

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 2

(Senator Feldman, *et al.*)

Judicial Proceedings

Judiciary

**Family Law - Child Conceived Without Consent - Termination of Parental
Rights (Rape Survivor Family Protection Act)**

This emergency bill authorizes a court, after a trial, to terminate the parental rights of a respondent if the court (1) determines that the respondent has been served, as specified; (2) finds that the respondent was either convicted of, or finds by clear and convincing evidence that the respondent committed, an act of nonconsensual sexual conduct against the other parent that resulted in the conception of the child at issue; and (3) finds by clear and convincing evidence that it is in the best interest of the child to terminate the parental rights of the respondent. The court may not terminate parental rights pursuant to the bill's provisions if the parents were married at the time of the conception of the child at issue unless specified conditions are met.

Fiscal Summary

State Effect: Potential significant increase in federal grant revenues. Since it is assumed that this bill applies in a limited number of cases, it is not anticipated to materially impact the finances or workload of the Judiciary. The Judiciary can also absorb minimal programming costs in FY 2018 only with existing resources.

Local Effect: The bill's provisions are not anticipated to materially impact the finances or workload of the circuit courts.

Small Business Effect: Minimal.

Analysis

Bill Summary: The court may not terminate parental rights if the parents were married at the time of the conception of the child at issue unless (1) the respondent has been convicted of an act of nonconsensual conduct against the other parent that resulted in the conception of the child or (2) the parents were separated in accordance with a protective order during the time of the conception of the child and have remained separate and apart since the time of conception. A termination of parental rights under the bill's provisions completely terminates a parent's right to custody of, guardianship of, access to, visitation with, and inheritance from the child. It also terminates a parent's responsibility to support the child, including the responsibility to pay child support.

An action for termination of parental rights under the bill's provisions may be filed by either parent of the child or the child's court-appointed attorney or guardian. An action filed by a parent must be filed within seven years after the later of (1) the date of the birth of the child conceived as a result of the nonconsensual sexual conduct or (2) the date on which the parent knew or should have known the other parent's identity. An action filed by a court-appointed guardian or attorney must be filed before the child becomes an adult. In an action for termination of parental rights filed against a respondent by a guardian or attorney, the other parent must be joined as a party to the action and the action may not proceed if the other parent objects before the trial commences.

When proof is made by affidavit that good-faith efforts to serve the respondent have not succeeded or that the respondent has acted to evade service, the court may order other appropriate means of service, as specified. The court must rule on any motion for alternative service within 15 days after the filing of the motion. The court may not require publication of the name or personally identifying information of the petitioner or the child.

The complaint must include notice to the respondent that a scheduling conference will be held within 60 days after service. At the scheduling conference, the court (1) must issue a scheduling order which takes into consideration the best interest of the child, the time needed for discovery, and the interest of justice and (2) after providing the parents with an opportunity to be heard, may determine temporary custody of the minor child. The court must also advise the respondent that the respondent may refuse to testify or to offer evidence and that no adverse inference may be drawn from the refusal. However, the failure of the court to advise a respondent of such rights is not grounds to overturn a finding under the bill's provisions.

Unless both parties agree otherwise or the court finds that it is in the best interest of the child to proceed, the court may stay all further proceedings in the action to terminate parental rights if a criminal proceeding involving the same underlying facts is pending. The proceedings may be stayed until the criminal proceeding is resolved. The court's

authority to stay the termination of parental rights action also applies if such a criminal proceeding commences after an action is filed. Otherwise, the court must hold a trial on termination of parental rights no later than 180 days after an answer to the complaint is filed.

The respondent may refuse to testify or offer evidence that may be self-incriminating and no adverse inference may be drawn from the refusal. A party's testimony and any other information obtained from the party in a proceeding under the bill's provisions, as well as any information directly or indirectly derived as a result, is inadmissible as evidence in a criminal proceeding against that party, if the criminal proceeding involves the same underlying facts and the evidence is offered for a purpose other than impeachment.

The court, on its own motion or on petition, and for good cause shown, may order that court records of a proceeding be sealed, or may require that filings be submitted and maintained in a form that protects the privacy of the parents and the child.

A parent in a proceeding under the bill's provisions is entitled to the assistance of counsel. The court must refer an unrepresented parent to a qualified grantee of the Maryland Legal Services Corporation (MLSC) for assignment of counsel or appoint counsel for an unrepresented parent. A parent is not entitled to assistance of counsel at the expense of MLSC or to appointed counsel unless the party is indigent.

Definitions

"Nonconsensual sexual conduct" means an act that is prohibited by (1) § 3-303 (first-degree rape); (2) specified provisions of § 3-304 (second-degree rape which involves force or the threat of force or is against a victim who is mentally defective, mentally incapacitated, or physically helpless and the person performing the act knows or reasonably should know of the victim's state); and (3) § 3-323 (incest) of the Criminal Law Article, if the other parent is a minor and the respondent was at least four years older than the other parent at the time of the act. A "respondent" is the person against whom an action for termination of parental rights is filed in accordance with the bill's provisions.

