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KAYDEN'S LAW: DO ENDS JUSTIFY THE MEANS?

BY ASHISH JOSHI & PETRA DEETER, PH.D.

Family courts grapple with claims of family violence, especially when the abuse affects a child. When abuse results in the tragic death of a child, there is bound to be a natural outcry to prevent incidents like that from happening again. The tragic death of Kayden Mancuso in 2018 spurred the August 13, 2024 Pennsylvania Senate Bill 55. This new law instigated legislative activities across the country in an attempt to protect children involved in high-conflict custody cases and spurred key changes to the Violence Against Women Act, including Title XV (“Kayden’s Law”), which contains recommendations to 1) limit court discretion to award unsupervised parenting time in cases where there were allegations of past domestic violence and child abuse, 2) prohibit the court from removing a child from a parent with whom the child is bonded or attached, 3) ban reunification treatment, 4) restrict the type of expert witness qualifications admissible in child custody cases and 5) mandate court personnel training on gender-based violence.¹ States that implement these provisions and adopt legislation to enforce these provisions are entitled to federal funding under VAWA Title XV. The goal behind Kayden’s Law is noble. However, the solutions that Kayden’s Law provides — primarily, restricting a parent’s access to a child and limiting a family court’s ability to consider evidence and provide appropriate intervention — are simplistic at best, counterproductive and perhaps unconstitutional at worst. When politicians and lobbyists who have good intentions are misled by special interest groups who have biased agendas, the results can be particularly tragic.

Victims of parental alienation (PA) — both men and women — are directly impacted by Kayden’s Law, despite that the term not being cited in the law. PA is the outcome of a process by which one parent (the abusive or alienating parent) negatively influences a child’s perception and relationship of the other parent (targeted parent or alienated parent). When a child internalizes and accepts as fact the erroneous belief that the targeted parent never loved them, abandoned them, is unsafe or unfit, they align with the alienating parent and then reject the targeted parent; the child becomes alienated from the parent they are rejecting. PA usually happens after a separation or divorce, resulting in the child becoming attached or bonded to the alienating parent. While alienating parents may come across publicly and in court as a competent or “protective”

parent, the child suffers from severe psychological consequences of this type of toxic and dysfunctional attachment and loss of another competent caregiver whom they are not allowed to grieve. The consequences of this condition include behavioral problems², self-esteem issues, anxiety and depression, alcohol abuse, and insecure attachment style.^{3,4,5,6,7,8,9,10} Kayden’s Law may prevent a court from removing the alienated child from this toxic enmeshment thereby leaving the child in an abusive environment. The targeted parent, who is a victim of the coercively controlling abuse that led to this outcome, remains helpless, with no legal remedy.

Alienating parents are abusive parents in that PA is a form of psychological abuse and perpetrators are more likely to have been found to be abusive in other ways (e.g., child physical abuse) than the alienated parent who is the target of their coercively controlling abuse.¹¹ The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), describes child psychological abuse as “nonaccidental verbal or symbolic acts by a child’s parent or caregiver that result, or have reasonable potential to result, in significant psychological harm to the child.”¹² Indeed, in the context of PA, scientific literature “identifies two core elements of child abuse: parental alienation as a significant form of harm to children that is attributable to human action. As a form of individual child abuse, parental alienation calls for a child protection response.”¹³ Alienating parents attempt to distort their child’s worldview by using tactics designed to manipulate the child and disparage the other parent. “Parental alienation involves a set of abusive strategies on the part of a parent to foster the child’s rejection of the other parent, whereby children are manipulated by one parent to reject the other” and (2) “Parental alienation is the child’s unjustified campaign of denigration against a parent, in which children’s views of the targeted parent are almost exclusively negative, to the point that the parent is demonized. For the child, parental alienation is a significant mental disturbance, based on a false belief that the alienated parent is a dangerous and unworthy parent.”¹⁴ The long-term consequences of this emotional abuse are devastating.

It is not uncommon for alienating parents to use false allegations of domestic violence or child abuse as an effective alienating strategy. Social scientists and legal scholars who studied 4,889 Canadian trial court decisions where PA was determined

to happen by a court appointed third party or the court itself found that allegations of child abuse or domestic violence are common, with 90% of the allegations later being found false or unsubstantiated after thorough investigation by the police, child protection services, or other administrative bodies.¹⁵ Kayden's Law requires that the court give inordinate weight to *allegations* of abuse, rather than convicted or proven abuse. This requirement alters the burden of proof in family law¹⁶, is a violation of due process, and unfairly impacts victims of PA.

