



## **POSITION ON PROPOSED LEGISLATION**

**BILL: HB0476**

**POSITION: OPPOSE**

**DATE: FEBRUARY 2, 2021**

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on House Bill 476.

House Bill 476 addresses the right of grandparents to obtain visitation with their grandchildren. Under the proposed bill, an equity court may consider a grandparent's petition for "reasonable visitation of a grandchild" and grant visitation rights of (1) both of the child's living parents consent; (2) one of the child's living parents consents and the other parent is unable to consent; (3) both of the child's living parents are unable to consent; or (4) exceptional circumstances exist that demonstrate current or future detriment to the child absent visitation.

This bill does not adequately protect the fundamental, Constitutional right of parents under the 14<sup>th</sup> Amendment to direct and control the upbringing of their children, including whether and to what extent third parties such as grandparents may have visitation. Parents' Constitutional right with respect to making decisions about who their children associate with is recognized by the U.S. Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000), and the Maryland Court of Appeals in *Koshko v. Haining*, 398 Md. 404 (2007). HB0476 does not provide the necessary due process safeguards that the Constitution requires.

First, there is no requirement that the grandparents show that the parents are unfit before a court may consider their petition. HB0476 requires only that the parent are "unable to consent to visitation." There is no clarification about what "unable to consent" means, nor or any indication that it is the same as being "unfit." The law is clear that parental unfitness must be shown before a third party, including a grandparent's, request for visits may be considered over a parent's objection.

Second, the "consent" and "unable to consent" language is vague and somewhat confusing. It is problematic that there is no definition of "consent" or "unable to

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consent.” If both parents consent, why is there a need for court action? If one parent is absent and does not object, does that equate to a consent? If one parent is unavailable to respond due to military service or overseas work, does that equate to being “unable” to consent? The language is capable of being interpreted in ways that do not pass Constitutional muster.

Finally, the “exceptional circumstances” language in subsection (iv) is not strong enough to safeguard the family’s right for parents to control their children’s upbringing. Grandparents may always be able to show that a child will suffer current or future “detriment” by not being able to visit with their grandparents; after all, it can always be argued that not having visits with grandparents is detrimental because it deprives children the opportunity to form a relationship with their grandparents. The “detriment” language gives too much discretion to individual judges to decide what would be best for the children based on that judge’s own experiences and personal views. What is required in order to comport to the Constitution, however, is a showing that “the lack of grandparental visitation has a **significant deleterious effect** upon the children who are the subject of the petition.” This language is lifted directly from *Koshko v. Haining*, 398 Md. at 441 (emphasis added). The due process right that parents are given under the Constitution should not be infringed upon by a mere showing of “detriment.” Requiring a showing of “significant deleterious effect” provides both protection for children and regard for the parents’ due process rights.

In its current stage, HB0476 is problematic and would not survive a Constitutional challenge.

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For these reasons, the Maryland Office of the Public Defender urges an unfavorable report on House Bill 0476.