Public Hearing on SB 78 Preventing Abuse in Child Custody Proceedings - Kayden's Law
Before the House Judiciary Subcommittee on Family Law
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WRITTEN TESTIMONY OF MOLLY CALLAHAN, ESQ.
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Thank you for this opportunity to provide testimony regarding SB 78. My name is Molly Callahan and I am the Legal Center Director of Women Against Abuse. Women Against Abuse, a 501(c)(3) a nonprofit agency, is Philadelphia's leading domestic violence advocate and service provider and among the largest domestic violence agencies in the country. Women Against Abuse operates the Legal Center, two emergency safe havens and a transitional housing program in Philadelphia, provides education and advocacy around domestic violence issues and is integral to the operation of Philadelphia's domestic violence hotline. The Legal Center provides advocacy and representation to victims of domestic violence in Protection From Abuse, custody and support cases. We also provide advocacy in the criminal justice system and the child welfare system. Annually, the Legal Center assists approximately 4,000 victims of domestic violence.

Women Against Abuse and I extend our deepest sympathy to Kayden's family. Kayden's murder was a horrific tragedy. Despite unimaginable grief and loss, Kayden's mother and extended family have been tireless advocates to improve the custody system for all children in the Commonwealth.

We also want to thank Senator Santarsiero for his work on this bill, the many conversations he had with various advocates and the many changes he made to strengthen the bill. Unfortunately, although there are many helpful provisions, Women Against Abuse opposes the bill as written because of our concerns about the unintended harm that the presumptions at the heart of the bill will cause.

As attorneys and advocates for victims of domestic violence and their children, Women Against Abuse knows that too often domestic violence is overlooked or minimized in custody cases. SB 78 attempts to rectify this problem and there is much to be appreciated in the bill. Training about domestic violence, child abuse, and racial and gender bias is essential to better equip judges to make decisions in these cases, which are complicated and have life-long impacts on the children and parties involved. Children and victims of domestic violence are safer when courts take more time to understand both the dynamics of domestic violence and the context of the whole case. Often, the best custody orders are the most comprehensive and

they are always tailored to the unique case. Supervised visitation is undoubtedly the best remedy in some cases but we believe judges make the best custody decisions when they have training and knowledge, relevant information about the case and the ability to craft orders that take all of the specific facts into account. To best serve children and victims of domestic violence, courts also need viable options, such as well funded professional supervised visitation sites.

Below are our concerns with the bill:

Presumption of Supervised Custody.

The legislation presumes that a parent should be divested of their right to any unsupervised physical custody if they have been found to be responsible for abuse. We agree that the safety of the child and of the protective parent must always be the highest priority. However, a rebuttable presumption which imposes supervised visitation when there has been any abuse will not always make the children and abused parent safer. Child custody cases are too complicated and too important to rely on a presumption. Rather than encouraging the court to take a deeper and more nuanced approach based on the specifics of the case, the presumption would encourage cookie-cutter solutions to a complex problem. In cases where there is domestic violence, it is vital for the court to understand the dynamics and context to make a determination which is best for the particular child and family. While there will certainly be times that supervised visitation is the only appropriate outcome, that will not always be the case and thus a presumption does a disservice to the children it intends to help.

A presumption, while well-intentioned, may have the opposite effect, putting victims of domestic violence and child abuse in more danger and causing unnecessary traumatic separations of abused mothers and their children, with unclear, nearly impossible barriers to reestablish contact. This presumption will disproportionately harm Black and brown mothers and their children. It will also disproportionately affect low income mothers and children. Because of systemic racism and gender bias throughout schools, the healthcare system, child welfare, law enforcement and court systems mothers, particularly low income Black and brown mothers, are the caretakers most likely to be reported and indicated for child abuse, which is broadly defined in Pennsylvania. Black and brown mothers, and mothers living in poverty, face much higher surveillance and scrutiny from child welfare, schools and courts. What might be regarded as an accident by a wealthier white parent is likely to be labeled abuse or neglect by a Black or brown mother. We are relieved that the bill now clearly states that an indicated child welfare report cannot be used as the basis for the presumption and that a de novo hearing must take place. However, many victims, particularly low-income victims who do not have representation, will be at a disadvantage in the de novo hearing.

