just two administrative notes. Written testimony from nonwitnesses will be made a part of the record. And we had one scheduling change. Harry Byrne of the PBA had a family emergency and won't be able to testify, so we'll have a short break if David Pollock doesn't come early for his testimony.

Without further adieu, I'd like to call our

first witness, who is Ned Hark, Esquire, American Academy of Matrimonial Lawyers, Pennsylvania Chapter. Thank you, Attorney Hark, for your participation today.

MR. HARK: Thank you for having me. Good afternoon. My name is Ned Hark. I'm here this afternoon on behalf of the Pennsylvania Chapter of the American Academy of Matrimonial Lawyers, and as a Past Chair of the Philadelphia Bar Association Family Law Section to speak with you regarding Senate Bill 95. My testimony this afternoon will both support the passage of the provisions of Senate Bill 95 and urge to you consider reintroducing language that was in prior drafts of the bill.

As you are aware, Senate Bill 95 is the result of the hard work of the Advisory Committee on Domestic Relations Law of the Joint State Government Commission. The committee was comprised of many of my colleagues who are leaders in the area of family law both as practitioners and now some as members of the bench. Senate Bill 95 codifies and clarifies many areas of the Divorce Code which practitioners, Masters, and courts have struggled with over the years. Implementation of laws such as are provided for in Senate Bill 95 encourages a more effective and efficient court system for the citizens of Pennsylvania who become involved in the process.

The proposed legislation brings changes to

issues dealt with in divorce, specifically premarital agreements, bifurcation factors, and determining equitable distribution, including increase in value and determination of pension and retirement benefits, and the codification of definitions which have tended to cause some confusion in the minds of both attorneys and judges that hear divorce cases. The provisions in the bill concerning premarital agreements are fashioned both from the existing case law in Pennsylvania and provisions of the uniform premarital agreement act. The proposed Section 3106 protects the parties entering into the premarital settlement agreements by providing safeguards against undue influence, unconscionability and a lack of full and fair disclosure while providing a high standard to be met to set aside or void the agreement. The proposed statutory provisions concerning premarital agreements recognizes the frequent argument that the agreement was entered into immediately before or very close in time to the marriage, and therefore raises the issue of duress. By implementing the 60-day period, the proposed statute seeks to eliminate the confusion and concerns that are raised by the execution of a premarital agreement, sometimes literally on the eve or day of a wedding. The 60 days, and I'll add, I don't have this in the written testimony, but the 60 days as far as my knowledge and my conversations with people that were

involved in the original draft when the Joint State Commission was basically the cut-off time from when the wedding invitations go out prior to the wedding, because that's where, and I won't call it duress, but that's where the periods of, oh my God, I'm being presented with this agreement and everybody knows there's a wedding. That's the period of time where the most difficult decisionmaking process is involved prior to the wedding, so basically that's where that 60 days comes from.

Another area of divorce litigation that has been evolving through the case law over the years is that of bifurcation. Provisions of Section 3323(C)1 of the Divorce Code gives statutory guidance to the court to follow when considering petitions for bifurcation. New subsection (C)1 provides for bifurcation aside from those situations where the parties consent. Bifurcation would be granted only when divorce grounds have been established and the moving party has demonstrated that compelling circumstances exist to enter a divorce decree and there have been more sufficient economic protections provided to the nonmoving party during the pendency of the remainder of the divorce proceedings. While I will allude to the time period considerations at a latter point in my testimony, it is clear that the proposed statute sets forth adequate and necessary protections for the nonmoving party that are so

often a concern to the litigant and to the court in considering the issue of bifurcation.

The proposed legislation also makes several changes with regard to the equitable distribution of property and determination of property rights and values in divorce matters. Proposed statute provides procedures for calculation of increases and decreases in value of premarital property. The statute also provides that potential tax consequences must be considered with respect to the distribution of assets by mandating that the court consider the economic circumstances of each party, including the Federal, State, and local tax ramifications of the asset distribution. Provision requiring the court's consideration of the expense of sale, transfer, or liquidation associated with a particular asset is important as it eliminates the problems of courts in different counties treating differently the costs of the sale of a marital asset. These provisions, with regard to asset distribution and value, as I stated are of particular concern because in the counties that I practice in in southeastern Pennsylvania, many of the courts have different policies and procedures with regard to the treatment of an asset and the valuation of an asset. Most commonly we see the difference and the difference in procedure and in theory in whether or not to deduct the

expense of sale or potential sale from a marital home when the contemplation is that one party is going to receive the home in equitable distribution and not sell it. It varies from county to county whether or not to apply the 7 1/2 or 8 percent of the cost of sale to the value, therefore making the value less. With the increase in value of real estate in today's market, it becomes more and more of an issue, the 7 1/2 or 8 percent. This type of legislation would help clarify and codify the language of the statute and help enable settlement or facilitate settlement before trial or before a hearing before a master.

Similarly, the provisions with regard to the treatment of increase and decrease in value, where you have stocks or mutual funds or things, some have gone up some have gone down, the proposed statute would give more guidance to how to treat the increase and decrease in value of premarital property, because the only issue that we're dealing with when a piece of property or property is premarital is what is the increase in value from the date of marriage to the date of separation. So the fact that there's somewhat of a formula and guidance for how to treat both the increase and decrease in value would help in the evaluation and settlement of equitable distribution matters.

Many times during the pendency of a divorce

action and the associated equitable distribution matter, it becomes necessary for a partial distribution of assets. Provisions set forth in proposed Section 3502(F) gives the courts the authority to enter an order providing for interim distribution or assignment of marital property; thus easing the financial burden of economically dependent spouses.

In addition to the aforementioned valuation and distribution provisions, the proposed statute at 3501(C) codifies a methodology for evaluation of defined benefit retirement plans. It sets forth provisions for situations where it is impractical to do an immediate offset of a pension, but the nonemployee spouse's share cannot be covered by another marital asset. Consideration is also given to pensions which have not yet vested. In those instances, the statute provides for a deferral of the distribution of the pension.

The aforementioned changes and additions to Title 23 with regard to equitable distribution provide guidance and would enable attorneys and litigants to better evaluate their cases and clarify issues so that settlements can be more promptly effectuated. The matters where settlements cannot be reached, the proposed statute gives the courts statutory authority to rule on these issues in a clear, concise, and consistent fashion. And again, I'll go

back briefly to the codification of the methodology for evaluating pension. Many times in cases where you have a limited amount of assets, not so much dollar wise but limited amount of assets that are actually at issue, both spouses may or may not have a retirement plan and you have the marital home and some other real estate, the tug of war enters into how to, the evaluation of the pension, how we're going to distribute the pension, when we're going to distribute the pension. What the statute does is requires that offset and enables the court to better get to the offset of the pension and gives it some guidance on how to distribute a pension that's not yet vested, because many times where you have that limited amount of assets, there is going to be deferral of the pension. It's going to be a qualified Domestic Relations order. Down the road, there's going to be distribution, and it's going to take effect. This, again, would help give more guidance to how to handle that type of situation.

While I've covered many different areas of the amendments to Title 23 included in Senate Bill 95, there is one area of concern that appeared in prior drafts of Senate Bill 95 and the report of the Advisory Committee on Domestic Relations Law of the Joint State Commission. I am referring to the provisions of Section 3301(D) of the Divorce Code, the provisions with regard to irretrievable

breakdown of marriage. Prior drafts of the bill included a change from the two-year waiting period to establish grounds for irretrievable breakdown to a one-year waiting period. The proposed legislation that was originally supported by the Pennsylvania Chapter of the American Academy of Matrimonial Attorneys and many of my colleagues who I practice with and against reduce the separation period under subsection D from two years to one years. It is the experience of many practitioners that the parties will know after one year whether there is any prospect of reconciliation. A reduction in the period of time for the entry of a grounds order pursuant to 3301(D) of the Divorce Code eliminates a potential extended period of time of litigation between the parties where the financial dependence, hostility, and animosity and potential involvement of ancillary issues, including custody, become magnified. Reduction of the time period to obtain a divorce to one year should be included in Senate Bill 95, as it was in prior drafts. While I and the Pennsylvania Chapter of the American Academy of Matrimonial Lawyers encourages the inclusion of the reduced time periods for divorce pursue want to the irretrievable breakdown provisions in Senate Bill 95, by no means am I suggesting to this committee today that the bill not be passed because those provisions were not included. As I previously

stated, there were many important practical changes and additions to the divorce law and laws concerning equitable distribution of property rights that should be included in Title 23 that will enable us to better effectuate justice and family courts of this Commonwealth. And let me add that I stated at the beginning of my testimony that I'm here on behalf of the Pennsylvania chapter of the academy, American Academy of Matrimonial Lawyers, and as a Past Chair of the Family Law Section of the Philadelphia Bar Association. The Philadelphia Bar Association has not yet adopted an official position with regard to Senate Bill 95, but I can tell you that many and most of its provisions will be supported by a large majority of the executive committee and of the Family Law Section itself, and hopefully ultimately, upon recommendation of that section, the entire Philadelphia Bar Association. However, I cannot formally inform you of the position of the Philadelphia Bar Association today.

I thank you for allowing me to present my testimony.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you, Attorney Hark, for your testimony.

Before I open it up to questions by the committee members, I just want to introduce the members of the committee for the record who are with us today.

Representative Manderino from Philadelphia and Montgomery Counties; Representative Hennessey from Chester County; Representative Harper from Montgomery County, Representative Petrarca from Allegheny County. Did I get it right?

REPRESENTATIVE PETRONE: Westmoreland.

SUBCOMMITTEE CHAIRMAN BROWNE: Westmoreland County, sorry.

Representative Walko from Allegheny County, and Representative Reichley, Lehigh and Berks Counties.

Do any Members have questions? Representative Manderino.

REPRESENTATIVE MANDERINO: Thank you. Thank you for being here.

Your testimony was very good and answered some of my questions, and I did not have the benefit of being able to read the Joint State Government Commission report prior to this, which I will do afterwards, and maybe some of my questions are addressed there, but since I have you here, under the section that deals with premarital agreements, and it might be easiest if you have the bill to follow me by looking at, starting on line 15, section 2(i) and section 2(iii), I guess I don't understand what the difference is between fair, reasonable disclosure of the property or financial obligations, and did not have

adequate knowledge of the property or financial obligations, and can you explain to me what the difference between those two are? And then, what does "did not have adequate knowledge" mean with regard to a person and a clear and convincing evidence burden of proof?

MR. HARK: The fair and reasonable disclosure, as far as I interpret Section 3106 and my experience in dealing with premarital agreements in case law, would indicate that there would be a duty upon the one party to present the fair and reasonable disclosure. In other words, outline what the assets actually are, disclose the existence of the assets to the other party, to the potential spouse, and the adequate knowledge is the other spouse, the nonpresenting spouse actually getting the knowledge that that property exists and that these potential financial obligations exist. I guess what I'm saying, I read it as being what the obligation is to disclose, and then the actual knowledge that the nonpresenting party gains as through the existence of those assets. It's kind of a hand-in-hand type of situation.

REPRESENTATIVE MANDERINO: Can you give it to me in a concrete, like I'm sitting here thinking somebody presents, the person who wants the premarital agreement presents the document that says I have holdings in XYZ corporation and all of that is exempt from any marital

property and anything that might happen in the future. And is that a fair and reasonable disclosure? But then the other party can come in and say, well, but wait a minute, I didn't know that meant $30 million, and then how does that lack of adequate -- I guess I just don't understand how they work together and I don't understand if you are the person who was presented the agreement and signed it, then how does this language impact your challenging that agreement under clear and convincing -- I don't mean to make this complicated. I guess adequate knowledge seems so subjective, and clear and convincing evidence seems such a high burden, and I'm trying to understand how they work together in the real world.

MR. HARK: The presentation of an enumeration of the assets themselves, the actual disclosure, as I said, is the obligation of the person presenting the agreement. The ability to gain the knowledge to the nonpresenting party, the party that's receiving the agreement, and works, I see it as an outgrowth of the disclosure. You tell them what assets you have, how many shares of stock you have, what pieces of real estate you own, where they are owned, what parcels they are, and you have basically set forth the values or potential values, and then the receiving spouse gains the knowledge that they exist.

I imagine, and I understand where you're saying,

you know, if you've made the disclosure, then they have the knowledge. I think that's what you're saying. Where does, I think you're asking where does the break point come in? Where do you stop having disclosure, where does disclosure stop and knowledge begin? And I think the fair and full disclosure means I've told you everything about what I have, and the knowledge that's there, I'm not doing anything to impede your investigative processes somewhere along the line once I have made that disclosure. And the clear and convincing evidence that that wasn't -- I think you're asking how do we prove that it wasn't done?

REPRESENTATIVE MANDERINO: Well, I'm just wondering if (iii), "did not have an adequate knowledge" is kind of like a -- I can't figure out, I mean, it seems like (i,) the act of disclosure, is on the presenting party of the agreement.

MR. HARK: Correct.

REPRESENTATIVE MANDERINO: And (iii), the adequate knowledge, is on the understanding of the person signing the agreement, the receiving end of the prenup. So, and if that's correct, then is (iii) kind of this catch-all that lets me go back in and say, I really didn't understand what I had been told, or is there some sort of action of nondisclosure, not full -- I just--

MR. HARK: I think you're saying where does the

duty to disclose or the proof that there wasn't the disclosure leave off and the knowledge actually begin?

REPRESENTATIVE MANDERINO: Right, and how do you litigate that under clear and convincing evidence? The whole notion behind pre-nups and the whole notion of us further describing it is to make things more clear cut instead of making them the potential sources of litigation, and I'm reading this and saying, unless I'm making it more complicated, doesn't this "did not have an adequate knowledge" just open the door to litigation about what my understanding was, or am I reading it wrong?

MR. HARK: It may open the door.

MR. HOWETT: Representative Manderino, if I could attempted to answer your question, my name is Jack Howett, H-O-W-E-T-T, I'm scheduled to testify later. The provisions that are here, and I'm answering this sort of in lieu of Albert Momjian, who was actually going to be addressing this particular subject and will in his testimony later.

REPRESENTATIVE MANDERINO: I can hold my question until then.

MR. HOWETT: Well, I can try and address it. This is basically a codification of existing Pennsylvania law as far as disclosure is concerned. In determining the validity of a prenuptial agreement, if the dependent

spouse, the spouse without the money, that spouse must, in order to set aside the agreement, show that there was either a lack of voluntary execution under paragraph (i), and that's a very well-defined criteria under Pennsylvania law as far as what is voluntary or what is not voluntary disclosure. We're not changing anything in that regard.

And in part 2, the party, before executing the agreement, didn't have all of these three things, wasn't provided a fair and reasonable disclosure of the property. In other words, she has to prove that she wasn't given fair and reasonable disclosure. Generally, that's proven by a writing that's attached to the agreement, so that it's very difficult to say I didn't get it when they've signed the agreement. They must also prove that they didn't waive disclosure, so a person can say, I don't want disclosure, I'm willing to waive it.

And finally, they have to be able to show that they didn't have, and this is part (iii), and this may be the part that sort of raises the question that they didn't have adequate knowledge of the property, in other words, they didn't have factual knowledge. So the decisional law that has built up over this particular issue is that let's say a couple has lived together for a year or two or knew each other very well before they got married and before the prenuptial agreement was executed. Even though there

wasn't written disclosure that was attached to the agreement, there is a provable disclosure in fact. In other words, the dependent spouse in fact knew that this person owned a large business that was very successful, knew that this person lived the life that only a wealthy person could live, knew that this person worked for AT&T or Pricewaterhouse or owned their own business of ABC Corporation, knew that this person had a lifestyle that provided for lots of travel, entertainment, and things like that. So paragraph (iii), this Roman (iii), is intended to pick up disclosure in fact. If the dependent spouse can show that I didn't have disclosure in fact, I had no reason really to know what this person's assets or liabilities were, we knew each other but we dated for a while and we didn't share any financial information, and that there wasn't a waiver and that there wasn't written disclosure, then she could set aside -- I use "she," but it could be either side -- set aside the agreement. I don't know if that helps your--

REPRESENTATIVE MANDERINO: Well, I think what helps more is that we're not changing the current standard but codifying existing. It kind of makes me, if I understood that part of what you're saying--

MR. HOWETT: Yes, Ma'am.

