

Changing Child Custody Law

The best interests of children demand our best efforts - FAMILY LAW

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Judges, legislators, lawyers, mental health professionals, parents and grandparents would likely be unanimous in saying that they want to promote the best interests of Pennsylvania's children when children are caught in the middle of child custody disputes. But once we get beyond that vague shared goal, we would find distinct differences in how people substantively define children's best interests and in the procedures people would propose to help determine those best interests.

Two bills House Bill 463 and House Bill 1639, both from the 2009 session are pending before our state Legislature that represent the latest efforts to define the best interests of children and to dictate some of the procedures that the Pennsylvania courts should follow in determining those best interests. A third bill, House Bill No. 418, also from the 2009 session, deals with a more limited set of family law related issues.

If HB 1639 were to become law, it would be a complete overhaul of Pennsylvania's child custody law the first in nearly 25 years. It is probably time for such an overhaul, but given that promoting children's best interests is a priority for virtually everyone, shouldn't we all judges, legislators, lawyers, law professors, mental health professionals, parents and grandparents come together to put forth our best efforts at improving child custody law?

Our legislators are to be commended for turning attention to Pennsylvania's child custody law, putting forth new bills and seeking public comment. The house Subcommittee on Family Law has scheduled a public hearing Thursday, at which the three bills will be discussed along with other ways to improve the handling of child custody disputes in Pennsylvania. Substantial discussion is warranted, and, in fact, that discussion is the horse that needs to be put back in front of the cart represented by these bills.

HB 1639 has the greatest scope of the three bills. This bill, which appears to be a reworking (with some additions) of Senate Bill 74 from the 2005 session, repeals Sections 4346 and 5301 through 5315 of Title 23 of the Pennsylvania Consolidated Statutes. The sections that will replace those sections, new sections 5321 through 5340, change everything in the current law. The changes range from the global and aspirational changing the statement of the policy of the commonwealth on custody disputes to the specific and concrete mandating the details of parenting plans that will now be submitted to the courts.

The need for changes is apparent to many of those who have become embroiled in child custody cases, whether personally or professionally, and HB 1639 attempts to address some of the areas of concern. For example, the definitions in Pennsylvania's current child custody statutes have been inadequate, and practitioners have found themselves using terms that are not defined in the statute "joint" custody or, worse, using terms in a manner inconsistent with their definitions using "shared" custody to mean "equally shared" physical custody. The definitions used are important not only because better definitions aid in the precision with which orders using them can be interpreted, but, as commentators have noted, also because of the psychological impact those definitions can have on the parties. When parents "share" physical custody, even if they don't equally share physical custody, they may feel differently and deal with one another differently than if one parent has primary physical custody and the other has partial physical custody. HB 1639 seems to allow for shared physical custody that is not necessarily equally shared physical custody while formally adopting and defining the terms "primary physical custody" and "partial physical custody." It does away with the more antiquated term "visitation," that was often used improperly by parents and practitioners.

HB 1639 also addresses the absence of specific statutory authority that left aggrieved parties unable to recoup fees and costs incurred in forcing a custody litigant to comply with court orders.

HB 1639 provides the authority for the award of counsel fees and costs not only in cases of contempt, but also in other cases where a party's conduct is "obdurate, vexatious, repetitive or in bad faith."

"Repetitive" conduct is a serious concern since Pennsylvania liberally allows custody modification actions to be filed and it has resulted in some litigants continually filing custody modification actions (five or more) that turn their children's childhoods into one continuous child custody trial.

HB 1639 also addresses the problem created because courts have not been willing to make custody decisions as long as the disputing parties were living in the same residence. A parent could not leave the house because there was no custody order allowing that parent to have contact with the children, but the parent could not get a custody order because the parent was still in the house. Under the new bill, when the litigants are living in the same house, the court is specifically authorized to enter orders that will only become effective upon the parties' physical separation.

HB 1639 attempts to clarify who has standing to request "any form of physical or legal custody" and who has standing to request "partial physical custody and supervised physical custody." This particularly clarifies the standing of grandparents and great-grandparents. The new Section 5326, which provides for the termination of the rights of stepparents, grandparents and great-grandparents upon adoption, may have the unintended consequence of preventing "open" adoptions, even by agreement, whereby grandparents or great-grandparents could maintain court-sanctioned relationships with grandchildren or great-grandchildren even after those children are adopted by new parents.

