Child Custody Dispute (Guardian/Limited Guardian Involved) Checklist

A dispute over a minor child's custody may be raised as an original action under the Child Custody Act (CCA), MCL 722.21 *et seq*., or incident to another action, so make this determination early to ensure appropriate procedures have been followed.[1] See MCL 722.27(1); MCR 3.204; MCR 3.205.

Although the CCA distinguishes between physical custody and legal custody, caselaw has indicated since 2003 that "custody" logically refers to both physical custody and legal custody. *Merecki v Merecki*, 336 Mich App 639, 647 (2021). There is no distinction between the legal standard required to change physical custody and the standard to change legal custody. *Id*. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 509-514 (2003).

In all actions that involve a dispute over a minor child's custody, the court must declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with the CCA. MCL 722.24(1). If paternity has not been established, refer to the Paternity Act, MCL 722.711 *et seq*.

All child custody disputes have precedence for hearing and assignment for trial over other civil actions. MCL 722.26(1).

The court may refer the case to the Friend of the Court (FOC) for an investigation and recommendation on custody. See MCL 552.505(1)(d). After reviewing the recommendation, the court then makes the ultimate custody decisions after applying the law to all relevant evidence.

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[1] "[A] circuit court has jurisdiction to consider a motion to change the domicile of a minor child established by a custody award in a divorce judgment while that underlying judgment is pending on appeal"; "MCL 722.27(1) authorizes the continuing jurisdiction of a circuit court to modify or amend its previous judgments or orders and is an exception to MCR 7.208(A) 'otherwise provided by law.'" *Safdar v Aziz*, 501 Mich 213, 215, 219 (2018) ("MCL 722.27(1)(c) specifically permits the circuit court to modify or amend its orders when proper cause is shown or when there has been a change of circumstances," and "[i]ts sole limiting principle is that the modification be in the best interests of the child"; accordingly, "it would be contrary to the plain language of the [Child Custody Act, MCL 722.21 *et seq*.] to require a court to wait for the conclusion of an appeal to address a change in circumstances that would affect the interests of the child.")

Overview (click any of the steps below to get more information):

- ❑ Determine who the parties are.
- ❑ Take preliminary steps related to service, proper cause/change of circumstances, and appointing a lawyer-guardian ad litem (LGAL) if necessary.
- ❑ Make findings regarding the established custodial environment, if any.
- ❑ Understand the scope and application of the best interests factors throughout the proceeding.
- ❑ Settle the child custody dispute, which could include ordering sole/joint custody, child support, reasonable parenting time, modifying previous judgments/orders, and/or taking any other action necessary.

Parties Involved

If a dispute over a minor child's custody is raised, inquire and determine the following:

- ❑ Whether the dispute involves a child's guardian/limited guardian. See MCL 722.26b(1).
  - ❑ If not and the child custody dispute is between the child's parents, refer to the Michigan Judicial Institute's *Child Custody Dispute Between Parents Checklist*.
  - ❑ If not and the child custody dispute involves an agency, refer to the Michigan Judicial Institute's *Child Custody Dispute (Agency Involved) Checklist*.
  - ❑ If not and the child custody dispute involves a third person, which includes a grandparent, refer to the Michigan Judicial Institute's *Child Custody Dispute (Third Person Involved) Checklist*.
- ❑ Ensure the child's guardian/limited guardian has standing to bring an action for custody under the CCA.
  - ❑ Guardian *has* standing to bring an action. See MCL 722.26b(1).
  - ❑ Limited guardian *has* standing to bring an action UNLESS the child's parent(s) has substantially complied with the limited guardianship placement plan. See MCL 722.26b(1)-(2).
- ❑ Determine whether this court has continuing jurisdiction over the child.[2]
  - ❑ If NOT, the child custody action MUST be filed in the circuit court in the county in which the probate court appointed the guardian. See MCL 722.26b(3).
- ❑ MUST request the Supreme Court, in accordance with MCL 600.225, to assign the probate court judge who appointed the guardian/limited guardian to serve as the circuit court judge and hear the child custody action *if* the child's guardian/limited guardian brings the child custody action. MCL 722.26b(5).

