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COMMENTARY

Kayden's Law—A New Emphasis on 'The History of Abuse'

Kayden’s Law represents needed but nonetheless sweeping changes to the way that courts and judges examine the huge responsibility of awarding child custody to parties when the risk of harm to a child is or could be at issue.

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Family Law

By John A. Zurzola | April 16, 2024 at 12:02 PM



Chances are that by the time you read this article, Kayden’s Law will have been signed by Gov. Josh Shapiro and we will be within the 120-day period for when it is scheduled take effect. The latest version of the series of bills that will be Kayden’s Law was passed by the Pennsylvania Senate a few months ago and was just recently passed by the Pennsylvania House—unchanged.

Anyone that has followed the history of the different iterations of this set of amendments to the Child Custody Law, and of the unspeakable 2018 tragedy that caused the legislature to re-examine the custody statutes with an emphasis on the safety of children, knows that the suggested changes and additions to existing statutes have been the subject of exhaustive lobbying by groups focused on child safety and the Pennsylvania Bar Association who weighed in heavily on the everyday implications of the suggested amendments. Now that we have the final version of the bill that will be signed and will become law, we can look with certainty at a few of the sections that stand out and represent changes to the laws that may substantially affect the courts’ work, whether a case presents child safety concerns or not.

The biggest change to existing law that will be used in the new court procedures and services that Kayden’s Law mandates is that the new language elevates facts that may allege “a history of abuse” to the same level with the question of whether “there is an ongoing risk of harm to the child.” The law amends current 23 Pa.C.S. Section 5323, which mandates the findings that courts must make before making any award of child custody, by replacing the words “if the court finds that there is an ongoing risk of harm to the child” with “if the court finds a history of abuse of the child.” While the law retains language allowing courts to focus on the key inquiry of whether there is a “risk of harm to the child,” the emphasis first on the undefined scenario of a “history of abuse of the child” might act to force courts to perform an exhaustive analysis that formerly focused on whether is this child in danger now, with a rehashing of allegations that may have already been dealt with—normally frowned upon by judges who want to get to the essence of how they may immediately help the parties and the child.

Against this backdrop it would seem that the mere existence of a years’ or decade-old protection from abuse matter (PFA), or even a withdrawn PFA, should trigger a court to have to go through a mandatory analysis of whether the safeguards and services required by Kaden’s Law apply—and if not, the law mandates that the particular court’s findings must be written in the custody order. On its face, this is a good thing, allowing the parties and the record to include reasons why a particular judge believes, or not, that the facts of any one particular case represent a “history of abuse” of a child. However, one wonders whether even in an everyday child custody dispute concerning pick-up and

drop-off times or changes to custody days of the week, Kayden's Law will force a court to examine whether there is a "history of abuse" should a party bring-up an old PFA or allegation of abuse already litigated from the past, this time for not so genuine reasons.

Anyone that has been involved in representing parents and others who are parties to a child custody case in court knows that the tendency of a litigant to bring up every past event and piece of "dirty laundry" in open court is the norm rather than the exception. Indeed, I recall one advocate in a case I was involved in characterizing the mentioning of an ancient PFA as "the gift that keeps on giving" in terms of child custody testimony. This is obviously a callous and cynical statement to be sure, but it is not a stretch to imagine that Kayden's Law as written makes the mere mention of "abuse" in any context before a judge, tantamount to saying "I smell gas" when on the phone with PGW and treated as an emergency whether it is or is not. What facts constitute "a history of abuse" that the law now puts on equal footing with the previous focus on "ongoing risk of harm to the child"? Furthermore, what judge in a new custody matter is likely to put in writing their opinion of the discounted value of the existence of an old PFA or "not relevant" previous set of facts that one side feels constitutes abuse.

The next aspect of the new law that could result in major changes to how the court does business and allows litigants to set their own boundaries by agreement with respect to ensuring the safety of a child can be seen in situations when the court finds that supervised physical custody of a child is warranted. Frequently, courts order supervised physical custody performed by agencies with credentialed staff that keep records and write reports that can be accessed by the parties and the courts and offer a real-time picture of a particular party's relationship with the child, their parenting skills, and the necessity of having supervised physical custody at all.

However, and just as frequently, parties to a custody case are content with choosing a trusted family member or friend to "be there" when the child visits with the party who may not have the child unsupervised. It is often an immediate and agreed-upon remedy that parties are happy to live with, especially when both parties' motivations are genuine—one party feels more comfortable with a family member supervising, and the other party does not want to delay their ability to see their child. Kayden's Law arguably makes this a little more difficult.

First, the new law may be read so as to almost establish a presumption of an award of supervised physical custody "if the court finds that past abuse was committed by a party," whether any abuse is likely to continue or not. The law dictates that the court must detail their reasons in writing why they did not order supervised custody and also seems to prevent supervised custody awards from sunseting or phasing out without the need to go back to court, another often-ordered arrangement that parties agree upon. Next, the law reads that a court may not allow parties to agree to a "nonprofessional" family member or friend to supervise a custody visit unless that person "has appeared in person before the court and executes an 'affidavit of accountability' and the court makes a finding, on the record, that the individual is capable of promoting the safety of the child." No one currently knows what this "affidavit of accountability" might entail but it is almost certain to result in discouraging family members and friends from getting involved with child custody cases and will likely result in an expansion of the imposition of costly professional supervision services for cases that might implicate abuse.

Needless to say, Kayden's Law represents needed but nonetheless sweeping changes to the way that courts and judges examine the huge responsibility of awarding child custody to parties when the risk of harm to a child is or could be at issue. Notwithstanding, it remains to be seen if the expanded inquiries and controls that the law establishes act to interfere with the effective management of the courts and do, in fact, promote the safety of children for whom the law was written.

John A. Zurzola is a partner at Weber Gallagher Simpson Stapleton Fires & Newby in the firm's family law group located in King of Prussia. He concentrates his practice on family law matters to include complex divorce and child custody cases as well as in assisting clients who require prenuptial and post-nuptial agreements. He can be reached at jzurzola@wglaw.com.