HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON FAMILY LAW
PUBLIC HEARING ON SENATE BILL 78
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COURT OF COMMON PLEAS OF CHESTER COUNTY
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Majority Chairwoman Klunk, Democratic Chairwoman Hanbidge, thank you for the opportunity to appear before you this morning to discuss Senate Bill 78. The legislation provides for comprehensive changes to the Child Custody chapter of the Domestic Relations Code. I appreciate the subcommittee's interest in this very important issue. Domestic Violence is a serious issue, and everyone agrees that protecting children is paramount.

Allow me to emphasize that the opinions and thoughts expressed in my statement and in response to any questions do not reflect the views of the Pennsylvania Supreme Court, any Court of Common Pleas or the Administrative Office of Pennsylvania Courts (AOPC). It is also important to note that nothing contained in these remarks should be construed as taking a position on the legislation. The goal is to provide the Subcommittee on Family Law, and by extension the Judiciary Committee, with vital "boots on the ground" feedback as it debates the bill.

The Pennsylvania Conference of State Trial Judges (PCSTJ) promotes the administration of justice throughout the Commonwealth of Pennsylvania by researching and disseminating to its members information of interest to the judiciary. PCSTJ presents and conducts meetings of the members and those interested in law and legal procedures. It also monitors and comments on legislation seeking to impact legal procedures or substantive law of interest and concern to the judiciary. PCSTJ has a number of committees and sections on areas of interest. As a family court judge, I am actively involved in the Family Law Section. PCSTJ also has a Legislative

Committee, of which Judge Foradora is a member, to keep the conference apprised of legislation of interest.

The Family Law Section took an active interest in Senate Bill 78. The section formed an *ad hoc* subcommittee made up of a cross section of judges to examine the bill. The subcommittee discussed many issues, but decided it was prudent to focus on the most critical pieces of the proposed legislation. The findings and recommendations I will discuss here today present the general consensus of not only the subcommittee, but the Family Law Section and the Legislative Committee of the PCSTJ.

Safety Considerations

In the proposed revisions of the safety conditions under an award of custody, the legislature should consider narrowing the scope of the phrase history of abuse by inserting the word "recent." The *ad hoc* subcommittee considered further defining what constitutes a recent history of abuse, but decided that judicial discretion, weighing all of the facts of the case together, was preferable to a bright line legislative definition. Relevance and recency of the abuse will be very case specific.

Rebuttable Presumption

The addition of new subsections governing supervision and professional supervision, and a *rebuttable presumption that the court shall only allow supervised custody upon a finding of abuse of the child, or any household member* presents a very concerning issue in the legislation. Each case is unique, and a presumption for supervised visits is not a wise addition for multiple reasons. First, at least in my experience, supervised visits are in order in only a fraction of cases that have had in the past or currently have an existing order for protection

from abuse (PFA). Many abuse orders are entered by agreement at the initial point of separation, and I believe many of them exist without violation(s) or further problems that rise to the level of whatever behavior created the need for the PFA initially. In other words, once the parties physically separate, there is a de-escalation and subsequent ability, for many families, to move forward with a reasonable custody arrangement. Second, most, and possibly even all, counties in Pennsylvania have a serious shortage of options for supervised custody. I come to you from a fairly large (3rd class) county, and we struggle to locate and assign supervisors. This was universally true for all judges on the committee. The structure is simply not in place for implementation on the scale contemplated by the proposed law. Third, all counties have a significant number of *pro* se, or unrepresented litigants in custody cases for whom the rebuttable presumption will be difficult to understand and navigate.

Removing the requirement in the bill that a finding of any abuse mandates supervised visitation is necessary because abuse can cover a wide range of people, timeframes and degrees. To take away judicial discretion to tailor conditions based on the particular facts in a given case, coupled with the fact that supervision, especially professional supervision, is often unavailable means a child may end up with no contact with a parent. That situation can be worse for a child. For example, a parent who committed a distant act of abuse against the other parent may now be able to have a beneficial relationship with the child without supervision that is in the child's best interest.

Requiring supervision usually tells the child that there is something wrong with the parent. Given the fact that Family Court judges usually face difficult situations, establishing

absolute prohibitions or requirements as opposed to factors that must be considered, unnecessarily ties a judge's hands.

