

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 715
Judiciary

(Delegate Dumais, *et al.*)

Family Law - Denial of Paternity, Custody, and Visitation

This bill establishes that a man must be excluded from legal status as a child's father for purposes of guardianship or adoption, and be denied custody and visitation, if he committed rape in the first or second degrees, incest, or sexual abuse of a minor against the child's mother and the child was conceived as a result of any of these acts.

Fiscal Summary

State Effect: The bill's provisions do not materially affect the workload of the Judiciary.

Local Effect: The bill's provisions do not materially affect the workload of the circuit courts.

Small Business Effect: None.

Analysis

Bill Summary: In a petition for (1) guardianship to and adoption through a local department of social services; (2) guardianship and adoption by a private agency; or (3) an independent adoption, upon motion of the child's mother and after service of the motion in accordance with the Maryland Rules, reasonably calculated to give actual notice, and a hearing, a court is required to exclude a man as the father of a child under the following circumstances:

- if the court finds by clear and convincing evidence that the man committed rape in the first degree, rape in the second degree (involving vaginal intercourse through the force or threat of force or with a mentally or physically incapacitated

individual), incest, or, if the mother was younger than age 16 at the time of the act, sexual abuse of a minor; or

- if the court finds, by clear and convincing evidence, that the man committed acts in another jurisdiction that would constitute these acts in this State; and
- the child was conceived as a result of the act; and
- the court finds that it is in the child's best interests for the man to be excluded as the child's father.

In making a finding, in addition to any other relevant evidence, the court must consider a prior statement regarding the circumstances of the child's conception made by the child's mother to law enforcement, child protective services, or any other reliable third party. For purposes of service of the motion, the court is prohibited from requiring publication of the mother's name or other personal identifying information. A hearing to exclude a man as the father of the child must be held within 30 days of service of the motion.

If the court excludes a man as father of a child, the court may order the man to provide financial support to the child.

Unless good cause for the award of custody or visitation is shown by clear and convincing evidence, a court may not award custody of or visitation with a child to a parent if the court finds by clear and convincing evidence:

- that the parent committed rape in the first degree, rape in the second degree (involving vaginal intercourse by force or threat of force or with a physically or mentally incapacitated individual), incest, or, if the other parent is younger than age 16 at the time of the act, sexual abuse of a minor against the other parent; or
- that the parent committed acts in another jurisdiction that would constitute these acts in this State; and
- the child was conceived as a result of the act.

If it is in the best interest of the child, the court may approve a supervised visitation arrangement that assures the safety and well-being of the child's other parent or guardian and the child.

In making a finding of denial of custody or visitation, in addition to any other relevant evidence, the court must consider a prior statement about the circumstances of the child's

conception made by the child's mother to law enforcement, child protective services, or any other reliable third party. For service of process, the court may not require publication of the other parent's name or personal identifying information. A hearing must be held within 30 days after service of the motion.

Current Law: In petitions for (1) guardianship through or adoption by a local department of social services; (2) private agency guardianship and adoption; and (3) independent guardianship and adoption, unless a court excludes a man as father of a child, a man is the father if any of the following circumstances exist:

- the man was married to the child's mother at the time of the child's conception;
- the man was married to the child's mother at the time of the child's birth;
- the man is named as father on the child's birth certificate and the man has not signed a denial of paternity;
- the child's mother has named the man as the child's father and the man has not signed a denial of paternity;
- the man has been adjudicated to be the child's father;
- the man has acknowledged himself, orally or in writing, to be the child's father and the mother agrees; or
- a genetic test indicates the man is the child's biological father.

A petitioner must give a juvenile court notice that a man claims paternity who is not named in the petition and has not been excluded as a father. After a request of a party or claimant and before ruling on a guardianship or adoption petition, the juvenile court must hold a hearing on the issue of paternity.

