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Senate of Maine
Senate District 31

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Testimony of Senator Donna Bailey introducing
LD 1544, An Act to Support Families by Improving the Court Process for Child Protection Cases
Before the Joint Standing Committee on Judiciary
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Senator Carney, Representative Kuhn, and Esteemed Members of the Joint Standing Committee on Judiciary, my name is Donna Bailey, and I proudly represent Senate District 31, which includes Buxton, Old Orchard Beach, and Saco. Today, as a former Probate Judge, I am pleased to introduce my bill LD 1544, "An Act to Support Families by Improving the Court Process for Child Protection Cases."

The Maine Child Welfare Advisory Panel (MCWAP) is a federally mandated citizen review panel made up of professional and private citizens who are responsible for determining whether state and local agencies are effectively discharging child protective and child welfare responsibilities, pursuant to the Child Abuse Protection and Treatment Act (CAPTA) and the Children's Justice Act (CJA). One of MCWAP's required responsibilities under CAPTA is to prepare an annual report containing a summary of the activities of the Panel and recommendations to improve the child protective services system. For the last several years, I have had the honor and privilege to serve as a member of MCWAP, in the seat reserved for a current member of the Maine Legislature.

Attached to my testimony today is the 2024 Annual Report from the Maine Child Welfare Advisory Panel. LD 1544, An Act to Support Families by Improving Court Process for Child Protection Cases, moves forward three of MCWAP's recommendations from the 2024 Annual Report. The three recommendations are:

1. Repeal a prior involuntary termination of parental rights as an aggravating factor in Title 22, section 4002(1-B)(C);
2. Amend Title 22 to make the Department of Health and Human Service's obligation to provide reasonable efforts to rehabilitate and reunify families a discrete element that is required prior to termination of parental rights; and
3. To ensure all child welfare partners consider the trauma that children experience when removed from their family of origin by requiring the court to make certain findings in the early stages of a child welfare case.

When a parent-child relationship can be maintained safely with adequate services and support, the State has a moral, statutory and Constitutional obligation to all parties involved, especially the child, to do everything it can to explore that as a possibility. This bill makes specific changes to the court process as set out in Title 22 to ensure that all parties involved in the child welfare system are upholding that obligation. In essence, LD 1544 seeks to insure the focus of Maine's Child Protective statutes remains on protecting children from harm, and not on punishing parents.

Current Maine law makes the prior involuntary termination of parental rights an aggravating factor. The practical effect of this is that the Department, after having obtained a preliminary protection order, will have no further obligation to support reunification of the child with their parent. It is important to note that this aggravating factor only applies to involuntary termination of parental rights – or, in other words, when a parent previously insisted on a trial and lost. If a parent had a prior voluntary termination of parental rights – when a parent agreed to have their parental rights terminated without requiring a trial - the aggravating factor does not apply. There is no consideration as to how long ago parental rights were terminated involuntarily or the extent of rehabilitation and growth a person has demonstrated in the intervening years.

This Committee has been entrenched in looking at the rights of defendants who are charged with crimes in Maine's criminal courts. This aggravating factor is analogous to a person's criminal sentence being enhanced due only to the fact that the defendant had exercised their right to trial in a prior prosecution. Both of these examples involve Constitutional rights. Nowhere else in our statutes would we tolerate the idea that someone should be penalized for requesting a court fully hear their case before infringement of their Constitutional rights.

In addition, this aggravating factor is a clear outlier in the types of other conduct for which we allow a court to permit the Department to cease reunification efforts. Other aggravating factors include: the parent has subjected any child that they were responsible for to rape, gross sexual assault, sexual abuse, incest, aggravated assault, kidnapping, promotion of prostitution, sexual exploitation of a minor, sex trafficking, abandonment, torture, chronic abuse, or any other treatment that is heinous of abhorrent to society; the parent has refused for 6 months to comply with the treatment required in a reunification plan; the parent has been convicted of a crime of murder, felony murder, manslaughter, aiding, conspiring or soliciting murder or manslaughter, felony assault that results in serious bodily injury of another child in their care; the parent has abandoned the child.

During MCWAP's deliberations on this recommendation, child welfare system partners reported that this aggravating factor is one that is seldom used, as it does not align with best practice child welfare policies, which encourages supporting the parent-child relationship whenever that can be safely maintained. As it is rarely used and is antithetical to what Maine's child welfare system partners recognize is the best practice approach to child welfare system intervention, it should be eliminated from our statutes.

With respect to the sections of this bill related to the Department's reasonable efforts to rehabilitate and reunify families, it is important to note that nothing in these sections requires the Department to do anything that they are not already required to do under State and Federal law.

