PENNSYLVANIA HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

MAIN CAPITOL
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BEFORE:

HONORABLE THOMAS R. CALTAGIRONE, MAJORITY CHAIRMAN
HONORABLE RON MARSICO, MINORITY CHAIRMAN
HONORABLE DEBERAH KULA
HONORABLE JOSEPH A. PETRARCA
HONORABLE WILL GABIG
HONORABLE RICHARD R. STEVENSON
HONORABLE JOSEPH F. BRENNAN
HONORABLE RONALD G. WATERS
HONORABLE BRYAN BARBIN

I N D E X

CHAIRMAN CALTAGIRONE: Let's get this started. It's House Bill 1140 introduced by Representative Solobay. We will have the Members this morning introduce themselves.

REPRESENTATIVE SOLOBAY: Thank you, Mr. Chairman. I'm not a member of the Committee, but I appreciate the opportunity for this Bill. Representative Tim Solobay from Washington County.

MR. TYLER: David Tyler, Democratic Judiciary Committee Executive Director.

REPRESENTATIVE MARSICO: Thank you, Mr. Chairman. Representative Ron Marsico, Dauphin County, Minority Chair for the Committee.

MS. DALTON: Karen Dalton, Counsel for the Committee.

REPRESENTATIVE STEVENSON: Dick Stevenson representing the 8th District and Mercer and Butler Counties.

REPRESENTATIVE BRENNAN: Thank you. Representative Brennan, Lehigh and Northampton Counties.

CHAIRMAN CALTAGIRONE: Thank you. My dear friend, I always refer to him as our Co-Chair, not Minority Chair. We work very well together. Representative Solobay would like to have an opening statement and then we

will turn it over to the testifiers.

REPRESENTATIVE SOLOBAY: Thank you, Mr. Chairman. First off, I would like to thank yourself and Chairman Marsico for allowing this Bill to see a hearing.

It's a unique topic as you're going to hear through I think some of the testimony that's going to be presented this morning, and whether or not the Bill that we have in print is the sole determining factor of what we should maybe look at as far as a change or a review of Legislation.

But definitely through I think some of the testimony you're going to hear, through especially the Lautar family, it's a very unique situation we have that's presently being determined by the way the law is presently written and whether or not we can do anything with that.

I think there is room to make some adjustments and changes in present law to make it more of a fairness issue. I realize that it's going to be a very touchy and emotional issue based on the fact that we have children involved in the determining factor.

But in all fairness, once you hear some of the testimony and hear some of the maybe injustice that is being done because of paternity fraud, we may be able to come up with something in either the existing language or some adjustments to the language to hopefully make some wrongs a little better or right in the sense of families that are

being both financially and probably emotionally subjected to a tough situation.

I appreciate, again, the opportunity for the hearing. Hopefully, after we get the testimony, we will be able to bring it before your Committee for a vote and on to the House Floor for a vote. Thank you for your indulgence in having this.

CHAIRMAN CALTAGIRONE: Thank you, Tim. We have been joined by Representative Deb Kula, a Member of the Committee. With that, if you would like to introduce yourself for the record.

MR. LAUTAR: My name is Mike Lautar representing Pennsylvania Citizens Against Paternity Fraud.

MS. LAUTAR: Lori Lautar and I also represent PA Citizens Against Paternity Fraud.

CHAIRMAN CALTAGIRONE: Go ahead.

MR. LAUTAR: Thank you for your time. Dear Honorable Representatives, the State of Pennsylvania tells us they are doing what's best for our children, that they have the child's best interest in mind when making decisions regarding children and families.

By allowing children to be deceived and lied to regarding who their biological father is, the State is putting children at risk physically, emotionally and

relationally. Finding out the truth at the time of birth before the alleged or presumed father's name goes on the birth certificate is in the best interest of the child.

DNA testing should be mandatory for every child born in PA to make sure the child is connected to the actual biological father. Discovering the truth at the time of birth would prevent paternity fraud from happening and prevent children from being damaged because of it.

Not knowing who the father is at the time of birth will put the child at risk medically. Doctors and other health care workers use family medical history and family genetics in making treatment decisions. Basing these decisions on a presumption or the word of the mother instead of basing them on the truth of paternity causes many of these decisions to be incorrect and can have costly consequences, even deadly consequences.

The enclosed article, "When Your Child Isn't Yours" by Sasha Brown-Worsham, tells the story of a boy who died when a doctor administered an antibiotic to the boy after the father told him he has no medical history of allergic reaction to this antibiotic. See paragraph 5 and 6 of the story. After getting the shot of antibiotics, the boy went into shock and died. Why? Because the mother lied about whom the real father was. The biological father had a severe allergic reaction to the antibiotic.

The death of an innocent child could have been prevented if mandatory DNA testing at birth would have been required. The medical reasons alone should compel you to make DNA testing at birth mandatory for all children born in PA. After all, the truth at the time of birth is in the best interest of the child.

It is nothing short of child abuse when a mother withholds the truth regarding who is or may be the biological father. The definition of child abuse from the PA Child Protective Services Law includes serious physical neglect by a perpetrator constituting prolonged or repeated lack of supervision or the failure to provide essentials of life, including adequate medical care which endangers a child's life or development or impairs the child's functioning. By withholding the truth about the medical history of the child, they are denying adequate medical care which endangers the life and well-being of the child.

Not knowing who the father is at the time of birth will put the child at risk emotionally. Knowing the truth at the time of birth about who the father is protects children from the emotional trauma of discovering they are living a lie. Letting a father/child relationship develop based on a lie or a presumption will be devastating to a child when they find out the truth years later.

Read the quotes from the children in the New

York Times Magazine article. "L" wished the truth would have been known at the time of birth so she would not have to go through this. These children are damaged because their mother and/or biological father deceived and lied to them. Again, prevention is the best medicine. Finding out the truth at the time of birth prevents a child from living a false reality only to find the truth out later.

