

Michigan Judicial Institute/ Friend of the Court Bureau Webinar

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What the Best Interest Factors Really Mean: Making Child Custody Determinations Using Plain English

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What Do the Best Interest Factors *Really* Mean?

The Child Custody Act broken down in plain English



INDEPENDENCE · ACCESSIBILITY · ENGAGEMENT · EFFICIENCY



What to Expect



A Few Words on Bias



Bias is: the attitudes or stereotypes that affect our understanding, decisions and actions in an unconscious manner. These implicit biases we all hold do not necessarily align with our own declared beliefs. (The Kirwan Institute)

OR

an inclination of temperament or outlook *especially*: a personal and sometimes unreasoned judgment (Merriman Webster)

A Few Words on Bias



"[T]he "biases are bad" claim is more than a bit misleading. Bias is neither inherently good nor bad. Biases can clearly come with upsides—they improve decision-making efficiency. However, when the accuracy of the decision is of utmost importance, over-reliance on our initial judgment may cause us to seek out information to support it and neglect information that is inconsistent with it.

This can create a confirmation bias that, when the stakes are high, may lead to disastrous outcomes."

–Dr. Matt Grawitch

What does a custody order mean?



The Big Picture

○ Two kinds of custody: Legal and Physical

○ Legal: Decision-making authority on basic child rearing issues including health care, religion, education, day to day decision-making and discipline.

○ Physical: The actual physical residence of the child.

The Big Picture

- Joint Custody: An Order of the Court that specifies one or both:
 - (a) That the child shall reside alternately for specific periods with each of the parents.
 - (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.
 - If parents agree: Court must order joint unless contrary to BIMC by *clear and convincing evidence*
 - If Court does not order joint custody, it has to explain why
 - Court *can* consider joint custody without parent's request
 - No presumption in favor of joint custody
- Sole Custody: No legal definition. Generally means one parent provides most of the day to day care for a child and has the exclusive right to make major decisions for the child.

A party wants to establish or change a custody order. Now what?



STEP 1: Is there Proper Cause/Change in Circumstances?

- Before the court may review custody or parenting time, the party who filed the motion must demonstrate proper cause or change of circumstances warranting the review.
 - Proper Cause: one or more appropriate grounds that could have a significant effect on a child's life or well-being
 - Change in Circumstances: Change of conditions **since entry of the last Order** that could have a significant effect on a child's life or well-being
 - Moving party has the burden of proving PC/CIC
 - Normal life changes: Not enough to modify custody, but could be for parenting time
 - Initial Threshold: PC/CIC showing not required

STEP 2: Determine who has the Established Custodial Environment (ECE)

- **"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 control."**
 - Viewed from the lens of the child **NOT** the parent
 - Look for preponderance of the evidence of ECE
 - You need to make a finding of ECE even in "pre" cases (Kessler)
 - Significant Duration: look at the preceding year(s)
 - Not about what is ordered, rather what is actually happening
 - Temporary orders do not automatically create ECE
 - Presumption given to natural parents
 - Failing to work with other party to encourage parenting time could work against an ECE finding

Step 3: Determine the Burden of Proof. Will the requested relief change the ECE?

Changes ECE: Clear and Convincing Evidence

Does not change ECE: Preponderance of the Evidence

ECE Destroyed: Means ECE not changed, and BOP is Preponderance

- Conditions to parenting time could become a change in custody, but likely not.
- Suspension of parenting time elevates BOP to Clear and Convincing because a child should have a relationship with both parents.

Burden of Proof for what?

○ Evaluating the Best Interest Factors, of course!

- Child Custody Act MCL 722.23: "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court.
- ✓ Not all factors are given equal weight and weight is in **the sound discretion of the Court**
- ✓ Finding on all factors: consider applicability of all factors (not for parenting time though)
- ✓ Parties reach an agreement: finding implicit in court's acceptance of parties' agreement

“A child custody determination is much more difficult and subtle than an arithmetical computation of the factors.”



Dempsey v. Dempsey, 96 Mich App 276 (1980).

Child Custody Act of 1970 MCL 722.23

- As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court.
 - The weight to be given each factor is ultimately left to the court's discretion
 - The Court must articulate its findings of fact on BIF's for custody decisions
 - Court does not need to comment on every matter in evidence
 - There will be some natural overlap
 - Things you ask the parents and things you consider may not be the same

Factor A:

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

○ **Meaning: The relationship between the child and each parent: Who has the more loving bond?**

- Describe your relationship with the child/parenting style?
- Who does the child go to with problems?
- To whom does the child go to celebrate victories?
- To whom does the child go to ask advice?
- Who comforts the child?
- How do you express your love to each other?
- Who disciplines the child historically?

