

**HOUSE JUDICIARY COMMITTEE**  
**SUBCOMMITTEE ON FAMILY LAW**  
**HONORABLE DANIEL J. CLIFFORD**  
**MONTGOMERY COUNTY COURT OF COMMON PLEAS**  
**NOVEMBER 15, 2021 PUBLIC HEARING**  
**CAPITOL BUILDING**  
**HARRISBURG, PENNSYLVANIA**

Good morning, I am Judge Dan Clifford and I serve on the Court of Common Pleas of Montgomery County. I welcome this opportunity to present these remarks to the House Judiciary Subcommittee on Family Law.

Today I am testifying as a member of the Custody Subcommittee of the Advisory Committee on Domestic Relations Law for the Joint State Government Commission.<sup>1</sup>

I also serve as Chair of the Family Law Section of the Pennsylvania Conference of State Trial Judges and you are receiving testimony this morning from our Section via my colleagues, Judge John Foradora and Judge Allison Royer. Judge Royer chaired the Subcommittee I appointed in July to review the pending legislation and to provide feedback to our Section. Judge Royer's Subcommittee Report was circulated to all of the Judges in our Family Law Section. All the feedback to the Report was favorable, and we are appreciative of the efforts undertaken by this Subcommittee.

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<sup>1</sup> Judge Clifford is the immediate past Chair of the Supreme Court Rules Committee on Family Law. Prior to his election in 2015, he was a family lawyer for over 30 years, actively practicing in 12 counties, and served as Chair of the Family Law Section of the Pennsylvania Bar Association in 2014. During his year as Chair, Judge Clifford spearheaded the award winning *Judicial Interview of the Child* video project and the legislative initiative that led to the adoption of Act 102 (signed into law by Governor Tom Wolf in October 2016).

As you are aware, the Joint State Government Commission is the primary non-partisan research organization that serves the Pennsylvania General Assembly.

The Advisory Committee on Domestic Relations Law, a subcommittee of the overall Joint State, consists of 23 members of lawyers, Judges and a law professor. Our members are both geographically diverse, from across all sections of Pennsylvania, and have achieved prominent reputations within our Commonwealth's family court community.

Preliminary to addressing the current legislation, a brief history of the Advisory Committee on Domestic Relations Law will be informative to members of your Committee.

Senate Resolution No. 43 of 1993 directed the Joint State Government Commission to undertake an ongoing limited study of certain areas relating to domestic relations law.

To accomplish this purpose, the Resolution created a legislative Task Force comprised of:

- the Majority and Minority Chairpersons of the House and Senate Judiciary Committees; and
- the Majority and Minority Chairpersons of the Senate Aging & Youth Committee and the House Children & Youth Committee.

To assist the Task Force, Senate Resolution 43 appointed the Advisory Committee to collaborate with the Joint State Government Commission on family law issues.

For over 25 years, the Advisory Committee has reviewed specific topics with the goal of developing statutory recommendations to the Domestic Relations Code to present to your legislative liaisons on the Task Force.

Presently, our Advisory Committee has four subcommittees to address the following important subject areas:

- custody
- equitable distribution,
- developing issues in family law, and
- the Uniform Parentage Act.

Despite the interruption produced by the Covid-19 pandemic, these Committees have continued to work on legislative topics that will eventually reach the recommendation stage to the Joint State Commission and then the legislative liaisons on the Task Force—with the expectation of ultimately receiving due consideration from your Committee.

The Report shared with you by Judge Royer, from the Pennsylvania Conference of State Trial Judges, was also shared with our Custody Subcommittee in an effort to achieve collaboration among those of us who are, for lack of a better word, “in the trenches” of Pennsylvania’s family courts. All of these stakeholders, by the way, work consistently and collaboratively, year in and year out, on improvements to our family court system.

Our Custody Subcommittee viewed Judge Royer’s Report favorably.

I will not repeat the same concerns to you about the proposed legislation that Judge Royer and Judge Foradora will eloquently present this morning.

Instead, the focus of my appearance, in addition to be supportive of my judicial colleagues, is to offer testimony on the impact of the proposed legislation on the custody Factors.