REPRESENTATIVE MANDERINO: --it makes me more

comfortable that we're not introducing a new release clause. I can't think of the right word.

MR. HOWETT: Right. Paragraphs 1 and 2 and the three subparts of paragraph 2 are codifications of existing law. They are also basically consistent with the Uniform Premarital Agreement Act. We've modified the uniform act somewhat in order to make it comply with existing Pennsylvania decisional law.

REPRESENTATIVE MANDERINO: Two other short questions, if I may. I'm assuming the calculation on the defined benefit retirement plans is something that all interested parties agree doesn't unduly benefit or harm any one side of the equation. So if, for example, if you had a nonworking spouse and a spouse who has worked 30 years for a pension, no one is arguing that one side or -- there's no argument about whether this equation that we're codifying is detrimental or beneficial to any one side.

MR. HOWETT: That also came out of my Subcommittee on Equitable Distribution and would be part of my testimony. This is not quite as clear-cut as the prenuptial agreement as far as codification of existing law. In fact, what this legislation does and is intended to do, and specifically stated in the commentary in the report, which you will, when you do read it, you'll see, is intended to reverse actually two decisions of the

Pennsylvania Supreme Court. One is called Berrington vs. Berrington, the other is Katzenburger vs. Katzenburger. Those decisions were rendered in 1993, I think, it might have been a little later than that, I'm sorry, but in any case, they changed what had been the Pennsylvania law up until that point, and what this legislation is trying to do is put it back to that.

Back to what? Back to a coverture fraction that takes the period of time that the wage earner, the pension earner, worked for the pension during the marriage. So let's say that the person worked 5 years before the marriage, and then they were married for 10 years, and then worked 8 years after the marriage. Okay. So there's 10 years out of 23 years, 10/23 is your fraction. So if you're doing a deferred distribution, in other words, by the time the person retires, he has worked 8 years after separating, 10/23 is the marital portion. If you're doing 50/50, she gets half of 10/23.

If you're going to do an immediate offset in the pension, in other words, you're not going to defer it, you're going to value that pension now and you're going to give some compensating asset, the house, which is very typical, one gets the pension, the other gets the house, then you value that pension based on, again, a coverture fraction, but the fraction this time is that the numerator

is the number of years in the pension up until the time of trial over -- I'm sorry, the number of years of marriage over the number of years in the pension up until the time of trial, because you're not going to go beyond the time of trial to do the immediate offset. So it's still a coverture fraction.

What this changes is that the dependent spouse is now entitled to receive the benefit of the growth of the pension up until the time of distribution, either offset at trial or deferred distribution when retirement actually occurs, except for the post-separation contributions of the pension earner himself or herself. Under Berrington and Katzenburger, the Supreme Court said that you have to stop it at the date of separation, and anything that happens after separation belongs to the pension earner. This has sort of been analogized to the spouse who plants the seed, waters the corn, watches it grow, and then separates and the corn is plucked right after separation and that spouse doesn't get to participate in it at all.

It is generally believed by the practicing bar, by the practicing bench, and by people who are very knowledgeable in the field, that the coverture fraction methodology that was the law in Pennsylvania up until the Berrington case was decided is by far the more equitable and fairer way to do this. And that was codified in a case

-- I'm sorry, not codified but was elucidated in a case called Holland vs. Holland, which was a Superior Court case, which everybody thought was, this is it, this is the way to go, this is the proper way to do it, and then two or three year later Berrington came along and I think was interpreted because of certain language in the statute that was never intended to be that way. So this clarifies now that it is to be done by a coverture fraction, and that the only benefits that are to be excluded are the benefits actually contributed by the pension earner after separation.

REPRESENTATIVE MANDERINO: Thank you.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you.

Representative Hennessey.

REPRESENTATIVE HENNESSEY: Thank you, Mr. Chairman.

Mr. Hark, Mr. Howett, if you could just, your experience, Mr. Hark, is that you're part of the American Academy of Matrimonial Lawyers, I saw from your bio. In today's society, what percentage of cases which present themselves to you initially get reconciled as opposed to the portion of the pie, so to speak, that go and ultimately end in divorce of their partners?

MR. Hark: I would say in my own practice, in my practical experience where the parties actually, you're

talking about where the divorce complaint or the proceedings have been instituted and then--

REPRESENTATIVE HENNESSEY: No, somebody walks into your office and says, I want a divorce, I can't stand my husband or I can't stand my wife, if you just took all of those cases and lumped them together, what percentage would ultimately be reconciled as opposed to proceeding to a divorce?

MR. HARK: That's a good question. Probably I would say a very small percentage. High side, maybe 5 percent. Maybe somewhere between 5 and 10 percent. It's a hard question because so many people come to us for guidance when they're contemplating a separation or have just separated and they're looking for different guidance as far as financial obligations or the procedures or even matters involving a potential custody case that you really can't put your finger on it, and it's a hard percentage too because sometimes those people never come back, so you don't know what's happened with regard to the cases. That's why I asked, I think a better barometer or a better measuring stick may be in cases in which we actually have some proceeding, whether it be a divorce complaint filed, or even if there's not a divorce complaint filed, there's been a separation and there's a support petition generated and the people have actually entered into the process with

regard to the courts, and I think that's where my 5 percent comes out of. Because those are the ones that we're better able to know that the parties actually reconciled after being separated.

REPRESENTATIVE HENNESSEY: It just seems to me that we've witnessed in Pennsylvania a sea change in terms of the attitudes toward reconciling or proceeding with divorce as a result of the no fault changes that we made back in '79 or '80, and that we're now seeking to modify it. And that probably is reflective of society in general. I remember the talk years ago that Ronald Reagan couldn't get elected as President in the '60s because he had a divorce in his background. By 1980, it didn't seem to make any difference. So maybe that's good, but it just seemed to me that the two-year statutory waiting period that we have in existing law was probably put there to try to give -- I think when I first came out we called it a cooling off period, to try to give reconciliation a chance to work with some sort of indication that as a matter of public policy, it was a better idea to try to save a marriage than to see it torn apart. And the question I'm going to ask you then is, to shorten the two-year period to a one-year period of cooling off basically almost seems to me that we might as well forget the 5 percent, we'll probably get down to 2 percent, because there's not going to be any timeframe

that's a real burden for a person who wants to -- who is the moving party and wants a divorce.

MR. HARK: I think that the 5 percent occurs in the first few months after separation, and that my experience is that once we've reached the 9-, 10-month, 12-month, and the 1-year period of time, people generally know by that point in time, especially if there's litigation, what their feelings are regarding reconciliation. I can safely say that I can't recall in my practice where we've gone down the road well past the year and we're litigating the case that the parties have reconciled. My experience is that the reconciliation takes place in the very few early weeks or months of the separation, and again, I'm not, when I say separation, I'm talking about the commencement of proceedings, because--

REPRESENTATIVE HENNESSEY: When it all seems real to the nonmoving spouse.

MR. HARK: That would be correct.

REPRESENTATIVE HENNESSEY: But the point that I was trying to make, and maybe I didn't make it very well, is that if you're looking at a divorce, if you're the ambushed spouse, so to speak, whether the husband or the wife, if you're the person who didn't see it coming or has no desire for a divorce and then suddenly the reality hits home when the divorce complaint is served, then I suppose

you look at the two-year statute as saying, well, that's going to be a help to me and a burden to the other side who wants this, and maybe he or she will change their mind. If we shorten that, and perhaps that's why 5 percent of the cases that do reconcile reconcile at least in part by the idea that the moving party finds that this isn't going to be as easy as I thought, and I may well, it's not going to be three months like the guy told me or like I hear about at work, this could take a couple of years, maybe we ought to rethink this. If we, as a matter of public policy, shorten the time period, don't we essentially say that reconciliation is really a thing of the past, it's not going to happen, and let's just move it along as quickly as we possibly can?

MR. HARK: Again, not necessarily, because if the reconciliation is going to take place, my point is that after a year of separation, and especially when there's litigation, if the one party who wants the divorce hasn't changed his or her mind, it's very unlikely that over the course of the next year they're going to change their mind. And I think if you balanced the interests, that in the ensuing year of litigation, there are a lot of different things that come up and crop up along the way, and as I pointed out in my testimony, the hostility, it spills over into child custody issues, there are issues that could

arise with regard to the potential dissipation of an asset, devaluation of an asset, especially if there's a business involved. The one-year period of time in the case where the one spouse may not want it and the other one is not making up their mind, that period of time, that year of litigation could become very costly to both parties. And the point is that if the one spouse who doesn't want it, the nonambushed spouse in your hypothetical, does not want the reconciliation or has made up his or her own mind that this is what's going to happen, they're generally not going to change their mind in that year between the end of year 1 and year 2, beginning of year 2.

REPRESENTATIVE HENNESSEY: I guess I'm just trying to figure out what the public policy implications are of shortening that timeframe. I used to practice some matrimonial law as part of a general practice and it always seemed to me that if there was going to be, if you were going to strike a deal for property, for example, it made more sense to do it -- the ambushed party had the best leverage in the first year rather than the second because psychologically you hit a point where the person who wants out of the marriage says, oh my God, I've got to wait for two years to get this thing over with, and once you get to the point where, hey, I've waited for 14 months already, it's only 10 months more, what's the big deal, the

leverage, there is a monumental change I think in the bargaining power of the parties, and it would seem to me that maybe as a matter of public policy we ought to leave the ambushed spouse with having some arrows in his or her quiver in terms of negotiating for an ultimate settlement.

But I understand your position and I think you're speaking for the academy as well when you say you prefer that we shorten the timeframe, even though that was left out of this particular draft.

MR. HARK: The bill that was -- the proposed legislation that was supported by the academy included the one-year provision that was stricken out of this current draft.

REPRESENTATIVE HENNESSEY: Okay. Thank you.

Thank you, Mr. Chairman.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you.

Just two quick questions before we finish up here. You had made some comments regarding the change in the statute and its relations to tax implications and cost of sale of assets. Is the language of the statute, is it different than what's currently established along those issues? It's my understanding that in order for tax implications that are taken into account, it has to be something that's immediate and is part of the tax effect that occurs as part of the divorce.

MR. HOWETT: Mr. Chairman, if I may address that, this has been a pet peeve of mine for a long time. In 1988, when we assisted in drafting the substantial amendments that were done at that time, which were the first major amendments to the 1980 code, the 1988 amendments were adopted on February 12, 1988. I'm not trying to impress you with my knowledge of that but rather to show the significance of why the decisional law today is that the tax implications or the costs of sale have to be immediate and certain in order to be taken into account. The Hovis case, H-O-V-I-S, which is cited in the book, in the report of the task force, was decided by the Supreme Court in April of 1988. It came down after the amendments had been passed. The amendments say that you should take into account the tax ramifications and the costs of sale.

The only thing this legislation does, it says even if it's not immediate and certain. Now, the reason for that is because when the Hovis case came down from the Supreme Court and it said you have to look at the tax implications and you can only do it if it's immediate and certain, they said because the legislature hasn't addressed that, and this is up to the legislature. They never once mentioned the 1988 amendments. The case was presented and argued to the Supreme Court well in advance of February 12, 1988. It wasn't handed down until April of 1988, and while

I can't prove this because I was not in chambers when it was decided, I am willing to bet you an annual pay of yours and mine that that case was decided under the 1980 code, because they specifically said it's up to the legislature to deal with this. So when they handed it down, nobody on the Supreme Court had any immediate knowledge--I'm not faulting them, this is the way things work, it takes a while to circulate the things--realized that the legislature had addressed it.

So now what you're saying with this new bill is that we said it before, and we really mean it. Tax implications and costs of sale should be taken into account.

SUBCOMMITTEE CHAIRMAN BROWNE: Without the immediate effect.

MR. HOWETT: Even if they're not immediate and certain. Because in the real world, you know and we know that they are there. Brokerage costs, real estate costs, tax costs, whatever. They're there, and if you can present evidence reasonably to show what they are or what they will be when the asset is sold, even if the asset isn't going to be sold tomorrow or is not under contract yet, then that should be taken into account. Because otherwise you are giving the other spouse, and we're not saying wealthy, nonwealthy, male, female, but you're giving the other

spouse cash assets or real assets to compensate for that asset that's going to belong to, let's say the house is going to belong to one side and you're going to give compensating cash to the other side, but when this side liquidates that house, they're going to have to pay 7 percent real estate and 1 percent transfer tax. And that's a real cost.

Now, you say, what about those who don't use a real estate agent? There are always cases where, you're not going to be able to pass a statute that covers every single thing. You have to look at what is real in life today, and that's what this is intended to do. You said it in 1988, 16 years ago, that was the intent of that change to the 1980 code, and because of the timing of the Hovis case, that intent was never implemented. So now this new language is intended to implement what the legislature said in 1988.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you.

And the other question I have, I just wanted to make sure I understood the policy behind the distribution rules in regards to pensions. You have consideration of post-separation of contributions by the participating spouse, but you wouldn't have considerations of salary increases or multiplier adjustments.

MR. HOWETT: No, they would be considered. The

only thing that wouldn't be considered under this legislation is actual contributions by the employed spouse. Let's say you're in a situation where you contribute some of your salary to the pension. Those contributions and the earnings or losses on those contributions would remain that spouse's property.

SUBCOMMITTEE CHAIRMAN BROWNE: So salary adjustments in perpetuity for the next 40 years, whatever, would be considered as part of it?

MR. HOWETT: They would be considered in a defined benefit plan because that's how a defined benefit plan works. You look at the last two or last three years' average salary and then you take it times a formula of the number of months worked or the number of years worked and you figure out what the monthly benefit is going to be. So as the income goes up, that is nothing more than a function, in many instances, of time, but even if it's a function of value of increased participation in the employer's activities and therefore you're getting raises, you're doing better, that's building upon a foundation, a good portion of which was during the marriage. So the marriage unit is compensated by use of that coverture fraction.

If the person works 30 years for the company and was only married 10 of those 30 years, then that

contribution may not be as great because it's only 10 out of the 30 years, and consequently the marriage only shares in 10/30, or one-third, of the pension. But if the marriage was 25 out of 30 years, and two or three years were premarital and two or three years were post-separation, then it's absolutely fair to say that 25/30 should be marital. The earning spouse, the employed spouse, still gets the benefit of keeping a portion of the pension as separate property, but you do it by simply a lineal fraction so that each year of the 30 years is considered under this concept to be equal, even though it's clear that the post-separation years are not really equal.

SUBCOMMITTEE CHAIRMAN BROWNE: Just taking the other side, I think some people would argue that the amount that you would receive with that fraction would be if there is a significant increase in salary post-separation which would be a lot higher than you would ordinarily receive based on the amount that you actually received during the marriage. In other words, if there's a huge increase in salary post-separation, that fraction would, by taking that salary into account, would be a lot higher than that person would ordinarily receive for that period of time.

MR. HOWETT: The fraction would be the same, but the amount that the fraction is applied to would be higher because of the nature of the formula that's used in a

defined benefit pension plan. The formula, because it uses the last couple of years' salary, is going to result in a higher value for the plan, or a higher monthly payment, if you will, when you get to the retirement period. The coverture fraction that's applied to that number is what this legislation does, and the longer the marriage in comparison to the period of time that the person worked for the company that provided the pension, then the higher the fraction that belongs to the marriage.

SUBCOMMITTEE CHAIRMAN BROWNE: I understand how the fraction works. It's just you have huge circumstances that could happen after the marriage.

