



## POSITION ON PROPOSED LEGISLATION

**BILL: HB0973**

**POSITION: OPPOSE**

**DATE: March 2, 2021**

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The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on House Bill 0973.

House Bill 0973 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 may grant the request for visitation if the grandparent's child, who is the parent of the child with whom visits are being sought, is deceased, or if the petition for visitation was filed after an action for divorce, annulment, custody or paternity was filed by a parent of the child, and the court finds that granting visitation rights would be in the best interests of the child and would not interfere with the parent-child relationship. The court is required to consider the amount of contact between the grandparent and child. If the child resided with the grandparent for at least 12 months, the court is mandated to award visitation rights if it would be in the child's best interests and visits would not interfere with the parent-child relationship. Finally, the court may not deny visits unless a preponderance of the evidence shows that visits would interfere with the parent-child relationship.

### **HB0973 is unconstitutional**

This bill would result in an unconstitutional statute. The United States Supreme Court and the Maryland Court of Appeals have both held that parents have a fundamental, Constitutional right 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. In other words, contained within the Due Process Clause is a fundamental liberty interest bestowed upon the parents concerning the "care, custody, and control" of their children, including the right to decide with whom their children associate. *Troxel v. Granville*, 530 U.S. 57 (2000), *Koshko v. Haining*, 398 Md. 404 (2007). In order for a third party to override parents'

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decisions about who their children visit with, there must first be a showing that the parents are (1) unfit OR that (2) exceptional circumstances exist to indicate that lack of grandparent visitation will have a harmful effect upon the child who is the subject of the petition. HB0973 does not reflect this Constitutional gloss that is required as a matter of Constitutional Law.

### **No threshold requirement of showing of unfitness or exceptional circumstances**

HB0973 is unconstitutional for several reasons. First, there is no requirement that the grandparents show that the parents are unfit before a court may consider whether visits would be in the children's best interests. HB0973 requires only that the court find that it is in the child's best interests for visits to occur and that visits will not interfere with the parent-child relationship. Giving the court the discretion to award visits over parental objection if the court finds it is in the child's best interest is exactly the approach that the Court of Appeals rejected in *Koshko v. Haining*. The Court of Appeals was clear that a statute like this "imposes a direct and substantial interference upon the [parents'] exercise of their parental rights with respect to the visitation with their children." In order for this statute to conform to the Constitution, the statute must presume that the parents' decision is in the child's best interests. And in order to overcome that presumption, the grandparents must make a threshold showing of parental unfitness or exceptional circumstances before the court goes on to determine whether a third party, including a grandparent's, request for visits may be considered over a parent's objection.

### **Unconstitutional shifting of the burden of proof to parents**

Second, HB0973 is unconstitutional because it shifts the burden on the parents to prove that visits would interfere with the parent-child relationship. Parents who oppose visits because they would interfere with the parent child relationship have the burden of proving to the court by a preponderance of the evidence that visits would "interfere" with their relationship with their own child. This is problematic on two levels: (a) It is a vague standard – it is impossible to know what to "interfere with the parent-child relationship" means; and (b) Although the presumption at law is that parents know what is best for their children, this statute requires the parents to defend their decision not to agree to visits with the grandparents by proving by a preponderance that the visits would "interfere" with their relationship with their children.

What is required in order to comport to the Constitution 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). Moreover, it should be the grandparents who are seeking visitation that bear the burden of proving this. Requiring a showing of “significant deleterious effect” provides both protection for children and regard for the parents’ due process rights. As written, HB0973 infringes upon the constitutional rights of parents.

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For these reasons, the Maryland Office of the Public Defender urges an unfavorable report on House Bill 0973.