Source: MCL

Case Law and Other Considerations

- ✓ A more consistent bond can weigh in favor of the more consistent parent.
- ✓ Unhealthy dependence on the relationship with the child can work against the parent
- ✓ Emotional attachment (bond) and preference are inseparable
- ✓ If it could go either way, an equal finding is not inappropriate.
- ✓ Custody does not mean who is the more loving parent.
- ✓ Are the ties and bonds between parents and children appropriate? Oversharing?
- ✓ Ask the parties to self evaluate and evaluate each other.

Factor B:

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

○ **Meaning: How willing and able is each parent to be present for the minor child emotionally, physically, and spiritually?**

- Who goes to school events/conferences/extra-curriculars? Participate in hobbies?
- Religious practices? Who takes them?
- Who disciplines the child and how?
- Who stays home with the child when sick?
- Who takes to doctors appointments?
- Who bathes and dresses child? Prepares meals?
- Does child have special needs and how do the parents handle them?

Case Law and Other Considerations

- ✓ Emotional guidance: Is the bond appropriate? When all other things equal, a child's need for discipline and guidance is outweighed by need for affection. Leaning on a one-sided account to make a determination is not clear legal error.
- ✓ Failing to provide suitable housing when a party can afford it and chooses not to exercise that ability, finding the factor against that party is appropriate.
- ✓ A willingness to provide counseling to navigate a parent's issues works in that parent's favor.
- ✓ Consider disciplinary techniques and their appropriateness.
 - ❖ I.e., time out v. corporal punishment

Factor 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.

○ Meaning: What is the parent's ability and willingness to provide for the child?

- Who buys clothes/food/necessities for the child?
- Do the parents work? Schedule/job history. If not how are they supporting the family?
- Parents income/capacity to earn? Debt load (possibly)?
- Special needs of the child? Who addresses? How do they each address? Does the other party have a capacity to address?
- Who takes the child to medical and dental appointments?
- Who finds and arranges for childcare?

Case Law and Other Considerations

- ✓ In a "Pre" case, this factor is rarely decisive, as the court will adjust family economics with support orders.
- ✓ If a party has the capacity to earn more than the other party, but the first party is voluntarily unemployed while the other party works, an equal weighting can be appropriate.
- ✓ Failing to provide suitable housing when a party can afford it and chooses not to exercise that ability, finding the factor against that party is appropriate.
- ✓ When the parties had similar incomes, but fought over the child's clothing, the court found the parties equal.
 - ❖ Speaks to willingness
- ✓ When the parties have met the children's material needs equally, but one party earns a higher income, it could be appropriate to weigh in favor of the higher wage earner.

Factor D:

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

O Meaning: How stable is the parent's home?

- Residential history: evictions/ foreclosures? Broken relationships? Roommates?
- Current home and sleeping arrangements. How long?
- Who else lives in the home?
- Who supervises the child if not home (if necessary)?
- Leave child alone? How long?

Case Law and Other Considerations

- ✓ Frequent relocation does not mean instability. Especially in a Pre case.
- ✓ Homelessness does not automatically mean instability.
- ✓ Identify the length of key relationships, predictability, and structured activity.
- ✓ If the party's housing appears unstable, take it a step further:
 1. Identify the source of instability (i.e., evictions, drug use, financial issues, mental health issues, etc.)
 2. Identify how those sources have impacted the child (i.e., shift in behavior, falling grades, etc.)
- ✓ This factor also speaks to the ECE

Case Law and Other Considerations

- ✓ One party giving the other party temporary physical control of the child for a short period so that the party can get back on her feet, does not automatically destroy the ECE for that party. (in this case, temporary meant 3 months).
- ✓ One party temporarily giving the other party custody to protect the BIMC, custody should be returned to that parent absent clear and convincing evidence (in this case, temporary meant 9 months).
- ✓ Though generally desirable to maintain continuity in a home to protect the BIMC, voluntarily relinquishing custody temporarily should be encouraged by returning custody.
- ✓ Like ECE, look at the *actual* circumstances of the case, NOT what is ordered.
- ✓ Custodial environment is more than physical custody. Look at the big picture.

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

OMeaning: How stable is the parent's home life?

- What is the parent's family structure? Describe history (i.e., new marriage, length, stability, etc.)
- Any non relatives living in the home (roommates, friends, etc.)?
- Any siblings or stepsiblings/parents? How are those relationships for the child?
- Has either parent engaged in multiple relationships?

