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Maryland General Assembly  
2017 Session

FISCAL AND POLICY NOTE  
First Reader

Senate Bill 368

(Senator Lee)

Judicial Proceedings

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**Child Custody - Legal Decision Making and Parenting Time**

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This bill alters provisions of law relating to child custody and visitation proceedings and establishes numerous factors for courts to consider in cases involving “legal decision making” and “parenting time.”

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**Fiscal Summary**

**State Effect:** The bill does not impact the workload of the Judiciary.

**Local Effect:** The bill does not impact the workload of the circuit courts.

**Small Business Effect:** None.

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**Analysis**

**Bill Summary:**

*Legal Decision Making and Parenting Time*

“Legal decision making” means the right and obligation to make decisions involving health, education, religion and culture, medical care, and other matters of major significance concerning the child’s life and welfare. Legal decision making is also known as legal custody.

“Parenting time” means the time the child is in a parent’s care according to an agreement or court-ordered schedule and the right and obligation of a parent to provide a home for the child, address the child’s needs, and make the day-to-day decisions required during the

time the child is with that parent. Parenting time is also known as physical custody, visitation, or access.

The bill alters numerous references to the terms “child custody” and “visitation” to “legal decision making” and “parenting time.” The bill establishes that if the parents live apart, a court may award legal decision making or parenting time to either parent or jointly to both parents. Neither parent is presumed to have any right to legal decision making or parenting time that is superior to the right of the other parent.

### *Legal Decision Making and Parental Responsibility – Judicial Determinations*

The bill establishes a new subtitle that specifies numerous factors for judicial consideration in cases involving legal decision making and parental responsibility. The purpose of the provisions includes (1) promoting stability and long-term health and welfare for children; (2) providing children with physical and emotional security and protection from exposure to conflict and violence; and (3) providing for an expeditious, thoughtful, and consistent process for decision making by courts to protect the best interests of children.

In deciding the appropriate allocation of legal decision making or parenting time between the parties, the court *must* consider the following factors:

- the ability of each of the parties to meet the child’s developmental needs, as specified;
- the relationship between the child and the parties, the child’s siblings, other relatives, and any other person who has a significant relationship with the child;
- the ability of each party to meet the day-to-day needs of the child, including, education, socialization, culture and religion, food, shelter, clothing, and mental and physical health;
- the history of any efforts by a party to interfere with the child’s relationship with the other party;
- any evidence that the child has been exposed to domestic violence, child abuse, or child neglect;
- the age and gender of the child; and
- military deployment of a party.

The court must also consider the ability of each party to (1) consider and act on the needs of the child, as opposed to the needs or desires of the party; (2) protect the child from the adverse effects of any conflict between the parties; and (3) maintain, foster, and facilitate relationships with the other party, siblings, other relatives, or other individuals who have a significant relationship with the child.

In deciding the appropriate allocation of legal decision making or parenting time between the parties, the court *may* consider the following factors:

- evidence of any prior court orders or agreements between the parties, including prior agreements concerning the child's custodial arrangements or parenting responsibilities for the child;
- the parental responsibilities and the particular parenting tasks customarily performed by each party, as specified;
- the proximity of the parties' homes as it relates to their ability to coordinate parenting time, school, and activities;
- the relationship between the parties, including the ability of each party to effectively communicate with the other party and co-parent the child without disruption to the child's social and school life;
- the extent to which either party has initiated or engaged in frivolous or vexatious litigation, as defined in the Maryland Rules;
- the child's preference if the child is of sufficient age and capacity to form a preference and the court considers the child's possible susceptibility to manipulation by a party or by others; and
- any other factor that the court considers appropriate in determining how to best serve the physical, developmental, and emotional needs of the child.

The bill also establishes factors that are only relevant in deciding the appropriate allocation of legal decision making or parenting time between the parties if the court finds a risk of harm to the child. Such factors are a party's (1) sex, sexual orientation, or gender identity; (2) age; (3) race, color, or national origin; (4) religious affiliation, belief, creed, or opinion; (5) marital status; (6) mental or physical disability; or (7) extramarital sexual conduct. The parties' relative economic circumstances are also not relevant unless (1) the combined financial resources of the parties set practical limits on the custodial arrangements; (2) a

party is voluntarily impoverished; or (3) a party is not in compliance with a court order for economic support and that noncompliance affects the welfare of the child.

A court's consideration of the factors as set forth above is subject to existing provisions relating to custody and visitation when there is evidence of abuse or when a parent has been convicted of specified crimes. The court must articulate its findings of fact on the record, as specified.

### *Legal Decision Making*

If the court determines that the parties are able to communicate and reach joint decisions concerning some or all of the child's needs as described above, the court may award (1) joint legal decision making to both parties; (2) joint legal decision making to both parties, designating one party to make final decisions if the parties are unable to agree after a thorough discussion of the issues; or (3) joint legal decision making to both parties, allocating responsibility for specific issues to each party, if the parties are unable to agree after a thorough discussion of the issues.

