
Public Hearing on Senate Bill 78
House Judiciary Subcommittee on Family Law

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Chairpersons Klunk and Hanbidge and Members of the Subcommittee:

Good morning. My name is Helen Casale, and I am Chair of the Family Law Section of the Pennsylvania Bar Association. Thank you for the opportunity to speak with you today on an extremely important issue: Child Custody. I am not only providing you with the Family Law Section's perspective on Senate Bill 78 but I am also providing you with my personal perspective as well. I have been practicing exclusively family law for twenty-five years and am currently a member of the American Academy of Matrimonial Attorneys. I practice in many of the counties in the Southeastern part of the state including Montgomery, Bucks, Chester, Delaware and Philadelphia. I also have the benefit of practicing in New Jersey.

I actually began my career as a law clerk in 1994 to a family court judge in the Superior Court of New Jersey. I then went on to practice at a large firm located in Norristown, Pennsylvania, again, practicing exclusively family law. I still practice in Norristown, Pennsylvania. My practice centers around representing families at their worst. I see very good people on a daily basis struggling with their emotions as they watch their family dissolve. It is heartbreaking at times, especially when it involves children. There are times these folks make very poor decisions as they are going through this tumultuous time in their lives. They make mistakes, especially when it comes to their children.

While I have always been in private practice, I also do a fair amount of *pro bono* work for the Montgomery County Court of Common Pleas. I am often appointed as the attorney to represent parents who are on the brink of having their parental rights terminated or I represent the children in these matters who are stuck in the middle between a relationship with their parents and a relationship with the foster care system. These are the worst of the worst cases, and I wanted you to know my involvement so you understood that I know what it looks like when a child really should sever their relationship with a parent. It is difficult to watch and to understand but it does happen. The involuntary termination of parental rights is a rare occurrence, and the courts take it very seriously which is why, in those dependency and/or termination cases, the Orphan's Court judges are provided with resources. They can appoint attorneys to represent these parents, free of charge. The judges are able to appoint guardians ad litem for the children or attorneys for the children, free of charge. The judges are able to order psychological evaluations, bonding evaluations and risk assessments in a termination case. The judge wants to be sure she has all of the information needed in order to make the right decision as it relates to the child. The counties provides these resources in these special cases.

This is not the case in family court. Our judges in the counties where I practice do not have these resources available at their fingertips when it comes to a contested custody case. This must be taken into consideration when you are making a determination on Senate Bill 78. Funding and resources are a main part of my argument today and the limitations our family court judges experience is a big part of my argument today against Senate Bill 78. However, what also must be taken into consideration is how our family court judges are extremely resourceful and use what they have at their disposal to get to the right answer in custody matters. Our family court judges are not given much to work with but they still find a way to act responsibly and take their job as the trier of fact in a custody matter very seriously. The way Senate Bill 78 is drafted minimizes the importance of our trial court judges and demonstrates a diminished amount of confidence in the ability for these judges to do the job they were sworn in to do.

The problems with Senate Bill 78 are glaring. As a family lawyer, I am troubled by a lot of the language. I fear what may be on the horizon for families if it passes "as is." Therefore, I thank you for the opportunity to outline and highlight some of my concerns.

First, please understand that in the counties where I practice attorneys are not appointed in contested custody cases nor are they appointed in contested protection from abuse cases. Often times, especially in Philadelphia County, these individuals are left to their own devices to navigate the family court system in order to gain custody of their child. A contested custody case can cost anywhere from $10,000 to $50,000 if a litigant chooses to be represented by counsel. It might be even more costly if the judge requires a custody evaluation to be completed. The language as currently stated in Senate Bill 78 will make it even more important for litigants to be represented by counsel in a contested custody matter. The Bill requires a great deal of advocacy on behalf of the litigant. I fear that only an experienced family law litigator may be able to navigate these waters before a trial court. Below I have specifically outlined some my biggest concerns:

(1) **S.B. 78 includes an overly broad definition of abuse to limit custody**. In Section 5323(e) in lines 10-12 there is language that references a "history of abuse" or a "present risk of harm." If either of these conditions exist then the court is required to outline "safety conditions." "History of abuse" is not defined. Does this mean there was an abuse incident that occurred last week? Last year? Three years ago? And, how do we define a "present risk of harm?" While the language seems to make sense as to the goal of protecting children it may be overly broad and end up creating unintended harm. Let me provide you with a specific example of what I mean. I represented a young father against the mother of his child in a contested custody matter. They separated when the child was only a year old. The parties were never married. I find these are often the most difficult cases because there is normally a lack of trust between the two parents. At the time of the separation, mother did everything she could to make sure father had limited time with his son. There was no justifiable reason other than she just did not trust he could care for the child as well as he could. She fought tooth and nail to limit this father's time. The matter was scheduled for a custody trial in the Philadelphia Court of Common Pleas. Father was simply asking for additional overnight time with this son. Unfortunately, right before the trial, an incident occurred during a custody exchange wherein the police were called and a PFA was filed against the father. Criminal charges were filed against father as well. Father plead "no contest" to the criminal charges and the PFA was withdrawn. There was no prior history of any abuse. Father had no criminal record. Father had no mental health issues. Mother simply utilized this incident to gain an advantage in the custody matter. Father made a bad decision that day during the custody exchange to place his hands on mother. He regretted it immediately. Father settled the custody matter taking less time with his son than he wanted. Three years after that incident occurred, father filed to get more time with his son. There were never any further accusations of abuse against father. Regardless, mother used this past PFA filing as a weapon against father. She wanted the custody judge to try the PFA matter all over again even though it was withdrawn and there was never any order entered. Mother was trying everything she could to continue to interfere in father's relationship with his son. She was not successful. In fact, the trial judge saw right through what mother was doing. The judge did not allow the custody case to turn into a "redo" of the PFA matter. The incident from three years

