GENERAL ASSEMBLY OF PENNSYLVANIA
HOUSE JUDICIARY COMMITTEE
FAMILY LAW SUBCOMMITTEE

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PROTECTING CHILDREN IN CUSTODY PROCEEDINGS

Testimony of
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The Support Center for Child Advocates is Philadelphia's lawyer pro bono program for abused and neglected children. We offer the skills and dedication of lawyer-social worker teams, and we represent more than 1,100 children each year. *Child Advocates'* legal and social services are offered to child victims through **Direct Representation Services** and **Child Advocacy Leadership and Training**. For more than 44 years, we have served as a resource to this Legislature and its staff, and I thank you for the invitation to serve in this role once again. When asked, we attempt to offer to you a balanced, candid and constructive assessment of what our children need and how we are all doing for our kids.

The Support Center for Child Advocates joins many other child and family advocates in urging the General Assembly to proceed with caution in consideration of the child custody legislation known as "Kayden's Law". Contrary to its intended effect, Senate Bill 78 (PN 930) will work to the detriment of the well-being of children involved in custody disputes. We recommend that the bill be substantially amended, and we want to make it clear that we are opposed to the bill in its current form.

As professionals focused on the advocacy for and representation of children and youth, and with a long history of commitment to child protection and well-being, we offer a child-centered framing and perspective on the important questions raised by the bill and its supporters. We are concerned that severe limitations on parental custody also work to limit a child's opportunity to know and be raised by her/his parents and other caregivers, often to the child's detriment.

Current custody law makes the priority of child safety clear: *"if the court finds that there is an ongoing risk of harm to the child or an abused party and awards any form of custody to a party who committed the abuse or who has a household member who committed the abuse, the court shall include in the custody order safety conditions designed to protect the child or the abused party."* 23 Pa.C.S. § 5323(e) Emphasis added.

SB 78 creates an unworkable schema of presumptions and conditions for supervision of custodial visits that will severely interfere with healthful parent-child interactions. An earlier version of this bill proposed mandatory professional supervision for a potentially very large number of cases; this approach was unrealistic given the limited availability and high cost of professional supervision. The current bill SB 78, as approved by the Senate in June 2021, presents a more considered approach to use of non-professional and professional supervision, expanding the number of possible supervisors to include thousands of family members and family friends. Unfortunately the bill still has many problems.

Yet, SB 78 (at § 5323(e)) still makes prominent use of both professional and nonprofessional supervised visitation as options for "*safety conditions*" when there is a history of abuse to either the child or a

household member. Present and ongoing risk to a child, and clear history of abuse of a child, are grave concerns, and so supervision is often warranted in those situations. In cases involved with a county Children and Youth (C&Y) agency, supervision is a key tool – because it is performed by government workers and agents. By contrast, there are precious few professional supervision programs operating in Pennsylvania that might serve in private domestic relations custody cases, and the purchase of professional supervision services is cost-prohibitive everywhere in the Commonwealth. Family members are sometimes ill-equipped or otherwise inappropriate to serve as visitation supervisors.

Problematically, the bill requires the court to consider the history of a party with other adults (i.e., "*household members*") in a way that seeks to impute a likelihood of future harm to the child. This is a potentially overbroad mechanism that may support unnecessary restrictions on custody and visitation.

While the current law focuses on "ongoing risk of harm to the child" as a predicate for mandatory safety conditions, SB 78 greatly expands the scope of safety consideration – without any limit on the look-back in time or need for relevance to the custodial care. 23 Pa.C.S. § 5323(e). SB 78 allows and requires the court's decision on supervision and other restrictions to be made based on any history, regardless of how old or irrelevant the conduct and regardless of who was involved, raising serious due process concerns. (SEE § 5323(e)(1): *"Supervision.--If a court finds by a preponderance of the evidence that a party has abused the child or any household member , there shall be a rebuttable presumption that the court shall only allow nonprofessional supervised physical custody or professional supervised physical custody ... "*).

