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## Pennsylvania Custody Legislation: Two Bills, Two Extremes

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*Special to the Legal*

It goes without saying that our world has gotten more and more polarized. You name the topic and there are two clearly divided sides; sides that are so diametrically opposed that you wonder how the concepts ever evolved from any sort of common ground, let alone coming to a reasonably compromised resolution of those differences.

This has even spilled over into the arena of Pennsylvania child custody legislation. Right now there are two bills pending in the state legislature that demonstrate just such a bi-polarity. Introduced May 6, HB 1397 seeks to amend the custody provisions of Title 23, such that a 50/50 custody schedule is a rebuttable presumption. On the other end of the spectrum, SB 868, which was introduced Sept. 30, focuses on the issues of domestic violence and its potential effect on children in child custody situations.

Like most ideas at either end of a philosophical spectrum, both

bills are based on good intentions but, to paraphrase Samuel Johnson, “The way to hell is paved with good intentions.”

HB 1397 was introduced by Rep. Susan C. Helm, a Republican representing parts of Dauphin and Lebanon counties. Generally when a state legislator seeks to introduce a piece of legislation, she circulates a co-sponsorship memorandum. Helm’s memorandum lists the certainly meritorious goals of her bill. According to that memo, HB 1397 seeks to bring gender equality to custody determinations and protect the right of children to have both loving and fit parents meaningfully involved in their lives following a separation or divorce.

The 50/50 custody presumption is not a new idea and the proponents and opposition to that idea have each aired the pros, cons and their reasons for their respective positions, since the idea of a 50/50 presumption was considered as part of the 2011 amendments to Pennsylvania’s custody laws. I wrote an article on HB 1397, the pending 50/50 legislation, for the **July**



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**2019 Family Law Supplement to the Legal Intelligencer**, and refer the reader to that article for a more thorough examination of the implications of adopting such a piece of legislation.

To summarize the advocates’ position, a 50/50 custody presumption is certainly simple and reduces custody litigation. It aims to ensure that both parents are involved in the children’s lives. The reasoning continues that involved parents pay child support and parents that are both involved in their children’s lives have not been or will not become alienated from that child.

This parental alienation component is a key element of

the whole 50/50 custody concept. Primarily, the advocates for such a presumption tend to be fathers' rights groups who see the legal framework surrounding child custody to be female-centric, both in terms of legislation and in terms of the courts. Their solution is to significantly reduce the discretion given the courts in custody cases and install a presumption rebuttable only by clear and convincing evidence.

A not-so-subtle undercurrent to all of this is the concept of domestic violence. A review of the legislative history surrounding the 2011 amendments to the custody laws shows that when representatives of the consortium of father's rights groups presented testimony, one of their concerns was the emphasis on the perceived over-consideration of domestic violence in custody determinations and potential misuse of the Protection from Abuse Act.

Contrast all this with SB 868, the bill that focuses more attention in custody determinations on the issue of domestic violence. SB 868 is known colloquially as "Kayden's Law" and has received a significant amount of publicity around the Philadelphia area because of the tragic facts that gave rise to its introduction. Kayden Mancuso was a 7-year-old girl living primarily with her mother in Bucks County. Through a Bucks County custody order, Kayden's father had partial physical custody at his

residence in Philadelphia. In the summer of 2018, Kayden's father, for whatever reason, took both Kayden's life and his own. SB 868 was introduced by Sen. Steven J. Santarsiero, a Democrat representing the part of Bucks County where Kayden resided. The bill is intended as a response to every family court judge's and practitioner's worst nightmare.

Looking at SB 868 in more detail, it creates a new definition of "abuse" specific to child custody cases that goes beyond the definition in 23 Pa. C.S.A. Section 6102. More significantly, it creates a system of court-appointed professionals to supervise certain custody arrangements. Those supervised custody situations center around parents found to have committed abuse. The only way a parent can cleanse him or herself of the label of abuser is to show "by clear and convincing evidence that the parent is no longer a threat to the health and safety of the child after completion of a court-approved treatment plan." "Any cost incurred for supervised physical custody shall be paid by the abusing parent."