ago was not relevant to what was happening in the custody trial. The judge determined that mother was intentionally interfering in father's relationship with his son and granted father primary physical custody. This was the right decision. This child was never "in danger" – the only harm coming to this child was mother's attempts to alienate father from his life. With the language in the Bill as it stands now, mother may have prevailed in continuing to interfere in the child's life. Instead, the family court judge saw mother's behavior for what it was – an excuse to keep father out of his son's life. The judge in that case determined mother was not facilitating a relationship between father and son but rather she was an obstacle. If Senate Bill 78 was law during this time, I am not sure the family court judge would have had the ability to come to this determination. He would have been forced to consider this "history of abuse" and would have had to include "safety conditions." Father certainly would not have gotten primary custody as he did in my example. In addition to the above, a custody order could provide protections for a parent who has alleged abuse either without the pursuit of the protections of a PFA, or provide protections to a parent whose PFA protections have expired

(2) **S.B. 78 would permit a party to re-litigate a Protection from Abuse matter, thus draining resources, preventing judicial efficiency, and causing litigants to incur more expense.** In Section 5323(e) it assumes the family court system is set up to allow the judge to have accessibility to certain resources. But, the system, as it stands now, does not allow the resources to the family court judge to explore the "history of abuse" as it is contemplated. If we go back to my example, mother would have gotten her wish which was to "retry" the PFA all over again. As a family lawyer, I have seen more than enough times wherein litigants file PFA's for the wrong reasons. There is no denying that at times the PFA system is abused by litigants. A petition is filed to gain exclusive possession of the home or to get a "leg up" on custody of the children. I wish this was not true but I have seen it enough times. Often times, the defendants in these actions negotiate a "deal" wherein the PFA is dropped in order to allow the petitioner to get what he/she wants – custody or the house or some other advantage. Often times the defendants in these actions do not have the benefit of counsel so they may just "agree" to a twelve month restraining order because they are being told it could be worse if it gets tried. This is the reality as it surrounds PFA litigation and now Senate Bill 78 is bringing that litigation to custody court. A litigant simply needs to inform the court that there is a "history of abuse" meaning she filed a PFA a year ago, or two years ago or whatever it might be and this means the family court judge may have to do a full analysis on the "history of the abuse" – even if the PFA was dropped or negotiated. This backlogs the family court. Most of the counties where I practice do not have the ability to give more than one day at a time for a contested custody matter. Now put on top of that the judge needs to carve out time to potentially "re-hear" or "re-litigate" an abuse matter that happened in the past. I just do not see how this can happen. The time is just not available in family court nor is it necessary.

(3) **S.B. 78 would impose a rebuttable custody presumption even in matters where abuse is unrelated to the child.** Section 5323(e.1) is especially troubling as it relates to the limitations put on a family court judge when there is evidence of abuse to the child or any household member. The Bill requires that there is a "rebuttable

presumption" in this situation and the only relief available is for there to be nonprofessional supervised physical custody or professional supervised physical custody. This provision does not specify there is a need for an "ongoing risk of harm." It only specifies if there "had been abuse" and not necessarily to the child then some type of supervised custody is required. The accused has to overcome a presumption that he can only have supervised custody. Does this mean in my example above the father (because he did plead guilty to a misdemeanor charge as it related to the alleged abuse three years ago) is presumed to only be allowed supervised custody? This father would now have to argue to the court the reasons why this remedy is not reasonable. The father in my case would have been able to make that argument because he was represented by counsel. But there are MANY parents in custody litigation that do not have the benefit of counsel and may not be able to overcome this presumption. In my example, supervised custody for father would have absolutely been the wrong result and not in the best interests of the child.

