



Arkansas child custody law undergoes major facelift in 2021 legislation, backers and critics differ on impact

by REMINGTON MILLER

Child custody rules in Arkansas dramatically changed after Act 604 of 2021 went into effect on July 28, nearly 90 days after the Arkansas General Assembly adjourned in late April with over 1,100 new laws on the books.

According to child custody advocates and critics, the new law will begin to reshape the family court system in Arkansas by creating a rebuttable presumption that

joint custody is the best option for the child and should be how the court rules.

Part of the team behind the former Senate Bill (SB) 18 was Arkansas Advocates for Parental Equality (AAPE). The advocacy groups' roots began in 2015 when co-founders Dr. Patrick Fraley and his wife, Gina Indelicato, a registered nurse, started a Facebook group to find support after their experience with the Arkansas family court system.

"I learned that family court is a money

game that serves the system, not the family. I am a fit and loving father with a clean record and an impeccable resume, so if it could happen to me, it could happen to anyone," Fraley said.

The Facebook group became an organization that focused on family law reform with members that worked to push for Arkansas legislation to pass SB18 in the 2021 legislative session.

AAPE first pushed for reform through Arkansas law in 2019, but that did not make it out of committee.

The group tried again in 2021 to obtain the change they wanted. Between the two years, Indelicato said, "What changed was our involvement in the legislature." The bill faced some revision, she said, but most of the change was in how the parental equality group lobbied the legislature and proposed a big change in an established system.

For AAPE and Brian Vandiver, an attorney and member of AAPE, there was plenty of evidence about why this change was needed. He said the former 2013 law where the legislature amended joint custody rules was not being enforced. "The Arkansas Supreme Court even told the lower courts last year in a very significant case called *Pace v. Pace*," Vandiver said.

Arkansas law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the children, and all other considerations

are secondary. In the *Pace v. Pace* ruling in 2020, the Supreme Court acknowledged the change in 2013 to Arkansas favoring joint custody was profound. The Arkansas high court affirmed the order of the circuit court denying a father's petition to modify a joint custody order and give him primary custody of his minor daughter.

LEGISLATURE REVISITS 2013 LAW

Sen. Alan Clark, R-Lonsdale, sponsored SB 18 in the recent legislation session with over 22 co-sponsors from the GOP supermajority in the Arkansas House and Senate. Under Clark's bill, current law determining child custody in a matter of divorce or paternity was changed to where there is a "rebuttable" presumption that joint custody would be in the "best interest of the child."

The legislation does list a series of circumstances where joint custody could be rebutted. That includes if the court finds clear and convincing evidence that joint custody would not be in the best interest of the child, such as an instance of domestic abuse committed by a parent or if one of the parties involved does not want joint custody.

"I think we have one of the best



Arkansas judges at the Pulaski County courthouse (above) and other state circuit courts will have to adapt to changes in state child custody laws under Act 604.



North Little Rock attorney Denese Fletcher believes Act 604 of 2021 will create uncertainty in future child custody cases in Arkansas. Fletcher is also a member of the Arkansas Ethics Commission, who has practiced law as a civil and criminal trial attorney with expertise in criminal defense in juvenile, district, circuit and federal courts.

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systems in the world, but it fails to value fathers," said Clark.

In the end, Act 604 was easily approved in both House and Senate chambers mostly along party lines. Gov. Asa Hutchinson signed the new child custody statute into law on April 8, instituting two major revisions to the Arkansas code that establishes the burden of proof for all custody cases and alters the roles of judges in family court.

Riley Cauley, staff attorney at Center for Arkansas Legal Services, explained that now to rebut the assumption that joint custody is in the best interest of the child, the evidence must be highly and substantially true.

"For civil cases, it's usually by a preponderance of the evidence. What that means is that the evidence is more likely than not to prove whatever it is you are trying to prove," he said.

Cauley added that attorneys and those presenting in child custody cases will now have to work harder to meet the parameters Act 604 set into place. Previously, the evidence only needed to "be greater than a 50% likelihood," he said, adding that clear and convincing is somewhere between preponderance and beyond a reasonable doubt.

For family law attorneys now, this new law changes how they address clients. The client must also explain to their attorney how their partner is an unfit parent in enough detail that would qualify as clear and convincing. These increases in the burden of proof raises questions for some family attorneys, including North Little Rock child custody advocate Denese Fletcher.

"I think there will be some circumstances where it is going to be argued that if the abuse didn't occur in the presence of the children and didn't have anything to do with the children that it may not meet the burden of clear and convincing," Fletcher said. "I am sure that the court will listen to these serious allegations, but with the burden being what it is the lawyer or the person making that allegation is going to have to have some really clear evidence."

