TESTIMONY OF THE PENNSYLVANIA BAR ASSOCIATION IN OPPOSITION TO HOUSE BILL 1140, PN 1352

BEFORE THE HOUSE JUDICIARY COMMITTEE MARCH 11, 2010

Good morning Chairman Caltagirone, Chairman Marsico, members of the Committee, and staff. I am Ned Hark, and next to me is Robb D. Bunde. We are here testifying on behalf of the Pennsylvania Bar Association against House Bill 1140, and we are both members of the PBA's Family Law Section.

A PBA task force examined the issue of genetic testing to rebut the presumption of paternity in 1999. The Report of that task force, including the recommendation contained therein, was adopted by the PBA. As the Report is still directly on point today, it shall serve as our testimony, and is attached hereto.

Thank you for inviting the Pennsylvania Bar Association to testify on HB 1140.

REPORT OF TUE TASK FORCE APPOINTED BY FAMILY LAW SECTION CHAIR, JAMES MAHOOD, AND CHAIR ELECT, MARY CUSHING DOHERTY, TO REVIEW PENDING PATERNITY LEGISLATION

NED HARK, ESQUIRE
TASK FORCE CHAIR
HOWARD M. GOLDSMITH, P.C.
7715 CASTOR AVENUE
PHILADELPHIA, PA 19152

JULY, 1999

INTRODUCTION

This is the report of Task Force appointed by Chair, James Mahood, and Chair Elect, Mary Cushing Doherty.

There is currently legislation which is currently being considered by both the House and Senate in Pennsylvania that would permit genetic testing to rebut presumption of paternity when a child is born during marriage. This report is limited to recommendations with regard to only the pending legislation regarding the birth of a child during marriage and is not intended to comment on any other pending legislation or proposed legislation with regard to genetic testing, custody or child support.

The Task Force includes Ned Hark, Ann Verber, Mark Ashton, Peggy Joy, Carol Behers, Robb Bunde and Maria Cognetti.

The decision to form the Task Force was made after John Howett and Maria Cognetti testified before the House Judiciary Committee in Hershey on April 27, 1999, concerning House Bill 722, 723 and 724. In his testimony, Mr. Howett asked the Judiciary Committee to delay consideration of the legislation until the end of the summer so that the Pennsylvania Bar Association, Family Law Section may provide a more thorough input on the issue. He urged that the Bill did not require "immediate action" and told the Committee that the matter deserves as much analysis and input as possibly can be provided. The Judiciary Committee was receptive to receiving input from the Family Law Section. The Task Force was thereafter formed for the purpose of reviewing the pending legislation.

PENDING LEGISLATION

There are currently five (5) Bills which have been introduced that address the admissibility of genetic test results as evidence in paternity disputes. They are as follows:

1. Senate Bill 516.

This legislation would provide that a Court can overcome the presumption that a child born during the marriage is a child of the husband if the evidence shows the husband is not and cannot be the biological father.

The proposed Statute would authorize the Court to consider a genetic test to rebut the presumption in a child support action and the best interest of the child would not be "unreasonably" harmed and one of the following two situations exist:

a. Husband and wife are divorced or irreconcilably separated and one or both present reasonable grounds to believe that husband is not the father, or

b. Husband and wife mutually agree to genetic testing and are bound by the results of that testing.

2. House Bill 521.

The proposed legislation would amend Title 23 to state the present policy that the presumption is rebuttable if it is established that the husband had no access to wife at the time the child was conceived or the husband was physically incapable of procreation at the time the child was conceived. Two more factors added to the Bill to rebut the presumption are as follows:

a. It can be established that wife was having an extramarital affair at the time of conception, or

b. The husband cannot be the biological father of the child.

The Bill also provides for making the presumption of paternity irrebuttable if there is clear and convincing evidence that the husband openly held the child to be his for two (2) or more years after the birth of the child.

3. House Bill 522.

This proposed legislation adds the presumption that husband and wife "cohabited" at the time of the birth and further applies the presumption that there was an "intact" family at the time of the birth, as compared with House Bill 521 which simply applies the presumption that husband and wife "cohabited" at the time of the birth.

