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~~CONFIDENTIAL~~ KKD
March 17, 2025

The Honorable C.T. Wilson
Maryland House of Delegates
231 Taylor House Office Building
Annapolis, Maryland 21401
Via email

RE: House Bill 1378 – "Child Sexual Abuse Claims Against the State – Time Limitation"

Dear Delegate Wilson:

You have requested a letter of advice concerning the constitutionality of proposed amendments to House Bill 1378 ("Child Sexual Abuse Claims Against the State—Time Limitation"). House Bill 1378 would amend the Child Victims Act, 2023 Md. Laws, ch. 6, to make changes to the provisions governing child sexual abuse claims against the State and State units. As relevant here, the proposed amendments to the bill would (1) reduce the cap on damages to $400,000 per claimant for all claims, including claims that are already pending; (2) provide that counsel fees may not exceed 10% of a settlement or 15% of a judgment based on a child sexual abuse claim against the State; and (3) require all child sexual abuse claims against the State filed after a certain date to proceed through a mandatory alternative dispute resolution process.

Although all of these changes will likely be subject to challenge by claimants under the Child Victims Act, especially to the extent the changes affect claims that are already pending, in my view these changes are legally defensible and not clearly unconstitutional.[1]

[1] We apply a "not clearly unconstitutional" standard of review in the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

Background

The Child Victims Act provided that "notwithstanding any time limitation under a statute of limitations, a statute of repose, the Maryland Tort Claims Act . . . or any other law, an action for damages arising out of an alleged incident or incidents of sexual abuse that occurred while the victim was a minor may be filed at any time." 2023 Md. Laws, ch. 6 (amending Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 5-117(b)).[2] Any such claim, if made against the State, would need to be brought under the Maryland Tort Claims Act ("MTCA"). Md Code Ann., State Gov't ("SG") §§ 12-101 to 12-110. The Child Victims Act amended the MTCA to provide that "[i]f liability of the State or its units arises under a claim of sexual abuse . . . the liability may not exceed $890,000 to a single claimant for injuries arising from an incident or occurrence." 2023 Md. Laws, ch. 6 (enacting SG § 12-104(a)(2)(iii)).

House Bill 1378, as originally introduced, would have amended the Child Victims Act to provide that "[a]n action against the State or a unit of State government" that was time-barred before, and revived by, the Child Victims Act "may not be filed on or after January 1, 2026." H.B. 1378, 2025 Leg., Reg. Sess. (First Reader). However, I understand that further amendments to the bill are under consideration. You have asked for advice about three of them:

(1) The statutory cap on damages in SG § 12-104(a)(2)(iii) would be amended to provide that the liability of the State or a State unit may not exceed $400,000 "to a single claimant for injuries arising from the claim or claims."

(2) The bill as amended would provide that, for any claim against the State or its units based on child sexual abuse, counsel may not charge or receive fees exceeding 10% of a settlement or 15% of a judgment.

(3) The bill as amended would require all claims of child sexual abuse against the State or its units to proceed through a mandatory alternative dispute resolution ("ADR") process administered by an entity designated by the Governor.

I will analyze each of these proposals in turn.

Analysis

A. Lowering the Damages Cap for All Claims

Under the Child Victims Act as enacted in 2023, the State may be liable up to $890,000 for each "incident or occurrence" of child sexual abuse. Under the proposed amendment, the State's liability would be limited to $400,000 per claimant, rather than per incident or occurrence. This amended damages cap would apply to claims that are

[2] However, such an action may not be brought if the alleged victim of abuse is deceased at the commencement of the action. CJP § 5-117(d).

already pending as well as future claims. To the extent it applies retroactively to reduce the total damages to which a plaintiff otherwise would have been entitled, this amendment raises a question under the Maryland Constitution's doctrine of "vested rights."

It is well-established that a law that operates to retroactively deprive a person of a vested right violates Article 24 of the Maryland Declaration of Rights and Article III, § 40 of the Maryland Constitution. *Prince George's County v. Longtin*, 419 Md. 450, 484-85 (2011). While there is no precise definition of what constitutes a "vested right," it is "something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another." *Allstate Ins. Co. v. Kim*, 376 Md. 276, 298 (2003) (citing *Godfrey v. State*, 530 P.2d 630, 632 (Wash. 1975)).