Supervised Custody

Resources present an obstacle to the concept of nonprofessional v. professional supervised physical custody. There is a real shortage of options is most counties when considering supervised custody. Even in larger counties, identifying and employing, let alone paying, professionals to provide supervised custodial time is a challenge.

Even those counties that might be considered well-resourced have limited programs with the ability to provide for supervised physical custody. Such entities, to the extent they exist in the counties, can charge high hourly fees, a cost that would have to be borne by the parent. A real risk is parents not seeing their kids because of an inability to afford supervision.

The legislature is encouraged to consider removing the distinction between professional and nonprofessional supervised custody and keep the definition of nonprofessional supervised custody simply as supervised physical custody. If it takes that route, consideration should be given to adding language requiring an "Affidavit of Accountability" for lay supervisors. Most counties are already employing some form of an affidavit of accountability when there is a lay supervisor, so specific requirements should be left to the counties to implement in concert with current practices.

Custody Factors

Judge Clifford has already spoken of the Joint State Government Commission's Advisory Committee on Domestic Relations Law and the work of the Subcommittee on Custody updating the custody factors. The Family Law Section encourages the legislature to allow the custody

subcommittee to complete its work on the custody factors before amending or adding new factors.

As general caution on the bill's custody factor provisions, however, the Family Law Section believes that the addition of abuse considerations to other existing factors is not necessary and potentially harmful. Abuse is already adequately covered in factor (2). To sprinkle it throughout the other factors makes it burdensome for the litigants and the courts to re-address the same issue in multiple places. Additionally, each of the existing 15 factors and the catchall "any other relevant factors" are all important, and the weighting of the certain factors is very case specific. Adding pieces of the abuse factor throughout numerous other custody factors, as opposed to keeping it contained logically within a single factor, risks diluting the others.

All of this said, the sponsors of the legislation should be commended for the addition of language that no single custody factor by itself is determinative in the awarding of custody and that courts need to examine the totality of the circumstances. While I can say with confidence that this already occurs, codifying it in the custody statute is a helpful addition.

Temporary Housing Instability

The Family Law Section firmly believes that there is no way to completely ignore housing in general, including instability, as a consideration in a custody case. How could we? Where a child will be living is always a critical fact with inherent safety analysis required. We cannot ignore where the child will live and whether the child will be able, for example, to remain in a particular school, etc. Regardless of its cause or duration, it is something the courts must be able to consider looking at the totality of a case. The language specifically prohibiting the

consideration of temporary housing instability due to abuse could have unintended consequences. The Family Law Section encourages the legislature consider removing this language from the bill.

Miscellaneous Observations and Concerns

The Family Law Section expressed significant concerns about the requirements that the court consider criminal background, past PFA orders, and the involvement of children, youth and family services or the Department of Human Services. As currently structured, the language potentially places the duty on the judge and the court. Under our system of justice, however, this should rest squarely on the litigants/counsel to bring specific matters to the court's attention. The Family Law Section concedes that some of this is already in the existing statute, but concerns exist that evidentiary burdens must remain with the parties, not on the courts as the neutral arbitrator.

The legislation allows the AOPC's Judicial Education Department to provide education on child and domestic abuse matters to guardians *ad litem* (GALs), masters and mediators. While this was not an issue that the Family Law Section specifically studied, it is not clear that the department is structured to provide education to entities other than judges. Additionally, and related, the legislation seeks appointment of GALs who have received such training, but funding is a critical component for that to occur on a more regular basis. It is also not clear that these changes will result in a large number of GALs seeking the education and appointment. In many counties, a GALs focus is on dependency, not custody issues.

The bill calls for an annual review of all cases wherein supervision is ordered. The Family Law Section believes that the court system should not be bringing cases back for review in the absence of a party requesting to be heard.

In conclusion, and perhaps most importantly, the legislation overemphasizes PFA orders in all cases and may result in their elevation to trophy status in custody litigation. PFA misuse is already a problem that every family court judge encounters on a regular basis. This could have the unintended consequence of leading to increased PFA litigation and decreased cooperation and settlements in protection matters that have companion custody actions. Protection orders entered by agreement often signal the beginning of families turning a new page toward consensus post-separation. We fear that this legislation will materially alter that dynamic to the detriment of many children and may risk turning every contentious custody proceeding into a PFA proceeding.

Thank you for the opportunity to appear before the subcommittee this morning. I look forward to answering any questions you might have.