



## PHILADELPHIA BAR ASSOCIATION

**TESTIMONY OF SUSAN PEARLSTEIN, ESQ.  
SENIOR ATTORNEY, FAMILY LAW UNIT, PHILADELPHIA LEGAL ASSISTANCE  
ON BEHALF OF THE PHILADELPHIA BAR ASSOCIATION**

Before the House Judiciary Subcommittee on Family Law  
Public Hearing on SB 78 Preventing Abuse in Child Custody Proceedings - Kayden's Law  
November 15, 2021

Good morning Representative Kauffman and Members of the House Judiciary Subcommittee on Family Law, and other distinguished guests. My name is Susan Pearlstein and I thank you for inviting me to testify this morning on behalf of the Philadelphia Bar Association. I hope that my testimony will assist the Subcommittee on understanding the Philadelphia Bar Association's opposition to SB 78, also known as Kayden's Law.

I am here today in my capacity as the incoming Chair of the Family Law Section of the Philadelphia Bar Association. I am also a Senior Attorney in the Family Law Unit at Philadelphia Legal Assistance, which I will refer to as PLA. PLA is a private, non-profit agency, which receives federal and other funding to provide civil legal services to the low-income residents of Philadelphia. I have been practicing family law at PLA for 23 years, specializing in representing survivors of domestic violence in all domestic relations areas, including child custody, support, divorce, and protection from abuse. PLA's Family Law Unit also provides legal services to approximately 2,000 low income individuals each year, of whom approximately 80% are minority women. In the area of Family Law, we focus our attorney representation on victims of family violence. PLA's Family Law Unit houses the largest public interest practice in Philadelphia providing holistic domestic relations representation to victims of domestic violence.

The Philadelphia Bar Association and I acknowledge the terrible tragedy resulting in the untimely death of Kayden Mancuso at the hands of her father. We extend our most sincere sympathies to Kayden's mother and surviving family. The senseless loss of a young child is horrific and of course we all would like to prevent such a tragedy from ever being repeated in the Commonwealth. We recognize Kayden's family's powerful advocacy to amend Pennsylvania's custody law to strengthen protection of children, parents and families, and commend Senator Santarsiero for his many efforts in crafting this bill and in working with myself and other advocates for survivors of domestic violence over the past several years.

We recognize it may appear counterintuitive for advocates for family safety to oppose a bill with the intent of protecting children from family violence. However, we continue to firmly believe this bill will have serious negative unintended consequences for survivors of family violence and their children, particularly those who are the most vulnerable to systemic racism and

biases within the court systems which we travel in, including the domestic relations, dependency, and the criminal justice system.

We believe the present law provides safeguards for children in custody proceedings. It requires the court to determine the child's best interest by applying the 16 custody factors codified by statute and to address and give weight to factors which affect the safety of the child. While well-intentioned, Kayden's Law would undermine the broad and comprehensive scope of judicial decision-making by injecting presumptions that would work *against* individualized decision-making for children. We believe this approach will undermine the well-being of children and put them and their families at risk for unjust and traumatizing outcomes.

The provision that poses the most risk to survivors is the rebuttable presumption for supervised physical custody. If a party abused a child or a household member, that person must have supervised physical custody. If the court finds there is an ongoing risk of harm to a child, the party must have professional supervised physical custody.

Presumptions in child custody matters are problematic. Therefore, the Family Law Section of the Philadelphia Bar Association has consistently been opposed to the same. This is an issue of concern to the entire legal community. In March of this year, the Philadelphia Bar Association's Board of Governors, which represents all 12,000 members of the Association, unanimously passed the attached resolution opposing SB 78.

We fear presumptions about parenting often become a "rubber stamp", do not allow for consideration of the many individual nuances in custody matters, and will often result in orders that do not serve the best interest of the child. The inherent uniqueness of each family's situation, and what is best for each individual, demand that custody determinations must be individually assessed on a case-by-case basis.

There is no time period for the presumption to apply. Thus, if a party is found to have abused a child or a household member, no matter how long ago, that party must only be awarded supervised physical custody. This provision will prevent many parents from having access to their children, with a difficult uphill battle to prove they no longer pose a risk of abuse to the child or any household member, AND that unsupervised is in the best interest of the child AND will not jeopardize the health and safety of the child.

It is also important to recognize that our law defines "abuse" broadly, and the presumption divesting a caregiver of custody when they are identified as having committed abuse could have devastating consequences for survivors of domestic violence and their children. In Pennsylvania, "abuse" is defined to include child abuse under the Child Protective Service Law. Black and brown mothers, who are involved with child protective services at a higher rate than their white, wealthier cohorts, are more likely to be negatively affected in custody court by involvement with child protective agencies.<sup>1</sup> An indicated report could result from investigatory findings related to

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<sup>1</sup> American Journal of Public Health, Lifetime Prevalence of Investigating Child Maltreatment Among US Children,

poverty, gender bias, bias against mothers, or systemic racism, false and manipulative allegations by abusers that a protective parent is abusive or neglectful, or behavior that is directly the result of being physically, emotionally and verbally abused, such as symptoms of Post-Traumatic Stress Disorder. Even with the language that an indicated report of abuse shall not trigger the presumption for supervised physical custody or professional supervised physical custody without a de novo review of the indicated report, there may be a very large negative impact on parents who are survivors of domestic violence.