Further, the proposed requirement for the court to conduct annual reviews and to make a finding of 'no-risk' prior to ending professional supervision are only facially attractive, and will be problematic to administer and virtually impossible to satisfy for many litigants. § 5323(e.1)(1). To make a clinical judgment that a party no longer poses a risk of abuse, a psychologist or other evaluator must conduct extensive clinical interviews, parent-child observations, and psychological testing; these evaluations can cost $5,000 or more, with additional fees for in-court testimony. How many indigent and working-class litigants will be able to afford that kind of proof? For any person with a "history" is it even possible to definitively find no risk?

The legislation adds to the supervision decision a complex and unworkable formula (including "*de novo review"*) for considering "*...an indicated report for physical or sexual abuse under chapter 63 (relating to child protective services) [as] a basis for a finding of abuse under this subsection.*" § 5323(e)(1). As noted below, a history of child abuse is already a key factor in the custody court's determination; like other proposed amendments, this mechanism adds layers of compliance without any real change in child protection.

It is ironic that the only cost associated with the bill, as identified by the "Fiscal Note" of the Senate Appropriations Committee (6/22/21), is the "minimal" government cost of some additional training programs for judges, hearing officers, and lawyers for children. In reality, the emotional and financial costs to the family members involved in custody disputes – for continuing litigation, legal representation, supervised visitation fees, loss of work, etc. – are likely to be exponentially increased by the litigation required to comply with this legislation.

For policy makers seeking to shape the law on visitation, the companion area of child welfare law provides a useful framework, as set forth in the chapter on "Visitation" in *The Pennsylvania Dependency Benchbook*:

> A careful analysis of safety for visitation and the protective capacities of the parent should be done to determine the level of oversight needed. It should be noted that safety for removal may not be the same as safety for visitation. **It should be presumed that visitation is unsupervised unless there is a safety reason that requires supervision. Once supervised, it is also important that visitation moves to unsupervised visits as quickly as safety allows,** including overnight visits and the children being placed in the home on a trial basis. …
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> As long as the goal is reunification, **a parent may not be denied visitation "except where a grave threat to the child can be shown"**. Furthermore, courts and child welfare agencies may not suspend parents' visitation with a child unless the party seeking to limit the visitation proves by clear and convincing evidence that visitation poses a "grave threat" to the child. [The Superior Court] stated that **in order to conclude that a "grave threat" exists, the court must find that "there are no practicable visitation options that permit visitation AND protect the child."** This standard reflects the parents' constitutionally protected liberty interest in such visitation, and also the significant consideration of allowing a parent to maintain a meaningful and sustaining relationship with his or her child.

(emphasis added; citations omitted). The Pennsylvania Dependency Benchbook, 3rd edition, Chapter 8, Visitation, at: https://ocfcpacourts.us/wp-content/uploads/2020/05/N-Chapter-8-Visitation-And-Benchcard-002424.pdf.

In 2013, the custody statute was amended to require the court to ascertain and consider whether any party had a history of child abuse findings or involvement with protective services. 23 Pa.C.S. § 5329.1. This revision had precisely the effect intended by SB 78 – to bring the history of abuse into the custody case – but without the mandate for a specific custodial condition or the deprivation of judicial discretion. Rather than automatically and severely restricting visitation when history is discovered, this bill might be revised to include further study of the effectiveness of that reform.

We want to be clear that a well-intentioned concern for a child's safety is not always a benign, let alone salutary act, and does not necessarily result in a safe child. For example, it is well known that children-and-youth agency interventions can sometimes be misplaced and even harmful. The gross disproportionality of minority children who are removed from their families, and the concomitant disproportionality of adults of color who are subject to child abuse investigations and findings – facts which might get brought into a domestic relations custody case as evidence of a history of risk – suggests that racism and other biases may be influencing the process of child protection. Such is the possible effect of an overbroad approach to child safety.

Factors to consider when awarding custody: SB 78 seeks to amend the factors to be considered by a court when awarding custody. 23 Pa.C.S. § 5328. These 16 factors were added in a well-intentioned, thoughtful reform initiative that started more than a decade before. The mechanism is well-regarded by most practitioners and jurists. There is no indication that courts are failing to comply with the law, which requires explicit on-the-record findings on all the factors. At least five of the factors already address violence or other detrimental effects on the child. The new bill goes further, however, to tie the hands of courts, by creating presumptions and bars, to both custodial and visitation opportunities.

