



POSITION ON PROPOSED LEGISLATION

BILL: HB808 JUVENILE LAW - PROCEDURE- APPEARANCE BY VIDEO CONFERENCE

POSITION: UNFAVORABLE

DATE: February 16, 2021

Legislation that broadens indiscriminately the use of video conference in contested juvenile delinquency proceedings presents risks of abridging children's constitutional rights and other significant harms. Under no circumstances should a child be compelled or induced to participate in hearing by video conference. Even with the child's consent, the holding of merits hearings, contested violation of probation hearings, or other substantive testimonial proceeding should be avoided except in the most extreme circumstances. Among the concerns that such hearings raise¹ are as follows:

- Violation of the confrontation clause, which guarantees the accused the right to be present at every stage of their trial² and the right to confront their accuser face-to-face;³
- Diminution of the right to effective assistance of counsel, the right to cross-examine, and other due process safeguards;⁴
- Challenges to the attorney-client relationship, when both are appearing from different locations, and even when they are appearing from the same remote location;
- Difficulties in communication between remote parents and/or detained children, as well as further complications when Court interpreters are involved

The concerns outlined above do not obviate the truth that use of video conferencing during the COVID-19 pandemic and related court shutdowns in uncontested and non-evidentiary hearings with the agreement of court-involved children through their advocates has served the interests both of children and the Courts charged with their care and rehabilitation. Among several of these benefits that might continue to serve these

¹ Shared by the Family and Juvenile Law Section Counsel of the Maryland Bar Association, the National Juvenile Defender Center and the Supreme Court of Florida, which recently struck down a related law

² *Illinois v. Allen*, 397 U.S. 337, 338 (1970)

³ *Maryland v. Craig*, 497 U.S. 836, 850 (1990); see also *White v. State*, 223 Md. App. 353, 392-93 (2015).

⁴ *Pinkney v. State*, 350 Md. 201, 209 (1998)

interests in uncontested, non-evidentiary hearings with child consent (in a future where presence in court does not risk the safety of those present) are as follows:

- Allowing a child who resides or is detained in another jurisdiction, and where appearing by video might advance their interests in their Maryland juvenile court case;
- A child who suffers from anxiety, stress, or other emotional harm associated with appearing in court such that they consider not appearing in person, might avoid that harm and a writ of attachment, by requesting to attend remotely;
- Where lack of equitable transportation services prevent the child's family from arranging the child's presence in court as well as ensuring they attend school, that child or family member might appear by video for an uncontested review or status hearing;

In summary, while the vast majority of hearings involving children would risk detriment to the child were they held by video conference, there exist specific circumstances where a child could reasonably express their interest in a hearing by video conference. Above all, the Court's power to modify a hearing to video conference should be narrowly curtailed to instances in which the request is made *by the child*, and not expanded to apply to any reason cited by any juvenile court stakeholder. The proposed legislation risks doing just that, absent strict conditional language.

The most elegant solution might be no such provision at all. While the precepts set forth above bestow a right to the accused to an in person-hearing, there is no legal principle or statutory provision that currently prohibits a juvenile court in Maryland from accepting a child's valid waiver of that right as well as any it implicates. The court is free to grant a child's request to appear by video conference and allow for an exception to the widely recognized norm of a child appearing at a hearing in person with their attorney. As discussed above, the rights associated with appearing in person are the accused child's rights alone to assert. They are therefore the child's alone to waive.

It may be that a remote or video hearing would offer benefits of efficiency and convenience to others besides the child involved. This should not weigh in favor of this law being passed. Unless the child wishes to waive their right to an in-person hearing, those hypothetical benefits cannot and do not outweigh the rights of a child to a fair hearing. To codify broadly permissive latitude for the Court to hold hearings by video conference would risk prioritizing the preferences of adult practitioners over the constitutional due process rights of the children whose care and protection is at the very heart of the Court's purpose.