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Senate Judicial Proceedings Committee

Senate Bill 28 Child Custody – Legal Decision Making and Parenting Time

Date: January 31, 2023

Position: OPPOSE

Dear Chairman Smith and Members of the Committee:

Disability Rights Maryland (DRM) is the protection and advocacy organization for the state of Maryland; the mission of the organization, part of a national network of similar agencies, is to protect and advocate for the legal rights of people with disabilities throughout the state. We write in strong opposition to Senate Bill 28 to the extent that it repeals due process and other protections for persons with disabilities and rejects findings and recommendations of the Commission on Child Custody Decision Making. In 2013, the Maryland General Assembly created a Commission on Child Custody Decision Making to study of several issues including, “how to ensure that child custody determinations involving parents with mental health, sensory or physical disabilities are handled in a fair and even manner based on actual evidence and not presumed limitations.”¹ Members of the Commission were appointed by the General Assembly, the Judiciary and the Governor. The Commission held public hearings statewide and conducted research, meetings and discussions in accord with its mission.

The Commission’s findings and recommendations resulted in passage of the law that Senate Bill 28 attempts to amend. Critically, the proposed legislation repeals language specifically enacted to address discrimination against parents with disabilities. Notably, the Commission found such discrimination to exist based on history, studies and Maryland law itself.

The Commission’s report found that the failure of custody determinations to identify a nexus between a parent’s disability and adverse consequences to a child contributes to disparate treatment of parents with disabilities. The Commission’s Report recommended that written findings be required to support a court’s determination that a parental disability adversely affects the child; that such determinations be based upon the preponderance of evidence, and that the burden of proof be established. These commonsense procedures help to clarify decision making processes when considering a parent’s disability in child custody and related proceedings. These recommendations are currently in statute but would be repealed by Senate Bill 28.

As stated by the Supreme Court of Maryland, “When courts allow presumptions of inadequacy to replace individual inquiry, they erect insurmountable hurdles for parents labeled . . . disabled”²

¹ HB 687/Ch.633 of 2013

² *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md.666 at 674-675 (2002).

The Court's finding has support from a seminal report by the National Council on Disabilities³, which determined, based on cited research and studies, that parents with disabilities are likely to encounter disparate treatment in the family law system on the basis of other people's perception of their disability and its impact on parenting. The existence of implicit bias is a direct result of our history.

This history was recognized by Congress when passing the Americans with Disabilities Act in 1990. The Act's findings states that "discriminatory policies and practices affect people with disabilities in every aspect of their lives . . . [including] securing custody of their children."⁴ Examples of our discriminatory practices include allowing mass involuntary sterilization of people with disabilities. By the early 1930s, more than thirty (30) states had laws permitting the involuntary sterilization of people with disabilities.⁵ By the 1960s, such laws were used to sterilize at least 60,000 people.⁶ This sterilization of people with disabilities against their will occurred with the approval of the federal courts. In *Buck v. Bell*, the U.S. Supreme Court upheld a Virginia law that authorized forced sterilization of a fifteen-year-old young woman with disabilities.⁷ The Court's reasoning reflects a classic eugenic viewpoint that people with disabilities were "imbeciles" who needed to be stopped from reproducing "degenerates".⁸ As recently as 1983, fifteen (15) states continued to have compulsory sterilization laws.⁹

In 1914, thirty-seven (37) states and the District of Columbia had laws restricting marriage for people with disabilities including those who were "epileptic," or "diseased," among others.¹⁰ Although society and the law have progressed since the days of mass institutionalization and forced sterilization, subtler disability misconceptions persist. This is especially true of the fundamental constitutional right to raise children, according to numerous studies and reports.¹¹ Several Maryland child custody cases examined by the Commission were later overturned by a

³ "Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children", National Council on Disability September 27, 2012; [Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children \(ncd.gov\)](http://www.ncd.gov/publications/2012/Sep272012/) (last visited 1/26/23). NCD is an independent federal agency tasked with making recommendations to the President and Congress.

⁴ H.R. Rep. No. 485, Pt. 3, at 25.

⁵ Phillip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* 45-55 (1991).

⁶ *Id.* at 94.

⁷ 274 U.S. 200 (1927).

⁸ *Id.* at 207.

⁹ *Accommodating the Spectrum*. United States Commission on Civil Rights, Clearinghouse Publication, 81 September 1983 at 37; see also P. Reilly, *The Surgical Solution* 2 & 148 (1991).

¹⁰ Stevenson Smith *et al.*, *A Summary of the Laws of the Several States Governing (I) Marriage and Divorce of the Feeble-minded, the Epileptic and the Insane, (II) Asexualization, (III) Institutional Commitment and Discharge of the Feeble-minded and the Epileptic*, 82 Bull. U. Wash. 5-15 (May 1914).

¹¹ "Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children", National Council on Disability September 27, 2012; [Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children \(ncd.gov\)](http://www.ncd.gov/publications/2012/Sep272012/); <http://www.ncd.gov/publications/2012/Sep272012/>. (last visited 1/26/23).

higher court for lack of findings or evidence that a parent's disability had any adverse impact on their child.¹²

In sum, the Commission found that bias exists in custody determinations involving parents with disabilities based on Maryland law, court decisions, research and studies; and that Maryland can better ensure that such determinations are made in a fairer manner based on actual evidence. The existing law is a result of recommendations endorsed by the Commission, which legislation had the support of multiple other groups.

Finally, current law allowing parents to demonstrate how they can address any identified parenting deficiency by use of support services, which simply codifies the rights of persons with disabilities to reasonable accommodations. There are a range of technologies and supports that can assist parents with disabilities to remove barriers to healthy parenting. To the extent deficiencies are identified that adversely affect a child, parents have the ability to counter such deficiency by demonstrating how they can neutralize any such concerns.

For the above reasons, DRM strongly opposes Senate Bill 28 to the extent it completely repeals the judicial protections against implicit bias and discrimination of parents with disabilities and the processes currently in place to ensure equal justice.

Please contact Robin Murphy, Executive Director, robinm@disabilityrightsmd.org or Leslie Seid Margolis, Managing Attorney, lesliem@disabilityrightsmd.org with any questions.

¹² *“Commission on Child Custody Decision-Making, Final Report”*, Appendix G, Dec. 1, 2014, HB 687/CH 633, 2013 (MSAR #9554) [20150076e.pdf \(maryland.gov\)](https://www.maryland.gov/20150076e.pdf) (last visited 1/26/2003)