MR. HOWETT: Oh, there's no question. In fact, there are examples of this in decisional law. The Berrington case, the Katzenburger case both involve cases where there were spikes in income post-separation, and the argument that supports what we're trying to do in this legislation is that the spouses in those cases, and it could be male or female, in those cases the dependent spouses were both women, had worked in the vineyards, if you will, or were watering the corn and watching it grow, so for all those years until their spouse got to the point of sufficient seniority where he was going to enjoy big bumps in pay, and in fact did, why shouldn't she share, instead of saying we're going to go back to 3 years earlier

when you were making $60,000 a year instead of now you're making $100,000 a year, that could make a big difference in the pension.

And when people are making their plans for a marriage, for a life together, and they've been together, particularly in a situation where they've been together for some period of time, they know that these incomes are going to go up and that when you get closer to retirement the value of the pension is going to go up significantly. Shouldn't the dependent spouse share in that benefit to the extent of the coverture fraction? You're not getting all of it. The independent spouse is still getting that portion which represents the number of years worked outside of the marriage.

SUBCOMMITTEE CHAIRMAN BROWNE: I understand the argument, I think, and there may be some who would agree with the argument of the case law this is trying to address, and that is the fact that post-separation should not be included because that person was not part of that household after separation, didn't contribute to those huge increases in salary.

MR. HOWETT: No, but they contributed to everything that allowed them to happen. Now, I can tell you, and--

SUBCOMMITTEE CHAIRMAN BROWNE: I'm not arguing

the point. I'm saying that there's a possibility of people--

MR. HOWETT: I don't know whether this means anything to you, but from an academic standpoint, and I think this is true around the country, that the manner by which pensions are divided in almost all jurisdictions are the way that is proposed in Senate Bill 95, and that academics and attorneys who represent both sides of the aisle in discussing from the standpoint of what is fair, what should be the law, will tell you that this is the way it should be done.

SUBCOMMITTEE CHAIRMAN BROWNE: Okay, thank you very much. Thank you both for your help today.

MR. HARK: Thank you.

SUBCOMMITTEE CHAIRMAN BROWNE: I've heard that David Pollock is with us. Yes, Mr. Pollock.

David Pollock, Esquire, from the Allegheny Bar Association. Thank you for speaking with me here today.

MR. POLLOCK: What we have is our written testimony, which is dated April 1, 2002, which is with regard to a very similar bill that has had changes. So I'd like to speak to those issues today as modified by Senate Bill 95.

My name is David Pollock, and I am Vice Chair of the Allegheny County Bar Association Family Law Section,

and I'm here today on behalf of the Family Law Section of the Allegheny County Bar Association. I am also Past Chair of the PBA Family Law Section, Present Editor of the Pennsylvania Family Lawyer, member of the International and American Academies of Matrimonial Law.

Senate Bill 95 that's before you has a provision in it with regard to premarital agreements, and I heard the prior testimony and agree that the 3106(a)1, 2, and then subparagraphs (i), (ii), and (iii), are a codification of existing law, and that clear and convincing standard is the standard to overcome all contracts in this State, whether the contract is a prenuptial contract, a contract for business, commercial, that is the standard and why you apply any other standard to contracts between two unmarried people or married people. As you well know, the Pennsylvania law of prenuptial agreements emanates from Simeone vs. Simeone and that Supreme Court case which established that the single ingredient to the enforceability of a prenuptial agreement of full and fair disclosure, which of course has its exceptions, that is if somebody knew or had reason to know or had voluntary waiver of that, that standard is also applicable to post-nuptial agreements, to marriage settlement agreements. That is our standard.

However, this bill has a provision in it that

voids agreements if they are entered into 60 days prior to marriage. What the Senate Bill apparently is saying that people who are adults, who enter into contracts 60 days prior to marriage, don't have the mental capacity to do a rational act. Now, we probably ought to have a 60-day requirement with regard to sports cars and other things, because some of us when we see a car with lots of horsepower and lots of glitter and lots of color, we are overcome with a compulsion to buy that car. Why are we singling out the people who are prospective husbands and wives? Typically, the premarital agreements in my practice are second marriages, they are late marriages, or they are family money that needs to be protected. Pennsylvania has been one of those States that has avoided the model act that has come across the country and said we'll let the decisional law continue to be upheld. As a matter of fact, in your statute, you have specifically stated in 1980 that contracts are a way to exclude property from marital property, because we know that all property comes into marriage is marital property, except as you have excluded by statute. And this is just one of those many, many exclusions. To treat people who are in love differently, because I fall in love with cars, okay, to treat people in love differently makes no rational sense.

Number two is that clearly I have cases, two

existing right now, where the people didn't get their prenup done and they didn't want to have all that worry, and now they're coming in. They're older, they're second marriages, they have families, they're going to fulfill the contractual obligation they had to one another, the handshake they had with one another, because when people get married, they get married with lots of things in mind. Yes, they have heart, they have lust, they have love, but they also have babies on their mind, they have houses on their mind, they have cars on their mind, and some people have prenuptials on their mind. To avoid it is to say that these people are different than all other people. And, if they just wait until the day after they get married and sign the contract, then that's a contract that's binding.

Now, you wouldn't say that, well, my goodness, they're now married, they now know better and there isn't any unfair advantage. There's tremendous unfair advantage throughout a marriage and throughout a courtship. Who are we kidding? But I would suggest to you that the Bar Association, Family Law Section, is adamantly opposed to voiding a contract merely because it was entered into during a black-out period of time. It is going to be fraught with danger anyway because matrimonial lawyers from the large urban areas are not the only ones who write prenuptial agreements. And people write prenuptial

agreements all the time, and when they write prenuptial agreements, they are unaware of 60 day black-out periods, and I would suggest to you that general practitioners are going to be unaware of it. They're going to pay a lot more attention to a lot of other legislation than this. But this is a trap waiting to happen to people, number one.

Number two is you know that people do actually meet, fall in love, and get marry quickly. Whether it is provident or not is none of our business. That means that there are those people who fall in love and get married within 60 days that aren't going to have the right to have a contract, unless they enter into it after they get married. So that is the first position of the Bar Association with regard to your act, and we would respectfully suggest that you allow the decisional law that has developed over the decades to continue to be in effect, and whether it's provident or not provident, to codify the decisional law with regard to the standard, we have no comment because that is the law as it exists today. So we would recommend deleting paragraph B from your act.

If I may continue, your next provision is 3323(c)(i), bifurcation. There are those who will argue that bifurcation is fraught with danger, there are those who will argue that without bifurcation there's unfair advantage. You know that the statute was put into effect

-- or the bifurcation provisions were put into statute at the time that the statute was originally written and it was a three-year separation period. It was an unduly long separation period that, as Mr. Howett has pointed out, the February 12, 1988, amendments had substantial revisions to this statute. One of those revisions was the changing from three years to two years.

Whether it makes sense to have bifurcation anymore because we only have two years is subject to debate, but the reality is that people do litigate cases for long, long, long periods of time, and one thing that seems to be of significance to certain people is am I married or am I not? Do I want to get remarried or don't I? Am I going to let that person get divorced, et cetera? Bifurcation gives something, and that is divorce. And therefore, leaving the PEF Code.

And what you have in paragraph (d.1) is a provision that essentially says if a party dies during the course of proceedings and there hasn't been a divorce entered but there are grounds for divorce established, then you can still follow through with a divorce action. And for those of us who have tried divorce cases against dead people, or we've been the dead party against live people, it's an aberration. It's about a small, little, tiny practice, and I would suggest that the aberrational cases

cause constituents to call their Senators and call their Representatives, and they usually make more noise than any constituent and therefore things somehow get to the forefront.

But what is there is essentially saying that whether you're divorced or not, in that tiny, tiny, tiny percentage of cases, the bill as written should give the same divorce rights, that is equitable distribution rights, to the dead person or the parties. And you know that the surviving spouse gets a statutory share under the PEF Code, and you know that the surviving spouse could get more and most likely will get more under the Divorce Code. And so it would seem to me that the reason for writing the provision the way it was written was to essentially say there will be no abatement. Yes, we're going to have to prove that there were grounds for divorce, and one would assume that's irretrievable breakdown, and every case is irretrievable breakdown if you filed for divorce, darn it, and the two years goes out the window because the person is dead, so it's a lifetime. But it's a rational way to deal with cases that go on and on and on and on until they finally die. And we've all been there, every lawyer in this room has been there where we've said to a judge, but the son of a gun is going to die on us, and we've had to deal with that. Do we bifurcate or not? But whether or

not we bifurcate, and bifurcation can be improvident because of the whole raft of things that could occur as a result, whether we bifurcate or not, a party is entitled to get the rights that the legislature has said they're entitled to get. So you have made a rational decision in writing your law by saying that the Divorce Code trumps the PEF Code in this particular regard.

Now, there could always be the funny aberrational case the day before the husband dies, the wife files for divorce because she knows she's going to get more under the Divorce Code than she would get under the PEF Code, but that's a family fight and that is aberration.

With regard to whether or not the statute should stay at two years rather than one year, our cases take a while to resolve. Yes, 85 to 90 percent of the cases do get settled ultimately. Only a few cases end up going on for 5 to 10 years. One year seems to be awful fast, but at some point somebody said two years seems to be awful fast.

Moving along to the provisions of page 7, and I believe this is 3501(a.1), and that's the increase in value. You've taken in writing the law a rational view of what happens, and now we know post-March 2000 what really can happen. We all thought our bank accounts and our stock accounts and everything would continue to go up, and when the law was written in 1980, we were still on a growth

curve. We never had, until '87 of course, and then but it was too late, and the year 2000 these dramatic reductions in our 401K plans, our defined contribution plans, and our stock portfolios, and what the increase in value is is essentially the only portion of nonmarital property, premarital, gifted during marriage inherited property that becomes a marital asset, that is the increase in value. What happened if it increased, we separated in '99, it increased and we tried the case in 2004 and it's down in the soup somewhere? Well, this statute that you've written essentially says, look, we'll take a rational look at this, and if it went down, then we'll do it at the lower value. Otherwise, you can have somebody in Erie County making a different decision than in Montgomery County, which is totally irrational, totally unfair when you have essentially a mechanical view of valuation. This is a mechanical statute, and the Supreme Court has reaffirmed that it is.

Now, if it is a mechanical view, why are you treating defined benefit retirement plans different than all other assets? It doesn't make sense. Why did you single out defined benefit retirement plans? I think it was done for the same reason that in the past it's been attempted to do with regard to alimony. You have a very flexible statute. You have an equitable distribution

statute, and once we've determined equitable distribution, however it's going to shake out, then we make a determination of alimony and again it can shake out. And my hands can't be recorded, but what I'm doing is the balancing act, the judge's discretion, the master's discretion as reviewed by the judge.

Now you have a statute of defined benefit retirement plans, you've singled out an asset, not the automobiles that I talked about, but the classic pensions. For us, the U.S. Steel and Carnegie pension, the Westinghouse pension, the classic time and salary related pension. Then you take the pension and you create a coverture fraction, and we all have battled with the coverture fraction long prior to Berrington and Katzenburger. And I know Berrington very, very well because Attorney Patricia Miller in Pittsburgh tried the case, and by the time that case came back from the Supreme Court, she became a standing master for the Court of Common Pleas of Allegheny County Family Division, and I sat in her seat and I tried to figure out how to get Berrington concluded because Westinghouse had changed their pension plan 10 times since then, the law had changed, Westinghouse even ridded themselves of their plan administration department and it was in New Jersey, they never even heard of Berrington, and then we began to realize something:

Your defined benefit plans are largely controlled by Federal statute. Now, "you" is the wrong pronoun, because we do have State plans, we have PSERS, we have Civil Service, we have firemen and police, we have State Police. That's controlled by State statute. Now, you haven't differentiated with this particular statute, number one.

Number two is that you have in your writing come up with a simplistic formula. Well, you got rid of that simplistic formula for alimony, and you got rid of it for a very real reason, and that is that you wanted judges to exercise discretion to make a determination as to whether or not it made any rational sense to have alimony, and if so, how much and for how long, taking into account the factors that you've set forth. But you imposed what I say is back door alimony by doing some formula. And the formula is patently unfair, the formula is a coverture fraction that is so simplistic, so very, very simplistic, that what it does is make it easy for lawyers, make it easy for Masters and make it easy for judges and make it wrong and make it unfair for all of the post-separation enhancements that occur.

Now, it's not simple corn, it's pieces of the corn, because corn isn't just a unit, it's got hundreds and hundreds of the little kernels on it and we cut them off for our parents and make sure they can eat as much as they

want, and that's what a judge can do. A judge can say I can take a piece of the kernels, it isn't whether you get the corn or not, I can take a piece of it, I can take kernels of it, and I can allocate it to the marital side and the nonmarital side, and then I can decide how much of the marital to do. And if it turns out that the nonmarital, the post-separation side is enormous, that is the guy finally got rid of his wife, the woman finally got rid of the guy and the kid, they all drove her crazy and now she's working day and night, she has a pension, which mind you is a dinosaur anyway, because they're not long for this world, then she has a huge, huge increase because the pension is based upon a final average salary and years in service. Now, some of these pensions, by the way, are subsidized. Lots of the union pensions that you're talking about are subsidized, and what gets subsidized is different components of it. But I would bet if I went around this room not one of us would know that because we're not experts.

And so you've essentially said we don't want experts, we don't want valuation, we don't want actuarial analysis, we don't want anything, we want to do a formula because it's all beyond us, and the answer is it's not beyond experts. We have experts in car cases, we have experts in products cases, we have experts in that dirty

"M" word cases, we have experts all over, so why not in this one particular area? We have experts for real estate, why not for pensions? Because it's inscrutable. Once in a while attorneys, masters, and judges have to do the hard work.

Now, what is particularly troublesome to us is the formula takes into account post-separation enhancements except those made by monetary contributions of the employee's spouse. There almost never is any. There's never a contribution to a pension other than when you buy because of past military service or you buy because there's a window allowing you to buy. That's the only thing we're talking about in that. The drafters have mixed the idea of defined contribution and defined benefit when they wrote that.

Number two with regard to it is it's only of the spouse. So if the employer throws something in and says, look, I'm going to enhance like crazy here, I'm going to give you a supplemental benefit, I'm going to do whatever I can to hold on to you or I'm going to do whatever I can to get rid of you, and it happened all long after separation, it seems to me that it's patently unfair to give some of that to the nonemployed spouse. And if there is something that looks like it's going to be unfair to the nonemployed spouse, then we've got the alimony still out there that

hasn't been made into a formula, we have the equitable distribution that hasn't been made into a formula, and people can balance those things out.

Then you go on to the immediate offset method. Instead of the deferred distribution method, you have the immediate offset method. That's the method that's fraught with danger because we're valuing based upon today's interest rates something that somebody is not going to get in futuro. Superficially, on the face of it, it looks like using a coverture fraction makes some rational sense, but it's also again unfair, because what you've done is the denominator is the time up to trial. But what it is that's going to be earned isn't going to be paid until age 65, so we've got 5 years, 10 years, 15 years of things on our minds that we've somehow taken care of with a formula.

Formulas don't work in divorce law just the same as they don't work in marriage. Every single marriage and every single divorce is different, and you invested in the judges tremendous discretion in 1980 for equitable distribution, and you stripped a little bit of the discretion, or as I say you maximized the discretion when you took away the rehabilitative threshold in 1988 for alimony and you gave it all in the discretion. Why strip the judges and masters of discretion at this point, and then why take the post-separation earnings and throw them

in the pot when you don't for anything else, and then why say, which is inscrutable to all of us, why say just the employee spouse's contributions? What happened to the employee who worked for a salary and the employer, as all of us do, throw in extra money to our employees for purposes of keeping them happy so they can continue to work, that's not to be included. So you have two very glaring unfairnesses in this particular provision, and it's the position of the Allegheny County Bar Association that there's no reason to treat this particular marital asset differently than all other assets and we should leave it to the court's own discretion.