Current law considers the "the well-reasoned preference of the child" as one of the 16 factors. 23 Pa.C.S. § 5328 (a)(7). SB 78 sets a more specific requirement that a child's fear of a party that is based on the

"*party's actual and specific conduct*" … "*shall be considered.*" Allegations about a child's preferences and fears can be quite relevant, and the fears both well-reasoned and real; indeed, we urge that children be believed and respected in their recollections of possibly abusive events and similar circumstances. These considerations are best left to thorough child-specific inquiry conducted by high-quality forensic interviewers, trained custody evaluators, children's legal representatives (counsel or guardian ad litem), and the courts, who are appropriately constrained to record-evidence. With the latest version of the bill eliminating a cumbersome presumption that had previously been proposed, we do not object to the new formulation of this factor.

Consideration of criminal convictions: A parent/caregiver's relevant criminal history has long been an element of best interest decision-making; and the court must consider whether the party with such record poses a present risk of physical, emotional or psychological harm to the child. 23 Pa.C.S. §§ 5329, 5330. The bill adds several crimes of violence or cruelty that are reasonable additions to the list of crimes to be considered by the court. But each iteration of SB 78 had also added to the list the offense of "simple assault" (18 Pa.C.S. § 2701). We are concerned that tens of thousands of parents and caregivers have some form of simple assault conviction on their criminal record. Including this misdemeanor offense will have a huge impact in the number of persons identified and the scope of a court's inquiry – certainly not behaviors to be encouraged or condoned, but so often irrelevant to the best interest custody determination.

Resources essential: One must recall that there is no form of case management structure or staff in the domestic relations system, similar to that found in the juvenile/C&Y settings. Thus, all of the referrals-for-service, supervision, case monitoring, enforcement, and oversight that the presumptions of SB 78 would require, will need to be maintained by the litigants themselves, and by the courts. Once a presumption is "turned on" it is extremely hard to get it "turned off" and involves a return to court and more evidence-based litigation. Restraining courts and burdening litigants with automatic presumptions and mandates, without mechanisms for review and implementation, will clog the already-crowded court dockets and leave many children and families without access to justice.

Many agree that in the most extreme and bitter custody battles between parents, there is often no one truly representing or advocating the child's needs and interests before the court. There is expansive literature spanning more than three decades on the pros and cons of legal representation of children in domestic relations cases. In high-conflict cases, a child's legal representative (i.e., legal counsel or guardian ad litem) may help remedy this gap as well as moderate the actions and conduct of embattled parents struggling for power and control in their relationship with each other. Funding is always an issue, as there is rarely public funding for child advocacy in domestic relations cases. There is clear precedent in our law for ensuring adequate representation of the child in many other legal proceedings, and the roles are embedded in Pennsylvania custody law. 23 Pa.C.S. §§ 5334 (guardian ad litem for child) and 5335 (counsel for child).

Data-Driven Reforms: Are Pennsylvania's custody courts adequately recognizing domestic abuse or sexual violence to the extent necessary to keep children safe in families? Are they minimizing or failing to understand the implications for children? There is precious little reliable research on the performance of the courts and the experience of children in high-conflict custody and dependency cases in the Commonwealth. Children often sustain harm through psychological and emotional trauma and may have related issues they struggle with throughout their lives. We respectfully suggest that a thorough review of the underlying custody case highlights the lack of resources and the tremendous complexity that these cases present. Bad cases make bad law. We are concerned that SB 78 works an over-correction that is well-intentioned but, without real study, dangerously misguided.

Our organization and others have advocated for increased public resource in court proceedings involving children, including family law cases. The safety and well-being of children are affected by the attention to and investments made (or not) in: safe visitation/exchange sites; custody evaluation capacities; high-quality forensic interviews; triage of the most serious and challenging high-conflict cases; counseling alternatives for families seeking help; judicial training; and improvements to the Child Abuse Registry and the mechanisms for review by the Bureau of Hearings and Appeals. Children and families need real help in their lives, not barriers that fail to meet their needs.

Finally, in calling for a better piece of legislation, meaningful child-centered research, increased resources, and sensitivity to the unintended impact on thousands of children and families, we do not mean to dishonor Kayden nor diminish the tragic outcome of the child's life. We all agree that children and their well-being should be the heart of the matter.

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