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ANALYSIS

What 'Safety First' for Children Should Mean

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Safety for children should mean that children's health and welfare are secure in law, policy and practice. On March 15, 2022, the Violence Against Women Act Reauthorization Act of 2022 (VAWA) was signed into law. Section 1603 states in relevant part:

"The purposes of this title are to:

(1) increase the priority given to child safety in any private State court proceeding affecting children's care and custody …;

(2) strengthen courts' abilities to recognize and adjudicate domestic violence and child abuse allegations based on valid, admissible evidence, and to enter orders which protect and minimize the risk of harm to children as the first priority …"

Colorado's "Julie's law" mandates that child safety be the first priority of custody and parenting adjudications. Courts are directed to prioritize safety risks and claims of domestic violence and child abuse as a bedrock consideration when they determine the best interests of the child, even before assessing other best interest factors. Likewise, Pennsylvania's "Kayden's Law"—awaiting passage—states: "It is the intent of the General Assembly to ensure that in all cases and controversies before the courts involving questions of child custody, the health, safety and welfare of the child are protected and regarded as issues of paramount importance."

To be child focused requires knowing what constitutional provisions apply and what modifications to policy should occur. In the case of *Terence Jamar Graham v. Florida*, 560 U.S. 48 (2010), the U.S. Supreme Court applied constitutional provisions to juveniles in a criminal proceeding, nullifying state action based upon the Eighth Amendment. In doing so, it established that children are citizens, entitled to fundamental constitutional protections. The case restricted all state action in a particular criminal circumstance for juveniles.

Additionally, the 14th Amendment says that all persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the state wherein they reside. Further, it says that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States—nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. The *Graham* case ratifies this concept as applying to children.

The 10th Amendment says that powers not delegated to Congress nor prohibited by the Constitution are reserved for the states or to the People. Children are people. Children are citizens. As citizens, children are entitled to all enumerated rights in the Constitution and the Amendments. Yet, children have no right in federal or state law to object to a visitation order entered by any court in any divorce action. Nor can a child object to any custody order entered by a court. During divorce proceedings, children are too often essentially treated as property to be "distributed" between parents. This is done under the guise of doing what is in their "best interests." But "best interests" often gets turned on its head where there are allegations of child abuse during divorce.

The Fourth Amendment says it is the right of the people to be "secure in their persons, houses, papers, and effects …" This should be applied to a citizen child. Do children have the right to object to any violation of their rights to be safe and secure in their home? Not as things presently stand in family court. It is up to the court sitting in the place of a parent to assure that safety. Against their will, child citizens are sent by judges every day to homes of parents who subsequently harm them even when courts were told of that possibility. This might not happen if children had

specified rights of safety first adhered to in family court where courts are required to equally apply constitutional rights to them.

The federal government requires every state to have child protection laws in order to receive federal funds, and every state must have a child protective services agency. But stringent protocols do not apply to family courts, which are regulated by state law, and, unlike child protection agencies, do not have to fit federal protocols to receive funding. Therefore, while courts are charged with entering appropriate orders to protect children from abuse and neglect, and the state is empowered to file a case against parents to ensure children are protected, the federal law overseeing child protection under CPS does not apply. Instead, these allegations get merged into custody issues and the safety matter does not get separately heard.

CPS investigators can remove a child from contact with their parent(s) when they come to a family home, yet when a parent in the midst of divorce repeats a child's outcry of abuse by the other parent after separation, or that parent reports witnessing abuse of the other parent and makes a complaint to CPS, the reporting parent may themselves become a suspect as having spurious motives for the report. Contact with the named abusing parent is not automatically stopped to assure child protection during a divorce, which is antithetical to child protection.

As a policy matter, we must address and end the circumstances of parents who raise allegations of abuse of their child during the pendency of a divorce from being unjustly attacked as being the problem. To shield these parents from attack requires absolute adherence to child safety protocols before any custody actions are considered. In other words,

investigations and hearings should be held on the sole issue of safety rather than permitting the merging of such allegations into a custody matter. When courts merge the abuse and custody issue, the issues can become blurred. It opens the door to a protective parent being accused of spurious motives, and the children and parents can become the subject of biased evaluators.

By keeping safety as paramount and separate, courts will not weigh parental rights against child safety. Safety will be the sole consideration. A child should be entitled to no less safeguards than an adult at a domestic violence hearing. Indeed, it is up to the court to assure children this in its role as parens patriae.

Violence to a child is an assault, battery, or some other criminal act. Such allegations should be referred to and investigated by a prosecutor. Indeed, there should be no action permitted by a family court where these allegations exist other than to enter a no contact order between the named perpetrator and the child until a criminal process is completed.

Child safety must be addressed properly by the courts as required by the Constitution.

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