Critics of Kayden's Law cite serious deficiencies in the methodological and statistical research upon which Kayden's Law was based. There is a tremendous amount of peer reviewed research supporting the construct of PA—a form of psychological maltreatment of children.¹⁷ When examining PA, three features are prominent. One, PA is a psychological condition present in the child. For instance, a child may present with a distorted or false belief that the rejected or disfavored parent is “evil,” “dangerous,” or somehow unworthy of love or affection. Two, the child's rejection of the alienated or target parent is without legitimate justification. This second feature is critical. If there is a documented history of the rejected parent being abusive or severely neglectful, the child's rejection of that parent could be legitimate and if so, it would not be a case of PA. Three, the rejected parent is not expected to be a “perfect” parent and may even have contributed to the child's dislike or hatred of him or her. Often, a rejected parent reacts to the alienation dynamic

in frustration, even anger. This can be a normal response to continued rejection by a child and loss of their relationship. This reaction to the sabotaging and breakdown of the parent-child relationship should not be confused with its causation. The essential feature of PA remains that the child's rejection of the alienated parent is far out of proportion to anything that parent has done.¹⁸ Family courts have defined PA by focusing on *behaviors* perpetrated by an alienating parent and the signs of alienation in the affected child.

Kayden's Law and its progeny of state legislation (e.g., Piqui's Law in California) is grounded on the theory that protective mothers are likely to lose custody of their children when faced with false claims of PA made by abusive fathers. However, this theory has significant flaws. Across at least four recent peer-reviewed studies, social scientists and legal scholars have found the *protective-mother-lose-custody-due-to-false-alienation-claims* hypothesis to lack evidentiary support.¹⁹ In one peer-reviewed study, scientists identified at least “30 conceptual and methodological problems with the design and analyses of the study” used to support Kayden's Law “research” and the authors of this biased and flawed research “made many inaccurate and misleading statements that have the potential to wooze scientifically naïve audiences.”²⁰ This critique of this hypothesis is critical, not just because it was published in a peer-reviewed scientific publication, but also because this hypothesis has a propensity to mislead courts and

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to compromise legal and mental health interventions in cases of PA – a serious form of child psychological abuse.

In fact, the short- and long-term impact of PA on children and the family system, must be considered when raised in a custody proceeding. Mental health experts have cautioned us about how alienated children may experience:

“...more psychosocial adjustment disorders (e.g., internalizing and externalizing problems) than children who have not been alienated. Alienated children are often separated from the targeted parent for long periods of time; this separation paired with parental alienating behaviors is associated with poor psychological adjustment among children. Adults who were alienated as children report severe long-term effects of this abuse: low levels of self-esteem and high levels of self-hatred, insecure attachment, substance abuse disorders, guilt, anxiety, and depression. These individuals also develop fears and phobias, experience attachment difficulties, have problems communicating with their children as adults, and develop a lack of trust in others or themselves.”²¹



Additionally, the Association of Family and Conciliation Courts (“AFCC”) and the National Council of Juvenile and Family Court Judges (“NCJFCJ”) have issued a Joint Statement on Parent-Child Contact Problems which acknowledges the risk of PA to children and emphasizes the importance of court intervention when there is evidence of parental alienating behaviors. In fact, courts across the country have acknowledged PA and have issued orders to protect children from the effects of PA in family law proceedings.²² Research on the prevalence of PA in U.S. Courts found “1181 cases were identified in which the construct PA was determined to be material, probative, relevant, admissible, and discussed.”²³

In *Martin v Martin*,²⁴ the Michigan Court of Appeals stated, “there is no reasonable dispute that high-conflict custody disputes frequently involve acts by one parent designed to obstruct or sabotage the opposing parent’s relationship with the child.”²⁵ PA is real and where it exists it causes significant and long-lasting damage to those afflicted by it. Evidence of parental alienating behaviors is a significant factor that can dramatically change a court’s decision on child custody and parenting time orders. And contrary to the flawed hypothesis (*protective-mother-lose-custody-due-to-false-alienation-claims*), family courts require *evidence* before accepting a claim of PA. One cannot simply declare “parental alienation” and gain custody. Trial courts throughout the country have required substantial proof in cases where allegations of PA are made. And where such evidence has been lacking, the courts have refused to accept conclusory allegations of “parental alienation.” For instance, in *Moir v Moir*, the trial court dismissed the case because it “found no evidence of parental alienation...”²⁶ In Ohio, a Court of Appeals opined “[n]o evidence was submitted that supports a conclusion that Mother engaged in parental alienation... the sole concern raised by the guardian ad litem was unsubstantiated by the evidence.”²⁷ In other cases, the court has objected to the presentation of a witness testifying about PA, without proof of PA. “[T]he court impliedly found no expert was necessary, because there was no evidence of parental alienation...”²⁸ In short, in the cases where PA was found, it was because there was substantial evidence to support the claim.

The role of the court is to hear evidence from both sides to a dispute and attempt to unveil the truth. As a Colorado court found in *In re Marriage of Humeny v Ortiz*, severe alienation can cause personality disorders and cause a feeling of abandonment in the child.²⁹ Hence, if a court is thwarted from offering appropriate legal and mental health intervention, the alienated parent would not be the only person suffering; the child caught in the middle of the parental feud is at risk of severe psychological damage. Simply put, it would be irresponsible for the court to ignore evidence of PA where it exists. When the evidence is there, the court must act promptly to protect the children.

