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Fixing Child Custody: Kayden's Law May Go Too Far

Commentary by Frank P. Cervone

The Pennsylvania Senate and many in the family law community have been engaged in a heated debate for months on proposed child custody legislation known as “Kayden’s Law." At stake is how to make the courts more responsive to the needs of children and more sensitive to the traumatic familial experiences that children may suffer.

What’s wrong with custody courts? Plenty. Dockets are overloaded and cases delayed, often by years. Few counties have mechanisms to conduct thorough, neutral custody evaluations, so unless the parties can pay for these expensive studies, the courts are left to the narratives presented by the litigants. With no right to court-appointed counsel, thousands of parents appear pro se. Reforms are needed, but Kayden’s Law will over-correct a system because of a singular, horrible case.

A host of child and parent advocates have expressed concern and even opposition to the proposed reforms. The ACLU-PA’s Elizabeth Randol, observed that "It is a sad truth that parents in custody battles use allegations of child abuse to gain leverage in those battles. Unfortunately, [Senate Bill] 78 risks turning that weapon into an arsenal, making it extremely likely that a poor—or merely not-wealthy—parent accused of child abuse will never see their child again.”

For many, the underlying case demonstrates the maxim that the "bad facts makes bad law.” A year into a bitter custody battle, a 2017 Protection from Abuse order restricted a father’s interactions with the child’s mother. The father was known to have anger issues since childhood, made worse by excessive drinking, self-medicating and violent outbursts. Over several years, before and after the PFA order, the father had substantial and healthy involvement with his daughter and four days of custody with the child on alternating weeks. While family members later shared that the father’s outbursts eventually made the child afraid, there were no allegations of child abuse.

The final custody order in May 2018 reduced the father’s custody time from four days to one overnight on alternating weekends. Tragically, in August 2018, on one of his scheduled visits, he brutally killed his 7-year-old daughter Kayden and then himself. The child’s mother and family have been seeking the reforms embedded in Senate Bill 78 ever since.

The legislative sponsors suggest that the law will make fundamental change to Pennsylvania’s child custody law, by requiring specific restrictions when a court finds a history of abuse or an ongoing risk of abuse. The bill also encourages the courts to implement an annual training program for judges on child abuse and domestic violence, but does not provide funding for the training.

In effect, Kayden’s Law would create an unworkable schema for supervision of custodial visits that will interfere with healthful parent-child interactions. Nonprofessional supervisors are required in certain circumstances. While family members and friends often provide valuable supportive childcare, kin are sometimes ill-equipped or inappropriate to serve as visitation supervisors. The bill will limit a court’s discretion to evaluate supervisory candidates and to make these judgments.

More importantly, the bill mandates professional supervision for a potentially large number of cases, which is unrealistic given the limited availability and high cost of professional supervisors.

Present and ongoing risk to a child is a grave concern, but this remedy misses the mark. Courts and parties will be forced to either ignore the requirement or create visitation barriers that are more harmful than helpful. Courts need discretion to respond to and protect the needs of each child in their care.

Further, a requirement for the court to make a finding of "no-risk” prior to ending mandatory professional supervision is only facially attractive, and will be problematic to administer and virtually impossible to satisfy for many litigants. Once a presumption is “turned on” it is extremely hard to get it “turned off.” To make a clinical judgment that a party no longer poses a risk of abuse, a psychologist or other evaluator must conduct clinical interviews, parent-child observations and psychological testing. How many indigent and working-class litigants will be able to afford that kind of proof? Is it even possible to definitively find no-risk?

Unlike in child welfare and juvenile justice, there are no mechanisms for case management or frequent court review of cases in domestic relations. Restraining courts and burdening litigants with automatic presumptions and mandates will leave many children and families without access to justice.

Current custody law makes the priority of child safety clear, requiring safety conditions if there is ongoing risk of harm. Without any limit on the look-back in time or need for relevance to the custodial care, the proposed change raises due process concerns, allowing restriction regardless of how old or irrelevant the conduct and regardless of who was involved. As observed by the ACLU's Randol, the proposed bill "specifically removes the requirement that a threat be ongoing."

In 2013, the custody statute was amended to require the court to consider whether any party had a history of child abuse findings or involvement with protective services. This revision had precisely the effect intended by Senate Bill 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.

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. It is well known that children-and-youth agency interventions can sometimes be misplaced and even harmful. The gross disproportionality of adults of color who are subject to child abuse investigations and findings, and the numbers of minority children who are removed from their families—facts that 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. As observed by legal services colleagues in a letter to the legislature, "the harm will disproportionately impact Black and brown mothers and children, as well as those living in poverty."

Senate Bill 78 also seeks to tie the hands of courts when it hears that a child is afraid. Current law considers the "the well-reasoned preference of the child" as one of the 16 factors custody courts must address in fashioning their custody orders. Allegations about a child's preferences 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.

Rather than some automatic finding, these considerations are best left to thorough child-specific inquiry conducted by high-quality forensic interviewers, trained custody evaluators, children's legal representatives, and the courts, who are appropriately constrained to record-evidence. Creating an irrebuttable presumption that a child's fear "shall be considered well-reasoned" will short-circuit considered judgment by the court, and may spawn a new layer of contentious litigation.

A caregiver's relevant criminal history has long been an element of best interest decision-making. But Senate Bill 78 adds simple assault to the list of crimes. Tens of thousands of parents and caregivers have some form of simple assault conviction on their criminal record—certainly not behaviors to be encouraged or condoned, but so often irrelevant to the best interest custody determination.

There are very real questions about how custody courts are addressing domestic abuse and sexual violence, how they are keeping children safe, and connecting families with mental health services, for both children and parents, and both victims and perpetrators. There is little reliable research on the performance of courts and the experience of children in high-conflict custody cases. Children often sustain lasting emotional trauma as a consequence of family strife. Senate Bill 78 works an over-correction that is well-intentioned but, without real study, is dangerously misguided and fails to address how to ensure that parents and children actually get the supports they need.

Are there better alternatives? The safety and well-being of children are affected by the attention to and investments made—or not made—in safe visitation/exchange sites, custody evaluation capacities, high- quality forensic interviews, triage of the most challenging high-conflict cases, counseling alternatives for families seeking help, judicial training, and improvements to the child abuse registry and appeals.

Children and families need real help in their lives, not barriers that fail to meet their needs. 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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