Not knowing who the father is at the time of birth will put the child at risk relationally. Genetic connections matter. Your heritage matters. It is part of who you are. To deny that to a child is bad enough, but to replace it with a lie for years can have devastating results.

Have you seen the show "Find My Family"? These people are trying to find what they consider to be their family, even though they may have never met them. Why? Because there is a genetic connection and it matters to them deeply. Once again, all this can be prevented with mandatory DNA testing at the time of birth so a child does not have to live a lie about who they are and what their heritage is.

Paternity fraud cannot occur without dishonesty, deception, perjury, misrepresentation or a mistake of facts by the child's mother. The mother is the only party with 100 percent knowledge that she has or had more than one intimate partner during the window of conception and then deliberately conceals this vital information from the alleged

or presumed father.

In the State of Pennsylvania, all types of fraud are punishable by crime except paternity fraud. Not only is the State not punishing paternity fraud, but it is enabling and rewarding this crime. In fact, the State of Pennsylvania is the enforcer behind the fraud.

With laws in place that require a false presumption to trump the known truth, the State legally forces a man to pay money to the lying mother who deceived him into believing he was the child's father. The state is extorting money from men who are victims of paternity fraud and giving that money to the perpetrator of the fraud.

The State is requiring their judges to blind themselves from the truth. Judge David Wecht said so on Andy Sheehan's KDKA interview with him. I quote, all may know the truth that science says, but the courts are required to blind themselves from the truth.

How is it just that evidence cannot be submitted that clearly shows the truth? How is it just that a presumption overrules the truth? How is it just that the victim is punished instead of the perpetrator of the crime?

I encourage you to read Judge Wecht's opinion of the court on my case that was before him. Starting at the end of page 16 through page 24, Wecht criticizes the current paternity law that can result in unjust rulings and asks for

the law to be changed so he can rule on the truth instead of a presumption.

Currently, the marriage license holds the husband accountable for every child the wife produces while they are married whether he produced them or not. Under equal application of the law, should not the wife be accountable for every child the husband produces whether she produced them or not?

PA does not hold the wife accountable for children the husband produces outside the marriage, but does hold the husband accountable for children the wife produces outside of the marriage. This is a violation of the 14th Amendment to the US Constitution, equal protection under the law.

In the past, injustices could happen because the state was simply unable to be sure about the identity of the child's father. That excuse no longer exists and there is no excuse for continued injustice.

The Association of American Blood Banks found that in the year 2001, men who were tested to establish paternity were not the father in 29 percent of the cases proven by DNA testing. Of the paternities established by DNA testing in the State of Pennsylvania for the year 2007, 52.7 percent of the men were excluded from being the father by DNA testing. In 2008 that number increased to 54.57 percent of men who were

excluded from being the father.

Many children are currently at risk because DNA testing was not used at birth to determine the truth regarding paternity. This does not have to be so for our future children. DNA testing at birth eliminates this risk.

Shouldn't people be held responsible and accountable for their actions? The man who caused the pregnancy should be held responsible and accountable for his children. The woman who withholds the truth should be accountable for her actions.

Pennsylvania currently allows men who impregnate a married woman to not be held responsible for their children and impose that responsibility on the innocent husband. The woman who withholds the truth and deceives her husband and her child is not held accountable for her deception by the State of Pennsylvania. This fraud can be thwarted and discovered at the time of birth with mandatory DNA testing.

Initially, there are three victims of paternity fraud: the child, the deceived man and the biological father. The presumption of paternity or the misstatement, lying, by the mother prevents the biological father from even knowing he has a child. Doesn't he have a right to know he is a father and to parent, raise and support his own child? DNA testing at birth would allow the truth to be known at this critical time.

The truth of paternity should never have time limits. I see you have a limit of five years after the birth of the child for the man to contest the paternity on the original HB 1140. So you are saying as long as she can hide her secret for five years, the State will reward her adultery.

Waiting five years does not solve the problem. The presumption of paternity should be eliminated completely and the truth should be used to establish paternity. There is no need for time limits when you do DNA testing at the time of birth. Thank you.

REPRESENTATIVE MARSICO: Go ahead.

MS. LAUTAR: I am an honest, taxpaying woman who has been deeply affected by paternity fraud. I am the second wife, the wife who is forced to live with the fact that we can't afford to have children of our own because we are court ordered to support a biologically intact family, a family who enjoys all the benefits of living together the majority of the time. I may never be the mother who has the joy of hearing a child call her mommy.

I believe all women are capable of being honest in paternity allegations and, therefore, should be held accountable by law for mistakes and fraud. It is often said that the child is the true victim. I stand here today to say the child is not the only victim.

To date, our courts continue to enforce legal

fiction instead of the truth that DNA testing can only give. We can no longer afford to turn a blind eye. Ladies and gentlemen, real families are affected and the lives of the children in the State of Pennsylvania are at risk.

I have a hard time understanding how the State of Pennsylvania can consider insurance fraud a felony and yet, at the same time, assist countless mothers in paternity fraud. It is often stated that knowing and ruling by the truth puts children at risk by being deprived of the emotional, financial and moral support of their legal father. The law seems to have blinders on as to what the child stands to gain by knowing their biological father.

Tell me, if a mother commits insurance fraud and she has children, do you hold that mother less accountable? Won't these same children also be at risk of being deprived emotionally, financially and miss the moral support of their mother? Does the State of Pennsylvania tell the insurance companies that they are at fault for not knowing the mother lied to them? Are these same insurance companies held by law to continue to cover these mothers who have profited off of their fraud? I think not. These women face felony charges, jail time, legal fees, etc.

I ask you fathers, did you ask your wife to take a DNA test at the time of birth of your children? I bet your answer is probably 99.9 percent no. How can you hold these

duped men to that same standard you, yourselves, did not think you needed to ask? You trust your wife or partner in being faithful and honest.

