National
Family Violence
Law Center
THE GEORGE WASHINGTON UNIVERSITY

TO: Maryland House Judiciary Committee, Chairman Clippinger, Vice Chairman Moon, and Distinguished Committee Members

FROM: The National Family Violence Law Center at GW Law

RE: Testimony in SUPPORT of HB 561

DATE: February 15, 2022

Dear Chairman Clippinger, Vice Chairman Moon, and Members of the Committee,

Thank you for the opportunity to provide testimony on HB 561, which will require the Maryland Judiciary, in consultation with domestic violence and child abuse organizations, to develop a training program for judges presiding over child custody cases involving child abuse or domestic violence. HB 561 will require judges to satisfy a minimum of 20 hours of initial training on issues related to child abuse and domestic violence prior to working on cases involving the same, and judges hearing these cases must receive at least 5 hours of continuing education every 2 years. This legislation, if passed, would improve the ability of courts to recognize child abuse, trauma, and domestic violence patterns, including coercive control, and prioritize the safety of those most vulnerable to such abuse.

By way of introduction, the National Family Violence Law Center (NFVLC) specializes in the intersection of adult and child abuse in the family and its implications for family courts. NFVLC serves as the pre-eminent home for national research and expert support for policymakers, judicial, legal and mental health professionals on this matter. Drawing on its own pioneering quantitative and qualitative research along with that of other top researchers, NFVLC provides training, education and evidence-based solutions for policymakers, professionals, advocates, media, and the public. Founded by Professor of Law Joan S. Meier in partnership with GW Law, the Center also develops state and federal policy proposals and files amicus briefs in high-profile cases to improve family courts' ability to deliver safe and beneficial outcomes for those exposed to domestic violence, including children.

We support this proposed legislation. Important determinations about child placement arrangements, including safety measures for children, are made by judges, as well as informed

by other court personnel, such as magistrates, appointed evaluators or counsel for the child. For this reason, we suggest an amendment be made to add requirements for such training for relevant court personnel who are participant in these cases where children are most at-risk of repeat exposure to family violence.

TRAINING IN OTHER STATES

Several states have already passed legislation which requires the judiciary to develop and implement such judicial and court personnel training programs. For example, California law requires the Judicial Council to establish judicial training programs for individuals who perform duties in domestic violence matters, including but not limited to, judges, referees, commissioners, mediators, and others as deemed appropriate by the Judicial Council.[1] California training programs must include instruction in all aspects of domestic violence, including, but not limited to, the detriment to children. Under Connecticut law, the judiciary is mandated to create an ongoing training program for judges and other court personnel, including Court Support Services Division personnel, guardians ad litem and clerks, regarding the function of the family violence intervention units and the use of restraining and protective orders.[2] New Hampshire law requires that, "all staff [shall] be fully trained to handle domestic violence cases"; protocols are mandatory and are produced by the state's judicial branch to ensure best practices.[3] Similarly, Washington D.C. law requires the chief judge, in consultation with the presiding judge of the Family Court, to carry out an ongoing program to provide training in family law and related matters for judges and attorneys who practice in Family Court, which includes information and instruction regarding family dynamics, including domestic violence.[4] In Texas, the court of criminal appeals must assure that judicial training related to the problems of family violence, sexual assault, trafficking of persons, and child abuse and neglect is provided, and the rules must require each district judge, judge of a statutory county court, associate judge appointed under their Chapter 201, Family Code, master, referee, and magistrate complete at least 12 hours of the training within the judge's first term of office.[5]

In 2021, Colorado passed HB1228 and enacted a law which creates domestic violence, child abuse, and trauma training requirements for court personnel who are regularly involved in cases related to domestic matters, including child and family investigators and parenting responsibility evaluators.[6] We at the National Family Violence Law Center provided trainings for Colorado practitioners pursuant to HB1228 in order to satisfy these new requirements.