Unless good cause for the award of custody or visitation with a child is shown by clear and convincing evidence, a court may not award custody or visitation to:

- a parent who has been found guilty of first or second degree murder of the other parent of the child, another child of the parent, or any family member residing in the household of either parent of the child; or
- a parent who has been found guilty of a crime in another jurisdiction that, if committed in Maryland, would constitute the above-mentioned acts.

If it is in the best interest of the child, however, a court may approve a supervised visitation arrangement that assures the safety and the psychological, physiological, and emotional well-being of the child.

When considering a ruling on a petition of guardianship of a child, a juvenile court has to give primary consideration to the health and safety of the child and consideration to all other relevant factors needed to determine whether terminating a parent's rights is in the child's best interests, including whether the parent has been convicted in any state or in a federal court of a crime of violence against a minor offspring of the parent, the child, or another parent of the child or has been convicted of conspiring or aiding the commission of these crimes. Also, a court may allow adoption without parental consent if the court finds by clear and convincing evidence that the parent has been convicted of the aforementioned crimes.

Background: Maryland common law requires courts to be guided by the best interest of the child in making custody and visitation decisions. Although the General Assembly has limited the discretion of the courts to award visitation in cases where there is a finding that the noncustodial parent has committed abuse toward the child, the spouse, or other household members, the courts have not denied all visitation except under exceptional circumstances. In *Arnold v. Naughton*, 61 Md. App. 427 (1985), *cert. denied*, 303 Md. 295 (1985), the Court of Special Appeals held that a finding that a noncustodial parent sexually abused the child did not preclude all visitation rights to that parent. A court could order limited, supervised visitation without abusing its discretion.

The U.S. Supreme Court and the Maryland Court of Appeals have also recognized that parents have a fundamental right to govern the care, custody, and control of their children without state interference, unless there is a showing of parental unfitness or the existence of exceptional circumstances. (*See, e.g. Troxel v. Granville*, 530 U.S. 57 (2000), *Koshko v. Haining*, 398 Md. 404 (2007), and *Janice M. v. Margaret K.*, 404 Md.661 (2008).)

According to a 2012 article in the *Duke Journal of Gender Policy and Law*, 31 states have enacted some form of legislation to address the rights of a parent who conceived a child through a forced sexual act. Twenty-six states have enacted legislation permitting courts to allow a rape victim to place her child for adoption without the consent of the father if the child was conceived as a result of rape. Of the 26 states, 14 allow for the termination of some or all of the other parental rights, such as the right to notice and consent, while the remaining 12 have no statutory provisions regarding a child conceived of rape if the mother decides to keep the child. South Dakota authorizes a court to prohibit, revoke, or restrict visitation rights for any person who has caused a child to be conceived as a result of rape. Louisiana requires that if a child is conceived as a result of felony rape, the parent who committed the rape must be denied visitation. However,

neither South Dakota nor Louisiana limits or restricts custody rights. Four states limit a father's rights to both custody and visitation if he has been convicted of rape. Six states allow for the termination of all parental rights if the father has been convicted of rape or sexual assault, and two states require a court to terminate a father's parental rights upon conviction. Five additional states do not require a conviction for a judge to terminate the parental rights of an individual who conceived a child through a sexual act.

According to the *2011 Uniform Crime Report* for Maryland, 1,196 forcible rapes were reported in calendar 2011. The number of children who were conceived as a result of these offenses is unknown.

Additional Information

Prior Introductions: SB 815 of 2009 was withdrawn prior to a hearing. SB 516 of 2008 passed the Senate as amended and received a hearing in the House Judiciary Committee, but no further action was taken. Its cross file, HB 500, received a hearing in the House Judiciary Committee, but no further action was taken. SB 679 of 2007 passed the Senate as amended and was heard by the House Judiciary Committee, but received no further action. Its cross file, HB 648, was heard by the House Judiciary Committee, but received no further action.

Cross File: SB 620 (Senator Raskin, *et al.*) - Judicial Proceedings.

Information Source(s): Judiciary (Administrative Office of the Courts), *Duke Journal of Gender Law and Policy*, *2011 Uniform Crime Report*, Department of Legislative Services

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