**To:** Virginia House Courts of Justice Committee

**From:** The National Federation of the Blind of Virginia

**Date:** February 2, 2017

**Re:** HB 2273 / SB 1199; Objections Raised by the Virginia Family Law Coalition.

1. **Introduction**

At the House Civil Law subcommittee hearing on Wednesday, January 18, the Virginia Bar Association Virginia Family Law Coalition, while experts on Virginia family law, made four claims about HB 2273 / SB 1199 relating to disability law unsupported by law or fact that led to HB 2273 being tabled. After the subcommittee hearing, we reached out to head of the Family Law Coalition and discussed our objections to their statements. During the Senate Courts of Justice Committee hearing on February 2, 2013, they were not present. We are uncertain as to whether we have convinced them of our point of view or whether they maintain their initial objections. Therefore, we wanted to briefly discuss each point and provide our point of view.

First, they claimed that the Americans with Disabilities Act (ADA) already provides substantive protections to parents with disabilities. However, numerous court opinions make it clear that the ADA does not provide substantive rights to parents with disabilities but merely ensures accessible court proceedings. Second, they claimed that parents with disabilities do not face heightened removal rates of children. However, the Civil Rights Division of the Department of Justice (DOJ) and the American Bar Association (ABA) have found that parents with disabilities do face higher rates of removal. Third, they objected to subsection C in each section because they say they have never seen burden shifting in other aspects of family law requiring clear and convincing evidence. However, Va. Code Ann. §16.1-283(C)(2) requires a court to find, by clear and convincing evidence, that it is in the child’s best interest to terminate a parent’s residual parental rights. Finally, they also objected to the bill only addressing the rights of blind parents. However, a one-size-fits-all approach to disability may fail to protect the rights of all parents with disabilities.

1. **Applicability of the ADA**

Federal courts interpreting the ADA have long held that courts must provide accessible materials and ensure that a person with a disability has meaningful access to proceedings; but that there are no substantive rights regarding a disable parent’s rights. For example, in Arneson v. Arneson, the Court held that, “A court has been considered a “public entity” for purposes of the ADA. Galloway v. Superior Court, 816 F.Supp. 12, 18 (D.D.C.1993) (court system is a “public entity” under the ADA and must provide reasonable accommodations for juror's visual limitations).   For our case, however, no authority supports the extension of the ADA into parental custody disputes.   Most cases concerning the application of the ADA in court proceedings deal with reasonable courthouse accommodations.   See Matthews v. Jefferson, 29 FSupp2d 525 (W.D.Ark.1998) (county courthouse in violation of ADA by failing to make courthouse readily accessible to paraplegic);  Ann K. Wooster, J.D., Annotation, When Are Public Entities Required to Provide Services, Programs, or Activities to Disabled Individuals Under Americans with Disabilities Act, 42 U.S.C.A. § 12132, 160 A.L.R. Fed. 637 (2000).   A custody proceeding is not a “service, program, or activity” under the provisions of the ADA. In re Adoption of Gregory, 434 Mass. 117, 747 N.E.2d 120 (2001) (proceedings to terminate parental rights are not “services, programs, or activities,” under the ADA). We conclude that the ADA does not apply to this custody litigation.” [[1]](#footnote-2)

Given this widely held view among federal courts, it is clear that the ADA does not provide substantive protections to parents with disabilities but merely ensures that a court proceedings are accessible. Being provided court documents in Braille or an accessible electronic format is little comfort to a parent whose child has been removed due solely to the parent’s blindness.

1. **Discrimination Faced by Parents with Disabilities**

Despite the Family Law Coalition’s lack of experience, which is likely a result of the low incidence of blindness, the ABA and the DOJ have found that disabled parents face higher rates of removal of their children. For example, in a 2017 report supporting ABA resolution 114, urging states to pass legislation similar to HB 2273 / SB 1199, the ABA states, “The blind and deaf communities also report heightened rates of child removal and loss of parental rights. In a study of more than 1,200 parents with predominately physical disabilities, 12.6 percent reported experiencing discriminatory treatment related to custody litigation. Persons with disabilities who seek to become foster or adoptive parents also encounter barriers based on biases and stereotypes about their parenting abilities.” (footnotes removed).[[2]](#footnote-3)

