

Department of Legislative Services
Maryland General Assembly
2004 Session

FISCAL AND POLICY NOTE

Senate Bill 602

(Senator Mooney, *et al.*)

Judicial Proceedings

Family Law - Children - De Facto Custody

This bill establishes the status of “de facto custodian.” The bill specifies the factors that a court must consider if an individual who has been the primary caregiver and financial support for a child seeks custody of a child. It authorizes a court to find that an individual who has been the primary caregiver and financial support for a child is a de facto custodian. Once a court establishes that an individual is a de facto custodian, that custodian has legal custody of the child and the same standing in custody matters as a parent.

The bill has prospective application.

Fiscal Summary

State Effect: The bill’s requirements could be met with existing resources.

Local Effect: The bill’s requirements could be met with existing resources.

Small Business Effect: None.

Analysis

Bill Summary: The bill defines a de facto custodian as an individual who has been the primary caretaker and financial support of a child who, if the child is less than three years old, has resided with the individual for six months or more; or, if the child is three years or older, has resided with the individual for one year or more. The time periods exclude

any period of residence beginning after a parent seeking to regain custody has filed a legal proceeding.

An individual seeking custody of a child as de facto custodian must file a petition in an equity court. The petition must state that the individual has been the de facto custodian of the child for the required time period and it is in the best interest of the child to remain with the petitioner because the child's parents are unfit or there are exceptional circumstances that make parental custody detrimental to the child's best interest.

A court may grant the petitioner custody if:

- by clear and convincing evidence the court finds the petitioner has been the de facto custodian of the child; and
- by a preponderance of the evidence, the court finds that it is in the best interest of the child for the de facto custodian to be granted custody because either the parents are unfit to have custody or exceptional circumstances exist that make parental custody detrimental to the best interest of the child.

The court must consider all relevant factors in making its determination regarding the custody petition, including 15 enumerated factors relating to the child's relationship with the petitioner and the parents, the child's physical and mental health, the child's wishes, and the child's likely future with the petitioner or the parents. The court is prohibited from considering the abandonment of the family residence by a parent if the parent was physically harmed or seriously threatened with physical harm by the parent's spouse and that harm or threat of harm caused the parent to abandon the family residence.

A court may grant joint custody to a parent and a de facto custodian. A de facto custodian has the legal custody of the child and has the same standing in custody matters as a parent. A de facto custodian must be joined in any action related to the child as a party needed for just adjudication under the Maryland Rules.

Current Law: Statute provides that parents are joint natural guardians of their minor child. A parent is the sole natural guardian of a minor child if the other parent dies, abandons the family, or is incapable of acting as a parent. Also, an equity court may consider a petition for reasonable visitation of a grandchild by a grandparent and grant visitation rights to a grandparent, if it is in the best interest of the child.

Maryland statutory law does not specifically address the issue of third-party custody, that is, custody by a person who is not a parent, unless the child is under the jurisdiction of the State through a Child in Need of Assistance or Child in Need of Supervision proceeding. A person who is not a parent, but may otherwise be related to a child, or a person who is

not related to a child may attain custody of a child through the status of guardianship or through an adoption process, in which a person becomes the parent for all legal purposes, and thereby becomes the child's custodian. However, Maryland case law does address the issue of third-party custody.

A Maryland Court of Appeals case, *Shurupoff v. Vockroth*, 379 Md. 629 (2003) synthesizes earlier holdings and statements relating to third-party custody disputes. This bill is intended to codify provisions in this case that define the status of de facto custodian, set forth factors that should be considered by a court, and specify the appropriate standard of proof for determination of de facto custodian status.

Shurupoff reiterated a standard first announced in *Ross v. Hoffman* 280 Md. 172 (1977) that the best interest of the child is always determinative in child custody disputes. In third-party custody cases, it is presumed that the child's best interests are served by a parent, but that presumption can be overcome and parental custody denied if the parent is unfit to have custody, or if there are exceptional circumstances that make parental custody detrimental to the best interests of the child.

In *Shurupoff*, the Court of Appeals stated that Maryland has adopted preponderance of the evidence as the standard of proof generally applicable in civil actions unless some higher standard is demanded by constitutional considerations, mandated by statute or rule of court, or established in common law. The Court of Appeals ruled that in custody actions, a preponderance of the evidence standard is appropriate, as a clear and convincing evidence standard is not constitutionally required in custody disputes. Accordingly, in third-party custody disputes, the presumption that a child's best interest is with parental custody may be rebutted by a preponderance of the evidence that shows either that the parent is unfit, or that there are exceptional circumstances that make parental custody detrimental to the child's best interests.

Background: The Citizen's Review Board, in its *Children's Out-of-Home Placement Annual Report for 2002*, reported that of the 25,000 children in out-of-home placements 4,000, or 16%, of these children were in kinship care, that is, placed with a relative. Tens of thousands more children are in the care of relatives through informal arrangements.

Additional Information

Prior Introductions: None.

Cross File: HB 1092 (Delegates Weldon and Hogan) – Judiciary.

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

Fiscal Note History: First Reader - March 8, 2004
ncs/jr

Analysis by: Karen D. Morgan

Direct Inquiries to:
(410) 946-5510
(301) 970-5510