

Michigan Family Support Council
Annual Fall Training Conference
Boyne Highlands, Harbor Springs, MI

Workshop Session A
Wednesday October 8, 2008
3:30 p.m. to 5:00 p.m.

Child Custody Factors

By:
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Michigan Child Custody Act Factors, Questions and Focus

Best interests of the child, definition – MCL 722.23

A. The love, affection, and other emotional ties existing between the parties involved and the child.

1. Meal preparation.
2. Bonding with and relationship to competing parties: To who is the child bonded?
3. When child has a problem, to whom does child speak?
4. When child has a triumph, to whom does child speak?
5. Place in column the average hours each party spends with the child each day.
6. Statements of child indicative of bonding.
7. Ability to separate child's needs from ones own; empathy with child.

Focus: The focus is on the emotional bond that currently exists between the parent and the child.

B. The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the education and raising of the child in its religion or creed, if any.

1. Who stays home from work when child is sick?
2. Who takes responsibility for involvement in academic affairs?
3. Who takes responsibility for involvement in extracurricular activities?
4. Who disciplines child; who uses preferable discipline techniques?
5. Who has preference because of the others verbal abuse, substance abuse or arrest record?
6. Who has preference because of ability to provide child access to extended family?
7. Are there other children, including children not a part of this litigation, whose custody should impact upon the court's decision in this case?

Focus: The focus is trying to project the parent's willingness and ability to foster an emotional bond in the future, and that parent's influence and impact on each individual item.

C. The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

1. Who makes purchases for the child?
2. Who attends to special needs of the child?
3. Who has greater earning capacity?
4. Who adjusts working hours based on need of child?
5. Who has certainty of future income?
6. Who has ability to provide insurance for child?
7. Who attends classes for professional improvement?
8. Who has requisite knowledge to meet the needs for the child?

Focus: The focus is trying to project the parent's willingness and ability to provide for the child in the future. This factor does not look at who earns more at the time of trial or who historically has been the family's main source of income (Berger v Berger, 277 Mich App 700 (2008)).

D. The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

1. Who has and who can provide safe environment?
2. Who has and can provide continuity?
3. Has there recently been or are there any anticipated changes in the living environment of the child that might upset things?

Focus: The focus is on the most stable and protective environment with the least possible disruption to the child.

E. The permanence, as a family unity, of the existing or proposed custodial home or homes.

Focus: This factor focuses solely on the permanence of the family environment not the acceptability of the custodial home or child care arrangements. (Fletcher vs. Fletcher, 871 Mich 871 (1994) and (Ireland v Smith, 451 Mich 457 (1996)).

F. The moral fitness of the parties involved.

1. Is a party having an extramarital affair **known** by the children? Unmarried cohabitation alone does not constitute immorality under the Child Custody Act. (Helms v Helms 185 Mich App 680, 684 (1990).
2. Verbal abuse.
3. Drinking problem.
4. Driving record.
5. Physical or sexual abuse of child.
6. Other illegal or offensive behavior.

Focus: This factor evaluates the parties' moral fitness only as it relates to how they will function as a parent and not as to who is the morally superior adult. (Fletcher).

G. The mental and physical health of the parties involved.

1. Is there culpable neglect on the part of the parent as to the child because of their mental and/or physical health?
2. Does the physical or mental health problem of the parent interfere with their ability to safeguard the child's health and well being?

Focus: Sensitivity must be given in order to avoid discrimination against a disabled person. This factor should not impair or defeat the public policy goal of integrating disabled persons into the mainstream of society. Yet you must weigh how much the child will be disadvantaged because of the mental and/or physical health of the party. Example: A serious illness alone is not enough to weigh the factor against someone. But, a serious illness coupled with neglect because they could not parent the child would be.

H. The home, school, and community record of the child.

1. Who can provide leadership to attend school?
2. Who can provide leadership in extracurricular activity participation?
3. Who is actively involved in school conferences, transportation and attendance at school events?
4. Who can more adequately assist either reducing necessity for other agency involvement (Juvenile Court, DHS) or if other agency is involved who can cooperate more fully.
5. Who can more adequately assure child's access to friends and peers useful for the child's development?
6. Who can more adequately plan and supervise child's undertaking of home responsibilities that are appropriate to child's age and circumstances?

Focus: The focus in this factor is both on the performance of the parent and the child. This may not be a relevant factor in very young children.

I. The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

1. Whom does child favor?
2. Is there a possibility of parental alienation or Domestic Violence affecting the child's preference?

Focus: The court must take the preference on the child into account if it decides that the child is of sufficient maturity to express a preference. The court is not required to disclose the child's preference. The child's preference does not automatically outweigh other factors; it is only one element used to make the determination. The interview by the court is strictly limited to the preference of the child and the basis for the preference (Molloy v Molloy, 466 Mich 852 (2002)).

Note: Before the interview of a child the court may see whether the parents and their attorneys are willing to waive the Molloy restrictions. Many parents/attorneys are happy to waive them (Michigan Family Law Bench Book).

J. The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.

1. Who can best cooperate with an appropriate visitation schedule by the other party?
2. Who is least likely to disparage the other parent in the presence of the child based upon past performance?

Focus: The focus on this factor is the functional relationship between the two parents.

K. Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

1. Have there been incidents of violence in the home by any party against any party; if so, has there been a police report, arrest or conviction?
2. Has there been a pattern of violence whether reported or not reported?