The bill specifies 16 factors for the court to consider in making a custody determination, including "any other relevant factor." Parents are to submit "parenting plans for the care and custody of the child," and the details of those parenting plans are spelled out. Section 5333 makes it clear that the court may require the parties to attend counseling sessions with each party's participation in the counseling sessions being verified by the counselor. Sections 5334 and 5335 provide authority for the court to appoint guardians ad litem and counsel for children and begin to define the roles of each. Section 5336 specifies that parents with sole or shared legal custody shall have access to records and information regarding the child, suggesting that those without any form of legal custody will not automatically get that information. Under the former law, a parent without legal custody was entitled to the information unless the court determined that the parent would not get that information.

The new bill sets forth the rules that parties seeking to relocate with minor children must follow, as well as the rules that those opposing relocation must follow. One of the main changes is that once the relocating party gives notice of an intention to relocate, the burden is on the party opposing the relocation to file an objection with the court. The bill also sets forth the factors that the court must consider in ruling on a relocation request.

House Bill 463 is a subject of greater concern. That bill provides for a presumption in favor of "joint custody." Our courts have moved away from the use of presumptions in child custody in favor of individualized determinations of what is in the children's best interests. Proposing the adoption of such a presumption is sure to generate significant opposition, just as a 2004 effort to adopt a presumption in favor of joint custody generated significant opposition. Given the way that "joint custody" and "joint physical custody" are defined in HB 463 with joint physical custody meaning that each of the parents will have the child with him or her for "significant" periods of time and will have "frequent and continuing" contact it is hard to assess the real meaning or potential impact of the bill.

HB 463 has other provisions that raise concern. For example, Section 5305 makes counseling mandatory when the parties haven't reached agreement and requires the court to consider the recommendations of the counselors in awarding custody. This seemingly requires mental health professionals to take on the dual roles of counselor and evaluator, despite prohibitions against such dual roles in relevant professional ethical guidelines. (A similar problem exists in the current law.) Perhaps worse, under Section 5306, if the court orders the parties to mediate their disputes about a parenting plan, the court is to have a "consultation consult with the mediator" despite the fact that under Pennsylvania law, mediation communications are supposed to remain privileged.

The third bill, House Bill 418, provides for amendments to the Pennsylvania Constitution that will more explicitly authorize and require the creation of procedures for handling family law disputes, "family resource centers" and educational requirements for judges and family law masters and will authorize the Judicial Conduct Board to investigate complaints against and discipline family law masters.

While most of the changes in HB 1639 are welcome and probably represent an improvement in our law regarding child custody, it is worth asking whether this is the best we can do after nearly 25 years of experience with the current law. In 2006, when it appeared SB 74 from the 2005 session a predecessor of HB 1639 was ready to become law, the Pennsylvania Bar Institute presented a seminar at which that bill was analyzed by the judiciary, the bar, the legal academy and the mental health professions. The participants in the seminar brought to bear not only their own broad and deep experience in child custody, but also the experiences of other jurisdictions, looking at how those other jurisdictions had resolved the issues. Some significant concerns were raised about SB 74, many of which apply to the current HB 1639. Certainly it would seem that a momentous change to our custody law one that we might hope would serve us well for at least the next 25 years should be made with great care only after attending to such concerns. In recent years, judges, lawyers, law professors and mental health professionals have had numerous conferences at which they have discussed the evolution of child custody law, suggesting that it may be time for some fundamental

changes in the way we approach child custody disputes and that it may even be time for a "paradigm shift." To mention two interdisciplinary efforts, the Pennsylvania Supreme Court organized a multi-disciplinary committee on "Changing the Culture of Custody." That committee, apart from preparing its own recommendations and report, has spawned other efforts, such as a multidisciplinary task force on parenting coordination that has attempted to bring the latest and best form of this alternative dispute resolution tool to Pennsylvania. Another multi-disciplinary effort was the joint conference of the American Bar Association Family Law Section and the American Psychological Association that took place in Chicago in May 2008. At that conference, Reconceptualizing Child Custody: Past, Present and Future Lawyers and Psychologists Working Together, judges, lawyers, law professors and mental health professionals from across the United States discussed ideas, experiences and research from all over the country in an effort to improve how we deal with child custody disputes.

Pennsylvania should be bringing all of these ideas, experiences and research findings to bear in reformulating our child custody law. We should be getting input from those judges, lawyers and mental health professionals who have been handling custody disputes, from law professors who have studied them, from litigants who have lived them and from legislators who have had to deal with the fallout from their constituents. Pennsylvania should be looking to put itself at the forefront of how we resolve child custody disputes by bringing together all of these hearts and minds.

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