4. House Bill 722.

This House Bill differs from House Bill 521 by adding the requirement that there must be "clear and convincing evidence" for exceptions to apply. It adds a requirement that husband must rebut the presumption within sixty (60) days of the date of discovery that he is not the biological father. There is a five (5) year limitation from the date of birth of the child on making the rebuttal. It maintains that the husband can continue to support the child during the action without incurring a further legal obligation to support which may create an estoppel argument.

5. House Bill 724

This Bill contains the same language as House Bill 722 except it merely requires a "showing" of one (1) or more of the four (4) points whereas House Bill 722 requires "clear and convincing" evidence. There is no mention in this piece of legislation of any estoppel argument as set forth in House Bill 722.

MATERIALS REVIEWED AND CONSIDERED BY THE COMMITTEE

In preparation for its meetings and discussion, the Committee reviewed the following documents, reports, testimony, legislation and proposed legislation:

1. Testimony of Neil Hurowitz, Esquire, April 27, 1939, before the House Judiciary Sub-Committee on Courts regarding House Bill 722, 723 and 724.

2. Testimony of Barbara Bennett-Woodhouse, Professor of Law, University of Pennsylvania, April 27, 1999, before the House Judiciary Sub-Committee on Courts regarding House Bill 722, 723 and 724.

3. Testimony Dr. Linda A. Palmo, April 27, 1999, before the House Judiciary Sub-Committee regarding House Bill 722, 723 and 724.

4. K. Lee Derr, Director of Policy Development and Research Office to Senator David J. Brightbill, Majority Whip of the Pennsylvania Senate dated May 3, 1999.

5. Existing statutes from other States dealing with DNA as blood evidence to rebut the presumption of paternity of a child born in wedlock which include California, District of Columbia, Florida, Kentucky, Massachusetts, Michigan, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Rhode Island, Texas, West Virginia and Wyoming.

6. The Uniform Parentage Act of the National Conference of Commissioners on Uniform State Laws (specifically Sections at 204, 605, and 701(b) and (c)).

REVIEW OF COMMITTEE MEETINGS AND WORK

In order to gain an understanding of the Committee's conclusions and proposed resolution, it is necessary to examine the commentary, discussions and memoranda submitted by Committee members and the evolutionary process which led the Committee to its conclusions and recommendations.

Prior to reaching a common ground, the Committee met via telephone conference on four (4) separate occasions from late May, 1999, until late June, 1999.

During the first telephone conference when the testimony of Neil Hurowitz and Professor Barbara Woodhouse were reviewed, the members of the Task Force participating in the call all concluded that there should be some statutory method of dealing with the longstanding paternity presumption. While the members at this point agreed that there should be a statute, none of the Committee Members who were in favor of the statute thought it should be open-ended, providing for a man to raise the issue at any time. The participating members also (at the time) were opposed to the five (5) year period as set forth in the House Bills and sentiment began to grow to establish a one (1) to two (2) year limitation.

During the discussions, a common concern began to manifest itself, that being the interests of the children and even whether there should be a consideration for a child's legal rights and protection of those legal rights should such testing be considered.

Collateral questions were also raised during this discussion. These questions concerned the following:

a. If a one (1) year limitation period is used, and a father asserts his right to genetic testing, then the questions are:

1. Does it operate to suspend his rights in the context of custody proceedings?

2. Does it operate as a stay of support proceedings? Can a father who has agreed to child support previously have the right to reverse his position so long as he is active within the one (1) year period?

3. If a father is separated from his family at the time a child is born but later reunites with that family, does the proposed one (1) year period run from his birth or reunification?

4. Does a mother have a duty to give a putative father notice of her belief in his paternity?

Mark Ashton, along with raising the previous questions, also alluded to some potential constitutional issues associated with the rights of a man who desires to allege his paternal rights with respect to an otherwise intact family. He raised a question of whether a misrepresentation by a mother of her marital status at the time the child was conceived would operate as an

exception or make a difference in application of the law.

During the second telephone conference, not all members were present, however, the absence of individuals who were not on the first conference call proved to be beneficial in that new and fresh ideas were expressed with regard to additional issues which may arise as a result of the implementation of the proposed legislation.

A continued concern that was raised was going to be the potential harm to the child and the impact on the child's overall welfare if such testing to be permitted by the Court. A new question regarding whether or not a child has a right to know who his or her father is and how that would impact upon the child's best interest were injected.