A further issue is that the threshold for determining whether or not a parent is considered an "abuser" is not limited to acts of abuse against the child. Those prior acts can be directed against the other party, another child in the parties' household, any other party who currently or formerly resided in the parties'

household, or any other individual, and include not only acts of violence, but acts that may have placed the child at substantial risk of severe emotional distress. No definition of severe emotional distress is given.

Pushing an example to its limits, if a parent did something to a third party and it caused the parent's child severe emotional distress, that parent is subject to a supervised physical custody schedule that he must pay for, and a court-mandated treatment plan, again that he must pay for, or else face having no relationship with his child. Add in the variable of economic distress and you have a formula for a child knowing only one parent.

Another significant concern about SB 868 is the proposed revisions to custody factor 23 Pa.C.S.A. Section 5328(a)(8), concerning one parent's attempts to turn a child against the other parent. The proposed revision limits a court's consideration to any such attempts only if they can be proven by "competent and admissible evidence." Additionally, if those efforts to turn the child against one parent are based on a parent's reasonable concerns for a child's safety and welfare and are part of the parent's reasonable efforts to "educate, support and protect the child," those efforts "shall not be considered attempts to turn the child against the other parent." Additionally those efforts are not limited to child abuse, but also include domestic violence.

For lack of a better description, that sounds like a license to alienate a child against the other parent if the parent has “reasonable” concern for the child’s safety. In other words, if one parent is found to have injured a child while that child was an infant, the other parent is free to remind or “educate” the child about that incident essentially forever. The same is true for incidents of domestic violence. If one parent is found to have committed an act of abuse against the other, the parent-victim is permitted to bring that up to the child conceivably forever. As I state above, it sounds to me like a license to alienate a child.

As noted above, both of the two bills are based on good intentions. One of the stated purposes of HB 1397 is to protect the right of children to continue to have both loving and fit parents meaningfully involved in their lives following a separation or divorce. The stated purpose of SB 868 is to establish a procedure for handling custody proceedings that ensures the protection of our children. Another positive of SB 868 is the establishment of a training program for judges and court personnel administered by the Administrative Office of Pennsylvania Courts. This education and training program shall be designed to improve the ability of courts to recognize and respond to the impact of child abuse, domestic violence and trauma on all victims, specifically

children, and make appropriate custody decisions that are in the best interest of the child. Helping judges and custody conciliators figure out which situations need supervised visitation and which need exchanges at the local police station is certainly a positive change.

Other similarities between the two bills, however, are potentially not as positive. Both bills move the focus of Pennsylvania child custody determinations away from the best interest of the child and more toward the two parents. Also, both bills would ultimately take a bit of discretion away from the trial judge in a custody case. Most significantly, both bills arise out of advocacy efforts by groups on either side of the child custody legislative divide. On the one side are father’s rights groups and on the other side are anti-domestic violence groups.

More significant than the similarities are the differences between the two bills. While one bill seeks to bring domestic violence to the forefront in child custody determinations, the other dilutes the various child custody factors in 23 Pa.C.S.A. Section 5328, including domestic violence, in making 50/50 custody a presumption. Additionally, on the issue of parental alienation, HB 1397’s solution to the problem is to essentially force a 50/50 arrangement on everyone; SB 868’s response is much more radical, essentially giving one parent the right to

alienate the other in the eyes of their child.

Which one is right and which one is wrong? While there are positive aspects of both bills, both bills represent extreme positions and neither one is an overall change for the better. In terms of movement in the state legislature, hearings appear to be on the horizon relative to HB 1397; no action is imminent on SB 868. Feel strongly about one bill or the other? Contact your state representative or state senator and make your views known.

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