Focus: Don't underestimate the intimidation that DV may cause in on other factors that the victim may be afraid to fully discuss. The child's preference may also be influenced if this issue is a factor.

L. Any other factor considered by the Court to be relevant to a particular dispute regarding termination of a guardianship, removal of a guardian, or visitation.

1. Who can most likely address the special needs of the child?
3. Threats of kidnapping?
4. Excessive time involved in traveling for child?
5. Record of failure to exercise visitation; Failure to notify; Failure to return child.
6. Failure to complete court reports; investigation reveals unsatisfactory conditions.
7. Are there other children, whether a part of this litigation or not, whose custody is relevant to the child's best interests?
8. Are there significant others or new spouses whose relationships with the child affects the child's best interests?

Focus: Leave it to your imagination anything they you think are of value in making your determination. The court may not consider the race of a parent's spouse in considering whether to change custody.

Burden of Proof
MCL 722.27 (c)

Established Custodial Environment – “The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented **clear and convincing evidence** that it is in the best interest of the child.”

“The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.”

See: (Baker v Baker, 411 Mich 567 (1981) Duperon v Duperon, 175 Mich App 77 (1989).

No Established Custodial Environment – preponderance of the evidence (Hall v Hall, 156 Mich App 286 (1986).

Sum of the Factors

Each case and its own facts and circumstances must be applied to the factors. Custody is not awarded on the basis of which parent “score” the most points (Lustig v Lustig, 99 Mich App 716 (1980). Factors need not be given equal weight. The weight to be given any factor is ultimately left to the court’s discretion (McCain v McCain 229 Mich App 123 (1998).

Miscellaneous Points of Discussion

- 100 Mile Rule – MCL 722.31
- When parenting-time turns into custody
- Alternative Life Styles
- Religion

PROPER CAUSE AND CHANGE IN CIRCUMSTANCES

MCR 3.210 (C) (8) Custody of a Minor. In deciding whether an evidentiary hearing is necessary with regard to a post-judgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.

MCL 722.27 Child custody disputes; powers of court; support order; enforcement of judgment or order.

Sec. 7.

(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

A. What Constitutes a Change of Circumstances or Proper Cause? See *Vodvarka v. Grassmeyer*, 259 Mich App 499 (2003).

“This Court has published minimal case law regarding what constitutes "proper cause" or a "change of circumstances" sufficient to reopen a custody issue. Those few published cases that do exist reveal that neither an intrastate change in domicile, *Dehring, supra* at 165, and the cases cited therein, nor minor allegations of contempt or visitation complaints, *Adams v Adams*, 100 Mich App 1, 13; 298 NW2d 871 (1980), are sufficient to establish a change of circumstances or proper cause warranting the revisiting of the child custody factors”.

The requirement that a party seeking a change in custody first establish proper cause or a change of circumstances emanates from the Child Custody Act, MCL 722.21 *et seq.* Specifically, MCL 722.27(1)(c) provides that if a child custody dispute has arisen from another action in the circuit court, the court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances" On the basis of this language, this Court held in *Dehring v Dehring*, 220 Mich App 163, 165; 559 NW2d 59 (1996), quoting *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994), that if the movant does not establish proper cause or change in circumstances, then the court is precluded from holding a child custody hearing: "The plain and ordinary language used in MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. *It therefore follows as a corollary that where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors.*" [Emphasis added.]"

PROPER CAUSE

"In summary, to establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. The phrase "proper cause" is not by the words themselves tied to a change in events as is "change of circumstances." Rather, proper cause is geared more toward the significance of the facts or events or, the appropriateness of the grounds offered. If the moving party is aware of an event, or should have been aware of an event that occurred before the entry of a custody Order, by consent or following a hearing, the moving party should not be allowed to argue that this event is significant enough to constitute proper cause to revisit the order."

CHANGE IN CIRCUMSTANCES

“In order to establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. Again, not just any change will suffice, for overtime there will always be some changes in a child's environment, behavior, and well-being. Instead, **the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child.** This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors.”

WHEN DOES THE CHANGE IN CIRCUMSTANCES OCCUR?

“Evidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes, but the change of circumstances must have occurred *after* entry of the last custody order. As a result, the movant cannot rely on facts that existed before entry of the custody order to establish a "change" of circumstances”

ELEMENTS OF PROPER CAUSE

1. Preponderance of the evidence that appropriate ground for legal action be taken by the Court.
2. Appropriate grounds must be relevant to at least one of statutory factors related to the Child Custody Act.
3. The grounds should be of such magnitude that they have a significant effect on the child's well being.

ELEMENTS OF CHANGE IN CIRCUMSTANCES

1. Since entry of the last custody Order, conditions, which have or could have a significant effect on child's well being, have materially changed.
2. Material changes have had or will almost certainly have an effect on the child.
3. Determined on the facts of each individual case, with the relevance of the facts based on the statutory best interest factors.

SOURCES

Proper Cause and Change in Circumstances section – Ronald Foon – Referee Supervisor
Oakland County Friend of the Court – Author of the enclosed section

Relevant Custody Act Factor Questions – The original source is unknown – I have had a
copy of these for years and have made some modifications to them over the years.

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Michigan Family Law, - Scott Bassett, Judith A. Curtis and Sherri L. Katz, The institute
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