If the court awards joint legal decision making authority to both parties without designating one party as a final decision maker or allocating responsibility for specific issues to each party, as specified above, neither party, without agreement of the other party, or order of the court, may unilaterally change the child's educational arrangements, religion, health care or health care professionals, or day care provider.

### *Modifications*

The court may modify a child custody or visitation order or a legal decision making or parenting time order if the court determines that there has been a material change in circumstances since the issuance of the order that relates to the needs of the child or the ability of the parties to meet those needs. A party's proposal to relocate the residence of the party or the child in a way that would cause parenting time to be impracticable constitutes a material change in circumstances.

### *Disability*

The bill repeals provisions relating to a "disability" and establishes a new definition. Pursuant to the bill, "disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of that impairment, or being regarded as having that impairment consistent with the federal Americans with Disabilities Amendments Act of 2008.

## **Current Law:**

### *Child Custody Determinations*

Maryland courts resolve child custody disputes based on a determination of “what is in the child’s best interests.” 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 include, but are not limited to, (1) the fitness of the parents; (2) the character and reputation of the parents; (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. *Montgomery County v. Sanders*, 38 Md. App. 406 (1977).

Traditionally, when one parent was granted “custody” of a minor child, the other parent would generally be awarded visitation rights. In 1984, the Court of Appeals first recognized and applied the concept of “joint custody.” See *Taylor v. Taylor*, 306 Md. 290 (1986). The *Taylor* Court explained that, within the meaning of “custody” are the concepts of “legal” and “physical” custody. Legal custody means the right and obligation to make long-range decisions involving the education, religious training, discipline, medical care, and other matters of major significance concerning the child’s life and welfare. With joint legal custody, both parents have an equal voice in making those decisions and neither parent’s rights are superior to the other. Physical custody means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody. Joint physical custody is in reality, “shared” or “divided” custody, with the child in the physical custody of each parent for periods of time that may or may not be on a 50/50 basis. *Taylor* at 296-297.

In addition to the factors set forth in the *Sanders* decision, a court considering an award of joint custody must also examine 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. *Taylor* at 304-311. The *Taylor* Court emphasized that the single most important factor in

the determination of whether an award of joint legal custody is appropriate is the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare. *Taylor* at 305.

#### *Custody – Evidence of Abuse or Neglect*

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

#### *Custody – Parents with Specified Convictions*

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.

#### *Disability*

“Disability” is defined as (1) a physical or mental impairment that substantially limits one or more of an individual's major life activities; (2) a record of having a physical or mental impairment that substantially limits one or more of an individual's major life activities; or (3) being regarded as having a physical or mental impairment that substantially limits one or more of an individual's major life activities. In addition, “disability” must be construed in accordance with the Americans with Disabilities Amendments Act of 2008. In any custody or visitation proceeding, a disability of a party is relevant only to the extent that the court finds, based on evidence in the record, that the disability affects the best interest of the child. The party alleging that the disability of the other party affects the best interest of the child bears the burden of proof. If the burden of proof is met, the party who has a disability must have an opportunity to prove that “supportive parenting services” would

prevent a finding that the disability affects the best interest of the child. If the court finds that a party's disability affects the child's best interest and denies or limits custody or visitation, the court must specifically state in writing the basis for the finding and its reasoning regarding supportive parenting services, as specified.

**Background:** The Commission on Child Custody Decision-Making, which was established by Chapter 633 of 2013, was required to study numerous aspects of custody within the State. The commission issued its final report in 2014. A primary recommendation of the commission was the need for a custody decision making statute to provide a clear, consistent, and predictable process to guide custody determinations for litigants, as well as attorneys and judges. The commission recommended that the proposed statute include determinations relating to significant regular contact with each parent, parenting quality, a child's developmental needs, the quality of the relationship between the parents or parental figures, the parents' psychological adjustment, and a child's need to maintain significant relationships. The commission also recommended that the proposed statute contain no presumption regarding schedules or legal decision making. In addition, the commission adopted recommendations to establish procedural and legal safeguards to protect against bias related to gender, disability, and economic status.

**State/Local Fiscal Effect:** The bill requires judges to alter the manner in which they make custody decisions but is not expected to substantially impact operations of the Judiciary. The bill does 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.

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### **Additional Information**

**Prior Introductions:** HB 1232 of 2016, a similar bill, received a hearing in the House Judiciary Committee, but no further action was taken. Its cross file, SB 978, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. HB 1083 of 2015, a similar bill, received a hearing in the House Judiciary Committee, but no further action was taken. Its cross file, SB 550, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken.

**Cross File:** None.

**Information Source(s):** Judiciary (Administrative Office of the Courts); Department of Human Resources; Department of Legislative Services

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