What you're saying to these men is, you, sir, are responsible for not knowing your wife or partner lied to you. Since you have held yourself out as the father, signed the birth certificate and perhaps were married to the mother at the time of birth, you are the legal father.

Tell me, where does the woman's accountability come into play in any of this? The mother is the only one with full knowledge of who she had sexual relations with at the time of conception. It may have been fifty men or it may have simply been two. The bottom line is, it is not her choice to tell the truth or to not tell the truth.

This is a hard topic for many. I'm here to tell you it's not an easy road to walk. Most say it's a complex issue. It's only complex if you don't treat it as seriously as any other type of fraud. For too many years, we were unable to fully know the truth. Those days are over. DNA is the game changer.

The children and the men in the State of Pennsylvania are counting on you to protect and defend the innocent. They have a right to expect the laws to demand truth and to seek justice. We will never have a civil society if the truth continues to be a lying mother's choice. Thank you.

REPRESENTATIVE MARSICO: Thank you very much. I would like to acknowledge Representative Petrarca and Representative Gabig who have joined us this morning. Are there any questions from Members?

(No response.)

REPRESENTATIVE MARSICO: Thank you very much for your testimony.

MR. TYLER: Dr. Hudson was not able to join us, Mr. Chairman. His testimony is in the packet and we will have it submitted for the record, please.

REPRESENTATIVE MARSICO: Good morning.

JUDGE WECHT: Good morning, Mr. Chairman.

REPRESENTATIVE MARSICO: Could you introduce yourself?

JUDGE WECHT: Yes, sir. Thank you. I'm Judge David Wecht and I am honored to have the opportunity to address the Committee and very pleased that the Committee saw fit to invite a judge to address the Committee.

Having said that, I want to emphasize that I'm only here as David Wecht who happens to be a judge. I do happen to be the Administrative Judge of the Family Division in Allegheny County currently. I do not come here to speak for the Judiciary. I do not come here to speak for any section of the Judiciary or any committee or anybody else. It's just the committee of me. I am one judge who's had the opportunity

to deal with these cases. I very much, again, appreciate the opportunity to share with you some thoughts.

I want to begin by saying that from my perspective, I don't have magical answers, any magical wand or ready solution to this very complicated area of our law. I do want to say that what I find most encouraging about Bill 1140 is its indication that the General Assembly recognizes that scientific truth and scientific fact is something that we ignore at our peril and that your constituents, no doubt, look with disfavor upon a body of law that forces judges to disregard scientific truth or to pretend that it doesn't exist.

I sense or perceive that a part of the reason for this proceeding today is frustration among Pennsylvanians that our law forces judges to disregard what science is telling us. The march of science is rapid and the march of science is ongoing. We can only expect that with improvements in technology that the need to acknowledge what science shows us will be more and more pressing.

Now, having said that, I want to say that the fact that the system is broken and the fact that the present law is inadequate is easier to recognize than it is to prescribe a solution.

I do believe that a nuanced approach is going to be necessary.

If I have a moment when I'm finished with the remarks I prepared, I do have a couple suggestions if the

Committee would be interested. Although, I do want to emphasize that from my perspective, there is no magic wand to wave and the reason why citizens like the Lautars and like the representatives of our bar association wrestle with these issues and why there is so much to say and write about it is it's not susceptible to a ready solution.

That's why we have a Legislature, because you express the will of the people. Ultimately, you will need to tell us what the law is and we in the courts will strive to apply that law fairly across the array of cases we get. I do want to say and I did say in the remarks I submitted that there are many, many questions and there are few answers or prescriptions. I do have the following comments.

By its terms, HB 1140 applies only to the presumption of paternity. This presumption is rarely, in my experience, case determinative because paternity issues seldom arise in families that are intact. If the family is not intact, the presumption of paternity does not apply.

Because the Bill would allow testing only when the parties are divorced, separated or agree to the test, it may arguably serve merely to codify the existing case law about the presumption of paternity.

Indeed, as I mentioned in my opinion in Mr. Lautar's case, which the Committee was kind enough to reproduce here, it could well be argued that at Title 23 Section 5104

we may already have been given the statutory law that we need by you. But perhaps it's just the case, as I indicated in my opinion, that the law is just being judicially nullified, which is something we can talk about later if you like.

The Bill does not address paternity by estoppel doctrine. Now, query, would this Bill and the estoppel doctrine coexist and, if so, how?

If a paternity test is allowed under this Bill and the putative father is excluded as the biological father but yet continued to hold himself out as the father, would the estoppel doctrine still preclude him from his claiming paternity? Would support and custody follow?

Does the Bill's five-year limit have any effect on common law doctrines? Should other forms of paternity contest such as under a fraud theory be precluded if filed more than five years after the child's birth?

Further, the Bill does not indicate how it will relate to acknowledgment of paternity or support. Under current law, as I'm sure the Committee knows, if a father signs an acknowledgment of paternity or he consents to a support order, he is not going to later be able to refute paternity absent fraud. Query, would this Bill supersede that principle or will an acknowledgment of paternity trump the Bill?

Also the Bill leaves custody issues

unresolved. If a putative father, for example, files for testing when the child is four, within that five-year period, and he is excluded as the biological father but he has a strong relationship with the child, what happens with custody? A corresponding amendment of the custody laws should be considered so as to allow these fathers to continue to exercise some type of custody when it is in the best interest of the child.

Now, assuming that the Bill drafters intended to address not just the presumption of paternity, but also the doctrine of paternity by estoppel, because I recognize that and it could be a matter of verbiage -- by the way, as I indicated, that is grounds upon which most of the cases are filed.

One issue for you, as lawmakers, to consider might be whether, from a public policy perspective, you might want to consider whether we're tipping toward an adult focus rather than a child focus or who in your Legislative judgment the balance should tip to.

As you know, our custody laws properly, in my judgment, instruct us to determine rights based on the best interest of the child. You, as lawmakers, of course, have the duty and authority to decide where the rights analysis comes down here in the instance of paternity. That tension is one that I addressed in the Lautar opinion.