Scope and Application of Best Interests Factors

[2] Guardianship proceedings concerning that child in the probate court are stayed until disposition of the child custody action. MCL 722.26b(4). A probate court order concerning the guardianship remains in full force until superseded by a circuit court order. *Id.*

❑ The *best interests of the child* control. MCL 722.25(1); see also *Shade v Wright*, 291 Mich App 17, 31 (2010) ("Custody decisions require findings under all of the best interest factors."). See MCL 722.23 for the *best interests of the child* factors.

Service, Proper Cause/Change of Circumstances, and LGAL Requirements

❑ Ensure proper service. MCR 3.203.

❑ If there IS a prior custody order and the court has jurisdiction to modify it, the court MAY modify/amend a previous judgment/order (unless parent is on deployment)[3] for ***proper cause*** shown or because of ***change of circumstances*** (available until the child reaches 18 years of age).[4] Determine whether proper cause or a change of circumstances exists to warrant modification or amendment of previous a judgment or order; burden of proof is preponderance of the evidence. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 509 (2003).

❑ If the court has jurisdiction over the child but there is NO prior custody judgment or order, proper cause or changed circumstances need NOT be established before the court may proceed with the established custodial environment analysis and the best interests analysis to make a custody determination.[5]

❑ Determine whether the child's best interests are adequately represented; if not, MAY appoint a lawyer-guardian ad litem

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[3] Special procedures apply for a parent **on deployment**. MCL 722.27(1)(c); MCL 722.27(3); MCL 722.27a(16). For a checklist on changing child custody or parenting time while a parent is on deployment, see the Michigan Judicial Institute's *Changing Child Custody or Parenting Time While Parent on Deployment Checklist*. If a motion for change of custody or parenting time is filed **after** a parent returns from deployment, the court must NOT consider a parent's absence due to that deployment (or future deployments) in making a *best interests of the child* determination. MCL 722.27(4); MCL 722.27a(17).

[4] Subject to MCL 552.605b, until the child reaches 19 years and 6 months of age.

[5] See *Sims v Verbrugge*, 322 Mich App 205, 215 (2017) ("A person is only required to demonstrate proper cause or a change in circumstances when that person seeks to modify or amend the trial court's previous judgments or orders.") (cleaned up). In *Sims*, "there was no previous judgment or order concerning legal custody, for although plaintiff enjoyed initial legal custody of [the child], it was granted by operation of law [under MCL 722.1006], not a judicial determination." *Sims*, 322 Mich App at 215. "Courts cannot treat the legal custody granted by signing an [Acknowledgment of Parentage (AOP)] the same as a judicial determination because . . . MCL 722.1006 provides that the grant of initial custody through the execution of an AOP '[does] not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time.'" *Sims,* 322 Mich App at 215 (2017) ("Accordingly, by requiring defendant to demonstrate by a preponderance of the evidence proper cause or change in circumstances—the standard required to modify or amend an existing judgment or order—the trial court erred, imposing a higher burden on defendant in violation of MCL 722.1006") (citations omitted).

(LGAL) to represent the child. MCL 722.24(2). See also MCR 3.204(D).

- ❑ LGAL may file a written report and recommendation, which the court may read, but is not admissible into evidence *unless* all parties stipulate to its admission. MCL 722.24(3).

- ❑ The court may assess all or part of the costs and reasonable fees of the LGAL against one or more of the parties, after a determination of ability to pay. An LGAL must not be paid a fee unless it is received and approved by the court. MCL 722.24(4).

Established Custodial Environment

- ❑ Determine whether an established custodial environment exists:[6] **do not** modify or amend any 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 interests of the child. MCL 722.27(1)(c).[7]

  - ❑ 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. MCL 722.27(1)(c).

