BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL

DONNA HILL STATON
DEPUTY ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

**CONFIDENTIAL**
February 6, 2017

The Honorable Kathleen M. Dumais
101 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Dumais:

You have asked for advice concerning House Bill 428, "Family Law - Child Conceived Without Consent - Termination of Parental Rights (Rape Survivor Family Protection Act)." Specifically, you have asked whether the alternative service provided for in new Family Law Article ("FL"), § 5-1403(d) is constitutional and legally sufficient. You specifically ask about the provision prohibiting a judge from requiring the publication of the name or other personally identifying information about the Petitioner or the child. It is my view that the alternative service provision is constitutional and legally sufficient.

House Bill 428 sets out the circumstances under which a judge, on petition by the parent of a child conceived as a result of an act of nonconsensual sexual conduct, may terminate the parental rights of the person who committed the act of nonconsensual sexual conduct. The alternative service provision, FL § 5-1403(d), states:

> (1) EXCEPT AS PROVIDED IN PARAGRAPH (3) OF THIS SUBSECTION, WHEN PROOF IS MADE BY AFFIDAVIT THAT GOOD FAITH EFFORTS TO SERVE THE RESPONDENT HAVE NOT SUCCEEDED OR THAT THE RESPONDENT HAS ACTED TO EVADE SERVICE, THE COURT MAY ORDER ANY OTHER MEANS OF SERVICE THAT THE COURT CONSIDERS APPROPRIATE UNDER THE CIRCUMSTANCES AND THAT IS REASONABLY CALCULATED TO GIVE ACTUAL NOTICE OF THE PROCEEDING TO THE RESPONDENT.
>
> (2) THE COURT SHALL RULE ON ANY MOTION FOR ALTERNATIVE SERVICE UNDER THIS SUBSECTION WITHIN 15 DAYS AFTER THE FILING OF THE MOTION.
>
> (3) THE COURT MAY NOT REQUIRE PUBLICATION OF THE NAME OF OR PERSONALLY IDENTIFYING INFORMATION ABOUT THE

PETITIONER OR THE CHILD.

Paragraph (1) of this provision is based on Maryland Rule 2-121(c), which provides:

> When proof is made by affidavit that good faith efforts to serve the defendant pursuant to section (a) of this Rule have not succeeded and that service pursuant to section (b) of this Rule [evasion of service] is inapplicable or impracticable, the court may order any other means of service that it deems appropriate in the circumstances and reasonably calculated to give actual notice.

This provision leaves the method of alternative service in the discretion of the judge, but it is apparently contemplated that it would be by publication, using a notice that looks something like this:

> [name of respondent] is hereby notified that a termination of parental rights case has been filed in the circuit court for (county name), case no. (number). [name of respondent] is believed to be the parent of a child conceived on or about (date) in (city, state). [name of respondent] shall file a written response. A copy of the complaint may be obtained from the clerk's office at (address) and (telephone number). If you do not file a written objection by (deadline), you will have agreed to the permanent loss of your parental rights to this child. Parties to this proceeding are entitled to counsel; if you cannot afford an attorney, one will be appointed for you.

Generally, due process requires that a party to a proceeding is entitled to both notice and an opportunity to be heard on the issues to be decided in a case. *Standard Oil Co. v. Missouri*, 224 U.S. 270, 281 (1912); *In re Katherine C.*, 390 Md. 554, 572 (2006).[1] With respect to notice, due process requires that it be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Maryland State Bd. of Nursing v. Sesay*, 224 Md. App. 432, 447 (2015). To meet constitutional muster, the means employed to give notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* Thus, the means chosen may be defended on the ground that it is "reasonably certain to inform those affected," or, where that is not possible "that the form chosen is substantially less likely to bring home notice than any other of the feasible and customary substitutes." *Mullane*, 339 U.S. at 315; *Sesay*, 224 Md. App. at 447.

No particular procedure is required in all cases. *Miserandino v. Resort Properties, Inc.*, 345

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[1] The Court of Appeals has interpreted Article 24 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth Amendment of the United States Constitution to be *in pari materia* with respect to this issue. *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 77 (2001).

Md. 43, 52 (1997). Instead, due process is flexible and "calls for such procedural protections as a particular situation may demand." *Reese v. Department of Health and Mental Hygiene*, 177 Md. App. 102, 150 (2007). Procedures adequate under one set of facts may not be sufficient in a different situation. *Miserandino v. Resort Properties, Inc.*, 345 Md. 43, 52 (1997).