Robb Bunde presented his position in a form of a memorandum. He presented the position that the legislation be formulated to have the paternity challenges handled in the same way S fraud or misrepresentation.

> "This could be done while maintaining some semblance of the common law presumption of paternity and the doctrine of the common law presumption of paternity and the doctrine of paternity by estoppel. A "father" who attempts to challenge paternity would have the initial burden showing facts he becomes aware of which led him to question paternity. He would have to act on these facts within an appropriate period of time. One to two years would probably be appropriate provided that the time does not start running until the person knew or should have known the facts at question. Once the "father" challenges paternity within the established time limitation, he would have the burden of proving elements much like those required to prove material misrepresentation or fraud. The wife would be able to put forth evidence to show that the "father" either knew or should have known the facts that now lead to questioning of paternity beyond the time limitation. If the wife could show that these facts were known prior to the one or two year statute of limitations, then paternity by estoppel would be established. If the "father" was able to establish that a misrepresentation or fraud had occurred and he acted upon it within the appropriate time limitation, then DNA testing could be ordered by the court."

He felt that this alternative would balance the competing interest of the child and the father against whom a misrepresentation may have occurred. The child's interest would be protected by the "estoppel doctrine", the husband having held the 'child out to be his own even after obtaining information which should have led him to question paternity. A man who possessed such information and essentially "slept on his rights" would be estopped from denying paternity. On the other hand, a father who had the information would have the opportunity to obtain DNA testing where the information led him to question the paternity and the information did not become known for a significant period of time.

The alternative would maintain the presumption but would have treated married or single individuals similarly under the law. A distinction as to whether the child was born during the marriage or out of wedlock would become irrelevant. The central legal and factual question

would be, "whether there was fraud or misrepresentation as to the paternity of the child?" If so, the genetic testing would be ordered.

Included in this approach is also the "discovery" factor. This approach does not use the time line of age, but rather the date of discovery or when the father knew or should have known or had reason to know that the child may not have been his.

Questions concerning this approach began to arise. These questions include for example, "do not all situations in which a woman designates a man as a father immediately after birth on the birth certificate constitute a misrepresentation." Simply put, the factual determination of fraud or misrepresentation could involve extensive trial time and in almost every one of these situations, creative individuals would find some fraud or misrepresentation.

By the time the Committee met as a whole for the third time there clearly became what was alluded to as "two camps", one being literally limited reversal of the paternity presumption within one (l) to two (2) years of the date of birth. The other accepted the challenge of the paternity within one (1) to two (2) years of the date of birth but sought an exception to the complete bar based upon fraud or misrepresentation.

Maria Cognetti presented the minority position in favor of the limited reversal of the paternity presumption. Her recommendation which was, at the time, a minority position proposed a statute which

> "makes the paternity of a child born during a marriage a rebuttable presumption; which presumption can only be rebutted (a) within the first two (2) years of the first two (2) years of the child's life and (b) within sixty (60) days of learning that there is a question as to the child's paternity. The presumption becomes irrebuttable once the child has reached age two (2)."

Ms. Cognetti also supported the concept of making a presumption irrebuttable based upon estoppel; i.e. once the father holds a child out to be his own and acts accordingly, he is estopped from ever raising the issue of paternity.

Robb Bunde expressed the position of what was then the majority of the committee. The proposal set forth by the majority accepted the proposition that a challenge to the paternity of a child born of a marriage be allowed within the first two (2) years of the child's life. The time period would effectively be a statute of limitations on paternity challenges which begins to run at birth. The majority differed from the position set forth by Ms. Cognetti in that it would allow a fraud or misrepresentation exception to the bar on challenges after that time period consistent with the statute of limitations in other areas of the law. It felt that fraud or misrepresentation will generally toll the statute of limitations on the theory that it is not equitable to bar an action by a party against whom fraud had been committed. The exception which would not be open ended and would have to been brought within six (6) months of the father gaining the information that would reasonably lead him to question paternity and would hold the father seeking to utilize the exception to a high burden.