Now, with regard to this battle of paradigms -- and it is a battle of paradigms. It's not an easy one. In the event that you choose to advance this Bill, I query whether you might want to consider a faster cutoff than five years. I mentioned in my remarks that a three-year limit was proposed by the Domestic Relations Association in a previous session because of disruptions to bonding between parent and child.

It's certainly something worth considering. Perhaps if the Committee is going to move the Bill forward, the Committee might wish to consider inviting child psychologists to give some expert opinion about child development issues and the like.

Now, the Bill's five-year provision would overcome the presumption of paternity. As I've indicated, that's essentially a redundancy within the Bill. Now, if it's intended to overcome the estoppel doctrine as well, it would change the decisional law, I assume, by eliminating the need for proof of fraud.

Now, that's something to consider because it might encourage what I call second thoughts or pretextual behavior on the part of a putative father, perhaps retaliation for an unrelated slight. What about, again, disruption to the life of the child? So we return again to that very difficult conflict of paradigms.

I also pointed out to the lawmakers there are procedures for establishment and disestablishment of paternity. Your staff was kind enough to reproduce the forms that the Department of Health has made under your Legislative mandate. There is an affidavit form for mothers to disclaim and fathers to respond and I can talk more about that if you wish.

In addition, as you all know I'm sure from going into your pharmacy, you see on your pharmacy shelves, just as I do, that for 39.99 or whatever the market price is, anyone can buy a kit. This underscores the reality that many Pennsylvanians are fed up with, the reality that they can run the test and yet the courts will not acknowledge what the test shows.

It's frustrating for many people -- and judges are included among those people -- to realize that the decisional law that binds us forces us to reject science and that that decisional law is so case specific when it's parsed that it's unreliable in exactly those circumstances that we need reliability and that's the difficult cases.

Ultimately, what I think might be best, all things considered, is to recognize what Representative Solobay has recognized and many of you recognize, that we need to address the test results. We need to consider that

the courts should not force themselves to be blind because the people recognize that that's an odd situation for the law to be in.

I would respectfully suggest to the lawmakers that an overall and contextualized review of the facts and circumstances of the particular case is in order. I would respectfully suggest that this Bill not be rushed and that rather a holistic approach be taken.

In the few minutes remaining, let me be a little more specific. I would recommend that the General Assembly does allow candor in recognizing scientific truth, allow a child to know his or her biological ancestry which could be important for medical, cultural and other reasons, and eliminate the feeling that something is being hidden. It would allow the courts the flexibility to consider the lives and actions of the child and the relevant adults and to deal with questions of paternity, support and custody on their own merits.

As suggested in my testimony and in the Lautar opinion, there could be some judicial expansion of the in loco parentis doctrine to accommodate this or preferably you, as the lawmakers, would revise our custody statute to specifically provide for such an expansion in custody standing.

In the context of that revision, the General

Assembly could fashion guidelines for us trial judges so that our discretion would be channeled and guided by the factors that you, as the lawmakers, tell us are important.

Let me digress for just a moment. What I mean to say is that the law ought I believe to allow for the test results to come in. But I think that that's not enough. I think that the law ought to allow for an overall assessment so the child and parent bonding, whether that is with the putative father or with the father who is later found to be the biological father, can be analyzed holistically in a contextualized way by the court on the record and that we not be chained to simply an all or nothing game.

Now, no doubt lawmakers and any citizen will wonder, doesn't that give the trial judge imperial power? And that's a legitimate concern. For that reason, what I would respectfully recommend is that the lawmakers consider, after appropriate hearings and consultations, telling us what the factors are that you, as our representatives, believe we in the courts need to look at.

For example, in the alimony statute and the equitable distribution statute, you have given us a number of factors. In various custody bills, you would also give us a number of factors. Arguably, we ought to be required to look at all those factors.

It would not suffice, in my opinion, to simply

put a five-year limit and a biological test trumps all without giving the court the opportunity to weigh the relevant interests in light of all the facts and to follow whatever statutory guidelines and criteria you, as lawmakers, deem important for us to evaluate on the record of the case and state our findings so they are susceptible to review by the appellate courts and the public at large.

One other thing -- and I expand on that a little bit more in my prepared remarks which you have -- is that we live in an exciting time, which is good, but it's also challenging, as the Chinese curse, may we live in interesting times.

The advent of reproductive technologies is phenomenal, as you all know better than I do, and query whether statutory law ought to be addressing the paternity issues within the context of some of these technologies which we are seeing and which we are even starting to see in some of our courts.

Gestational surrogacy, sperm donors, egg donors and the like are raising questions about paternity affiliations which are novel and which I would respectfully suggest that the General Assembly consider hearings on and address paternity law as a piece of this, not as the whole universe of it, but as a piece of it because it also implicates custody and support.

I would respectfully recommend that the good elements in the Bill, principally the recognition that scientific truth is important, be kept in mind and used and that this be used as a starting point rather than as a finishing point by you, as lawmakers, when considering where we go from here.

There was one interesting point made by Mr. Lautar that I did want to acknowledge, the provocative point about testing at birth. I would simply say this. There are two levels of analysis which the General Assembly could employ in evaluating perhaps the issue of whether there should be testing at birth.

One is the constitutional one. For example, if both parents, putative or otherwise, refuse or decline, is there a problem under Troxel versus Granville, which is a US Supreme Court case articulating parental rights of a constitutional dimension.

If there is not or if that's arguable, then you, as the General Assembly, from a public policy perspective as to what our citizens want, I respectfully suggest, would want to consider whether the scientific truth at birth trumps or whether the potential for disruption or the letting sleeping dogs lie type of analysis trumps. That's an interesting issue and certainly one for proper Legislative consideration.

I thank you very much for your patience and your

time. I would welcome any questions.

REPRESENTATIVE MARSICO: Thank you very much for your testimony, Judge. I would like to acknowledge two Members, Representative Waters and Representative Barbin. Any questions from Members? Representative Gabig?