Section 5323 (e.2) takes the issue a step further and states that if there is a determination that there is an "ongoing risk" of abuse to the child then there is a rebuttable presumption that there shall only be *professional* supervised physical custody. While the intent is clear in this provision – the law needs to protect children – I am just not sure if this accomplishes the goal. There is so much emphasis throughout the wording of this Bill as to the "abuse" and less emphasis on the relationship between the parent and the child and it discounts the ability of our extremely experienced family bench. I believe there just may be a lack of awareness as to the limited resources in family court in each county. The services of a "professional supervisor" are not easy to come by – there is not a list of willing individuals. And, it is costly. It should be noted that professionally supervised visitation is extremely limited in parts of the Commonwealth. To the extent that it is available, it may be for periods of only one or two hours per week. For lower income individuals, the costs per hour could be such a financial burden that the parent cannot afford to maintain contact with the child, particularly with the expenses of litigation and batterer's intervention. Thus, the child loses the relationship with this parent rather than having safe contact with the parent. This is not to say that there should not be supervised contact as an option for the Court to order. Rather, the practical factors of availability at realistic hours and affordable prices for a working parent must be considered, or it becomes no option at all. If a parent cannot find these services or cannot pay for these services then what is the alternative? A court may feel compelled to restrict a parent's access to his or her child where they do not have access to supervision.

The section regarding presumption and supervised physical custody also provides that the court may use as a basis for a finding of abuse, an *indicated report* from the county Children & Youth Agency for physical or sexual abuse under the Child Protective Services Act only after a de novo review. "Indicated" reports are not judicial findings by a Common Pleas Judge, but a determination by a caseworker that there is "credible evidence to support finding of abuse or neglect" after the agency investigates. Pa. Code 3490.4. There is no time frame provided in this section of the bill as to a look back period for the "indicated abuse", which would trigger the de novo hearing (Page 6, Lines 9-11). The age of the finding may present challenges for de novo review. It is

understood that there is a high turnover rate for persons who perform these investigations. So, the most important witness could well be unavailable. However, it is clear that it would constitute a hearing within a hearing regarding the circumstances leading to the Protective Services indicated report. This would create a need for additional court time and legal expense for the parties.

(4) **S.B. 78 removes important child-focused best interest factors under Section 5328 and adds more parent centric factors.** Section 5328 is the Section that outlines the factors a family court judge must consider when making a custody determination. Section 5328(1) has been deleted and replaced. The number one factor in 5328 used to be, "Which party is more likely to encourage and permit frequent and continuing contact between the child and another party." This has now been deleted and is now embedded in the new language of 5328(2) as 5328(2.3). In my experience, besides the necessity to be sure the child is safe and protected, it is vitally important to be sure the parent with the majority of custody is the parent facilitating the relationship with the child and the other parent. Often times, this is the factor the judge weighs most heavily. And now, Senate Bill 78 has diluted its importance. If we go back to my example about the father and the allegations of abuse, the number one factor that was the most important in that case was the evidence presented as it pertained to mother's efforts to "stand in the way" of the father's relationship with the child. The judge, in that case, saw the evidence so heavily went against mother that he granted father primary physical custody. The focus absolutely needs to be on a child's safety which is why I understand the intent of Senate Bill 78. However, we cannot lose sight of the fact that a parent's relationship with his or her child is paramount. If we water down the importance of a party promoting and encouraging contact then I believe we are not heavily focusing on the meaning of "best interests."

Section 5328(2.4) is also seriously flawed. This is another factor for the court to consider but what it requires is essentially a "retry" of the abuse matter that was resolved either by consent or without admission. This simply makes no sense and again, assumes the time and money is there for the family court to schedule these matters. I am not sure when the family court would have the ability to take the time during a protracted custody matter to "retry" a PFA matter that was already resolved by consent or without admission. This provision will cause a "chilling effect" for anyone negotiating a PFA matter. I would be less likely to encourage my client to consent to a PFA or agree to same "without admission." I would insist on trying the matter if I know custody is going to be an issue in the case. This provision could unintentionally backlog PFA court. As previously stated, it is difficult enough for the family court to schedule protracted hearings on custody and virtually impossible to schedule days consecutively. This must be considered when determining the fate of Senate Bill 78.

The passage of Senate Bill 78 might seem as though it will benefit children across the Commonwealth of Pennsylvania, but I fear it will not accomplish its goal. Instead, it will end up hurting families. It will put a larger burden on the family court system, a system already at its maximum. The presumptions the Bill includes will not be easy to overcome without expert legal counsel or even private custody evaluators. The courts will feel "locked in" on ordering supervised custody when in most cases it might not be necessary. While the incident that

occurred to create the drafting of this legislation was tragic, it is thankfully few and far between. Our judges in family court are well educated, well-reasoned and take each and every custody case seriously and have the benefit of examining all of the witnesses and making a determination on the best interests. In fact, this is exactly what happened in that Bucks County case that has created this legislation. No one could have possibly predicted the outcome in that matter. The evidence presented did not support supervised visitation. Since 2010, approximately 450,000 custody orders were entered in Pennsylvania during which time there were four homicides of children by a parent in a court-involved custody case and in one of them the father actually did have supervised custody. We want to facilitate a relationship between child and parent. We do not want to put even more obstacles in place when it is not warranted. Senate Bill 78 is not the direction we want to go in. We should be focusing on the resources available to parents such as legal services, counseling, mental health treatment and anger management classes and parent education.