Case Law and Other Considerations

- ✓ Stability of the family unit is demonstrated by the strength of key relationships and likelihood of continuing the living structure with people with those key relationships.
- ✓ Though keeping siblings together is inherently in the BIMC, look at each child individually, and their own growth.
- ✓ This factor is about whether the family unit will remain intact, not which home is more acceptable, or whether one parent goes out more than the other (i.e., is home for the children). Again, look at the key relationships.
- ✓ However, a parent's social interests outside the home, leading to frequent use of babysitters, can impact the permanence and continuity of the custodial family unit. Again, look at the key relationships.

Factor F: The moral fitness of the parties involved.

- **Meaning: Not who is the morally superior adult, but how does the parent's decision making and conduct impact their ability to care for the child?**
 - Criminal history
 - Drug and alcohol or other substance use
 - Multiple partners (i.e., instability of relationships)
 - Any mistreatment or abuse of the other parent in front of the child?
 - Abuse of the child?
 - Have any of these behaviors be in the presence of or had an impact on the child?

Case Law and Other Considerations

- ✓ Check CPS and MDHHS records
- ✓ Check who the parent will have frequenting the house and how and if their presence will impact the child.
- ✓ Very little case law on moral fitness
- ✓ Offensive or illegal behaviors, physical or sexual abuse, verbal abuse, substance abuse, impact this factor.
- ✓ Look not only to the behavior but the impact on the child.
"Offensive" behavior not necessarily in front of the child does not necessarily mean the factor should weigh against that parent.

Case Law and Other Considerations

- ✓ Standing alone, a parent having a baby with a teenaged, unmarried man does not constitute immorality.
- ✓ Unmarried cohabitation does not constitute immorality.
- ✓ Look inward to your own biases and to the biases that exist in your own community. What constitutes "morality" is highly subjective and will vary from person to person, and court to court.

Factor G: The mental and physical health of the parties

O Meaning: Does the parent have any physical or emotional health issues that would interfere with the ability to care for the child?

- Does the parent have any mental or physical issues or diagnoses?
- Does the parent follow doctor's recommendations for treatment? Take medication?
- Would the energy of the child overwhelm the parent, given the health issues?
- Does that parent's health issue interfere with his/her ability to care for and keep the child safe?

Case Law and Other Considerations

- ✓ Even if psych evals indicate no mental health issues, evidence of inappropriate displays of anger in a child's presence or other behavioral issues can lead to a finding against a party.
- ✓ Having mental or physical health issues does not necessarily constitute an unequal finding on this factor. Take a step further and look at how the parent manages the issue and whether the parenting would be impacted by it.
- ✓ If a parent is disabled or impacted by a health condition, and it could impact their parenting, ask questions about access to support systems and if they can assist in raising the child.
- ✓ If the parties are otherwise healthy, it is not appropriate to consider age and weight of the parent as factors against the parent.

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

O Meaning: This factor focuses on the child's interactions at school, home, and in the community—not the parents'

- What is the child's performance and attendance in school with each parent?
- Has the child been disciplined for behavior in school? How did the parent respond?
- Does the child participate in extra curricular activities? Are the parents involved?
- Does the child have any chores or responsibilities at home? Behavior at home?
- Is the child able to see friends at home?
- Has the child been in trouble in the community at the parent's house?
- Who helps the child with homework?
- Is the child respectful/get along with all the member's in the parent's home?

Case Law and Other Considerations

- ✓ If the child is very young, it may be difficult to evaluate this factor.
- ✓ Look at school attendance records while the child is with each parent: excessive absences or tardies with one parent could weigh against that parent.
- ✓ If a parent's actions at home relative to the child negatively affect the child's grades, it could weigh against that parent.
- ✓ FERPA: schools will not discuss matters without a waiver signed by each custodial parent.

Factor I:

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

O Meaning: What does the child want?

- "Old enough" is subjective, depending on the child's age and maturity.
- **THIS IS A CONFIDENTIAL CONVERSATION – let the kiddo and parties know that!**
- A parent must be informed that the child's preference was expressed to the court.
- Things you can ask the child:
 - Do you know why you're here?
 - What is it like at mom's house? Dad's house?
 - What do you want the schedule to be?

Case Law and Other Considerations

- ✓ Make the interview as comfortable as possible for the child.
- ✓ Look for the reason behind the child's preference.
- ✓ If the parents do not produce the child for the interview, it may not count against the parents.
- ✓ A failure of the court to interview the child could mean reversal of the decision.
- ✓ If there are multiple children in the matter, and they express different preferences, the factor can weigh in different ways as well.
- ✓ A change in preference does not automatically mean a change in custody.
- ✓ Coaching will color the child's preference and should be weighed when considering this factor
- ✓ "The minor child was interviewed and a preference was expressed, which shall remain confidential." *no weight given in recommendation*

Factor J:

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

O Meaning: Can the parents play nice and say nice things about each other?