In *Longtin*, the Maryland Supreme Court found that the retroactive application of a statutory damages cap violated Article 24 of the Maryland Declaration of Rights and Article III, § 40. The Court noted:

> To be sure, applying a damage cap does not vitiate a person's remedy altogether. Moreover, there was no "particular" sum that [the plaintiff] had a right to when the statute was changed; it had not yet been determined by the jury. We are not persuaded, though, that these distinctions disqualify [the plaintiff's] accrued right to recover damages from the constitutional protections against retroactive application of laws... Our constitutional precedent recognizes that a person's rights shall not be "impaired" by later-enacted legislation.

419 Md. at 489. The Court went on to hold that the plaintiff "had a vested right in bringing his cause of action—with no statutory cap on damages—prior to the enactment of the LGTCA revisions." *Id.* at 489-90. *Longtin* provides support for a finding that application of a reduced cap to pending cases would be unconstitutional, and there is a not insignificant risk that a challenge along those lines could succeed.

Nevertheless, there are counterpoints. The most important distinction between this situation and *Longtin* is that Child Victims Act claims against the State are only possible in the first place because of the State's waiver of sovereign immunity. The claim in *Longtin*, by contrast, did not depend on any such waiver. *See* 419 Md. at 484. Waivers of sovereign immunity are disfavored and strictly construed in favor of the State, because courts defer to the General Assembly's authority to decide how far to waive immunity. *See, e.g., Williams v. Morgan State Univ.*, 484 Md. 534, 547 (2023); *see also Rodriguez v. Cooper*, 458 Md. 425, 451 (2018) (noting that whether to change the State's waiver of sovereign immunity "is entirely within the prerogative of the General Assembly"). And courts are less likely to find a right to be vested when that right is generally disfavored in the law. *See Roman Catholic Archbishop of Wash. v. Doe*, Nos. 9 & 10; Misc No. 2, Sept. Term, 2024 (Md. Feb. 3, 2025) (slip op. at 27 n.14). Moreover, a vested right must be "something more than a mere expectation based on

the anticipated continuance of the existing law." *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 560 (2011) (citation and emphasis omitted). That sort of "mere expectation" is all a plaintiff can have in the context of waivers of sovereign immunity, which the General Assembly retains full discretion to alter. *See Rodriguez*, 458 Md. at 451. There is accordingly a defensible argument that a plaintiff cannot acquire a vested right in a waiver of sovereign immunity, meaning the General Assembly can narrow the scope of the waiver, even retroactively.

The Supreme Court of Maryland further indicated in its decision upholding the Child Victims Act that "the constitutional protection even for an accrued cause of action . . . extends only to ensuring a reasonable opportunity to file suit, after which all remedies may be precluded." *Doe* (slip op. at 24-25). The Court, then, seems to be calling into question its earlier suggestion in *Longtin* that a plaintiff can acquire a vested right not only in a cause of action but in a particular amount of damages.[3]

For all these reasons, it is my view that, while the proposed alteration of the damages cap will certainly be challenged, and there is a not insignificant risk that such a challenge could succeed, the change is defensible and not clearly unconstitutional.

B. Limitation of Counsel Fees to 10% of Any Settlement or 15% of Any Judgment

The bill as amended would provide that counsel fees in a claim against the State based on child sexual abuse could not exceed 10% of a settlement or 15% of a judgment. This change would apply retroactively to retainer agreements entered into before the effective date of the bill. Nonetheless, my view is that the fee limitation is likely constitutional.

Plaintiffs' attorneys challenging the fee limitation might first argue that it deprives them of a vested right in their fees beyond 10 to 15% of the settlement or judgment. However, it is doubtful a court would recognize a vested right in a fee that has not yet been earned. A vested right must be "more than a mere expectation." *Muskin*, 422 Md. at 560. There is no authority "for the proposition that, upon entering a contingent fee contract, the contract creates an immediate property right in the possible future fee." *State v. Maryland State Bd. of Contract Appeals*, 364 Md. 446, 459 (2001).

Plaintiffs' attorneys might also argue that, to the extent the limitation modifies their existing contracts with their clients, it violates the Contracts Clause of the United States Constitution, which forbids states to pass laws "impairing the Obligation of Contracts." U.S. Const., Art. I, § 10, cl. 1. But in the specific context of attorneys' fees, a change to the law affecting existing contracts is unlikely to violate the Contracts Clause.

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[3] In addition, other cases have indicated that a statutory cause of action vests only when an award or determination is made. *See Landsman v. Maryland Home Improvement Comm'n*, 154 Md. App. 241, 255 (2003); *McComas v. Criminal Injuries Compensation Bd.*, 88 Md. App. 143, 149-50 (1991).