Additionally, low income Mothers will have a more difficult time attempting to rebut a presumption of supervised physical custody following allegations of abuse as they will typically

not have the advantage of counsel. Throughout the Commonwealth, many custody litigants do not have legal representation. In Philadelphia, 80-85% of litigants lack representation due in large part to the lack of financial resources and the dearth of free representation. Understanding how to rebut a presumption will be a challenging process for them.

It is also not clear how this presumption will impact families where both parents have been found to have committed abuse, a scenario that is common in intimate partner violence and often masks the true domestic violence dynamics at play. Again, this will adversely affect victims of domestic violence.

Supervised Visitation Centers.

As currently written the presumption mandates either supervised visitation if there has been any abuse or "professional supervision" when there is an on-going risk of harm. Unfortunately, there are very few professional supervision centers in Pennsylvania and none in Philadelphia. Without including funding for safe visitation and exchange sites in the bill, indigent and lower-middle class parents will not be able to secure professional supervised visitation, thus potentially presumptively cutting off all contact with their children. We urge the legislature to explore funding for professional supervised visitation centers. Creating such centers throughout the Commonwealth would have an immediate beneficial impact for victims of domestic violence and their children. Judges would be more likely to order this remedy if it were a viable option. Without a professional visitation site, Judges may be forced to effectively deny all access or to find that the presumption is unworkable in practice and thus effectively nullify the presumption.

Addition of the existence of a PFA by agreement as a factor.

Currently, it is clear that if a party raises allegations of abuse the Court must consider those allegations, whether or not a petition for a Protection From Abuse (PFA) order has ever been filed. Thus, the proposed addition in §5328.a.2.4 , which adds the consideration of a Protection From Abuse by agreement to the list of factors, is duplicative and will potentially cause confusion.

Listing a Protection From Abuse order by agreement as an enumerated factor falsely gives the impression that a victim needs to have filed for a PFA to raise issues of abuse. Regardless of whether there has been a Protection From Abuse petition filed against a party, the court must hear and consider any allegations of abuse that a party raises.

Additionally, the court may believe the language in §5328.a.2.4 requires an inquiry into any underlying facts whenever there is a PFA by agreement, even if the parties do not raise this issue. The addition of this language makes it likely that there will be an automatic inquiry into

the underlying facts, and thus defendants will be less likely to agree to a PFA without admission. Agreements without admission are often much more individualized than a PFA order entered by a judge after a hearing and thus often provide more protection for a victim and their children. PFA agreements often include custody provisions which help protect children. The newly created factor will be a disincentive for defendants to agree whenever there is any possibility of future custody litigation. While the impetus behind the language is to protect children and victims of domestic violence, it may make it much more difficult for victims to obtain a PFA by agreement, which ultimately may jeopardize their and their children's safety. The addition of this factor will also further overburden the PFA system, making it more difficult for victims. Currently, almost half of PFA petitions are resolved by agreement without admission. In 2019, Pennsylvania courts granted 13,755 final PFA orders. 7,163 of those orders were by agreement without admission. Disincentivizing agreements in the PFA process will slow down the PFA system, leading to more continuances and delays, which in turn leads to more victims becoming demoralized and dropping out of the process.

Expansion of Criminal Conviction Consideration.

The legislation expands the list of crimes that a court must consider in custody determinations to include simple assault. We worry that this expansion is so overbroad that it will often be of little help to the court. In some cases, rather than assisting the court in making a determination it will further harm Black and brown victims of abuse who are often both over-policed and under-protected in the criminal justice system. This provision will penalize victims of abuse who have been convicted of simple assault when defending themselves in abusive relationships, or in contexts that are unrelated to their fitness to safely care for their children. The over-policing and punishment of Black and brown women in the criminal justice system makes it likely that this provision will fall most heavily upon Black and brown women. Additionally, racial and gender biases make it likely that women, and particularly Black and brown women, will be judged much more harshly when they are found to have a simple assault conviction, regardless of the circumstances.

Recommendation.

Women Against Abuse agrees that the courts must do more to stop the harm caused by intimate partner violence and to protect children in custody cases. However, SB 78 continues to include provisions that have the potential to cause enormous damage to the domestic violence victims and children it seeks to protect and so we ask the committee to vote against the current bill. Thank you for your attention to our concerns, and we welcome the opportunity for further conversation and collaboration to protect children and families.