REPRESENTATIVE GABIG: Thank you, Mr. Chairman. Thank you, Judge, for coming all the way here to Central Pennsylvania to give us some very good background on this matter. It sounds like you have a lot of familiarity in your role at Allegheny County Courts there in the Family Division.

I am reviewing Mr. Solobay's Legislation. It seems to me to have two effects. One has to do with adding DNA, specifically adding the term DNA into blood test, including blood test and DNA into the statutory language.

Let me just run and ask two or three questions, if I could. I used to be in the DA's Office here in Dauphin County. We used to handle some of these paternity cases where DPW was involved. This was in the '90s I guess. So it's been a while ago. We were doing DNA. DNA was coming along and we were using that. It was considered a blood test.

We were having less and less jury trials because DNA came along and it wasn't as imprecise. It was more precise. You could get the case resolved without having to go to a jury. I imagine that was the same

experience throughout the Commonwealth. But DNA has been being used out in the field under this statutory rubric and the case law as a test. Am I right about that?

JUDGE WECHT: Yes, sir, Representative Gabig. I certainly think that the addition of the term DNA updates the law and recognizes that technology, which overwhelmingly is the technology of choice here rather than blood test.

REPRESENTATIVE GABIG: It sort of codifies or updates this statute but it's really not changing much that's out in the field. It's recognizing this technology in the statute and recognizing what's going on in the courts throughout Pennsylvania. Am I right about that part?

JUDGE WECHT: Yes. I did want to mention in that regard, in fairness, HB 1140 does have the five-year cutoff which I think is the significant change that it would make.

I neglected to point out that in addition to the other challenges with that language, very often -- and anecdotally I'm sure we can all recognize this -- the truth doesn't come out within five years.

A divorce can take a while to process and there's inherently some arbitrariness. I recognize there has to be a date picked if there's going to be a date picked. But very often the bond has been formed and the truth comes out later. You can see why these cases are so difficult and so

challenging from the perspective of child welfare and the child's bond and interest.

REPRESENTATIVE GABIG: Just to make it clear, those sections don't have to do strictly with this wedlock scenario. They have to do with any kind of paternity issues that might come up, many of which are outside of wedlock in today's world, and it has to do with whether there's been welfare fraud and should the father be paying for support versus the state supporting or should they have to reimburse DPW for their failure to pay support over the years. As you mentioned, it could be five years because the child wasn't tested, etc. But it comes up in a whole slew of other cases in your courtroom I'm sure other than this wedlock issue; is that right?

JUDGE WECHT: That's precisely right, Representative Gabig. The vast majority of cases that I see are cases where the presumption of paternity is totally irrelevant because the families are not intact, especially in large urban jurisdictions, Allegheny, Philadelphia. As I pointed out in the Lautar case, the whole presumption of paternity is sort of an archaic, paternalistic, what I called, an antediluvian world.

In the language of (g)(1)(i), the parties would not be subject to the presumption anyway if they are divorced or separated; and if they agree, they agree anyway.

But, again, in fairness, I recognize that the language may be calculated to apply to the estoppel cases and it's the estoppel cases where the battle is filed.

REPRESENTATIVE GABIG: Getting to the more somewhat controversial part which has to do with this presumption which, of course, is in the law, the current law as I understand it, the effect -- it's on page 22 of your opinion and it's on page 3 of our Bill, Section G. It says, the effect on presumption of legitimacy.

I guess Mr. Solobay's proposal right in front of me, the maker of the bill, the prime sponsor, is to change that term from effect on presumption of legitimacy to effect on presumption of paternity, which is what that whole section deals with, paternity. I guess that's what you mean as the term legitimacy, changing it to paternity. The legitimacy is the antediluvian part. That's what you're saying, right?

JUDGE WECHT: Yes, sir. I think that also is a commendable updating of the verbiage from prior language.

REPRESENTATIVE GABIG: Then there's paternity and then there's the whole meat and potatoes, so to speak, of this piece of it. But from reading your section there on page 22, what you're saying is or the cases you cite there, basically the courts -- it wasn't being interpreted as a rebuttal presumption.

As it seems to read in the current law, you're saying the courts had interpreted that, at least according to the language you cite here from one of the Supreme Court Justices, had become an irrebuttable presumption, basically the term that is used in the case law. So the courts had changed the statutory language which clearly says it can be overcome if the court finds. That was a rebuttal presumption. So you're saying in the case law, they made it an irrebuttable presumption and what Mr. Solobay is trying to do is take it back to a rebuttable presumption and put some guidelines in there. Is that it?

JUDGE WECHT: Yes, sir, I think that's absolutely correct. I want to emphasize that, again, it's a relatively small section of the cases because by definition, in most of these situations, the relationship is no longer intact, in part, because of the advent of technology, because somebody has gone to the pharmacy, bought the kit, knows the science, knows the truth and the relationship is not intact. The presumption is, in the cases we see, rarely there anyway.

REPRESENTATIVE GABIG: Right. In other words, if the husband wants to maintain the marriage and keep going on, we're never going to wind up in court. Those cases go on and everybody goes to heaven and those cases live happily ever after.

The cases you deal with and then Mr. Solobay

is trying to address are the ones where the father wants to leave and there's allegations of adultery and who's going to pay. So that's basically what we're doing here. We're trying to address those cases and get the statute back to where it originally was, where it's a rebuttable presumption, whereas case law seems to have taken it over the years to a less rebuttable one. The term Justice Neuman used, as you cited, was an irrebuttable presumption. So that's what we're trying to do.

You think we might have to work on the language a little bit and you gave us some ideas on that. I know somebody named Wecht was a very big expert in some of these scientific areas.

JUDGE WECHT: I don't profess any knowledge about science. I took the minimum number of courses in college. I'm not ashamed to say it.

REPRESENTATIVE GABIG: I took some at Duquesne and somebody with a name similar to yours used to tell us about cases and law.

