



PAUL DeWOLFE

PUBLIC DEFENDER

KEITH LOTRIDGE

DEPUTY PUBLIC DEFENDER

MELISSA ROTHSTEIN

DIRECTOR OF POLICY AND DEVELOPMENT

KRYSTAL WILLIAMS

DIRECTOR OF GOVERNMENT RELATIONS DIVISION

ELIZABETH HILLIARD

ASSISTANT DIRECTOR OF GOVERNMENT RELATIONS DIVISION

POSITION ON PROPOSED LEGISLATION

BILL: HB 1155 – Foster Parents, Kinship Parents, Preadoptive Parents, and Caregivers – Right to Intervene

FROM: Maryland Office of the Public Defender

POSITION: OPPOSE

DATE: March 8, 2022

The Maryland Office of the Public Defender (OPD) respectfully requests that the Committee issue an unfavorable report on House Bill 1155.

In Child in Need of Assistance (CINA) and Termination of Parental Rights (TPR) cases, the court needs to make determinations that are in the best interests of the children before the court. House Bill 1155 should not pass because in certain cases it takes that discretion away from the court and prohibits the court from making decisions on a case by case basis by requiring the court to allow foster parents and kinship caregivers to intervene *even in cases where it is not in the child's best interest*. Furthermore, under HB1155, the court would have no authority to remove a foster or kinship caregiver from the case even if they no longer have custody of the child, have lost their foster care license, are found to have neglected or abused the child, or incur criminal charges or convictions. Under the current law, temporary caregivers have the right to be heard and provide information to the court. HB 1155 inappropriately seeks to remove that discretion from the court and force courts to permit any and all temporary caregivers to become parties to the CINA and TPR cases.

The U.S. Supreme Court and every state, including Maryland, recognizes that the parent-child relationship is unique and unlike any other relationship. HB1155 would inappropriately - and unconstitutionally - put third parties on equal footing as parents in CINA and TPR hearings. Allowing foster parents to be parties will disproportionately harm economically disadvantaged and marginalized parents and children who are

already facing many barriers to reunification. This would unconstitutionally diminish parental and children's rights by adding additional parties to a court process that already accommodates multiple attorney voices for children, parents, legal guardians, and defacto parents.¹ The parties' attorneys are best positioned to discern whether and when the children's needs will be served by hearing from these third party participants in the children's care.

(1) This change in the juvenile statute would harm the very families that the juvenile statute was meant to preserve and assist.

- Children who are depending on their temporary caregivers to take care of them during a traumatic time in their lives will end up in the middle of an adversarial relationship between their caregivers and parents. Children in foster care are suffering the trauma of being separated from their parents and families. Caregivers are not only supposed to be taking care of them, but also partnering with the Department of Social Services to promote reunification. yet rather than being supportive and at least neutral, caregivers will be able to join the fray instead of supporting the reunification of children with their families. Custody battles are harmful to children's mental health.
- Allowing caregivers to be parties would have a chilling effect on children: They will be afraid to complain if they were unhappy or not doing well in foster care and afraid to disclose if something bad is happening in their foster home because they know their caregiver is a party and will receive documents and information about their case and might be angry at or even retaliate against against the child. Conversely, once the foster or kinship care provider feels empowered as a party, the foster parent could seek to influence the child against the parent(s).
- Allowing caregivers to join a case as a party creates an antagonistic relationship between parents and caregivers. Parents go into a CINA or TPR case trusting that their children are being taken care of on a temporary basis by people who support the family's attempts to reunify. When caregivers join a case as a party, the trust is destroyed, and the parent will see the caregivers as yet another person trying to keep them apart from their children. The relationship between the caretakers and the parents would become strained and would affect the quality of the relationship between parents and caretakers, which would have a detrimental effect on the children.

¹ The right to maintain family ties is a fundamental constitutional right and presumed to be in the best interests of children. See *Lassiter v. Department of Social Services*, 452 U.S.18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Stanley v. Illinois*. 405 U.S. 645 (1972); *Troxel v. Granville*. 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

- The addition of caregivers – third parties - erodes the Constitutional right of parents because it would give caregivers equal right as the parents to say what should happen to the children, even though what the third parties want may be in conflict with the interests of the parents and children.
- It incentivizes the Department of Social Services to remove children from a caretaker who intervenes and takes a position different from the Department.
- Allowing a caregiver to become a party will also deprive a child of another supportive, and reliable, person in their life post reunification. These children have spent at least 6 months with this family. That connection will unequivocally be lost once reunification occurs as the parent(s) will now view them as adversaries looking for a reason to take their child (ren).

(2) Mandatory intervention takes authority out of the court's hands to protect a child if it has reason to believe that caretaker intervention is not in the child's best interests.