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[1] CAL. GOV. CODE § 68555
[2] CT STAT ANN. § 46b-38c
[3] N.H. CT. R. DOM. VIOLENCE PROTOCOL 5-1
[4] D.C. § 11-1104; § 11-1732A
[5] TX. GOV. CODE § 22.110
[6] Colorado HB 1228

SEPARATION OF POWERS

Concern has been raised that the proposed legislation may infringe on "duties constitutionally assigned to the Judicial Branch" and that "[c]urrent laws recognize . . . authority over the behavior and training of Judges in Maryland," specifically in a memo stating that the proposed HB 561 "encroaches upon the . . . constitutional duty to oversee the integrity and impartiality of state judges . . . ." The Maryland Declaration of Rights prohibits one branch of government from assuming or discharging the duties of another.[7] However, those raising the separation of powers concern do not cite any provision of Maryland's Constitution nor any jurisprudence conferring the authority and duties mentioned.

Maryland's Constitution states that the Court of Appeals "shall adopt rules . . . concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until *rescinded, changed or modified* by the Court of Appeals *or otherwise by law*."[8] As recently as September 2020, this language has been interpreted to allow the legislature to rescind and modify rules adopted by the Court of Appeals.[9] As such, the proposed bill cannot "encroach" upon the judiciaries' duty to create rules governing the practice and procedure and judicial administration of Maryland courts, because the Maryland Constitution expressly authorizes the legislature to rescind and modify those rules.

Conversely, Maryland's Constitution specifies that the Chief Judge of the Court of Appeals "shall be the administrative head of the Judicial system . . . ." As such, one could argue that the proposed bill would allow the legislature to impermissibly "discharge" the Chief Judge of her duties as the administrative head of the Maryland judiciary. However, this argument is likely without merit. Cases referencing the Chief Judge's power to create rules for the judiciary as the "administrative head" are accompanied by references to the Court of Appeals' power to "adopt rules . . . concerning . . . the administration of the . . . courts . . . ."[10] While the Chief Judge is the administrative head of the judiciary, her power to prescribe rules governing the judiciary is subject to recission and modification by the legislature. Therefore, the proposed bill passes constitutional muster, as it does not discharge the Chief Judge of her duties as the administrative head, but merely creates the backdrop under which she must carry out those duties.

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[7] Art. 8 of the Maryland Declaration of Rights (available at: https://msa.maryland.gov/msa/mdmanual/43const/html/00dec.html).

[8] Art. IV § 18 of the Maryland Constitution (emphasis added) (available at: https://msa.maryland.gov/msa/mdmanual/43const/html/04art4.html#baltimore).

[9] *See* Carlisle v. State, 2020 WL 5423939, 7 (Md. App., 2020) (citing Johnson v. Swann, 314 Md. 285, 289 (1988)).

[10] *See* Baig v. State, 2021 WL 2345696, fn. 2 (Md. Ct. Spec. App. June 8, 2021); St. Joseph Med. Ctr., Inc. v. Turnbull, 432 Md. 259, 275 (2013); Maryland State Highway Admin. v. Kim, 353 Md. 313, fn. 15 (1999); In re Petition for Writ of Prohibition, 312 Md. 280, 285 (1988); and Whitaker v. Prince George's Cty., 307 Md. 368, fn. 3 (1986).

Invoking its constitutional powers, the Maryland Court of Appeals issued two administrative orders concerning judicial education in June 2016: "The Judicial College of Maryland"[11] and "Continuing Education of Judges, Magistrates, and Commissioners"[12] ("Continuing Education Order"). Those raising concerns cited the former as making the Judicial College "responsible for the continuing professional education of judges" and conferring certain responsibilities on the Education Committee of the Judicial Council. However, the Continuing Education Order § (a) states that the Judicial College will serve as "the *primary* entity" for judicial education. The Continuing Education Order § (g) also provides requirements for judicial education programs outside of the Judicial College, including prompt notification to the Assistant Administrator of the Judicial College, notice and review of the proposed program by the Education Committee, and approval by the Chief Judge of the Court of Appeals for mandatory programs.