JUDGE WECHT: Well, if he gives you any opinions on science, go with his, not mine.

REPRESENTATIVE GABIG: All right. Thank you very much.

JUDGE WECHT: Thank you, sir.

REPRESENTATIVE MARSICO: Any other questions?

Counsel?

MS. DALTON: Thank you, Mr. Chairman. Good morning, Judge Wecht. Let me tell you, as a practitioner, it is a high honor for me to ask you some questions this morning. I have seen you before talk about paternity because I had been at the PBA's wonderful presentations on paternity. Frankly, I've actually worked here for 16 and a half years and I've been trying to figure this area of the law out for that entire time.

You spoke about two components of the law regarding paternity, one being the case law and the presumptions which are judge made; the estoppel doctrine and presumption of paternity, both judge made; and the statute which you briefly cite in your opinion saying, I think the language is fine. Perhaps the appellate judiciary should revisit the judge made doctrine.

I wanted to ask you, however, about the third leg of the stool about paternity which are the Rules of Civil Procedure, specifically Rule 1910.15(c) which states that if either party or the court raises the issue of estoppel, which would be paternity by estoppel, or the issue of the presumption of paternity, that the court shall dispose promptly of the issue and may stay genetic testing.

JUDGE WECHT: And the last part, counsel?

I'm sorry.

MS. DALTON: These are my notes but this is essentially what the rule says. The court rule states that if either party or the court raises the issue of estoppel or the issue of whether the presumption of paternity is applicable, the court shall dispose promptly of the issue and may stay the order for genetic testing.

I'm just wondering, Your Honor, because the Supreme Court is vested with exclusive authority to set the procedure of the courts under the Pennsylvania Constitution -- and you know about the suspension power under Article V, Section 10(c) of the Constitution. I'm wondering how we can ever undue that court rule because it's roping in the judge made doctrines that Representative Solobay is trying to kill within his bill.

JUDGE WECHT: Thank you for your kind remarks. It's an honor for me to be here. One thing about that rule is it's permissive. Faced with a clear mandate, whatever it may be, at the end of this process from the General Assembly as to what the people's representatives want, the fact that there is a permissive rule -- and the rules can be amended, of course, by the high court.

But faced with a mandatory statute, whatever the language is on the one hand, and faced with a rule that's permissive on the other, I suspect, speaking only for myself,

courts would be less likely to employ that discretion in favor of a stay once the Legislature has affirmed or reaffirmed its intent that testing be a piece of the puzzle.

I don't know if that responds adequately, but the constitution is what it is. I do believe that the rule's application and the rule's citation, for that matter, would decrease faced with a clear statutory mandate, whatever that mandate was that you gave us.

MS. DALTON: Just one follow-up question. Thank you for that, Your Honor. You mentioned perhaps there should be a statute that outlines factors to consider. Can you suggest a couple?

JUDGE WECHT: I would have to think about them. I think that they're worthy of a lot of thought and perhaps some hearings, if you chose, and some research and some input from experts such as child psychologists. Obviously, I totally lack any of that knowledge. But I think clearly and obviously and certainly the Lautars and the PBA representatives would have input.

I would say factors like the child's bond and affection, the parents' interaction with the child, the course of dealing between the parents and the child, the custody arrangements that the parties have followed up to that point, the support of the child, financial and otherwise, that has been going on up to that point, the absence or presence

of any fraud on anybody's part, the pattern of residence, the pattern of affectional ties between the various parties, the behavior by any of the parties after biological paternity was revealed.

Other factors like these could emanate or occur to us once we read or reread some of these appellate cases. I'd be happy to have an ongoing dialogue with any of the Members or staff of the Committee at any time but those are the ones, counsel, that leap to mind immediately that could be statutory factors that the Legislature chose.

MS. DALTON: Thank you very much, Your Honor, and thank you, Mr. Chairman.

REPRESENTATIVE MARSICO: Thank you very much for being here and for making this trip to the Capitol. We really appreciate your expertise and your testimony.

JUDGE WECHT: Thank you so much, Mr. Chairman. Anytime anybody on the staff or Members of the Committee would like any further comments or input, I would be very happy to give it, sir.

REPRESENTATIVE MARSICO: Thanks. The next presenters are from the Pennsylvania Bar Association. Welcome.

MR. HARK: Good morning. My name is Ned Hark.

MR. BUNDE: My name is Robb Bunde.

MR. HARK: We are here this morning on behalf of the Pennsylvania Bar Association and the Family Law Section of the Pennsylvania Bar Association to speak in opposition to House Bill No. 1140.

Our written testimony that we have submitted is the result of a task force which I had the privilege of chairing in 1999 when there were several Bills that were before the House and Senate concerning the same issue. I invite you to read, if you haven't already done so, that task force report because we're all very proud of the work that was done in getting to our position.

When we started with our work, we were not in a mode to say up or down to the Bill or to the Bills that were pending. What we were trying to do was come up with ways of tweaking the Bills and coming up with suggestions to make so that the Legislation could be effective.

The report is, more or less, a summary of the five or six meetings that we had via conference call which each lasted probably an hour and a half to two hours. It was during these calls, which you'll see from the history of those discussions, that the members including Mr. Bunde came around to coming to the conclusion that the, so to speak, judge made laws concerning the presumption of paternity were the most workable and served the best interest of the children of

Pennsylvania.

Now, many times people who hear lawyers come before different Committees here in Harrisburg and other places say, here come the lawyers and here they come ready to protect their interest and line their pockets.

The various times I have spoken with individuals on this issue over the past now eleven years, I always tell them if this Bill or some form of this Bill or the Bills that preceded it were passed, it would create more work for us. Essentially, what we're saying is, don't give us more work. You can see from the members of the Committee that served we practice in the area of family law and we represent both men and women. Nobody brings any type of preconception or any type of notion of being on one side or the other to these discussions.