While I'm on a roll, I might as well continue on, and that is with regard to equitable distribution of marital property, and that is Section 3502 and then the addition of the tax and the market cost or sales cost provisions. Understand, as Mr. Howett has so well stated, that when Hovis came down, the Supreme Court just didn't know anything about this February 12, 1988, amendment because the decision was probably written before and it came out in April. So that we have fought Hovis forever, and there's no question that the Federal tax IRS commissioner looks at valuation differently than Pennsylvania looks at valuation, but I think that something is pretty obvious, and that is that many of the masters and

judges know how to deal this and deal with it with the proper discretion, and that is they match taxables against taxables when they're divvying things up, and they match nontaxables against nontaxables when they're divvying things up, and they don't mix apples and oranges.

What you've essentially said is the court may consider each marital asset or group of assets independently and apply a different percentage to each marital asset. And the factors which are relevant to that are the following. You put the word "may" in, and the word "may" is another discretion word. This is not "shall," it's not that the judge must do that, but rather the judge may take a look and utilize all of these factors or some of the factors, but the judge has to go over the factors. And one of the factors is the tax ramifications, which need not be immediate and certain. But it doesn't say that absolutely those tax consequences will be taken into effect, because clearly some of the tax consequences are so far distant and it's so difficult, and Hovis was a funny case because in Hovis, he was the one that took the appeal, and when he took the appeal, he was complaining he only got 15 percent Federal income tax reduction against a particular pension asset, and in fact he wanted 20 or 25, and the Supreme Court said, hey, we're not doing anything at all. So there was one litigant who should never have

taken an appeal, and then we get stuck with this aberrational case. But all this is saying is this is something you may do, and you don't have to just totally exclude it, you can still consider that somewhere down the line there's going to be taxes or sales costs and expenses, because clearly taxes and expenses or death are the things of certainty in our lives anyway and we know it's going to happen, but it's there.

Your partial distribution is a good statement, because I practice in about a seven-county area, and all the counties do differently, and there are certain counties that say there are no partial distributions. So you get the rich spouse with all the dollars and the nonemployed spouse or the unemployed spouse, the one with all the kids who have no control, has no money and can't get any money and has no opportunity, unless has a crazy person for an attorney who's willing to hang on until the end of the case, which normally doesn't happen.

Then I wanted to -- no, I think I want to stop. Do you have any questions? That was with one breath.

(Laughter.)

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you very much.

We have a question from Representative Harper.

REPRESENTATIVE HARPER: Thank you for your

testimony. I particularly appreciated the comments on the defined benefit plan section. But my question relates to prenuptial agreements, because your testimony was slightly different than Mr. Howett's. Here's my question: If we enact the bill as written, would we be imposing an affirmative obligation to provide full and fair disclosure in prenuptial agreements?

MR. POLLOCK: The act, if you ignore the 60-day, we're ignoring 60-day for this discussion, we have that obligation already. You're not imposing it, it already is. You're just codifying the case law as written to assure that this is the case law.

REPRESENTATIVE HARPER: Let me just stop you there for one second, because I thought that Pennsylvania law in this regard treated prenuptial agreements the same as any other contract, and in any other contract, persons of equal bargaining ability or persons who are not under the influence of the other could waive certain things. They could say, for example, each party has made full and fair disclosure of the assets by the schedules attached hereto as exhibits A and B, or has waived the right to do so.

MR. POLLOCK: That's correct.

REPRESENTATIVE HARPER: Okay. So are we now imposing an affirmative obligation, or is it your view of

Pennsylvania law that presently in order to be valid, every single prenup has to have full and fair disclosure?

MR. POLLOCK: No, that's not what your statute says. What your statute and the existing law says is that to be valid you must have full and fair disclosure or you must voluntary and expressly waive in writing any right to full and fair disclosure, or that you had adequate knowledge. So we try cases, and there was no exhibits attached, there was no exclusion as it says in the case law, but he did her taxes for five years prior to marriage, he knew everything about it, so who was he to say that he didn't know, that he didn't have a full and fair disclosure?

So it's a funny way to write the statute, but what the statute is essentially saying is that to overcome, this is a negative way to write, but it's clear, and that is to overcome an existing contract, you have to show clear and convincing something or other, and that clear and convincing something or other you have to show is all of those things, because if you miss one of them and it pops up, then of course the agreement's okay. If we put in that we waive or that we got to see it and we don't attach it or we do attach it or that we knew everything. So it's a kind of a funny way to write it, but it doesn't change the case law at all.

Now, your real question is why are we doing to prenuptial agreements this fair and reasonable disclosure thing?

REPRESENTATIVE HARPER: Right.

MR. POLLOCK: And the answer is that that was the Supreme Court's essentially, I mean, you got to read the case over and over and over again, which we all do because we have nothing else to do, and so essentially what Simeone is saying is that this is how we view fraud in a contractual relationship between prospective spouses. This is like a subset of fraud in my mind. Whether that's the proper interpretation of Simeone, it seems to be the reading of Simeone, and that is that if you and I contract with regard to this and I don't tell you that it's nonpotable water, you can get your money back for this bottle of water because I committed fraud. I mean, I knew that it was nonpotable. And so we've done a subset of that fraud, and that is we've essentially said, look, if you knew you were sitting on material assets or material liabilities and they were nondisclosed, then that's fraud.

REPRESENTATIVE HARPER: Right, I agree with that, and I think that you're right based on the way it's written, and I wanted to make sure that you felt that we weren't imposing an affirmative obligation on people--

MR. POLLOCK: No, I'm--

REPRESENTATIVE HARPER: Hold on for a second.

MR. POLLOCK: I'm sorry.

REPRESENTATIVE HARPER: Because the court has the ability to discern fraud in a specific case. The legislature paints everything we do with a broad brush. Either everybody does everything we write down or nobody does it. So by taking it out of the realm where the court says, is this contract like every other contract in Pennsylvania, and applies contractual law to it. And putting it in a statute, I mean, I think we have to know we're making a change in the law or not, but it's your view that we're not.

MR. POLLOCK: My view is we're not. I'm not making a value judgment on why we would codify the existing law. I mean, you have very real reason to throw in as many factors as possible in equitable distribution and alimony and not make them controlling and say that there could be many, many other things, but essentially because that's a way to have some consistency statewide. On the other hand, to absolutely say this is how these particular contracts are supposed to be done, I'm not making any value judgment on whether that's--

REPRESENTATIVE HARPER: Or whether it should be here or not.

MR. POLLOCK: Right.

REPRESENTATIVE HARPER: Okay. And to make it clear that both of us are speaking this way for the record, we're not talking about the 60-day requirement, which would be a brand new requirement under Pennsylvania law.

MR. POLLOCK: Yes. And the Bar Association clearly is against the 60-day requirement, but it made no value judgment as to whether or not the legislature should be recodified in case law as the enforceability of contracts.

REPRESENTATIVE HARPER: Thank you.

Thank you, Mr. Chairman.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you.

Representative Manderino.

REPRESENTATIVE MANDERINO: Thank you.

Let me start, I guess, with the discussion that just left off, because either I didn't understand all of the dialogue or it really didn't answer the concern that I had. I heard and understood your testimony with regard to the 60-day unenforceability clause, for lack of a better word. What I didn't understand clearly from your testimony or the last dialogue was if that 60-day provision isn't there, what is existing decisional law with regard to agreements signed if the receiving party wants to claim duress in the contract? What is the existing law? Because if not, Roman numeral (i), (ii), (iii) don't address the

issue of duress at all, and you said take 60 days out, leave it to decisional law, but nobody said what decisional law does with regard to duress, and my understanding of the reason that 60 days was being proposed was to deal with what seemed to be some nebulous standard about whether or not I was under duress.

MR. POLLOCK: Okay, it is not duress. The decisional law with regard to duress is actual physical constraint. Economic duress is not deemed to be duress to void a prenuptial or post-nuptial agreement. So although it's stress and emotion, its not duress.

REPRESENTATIVE MANDERINO: Okay, so if I am of the mindset that signing a contract under emotional distress ought not to be considered, I want to get rid of the 60 days; if I think it ought to be considered, I want to keep the 60 days, or something similar.

MR. POLLOCK: It sounds like that, except that I think both sides have the emotional stress. I have a 25-year-old and a 21-year-old and we talk about marriage all the time and we talk about the rationality of marriage, and having been married now for 33 years, and pray that I continue to be married, how I think of marriage today and how I think of it during those 60 days prior to marriage I'm sure are two different things. We're all under stress, we all have different tugs and pulls, and the well-heeled

spouse, the industrial magnate who is marrying the night cleaning lady for a second marriage and he wants to wipe her out of equitable distribution, spousal support, APL and alimony, counsel fees, costs and expenses, sounds like some power thing. But he wants to marry her, but he'll marry her on one condition. Well, I'll bet there's more than one condition. She wants to marry him at all costs, she's pregnant. So she has this overriding need to marry him. That's just not true. That's human nature. People do things.

REPRESENTATIVE MANDERINO: Okay, so current decisional law doesn't recognize a defense or a -- "defense" isn't the right word, what's the word I'm looking for, a reason to break the contract to be one of emotional duress?

MR. POLLOCK: No.

REPRESENTATIVE MANDERINO: Okay.

MR. POLLOCK: No, but emotional instability. Maybe you could go to that clear and convincing standard that somebody was non compos mentis. We have annulments, you know, but very, very few.

REPRESENTATIVE MANDERINO: On the issue of the formulary with regard to distribution of pension plans, and again, I understood what it was you said, but then you said several times to put this simplistic formula is unfair, and

you never finished by saying unfair to whom. Is there always an unfair to the -- is it that it ends up being unfair to the earning party whose pension the name is in? Is it unfair to the nonearning person who it wasn't their pension, or if it's not one side or the other, explain who it's unfair to?

MR. POLLOCK: I mean, theoretically it could be unfair both ways, that is that we've had salary cutbacks, et cetera, et cetera, et cetera, or we've had some really aberrational things go on with regard to pensions. LTV Steel is the prime example. But we all know what I'm really saying, and that is the unfairness is the post-separation activity that could be because our cases do go on longer than two years. They go on for 5 and 10 years, not because the lawyers want it to happen, believe me, but rather because some clients can't get there, or they allow it just to happen because they just don't want to get to equitable distribution.

In that 5- or 10-year period of time, all kinds of stuff happens, not the least of which is that the employed spouse has redoubled his or her efforts in terms of the career track. And paid alimony pendente lite, or had lessened APL throughout that period of time and may be paying alimony, but by hitting him again on equitable distribution by saying we're going to take a chunk of your

post-separation earned income is patently unfair because when one works, one works for a package, one works for a salary, one works for deferred compensation, pension, supplemental pension, disability, life insurance the whole shooting match. And there are those who work for modest incomes knowing they're going to have good pensions and stay on and on and on and on because the pension is what they're earning. It's a balance from an employer viewpoint, and I'll tell you, U.S. Steel and Carnegie, the pension plan is a dinosaur. When those skilled workers are gone, this whole concept is going to be gone.

All I'm suggesting is don't put a Band-Aid on it because you're hurting very clearly the spouse who has significant post-separation earnings. And we all want to take care of the dependent spouse who raised all the children, and there are two ways to do it under your statute. You don't have to do it again. One, equitable distribution, do something fair for that person. Two, alimony. And you've, fortunately, avoided this formula thing that made no rational sense, and so you allow alimony to fill in that gap. And as that person continues to work, you're saying we allow his or her income to be carved away and given to the nonworking spouse or the dependent spouse or lesser employed spouse throughout a particular period of time. And then this statute says, you know what, we'll do

some simple formula, we'll take another piece of the same thing. It ain't fair.

REPRESENTATIVE MANDERINO: How do you address what I would think would be the counterargument to that is, well, the formula by its very nature also takes that into account because if they let the post-separation distribution drag on for 10 years and they were only married for 3 years, there still is only, built in by way of the formula, 3/13 of pension.

MR. POLLOCK: Right. It sounds good, it sounds easy, but it's inexact, it's inaccurate, and I'm not saying this from a I've-got-to-have-it-right-down-to-the-penny sort of thing. We don't know why this is being applied to the U.S. Steel and Carnegie pension or the union pension. They're not the same, or the State Police pension. Because remember, vested or unvested, we still apply a coverture fraction. Or the firemen or the municipal or the PSERS. You're applying it all across the board, when in fact, there's multiple components to these people's pensions. And to do it without having appropriate actuarial and/or expert input does clearly cause an unfair, and I can't tell you if it's unfair one way or the other, because this is a matter of running the numbers, but you run the numbers based upon the individual facts and the individual pensions.

So what has been proposed here is an across-the-board formula that's supposed to apply to everybody when in fact all it is is just an easy way out of a very difficult intellectual area, and I'm not intellectually capable of getting on the stand and testifying as to valuation or what's marital and what's nonmarital, but boy, I hire experts to do that.

REPRESENTATIVE MANDERINO: Which brings me to my last point. Let's bring this down to the real world. I'm making up these numbers, but my gut reaction tells me that at least in theory they're probably not off. Ninety percent of the Joes and Josephines going through this are average wage and salary earners for whom their one sole house and the potential pension benefits are their only assets, if they even end up into the plus column as compared to the minus column by the time you do the net assets of the family, and only 10 percent of the people are in the other category where you're talking about big dollars. Now, I'm Joe and Josephine, 90 percent of the average, where I can barely afford to get divorced let alone the costs of divorce. Why should we not make a general rule that could potentially reduce substantially the costs of the litigation of the marital distribution, the property distribution?

MR. POLLOCK: Those 90 percent of the cases do

settle, and they do settle with coverture fractions because they are the house, car, and pension case. That's what we call them. And before the Divorce Code you well recall that there was a trade-off. You know, I want to drive off into the sunset, have my girlfriend, and you can have the house. Okay? Because we had no -- 90 percent of the cases or 95 percent of the cases, or even 99 percent of the cases, are the house, car, and pension cases, and they all settle ultimately. Yes, they battle over the kids, and there's nothing you can do about that, that's just human nature. Yes, they battle over is my earning capacity or my earnings or should I go back to work or not go back to work, and there's nothing you can do about that. And you have excellent systems statewide to do this with a statewide computer to enforce it. But what you're talking about with a myriad of these things is that tiny, tiny little percentage. So 90 percent of it is okay anyway, or I think you're being conservative. I think 95 percent of these cases are house, car, and pension, and they all settle. They all settle because no one can afford emotionally or financially to go through this aggravation.

But there are the few that you're talking about hundreds and hundreds of thousands of dollars that you will strip from people with these formulary, as you call them, or formula, that I call them. And without any rationale,

without any input, you're just wiping out an entire either actuarial or expert science. There's a whole industry out there of bean counters involved in this area. Heaven knows that's their world, but they're the ones that created these animals. And to say that the firemen's pension is the same as U.S. Steel and Carnegie pension doesn't make any sense to me. And then the union pension that is subsidized substantially or heavily weighted or not heavily weighted to the surviving spouse, it doesn't make sense to then have one formula across the board for that, because you didn't do that for the car and you didn't do that for the house.

You start going down the slippery slope, as we say, of creating specific ways to value specific property, you might as well do it all and you might as well give up being a legislature and go into the judiciary. That's why you said I will leave to the judiciary or we will leave to the judiciary valuation, we will leave to the judiciary how we split up the valuations, and then what to do once we split them up with regard to alimony. Why do it for one particular asset? And I defy anyone in this room to tell me that they're that experienced and knowledgeable and educated to tell us how this financially works out the same way for all the pensions. And then why is it that you have employee contributions only and not employer when I worked for an employer, I worked for a whole myriad of things and

not just my salary. I worked for lots of things.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you.

