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Legislative Service Commission

Bill Analysis

H.B. 232

125th General Assembly
(As Introduced)

Reps. Young, Grendell, Hagan, Collier, Willamowski, McGregor, Martin, Brinkman, Setzer, Aslanides, Gilb, Strahorn, Kearns, Faber, Flowers, Seaver, Husted, Wolpert

BILL SUMMARY

- Requires, in a proceeding concerning the allocation of parental rights and responsibilities, that the court make a substantially equal allocation between the parents unless it finds by clear and convincing evidence that substantial equality would be harmful to the children.

- Requires that a shared parenting plan provide a substantially equal allocation of parental rights and responsibilities for the care of and access to the children.

- Requires that a court certify its finding that it is in the best interest of the child for neither parent to be designated the child's residential parent and legal custodian if it temporarily commits the child to a relative.

- Permits a court to modify the allocation of parental rights and responsibilities based on a change in the circumstances of the nonresidential parent and eliminates the requirement that the child's residential parent remain the same.

- Requires a court, for the purpose of determining the best interest of the child, to consider whether the parent had the ability to pay the support ordered when considering whether either parent has failed to make child support payments.

- Permits an aggrieved party to file a family access motion when a party does not comply with an order or decree that allocates parental rights and responsibilities.

- Requires a court to order a remedy when it finds that a party has failed without just cause to comply with an order allocating parental rights and responsibilities.

- Requires the clerk of courts to take certain actions with respect to family access motions.

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CONTENT AND OPERATION

Background

In a divorce, legal separation, annulment proceeding, or any proceeding in which parental rights and responsibilities for the care of a child are allocated, current law requires the court to make the allocation in one of the following ways: order shared parenting, allocate parental rights and responsibilities primarily to one parent, commit the child to a relative, or certify jurisdiction to the juvenile court to determine custody of the child. The Revised Code provides that the

objective of the court in making the allocation of parental rights and responsibilities is to make a decision that reflects the child's best interests.[1]

Requirement of substantially equal allocation of parental rights and responsibilities

(R.C. 3109.03 and 3109.04(F))

Fundamentally, the bill establishes a presumption in all determinations concerning the allocation of parental rights and responsibilities for the care of and access to children that a substantially equal allocation between the parents of rights and responsibilities for the care of and access to the children is in the best interest of the children. It prohibits a court from allocating parental rights and responsibilities in a way that is not substantially equal in the absence of clear and convincing evidence that a substantially equal allocation would be harmful to the children. If a court makes an order or decree that does not provide for substantial equality, it must explain in writing the reasons for its determination.

Shared parenting

(R.C. 3109.04(A)(2), (D), and (E))

Shared parenting means that the court allocates the parental rights and responsibilities for the care of a child to both parents and requires the parents to share all or some of the aspects of the child's physical and legal care. Either or both parents may file a motion requesting shared parenting. A parent who files a request for shared parenting must also file a shared parenting plan. A shared parenting plan must include provisions covering all factors relevant to the care of a child, including physical living arrangements, financial support, medical and dental care, school placement, and the child's physical location during legal holidays, school holidays, and other days of special importance. When it is in the best interests of the child, the court must require that the plan ensure the opportunity for both parents to have frequent and continuing contact with the child.

The parents, jointly or separately, may request shared parenting and submit a shared parenting plan. The court reviews each plan to determine whether it is in the best interest of the child and may require modifications to the plan if it is not.

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[1] *The terms "custody," "joint custody," "custodial parent," "noncustodial parent," and "visitation" are not used in the Revised Code, although they are often used elsewhere. The corresponding terms for purposes of Ohio law are "allocation of parental rights and responsibilities," "shared parenting," "residential parent," "parent who is not the residential parent," and "parenting time."*

If the parents do not make changes to the plan or the parents propose changes that are not acceptable, the court may reject the request and proceed as if it was never made. A court may approve only one plan and must determine that the plan is in the best interests of the child. The Revised Code does not authorize a court to order shared parenting unless at least one parent has requested it and submitted a shared parenting plan that meets the requirements for approval.

