

Testimony before the Pennsylvania House of Representatives Judiciary Committee,

Subcommittee on Family Law

October 1, 2009

Presenter – Jeffrey M. Williams, Esquire

Chair of the Family Law Section of the Pennsylvania Bar Association

I appear before you representing the Pennsylvania Bar Association. I presently serve as the Chair of the PBA Family Law Section. Testifying with me today are Mary Cushing Doherty, Esquire and Ned Hark, Esquire (both prior Chairs of the PBA Family Law Section).

I intend to present comments of a more general nature than those being offered by Ms. Cushing Doherty and Mr. Hark. Ms. Cushing Doherty will testify as to certain revisions that we believe are appropriate as to House Bill 1639. Mr. Hark will address the subject of whether there should be a presumption of equal physical custody in any legislation passed by the Pennsylvania House or the Pennsylvania Senate. He will address this presumption in the context of discussing House Bill 463. Mr. Hark will also address House Bill 418.

It should be noted that the testimony that I am presenting, together with the testimony being presented by Ms. Cushing Doherty and Mr. Hark, reflects the position that has been adopted by the PBA after careful consideration. It should also be noted that House Bill 1639 addresses the vast majority of considerations and concerns presented in the Custody Recommendations of the Joint-State Government Commission in November of 1999.

In general terms, House Bill 1639 has benefits, that I, simplistically, characterize as “the three C’s”: (1) cleanup; (2) clarification; and, (3) codification.

Cleanup – Any legislation signed into law inevitably presents some need for minor revision after the law is tested in the judicial process (i.e., trials). House Bill 1639 addresses a number of these needed minor revisions. One example of this would be clearing up the confusion by use of the term “visitation” which is defined by the Pennsylvania Rules of Civil Procedure as involving a supervised setting, while, in contrast the term is used elsewhere in substitute for “partial physical custody.”

Clarification – Given the passage of time and the role of *stare decisis* in the legal system, some change to laws is inevitable. An example in this regard would be the presumptions related to litigation over child custody when one of the parties is a third party (e.g., grandparent, uncle, aunt). When one reviews third party custody litigation cases in the Commonwealth of Pennsylvania, in an appellate context, the issue as to whether there is a presumption in favor of a parent over a third party, is somewhat unclear. House Bill 1639 clearly addresses this presumption and comes down squarely on the side of favoring a natural parent. This clarity will help assist in the orderly litigation of third party custody claims in the future.

Codification – House Bill 1639 codifies 16 factors to be considered by the trial court in any custody case. This is arguably the most important feature of this legislation. At present, a family law attorney trying a custody case is required to review over a half century of cases to determine what factors are relevant in a custody proceeding. Codification of these “custody factors” will

have two significant benefits. First, a domestic relations attorney litigating a custody matter will clearly know what factors must be addressed during the hearing at hand. Second, the list of factors will assist the jurist in making certain that all important factors are given due consideration in the fashioning of the custody award. This is particularly important given the experience of numerous family law attorneys where newly elected or appointed judges are often first assigned to family court. For example, that is clearly the practice in my home venue, Bucks County. The delineation of the factors will make certain that judges, experienced or not, consider all appropriate issues in handing down custody decisions.

In addition to “the three C’s”, there are a number of new and very beneficial provisions embodied within House Bill 1639. In my view, some of the most important of these new provisions are as follows.

First, custody relocation. House Bill 1639 would require a relocating parent to provide 60 days notice to the non-relocating parent. This requirement will give sufficient time to allow the custodians of the child to resolve the issues related to the relocation in an amicable fashion, or if unable to do so, proceed to court for the determination of the unresolved issues. This is in contrast (sometimes stark contrast) to present practice where the parties may leave the Commonwealth of Pennsylvania with little or no notice to the opposing party, or parent, thereby endangering the stability of the child or children.

Second, the legislation as proposed would allow the filing of a custody pleading (e.g., custody complaint) when parties reside in the same residence but are otherwise “separated” as that term is defined by law in the Commonwealth of Pennsylvania. The clear intent of this provision is to allow the beginning of the custody process where otherwise the parties’ children would be subject to a “free for all” for numerous months. By way of example, in Bucks County, when two parties separate, the initial court proceeding is a custody conference which is held approximately eight weeks from the filing of the initial custody complaint. Under current law, that complaint cannot be filed until the parties physically separate into two residences. There is an eight week hiatus during which confusion can reign. Worse yet, custody conferences are conducted by custody conciliators who have no authority to issue an interim custody order. A judicial determination would likely not occur until two months after a custody conference. All told, under this example, it can well be four months where no custody order (even an interim order) is in place and the children of separated parents or custodians are in jeopardy. With the filing of a custody complaint while the parties reside together, the entire process can be truncated and relief more quickly obtained. In addition, when a custody evaluation is required, that process can begin much more expeditiously, as such a process often leads to resolution of the underlying custody issues.

Third, House Bill 1639 also requires the sitting judge to place his or her reasons upon the record for any custody awards handed down. This is, strangely and tragically, not the process engaged in by many jurists at present. I can state unequivocally, as a practitioner who has specialized in matrimonial law since 1986, that there is “nothing worse” than trying to explain “what the judge

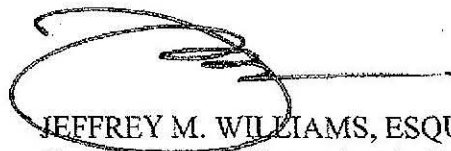
did" when the judge hands down a custody order from the bench and then exits the courtroom without comment or explanation.

Fourth, the increased use of Parenting Plans is required by House Bill 1639. A Parenting Plan is a document submitted by a custody litigant proposing details as to legal and physical custody of the child or children who are the subject of litigation at hand. In my experience the use of a Parenting Plan has occurred on a limited basis. When Parenting Plans have been used in cases in which I have been involved, resolution of a number of issues often occurs by negotiation and agreement. In any event, the submission of Parenting Plans allow a presiding judge to make a more reasoned (and, importantly, more detailed) determination as to the ultimate custody award. Inclusion of such details often mean less disagreement between the custody litigants as the custody order is implemented and enforced.

In closing, I would like to thank you for the opportunity to appear today. House Bill 1639 presents a great step forward (a step forward that is long overdue) as to custody litigation and therefore its passage will have a direct and positive impact on the children of the Commonwealth of Pennsylvania.

I would be happy to address any questions members of the Subcommittee have.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "JEFFREY M. WILLIAMS", is written over a horizontal line. The signature is somewhat stylized and loops back to the left.

JEFFREY M. WILLIAMS, ESQUIRE
On Behalf of the Pennsylvania Bar Association