Representative Hennessey.

REPRESENTATIVE HENNESSEY: Thank you, Mr. Chairman.

Thank you, Mr. Pollock, for your testimony. A question from one of the prior Representatives, I guess Kathy, referred to page 2 on line 12. The question that I have involves the word "voluntarily." I thought that in today's society voluntarily had a concept with nonduress, almost intrinsically woven into the fabric of the term. I ran into a dinosaur of a judge a few years ago who said, if you didn't have a gun to his head, then it was voluntary, period, end of discussion, and threw us out. When the question was asked, it just seemed to me, you know, brought up a whole lot of rather unpleasant memories, and I'm wondering if we shouldn't simply say the party didn't execute the agreement voluntarily and it was not the probable result of duress. So that some, I mean, there may be, with my due respect to the members of the bench who are here, but there may still be some dinosaurs out there who actually think that duress voluntariness today does involve the concept of not having a gun to your head. I don't think it would hurt, I think it probably would make sure that we don't, when we address that issue, not leave

parties to argue over what that term means by simply saying it involves a more modern concept than the one that was applied against my client at the time.

MR. POLLOCK: Well, the gun to my head is close to my analogy of physical constraint. That's what duress is. We had to spell it out one time in one of our cases to try to explain, look, I understand you shelled out $40,000 or $50,000 for all the wedding arrangements and you spent $10,000 on a dress and you've done this and you've done that and you would have been terribly embarrassed with your family and his family and your friends, but that's only money. That's not somebody physically restraining you, or as this judge said, a gun to that person's head. It's only money. And so that's what we're talking about really is only money at that point.

It's the down the line, the 10 to 20 to 30 years down the line where those aberrational cases of Dr. Simeone occur where she got $25,000 in alimony over a two-year period of time and he was a neurosurgeon or general surgeon. Didn't seem to be fair, but that was our law. If this is our law, one would ask why are we singling out one thing or another? I think the codifiers did a superb job in isolating all the components of Pennsylvania case law as it sits, at least at 3106(a). To say voluntarily or not is unnecessary because that's our law. It's a judge's

discretion as to whether or not a gun to the head is the only component of nonvoluntariness. I would suggest to you, just because these people would be embarrassed before their hundreds of friends or parishioners doesn't make it involuntary. Because we all have decisions like this all the time. People break off engagements all the time, pregnant or not, people break off engagements.

I don't think it's necessary to say voluntary or not, but if voluntary is there, it's going to be interpreted by judges. And one judge in Allegheny County will have one view and another judge will have another view, and the Superior Court may have a third view, and the Supreme Court will have a fourth view. You put it in, the courts will interpret it, and they will meld it and mold it over time, and hopefully that judge 15 years ago isn't sitting on the bench right now, but on the other hand, if voluntary is the opposite of duress, then maybe he was close to right at the time. It didn't seem kind of nice to me, he didn't give you any other alternative other than voluntary, and so the drafters seem to be saying here are all the components.

I didn't answer your question.

REPRESENTATIVE HENNESSEY: I don't know, you might have. You might have answered it three or four times. But what I'm trying to get at is should we enhance

the word "voluntary"? Should we define it elsewhere in the bill by amending the bill, or should we add a component that says voluntarily and not the product of duress?

MR. POLLOCK: But then you'd have to define duress or not define duress.

REPRESENTATIVE HENNESSEY: Well, the benefit I would see, it would take us into the modern era as opposed to the old west where we say that voluntary was absence of a gun to your head.

MR. POLLOCK: I think that they're both sides of the same coin, and I don't know if one would do harm, but I wasn't one of the drafters for the Senate on the bill, so I can't say with absolute certainty it wouldn't do harm, but I can't see how it would do any harm because in fact you still leave to a judge to make a determination of what's voluntary and what's duress, and you have limited slightly, maybe, what it means to be involuntary, maybe. Or maybe it's two sides of the same coin.

REPRESENTATIVE HENNESSEY: I don't know what the Senate drafters intended, but I think I've already got my amendment prepared to make sure we don't go back to the wild west.

MR. POLLOCK: Well, you're not going to do any harm by doing it, I think. That's my personal opinion.

REPRESENTATIVE HENNESSEY: Thanks.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you, Attorney Pollock, for your testimony. Appreciate it.

MR. POLLOCK: Thank you for the opportunity to appear before you.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you.

Next we will have a panel of the Advisory Committee on Domestic Relations Law of the Joint State Government Commission, the Honorable Emanuel Bertin, Court of Common Pleas. Judge Bertin and Mr. Howett, Attorney Howett is back with us. Attorney Albert Momjian, is that correct, and Frederick Frank.

Thank you very much for participating with us today. You may start when you're ready.

JUDGE BERTIN: Thank you, good afternoon. My name is Judge Emanuel Bertin, and I am a judge with the Court of Common Pleas of Montgomery County. It's an honor for me to be here today to make some opening remarks about the work of the Joint State Government Commission Advisory Committee on Domestic Relations Law, a committee which I'm privileged to chair.

From a historic perspective, the advisory committee was formed pursuant to 1993 Senate Resolution 43, Printer's No. 1673. And Senate Resolution 43 directed the commission to undertake a study of Domestic Relations Law, but excluded the subjects of child abuse and adoption.

Senate Resolution 43 also created a task force comprised of the Majority and Minority Chairs of the Senate and House Judiciary Committees, and the Senate and House Aging and Youth Committees.

At the outset, I wish to extend my appreciation to the task force for constituting such a wonderful committee for me to chair. The committee of 27 individuals, 11 women and 16 men, was highly credentialed, diverse, and dedicated. The members have had extensive experience in family law, many of whom held leadership positions such as State and county Bar presidents, chairs of Family Law sections of the PBA, the American Academy of Matrimonial Lawyers, the American Bar Association, and they have written and lectured extensively in the area of family law and have been active in dealing with prior revisions of the code, initially the 1980 code and then the '88 amendments. These individuals have represented both husbands and wives regularly so that they have brought a balanced approach to the issues at hand. A broad perspective of disciplines was present on the committee through the diversity of the various family lawyers, family court masters, trial judges, an appellate court judge, a law professor, and a legal aid attorney.

The advisory committee decided to begin its review of Domestic Relations Law with a reconsideration of

the Divorce Code, and it formed three subcommittees, consistent with the statutory structure of the Divorce Code. One, the Dissolution of the Marriage Subcommittee, that's basically divorce, and the chair of that is Fred Frank, who is sitting to my extreme right. Second, Property Rights Subcommittee Chair, Jack Howett, who is to my left, and Alimony Subcommittee Chair Ann Begler from Pittsburgh, who is not present today with respect to the alimony portion of our work.

It then formed a liaison committee co-chaired by Albert Momjian, who is to my immediate right, and Leonard Dugan, with the Joint State Government Commission Advisory Committee on Decedents Estate Law.

And here is how our process worked. The subcommittees and the liaison committee met in Pittsburgh, Harrisburg, and Philadelphia many times and brought to the full advisory committee recommendations which would be studied in advance by the full advisory committee and then debated before the full advisory committee at our meetings in Hershey. That's where the full advisory committee met, in Hershey. Nine such full advisory committees were held in Hershey, which followed the numerous prior subcommittee meetings with the smaller group. At the conclusion of the subcommittee meetings and the nine full advisory committee meetings, a consensus was reached and reflected in the

April 1999 report of the advisory committee. Senate Bill 95 incorporates the recommendations of the committee contained in this April 1999 report except for the committee's recommendation relating to alimony and the committee's recommendation for a one-year separation period as a ground for divorce.

Therefore, the proposed amendments as they presently stand in Senate Bill 95 would be as follows: One, to clarify the definition of separate and apart; secondly, to establish statutory rules regarding the enforceability of premarital agreements; thirdly, provide that any premarital agreement executed within 60 days of the marriage would be void; fourth, to amend the provisions concerning bifurcation of divorce by rejecting automatic bifurcation, providing for bifurcation with consent of both parties, and permitting bifurcation only under limited circumstances in the absence of consent.

Next, to provide that under certain circumstances the divorce action does not abate upon the death of a party, and the party's economic rights and obligations are determined under equitable distribution principles, not under the elective share provisions of the Probate Code.

Further, to clarify how and when to measure and determine the increase in value of nonmarital property.

Next, to insure that only the net increases in the value of a party's nonmarital property is considered part of the marital estate. Next, which you've been discussing, reverse Berrington, adopt a coverture fraction methodology along the lines of the Hovis case, and include all post-separation enhancements except for the post-separation monetary contributions by the employee spouse in the value of a defined benefit plan. Next, clarify statutory law to specifically authorize courts to consider each marital asset independently in equitable distribution, and in appropriate cases to apply a different percentage to each marital asset.

Next, to clarify the tax ramifications need not be immediate and certain to be considered in making an equitable distribution award. Next, to provide that the expense of sale, transfer, or liquidation associated with a particular asset may be considered in making an equitable distribution award. And lastly, to authorize interim equitable distribution awards, and a minor matter, to raise the amount from $500 to a thousand as the threshold for when a party may petition the court for the creation of a constructive trust for undisclosed assets.

As I stated earlier, we created a subcommittee on alimony and did include a revised chapter on alimony in our April 1999 report. Generally speaking, the

recommendation proposed a revision of the rules regarding alimony to provide more certainty and predictability through presumptive guidelines for the amount and for the duration of alimony. While the alimony recommendation is not part of Senate Bill 95, we stand ready as an advisory committee to assist the legislature on addressing the issues related to alimony.

In November of 1999, the advisory committee issued its a second report. This report made recommendations regarding Pennsylvania custody law. Maria Cognetti chaired that custody subcommittee. These recommendations are incorporated into Senate Bill 275, Printer's No. 465. We wholeheartedly feel that these recommendations are in the best interests of the children of Pennsylvania.

As to the presently proposed Divorce Code legislation, our committee felt we had an opportunity to write a report on divorce law that would fairly and sensitively meet the needs of the households of thousands of citizens throughout the Commonwealth of Pennsylvania for years to come. We realize that we were entrusted with a heavy responsibility, and we welcome the opportunity to serve. We wanted this legislation not to give mere lip service to, quote, achieve an economic justice, but to embody it.

I've been pleased to serve as chair of the advisory committee, and at this time it brings me great pleasure to introduce three distinguished members of our advisory committee, Jack Howett from Dauphin County, Al Momjian from Philadelphia County, and Fred Frank from Allegheny County, and they will present testimony regarding the specific provisions of Senate Bill 95 and will answer questions that you might have.

I want to thank you very much for this opportunity. I am unaccustomed to reading my canned testimony, so if my cadence was in any way boring, I apologize. But with that, and perhaps with a more fluid presentation, or is yours canned as well?

MR. HOWETT: No.

JUDGE BERTIN: Can we start with Jack Howett, because he had the bulk of this matter with respect to the ED, and I know you've heard from him before. I came in at a time where I saw the tail end of his testimony.

SUBCOMMITTEE CHAIRMAN BROWNE: Sure.

JUDGE BERTIN: Okay, thank you.

And I just want to acknowledge a Montgomery County Representative.

REPRESENTATIVE HARPER: I'm trying to think of a question, because usually you get to ask me questions.

JUDGE BERTIN: It feels a little awkward on this

side.

MR. HOWETT: Mr. Chairman, members of the committee, I will try and move through my testimony rather quickly, and I'm going to follow the format of the report that was prepared in 1999, and I know all of you have available to you. And I'm going to broad brush some of the things that I think are particularly noncontroversial, but I want to mention them anyway.

The first is as to how and when to measure and determine the increase in value of nonmarital property, and this section simply codifies a case called Litmans, which says that in nonmarital property, we're talking about property that is inherited property, property that you owned before the date of marriage, property that was gifted to you alone and not transferred into joint names, these are the things that have traditionally been and are under Pennsylvania law separate property, nonmarital property, that in valuing those things, this section says that you value them at the time of separation or the time of closest to trial, which is going to be sometime after separation, whichever produces the lowest value. So that if it's your separate property, the other party can't say, well, we're going to pick the higher value time and include that increase, that increase in value, because the increase in value of separate property is marital property under

Pennsylvania law, and we're not proposing that that be changed. That's been the way it is since 1980. It's just a question of when do you determine what that increase is, and this just says you would determine it at the point of separation, or the point of trial, whichever is lower. And it makes common sense to do that.

The next point is to ensure that the net increase in value of a party's nonmarital property is part of the marital estate. If you own two assets when you come into the marriage and they're two different stocks, AT&T and IT&T, and they're both worth $50, and the AT&T goes to $100, and the IT&T goes to zero, you have a package, a bundle of rights, that's still worth 100 bucks. It hasn't gone up in value as far as your portfolio of rights. But there have been some decisions and some masters that say, well, we've got a $50 increase in AT&T, that's marital. We have no increase in the IT&T, therefore there's no increase there, so we're going to add 50 bucks to the marital pot. It makes no sense, and I think that it's sort of logical and intuitive to say that it was your intent when you first adopted this in 1980 to say that the increase in value is the whole bundle of rights that one comes into the marriage with. All this does is codify the Litmans case that so held and seems to make rather rational sense.

The Berrington and Holland issue I'm going to

defer for just a moment, because I want to try and go through these simplistic things and I want to come back to a couple points that you raised, Representative Manderino. We want to clarify that in Section 3502(a) that the courts may consider each asset independently. They don't have to decide each asset independently, they don't have to say that you get 50 percent of the car, you get 52 percent of the house, you get 56 percent of the pension, you get 40 percent of the shore house. You can bundle things together or you can say I'm going to treat everything together, but it gives the court the authority to say that, for example, in a defined benefit plan that has gone on for a long period of time, to say that, well, the independent spouse here really worked pretty hard in the vineyards for this five or six years after separation, and we're going to give that spouse 60 percent of the pension and only 40 percent to the dependent spouse, whereas we're giving 50/50 on everything else. It allows the judge the discretion to do that in an appropriate case.

As to the tax ramifications, I think we've pretty much covered that. The tax ramifications and the cost of sale, if there are any questions, I'll be happy to try and field those afterwards, but I think we covered it in my earlier questions and I think it's been adequately discussed today. And this goes to both the costs of sale

as well as tax ramifications.

We want to, in Section 3502(f), establish that the court clearly has the authority to make interim distributions of marital property. There have been some courts and some masters that have said, we don't have the authority to make an interim distribution. Let's say there's a $100,000 account or a $5,000 account, it doesn't matter, and I realize that as Representative Manderino said, 90 percent of these cases are small cases. A lot of the cases that perhaps some of those of us testifying today tend to have somewhat larger cases because we're more experienced, we're older, we've been around longer, doesn't mean that most of the cases in this Commonwealth aren't the mom and pop cases that are very simple, often with no assets, and when there are assets, they're the house and the pension cases. But even in those cases, there is often the need for an advance distribution to the dependent spouse. Let's say because everything is titled in husband's name, is it fair that just because it's titled in his name, it's clearly marital property, that there shouldn't be some advance distribution, even a small amount, during the course of the case so that the dependent spouse has the ability to carry on the case? This clearly gives the court the discretion to do that. It says that the authority is there. You don't have to do it, but the

authority is there to do it.

Now, I want to come back now to the issue of Berrington, Katzenburger, and these defined benefit plans, and I'll try and do it briefly, because I know that we've sort of been around this pretty much today as well. Representative Manderino, you mentioned that 90 percent of the cases aren't going to be able to afford experts, and you are spot-on right. And Mr. Pollock said that 90 percent of the cases settle, and I would say probably at least 90 percent of the cases settle, but that doesn't give any justification for the law to be unfair. Now, it's whose ox is being gored here, I guess. Mr. Pollock says it's unfair one way, we're saying it's unfair unless the legislature changes it back to the Holland case and goes back to the coverture fraction methodology.

