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POSITION ON PROPOSED LEGISLATION

BILL: SB41
FROM: Maryland Office of the Public Defender
POSITION: SUPPORT WITH AMENDMENTS
DATE: January 24, 2022

The Maryland Office of the Public Defender supports Senate Bill 41 with amendments. Specifically, it must exclude its application to Child In Need of Assistance cases, and subsection 9-105(b) must be deleted. This bill provides protection to a child who is the subject of a visitation or custody battle between two parents or a parent and a third party. The focus of SB41 is children who were the victims of domestic violence but who the Department of Social Services (DSS) for whatever reason did not seek to remove from the parents. Thus, SB41 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. However, there is no language expressly excluding the application of SB41 to Children In Need of Assistance (CINA) cases, even though the legislative history of Family Law § 9-101 shows that it was not intended to apply to CINA cases but to cases where the DSS would not be involved. Additionally, SB41 is vague and overbroad and gives one parent or party unlimited power to deprive the other parent of visits. Therefore, amendments are necessary to SB41 in order for the OPD to support it.

1. SB41 includes within its reach parties in Children In Need of Assistance (CINA) cases despite there already being a comprehensive CINA statute that provides greater protection to children.

Senate Bill 41 applies to parents (and other family members) and their children who need protection from abuse and neglect. When the government (the Department of Social Services) is involved for the protection of children, the CINA statute applies (Courts & Judicial Proceedings, Title 3, Subtitle 8). The comprehensive CINA statute contains provisions that require the court to deny custody or visitation to parents when there is a further likelihood of abuse or neglect, but does so without shifting the burden to the parents and thus raising a challenge to the Constitutionality of the statute, like SB41 does.

(a) 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 natural 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, DSS 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 rather than in foster care. 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 SB41 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 CINA cases from these requirements, the statute would be safe from being struck down for being unconstitutional.

(b) The comprehensive CINA statute provides children in CINA cases greater protection under the CINA statute than they would have under SB41. 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)). 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 has been neglected or abused (and is therefore a CINA) 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, C&J § 3-81.2 (a) (2)) requires the court to determine the following, among other factors:

- (i) Evaluate the safety of the child;
- (ii) Determine the continuing necessity for and appropriateness of any out-of-home placement;

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 where is no likelihood of further abuse or neglect before the

court may reunite children with their parents. Including CINA cases within the ambit of SB41 as written accomplishes only one thing: It shifts the burden to the parents, thereby subjecting the statute to a Constitutional challenge. In the CINA statute, on the other hand, the burden is on the government to show that the children should not be reunited. SB41 is intended for family law disputes, not disputes where the government is separating the family. The CINA statute is comprehensive and clear; applying SB41 as written would only be redundant.

2. Subsection 9-105 (B) is vague and overbroad and could be used by the government to unilaterally suspend visitation; this subsection must be deleted.

This subsection is vague and overbroad and allows one party to unilaterally make a decision that is harmful to the child. A “reasonable effort to protect a child or a party” from the other party is extremely subjective. What is a “reasonable effort” to protect a child? What action by the other parent requires a child to be protected? Who decides what is reasonable? Who decides what action by the non-custodial parent warrants suspension of visitation? In a CINA case, the Department of Social Services could suspend court-ordered visitation based solely on the word of the individual who has physical custody of the child – in many cases it would be a foster care provider or a relative. The court would not be able to immediately review this decision, so the child could potentially go without seeing the other parent for months. Even if the court decided the suspension of visits was unreasonable, the child would never be able to make up the lost time with the other parent. This subsection must be deleted.

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For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a favorable report on Senate Bill 41 with amendments as requested above.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.

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