While we acknowledge that the presumption contained in Kayden's law is rebuttable, we must also recognize the challenges that parents seeking to rebut the presumption will face. Many litigants in custody cases are self-represented. In Philadelphia County, approximately 85-90 percent of custody litigants must represent themselves. This includes victims of family violence, and parents and caregivers of children who have been physically and/or sexually abused by a party. Organizations like PLA try to provide representation in cases in which a parent, caregiver or child has suffered physical or sexual abuse, but we do not have the resources to provide representation to all who meet those conditions, and neither do our fellow public interest organizations and law school clinics. This leaves many survivors extremely vulnerable to a presumption that would divest them of meaningful contact with their child.

Rebutting such a presumption may be very difficult for any litigant, but particularly for self-represented litigants who are survivors of domestic violence. As I mentioned, many survivors suffer from Post-traumatic Stress Disorder, anxiety and other physical or mental conditions. These conditions may impair a survivor's ability tell their story in a linear narrative, let alone prove by a legal standard they likely do not fully understand, that they are no longer a threat of harm to their child.

We must also remember the trauma to children when they are removed from a parent or caregiver's custody. There are life-long consequences to a child's emotional and mental health when they are separated from their primary caregiver. Thus, the presumption in this Bill could have the consequence of separating a parent from their child for a significant period of time. There are often delays in scheduling custody matters, with litigants sometimes waiting many months before a hearing may be held.

Additionally, the presumption demands professional supervision if the court finds by a preponderance of the evidence that there is an ongoing risk of abuse of the child. For many parents in Pennsylvania, this will mean there is no feasible way for that parent to see their child. There are few professional supervision and exchange centers in Pennsylvania, none in Philadelphia. Unless the bill includes funding for safe visitation and exchange sites, which are sorely needed in many communities across the Commonwealth, many parents will be financially unable to secure professional supervised visitation. This will mean that many children in the Commonwealth will lose all opportunity for contact with their parent.

One other important provision in SB78 about which we are concerned is the addition of

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<https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2016.303545>; Community Legal Services, Reform the Child Abuse Registry in Pennsylvania, <https://clsphila.org/wp-content/uploads/2020/11/Reform-the-Child-Abuse-Registry-update-3.pdf>



factor (2.4) to the factors a court must consider when determining custody. This factor requires the consideration of the existence of a protection from abuse order entered by agreement of the parties, without admission of evidence or finding of abuse, if the court finds that abuse occurred. In 2019, 19% of protection from abuse matters in the Commonwealth were resolved by agreement of the parties. The custody statute as it stands requires the court to consider a parties' history of abuse. The addition of this factor will take the option away from a survivor of domestic violence of whether or not to litigate the facts of the prior abuse. We fear this provision will impede defendants in protection from abuse matters from ever agreeing to a final order, as they know they will have to litigate the allegations of abuse in a later custody matter. A final order entered by agreement without admission is often the best option for both parties. It also may prevent a plaintiff from being retraumatized by testifying at a hearing or having findings made against them. This provision does not add any protection to survivors or their families, as the custody statute as it stands must consider allegations of abuse raised by a party. Again, we believe the unintended negative consequences strongly outweigh any possible protections to children.

In conclusion, despite our recognition of the noble and important intentions of SB78, for the reasons I have stated here today, the Philadelphia Bar Association opposes this bill. Thank you for the opportunity to share the Philadelphia Bar Association's position with regard to SB 78.

Respectfully Submitted,

Susan Pearlstein, Esq.  
2022 Chair, Family Law Section  
On behalf of the Philadelphia Bar Association

**PHILADELPHIA BAR ASSOCIATION  
RESOLUTION OPPOSING SENATE BILL 78, PRINTER'S NO. 65  
KNOWN AS 'KAYDEN'S LAW'**

**WHEREAS**, the Family Law Section of the Philadelphia Bar Association has consistently been opposed to presumptions in custody cases and takes the position that presumptions about parenting often become a "rubber stamp" and do not serve the best interest of the child, and should be individually assessed on a case-by-case basis; and

**WHEREAS**, the present law provides safeguards for children in custody proceedings and requires the court to determine the child's best interest by applying the 16 custody factors codified by statute and to address and give weight to factors which affect the safety of the child; and

**WHEREAS**, the Philadelphia Bar Association acknowledges the terrible tragedy resulting in the untimely death of Kayden Mancuso at the hands of her father and extends its sympathies to Kayden's mother and surviving family; and

**WHEREAS**, Senate Bill 78, Printer's No. 65 ("SB 78"), introduced in the current session of the Pennsylvania General Assembly and known as "Kayden's Law," while intended to protect children and prevent tragedies such as the death of Kayden Mancuso, adds rigid requirements to the law that ultimately may harm the children and parents the law intends to protect; and

