Department of Legislative Services

Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE

House Bill 717 (Delegate Dumais, *et al.*)
Judiciary

Family Law - Child Custody Determinations

This bill specifies the procedures under which courts are required to 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, 2009 effective date.

Fiscal Summary

State Effect: The bill does not 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 education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and 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.

In any proceeding between parents in which the custody of a child is raised as an issue, the court is required to make a determination of legal and physical custody in accordance with the provisions of the bill. 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 the 18 factors that are specified in the bill:

(1) the fitness of the parents, including the psychological and physical capabilities of each parent and any conduct and characteristics of a parent that affect that parent's ability to care for the child or that may have an adverse effect on the child;

(2) the requests of each parent and the sincerity of their requests;

(3) the willingness of the parents to share custody;

(4) any agreements between the parents;

(5) each parent's ability to maintain the child's relationships with the other parent, siblings, relatives, and any other person who may psychologically affect the child's best interest;

(6) the child's preference, if the child is of an age and intelligence to form a rational judgment;

(7) the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare;

(8) the geographic proximity of the parents' residences and opportunities for time with each parent;

(9) the length of and the reasons for the child's separation from a parent;

(10) any prior voluntary abandonment or surrender of the child by a parent;

(11) the relationship established between the child and each parent;

(12) the ability of each parent to maintain a stable and appropriate home for the child;

(13) the demands of parental employment and opportunities for time with the child;

(14) the potential disruption of the child's social and school life;

(15) any impact on government assistance or benefits;

(16) the age, gender, and health of the child;

(17) the age and number of children each parent has in the household; and

(18) any other consideration the court determines is relevant to the best interest of the child.

The court must articulate its reasons on the record, including the factors considered in the custody determination.

The court is prohibited from denying custody to a parent solely on the basis of a disability, unless the court specifically finds that the disability causes a condition that is detrimental to the best interest of the child. A disability means a physical impairment that substantially limits one or more of the major life activities of an individual. Disability does not include the illegal use of or addiction to a controlled dangerous substance or controlled substance as defined by state or federal law.

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.

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. 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.

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 will not substantially impact operations of the Judiciary. This 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.

Additional Information

Prior Introductions: HB 1147 of 2008 received an unfavorable report from the House Judiciary Committee.

Cross File: SB 740 (Senator Raskin) - Judicial Proceedings.

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

Fiscal Note History: First Reader - February 25, 2009
mam/kdm

Analysis by: Jennifer K. Botts

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