A court that approves a shared parenting plan must incorporate it into a final shared parenting decree. The final decree must be issued at the same time as, and be appended to, the dissolution of marriage, divorce, annulment, or legal separation decree to which the shared parenting decree relates. The decree takes effect on the date of issuance.

Additional requirements for approval of shared parenting plans

Under existing law, a shared parenting plan must be in the best interest of the child for the court to approve it. The bill requires not only that the plan be in the child's best interest, but also that it provide for a substantially equal allocation of parental rights and responsibilities for the care of and access to the children. (See **COMMENT** 1.) As described above, current law requires that a shared parenting plan ensure the opportunity for both parents to have frequent and continuing contact with the child, unless frequent and continuing contact would not be in the child's best interest. The bill requires instead that the court ensure, to the greatest extent possible, that parental rights and responsibilities for the care of and access to the children are allocated to the parents on a substantially equal basis unless there is clear and convincing evidence that such an allocation would be harmful to the children.

Mandatory approval of shared parenting

Under current law, if the parents jointly request shared parenting and file a shared parenting plan and the court determines that the plan is in the child's best interest, the court is required to approve the plan. If, however, the parents separately file plans or only one parent files a shared parenting plan, the court is not required to approve the plan. Under the bill, if the parents file separate plans or if only one plan is filed and the court determines that one of the filed plans is in the best interest of the children and provides for substantial equality with regard to rights and responsibilities for the care of and access to the children, the court must approve the plan.

Effect of designation of child's home for the purpose of receiving public assistance

If a court issues a shared parenting order and the court is required to designate one of the child's residences as the child's home for the purpose of receiving public assistance, the bill specifies that the designation is for the sole purpose of receiving public assistance and does not affect the legal designation of each parent as the residential parent, residential parent and legal custodian, or the custodial parent.

Allocation of parental rights and responsibilities primarily to one parent

Generally, if the court does not issue a shared parenting order, it is required to allocate parental rights and responsibilities for the care of a child primarily to one of the parents, designate that parent as the child's residential parent and legal custodian, and divide the other rights and responsibilities for the child's care between the parents.[2] A court must allocate parental rights and responsibilities primarily to one of the parents if both of the following apply: (1) neither parent files a pleading or motion requesting shared parenting; at least one parent files a pleading or motion requesting shared parenting but neither files a shared parenting plan; or at least one parent files a pleading or motion requesting shared parenting and a plan but no plan is in the best interest of the child, and (2) allocating parental rights and responsibilities primarily to one parent is in the child's best interest.

The bill requires that the court grant substantially equal rights to the parents unless it finds upon clear and convincing evidence that substantial equality would be harmful to the children. But the bill retains the requirement that a court allocate parental rights and responsibilities primarily to one parent when shared parenting is not requested or when neither of the parties have filed a shared parenting plan that is in the best interest of the child.[3]

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[2] *Examples of other rights and responsibilities include the provision of financial support and the right of the parent who is not the residential parent and legal custodian to have continuing contact with the child.*

[3] *It is unclear how a court could comply with the continuing requirement that it allocate parental rights and responsibilities* primarily to one of the parents *while complying with the bill's requirement that the allocation be* substantially equal.

Other custody options

(R.C. 3109.04(D)(2))

Current law provides that when a court finds, with respect to a child under 18, that it is in the child's best interest for neither parent to be designated as the residential parent and legal custodian, the court may commit the child to a relative. The court may also certify its finding that neither parent should be the residential parent and legal custodian to the juvenile court. On certification, the juvenile court has exclusive jurisdiction to make custody decisions. Under the bill, if the court finds ***by clear and convincing evidence*** that it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child, it may ***temporarily*** commit the child to a relative ***and is required*** to certify its finding to the juvenile court.

Modification of an existing order allocating parental rights and responsibilities

(R.C. 3109.04(E)(1)(a))

Under current law, a court may modify a decree allocating parental rights and responsibilities only if it finds, based on the facts that have arisen since the decree or that were unknown to the court at the time of the decree, that (1) there has been a change in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and (2) modification is necessary to serve the best interests of the child. The court must retain the residential parent designated by the decree, unless a modification is in the best interest of the child and one of the following applies:

(1) The residential parent in a sole custody situation (or both parents under a shared parenting decree) agrees to change the residential parent designation;

(2) The child, with the residential parent's consent (or both parents' consent under a shared parenting decree) has been integrated into the family of the person seeking to become the residential parent; or

(3) The advantages of a change in the child's environment outweigh the disadvantages.