Additionally, in an August 2015 report, the Department of Health and Human Services (HHS) and the DOJ stated that, “Both the HHS Office for Civil Rights (OCR) and DOJ Civil Rights Division have received numerous complaints of discrimination from individuals with disabilities involved with the child welfare system, and the frequency of such complaints is rising…. Parents who are blind or deaf also report significant discrimination in the custody process, as do parents with other physical disabilities…. For example, a child welfare agency removed a newborn for 57 days from a couple because of assumptions and stereotypes about their blindness, undermining precious moments for the baby and parents that can never be replaced.” (footnotes removed).[[3]](#footnote-4)

1. **Rationale for Requiring Clear and Convincing Evidence before Restricting Parental Rights of Blind Parents**

Subsection C of each section of code implemented by HB 2273 / SB 1199 requires a party alleging “that such parent's blindness should (i) be a factor to be considered as not in the best interests of the child or (ii) otherwise be a reason for the denial or restriction of [parental rights], such party making such allegation must prove by clear and convincing evidence that the best interests of the child would not be served or met due to such parent's blindness or that such parent's blindness should serve as the basis for such denial or restriction.”

Despite the Family Law Coalition’s claim to the contrary, this would not be unique in Virginia family law. Indeed, “before residual parental rights can be terminated under Code 16.1-283(C)(2), a court must find: (1) by clear and convincing evidence; (2) that termination is in the child's best interests; and, (3) that the parent or parents, without good cause, have been unwilling or unable within a reasonable period of time not to exceed twelve months from the date the child was placed in foster care to remedy substantially the conditions which led to the child's foster care placement, notwithstanding the reasonable and appropriate efforts of social, medical, mental health or other rehabilitative agencies to such end.” C.S. v. Virginia Beach Dep’t of Soc. Serv., Va. Ct. App. Record No. 3156-02-1 (Sept. 30, 2003).[[4]](#footnote-5) The reason for this is that the Constitutional right to due process requires that allegations of parental unfitness be supported by at least clear and convincing evidence. *See, e.g.*, *id.* citing Wright v. Alexandria Div. of Soc. Serv., 16 Va. App. 821, 433 S.E.2d 500 (1993).

To prevent discrimination against the blind, HB 2273 / SB 1199 will accelerate the burden shifting and heightened standard of review already found in Virginia family law required in cases to terminate parental rights, which occur at the end of a long cycle of state intervention, to cases that merely restrict parental rights of blind Virginians which precede termination proceedings.

1. **Conclusion**

The Family Law Coalition’s relative inexperience representing disabled parents has led to a lack of understanding of the rights, or lack thereof, of parents with disabilities and the dangers we face in family court. This very inexperience, due to the relatively low incidence of disability and the financial hardships we face, demonstrates why HB 2273 / S 1199 is so sorely needed; to provide us the rights most lawyers think we already have and to inform the advocates who are supposed to protect our rights in these proceedings what options are available.

While we agree that protecting the rights of all disabled parents is ideal, we cannot speak for people with disabilities writ large. These parents, especially those with mental illness, as they face the most discrimination among parents with disabilities,[[5]](#footnote-6) may need additional safeguards beyond those provided in this bill. However, we must not let perfect be the enemy of the good. We must start by protecting the rights of blind parents and let other groups with different disabilities and their advocates build on this law when they determine what safeguards will ensure their rights are protected as well.

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1. Case *available at* <http://caselaw.findlaw.com/sd-supreme-court/1309193.html> [↑](#footnote-ref-2)
2. Report for resolution 114 *available at* <http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2017_hod_midyear_electronic_report_book.authcheckdam.pdf> [↑](#footnote-ref-3)
3. Report *available at* [https://www.ada.gov/doj\_hhs\_ta/child\_welfare\_ta.html#\_ftn10](https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html%22%20%5Cl%20%22_ftn10) [↑](#footnote-ref-4)
4. *Available at* <http://www.courts.state.va.us/opinions/opncavtx/3156021.txt>. [↑](#footnote-ref-5)
5. *See* sources in footnotes 2 and 3. [↑](#footnote-ref-6)