Contracts Clause analysis considers the parties' legitimate expectations at the time of entering the contract. *See, e.g., U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 20 n.17 (1977). "In a heavily state-regulated area, the individual's expectations of immutability of contract are reduced, and change is more readily upheld." *East Prince Frederick Corp. v. Board of County Comm'rs*, 320 Md. 178, 186 (1990).

The attorney-client relationship is heavily regulated to protect clients. Indeed, the MTCA already caps attorneys' contingent fees. SG § 12-109. More generally, the parties to any retainer agreement would understand that any fees provisions remain subject at all times to external regulation to ensure their reasonableness. *See* Md. R. 19-301.5. That is, there is no guarantee that a fees provision in a retainer agreement will be enforceable to the full agreed amount. For all these reasons, modification of the fee in an existing retainer agreement would not violate the contracting parties' legitimate expectations. Letter from Robert A. Zarnoch, Counsel to the General Assembly, to Del. Robert L. Flanagan, at 2-3 (Apr. 8, 1998); *see also, e.g., McMullen v. Conforti & Eisele, Inc.*, 67 N.J. 416 (1975); *Paul v. United States*, 687 F.2d 364, 367-68 (Ct. Cl. 1982).

Also, even a change to the law that substantially impairs existing contracts is permissible if "reasonable and necessary to serve an important public purpose." *East Prince Frederick Corp.*, 320 Md. at 184; *see also Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444-45 (1934). Here, the State has an important interest in ensuring that the benefits of the Child Victims Act flow primarily to abuse survivors themselves. *Cf.* Letter from Robert A. Zarnoch, Counsel to the General Assembly, to Sen. American Joe Miedusiewski, at 3 (Oct. 21, 1993) ("Miedusiewski Letter") (explaining that this rationale has been used to uphold various federal attorney fee caps under due process challenge). And deference to the State's judgment of reasonableness is heightened when a change to the law affects private contracts rather than the State's own contracts. *See East Prince Frederick Corp.*, 320 Md. at 188.

Plaintiffs' attorneys also could argue that the change impairs plaintiffs' access to the courts by preventing them from obtaining counsel. Even assuming that argument had merit in some cases, however, that would be a factual claim requiring proof, and so would not invalidate the bill on its face. *See* Miedusiewski Letter at 3. The attorney fee limitation thus is not clearly unconstitutional, even as applied to existing retainer agreements.

C. Mandatory Alternative Dispute Resolution

Finally, the bill as amended would establish a mandatory alternative dispute resolution process for child sexual abuse claims filed against the State or its units. The Governor would designate a State entity that would administer the process and adopt regulations to govern it. The ADR requirement would apply prospectively only to child sexual abuse claims filed after the effective date of regulations implementing the process. The bill does not specify the details of the process, but it does provide that the ADR decision would be subject to judicial review similar to review of contested cases under the Administrative Procedure Act (although the ADR process itself would not be subject to the Administrative Procedure Act's contested case procedures).

The General Assembly may require a category of civil claims to proceed through mandatory arbitration or alternative dispute resolution. *See Attorney General v. Johnson*, 282 Md. 274 (1978), *overruled in part on other grounds, Newell v. Richards*, 323 Md. 717 (1991). One difference between the process proposed here and the process for medical malpractice claims approved in *Johnson* was that claimants under the child sexual abuse ADR process will not be entitled to a jury trial at any stage. But this is likely permissible in the context of claims brought under a waiver of sovereign immunity, because there was no common-law right to trial by jury in such cases. Prior to the waiver, there was no right to trial by jury against the State on any tort claim; providing that a limited category of damages claims against the State will be resolved without a jury thus does not violate any constitutional jury trial right. *See Rodriguez v. State*, 218 Md. App. 573, 631-32 (2014).

Similarly, plaintiffs' constitutional right of access to the courts under Article 19 of the Declaration of Rights is likely not implicated here. Because the waiver of sovereign immunity is a matter of legislative grace, the General Assembly has significant leeway to alter procedures for recovery under the waiver, especially when it acts prospectively only. *See State v. Wallace*, Nos. 164 & 642, 2022 WL 2282705, at *20 (Md. Ct. Spec. App. June 23, 2022) (unreported).

Thus, although many details of the proposed ADR process have yet to be determined, the aspects of the process established by the bill itself are not clearly unconstitutional.

Conclusion

Although each of the proposed amendments to H.B. 1378 discussed above is likely to be challenged, and there is a not insignificant risk that the challenges could succeed—particularly as to the retroactive application of the $400,000 damages cap to already-pending claims—in my view the proposed changes are all defensible, and none are clearly unconstitutional.

Sincerely,

Sandra Benson Brantley
Counsel to the General Assembly