The bill permits the court to modify the allocation of parental rights and responsibilities based on a change in circumstances of either of the parents. Thus, a change in circumstances of the nonresidential parent could serve as a basis for modification under the bill. Additionally, the bill eliminates the requirement that there be no change in the residential parent absent certain circumstances.

Modification from sole custody to shared parenting

(R.C. 3109.04(E)(1)(b))

Current law permits either or both parents under a decree allocating parental rights and responsibilities that is not a shared parenting decree to file a motion requesting that the decree be modified to give both parents shared rights and responsibilities. The court may make the modification if it is authorized because of a change in circumstances, shared parenting is in the best interest of the child, and the shared parenting plan complies with the legal requirements for such plans. Under the bill, one or both parents may request that the prior decree be modified to give both parents substantially equal rights and responsibilities for the care of the children. In such a case, if the request meets the standard for modification of orders allocating parental rights and responsibilities, the court must modify the prior decree to grant a shared parenting order, provided that the court complies with the law governing the issuance of shared parenting orders.

Modification of a shared parenting decree

(R.C. 3109.04(E)(2))

Parents under a shared parenting decree may jointly modify the terms of a shared parenting plan the court has approved. The parents may make the modifications at any time by jointly filing the modifications with the court. The court must include the modifications in the plan unless they are not in the best interest of the child. If the modifications are not in the best interest of the child, the court may do any of the following: reject the modifications, alter the proposed modifications, or make modifications to the plan. Modification becomes effective at the time the court includes them in the shared parenting plan.

Under current law, regardless of whether the parents request that the court modify a shared parenting plan, the court may modify the terms of a court-approved shared parenting plan on its own motion at any time if it determines that modifications are in the best interest of the child. The bill eliminates the court's authority to modify a shared parenting decree on its own motion.

Modification when parental rights and responsibilities are unequal due to unsuitability

(R.C. 3109.04(E)(1)(c) and (E)(2)(e))

The bill provides that if the court, in modifying an existing decree, allocates parental rights and responsibilities for the care of and access to the children in a substantially unequal manner because one of the parents is unsuitable for substantial equality and the unsuitable parent removes some of the grounds for the

finding of unsuitability, the court on motion must modify the prior order or decree to provide for greater equality. When all of the grounds for the finding of unsuitability have been removed, the bill requires the court to modify the order or decree to provide for substantial equality. (See **COMMENT** 2.)

Factors for consideration in determining the child's best interest

(R.C. 3109.04(F))

In determining the best interest of a child in allocating parental rights and responsibilities, the court is required to consider all relevant factors. While the court has discretion in determining what is relevant, the Revised Code lists specific factors that must be considered depending on the type of custody allocation.

When allocating parental rights and responsibilities other than by shared parenting the court must consider the following factors: the parents' wishes; if the child was interviewed in chambers, the wishes and concerns of the child as expressed to the court; the child's interaction and interrelationship with parents, siblings, and other persons who may significantly affect the child's best interest; the child's adjustment to home, school, and community; the mental and physical health of all persons involved; the parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights; whether either parent has failed to make child support payments; whether either parent has been convicted of or pleaded guilty to committing a criminal offense involving an act that resulted in a child being abused or neglected; whether either parent, in a case in which a child has been adjudicated abused or neglected, has been determined to be the perpetrator of the abusive or neglectful act; whether either parent has been convicted of or pleaded guilty to committing an offense of domestic violence, or an offense that caused physical harm, against a member of the parent's family or household; whether there is reason to believe that either parent has acted in a manner resulting in a child being abused or neglected; whether the residential parents or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time; and whether either parent has established, or is planning to establish, a residence outside Ohio.

A court considering whether shared parenting is in the best interest of a child must consider all relevant factors including those listed above and additional factors applicable to shared parenting determinations. The additional factors are the ability of the parents to cooperate and make decisions jointly concerning the child; the ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent; any history of, or potential for, child abuse, spousal abuse, other domestic violence, or parent kidnapping by either

parent; the geographic proximity of the parents to each other; and the recommendation of the guardian ad litem. When allocating parental rights and responsibilities for the care of children, the court is prohibited from giving preference to a parent because of the parent's financial status or condition.