When we started, as I said, our position was not for or against the Legislation and a large portion of our membership at the time was basically in the same position. It's through the work and discussion over that period of time that we came to the conclusion that there is no Legislative work that will solve the problem and that the problems and the issues are best solved by adhering to the case law that existed back then and continues to exist over the past eleven years.

Now, when the Family Law Section reviewed this

material and the position of the Committee, the same questions arose and then the same questions arose as the work was presented to the Pennsylvania Board of Governors and House of Delegates.

It's after the consideration and discussion of whether it would be two years or five years on permitting the test to be admitted or how we're going to go about it or whether or not we're going to have a hearing first on the presumption issues that everybody came back to the same conclusion. The position of the section has remained the same and the position of the Bar Association has remained the same for the past eleven years.

Mr. Bunde will speak more specifically to those reasons. I am speaking to the history and the procedural aspects of how we came to this because I think it is very important that consideration be given to the process that was employed and the process that I along with six of my colleagues who I have a lot of respect for who at the time were very experienced in the area of family law and since then have become more experienced in the area of family law. The way we got to our conclusion is very important and I invite you to review that. After Mr. Bunde is finished with his testimony, I would be happy to answer questions concerning that. Thank you.

MR. BUNDE: Thank you, Mr. Hark. The task

force when we started out -- and at that time, I believe there were five Bills that were pending in some form or another that dealt with the issue of paternity, with the estoppel doctrine and the presumption of paternity.

Through the course of our conversations and addressing that number of Bills, what we attempted to do was to come up with a way that this very visceral issue could be dealt with and try to take into account the parties involved, the mom, the putative father, the husband slash alleged father, and the child.

In looking at the number of different ways to approach it, the one common thing that came through every variation of Bill that we looked at is that there was really nothing that could be done in a way that the child would not suffer a great deal.

I believe that that was the driving force in us finally coming up with the conclusion that although the status of the case law as it is is not perfect, to pass legislation to try to right the wrongs aimed at one of the parties involved could have a very bad impact on the children and also could create the opportunity for litigants in family law matters to utilize that statute in ways that it's not intended. It could come up in divorce proceedings. It could come up in custody proceedings.

We believed that it was going to create more

problems than it was going to be able to rectify and that it would have a greater impact on families and children as a whole in the Commonwealth than on the people who find themselves in this very, very unfortunate situation.

Believe me, there was nobody that sat on this, nobody that was practiced in this area that would believe that it is a good thing that somebody would have to pay child support for a child that is not biologically theirs.

But the other issue is that when you look at the impact on the kids that are involved in these cases, we felt that -- and the current Bill is not that much different than some of the other Bills that we looked at. After hours and hours of discussion, we just kept coming back to that same thing and that's what led us to conclude that, as a whole, the PBA was against that Legislation and also the Bill in its current form.

REPRESENTATIVE MARSICO: Thank you. Any questions from Members? Representative Solobay?

REPRESENTATIVE SOLOBAY: Thank you, Mr. Chairman. I understand everything you said through the process. The one piece though, the right or wrong issue, putting that aside and the concern of the child which I think that's also very important, in that same scenario considering the small number of occasions that this probably really deals with anyway, the one issue that you didn't make mention of

is the health and welfare of the child.

In the case that they are not completely aware of the biological father and in that case where there could be health implications on the child in the future down the road, assuming one person is the father and not knowing any kind of medical conditions with that but the biological father had certain issues that could cause that child a problem, did you discuss that in your conferences, about how that would be addressed, the unknowns that that child may never realize, the factors that the child is unaware of, any health issues that could be tied to the biological father?

MR. HARK: I can't say that we specifically addressed it in the report. The best interest of the child and the best interest of children ultimately became our paramount concern.

I don't disagree that it's important to know family history and to know what type of conditions somebody may be susceptible to or should be on guard for. Those situations arise unfortunately in other areas of law that we deal with, specifically adoptions, where we may not know or the children or the adoptive parents may not know of the prior family history.

What we really wanted to center in on and what we really were concerned about -- and it was somewhat ironic. At the time we were moving from 1999 to 2000 and somebody had

been sponsoring something on a federal level called "The Year of the Child", I found it kind of ironic that we were sitting there at the time thinking about the situation and where did the kids fit in in all of this.

I don't dispute that that's a concern. I'm not, as the judge isn't, a scientific expert. I'm not a medical expert. So I'm not so sure that there may not be ways to test children or to test individuals for certain types of conditions that may or may not arise as they get older. It's always better to know that.

What we were concerned about is that there would be litigation and that there would be children in Pennsylvania that had recognized somebody for even two, three, four or five years. And that's where this discussion became, where does the child start to recognize that that person, that man, is their father and is it okay to cut it off at a certain age. And that's what brought us to our conclusions.

We're always dealing with and our concerns are always mandated by the courts in custody cases to deal with the best interest of the children. When custody cases are mediated and people try to resolve their differences, we're always concerned with the children.

If this type of Legislation were to be passed, it's our opinion that, in the end, you're going to have

children -- and when I say children, they're going to become preadolescent, adolescent and teenage years and nobody knows how they are going to be affected by that litigation that took place when they were six or seven years old. In our discussions, where is the end result for that?

The medical concern, I'm not going to say that that's not a valid point. But the point is, in the long run the overriding factor is, how does it affect the kids and ultimately when those kids become adults.

REPRESENTATIVE SOLOBAY: I guess the other question is -- and it could be considered hypothetical but maybe a reality also. I think the earlier testimony may have said it. There could be that same affect on other children based on the determination of this paternity case.

If that father creates a new family and starts forward with another family, not only the fiscal impacts that he's having to now deal with with his present family because of requirements that he's having to make to a previous situation that has been found out isn't really even his situation, but there's also those implications for his second family and now his second maybe group of children that are dealing with this because of a false paternity scenario, if you understand what I mean by that.

MR. BUNDE: Yes, I think that's true. I guess what you're saying is that if the testing says that that

person is not the biological father of the child and the marriage has broken up and he starts another family but he has to pay money to the mother of the other --

REPRESENTATIVE SOLOBAY: Correct.