Fletcher also fears that to meet this burden of proof might be a push to have children come into the courtroom and testify, which most judges look unfavorably upon because of the negative impact

that has on the child. Both Cauley and Fletcher also emphasized the new roles this law assigns to Arkansas judges.

"Judges no longer have the decision to make on custody, it's mandated. And if they don't make that decision they have to explain why. That's going to take more time, that's going to take more work. And to some degree, it is going to cost more money," said Fletcher.

However, Indelicato said "the new law doesn't impact cases of abuse. She said Act 604 left the evidentiary burden at 'preponderance' in cases of abuse, meaning there is no change in the existing statute.

"Act 604 deferred to the existing law in cases of abuse," Indelicato said. "There is no mandate for joint custody. A presumption is a defined starting point, not a required endpoint."

In addition, if a judge decides joint custody is not in the best interest of the child, they must provide a written statement defending their decision and a schedule that maximizes the amount of time each parent has with the child. Vandiver said "parenting time" does not necessarily mean that the parent is present, yet some may choose to have their child in daycare. Act 604 stands that both parents have 50/50 access to legal custody as well as physical custody, he said.

"Parenting time is defined as physical custody time, the number of nights each parent spends with the child. The goal is that each parent gets 182 nights a year," said Vandiver.

Still, a big concern from Fletcher was that Act 604 involves all fathers, including unmarried dads. She compared it to the Kentucky statute, where divorced couples were awarded joint custody with a high burden of proof required to deny it.

"But Arkansas' statute goes a step further," Fletcher said. "It mandates the same consideration for people who are not married and paternity actions." Paternity

has to be proven, but the father could have never met the child or lived with or been in a relationship with the maternal side and petitioned for joint custody and this legislation makes it seem likely that he would receive it. These factors are not covered in the law."

In cases where pregnancy results between two individuals who barely know each other, Fletcher also was not sure that the statute is necessarily always in the best interest of the child.

"I understand that both people made the child and the want for equal rights to the child. But, when the parents don't know each other, it's going to force, in my opinion, more litigation," said Fletcher, adding that she foresees a lot of women being impacted by the change. "I do think that a lot of this is good, but I do think that extending it out to people that are not married, no matter what the circumstances are, is going to cause problems."

However, Vandiver called this concern a red herring argument, saying he does not see a distinction between children born in a marriage or out of wedlock. "If paternity is established, they are entitled to the same rights. A parent is entitled to a relationship, equally. And a child is entitled to a relationship with each parent, equally," he said.

UNCERTAIN FUTURE

Act 604, however, does not deal with child support statutes in Arkansas, where child custody is a separate issue. For example, an order to pay child support does not directly entitle a parent to visitation.

If two parents were spending equal time with the child and were in relatively similar circumstances financially, Fletcher said she would not necessarily see the court entering an order for child support.

"So, if a person doesn't want to pay child support, they can easily say they want joint custody. And it will be the presumption," said Fletcher, who is also a member of the Arkansas Ethics Commis-

sion. She said the idea to start at the 50/50 baseline might nudge money out of the equation to allow the family court system to evaluate what is truly in the best interest of the child.

Meanwhile, all attorneys interviewed by *The Daily Record* said the future of child custody rights in Arkansas are uncertain, even with the passage of Act 604.

"The biggest impact is not known yet," said Cauley, "We have to wait and see." This statute is not mandatory unless one party wants it, a parent has the choice to waive this option for joint custody.

Fletcher said she suspects a rise in court dockets due to the requirement for a judge to help resolve areas of conflict between two parents, especially those unfamiliar with each other. She also said there are a lot of unknown topics, such as tax returns, that will have to be decided by case law as they are not specified in the legislation and will encourage more parties to go before a judge. These uncertainties will be handled by the appellate courts, which will have parties spending more time in court hearings, she concluded.

Still, Act 604 supporters said the involvement of a judge in such areas will prevent constant returns of cases over disputes. The new law that went into effect in late July is a start to change, even with the uncertainties and concerns that are attached to it, they said.

"Our biggest hope is reduced litigation," said Indelicato, "We saw that in Kentucky where they implemented their rebuttable presumption in 2017 and 2018."

"There is a lot that could still be changed in the family court system in order for it to work in the best interest of families," added Fraley, "We've discussed other things we would like to do but we haven't decided where to we are going to go from here because families deserve better and we can make it happen now I think." ♦



Arkansas Advocates for Parental Equality (AAPE) co-founders Dr. Patrick Fraley (far left) and his wife, Gina Indelicato (far right), were instrumental in the drafting of Senate Bill 18, which is now Act. 604 of 2021.

Sen. Alan Clark, R-Lonsdale, sponsored the bill during the 2021 legislative session. It became law on July 28.