The bill requires that, for the purpose of determining the best interest of the child, when considering whether either parent has failed to make all child support payments, the court must also consider whether that parent had the ability to pay the support ordered.

Family access motion

(R.C. 3109.043)

If a party to a proceeding related to allocating parental rights and responsibilities does not comply with the portion of the order or decree that allocates parental rights and responsibilities, the bill permits the aggrieved party to file a family access motion specifying the facts that constitute a violation of the order or decree. On finding on a family access motion or motion for contempt that the party against whom the motion was filed has failed without good cause to comply with the order, the bill requires the court to order a remedy that may include any or all of the following:

(1) A compensatory period of parenting time at a time convenient for the aggrieved party that is not less than the period denied;[4]

(2) Participation by the violator in counseling to educate the violator about the importance of providing the children with a continuing and meaningful relationship with both parents;

(3) The assessment of a fine of up to $500 against the violator payable to the aggrieved party;

(4) A requirement that the violator post bond or security to ensure compliance with the order or decree;

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[4] *Existing law governing contempt of court entitles a person who is granted parenting time rights under a parenting time order or decree issued pursuant to section 3109.051 or 3109.12 of the Revised Code to initiate a contempt action for failure to comply with, or interference with, the order or decree. R.C. 2705.031. The law also provides that disobedience of or resistance to a lawful order of a court, which would include an order allocating parental rights and responsibilities, is punishable as contempt. R.C. 2705.02. The penalties for contempt include fines, imprisonment, or both. R.C. 2705.05.*

(5) An order that the violator pay the cost of counseling to re-establish the parent-child relationship between the aggrieved party and the children;

(6) An award to the aggrieved party of reasonable expenses incurred as a result of the unreasonable denial of or interference with parental rights and responsibilities, including attorney's fees and the costs of the family access motion, if requested and for good cause;

(7) Any other remedy that the court could have provided in the absence of this section.

The bill provides that the cost of filing a family access motion is the standard court cost otherwise due for instituting a civil action in the court of common pleas. A family access motion must be disposed of (not including appellate review) not later than 60 days after it has been served unless a later date is agreed to by the parties or determined to be in the best interest of the children. The bill requires the clerk of the court of common pleas to explain to persons wishing to file a family access motion the procedures for filing the motion and conspicuously post in the clerk's office that the clerk will provide that assistance. The clerk must also conspicuously post in the court building the location of the office where family access motions may be filed.

The bill requires that a family access motion be made using a form that is substantially the same as the following and includes the notice in boldface type and all capital letters:

"COURT OF COMMON PLEAS

DIVISION OF DOMESTIC RELATIONS

_____ COUNTY, OHIO

_____	CASE NO _____
PLAINTIFF	JUDGE _____
VS.	FAMILY ACCESS MOTION
_____	_____
DEFENDANT	

An order/decree allocating parental rights and responsibilities for the care of a child has been entered in _____ County, Ohio.

(Plaintiff)(Defendant) _____ hereby states that

(Your Name)

parental rights and responsibilities as ordered by the court have been interfered with by a parent or third party without good cause. The following facts constitute a violation of the court order. (Please provide the specific facts, including dates and times, that constitute a violation of the court order.)

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Pursuant to section 3901.043 of the Ohio Revised Code, I request that the court find that (defendant)(plaintiff) violated the order allocating parental rights and responsibilities.

I request that the (defendant)(plaintiff) be ordered to: (check boxes that apply)

_____ Provide a compensatory period of parenting time at a time convenient for the aggrieved party not less than the period denied.

_____ Participate in counseling to be educated about the importance of providing the children with a continuing and meaningful relationship with both parents.

_____ Pay a fine of up to five hundred dollars ($500.00).

_____ Post bond or security to ensure compliance with the court's order.

_____ Pay the cost of counseling to reestablish the parent-child relationship between the aggrieved party and the children.

_____ Pay the reasonable expenses, including attorney's fees and court costs, actually incurred by the aggrieved party as a result of the violation of the court's order.