Two aspects of the administrative orders are noteworthy. First, the administrative orders recognize that secondary entities may be responsible for judicial education and provides a mechanism for those entities to be recognized. Further, while it is clear that the orders make the Judicial College and the Education Committee responsible for providing judicial education, nothing in either order indicates that these entities are responsible for determining *the content* of that education. From this, it is not clear that the proposed bill is contrary to the current judicial education scheme.[13] While the bill requires judicial employees to receive a certain amount and type of training, this training could be implemented using the existing framework for educational programs outside of the Judicial College. Additionally, because the orders do not state that the Judicial College is responsible for determining the *content* of judicial education, the Chief Judge could implement the bill's required training through the Judicial College itself.

Second, even if the orders were interpreted as contrary to the proposed bill, the legislature would still retain the power to rescind and modify the orders under its constitutional authority. The Chief Judge expressly promulgated these orders pursuant to her powers as the administrative head of the judiciary and her power to promulgate rules governing judicial administration. As stated in the second paragraph, cases have repeatedly recognized the legislature's power to rescind and modify rules promulgated by the Court of Appeals. As such, if the proposed bill conflicts with the orders, the legislature should retain power to rescind and modify the existing orders. Conversely, all caselaw on the subject is distinct, as none of the prior cases have concerned judicial education, and most concern issues related to "procedure and practice" as opposed to "administration." However, the rulemaking authority related to "procedure and practice" is the same rulemaking authority related to "administration," and there is no existing caselaw in Maryland indicating that these provisions should receive differential treatment.

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[11] Available at: https://www.mdcourts.gov/sites/default/files/admin-orders/20160606judicialcollege.pdf.
[12] Available at: https://www.mdcourts.gov/sites/default/files/admin-orders/20160606continuingedofjudgesmagistratescommissioners.pdf.
[13] When two rules exist that are "neither irreconcilable nor mutually repugnant" the court will interpret the rules in a way that allows them to exist in harmony. *See* Johnson, 314 Md. at 290.

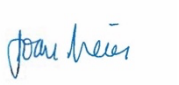
Reference has been made to Court and Judicial Proceedings Article § 1-201[14] as "empower[ing] the Court of Appeals to make rules and regulations for the courts of the state." However, nothing in § 1-201 confers any powers on the Court of Appeals. Section 1-201 (a) provides that the Court of Appeals' power to make rules governing practice and procedure and judicial administration "shall be liberally construed." Part (a) further elaborates on the meaning of "practice and procedure." Section 1-201 (b) provides that other courts may make additional rules so long as those rules are consistent with the Court of Appeals' rules, and those rules are not otherwise limited by the Maryland Rules "unless authority to adopt rules is expressly granted by *public general law*." As such, nothing in § 1-201 empowers the Court of Appeals to adopt rules, and it appears to merely clarify the judiciaries' rulemaking powers under the Maryland Constitution. Additionally, section 1-201 (b) reiterates that the legislature may alter the judiciaries' rulemaking powers.[15]

In closing, we commend you for taking up this very important matter to improve court responses to family violence, especially on behalf of vulnerable children. Please do not hesitate to contact us if we can be of assistance.

Sincerely,

Danielle Pollack, Policy Manager, NFVLC

William "Jordan" Crider, Class of 2022, GWU Law School



Professor Joan Meier, Founder and Director, NFVLC

The National Family Violence Law Center
George Washington University Law School
2000 G St. N.W. , Washington, D.C. 20052
Tel. (202) 994-2278

[14] Available at: https://law.justia.com/codes/maryland/2005/gcj/1-201.html.
[15] *See* MD GEN PROVIS § 1-204 (2016) (available at: https://law.justia.com/codes/maryland/2016/general-provisions/title-1/subtitle-2/section-1-204) (explaining that laws adopted by the legislature are 'public general laws').