MEMORANDUM

Date: June 21, 2021

To: Members, Pennsylvania General Assembly

From: Frank P. Cervone, Executive Director, Support Center for Child Advocates
Kathleen Creamer, Managing Attorney, Family Advocacy Unit Community Legal Services
Terry Fromson, Managing Attorney, Women's Law Project
Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

RE: Senate Bill 78 (PN 65) – Kayden's Law

FRIENDS – We have only today learned that Senate Bill 78 may be moving in the PA Senate this week, and so we wanted to respond to recent points made by the bill's sponsors. We continue to urge that the legislation will work to the detriment of the well-being of children involved in custody disputes. **I expect there will be other voices joining in opposition, but because there is some urgency to legislative deliberations we are providing this memorandum now.**

Primarily, we again urge restraint and caution. Meaningful custody law reform that helps and does not hurt is best done in a deliberative process that balances competing needs and considerations. Interposing the discretion of legislators into complex child custody proceedings, and ignoring the insights and experiences of family court practitioners and judges, remains as problematic today as it did when this initiative was started by a tragic event and a passionate campaign.

The course of this drafting process has been frustrating and disappointing. We have made repeated outreach to the lead sponsors throughout this legislative term, without response. None of the interested advocacy organizations even saw Amendment A00994 until after noon today! While we previously met extensively more than one year ago, there was no movement on the substantial problems we have raised, and instead persistent intransigence on key problems. To now accuse us of "moving the goalposts" when we have been refused in engagement about our persistent opposition to the bill language feels profoundly disingenuous.

Other points:

Presumptions: The sponsors note that a prior CPS finding was always a required consideration, which is true, but the use of CPS abuse findings to presumptively divest a parent of custody is brand new and will have broad and unprecedented consequences. We do and have acknowledged that the presumption is rebuttable, contrary to his representation, but have also called attention repeatedly to the practical reality that many working class litigants will not be able to afford the extensive and costly litigation that will be needed to rebut the presumption, and that unrepresented pro se litigants lack the knowledge or skill to rebut legal presumptions.

Supervised Visitation: The continued reliance on professionally supervised visitation completely ignores concerns about the limited availability of supervised visitation –whether site-based or delivered by individual professionals – throughout the Commonwealth. Contrary to its sponsors' statements, the draft bill explicitly requires "… the court shall be presumed to only allow professional supervised physical custody." It is impossible to address the harm of the presumption for supervised contact without confronting this reality, and the attendant reality that this will lead to complete suspension of contact for so many families.

Consent PFAs: The sponsors mistakenly suggest that this problem has been fixed. We tried to make clear in our advocates' letter of April 27, 2021 to the entire General Assembly the problems with adding a new custody "factor" for consideration of prior PFA orders entered "on consent of the parties" without finding or admission of abuse §5328.a.2.4. Despite the reported language to distinguish cases that have and do not have a "finding of abuse", this factor would require the court to consider the underlying facts of most PFA orders entered by agreement. To suggest that the burden will be minimal is uninformed by the real number of these cases. As we have previously demonstrated, the language applies to any agreed-upon protection orders regardless of when they were agreed to or if they are still in effect – a huge number of cases. Court data indicates that 19% of the approximately 38,000 PFA cases processed in PA in 2019 were final orders by agreement without admission. Over half of all PFA petitions that end in a final order are resolved by agreement. In 2019, of the 13,755 final orders issued across the Commonwealth, 7,163 were by agreement without admission and 6,592 were after a hearing.

Most importantly, the provision takes the decision of whether or not to raise these facts away from the abused party. This provision will chill current practice of many protection from abuse orders being entered by agreement of the parties, creating a large disincentive to resolve cases "by agreement" which is an important tool for victim safety and the resolution of potentially costly (in both litigation cost and emotional turmoil) high-conflict family law disputes. Agreements are often more individualized than an order granted by a judge, thus offering a victim more flexibility and safety. We are concerned if the defendant knows they must re-litigate the underlying facts of the case at a future custody proceeding, there will be much less incentive for an agreement. As the custody statute stands now, a party who has been subjected to domestic violence may choose to testify regarding a protection from abuse order which was previously entered by agreement of the parties. We firmly believe this decision should remain with the victim.

The suggestion that this element will not burden the courts or litigants is just plain wrong, and likewise is hardly benign or good for children.

Expansion of Criminal Conviction Consideration. We continue to oppose the inclusion of the misdemeanor crime of simple assault among the expanded list of crimes that a court must consider in custody determinations. To suggest that including thousands of cases to the body of relevant evidence will have no effect on already-crowded court dockets and high-conflict court cases, belies the reality of domestic relations practice. More importantly the change could inadvertently restrict parents, and mostly victims, who have received such a conviction in the context of defending themselves in abusive relationships or in contexts that are unrelated to their fitness to safely care for their children. We know that the criminal justice system disproportionately involves and even targets Black and brown people, and this change will exacerbate the effects of that bias, separating children from their parents indefinitely.

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