MR. BUNDE: I think that that's an impact that obviously would be there. And that's real and I'm not diminishing that. But one of the things that we looked at was circumstances where the parties are no longer an intact family and there's a child that's under the age of five and one of the parents then can make paternity an issue.

Let's assume for this hypothetical that the test comes back in and the husband is the father of the child. Our concern was that down the road in custody litigation or as part of the divorce proceedings, the fact that if it was the father that requested the paternity testing and it came back positive, the mother is going to take that request and is going to take the results, put them in a drawer and at some point in custody proceedings going to point that out to the child.

So kids that it is their biological parent could be harmed by that type of a scenario down the road if one of the parents went into court and asked for testing that this statute would allow because they are now not an intact family, so the presumption doesn't apply, if the child is under five years old.

In the versions of the Bills that we looked at, we saw potential harm for children when the test results came back and it was their biological father. So we were concerned about that as well.

REPRESENTATIVE SOLOBAY: Definitely a tough issue no matter how you look at it.

MR. BUNDE: Very much so.

REPRESENTATIVE SOLOBAY: Thank you.

REPRESENTATIVE MARSICO: All right. Representative Gabig?

REPRESENTATIVE GABIG: Thank you, gentlemen, for coming in here and offering your expertise and providing us with the task force memo I guess you would call it. Let me try to frame my question in terms of maybe a real type scenario, sometimes called a hypothetical. Nobody ever wants to answer a hypothetical question.

This Bill says between the time a child is born and five years old. Let's say the father wants to contest paternity and he's married, they're married. There's two conditions, that they are divorced or irreconcilably separated. If they are divorced, he's having to pay child support to his former wife.

The presumption of what's called legitimacy today, what most people are calling paternity, applies under today's existing law. And although statutorily it says it's

a rebuttable presumption, we already established with the judge that under case law basically it's almost an irrebuttable presumption. That's where we are today with Solobay's proposal.

If they wanted to do a DNA test and it came back that the former husband was not the father, he could take that to court, I guess, and say I shouldn't be paying child support for this child or I shouldn't have to pay because I'm not the father. Basically, that's a scenario where this would come up in real life. Am I following where this might come up in your type of practice?

MR. BUNDE: Yes. Normally where it comes up is they are not divorced.

REPRESENTATIVE GABIG: But under Solobay, he says that's one of the conditions. Under (i) he says the parties would have to be divorced or he uses the term irreconcilably separated. Agreed to it is the second one. So that's under the current Bill, that they would be paying support and now they are divorced and he wants to contest paying support.

You're saying that that isn't good because it either could come back that he is the father and the mother can say, see, your father doesn't really even like you. He tried to call me a bad name, tried to call me an adulteress. He didn't even think he was your father. As they get older,

they can get into nasty things. And what was the other one? That was the one reason you said it would not be good for the child, right?

MR. BUNDE: Right.

REPRESENTATIVE GABIG: And there was another reason or was that the main reason?

MR. BUNDE: What we're saying is that's a potential harm to a child when the test result comes back and confirms. Then the other obvious one that we were concerned about is the child who has bonded with the father and the child is not yet five years old and the father goes in and under the statute would be allowed to have the testing.

Because of the doctrine of paternity by estoppel, which is if somebody holds a child out to be their own even if they're not the biological parent, they are estopped from denying paternity at a later date, what we would have to do is we would have to advise our client that if you want to deny paternity, you need to cut off all contact with that child because even if the test comes back and the test shows that you are not the biological parent, the estoppel doctrine is what precludes that evidence from coming into court.

REPRESENTATIVE GABIG: Right. You're saying even with a paternity, you know, getting this thing, he says in his bill that it has to include to get permission

to do the test, not the results, but just to be permitted to do the test, there would be some type of hearing.

In here Mr. Solobay says, provided the overall interest of justice, including the best of the child, would not be unreasonably harmed, just ask permission to get the test. I guess some of those other issues would come in then. Have you held yourself out to be the father? Is there a bond?

There would be some kind of pretest hearing. I don't know what we would call it. Maybe we would call it the Wecht hearing to see whether or not you're even going to be allowed to get a test, but if we move to something like that where we actually address some of your issues there with the Solobay language, to more lay that out, where you would have to take those into consideration before you even get the test and the judge would have to say, you know, I'm sticking with the presumption because there's too much that's going to harm the child to go further.

But say it's this situation. Say the mother married the actual father, the biological father, and now she's married to the biological father. They got divorced. One got married. We talked about the father having kids. The mother though married the actual father. They had an affair and they got married. Would that not be a scenario that maybe justice would say, well, that might be a good scenario for everyone?

I mean, that's just a hypothetical. There

might be situations where the Solobay language might actually help everybody or many people. I just throw that out for you. I know it's about eleven years ago when you looked at some of the older things.

If there are some ideas that you have, as we asked the judge if he had, if you want to help us move forward with some ideas on how we might address those, we would certainly be open to it. I'm not in favor or against the Solobay. I'm not a co-sponsor of it.

But it does seem like there are a few cases where I don't think that's come up. They probably make movies about these type of cases occasionally. We did hear from a couple of witnesses that clearly have been emotionally drained it sounded like almost through the current law and maybe this would have helped them. Maybe it wouldn't have actually too.

But I just want to throw that out. If you want to get back to us with some ideas on how we might be able to improve and address some of the specific concerns in terms of the interest of the child specifically, we certainly would appreciate that.

REPRESENTATIVE MARSICO: Thank you very much. That's an excellent point from Representative Gabig. We would certainly like to see some other recommendations, if you could give them to staff. We appreciate you coming to the Capitol and we appreciate your

testimony. Thank you. This concludes the hearing on House Bill 1140.

(Hearing concluded at 11:22 a.m.)

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

_____
Shannon L. Manderbach
Notary Public