

Department of Legislative Services
Maryland General Assembly
2008 Session

FISCAL AND POLICY NOTE

House Bill 1147
Judiciary

(Delegate Dumais, *et al.*)

Family Law - Child Custody Determinations

This bill specifies the procedures under which courts should make legal and physical child custody determinations.

The bill may not be considered to be a material change of circumstances for purposes of modifying a custody order issued before the bill's October 1, 2008 effective date.

Fiscal Summary

State Effect: The bill is not expected to directly affect governmental operations or finances.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: The bill defines legal custody as the right and obligation to make long-range decisions involving matters of major significance to the child's welfare. Physical custody means the time the child is in the parent's care according to an agreed on or court-ordered schedule and the right and obligation of a parent to provide a home and make daily decisions during the time the child is with that parent.

The bill sets forth the factors that must be considered by the court and the factors that cannot be considered when making a determination regarding the legal and physical

custody of a child. The court may award sole legal custody to one of the parents, joint legal custody, or joint legal custody with one of the parents responsible for making the final decision if they cannot reach a shared decision after thorough discussion, and physical custody to one or both parents in any manner that the court determines is appropriate.

Subject to the provisions that require the court to consider the impact of likely abuse or neglect against the child, that abuse occurred against members of the child's household or that the parent was convicted of first or second degree murder, as specified in statute, the bill specifies that the court must give primary consideration to the best interest of the child when making a determination of legal and physical custody and requires the court to consider all relevant factors, including 19 factors that are specified in the bill.

The court must articulate on the record the factors considered in the custody determination. If the court finds that joint legal custody is appropriate and there is no evidence of the willingness and ability of the parents to communicate and reach shared decisions on the child's welfare, the court has to articulate on the record the findings that support the joint legal custody decision.

The court is prohibited from considering race or ethnicity, and the parent's sex. Unless there is a showing of actual or probable harm to the welfare of the child, the court is prohibited from considering a parent's religious practices, extramarital sex conduct and the sexual orientation of a parent. The court may not consider the relative earning capacities or financial circumstances of the parents except that the court may consider the practical limits on the custodial arrangements that result from the parents' combined financial resources and a parent's voluntary impoverishment on a showing of actual or probable harm to the child's welfare. The court is also prohibited from considering the parent's compliance with court orders on economic support, unless there is evidence that nonpayment affects the child's welfare.

A court is authorized to modify a custody order or agreement if the party requesting the modification proves that a material change of circumstances has occurred that affects the child's welfare and the court finds that modification of the custody order is in the best interest of the child. Relocation of a parent constitutes a material change of circumstances.

Current Law/Background: This bill is intended to set forth a statutory framework for custody determinations by the courts. The courts make custody determinations based on the factors and rationale set forth in common law to a greater extent than the factors currently set forth in statute. The common law factors are well-settled due to decisions by the appellate courts, but lower courts may still employ wide latitude in applying those

factors and may not always adequately articulate the rationale behind their custody determinations. Also, while the factors that courts must consider have been articulated in numerous appellate decisions, the factors that courts should not consider have been articulated to a lesser extent in the common law. Courts have also employed discretion in determining what constitutes a “material change of circumstances” for purposes of modifying custody determinations. This bill specifies that the relocation of a parent is a material change in circumstances. Under the common law, courts may not always find that relocation warrants consideration of modification of a custody order.

Common Law Framework for Custody Determinations: Maryland courts resolve custody disputes based on a determination of “what is in the child’s best interests.” *Taylor v. Taylor*, 306 Md. 290, 500 A.2d 964 (1986). In a custody dispute between the child’s parents, the court examines numerous factors and weighs the advantages and disadvantages of the alternative environments. The criteria for judicial determination includes, but is not limited to: (1) the fitness of the parents; (2) the character and reputation of the parties; (3) the desire of the natural parents and any agreements between them; (4) the potential for maintaining natural family relations; (5) the preference of the child, when the child is of sufficient age and capacity to form a rational judgment; (6) material opportunities affecting the future life of the child; (7) the age, health, and sex of the child; (8) the residences of the parents and the opportunity for visitation; (9) the length of the separation of the parents; and (10) whether there was a prior voluntary abandonment or surrender of custody of the child. *See: Montgomery County v. Sanders*, 38 Md. App. 406 (1977).

In addition to the factors specified above, in cases in which the court is considering an award of joint custody, the court examines a range of factors particularly relevant to a determination of joint custody, including: (1) the capacity of the parents to communicate and reach shared decisions affecting the child’s welfare; (2) the willingness of the parents to share custody; (3) the fitness of the parents; (4) the relationship established between the child and each parent; (5) the preference of the child; (6) the potential disruption of the child’s social and school life; (7) the geographic proximity of parental homes; (8) the demands of parental employment; (9) the age and number of children; (10) the sincerity of the parents’ request; (11) the financial status of the parents; (12) any impact on state or federal assistance; (13) the benefit to the parents; and (14) any other factors the court considers appropriate. *See: Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986).

If there is a dispute as to visitation or custody, the court must also determine whether mediation of the dispute is appropriate and would be beneficial to the parties and any minor children and if there is a properly qualified mediator available to mediate the dispute. The court must not order mediation if there is a good faith representation of genuine physical or sexual abuse of a party or a child subject to the proceeding.

The court's discretion to determine custody or visitation is limited as provided by law if there is an allegation or evidence of abuse or neglect. If the court has reasonable grounds to believe that a child has been abused or neglected by a party in a custody proceeding, the court must determine whether the abuse or neglect is likely to occur if custody or visitation rights are granted to the party. Unless the court specifically finds that there is no further likelihood of child abuse or neglect by the party, the court must deny custody or visitation rights to that party except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well being of the child.

In a custody or visitation proceeding, the court must consider evidence of abuse against the other parent of a party's child, the party's spouse, or any child residing within the party's household, including the child who is the subject of the custody or visitation proceeding. If the court finds that a party has committed abuse against any of the aforementioned people, the court must make arrangements for custody or visitation that best protect the child who is the subject of the proceeding and the victim of abuse.

Custody in the Real World: According to an empirical study of custody and divorce cases in Maryland completed in 2004 by The Women's Law Center, women request and receive sole custody of children more often than men do. The analysis of 1,022 divorce cases with children revealed that sole legal and physical custody to the mother occurred 38% of the time, the most frequent outcome. The next most frequent outcome was joint legal custody, with physical custody to the mother in 28% of cases. In 13% of cases, the outcome was joint legal and physical custody and in 7% of the cases, sole legal and physical custody went to the father. Joint legal custody with physical custody to the father also occurred in 7% of the cases.

Custody outcomes indicate, however, that parents are sharing some form of decision making in nearly half the cases with children. Also, custody outcomes are more frequently resolved through agreements of the parties than through judicial intervention. When custody issues are resolved through judicial intervention, parties return to court at least twice as often as when they agree on the outcome.

State and Local Fiscal Effect: This bill requires judges to alter the manner in which they make custody decisions, but is not expected to substantially impact operations of the Judiciary. This bill would not alter case management standards and family services provided by the circuit courts and the Family Services Administration in the Administrative Office of the Courts.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Human Resources, Judiciary (Administrative Office of the Courts), The Women's Law Center, Department of Legislative Services

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