The fact is that even though 90 percent of the cases settle, they settle on the basis of what the law is. You settle a case knowing that if you can't settle it, you're going to have to litigate it. Well, why litigate it if the law is against you? Right now, the law is against the dependent spouses in these pension cases. And again, as you pointed out, Representative Manderino, if a case does run 5 or 10 years, and there are cases that do, but they're certainly the rare ones, those cases will be corrected by the use of the coverture fraction. You'll

have 3/13 instead of 25/30. All we're doing by this legislation is defining what is marital property. And that is your job. That is the legislature's job, and that's what the legislature has done throughout the Divorce Code, to define what is marital property. You're not taking away the discretion of the court to deal with who gets what portion of that marital property. That is not being removed.

So I submit to you that really what is fair here is not to exclude a big chunk of that which is marital property by continuing to use the Berrington, Katzenburger analogy. And so the Joint State Government Commission, your body that we constituted by doing this work over the years and so forth, is recommending to you that you reverse Berrington, Katzenburger and basically adopt the Holland approach, the coverture fraction approach.

Mr. Momjian will speak to you primarily about the premarital agreements, and Mr. Frank about some of the aspect of the Divorce Code itself as far as the actual implementation of getting a divorce decree, and I will certainly stand for questions now or at the conclusion of Mr. Momjian's and Mr. Frank's testimony.

MR. MOMJIAN: Does the committee have any questions of Mr. Howett?

SUBCOMMITTEE CHAIRMAN BROWNE: It's probably

preferable that we do all the testimony first.

MR. MOMJIAN: I appreciate the opportunity, members of the committee, of appearing also to talk exclusively on Section 3106 dealing with premarital agreements, which seem to be somewhat controversial. I'm an attorney practicing for 45 years. There are 14 attorneys in the department of the firm of which I chair which do nothing but family law work. We do literally hundreds of premarital agreements, litigate the enforceability and validity of premarital agreements for a number of years. I feel strongly, and I'm almost in agreement with Mr. Pollock, with the exception of his reference to the 60-day exclusionary period, that the first parts of the proposed law are really a recitation of what I regard to be existing law for the most part, they give a little bit of balance, burden of proof being upon the party seeking to say it's unenforceable, there's another party seeking that, it has to be by clear and convincing evidence is okay, and I'm more than satisfied that existing law that the parties did not execute the agreement voluntarily or any of the other three things in an event to do it.

The big issue that appears to be controversial is the issue of 3106(b) dealing with the 60-day period. I'm somewhat surprised at my colleague from Pittsburgh. I'm an Eagles fan and we're very much softer than he, I

don't treat my wife as an antique car, or a classic car. I've been married for 45 years, as long as I've been practicing law, and I think it's wrong, honestly, to equate the marriage to someone that you love and have lived with for a lifetime with your children as the purchase of a car.

Sure, adults signed it, but even under existing law today, you have all kinds of limitations on what people can sign. Even the Simeone case, which says it's a mere contract, nonetheless imposed an overlay that whether it's consenting adults who sign a day before the marriage or 55 years before the marriage, you have to have a full and fair disclosure. That was the condition imposed before you could have a contract under Simeone. You have all kinds of Federal and State laws regarding recisions of contracts within 48 hours. Nobody says, why don't you just sign and let it go? In old days, we used to sign confessions of judgment ordinarily and sign them in two minutes. You can't -- it's cheaper to file suit and get a judgment by default or otherwise than get someone to sign a confession of judgment because of the complexities of going through that.

And the idea that you can sign one day after the marriage, be my guest, because that would be great. Your bargaining position is then equal if not better, because you don't have to be satisfied with an agreement that's

stuck in front of you 48 hours before the wedding takes place. Keep in mind, if you will, that 26 States in this country have some provision of the uniform premarital agreement law, which has certain protections for people who sign these agreements. You have to have a lawyer, there has to be a degree of reasonableness or conscionability at the time the agreement was signed, or there has to be a degree of reasonableness or conscionability at the time it was enforced. We have none of that. We have a bare contract, and the only thing that we're suggesting -- incidently, this concept of falling in love one day before your marriage and getting married like what these movie stars did recently, fine, they didn't sign a premarital agreement. If they had to do it, they'd have to wait 60 days.

What we're saying is the following, and in Simeone, the agreement was signed the eve of the marriage. And the court went on to say that even if you didn't understand the agreement, that's okay. Now, you can't even do that sometimes now. You have all kinds of things in a complaint. There has to be, in Philadelphia at least, in Hispanic language or it has to be in a certain kind of language. There are protections for certain people, and I think people forget that when you get married and sign a premarital agreement before you get married, you're giving

up something substantial. When you turn down a fancy car because you're an adult, you're turning down a car. That car has no rights under the Divorce Code. It doesn't have equitable distribution, it doesn't have alimony, it doesn't have counsel fees and costs. In a probate sense, and we're not dealing with probate here, you have a statutory right of one-third no matter what happens.

And incidentally, the one remark that was made about definition of, unfortunately, most of the agreements that are premarital agreements have lawyers on both sides. Under the Susan Market, one of the cases that I cited in my thing, you can't have duress under Pennsylvania law if you're represented by counsel, short of putting a gun to your head. So there can be nothing. What you really have here is emotional turmoil.

Think about the classic cases. Simeone, it's surprising that it still stands up, Simeone says that if you signed the day before and all the guests are out there, Dave Pollock seems to think, well, that's okay, go out and tell the people who came there, gathered together, gave you gifts, came from all over the country, go out and say I can't get married. Now why? Because my husband or husband-to-be stuck in front of my face 24 hours something to sign, and he's the one that's going to back out of the marriage if I don't sign. What kind of a position is that

when people who are getting together to marry should be put in that position?

What we felt was the following. We had three choices: Leave the law as it is, which is Simeone with a full and fair disclosure. If you want to leave it that way, then you're going to leave it that way with a lot of litigation. Or adopt some form of the uniform premarital agreement, which puts some kind of reasonableness or a conscionability into it either at the time it was signed or at the time it's enforced. We felt that's unusual because you're going to have an awful lot of litigation.

What we said was why don't we do it this way, treat it like a contract, do anything you want to do, but if it's that important for you to have a premarital agreement because your dad was a multi-millionaire and says have a premarital agreement, do all that work and then plan your wedding. What we did in taking the 60 days, we figure it takes six weeks to get out the announcement, and we tacked on another two weeks, so that's where the 60 days comes from. It could be 90 days, it could be 60 days, but in that way people can be fully informed. And I agree with Dave Pollock, if you have 60 days before the marriage and the invitations haven't gone out and you're a consenting adult, you sign that paperwork, you have a lawyer representing you, and there's no condition, you have that

lawyer, fine. Then there's nobody that can complain. It, in my judgment, is worse than putting a gun to your head to tell someone who's getting married in a wedding dress that, you know, you've just run in and you got to sign something.

I can give you one illustration of a case I had where I represented a female in Chester County, she was getting married in her bridal dress and her fiance, husband-to-be's friend who is a lawyer comes running in, I got a gift for both of you, he says. It's a premarital agreement protecting your assets, and they go into the anteroom of the church vestibule and they're signing paperwork she never even saw, it's witnessed by the maid of honor, and the lawyer was bright enough to say at least the following: I know you haven't had a chance to read it, but it's here to protect both of you, she signed it. What is she going to do, walk out because he's insisting that it be signed? She never got a copy of the agreement, number one, never knew that the lawyer told the husband that in the agreement itself you have 24 hours or 48 hours to opt out of the agreement after you read it, never saw that, she never got a copy of the agreement.

After a 17-year marriage with three children or four children, she says, I don't like the marriage, I'm getting out of here, he throws the agreement in front of her face that she never even had. I said, you signed away

all of your rights. I was able to get that agreement turned aside because it was evident that nobody understood the agreement when it was signed. That's the worst example you have. But those things happen. And I don't think it's so frightening in today's economy and in today's what we're doing to have someone have 60 days to sign an agreement.

There are two cautions I have to give you. One is the Bonds case, which I cite, and the Bonds case stands for the proposition, and that's on the last page, that's Barry Bonds the ball player. California takes the position that we will interpret the premarital agreement that's signed in accordance with the jurisdiction where it was signed, but we're going to enforce it under our public policy.

I say that because the question that arises that nobody has asked yet, what happens if you have a premarital agreement signed 10 days before the marriage in New Jersey and then you come in and you live in Pennsylvania and you want to enforce your agreement, what happens? I don't know what happens. I suspect that there might be some policy. We can't say that the New Jersey premarital agreement is invalid because it was signed lawfully under the law of New Jersey. Now, fortunately, New Jersey law has degrees of conscionability and reasonableness patent under their law, so it might not be a bad agreement to begin with, but if

you have that 60-day rule in Pennsylvania and you don't have it in the surrounding States wherever they come from, that's an issue you have to deal with.

I don't address the issue, I don't know what the solution would be. I think that a Pennsylvania court would have to define and decide, unless you want to orchestrate it by legislation, as to what that position would be. The minute you say that they're going to honor on a full faith in credit basis premarital agreements signed in other States, then you might as well get your premarital agreements signed someplace else and live someplace else and move back to Philadelphia.

The second issue which concerns me, but I don't know what I can do about it, I can call it to your attention, this only applies to divorces in the context of premarital agreements. It doesn't apply in the event of death, and that's unusual. I don't know whether you picked that up. As it is now under Simeone, a premarital agreement, either in the context of divorce or death, has to have a full and fair disclosure, otherwise the contract is unenforceable. Here as we're proposing it, because I was on the committee with Mr. Dugan, and we couldn't get the probate bar to go along with what we're doing in the divorce context, I think it's a little bit awkward to have an amendment to the Divorce Code which would provide for 60

days but then not have it applicable in the event of death.

And I would suggest that if you're troubled by that as I am, that there be some legislation that amends the probate law that would treat it the same way. I'm not here authorized to tell on behalf of the probate bar that this is something that we're advancing on their behalf, but this is an amendment to the Divorce Code, and as an amendment to the Divorce Code, in my judgment, it can only deal with premarital agreements that arise under the context of divorce and not under the context of death. It's surprising to me, but that's the result of the committee's work. We couldn't do any better than that.

JUDGE BERTIN: Fred Frank, unless there's--

REPRESENTATIVE HENNESSEY: Could I just ask a question according to that?

JUDGE BERTIN: Sure.

REPRESENTATIVE HENNESSEY: The language says that a premarital agreement executed within 60 days shall be void. It doesn't say it should be voidable, it shall be void, which would strike me as saying it's unenforceable for any purposes.

MR. MOMJIAN: It's void for any purpose.

REPRESENTATIVE HENNESSEY: Including somebody claiming a benefit after a death under the Estate Code.

MR. MOMJIAN: But it's only an amendment to the

Divorce Code. Our sense is that could not affect the Probate Code.

REPRESENTATIVE HENNESSEY: Even though we say that it's void and not simply voidable?

MR. MOMJIAN: It's void in connection with the application of the Divorce Code.

REPRESENTATIVE HENNESSEY: But it doesn't say that. It says it's void.

MR. MOMJIAN: You're right. If it can be interpreted that way, it would be fine. I think it could be enlarged. I think that the ideas literally promote that idea. I don't think it takes a great step to amend the probate law accordingly. I think it would be awkward to even run the risk that there's going to be one premarital agreement that has a 60-day rule in the Divorce Code without a comparable reference to the Probate Code. It could be solved in that way.

REPRESENTATIVE HENNESSEY: If we were to simply add that it would be void for any purpose, would you still think that that would be insufficient to have it effective against an estate's claim versus under the Divorce Code?

MR. MOMJIAN: You guys are much better than I am at this. But I would suggest that if you're going to say it's void even in the context of a death without regard to a divorce, then what you're doing is putting in the Divorce

Code something that really should be in the Probate Code. And I just think that it's better to pick up the same kind of language without all the, you know, and just I don't know whether you could do that.

REPRESENTATIVE HENNESSEY: Sometimes you have to wait for the particular vehicle to come along. We might wrestle with a Divorce Code one session and not pick up any amendments to the PEF Code until four sessions later.

MR. MOMJIAN: Well, we struggled with this, and the three options, leave it as it is, adopt some form of the uniform premarital agreement, which would be a good solution, but we were concerned that these concepts of reasonableness, conscionability, and unconscionability would just motivate more litigation, this was a simplistic thing. It's a simple contract, you could even waive the disclosure, just give it 60 days so it can sink in, and before you're embarrassed or terrorized or emotionally distressed, it's a terrible time to be getting married to go through the idea of negotiating something. And most of ours, as I say in my statement, most of the agreements that we negotiate are negotiated in a matter of weeks or even days of the date of the marriage.

MR. HOWETT: Representative Hennessey, in specific point of your question concerning how it might affect the PEF Code, because it says shall be void, the

next section, which is the definition section, the reason we defined agreements the way we define them here, it says a premarital agreement as used in this section means an agreement regarding matters within the jurisdiction of the court under this part between respective spouses made in contemplation of the marriage. So it only deals with the rights that are set forth in the Divorce Code, and so we try to deal with through the definitional provision of premarital agreement that it only deals with rights under the Divorce Code. Because we knew that the PEF Code issues, because the probate people were not joining in this, we didn't want to affect how a prenuptial agreement would be dealt with under the PEF Code. Does that--

REPRESENTATIVE HENNESSEY: Okay, I think I understand what you're saying. I just, it just seems strange that we would have, I understand the idea of trying to avoid amending one body of law, but you know with language in the Divorce Code here, it would be hard for me to understand how the estate's court could turn around and say that it's void under the divorce law but because we're not dealing with a divorce, or maybe we're dealing with a divorce in progress and then somebody died not far offhand that we're going to use that other special provision in the back that we'll take what was clearly to be a void contract and breathe some life into it.

MR. HOWETT: If the prenuptial agreement, as for the ones that we draft in our office typically deal with divorce and death. We say if the marriage ends because of divorce, then X happens. If the marriage ends because of death, then Y happens. It would not seem inconsistent to me at all for a judge to say in a situation where there is a death in a happily married family to say that even though this was executed within 60 days, it's void for divorce purposes, but we're not dealing with divorce, we're dealing with the death provisions, so we're going to enforce them.

MR. MOMJIAN: But there are a couple points, if I may. We deal with three contexts: Divorce, number one; happy death, which it's hard to believe that a death can be happy, but that's when they're living together and they die, but also an unhappy death context where the parties are in the middle of a divorce and there's a death. And what generally happens in these premarital agreements, if I may, is that a greater benefit is given to the surviving spouse, or if there's a happy death and the parties are living together at the time of the death of the person with all the money. But if there is a death during the pendency of a divorce action, then the benefit given to the dependent spouse is more akin to the benefit given in the context of a divorce. So that's the problem that I think Jack is right, if it's a happy death, it may not be the end

of the world.

And I do think there's another issue that you raised. If the agreement or the legislation proposed says it's void, can the parties kind of say it's okay? Maybe that's something that we could probably add. I'm just thinking about it, if both parties acknowledge that it's okay, I guess it's okay. But I don't know now whether we have to put that in legislation or not.

REPRESENTATIVE HENNESSEY: Thank you.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you.

Attorney Frank.

MR. FRANK: As Judge Bertin noted, it was my privilege to serve as the Chair of the Advisory Committee Subcommittee on Grounds for Divorce. The committee's principle recommendation on grounds was to lower from two years to one year the period required to obtain a divorce under Section 3301(d) of the code. The genesis of this recommendation was the committee's firm belief that after a year's separation, parties will know whether there is any possibility of a reconciliation. Requiring a period longer than one year holds a party hostage to a failed marriage, which is contrary to the intent of the Divorce Code. We also noted that the experience of having to wait two years before being able to proceed with a divorce contributed to a lack of confidence by the party in the judicial system.

They saw themselves caught in an attenuated legal battle which put their personal and financial lives in limbo.