This is where Kayden’s Law has an unintended consequence: It interferes with the judicial discretion that is necessary to

protect a parent-child relationship from psychological and emotional abuse. For instance, Kayden's Law would interfere with the court's ability to make informed decisions regarding PA by narrowly limiting the qualifications of expert witnesses and type of training court personnel can use. Provisions in Kayden's Law exclude experts who could offer otherwise qualified testimony regarding family dynamics, personality disorders, suggestibility of children, child development, and forensic science. The provisions of Kayden's Law provide for a broad overview of domestic violence training (provided only by advocates or victims of domestic violence and not scientists), but it disallows testimony that is purely forensic in nature and most importantly, and it prohibits judges from ordering reunification treatment, one of the only and most effective treatments for children who have suffered from severe PA. Kayden's Law infantilizes family court judges: It dictates to the courts what evidence it must consider (and what to ignore), what experts it may permit to testify (and which ones to ignore or preclude), and what interventions it can provide (and what is impermissible).

Emotional abuse against children is prohibited for good reason. In *Stern/John v John*, a Minnesota court defined endangerment as "an 'unusually imprecise' concept³⁰ that encompasses danger to emotional health or development, such as risk of harm flowing from emotional abuse,

including parental alienation."³¹ Because PA is so harmful to children, its resolution is critical to the child's healthy development. However, resolving family law cases involving PA can be tricky at best. The longer the alienation has occurred, the more entrenched families become with their roles of alienator, target parent, and manipulated child. In instances where false allegations of abuse are made, the alienator and the manipulated child may release a blitzkrieg of accusations in the hopes of forever severing the bond between the target parent and children. As a Michigan court found in one case, "[there] was evidence of numerous, ever-growing, increasingly-egregious, and highly-suspect claims of abuse by the children that were unsubstantiated and called into question by several witnesses, giving rise to a reasonable conclusion that no abuse occurred, along with a reasonable inference that the claims were attributable to conduct, coaching, and communications by defendant, which can be properly characterized as acts fostering parental alienation."³² Partly because of this type of entrenchment, family therapy often is ineffective, with a more coordinated and specialized effort required of the court and experts trained to recognize and treat issues surrounding PA. In cases of severe PA where parental alienating behaviors have resulted in "exposing the children to unregulated emotional turmoil, verbal denigration of the other parent, withholding access of parenting time, and a hostile atmosphere" that



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has “instill[ed] fear and anxiety in a child who has very little resilience,” traditional therapy would be useless.³³ In such situations, in order to protect the child from ongoing psychological abuse, it may be necessary not only to separate the child from the alienating (abusive) parent, but also to order proper reunification counseling with the alienated parent. The separation from the alienating parent is not dissimilar to how child protection services separate children from other abusive parents—until that abusive parent receives treatment and help to prevent further abuse. After such treatment has been completed, the abusive parent and child can then be supported with reunification—again, only when the child is no longer at risk for the parent’s abuse. Reunification in cases of PA involves repairing the alienated parent-child relationship, where the alienated parent is not the abusive parent, but the victim of abuse, just as the child was. By prohibiting reunification in PA cases between the two victims of abuse, the children remain in the care of an untreated, abusive alienating parent and the family continues to suffer with no legal recourse. Reunification therapy that is designed to repair the relationship between the alienated child and the target parent helps alleviate the abuse suffered by the child at the hands of the alienator. In contrast, reunification therapy often ordered in abuse and neglect proceedings is designed to repair the relationship between the abuser and the victim child. This type of therapy can only happen after the abusive parent has been treated and there is no longer a risk of abuse to the child. Reunification therapy for an alienated child and target parent is dissimilar and intended to protect both victim child and victim parent from the abusive acts of the other parent. And this is where Kayden’s Law has unintended consequences: It severely restricts a family court’s integrity, independence and ability to assess and use effective treatment for alienated children, thereby leaving them in the hands of their abusers.

About the Authors

Ashish Joshi is a trial lawyer and the owner of the law firm, *Joshi: Attorneys + Counselors, P.C.* Mr. Joshi’s practice specializes in cases involving family violence. He has been admitted to practice law in Michigan, New York, District of Columbia, and India. He serves as a Senior Editor of *Litigation*, a journal published by the Section of Litigation of the American Bar Association. He is the author of *Litigating Parental Alienation: Evaluating and Presenting an Effective Case in Court* (ABA, 2021).

Petra Deeter, PhD is an award-winning film director who has made films in many genres and topics, including narrative and documentary films about domestic violence, child abuse and parental alienation. She is the founder of Victim To Hero Institute that supports victims of child psychological abuse.

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