**WHEREAS**, the Philadelphia Bar Association remains confident that the present law provides the Courts with discretion to enter orders providing for the same remedies and protections proposed in SB 78; and

**WHEREAS**, demographic statistics prove that persons of Black and Hispanic racial backgrounds are disproportionately policed regarding their parenting and disproportionately negatively affected in custody court by involvement with child protective agencies;<sup>1</sup> and

**WHEREAS**, low income mothers of color are the caretakers most likely to be indicated for child abuse under Pennsylvania's child abuse law, which is broadly defined, and an indicated report could result from investigatory findings related to poverty, gender bias, bias against mothers, or systemic racism, false and manipulative allegations by abusers that a protective parent is abusive or neglectful, or behavior that is directly the result of being physically, emotionally and verbally abused, such as symptoms of Post-Traumatic Stress Disorder; and

**WHEREAS**, the current proposed language of SB 78, through the use of the term "shall," mandates that the court include restrictions in any case where there has been any past abuse, whether or not there is any risk of continuing harm to the child, thereby mandating restrictions

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<sup>1</sup> American Journal of Public Health, Lifetime Prevalence of Investigating Child Maltreatment Among US Children, <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2016.303545>; Community Legal Services, Reform the Child Abuse Registry in Pennsylvania, <https://clsphila.org/wp-content/uploads/2020/11/Reform-the-Child-Abuse-Registry-update-3.pdf>

which may not be in the child's best interest as well as creating additional litigation and causing prolonged uncertainty for the children involved; and

**WHEREAS**, children of this Commonwealth may be greatly harmed if they are removed from their primary caretaker and only able to see them in a supervised capacity as a result of a "rubber stamp" presumption requiring such an outcome; and

**WHEREAS**, in most parts of the Commonwealth including the City of Philadelphia, the majority of low-income parents do not have the ability to retain counsel and, thus, they are at an even greater disadvantage in attempting to defend against or rebut a presumption of supervised physical custody following allegations of abuse; and

**WHEREAS**, when presumptions demand professional supervision, an indigent parent will likely have no feasible way to see their child or children as there are few professional supervision and exchange centers in Pennsylvania, and the proposed bill provides no funding to create or secure any new sites; and

**WHEREAS**, SB 78, as written, expands the list of crimes that courts must consider in custody determinations to include simple assault, which may inadvertently harm parents who were convicted of such crimes in the context of defending themselves in abusive relationships or in contexts that are unrelated to their fitness to safely care for their children, such as the over-policing of Black and Brown people, especially Black and Brown women in the criminal justice system; and

**WHEREAS**, SB 78 proposes expanded counsel fees and costs be assessed against the alleged abuser and may create a financial burden on that parent which will chill the ability of any parent with an undeserved finding of abuse to have any ongoing contact with the child at issue;

**NOW, THEREFORE, BE IT RESOLVED**, that the Philadelphia Bar Association opposes SB 78, in its current form and any similar legislation.

**AND BE IT FURTHER RESOLVED**, that in the interest of justice and fairness to all parties involved in custody disputes, if the General Assembly wishes to enact SB 78, that SB 78 be amended in the following manner:

1. Delete the presumptions contained in Sections 5323(e.1) and (e.2).
2. Amend Section 5323(e) by revising the language to create a more discretionary standard for the court where warranted, by replacing the term "shall" with "may" and adding "or" between each of the listed safety conditions, i.e. "the court **may** include in the custody order safety conditions, restrictions or safeguards as necessary to protect the child or the abused party, including. . .or. . ."
3. Amend Section 5328(a.1) by replacing it with clearer language: "A factor shall not be weighed against a party if the circumstances related to the factor were in response to abuse and/or necessary to protect the child or abused party from harm."

4. Amend Section 5329(a) relating to consideration of criminal conviction, by removing “simple assault” from the list of crimes to be considered.
5. Amend Section 5339(b) by deleting the entire section relating to costs and attorney fees.
6. In the event that the presumptions remain, we propose two alternative amendments to Sections 5323(e.1) and (e.2) which will reduce the impact of systemic racism, sexism, and poverty on parents involved in protective services:
  - a. State that the “court shall consider ordering non-professional supervised physical custody” rather than “the court shall be presumed to only allow non-professional/professional supervised physical custody” in Section 5323(e.1) and (e.2).
  - b. Add language clarifying that “A court shall not find abuse by a preponderance of evidence based solely on an indicated Child Protective Services Law (CPSL) report, the fact of a CPSL investigation, or the acceptance of services from a children and youth agency.”

**AND BE IT FURTHER RESOLVED**, that the Philadelphia Bar Association authorizes the Chancellor and/or the Chancellor’s designee(s) to communicate the Philadelphia Bar Association’s position on Senate Bill No. 78, Printer’s No. 65 and similar legislation to the General Assembly, the Governor, the legal profession, the media, and the public and take whatever additional action is necessary to effectuate this resolution.

**PHILADELPHIA BAR ASSOCIATION  
BOARD OF GOVERNORS  
Adopted: March 25, 2021**