"Reasonable efforts" refers to the assistance, services, and supports provided by the Office of Child and Family Services to families in order to preserve and reunify families. Federal law requires states to make "reasonable efforts" to preserve and reunify families: (1) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (2) to make it possible for a child to safely return home.[1] Absent certain special circumstances, such as the finding of an aggravating factor, OCFS is required to make "reasonable efforts" in all cases. This aligns with the purposes of Title 22 to only remove children from their family of origin when failure to do so would jeopardize the child's health and welfare and require that reasonable efforts be made as a means for protecting the welfare of children.[2]

Currently, if the Court finds that reasonable efforts have not been made, the only consequence to the State is that OCFS cannot be federally reimbursed for its costs for serving the family to that point. Consequences to children, as well as parents and legal guardians, up to and including termination of their parental rights, may proceed regardless. The loss of Title IV-E funds has been insufficient to ensure fidelity to this obligation, given the obstacles currently presented.[3]

Including a reasonable efforts finding as a discrete, required element for termination of parental rights promotes the dispositional priorities of protecting a child from jeopardy and giving custody of the child back to a parent (or keeping them with a parent) at the earliest possible time.[4] And this is not a novel approach. At least 13 other states require a finding of reasonable efforts to proceed with termination of parental rights.[5] An additional 14 other states[6] include language in their statutes requiring reasonable efforts of the state's child welfare agency to factor more firmly into the decision-making process than current Maine Law. Adding accountability for the obligation to provide reasonable efforts as part of court determinations would not be unprecedented even in Maine. The Indian Child Welfare Act (and Maine's ICWA) already

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[1] Child Welfare Information Gateway. (2020). Reasonable efforts to preserve or reunify families and achieve permanency for children. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, https://ocfcpacourts.us/wp-content/uploads/2021/09/1.-Reasonable-Efforts-to-Preserve-or-Reunify-Families-and-Achieve-Permanency-for-Children.-new-committee-to-review.pdf. 42 U.S.C 671(a)(15).

[2] 22 M.R.S.A. §4003.

[3] "Although the Department filed rehabilitation and reunification plans pursuant to section 4041(1-A), the plans failed to afford the mother opportunities for home visits with sufficient nursing care or resources in place to assist her in alleviating jeopardy." In re Child of Barni A., 2024 ME 16, ¶ 24, 314 A.3d 148.

[4] 22 M.R.S.A. §4036(2).

[5] These include: Alaska, Arizona, California, Connecticut, New Jersey, New York, Ohio, Rhode Island, South Dakota, Texas and Utah.

[6] These include: Alabama, Arkansas, Colorado, Florida, Illinois, Indiana, Kansas, Maryland, Massachusetts, Minnesota, Missouri, New Mexico, Tennessee and Wyoming.

requires the Department to affirmatively demonstrate "active efforts" at rehabilitation and reunification as part of all ICWA cases.[7]

Although parents in several Law Court appeals have raised the argument that the Department has not made reasonable efforts, the Law Court has noted that even in cases where the trial court concluded that the Department had not made reasonable efforts, the Court cannot use this as a basis to overturn the termination because the statute does not require it as an element of termination. In the published opinions and memoranda of decisions issued by the Maine Law Court over the last five years, the sufficiency of reasonable efforts provided have been a frequently contested issue.[8] [9]

The Panel observed and discussed that families of low socio-economic standing are disproportionately represented in child welfare cases. These families often have overlapping vulnerabilities that create challenges to families in obtaining the supports and services they need to be successful. Where the consequence is the permanent severing of the constitutionally protected parent-child relationship, and where unnecessary termination of the parent-child relationship can cause long-term harm to the child, there must be better guardrails in place to ensure that the State complies with its obligation to provide reasonable efforts to prevent removal and reunification/rehabilitation in order to avoid unnecessary termination of the parent-child relationship. Children deserve to have a full and fair opportunity to safely remain, or, if removed, return, to their family of origin.

Finally, there is ample research to demonstrate that removal and entry into foster care evokes emotional and psychological trauma and is the most drastic safety intervention utilized by a child welfare agency."[10] This is an intervention that is designed to be used only when absolutely necessary to mitigate serious, imminent harm, and our justice system should only allow this to happen when it is absolutely necessary to mitigate such harm. That necessarily means that removal should only be called for in those cases where the harm of the child remaining in their

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[7] "Active efforts" means affirmative, active, thorough and timely efforts intended primarily to maintain or reunite an Indian child with their family. https://www.bia.gov/sites/default/files/dup/assets/bia/ois/ois/pdf/idc2-041405.pdf.

[8] "We have long held that although the Department's obligations pursuant to section 4041 are mandatory, the Department's failure to satisfy those obligations does not preclude a termination of parental rights. *In re Daniel C.*, 480 A.2d 766, 770 (Me.1984). We have stated: "We simply do not detect any legislative intent that the department's reunification efforts be made a *discrete* element of proof in termination proceedings," even though the court *may* consider the lack of reunification efforts as one factor in evaluating the parent's conduct for unfitness. *Id.* at 770–71." In re Doris G., 2006 ME 142, ¶ 16, 912 A.2d 572.

[9] In re Child of AnnaMarie D., MEM 2022-033.

[10] Vivek Sankaran. "A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families." Christopher Church and Monique Mitchell, co-authors. Marq. L. Rev. 102, no. 4 (2019): 1163-94, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3055&context=articles.

home outweighs the harm that the trauma of that removal will cause the child *and* that all reasonable efforts have been expended to structure supports and interventions that would allow the child to remain in their home without the risk of serious, imminent harm.

Other states have taken steps to ensure there is an appropriate balancing of the harms and that all other options have been considered. The remaining sections of LD 1544 would ensure our court process incorporates consideration and balance of the harm that occurs when children are removde from their home. In discussions on this issue, the Office of Child and Family Services ensured the Panel that their staff engages in this consideration and balance in each case. Therefore, there is no policy justification for failing to ensure that commitment and practice is reflected in the required court process.

I thank the Committee for its time, and I would be happy to answer any questions.

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