- Always look to the *why* behind a parent's bad behaviors.
 - Does a parent make derogatory comments about the other parent in front of the child?
 - Does the parent inform the child about court proceedings or other adult issues?
 - Did a parent deny the other parent parenting time?
 - Do the parents seek input about one another for decision making re: the child?
 - Do the parents speak respectfully to one another?
 - Do the parents cooperate with one another?
- O REMEMBER: A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.**

Case Law and Other Considerations

- ✓ Ask the parties to describe their relationship with the other parent. Ask the parties how the other party acts as a co-parent.
- ✓ Domestic/IP violence? The survivor's action may not constitute a failure to co-parent.
- ✓ Repeated violations of a parenting time order to minimize the other parent's time could weigh against the parent.
- ✓ Berating a parent in the presence of the children could weigh against a parent.
- ✓ Big picture: if the only evidence against a parent in this factor is their refusal to cooperate with the other parent after an interim order is entered, for example, it may not mean the factor should be weighed against that parent.
- ✓ Presumed to be in BIMC to have a relationship with both parents.

Case Law and Other Considerations

- ✓ Parental alienation: “[t]he process of one parent trying to undermine and destroy to varying degrees the relationship that the child has with the other parent.” Focuses more on the process and behaviors that destroy the relationship.

*Highly criticized as junk science.

- ✓ While there may be a dispute in the scientific community about whether there is a diagnosable, pathological condition called parental-alienation syndrome, there is no reasonable dispute that high-conflict custody disputes frequently involve acts by one parent designed to obstruct or sabotage the opposing parent's relationship with the child. See *Martin v. Martin*, COA No. 349261 (Jan. 28, 2020).

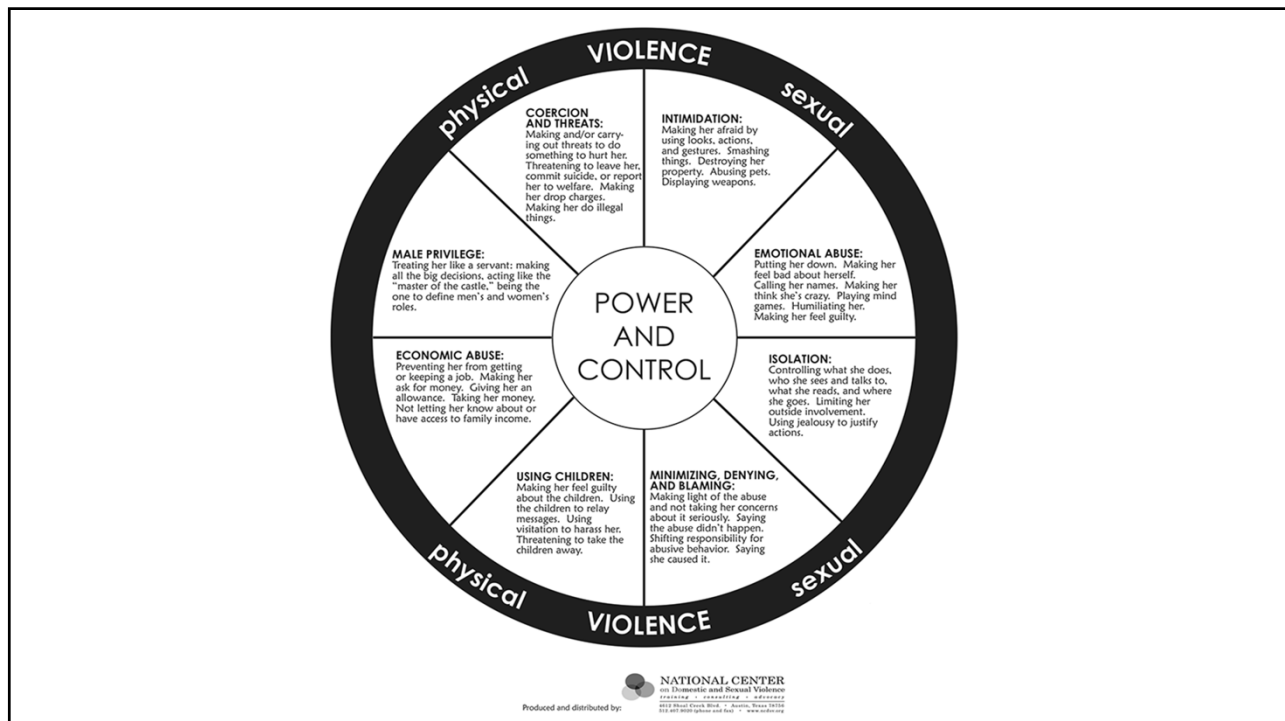
Factor K:

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

- **Meaning: Is there violence in the relationship between the parties? Did the children witness it? Were they a victim to it?**
 - Any physical violence? Choking? Guns or other weapons?
 - Name calling? Yelling? Intimidation?
 - Controlling behavior? Limiting where a person can go - blocking doorways, disabling cars, stalking, etc. Can the children leave with the parent?
 - Intimidation: punching holes in walls, flipping furniture, co/overt threats to the party, child, animals.
 - Pattern of behavior: Ask about most recent, first, and worst incidents.

Case Law and Other Considerations

- ✓ Explore resources from the MCEDSV and MDVSPTB
- ✓ Domestic violence is about power and control. Look for a pattern of violence.
- ✓ 2 types of “Domestic Violence”: A theory. Look for a pattern of behavior for actual DV.
- ✓ Parties with equal culpability in fighting should probably go to factor J.
- ✓ Very little case law under this factor because DV used to be considered under other factors.



Factor L:

Any other factor considered by the court to be relevant to a particular child custody dispute.

O Meaning: This is a subjective catch-all to cover any facts that may not fit neatly into the other factors.

- Are there any unique, case specific issues?
- Any distance/transportation issues (also a pt factor)
- CPS involvement? Did the parties cooperate with services? Complete services?
- Are there any facts indicating the children should be kept apart?
- Is there anything else you think I should know?

Case Law and Other Considerations

- ✓ The ability of the parents to consider the interests of the child is considered here. i.e. a parent temporarily relinquishing custody of a child to protect the child could weigh in the parent's favor — or not, depending on the circumstances.
- ✓ Consideration of any special needs of the child OR the parent should be addressed here.
- ✓ It is inappropriate to interject personal philosophy when it contravenes public policy—for example, using this factor against a parent in a mixed race or homosexual relationship.
- ✓ Past conduct can be appropriate and relevant to the weight of this factor.
- ✓ Bio, step, and half sibling relationships should be considered here.

Parenting Time

○ Parenting Time Statutory Authority: MCL 227.27(a)

- Parenting Time is to be granted in accordance with the best interests of the minor child.
- If the parents agree to a schedule, the court will order it barring clear and convincing evidence to do otherwise.
- A child has a right to parenting time, barring clear and convincing evidence to the contrary.
- Child conceived by way of CSC = No parenting time
- Specific Parenting Time shall be granted at any time if requested by one of the parties
- Parenting time cannot be exercised in a non-Hague Convention articles-participating country.
- Parent exercising parenting time gets to make routine decisions for the child at the time.

Parenting Time Factors

- a) The existence of any special circumstances or needs of the child.
- b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
- c) The reasonable likelihood of abuse or neglect of the child during parenting time.
- d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
- e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

Parenting Time Factors

- f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
- g) Whether a parent has frequently failed to exercise reasonable parenting time.
- h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
- i) Any other relevant factors.

Conditions to Specific Parenting Time

Designed to facilitate orderly and reasonable exercise of parenting time

- a) Division of the responsibility to transport the child.
- b) Division of the cost of transporting the child.
- c) Restrictions on the presence of third persons during parenting time.
- d) Requirements that the child be ready for parenting time at a specific time.

Conditions to Specific Parenting Time

- e) Requirements that the parent arrive for parenting time and return the child from parenting time at specific times.
- f) Requirements that parenting time occur in the presence of a third person or agency.
- g) Requirements that a party post a bond to assure compliance with a parenting time order.
- h) Requirements of reasonable notice when parenting time will not occur.
- i) Any other reasonable condition determined to be appropriate in the particular case.

Things We Didn't Talk About

- Paternity
- Grandparenting Time
- Domicile
- Contempt / PT violations
- Third Party Custody
- UCCJEA / UIFSA
- Child Support
- Impact of outside orders (N/A, PPO's, Criminal proceedings)

Sources

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Harper v. Harper, 199 Mich App 409 (1993)

Phillips v. Jordan, 241 Mich App 17 (2000)

Barringer v. Barringer, 191 Mich App 639 (1991)

Questions? Contact me!



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Thank You!