Current Law: Parents are joint natural guardians of their minor child. A parent is the sole natural guardian of the minor child if the other parent dies, abandons the family, or is incapable of acting as a parent. Statutory provisions specify, for various proceedings, circumstances in which an individual's commission of specified offenses may impact parental rights.

Adoption and Guardianship

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.

Custody and Visitation

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. *See, e.g., Montgomery County v. Sanders*, 38 Md. App. 406 (1977).

Notwithstanding the common law standards governing determinations of custody or visitation, statutory provisions limit the court's discretion to determine custody or visitation if there is 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 or visitation proceeding, the court must determine whether 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 likelihood of further child abuse or neglect by the party, the court must deny custody or visitation rights to the party, except that the court may approve a supervised visitation arrangement that assures the child's safety and the physiological, psychological, and emotional well-being of the child.

Similarly, in a custody or visitation proceeding, statutory provisions also require the court to 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.

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, as specified. However, if it is in the best

interest of the child, a court may approve a supervised visitation arrangement that assures the safety and the psychological, physiological, and emotional well-being of the child.

Background: The National Conference of State Legislatures (NCSL) reports that various studies over the last two decades estimate that between 17,000 and 32,000 rape-related pregnancies occur in the United States every year. Studies vary widely on the outcome of pregnancies resulting from rape. For example, one study found that 26% of women who became pregnant through rape underwent abortions. Of those women who carried their pregnancies to term, 64% raised the children and the remainder of the women placed the children for adoption. Another study found that approximately half of the women who became pregnant by rape underwent abortions.

Maryland common law requires courts to be guided by the best interest of the child in making custody and visitation decisions. However, the U.S. Supreme Court and the Court of Appeals of Maryland 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).) 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, courts have not denied all visitation except under exceptional circumstances, and court decisions have demonstrated that the finding of exceptional circumstances is a high threshold to meet. For example, 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.

According to NCSL, as of April 2017, approximately 45 states and the District of Columbia have enacted legislation specifically regarding the parental rights of perpetrators of rape resulting in the conception of a child. Approximately 30 of the states allow or require the complete termination of parental rights; the remaining states and the District of Columbia deny or restrict some aspect of parental rights, such as custody or visitation. Of the states in which parental rights may be terminated completely, at least 14 do not require a conviction prior to the termination of parental rights. The Rape Survivor Child Custody Act, enacted in 2015 as part of the Justice for Victims of Trafficking Act, included congressional findings that (1) rape is one of the most under-prosecuted serious crimes, with estimates of criminal conviction occurring in less than 5% of rapes and (2) the clear and convincing standard is the most common one for termination of parental rights.

MLSC was established by the Maryland General Assembly in 1982. It receives and distributes funds to nonprofit grantees that provide legal assistance to eligible clients in civil cases. MLSC receives some State funding from specified sources, including revenues from a surcharge assessed on fees, charges, and costs in civil cases. These funds are deposited by the Administrative Office of the Courts into the MLSC Fund, which MLSC then distributes in the form of grants to various organizations that perform the legal assistance services.

State Revenues: Federal grant revenues may increase, potentially significantly, as a result of the bill. The Rape Survivor Child Custody Act provides additional federal grant funding for states that have enacted laws to allow the mother of any child who was conceived through rape to seek court ordered termination of the parental rights of the rapist. In order for a state to be eligible for additional federal funding, the court must be authorized to grant the termination of parental rights (the complete and final termination of the parent's right to custody of, guardianship of, visitation with, access to, and inheritance from a child) upon clear and convincing evidence of rape. The federal law authorized appropriations of \$5.0 million annually in federal fiscal 2015 through 2019.

Additional Information

Prior Introductions: HB 428 of 2017, a similar bill, passed the House and the Senate, as amended. Its cross file, SB 574, also passed the Senate and the House, as amended. Although a conference committee was appointed to reconcile the differences between the two bills, its work was not finalized prior to Sine Die. HB 646 of 2016, another similar bill, passed the House and received a favorable with amendments report from the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, SB 593, received a favorable with amendments report from the Senate Judicial Proceedings Committee, but no further action was taken. Similar legislation was also introduced in the 2015, 2014, 2013, 2009, 2008, and 2007 sessions.

Cross File: HB 1 (Delegate Dumais, *et al.*) - Judiciary.

Information Source(s): Judiciary (Administrative Office of the Courts); National Conference of State Legislatures; Maryland Legal Services Corporation; Maryland Coalition Against Sexual Assault; Department of Legislative Services

Fiscal Note History: First Reader - January 9, 2018
md/kdm Third Reader - February 8, 2018
Revised - Amendment(s) - February 8, 2018

Analysis by: Jennifer K. Botts

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