In *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67 (2001), the Court of Appeals considered the application of Maryland Rule 3-121. That Rule is identical to Maryland Rule 2-121, which forms the basis of the provisions of House Bill 428 relating to alternative service. The Court noted that the Rule leaves the court free to "customize a method of service based on the facts and circumstances restricted only by the need to be 'reasonably calculated to give actual notice,'" a standard that embodies the "spirit and purpose of procedural due process" as discussed in the *Mullane* case. *Id.* at 80-81. While noting that personal service is the preferred method of service, the Court found that the rule "allows the District Courts to customize a method of service for situations where good faith attempts at personal service have been made unsuccessfully and prove futile." *Id.* at 82. Like Maryland Rules 2-121 and 3-121, the alternative service provision in House Bill 428 gives the courts wide discretion to require a method of service that is suited to the situation at hand and "reasonably calculated to give actual notice." Like these Rules, House Bill 428 requires the party seeking alternative service to file an affidavit that good faith efforts to serve the respondent have not succeeded or that the respondent has acted to evade service. Thus, it is my view that the basic concept of the House Bill 428 provision is both constitutional and legally sufficient.[2]

As mentioned above, personal service is the classic form of notice, "always adequate in any type of proceeding." *Mullane*, 339 U.S. at 313-314; *Miserandino, Inc.*, 345 Md. at 55-56 (1997). In contrast, service by publication is generally disfavored. The Supreme Court has said that "[n]otice by publication is a poor, and sometimes a hopeless, substitute for actual service of notice. Its justification is difficult, at best." *New York City v. New York, N.H. & H.R. Co.*, 344 U. S. 293, 296 (1953). The Court has recognized, however, that "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." *Mullane*, 339 U.S. at 313-314. Thus, "when the names, interests, and addresses of persons are unknown, plain necessity may cause a resort to publication." *New York City*, 344 U.S. at 296. In such situations, employment of "an indirect, and even a probably futile, means of notification is all that the situation permits." *Mullane*, 339 U.S. at 316.

When making a determination of an appropriate method of alternative service, the court "must balance the interests of the state or the giver of notice against the individual interest sought to be protected by the fourteenth amendment." *Miserandino*, 345 Md. at 53. Among the multiple

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[2] In fact, notification by publication is available in other proceedings that can lead to a termination of parental rights under current law, including FL §5-316(f) (petition for guardianship); §5-334(d) (Adoption Without Prior Termination of Parental Rights); §5A-3A-15 (Private Agency Guardianship and Adoption); §5A-3B-15 (Independent Adoption).

factors to be considered in determining what process is due in a given situation is the nature of the action being brought. *Id.* "[T]he more significant the interest, the greater the required certainty that the notice will be effective." *Golden Sands Club Condo., Inc. v. Waller*, 313 Md. 484, 502 (1988). There can be no question that termination of parental rights implicates significant interests. The Supreme Court has said that parental rights are "far more precious than any property right," *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982), and they have consistently been treated as a fundamental right entitled to due process protections. *In re Adoption/Guardianship No. 6Z000045*, 372 Md. 104, 115 (2002). The process that is due includes sufficient "reasonable good faith efforts" to locate the parent and give them notice of a hearing that could result in a termination of rights. *Id.* at 121-122, *see also Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

As a result, courts have allowed notice by publication in cases involving adoption and termination of parental rights. *In re A.Y.*, 16 S.W.3d 387, 389 (Tex. App. 2000); *Dana P. v. State*, 656 P.2d 253, 256-257 (Okla. 1982); *Lutheran Social Services of New Jersey v. Doe*, 411 A.2d 1183, 1186 (N.J. 1979). Such notice is not permissible, however, when the person's identity is known, and methods of contact are available. *In re E.R.*, 385 S.W.3d 552, 560 (Tex. 2012) (state knew mother's identity and had been in regular contact with her); *Taylor v. Padgett*, 684 S.E.2d 434, 438 (2009) (relatives had the phone number of a woman who was living in her truck); *Augusta County Dept. of Social Services v. Unnamed Mother*, 3 Va. App. 40, 348 S.E.2d 26 (1986) (mother knew name and location of father, but did not want to notify him). Nor is notice by publication permissible unless the moving party shows, by affidavit or testimony, that they have made diligent efforts to identify and locate the missing parent. *Kickapoo Tribe of Oklahoma v. Rader*, 822 F.2d 1493, 1498 (10th 1987); *In Interest of A.H.*, __ S.E.2d __ , 2016 WL 7235464 (Ga. App. December 13, 2016); *In re J.M.A.*, 240 P.3d 547, 550 (Colo. App. 2010); *Department of Children and Families v. J.J.E.*, 953 So.2d 659, 663 (Fla. App. 2007).

In cases where diligent efforts to ascertain the identity and location of the father have failed, however, courts have generally held that publication without the name of the mother is permissible. These cases have relied on the mother's privacy interests and state policies protecting confidentiality in adoption proceedings, as well as the diminished rights of fathers who do not maintain contact with or support an expectant mother or child. *Jones v. South Carolina Dept. of Social Services*, 534 S.E.2d 713, 715 (S.C. App. 2000); *South Carolina Dept. of Social Services v. Doe*, 527 S.E.2d 771, 773 (S.C. 2000); *Evans v. South Carolina Dept. of Social Services*, 399 S.E.2d 156, 157-158 (S.C. 1990); *see also Adoption Place, Inc. v. Doe*, 273 S.W.3d 142 (Tenn. App. 2007) (court found lack of diligent efforts, but noted that there is no statutory requirement that the name of the birth mother appear in the notice and concluded that it would approve the notice without it if there were evidence in the record that proved the statements therein). Because actions brought under House Bill 428 will generally be linked to adoptions, and in any event would raise privacy issues with respect to the victims of sexual assault, it is my view that the reasoning of these cases apply in this instance as well, and failure to publish the name of the petitioning parent would not violate due process.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

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