_____ Other relief _____

_____

The court may schedule alternative dispute resolution.

NOTICE

PURSUANT TO RULE 6(D) OF THE OHIO RULES OF CIVIL PROCEDURE, YOU ARE REQUIRED TO RESPOND TO THE CLERK'S OFFICE OF THE COURT OF COMMON PLEAS, DOMESTIC RELATIONS DIVISION, ON OR BEFORE _____ (DATE)

FAILURE TO RESPOND TO THE COURT CLERK'S OFFICE MAY RESULT IN THE FOLLOWING:

(1) AN ORDER FOR A COMPENSATORY PERIOD OF PARENTING TIME AT A TIME CONVENIENT FOR THE AGGRIEVED PARTY NOT LESS THAN THE PERIOD DENIED;

(2) PARTICIPATION BY THE VIOLATOR IN COUNSELING TO EDUCATE THE VIOLATOR ABOUT THE IMPORTANCE OF PROVIDING THE CHILDREN WITH A CONTINUING AND MEANINGFUL RELATIONSHIP WITH BOTH PARENTS;

(3) ASSESSMENT OF A FINE OF UP TO FIVE HUNDRED DOLLARS ($500.00) AGAINST THE VIOLATOR;

(4) REQUIRING THE VIOLATOR TO POST BOND OR SECURITY TO ENSURE FUTURE COMPLIANCE WITH THE COURT'S ORDER;

(5) AN ORDER THAT THE VIOLATOR PAY THE COST OF COUNSELING TO RE-ESTABLISH THE PARENT-CHILD RELATIONSHIP BETWEEN THE AGGRIEVED PARTY AND THE CHILDREN;

(6) A JUDGMENT IN AN AMOUNT NOT LESS THAN THE REASONABLE EXPENSES, INCLUDING ATTORNEY'S FEES AND COURT COSTS, ACTUALLY INCURRED BY THE AGGRIEVED PARTY AS A RESULT OF

THE VIOLATION OF THE ORDER ALLOCATING PARENTAL RIGHTS AND RESPONSIBILITIES.

Plaintiff/Defendant under oath says that the facts stated in the above motion are true according to his or her best knowledge and belief. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury or the denial of the motion.

_____	_____
DATE	PLAINTIFF/DEFENDANT'S SIGNATURE
Subscribed to and sworn before me on	_____
	_____
	Deputy Clerk/Notary Public

KEEP A COPY OF THIS MOTION AND BRING IT TO COURT"

COMMENT

1. Certain language used in the bill may give rise to ambiguity. There are instances in the bill when the phrase "substantially equal allocation of parental rights and responsibilities" seems to be used interchangeably with "shared parenting." But it is not clear that these concepts are intended to be the same. Parents subject to a shared parenting order are each considered the child's residential parent, but that does not mean that they share equally in decision-making concerning the child's welfare or that the parents spend equal time with the child. In shared parenting, the parents agree to share all *or some* of the aspects of physical and legal care of their children. The specifics are spelled out in the shared parenting plan. The parents may agree in the plan, for example, to choose a more traditional arrangement for the child's division of time between the parents, one in which the child resides with one parent on weekdays and the other on weekends or may designate one parent to be responsible for the bulk of the decision-making concerning the child. It appears that the bill is intended to eliminate this type of agreement so that all shared parenting plans would be required to allocate parental rights in a substantially equal manner.

2. The consideration of a parent's suitability in a custody dispute between parents is unusual. Because parents stand on equal footing before the court with respect to their right to custody of their child, the court's consideration is generally limited to the child's best interest. *In re Perales* (1977), 52 Ohio St.2d 89, at 96.

Examination of a parent's fitness or suitability is usually reserved for decisions concerning custody disputes between a parent and a third party or in cases in which the child is alleged to be abused, neglected, or dependent, and the use of such terminology in this bill may have unintended effects. A parent does not necessarily have to be unsuitable for a court to determine by clear and convincing evidence that a substantially equal allocation would be harmful to the child. Moreover, the bill affords the unsuitable parent this remedy when an unequal allocation is made during modification proceedings but not when an unequal allocation is made during the initial decree allocating parental rights and responsibilities.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	06-24-03	p. 943

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