We recognized that this provision was eliminated in Senate Bill 95. In recommending the one-year separation provision, we were mindful of the concern that the existing two-year provision did guarantee a period of support for dependent spouse who would not consent to a divorce. Part of the committee's recommendations, as Judge Bertin noted, was to strengthen the alimony provisions, which mitigated this concern. The change in the separation period was linked to a reform of the bifurcation provisions. Believing that the need for bifurcation would be lessened by a shorter separation period, the committee provided that there would be no bifurcation unless the parties either consented thereto or one year had elapsed since grounds were established, which except in the case of the rare fault divorce would either be by filing affidavits of consent or proof of a one-year separation. In the case of a contested bifurcation, the burden is on the moving party. That party must show, one, compelling reasons for bifurcation; and two, that there are sufficient provisions in place for the other party during the pendency of the litigation to protect that party.

The committee's recommendations on bifurcation remain intact under Senate Bill 95, except the requirement

of one year having elapsed since the grounds were established has been eliminated. This recommendation was also borne of the general concern that bifurcation can create numerous problems for the dependent spouse, including loss of health care coverage and protection under retirement benefits. Thus, rather than putting the burden on the dependent spouse, who can ill afford the costs of drafting orders for interim protection, the burden is shifted to the nondependent spouse to see that the protections are in place.

A concomitant recommendation is that an action for divorce should not abate on the death of one party where divorce grounds have been established. Again, we view this as a protection for the dependent spouse who may lose valuable rights in equitable distribution simply because the other party dies during the pendency of the litigation. Under the current state of the law, in the event of such a death, absent bifurcation, a surviving dependent spouse is left with his or her elective rights under the Probate Code, which generally would result in a far inferior award to that in equitable distribution.

Lastly, an area of considerable litigation is proof that parties have lived separate and apart either for purposes of defining the separation date for marital property, or for proof of separation under Section 3301(d).

This is particularly problematic when parties continue to live in the same residence after the divorce action is final. To lessen litigation in this area, the committee recommended the definition of separate and apart be amended to create a presumption that the parties separated at the time of service of the complaint on one party by the other. With service of the complaint, there is clear notice from one party to the other that he or she wishes to terminate the marriage. It gives the courts a definitive demarcation point of record and should discourage frivolous litigation on this issue of the separation.

Thank you.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you, Attorney Frank.

Before I ask the members for questions, I just want to extend my thank you to all of you for your hard work as members of the Advisory Committee for the Joint State Government Commission. From the Judge's explanation of the process, it was obvious you did a lot of work to provide these recommendations to the committee, and I think I can speak on behalf of the Chairman of the Judiciary Committee that we'll take the recommendations very seriously in determining how to proceed on Senate Bill 95 and other recommendations to improve on. So I just want to say thank you to all of you.

JUDGE BERTIN: Thank you.

MR. HOWETT: Thank you.

MR. MOMJIAN: Thank you.

MR. FRANK: Thank you.

SUBCOMMITTEE CHAIRMAN BROWNE: Representative Manderino.

REPRESENTATIVE MANDERINO: Thank you.

Two areas of questions. First, Mr. Frank, I just want to make sure I understood your testimony about the one-year, two-year separation point, and what you're saying is that you're okay with the legislation even though it went back to two years because the one year was contingent on also the revisions to the alimony portion of the law that we didn't do in this particular bill, but in theory you'd rather see one year, but one year needs to have the reforms to the alimony section of the law? Am I following that correctly?

MR. FRANK: Well, Representative Manderino, this was viewed as an integrated document. One subcommittee did not act in the absence of the other. And traditionally what has been raised as to why we should keep the two-year separation period was the concept that it guaranteed a period of support, of rehabilitative support to the dependent spouse. And recognizing this out of concern that there had been a lack of uniformity in the application of

the alimony provisions, as well as we felt generally in certain instances insufficient alimony, while we were limiting the period of the separation, we also were attempting to reform the alimony provisions so to strengthen an individual's right to alimony at the end of that one-year period.

Speaking, and Judge Bertin can speak to this better, but I think that speaking for the advisory committee, which is what we are here for, we have to go back, we had a document that clearly recommended a one-year separation, and that was the recommendation of the committee for the reasons that I spoke about. A, that we believe that whether you're going to know whether there's going to be a reconciliation, it's going to occur, and of course there are provisions in the code which allow for mandatory marriage counseling. And secondly, that the whole process has become so attenuated and people have lost faith when they see themselves mixed up in this. And I would just also add that for my own experience, the effect upon children of the lengthy divorce proceedings, where the parents are engaged in this type of a battle, is really not in the best interest of the whole family, but rather to see this matter resolved and to go forward is perhaps the best thing that can happen for the children.

REPRESENTATIVE MANDERINO: Let me articulate it

a little bit differently then, because I'm still not sure I'm understanding the point. From the point of your, I don't know what I'm calling it, commission or task force, the advisory committee, from the point of view of the advisory committee, one-year separation with the alimony reforms is what we want to see.

MR. FRANK: That's right.

REPRESENTATIVE MANDERINO: Senate Bill 95 doesn't deal with the alimony reforms.

MR. FRANK: And it also eliminates the one-year.

REPRESENTATIVE MANDERINO: Right, but isn't that consistent with, I mean, you don't want to shorten to one year and not have the alimony reforms in there.

MR. FRANK: Well, I think that that was certainly part of our thinking, but it was not a single factor causation here. There were multiple causational reasons that we saw, why we saw the one year should be shorter.

REPRESENTATIVE MANDERINO: Okay, so then you're saying that we'd like to see it shortened back to one year even if you can't agree to put the alimony stuff in here?

MR. FRANK: The problem is, you know, this is like Humpty Dumpty and how do you put it back together again, because we did have an integrated document, and I'm not sure, faced with that decision, what the advisory

committee would have said.

REPRESENTATIVE MANDERINO: Okay, I understand. My second question for Mr. -- Momjian?

MR. MOMJIAN: Momjian.

REPRESENTATIVE MANDERINO: I'm going back to the 60-day timeframe on the prenups, and I'm not troubled by what it is attempting to provide. I'm a little bit troubled by a solid, a specific number of 60 days, and maybe I would be less troubled if I understood the impact of post-marital agreements. If both parties of their own volition choose to execute a post-marital agreement, does that kind of like, you know, my last will and testament, this is the updated version, does that trump, does that void, does that precede the prenup?

MR. MOMJIAN: Representative Manderino, the reason it doesn't is because on a post-marital agreement, the parties have had the benefit of the full panoply of rights and benefits under the Divorce Code, so there's no question about it. In most of the cases, other than the 95 percent which are house and pension, where they're represented by counsel, they've had the benefit of counsel. So even if they haven't had the benefit of counsel, they've had the benefit of the court system, the master system, the judicial system, judicial review. So there you can have agreements signed on the courthouse steps in two minutes

because you've been through a process and you have all of your rights.

REPRESENTATIVE MANDERINO: Okay, maybe I didn't use the right term. Let me be very specific with that kind of hypothetical example. Whether it is, as Mr. Pollock raised, whether it is two people who fall in love and decide to get married on less than 60 days' notice, or it was folks that were planning to get married and everything is rolling around and finalizing all the documents and dotting the I's and crossing the T's and just didn't get it 60 days before the date that the church was reserved, so that a week before the wedding or the night before the wedding the agreement is signed. Now, under this, if this was law, that would be a void agreement because it was less than 60.

MR. MOMJIAN: That's correct.

REPRESENTATIVE MANDERINO: Okay, but let's say that I signed it one week before the wedding, fully understanding that as consenting adults that we went through all this thing and we were both in agreement, and if we were both in agreement with it a week before the wedding and it was Kosher, then we're both going to be in agreement a week after the wedding. So we come back from our honeymoon and two weeks after the wedding we sit down with lawyers again and now we call it a post-marital

agreement. We say we still agree with those same provisions that we agreed with a week before, and now we're married and now I can't say, if I was the more economically powerful person, the person that had the rights to be protected, that I presented this in less than a week later, but now a week or two weeks after my wedding I'm willing to sign the exact same agreement again with that spouse and I sign that agreement, does that now make what was void a week before my wedding not void a week after?

MR. MOMJIAN: Absolutely, because then all the rights were established, and there's no way in the world that bargaining position is the same. So if that person comes back from a wonderful honeymoon, then says here's the piece of paper that I want you to sign, the wedding people are out of the question, the gifts have been exchanged, the family is out of there, there's no pressure, that person then is a consenting adult with the whole rights and responsibilities under the Probate Code, it's not applicable under the Divorce Code, yes, that's an absolutely sound agreement. It's a lot different than the situation that Dave said, which is I fell in love all of a sudden with a car and I can sign it.

REPRESENTATIVE MANDERINO: Right, so the fact that a week before the wedding both parties were in agreement but technically it was void because we have this

60-day provision in the law, a week after the agreement if we put our stamp of approval on it again and call it post-nup instead of a prenup, that is a valid contract. The valid contract is now the contract that I signed when I came home from my honeymoon.

MR. MOMJIAN: That's correct.

REPRESENTATIVE MANDERINO: And so if the intent was pure with the eve of marriage presentation of the final document such that I can execute it when I come home from my honeymoon, then there's nothing to worry about. The 60-day notice protection is isn't needed anymore.

MR. MOMJIAN: But it's the pureness of the intent that the problem, Representative Manderino, because in most cases the bargaining position is so tilted that in a million years you don't have it. It's not, unfortunately, duress.

REPRESENTATIVE MANDERINO: Yeah, I think I understand it. What I was saying was I like the, I'm speaking personally, I do think that duress is legally defined and what you were talking about, emotional duress, emotional stress, et cetera, is valid. I think that's a valid consideration for an eve of wedding presentation. And so from that point of view I like the protection you're attempting to afford, and the only thing that was troubling me was the 60-day limit, and what you have just explained

to me is if the intention was pure, there's an easy way around the 60-day limit, execute the same document when you come home from the honeymoon.

MR. MOMJIAN: Absolutely.

REPRESENTATIVE MANDERINO: The questions are all over, then the concerns are none.

MR. MOMJIAN: Absolutely.

REPRESENTATIVE MANDERINO: Thank you.

MR. MOMJIAN: Thank you for asking the question.

SUBCOMMITTEE CHAIRMAN BROWNE: Representative Hennessey.

REPRESENTATIVE HENNESSEY: Thank you, Mr. Chairman.

Mr. Frank, let me, in your testimony you indicated that having to wait two years contributed to a lack of confidence by the party in the judicial system, and I guess that's the one who is the moving party, but I want to ask you to take a look at it from the perspective of the, who I've described earlier as the ambushed or the surprised spouse, didn't expect this coming along. The fact that there's a two-year statutory waiting period it seems to me gives a little bit of comfort to the ambushed spouse saying, well, I don't have to rush into this, this is not going to be something that's done rather quickly. I'm going to have some time to get my affairs in order for

life after marriage. And I guess I tried to write down a question for you. If I listen to you, it would seem to me that I want to ask the question from the point where one party decides that he or she wants a divorce, does the State any longer have a public policy interest in trying to find a reconciliation or facilitate a reconciliation for that marriage? Because it would seem to me that your testimony was once one party has filed, well, we recognize now that this is going to end up in a divorce, so let's get this thing over and do it as an efficient, quick, and prompt matter as we can, but it seems to me that there are other public policy considerations that we ought to look at to protect the surprised spouse.

MR. FRANK: Let me just give, by way of some background, if I could. First of all, as Mr. Momjian looked at this in a national context, first of all, Pennsylvania is one of the few States left that has any type of a waiting period like this. The vast majority of States where one party decides that they wish to go forward, they can go forward. And I think that's important for the members of this committee to realize.

With regard to the issue of the spouse having a period of time in which to prepare, first of all, under our amendment, nothing could really happen until one year has passed from the date. That is not, as a practitioner, at

the end of that one year, it's not like all of a sudden things are done, the property is settled and the matter is over. The process begins at the beginning of that one year. And indeed, one of the things that we built into this was that there would not, in all probability, be a divorce at that particular time because of the way we structure the bifurcation, but rather the economics would proceed at the beginning of the one year.

In practicality, Representative, even under a one-year provision, there are going to be two years before the matter is finalized in which the party, the dependent spouse or the ambushed spouse, has a chance to put themselves into order. I, because right now, and that's one of the problems, because it's really a three-year process under the two-year statute currently. Built into the Divorce Code are provisions where parties can request marriage counseling, and the court, in its discretion, can order a series of marriage counseling. I personally have always attempted in my practice, particularly where I feel that there is an opportunity, and one of the first questions on the form that I have my clients fill out, has there been any attempt at marriage counseling and to counsel people particularly where I sense that this is not a dead marriage, to try to see if there's a possibility for reconciliation, and I feel that particularly strong ethical

duty where there are children involved.

But once that is done and where it is clear there is no opportunity for reconciliation, the committee did feel that it is time to move the process forward.

MR. MOMJIAN: I support the Mr. Frank's comments. A commencement of a divorce action in Montgomery County in January of this year which runs its full route without any appellate rights at all, you're likely not to be finalized with your economic issues until sometime perhaps in 2008. You have to wait two years without the consent being filed, and then I envision it that your case is on a shelf, it comes off the shelf after the two years, you blow off the dust, and then you go through a system of prehearing statements, you have a nonrecord divorce master, it could take nine months to a year to go through that process. All you have to do as a recommendation or a conciliation effort, then you just file a piece of paper saying I want a trial before a judge. The trial before a judge will have a short list conference in three, four, five months, and then it will be listed on a protracted list. I don't think you'd have that case finished until sometime the year 2008 if it takes its full course.

That doesn't preclude the possibility of settlement. There are people who do that, but in the normal case that has to be litigated, if there are some

complex issues involved, you're talking about you're going into the fifth year before there's a finalization of it, without any regard to appellate rights.

REPRESENTATIVE HENNESSEY: So this would then shorten it to four years.

MR. MOMJIAN: Pardon?

REPRESENTATIVE HENNESSEY: Shortening the two-year statute to one would make it a four-year rather than five?

MR. MOMJIAN: Yeah.

MR. FRANK: Let me just say one other thing, Representative. It's not always the dependent spouse who is the opponent of the divorce. In many times it is the nonowning spouse, the person who doesn't have the majority of assets in their possession who is the moving party because they want to terminate the marriage. And one of the problems that I have seen in my practice, which is in the larger estates, particularly where one spouse is in control of closely held corporation assets, is that that party is the one who will oppose the divorce and who will use that two-year period to begin the process of hiding assets, of course all a sudden you see then, Representative Hennessey, if I ever had a case where the owner/spouse came into me or said in the courtroom this is the best year I've ever had, being the year of the divorce, they would have to

call the paramedics.

REPRESENTATIVE HENNESSEY: For you or for him?

MR. FRANK: For both of us. First of all, they'd probably have to commit him, and then call the paramedics for me to revive me. They always take that period of time to show that the corporation has declined in value and we see transfers to siblings and all kinds of mischief that are not in the interest of the nonowning spouse, so that the sword cuts both ways.

REPRESENTATIVE HENNESSEY: Right.

MR. HOWETT: Could I support the provision as well on one particular aspect. The bifurcation provisions that appear I think on page 4 of the bill were put in there to add strength to the dependent spouse, not forcing a bifurcation of the divorce from the economic issues because we're reducing it to one year and thereby making it much more difficult to get a bifurcation if you reduce the waiting period to one year. If you're going to leave it at two years, and that of course is a legislative determination to do, then you might want to give consideration to eliminating from Senate Bill 95 (c.1) and putting back in (c). Because (c.1) was an extra protection for one-year separations. If you put in the two-year, if you leave it at two years and leave in the bifurcation provisions, it will actually lengthen the period beyond the

two years, because it is so much more difficult to establish a bifurcation under (c.1) than it is under current law.

REPRESENTATIVE HENNESSEY: Okay, thanks.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you.