  - ❑ The age of the child, the physical environment,[8] and the inclination of the custodian and the child as to permanency of the relationship must also be considered. MCL 722.27(1)(c).

  - ❑ The custodial environment is evaluated based on the conditions as they exist at the time the court renders its custody decision.[9]

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[6] "[A] trial court must not 'presume an established custodial environment by reference only to' the most recent custody order, but must 'look into the actual circumstances of the case.'" *Marik v Marik*, 325 Mich App 353, 370 (2018).

[7] "[I]t is critical that trial courts, in the *first* instance, carefully and fully comply with the requirements of MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment. Any error in this regard may have lasting consequences yet effectively be irreversible." *Daly v Ward*, 501 Mich 897, 897-898 (2017) ("emphasiz[ing] how critical it is that trial courts fully comply with MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment[]").

[8] "Although the 'physical environment' of the children is to be considered in determining a child's established custodial environment, it is not the only factor, and it is not dispositive." *Sabatine v Sabatine*, 513 Mich 276, 293 (2024). In *Sabatine*, the Court emphasized that the established custodial environment is not determined merely by calculating the number of overnights with each parent, and that an established custodial environment may exist with both parents even when there is an "imbalance in time spent with each parent." *Id.* at 294.

❑ **Schedule an evidentiary hearing if the parties do not agree on the proposed change and the proposed change would alter an existing established custodial environment** to determine whether clear and convincing evidence supports that the proposed change is in the child's best interests.[10] MCR 3.210(C)(1) controls the timing of the hearing.

❑ **When a modification of custody with a parent or the parents would not change the established custodial environment,** determine whether the moving party has shown by a preponderance of the evidence that it is in the child's best interests. *Pierron v Pierron*, 486 Mich 81, 92-93 (2010).[11]

Settle Child Custody Dispute

❑ DETERMINE the child custody dispute by doing one or more of the following for the best interests of the child:[12]

❑MAY award custody of the child to one or more of the parties involved or to others and provide for payment of support for the child until the child reaches 18 years of age.[13] MCL 722.27(1)(a).

❑If the dispute is brought by the child's guardian/ limited guardian and this court awards custody of the child, SEND a copy of the judgment/order of disposition to the probate court in the county that appointed the guardian/limited guardian. MCL 722.26b(4).

❑MAY provide for reasonable parenting time of the child by the parties involved, by the maternal/paternal grandparents, or by others, by general or specific terms and conditions. MCL 722.27a governs parenting time of the

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[9]See *Sabatine*, 513 Mich at 296 ("[W]hether a parenting time provision modifies a child's established custodial environment for purposes of MCL 722.27(1)(c) is to be answered on the basis of the circumstances that exist at the time the trial court renders its custody decision . . . .").

[10]""When the custody, parenting time, change of domicile, or another motion regarding a minor is contested, the court may not enter an order resolving the contested matter that changes the child's established custodial environment without first holding an evidentiary hearing to determine whether clear and convincing evidence exists to support the order." MCR 3.210(C)(2).

[11]Note: *Pierron* was a custody dispute between parents and did not involve an agency or third party.

[12] See MCL 722.23 for *best interests of the child* factors.

[13] The court may require that support payments be made through the Friend of the Court (FOC), court clerk, or the state disbursement unit (SDU). MCL 722.27(1)(a). A judgment or order entered under the CCA providing for child support is governed by and is enforceable under the Support and Parenting Time Enforcement Act (SPTEA), MCL 552.601 *et seq*. MCL 722.27(2). For a checklist on issuing child support, including issuance of support after a child reaches 18 years of age, see the Michigan Judicial Institute's *Issuance of Child Support Checklist*.

child by the parents. MCL 722.27(1)(b). Refer to the Michigan Judicial Institute's *Establishing Parenting Time Checklist* for the procedures.

❑ MAY take any other action considered to be necessary in a particular child custody dispute. MCL 722.27(1).

For court forms related to domestic relations actions, see the One Court of Justice website.

For additional domestic relations resources, see the Friend of the Court Bureau website.