



POSITION ON PROPOSED LEGISLATION

BILL: HB 748 – FAMILY LAW -CHILD CUSTODY AND VISITATION

POSITION: SUPPORT

DATE: February 16, 2021

The Maryland Office of the Public Defender respectfully requests that the Committee issue a favorable report on House Bill 748.

This bill seeks to protect a child who is the subject of a visitation or custody battle between two parents or a parent and a third party. This bill requires a court presiding over a custody or visitation proceeding to deny a party to the proceeding custody or unsupervised visitation with a child if that child was abused or neglected unless the court makes a specific finding and states with specificity the reasons for finding that there is no likelihood of further child abuse or neglect by the party. The court may approve supervised visits which specifically takes into account the type of abuse or neglect and assures the safety of the child. This bill applies to private custody or visitation disputes and specifically excludes Children In Need of Assistance cases.

The Office of the Public Defender SUPPORTS this bill for the following reasons:

- (1) Expressly providing that this statute is inapplicable in Children In Need of Assistance (CINA) cases strengthens the provisions of the statute by shielding the statute from Constitutional challenges. HB748 applies to parents (and**

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other family members) and their children who need protection from abuse and neglect. When the government (the Department of Social Services) is involved to try to protect children, the CINA statute applies. The comprehensive CINA statute already contains provisions that require the court to deny custody or visitation to parents when there is a further likelihood of abuse or neglect, without shifting the burden to the parents and thus raising a challenge to the Constitutionality of the statute.

(a) Why Family Law custody and visitation cases between parents/family members are different from CINA cases where the government is the party who wants custody or visitation denied to the parents.

- When two parents engage in a custody or visitation dispute, they are on equal footing in the eyes of the law. Both parents have the same rights because they are the parents and both have an equal chance to obtain custody and visits.
- But when the government is the entity that is seeking to separate families and remove the children from their parents' custody or prevent them from having visits, it becomes a Constitutional matter, because the parent-child relationship is protected from government intrusion by the 14th Amendment of the U.S. Constitution.
- In a CINA case, the Department of Social Services prosecutes the case; therefore, the government is a party. Under the 14th Amendment, there is a presumption that it is best for children to be with their parents. When the government is attempting to separate a family, such as when it asks the court to deny custody or visitation to the parents, the 14th Amendment is implicated. Under the Constitution, the government is not allowed to separate families except under limited circumstances, and the

government has the burden of proving that the family should be separated. Applying HB748 to CINA cases will make it very vulnerable to legal challenges because it shifts the burden to the parents to show that they should have custody or visits with their own children. By excluding Child In Need of Assistance cases from these requirements, the statute will be safe from being struck down for being unconstitutional.

(b) Why the comprehensive CINA statute provides children in CINA cases greater protection under the CINA statute than they would have under SB57.

- The CINA statute is comprehensive and requires the court to determine that there is no likelihood of further abuse or neglect before the court may reunite children with their parents. The difference is that under the CINA statute, the responsibility for proving that the children would not be safe with their parents is on the government, whereas HB 748 shifts the responsibility to the parents. The CINA statute is therefore not subject to the same Constitutional challenges that HB 748 would be if it applied to CINA cases.
- At the very beginning of a CINA case – the shelter care hearing – if a court has reason to believe that the child has been abused or neglected, the court has to “determine whether the temporary placement of the child outside of the home is warranted.” (Courts & Judicial Proceedings § 3-815 (c)(2)). The Court only needs to have “reasonable grounds” to believe that the child needs to be placed outside of the home (i.e. deny custody to the parents) which is the exact same standard of proof as is proposed in HB 748.
- Even beyond emergency shelter care, the court may continue to deny custody or visitation to the parents if the court finds that giving custody of the child back to the parents is “is contrary to the safety and welfare of the child.” Obviously, if the court

believes there is the likelihood of further abuse or neglect, then the court can deny custody and visitation because that would be contrary to the child's safety and welfare. (C&J §3-815 (d)(1)).

- If a court finds that a child is a Child In Need of Assistance (because the child has been abused or neglected) the court then has the authority to deny custody and visitation to the parents if it would not be in the child's best interests to be in the parents' custody or for them to have visitation. (C&J §3-819 (b)(1)(iii)) Obviously, this means that if the court believes there is the likelihood of further abuse or neglect, the court will deny custody and visitation to the parents. Of equal importance, the court may order the parents to engage in services as a prerequisite to regaining custody and/or visitation. (C&J §3-819 (c)(1)(iii) and (2)).
- Even after the court has determined that a child is a CINA and the parents seek to regain custody or have visits with their child, the court always has to determine whether returning the child is in the best interests of the child. The court is required to hold a review hearing every six months. At the review hearing, the court has to determine the following:

(2) At a review hearing under this section, the court shall:

(i) **Evaluate the safety of the child;**

(ii) **Determine the continuing necessity for and appropriateness of any out-of-home placement;**

(iii) Determine the appropriateness of and extent of compliance with the case plan for the child;

(iv) **Determine the extent of progress that has been made toward alleviating or mitigating the causes necessitating the court's jurisdiction;** and

(v) Project a reasonable date by which the child may be returned to and safely maintained in the home or placed for adoption or under a legal guardianship.

(C&J § 3-81.2 (a) (2)).

- Existing law is very well-established that **the guiding principle in CINA cases is the best interests of the child.** “The purpose of CINA proceedings is ‘to protect children and promote their best interests.’ ” *In re Priscilla B.*, 214 Md.App. 600, 622 (2013) (quoting *In re Rachel T.*, 77 Md.App. 20, 28 (1988)). The CINA statute requires the court to determine that there is no likelihood of further abuse or neglect before the court may reunite children with their parents. Including CINA cases within the ambit of HB 748 accomplishes only one thing: It shifts the burden to the parents, whereas in the CINA statute, the burden is on the government to show that the children should not be reunited, and subjects the statute to a constitutional challenge. HB 748 is intended for family law disputes, not disputes where the **government** is separating the family. The CINA statute is comprehensive and clear; applying HB 748 would only be redundant.

(2) HB 748 properly applies in cases where the government is not a party. It requires the party to prove that the children would not be abused or neglected again if the parent seeking custody or visitation were to be given access to the child. The focus of HB 748 is children who were the victims of domestic violence but who the Department of Social Services for whatever reason did not seek to remove from the parents. Thus, HB 748 ensures the safety of children who were the victims of abuse or neglect from further abuse or neglect by requiring the court to state with specificity its basis for determining that the children will be safe if custody or visitation were granted to the former abuser.

- A party to a custody or visitation proceeding will be required to produce evidence that further abuse or neglect is unlikely to occur if the child is placed in the party’s custody or if the party is granted visitation. If the party is unable to produce sufficient

or satisfactory evidence then the court will be unable to make the required determination that further abuse or neglect is unlikely, and custody and unsupervised visitation will be denied. Children will not be returned to a dangerous situation.

- Even if the court is unable to award custody or unsupervised visitation to a party, the court may still award supervised visits as long as long as adequate safeguards are in place to protect the child. This provision is consistent with current law which severely limits the circumstances in which any form of visitation is completely denied even to an errant parent. If a child's physical, emotional, and physiological well-being can be protected, supervised visitation should be awarded.
- Children who are the victims of domestic violence – whether it is physical, psychological, or sexual abuse – will be protected from the abuser but not separated from the non-abuser (who is often also a victim of the domestic violence). This -- not creating a redundant provision to apply to CINA cases -- was the underlying purpose of HB 748.

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For these reasons, the Maryland Office of the Public Defender urges a favorable report on House Bill 748.