Representative Harper.

REPRESENTATIVE HARPER: Yes, I have one question. I would like to address the bigger issue that's not in the bill, which is the one-year, two-year thing, and I want to direct my question to Judge Bertin. I'm picking on you not because I get to.

JUDGE BERTIN: Go ahead, pick.

REPRESENTATIVE MANDERINO: Come on, Kate.

REPRESENTATIVE HARPER: Because I actually feel that the discussion we've had this afternoon of the one-year, two-year provision, which is not in the bill but the way things happen out here in Harrisburg could be in the bill at some point in the future, maybe five minutes before we pass the bill on the floor of the House, that happens. I guess my question, Judge Bertin, is from your vantage point of having practiced family law for many, many years and then having seen it from the side of the bench and not being involved in the trenches anymore where you're worried about how it affects your cases or a particular fact pattern, do you think there is any obligation on us as

the Pennsylvania General Assembly to consider whether we make divorce easier or harder in Pennsylvania? I mean, that's actually one thing we have to look at, and I just wanted your views on whether or not the one-year, two-year plays into the bigger issue of whether divorce should be easy or hard when one doesn't want it. When they both want it we have the three-month mutual consent provision. So we're actually talking about a divorce where the party who doesn't want it is not guilty of any fault ground and they don't want to get divorced. The question is from a big policy point of view, should we be sending the message that it's easier or harder to get a divorce in Pennsylvania in that one circumstance?

JUDGE BERTIN: Well, I don't want to duck your question, and I don't know really if it's my province in that regard. I can only say this, that I think it was the considered judgment of the good lawyers that were on this committee who one day are representing a spouse, for example, that does not want the divorce to go forward, for whatever reasons, and the next day a spouse that does, Monday representing the husband, Tuesday representing the wife, and I think that the sense was with the relative backlog that you have in all of the other counties, all of the counties I think throughout the Commonwealth, that a one-year separation would serve overall the best interests

of the citizens of Pennsylvania, and I think that the committee would be not be unhappy if it turned out to be a one-year period.

But at the same time, there's so much good in this bill itself that we certainly could live with the two-year, but I think the overall sense was that the system would work better and serve the greater needs of the litigants if it were one year. That's not a direct response to your question, I guess, but I think that's about the best that I can do.

REPRESENTATIVE HARPER: So if I can understand what you're saying, what you're saying is if you're in the system, i.e. you have decided to get a divorce or you are the unwitting other side of someone who's decided, that it would be better as a public policy matter to get it over with faster?

JUDGE BERTIN: Well, I think probably, you know, when there is a separation, a separation just doesn't come with a problemless marriage. I mean, there's strife before the separation, and a one-year period of time is a fairly substantial period of time. And as the other panelists indicated, if one party does not want that divorce, it just won't move forward. What you have to do is after that one-year period, there's something called a praecipe to transmit the record, and then that record gets placed on a

waiting list before the equitable distribution master, and each county has a certain amount of backlog with respect to when that equitable distribution master is going to get to that. And it depends really on the lawyers and the parties how quickly they process and get ready for their ED hearing. They have to prepare inventories and appraisements, there's pretrial conferences, there's appraisals that have to be taken care of, pension appraisals, business appraisals, real estate appraisals.

REPRESENTATIVE HARPER: But all those things go to the mechanics of the divorce.

JUDGE BERTIN: Right.

REPRESENTATIVE HARPER: I guess my question, and I think this relates to the alimony discussion, I just took a look at the alimony recommendation. The alimony is quite generous, much more generous than anything I've seen in southeastern Pennsylvania.

JUDGE BERTIN: The charts.

REPRESENTATIVE HARPER: The charts. Not the amount, the duration. A 20-year marriage is not unusual to split. If you think of somebody having a mid-life crisis, a 20-year marriage is probably--

JUDGE BERTIN: You're talking about the indefinite after 20?

REPRESENTATIVE HARPER: It's indefinite after

25, but it's about 19 years of alimony, if I'm reading this chart right, which is huge compared to what you can now get in Bucks, Montgomery, Chester, or Delaware.

JUDGE BERTIN: Well, you'd have to deduct from that the years of the APL and the support.

REPRESENTATIVE HARPER: That's true, but still.

JUDGE BERTIN: And that deduction is for every year of support is a year deduction, which is substantial.

REPRESENTATIVE HARPER: Okay, but I guess what the committee was trying to say was, look, there are dependent spouses out there that don't want a divorce, so we'll give them more alimony or guaranteed alimony or insured alimony or presumptive alimony, and that will soften the blow that they're getting divorced a little faster, whether they want to or not.

JUDGE BERTIN: No, I don't think it was that way.

REPRESENTATIVE HARPER: No?

JUDGE BERTIN: No.

REPRESENTATIVE HARPER: Because I'm afraid that the House or Senate, or both of us, may pass this bill with an amendment making it one year and never go back and pick up the alimony provisions that your committee worked so hard on and which you did not finally endorse to bring to us.

JUDGE BERTIN: Well, we didn't reconvene after, we thought that the one year would be accepted and we didn't reconvene after that, but the consensus is that we still would like the one year.

MR. FRANK: Yes.

MR. MOMJIAN: Yes.

MR. HOWETT: Yes.

REPRESENTATIVE HARPER: But without the alimony that you also recommended?

JUDGE BERTIN: Yes.

MR. HOWETT: Yes.

REPRESENTATIVE HARPER: Okay, thank you.

Thank you, Mr. Chairman.

MR. FRANK: Could I address that question, if I may, more a little bit?

REPRESENTATIVE HARPER: Sure.

MR. FRANK: After 30 years of experience in this field, my concern, Representative, divorce is inevitable. It's going to happen. It's a question of just when. The real issue is what happens at the end of the day when that happens? And I think that the real public policy issue is at the end of the day, is the dependent spouse going to get a fair and just result? And I think that is really the thing that we saw out of this report. From my experience, giving that person one more year or one less year of

alimony pendente lite doesn't solve the problem. It's proper valuation of the award, having people who understand the economics and the tax ramifications and seeing in some instances decent alimony awards going forward.

REPRESENTATIVE HARPER: Okay, but you're once again back in the trenches, and I was hitting the broader view, should we make divorce easier or harder in Pennsylvania? Is being at the end of this trend a bad thing? Maybe it's coming around on itself. You know, we have a public policy obligation here. We also have to deal with the people who are in the trenches, in the litigation and who are in trouble. I'm struggling with the bigger issue that today's discussion left largely undiscussed, you know, what is the bigger issue here about Pennsylvania's policy regarding marriage? That's all.

JUDGE BERTIN: Well, I think when the statute was first adopted and it was three years, I don't know what our studies were then, but I don't think there were many States that had three years.

MR. FRANK: No.

JUDGE BERTIN: I think we stood alone there. Then when we dropped it to two. I'm unsure of the national survey, but I'm sure plenty of States have six months, right?

MR. FRANK: Or less.

JUDGE BERTIN: Or less.

MR. FRANK: We started it at the time.

JUDGE BERTIN: But I think the policy decision probably in your--

MR. MOMJIAN: But the policy makes sense because it's too complicated, it's too layered. You can go through rounds of support, rounds of custody, rounds of equitable distribution. There should be some consolidation so that you don't go through all of that. Maybe one judge, somebody handles everything. Right now in any county that we have, you go through layers. It's not a 3-ring circus, it's a 30-ring circus, because you're all in and out of court dozens of times. It's running up expenses. You have every right to be concerned about the public and the process of the divorce system. It's just too layered. And practicing in Montgomery County, the suburban counties, you know that the divorce takes one thing, custody takes another thing, and the equity distribution takes another, and then in Montgomery County you got a judge for two years, and in the middle of the case there's another judge that comes in and takes it over. It's impossible to explain to a client why the bills are so high.

MR. HOWETT: And we believe that by shortening the time, the costs will go down. The issue of is it easier or harder might be stated differently, is it more

fair or less fair? Is it more expensive or less expensive? If the divorce is going to happen anyway, and it will, whether it's one year or the two years, then is it a question of making it easier or is it just a question of extending it and making it more expensive? It's that more difficult. It's a hard question.

REPRESENTATIVE HENNESSEY: If I can weigh in on that, it just seems to me that a lot of times when you're sitting on this side of the table, as Kate and I and the rest of us are, then you tend to look at how this is going to be perceived by the public. And it would be clear to me that if the bill were to pass saying that we're shortening the waiting period to one year, then newspaper headlines will say, "Divorce Becomes Easier in Pennsylvania."

MR. HOWETT: Yeah, no question.

REPRESENTATIVE HENNESSEY: And I think the question that Kate's asking is, by divorce becoming easier, do we then somehow undermine the concept of marriage as a building block in the unit of our society? I mean, the headlines are not going to say "Divorce Becomes Easier But People Will Feel That They Were Treated More Fairly Before They Entered the Next Marriage," or maybe encourage them to enter another marriage, because it won't happen.

MR. HOWETT: We're not going to be able to control that, and neither are you.

REPRESENTATIVE HENNESSEY: They will simply be saying, hey, divorce is easier to get in Pennsylvania, much the same as they felt that way when we went from three years to two.

MR. HOWETT: You're right, that's going to happen.

JUDGE BERTIN: Yeah.

REPRESENTATIVE HENNESSEY: And is that a good thing?

MR. HOWETT: It's not a good thing that the press is going to paint it that way because they're going to be painting it inaccurately, but you're absolutely right that it will be painted that way.

JUDGE BERTIN: Because you're not making divorce easier. The question is, how do you manage that divorce, because it's not like one year after the marriage you're going to be divorced, because we all know that that's not true.

MR. HOWETT: And this bifurcation provision prevents that from happening as expeditiously as it does now after a two-year separation.

MR. FRANK: Representative, I think there can be perceptions, but what is the reality? And I think if you were to do a study, the percentage of divorce that existed in Pennsylvania when we had three years versus the

percentage of divorce we have when we have two years, I would be surprised if there is any material upswing in the percentage of divorce because we reduced it from three years to two years. And I also would be willing to bet $50 to your favorite charity that if we reduced it to one year, we are not going to see an increase in the number of divorces in this Commonwealth. I think the reasons for divorce are far more systemic to a whole sorts of other issues in our society that have nothing to do with how easy we make it.

REPRESENTATIVE HENNESSEY: Well, thank you. You've certainly given us plenty to think about.

JUDGE BERTIN: Mr. Chairman, can I just add, on the pension issue, I just want to highlight one thing because I think you hopped out then just when Jack Howett made a point, and I was watching and observing the pension issue, which you were pretty lively on, and I think what Jack pointed out was this: In the situations where you have a real moneyed spouse and you have a spike of income maybe two, three years after the separation, I think there was an argument, well, this is kind of unfair and it would not be appropriate to include that huge increase in salary in those limited cases where that would occur, and I think what Jack pointed out was very good.

The proposal that we have allows the judge to

treat each particular asset separately so that in the instance of a high spike, and you have good advocates on both sides, I am confident that the husband who got the high spike could argue to the court that this, there's a difference between a passive increase and an active increase, so to speak, and if there were an argument indicating that, gee, the pension benefit is so much higher now because of this post-separation increase in salary, I think an argument could be made to the judge to deal with this asset and consider that factor, because all you're really doing is defining what is marital and what gets in the marital pot.

So now this higher spike is defined in your marital pot, and a judge may be persuaded to give 30 percent of that marital pot with this high spike as opposed to perhaps 50 percent if there weren't that high spike if that judge were persuaded that that was equitable under all of the circumstances. So we have great leeway and the masters have great leeway in determining what percentage of the marital pot one should get.

Now, heretofore prior to this amendment you basically added up that marital estate, and I think most people felt you just cut it one way 50/50, 60/40, and I think this would give us some leeway.

SUBCOMMITTEE CHAIRMAN BROWNE: Well, one of my

concerns is at the time of divorce, you may not know about that marital spike. In other words, you have the divorce and then for whatever reason, the marriage could have been detrimental to one of the parties, and then five, six years down the road subsequent, there could be a huge marital spike that had nothing to do with that past relationship that fell apart.

MR. HOWETT: But of course then you're going to have a much smaller coverture fracture because the denominator will be much larger because it's now being done on a deferred distribution basis. And under the code, the preferred way is to deal with an immediate offset, and the comment, which is part of the legislation, specifically says that.

JUDGE BERTIN: Cash out and not do a QDRO in the defined benefit. The preferred method is to quantify this and then cash out, or as Jack says, make a payment and don't even hook in.

SUBCOMMITTEE CHAIRMAN BROWNE: In a defined benefit, usually you can't make the--

MR. HOWETT: Well, you value it and then you give compensating assets. You give the house that's worth $100,000 to the wife, and you give the pension that has a present value now at the time of the divorce trial of $100,000 to the husband.

JUDGE BERTIN: Actuaries value that future flow of income, and they say, okay, if you had it presently, it would be worth $100,000. And then you could say, well, the wife should get half of that, which would be $50,000, and she's not going to get it as a future flow, she'll take it out of this bank account then.

SUBCOMMITTEE CHAIRMAN BROWNE: The actuary, first of all, may not be able to predict that future flow, and that's why I'm concerned about capturing that in the marital estate, because there's circumstances after the marriage is long done that this is something--

JUDGE BERTIN: Well, there's a cut-off date of the hearing.

MR. HOWETT: Well, you capture what exists at that time.

JUDGE BERTIN: At the date of the hearing.

SUBCOMMITTEE CHAIRMAN BROWNE: Yeah, but you're saying that you take the entire time that he's vested and working and the time that he or she is married, and that's what you'll get in perpetuity on that pension. So if you have an increase because of increase in salary or increase in multiplier, that increase goes to that former spouse.

MR. HOWETT: Only in a deferred distribution. In a perfect world, the determination of what one gets in a divorce would be made the day of separation.

SUBCOMMITTEE CHAIRMAN BROWNE: Right.

MR. HOWETT: But because of just the way things are, the judicial system, the fact that it takes time to gather information and so forth, it's determined a year or two years after separation.

SUBCOMMITTEE CHAIRMAN BROWNE: I think in most cases, in average cases you'll have a deferred distribution because someone can't, in your traditional defined benefit plan you will not have a distribution until some time in the future.

MR. HOWETT: Even though you don't have a distribution until the future, you still have an immediate offset. In fact, I would venture to guess that in 90 percent of the cases that even in a defined benefit plan that's not going to come into pay status until sometime after the divorce trial, in 90 percent of the cases there will be an immediate distribution. The husband will get the plan, if it's the husband's plan, and the wife will get other assets based upon the present value of that defined benefit plan, even though it's not going to go into pay status until later. And in fact, the comment to the legislation says that that is the preferred method of distribution, an immediate offset. It is only when there cannot be offsetting assets given to the other spouse that you should be forced into using a deferred distribution

scheme.

JUDGE BERTIN: Because a lot of litigation can occur years from now about how it's distributed. It's more costly to do your QDRO, which is cleaner to have that offset.

MR. HOWETT: But under either an immediate offset or a deferred distribution, we still use the coverture fraction. It's just that the fraction, if you're doing an immediate offset, is going to be a bigger marital portion of necessity because we're not doing that deferred portion that adds time to the denominator of the fraction.

JUDGE BERTIN: And in a great many of the 401K plans, you don't have that situation because it's much easier to deal with because it's kind of like a bank account, so you value it then. You don't have that problem.

SUBCOMMITTEE CHAIRMAN BROWNE: Thank you both. Thank you all for your testimony today.

MR. HOWETT: Thank you so much.

SUBCOMMITTEE CHAIRMAN BROWNE: At this time, our hearing is adjourned.

(Whereupon, the proceedings were concluded at 4:15 p.m.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me during the hearing of the within cause, and that this is a true and correct transcript of the same.

Ann-Marie P. Sweeney

ANN-MARIE P. SWEENEY

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