"In implementing the exception, the "father" would have to prove elements, like those below, to be allowed to proceed with a paternity challenge of a child older than one or two:

Father must prove the following occurred:

a. a representation as to paternity has been made by mother;

b. the representation is material to the issue of paternity;

c. the representation is made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;

d. the representation is made with the intent of misleading father into relying upon it;

e. father is justified in relying on the misrepresentation; and

f. the resulting injury to father recipient was proximately caused by the reliance.

The Committee had the opportunity to individually review both of these position papers and then met to discuss the respective majority and minority positions.

Once again, the notion that enactment of statutes which would strike down the longstanding paternity presumption would potentially give rise to genetic testing in other related matters such as

(1) a mother requesting genetic testing during a custody case or during a highly contested divorce or

(2) a third party requesting a genetic test of a child of an intact marriage.

Consideration was given to the exceptions which were proposed by the majority. A key sticking point in implementing the exception rule would be the amount of litigation which could arise over the "discovery" date or other questions, including, "when did the father know and when he should have known"? The example was raised with regard to the eye color of the child and that anybody with an eighth grade or high school biology background should have known or had reason to know that there is a difference in the eye color of the child as opposed to he and his wife.

A discussion ensued concerning: (a) is this knowledge credible and (b) what standard do we hold the father to have this type of knowledge. Also, the question of fraud and misrepresentation was raised, and it became apparent to the Committee that fraud and misrepresentation are inherent in almost all of the paternity cases. There could be an increase in the amount of litigation arising from the issues necessary to prove the exception.

Most importantly, it was during the June 24, 1999 conference call that the Committee members, after voicing all of their concerns about the pros and cons of each of their respective positions and even some doubt about aspects of their own positions, came to the common question of how do we create a law to balance all of these interests. Once again, the Committee came back to the paramount interest, that being of the children and the family. It was at that time that the Committee agreed that the arguments that were being raised amongst the members were beginning to echo the verbiage of the existing case law regarding this paternity issue. There was then an overall consensus by the Committee that there should not be any statutes enacted which would change the existing case law.

CONCLUSIONS AND PROPOSED RECOMMENDATION

This Committee set out to review the bills and determine what, if any, changes to the bills were necessary. It was formed as a result of our Section Members' request that the Senate and House Judiciary Committees agreed to wait for our comments after we had the necessary time to think through and discuss alternative legislation and/or modifications to the pending bills. Jack Howett and Maria Cognetti were insistent that there should not be a "knee-jerk" reaction by us to the bills.

This avoidance of such quick emotional reaction is the reason why the common law presumption exists and has withstood the test of time.

Serious social and legal concerns, the welfare of all of the children of this Commonwealth and the sanctity of the family unit, the preservation of which, as we move into the new millennium, present themselves as challenges on a daily basis in cities and towns from Philadelphia to Erie, Scranton to Pittsburgh. "Knee-jerk" reactions to bills which were introduced as a result of an individual(s) displeasure with the rulings of a trial court, the Superior Court and the Supreme Court of Pennsylvania should not be permitted to threaten the welfare of our children or threaten the goals of those who work diligently to preserve the family unit.

Passage of legislation that overturns the presumption would cause an increase in litigation ancillary to divorce matters, enable mothers in custody cases to inject a new weapon into the fight, prompt fathers to rush their children for genetic testing prior to the "statutory window" closing and enable third parties to question the paternity of children of intact family units.

This committee realized all of the above possibilities while its members passionately defended their positions and opinions. In coming to this realization it concluded that each alternative presented to the existing bills would lead us down the path to the reality that the aforementioned situations could present themselves more and more often. We also realized that just maybe the appellate courts were thinking the same when they throughout the years have maintained the presumption even in the face of modern technology and genetic testing.

The existing case law sets a high standard, "clear and convincing" evidence, under limited circumstances, "no access or inability to procreate at the time of conception" to rebut the presumption. After much discussion and application of the pending legislation and the considered alternatives, the Committee concluded that the magnitude of the issue and the wide range of possible legal and factual scenarios requires maintaining the high standard and limited circumstances to overcome the presumption.

Through the review of the bills and our attempts to balance the interests by fashioning alternatives to the legislation, it is now clear to the Committee that statutory management of the issue simply does not provide the framework to approach the presumption question.

Therefore, the Task Force recommends that the Council of the Family Law Section oppose the pending legislation.