Our Custody Subcommittee has been diligently working on revisions to the 16 custody Factors set forth in 23 Pa. C.S. § 5328 (a). These Factors were incorporated into the custody statute in 2011 and require every judge presiding over a child custody case in Pennsylvania to analyze 15 very specific factors plus any additional “relevant” factor within a 16<sup>th</sup> factor.

Factor 2. of the 16 Factors pertains to abuse considerations and is set forth as follows:

“(2) The present and past abuse committed by a party or member of the party’s household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.

(2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).”

Notably, there is no delineated priority as to the list of the 16 Factors. The presiding custody Judge has discretion to first, consider, then weigh, each Factor separately and to assign the amount of weight that each deserves within the context of the particular case before the Court. This discretion is absolutely essential to the critical responsibility judges have in child custody cases.

Notwithstanding that there is no prioritization to the 16 Factors, the mere fact that consideration of abuse is the *second* factor, of 16 total, provides ample assurance that it is an extremely significant factor – a priority if you will - and a Factor that will be addressed with certainty by the Judge before considering all of the remaining factors. A judge cannot just overlook or leave the Factor “blank”.

In other words, the trier-of-fact will not just be “getting around to the abuse factor” as an afterthought - after going through 5, 10 or even 15 of the other factors.

So, in essence, the consideration of abuse has a “premiere” placement in the current list of Factors and is assured significant attention by the judge prior to proceeding on to the rest of them.

In addition to already having a high-placed factor related to abuse, arguably, why would it be necessary to now proceed to include all these additional abuse considerations within the other 15 Factors? To proceed to include abuse as subparts to the other Factors will significantly act to diminish and/or dilute the importance of these other Factors that are important to be considered.

Judge Royer aptly describes our concerns in her Report. To paraphrase: *“to sprinkle additional abuse considerations to the other Factors is not necessary and is not logical since it already has its own single Factor.”*

With the enactment of the custody statute, and creation of the 16 Factors, the legislature already took into account that abuse is an important consideration in a child custody case and, for lack of a better analogy, it has “top billing” in its placement as Factor 2.

This discussion with regard to the Factors prompts me to discuss with you the work of our Custody Subcommittee. For the past two years, we have taken up the task of revisiting the Factors with an eye to “refreshing” them. It has been 10 years since they were enacted and this seemed an appropriate timeframe for our Subcommittee’s work. By the way, I use the word “refresh” as opposed to “revise” or “redraft” as the existing Factors you created 10 years ago remain a solid framework upon which to require Judges to consider in making child custody decisions.

As part of our work, we took on the significant effort of reviewing the Factors that are in place in our 49 sister states to determine if there are other factors that may make sense for us to include, existing ones that may make sense to combine and still others that may need to be tweaked in the wording to be up to date with current parenting trends. This has been an extensive and

thorough process which we have been undertaking for you, the legislature, as your designated Advisory Committee, with the hope that our work would eventually be considered.

Our Custody Subcommittee is ready to submit our Report with regard to the Factors to the overall Advisory Committee as a whole and we are anticipating that full Committee action on it will occur shortly. Thereafter, it would be submitted to your legislative liaisons on the Task Force for further consideration.

I would be remiss if I failed to mention Act 102 this morning. This was enacted in October 2016 and represented the most substantive change to the divorce code in nearly 30 years. The change in that statute originated within the PBA Family Law Section. It was introduced by your esteemed colleague, Representative Tarah Toohil, who will shortly join us on the Bench in Luzerne County. With her guidance, support and perseverance it passed both the House and the Senate with flying colors. This is the best example of the type of collaboration which results in providing meaningful improvement to our family court system.

Before there is a decision to proceed on making the changes to the Factors, as contemplated in this Bill, please work with us on this instead as a collaborative effort. Please permit us the opportunity to present our Report to your legislative Task Force to the Joint State Government Commission, to review all of our carefully considered recommendations and let's work together - collaboratively - to ensure overall improvement to the custody factors.

Thank you for the opportunity to present these remarks.

Respectfully submitted,



Honorable Daniel J. Clifford