While the majority of foster and kinship care providers are good people who are doing a kind act for children, not all of them are good or have pure motives. For example, some caregivers do end up causing emotional or physical harm to the children in their care. The court needs to be able to keep out people whose involvement in the case would harm the children. Under the terms of HB1155, if a court determines that a caretaker would cause harm to the child by participating in the hearings the court would be powerless to remove the caretaker as a party, even though they have no independent legal interest in the children.

Example A: A child has been living with a foster care provider for 12 months, but is then removed from that placement because it was determined that the child was sexually abused by that caretaker. Under HB1155, that foster caregiver must still be allowed to participate in the hearing and therefore could seek custody of the child, and the court would be powerless to prevent that caretaker from being a party.

Example B: A child has been in a foster home for 12 months because the parents had substance use disorder and unregulated mental health problems. However, after one year, the parents have successfully completed drug treatment and are properly medicated for their mental health problems under the care of a psychiatrist. The Department of Social Services, children's attorney, and parents all agree that the children should be reunified with their parents. The children want to go home to their parents. However, the foster caregivers want to keep the children and try to adopt them. HB1154 would require that they be involved in a

hearing as a party and can delay reunification of the family by turning the case into a custody battle.

Example C: Two siblings are with foster family X, and the third sibling is with foster family Y. After 12 months, DSS, the children, and the parents believe it would be in the children's best interest to reunify with their mother, a single parent. Foster family X supports the plan to reunify the family. Foster family Y is very wealthy and believes they can provide a better life for the third sibling. HB1155 would require the court to allow foster family Y to intervene and fight for custody of the third sibling.

(3) Mandatory intervention by a caretaker in a Termination of Parental Rights proceeding allows a third party to advocate for ending the legal relationship between a parent and a child, which is a legal determination only, not a hearing about where the child should be placed.

A termination of parental rights (TPR) hearing is a hearing where the State of Maryland or the Child asks the court to permanently cut off the legal relationship between the parent and the child. A TPR hearing is the civil-law equivalent of a death penalty case, because if parental rights are terminated, the parent and child forever lose their legal ties, rights, and obligations to each other, and it is irrevocable. The issue at a TPR is whether the law supports the decision to terminate parental rights. It is not a custody hearing. Permitting temporary caregivers to be a party in a TPR proceeding would be analogous to allowing a victim's family member to become a party in a criminal trial. HB1155 would also be subject to a Constitutional challenge because it permits third parties – people who don't otherwise have a right to the children – to argue that the parent-child relationship should be extinguished forever.

(4) The State would face an additional fiscal burden if required to provide counsel at State expense for indigent parties.

- According to Md. Rule 11-207 (a) a party in a CINA case is entitled to counsel. Additionally, Md. Code, Courts & Judicial Proceedings § 3-813 entitles a party to counsel at state expense if a party is indigent. Rule 11-207(c)(2) requires the Office of the Public Defender to provide counsel only to indigent parents and guardians. This means that funding for indigent foster and kinship caretakers must necessarily come from the judiciary's coffers.

(5) Mandatory intervention will cause delay in attaining permanency for children in foster care.

- In most CINA and TPR cases, there are already at least 4 parties, each with separate counsel. When sibling interests do not align they are given separate counsel. Legal Guardians are entitled to counsel. Defacto Parents are entitled to bring private counsel. All parents on a birth certificate are entitled to counsel. Allowing intervention means that for every hearing there could be one or more caretakers for each child included as a party even if there were no special circumstances that necessitated the involvement of the caretakers.
- Courts must take into account the schedule of the parties and counsel when scheduling cases.
- Caregivers who are aggrieved by a court's ruling would have the right to note an appeal, which would delay the progress in the case.
- Family separation would be prolonged by complicating the litigation, which will further traumatize the children and harm families.

(5) Existing rules and statutes already provide a clear avenue for intervention by third parties who want custody of the child.

- Pursuant to Courts & Judicial Proceedings § 3-816.3, foster care providers have the right to notice of proceedings and the right to be heard at the proceedings.
- Md. Rule 11-215 grants an individual leave to seek intervention (and become a party to the case) and fight for custody of a child, obtain certain records, and participate in dispositional hearings.
- Where it is in the children's best interests, caregivers already have a way to become a party in the case.

CONCLUSION

Laws already exist to allow foster and kinship caregivers the opportunity to provide information to the court without becoming parties to a government-initiated case. Adding another party to a CINA or TPR case is not the answer to the problem of courts not being given the information they need to make well-informed decisions about what is in the children's best interests. Temporary caregivers have a role to play in the child welfare system: they are supposed to take care of children while their parents are not

able to, but they are not supposed to become involved in the litigation. Children and families in Maryland are counting on caregivers to continue with their vital role.

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For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on House Bill 1155.

**Submitted by: Government Relations Division of the Maryland Office of the Public Defender. Authored by: Nenutzka C. Villamar, Assistant Public Defender 410-458-8857
nena.villamar@maryland.gov**