

# The Established Custodial Environment

WHAT IS IT, WHAT DO WE DO WITH IT, AND WHY IS IT IMPORTANT?



INDEPENDENCE · ACCESSIBILITY · ENGAGEMENT · EFFICIENCY



1

## Goals



- ▶ UNDERSTAND CUSTODY GENERALLY
- ▶ DEFINE THE ECE
- ▶ UNDERSTAND THE IMPACT OF THE ECE/ITS IMPORTANCE
- ▶ RECOGNIZE THE INTERSECTION OF ECE AND CUSTODY
- ▶ RECOGNIZE THE DIVERGENCE BETWEEN ECE AND CUSTODY

2

AN ACT TO **DECLARE THE INHERENT RIGHTS OF MINOR CHILDREN; TO ESTABLISH RIGHTS AND DUTIES TO THEIR CUSTODY, SUPPORT, AND PARENTING TIME** IN DISPUTED ACTIONS; TO **ESTABLISH RIGHTS AND DUTIES TO PROVIDE SUPPORT** FOR A CHILD AFTER THE CHILD REACHES THE AGE OF MAJORITY UNDER CERTAIN CIRCUMSTANCES; TO PROVIDE FOR CERTAIN PROCEDURE AND APPEALS; AND TO REPEAL CERTAIN ACTS AND PARTS OF ACTS.  
HISTORY: 1970, ACT 91, EFF. APR. 1, 1971; □AM. 1990, ACT 245, IMD. EFF. OCT. 10, 1990; □AM. 1996, ACT 19, EFF. JUNE 1, 1996.

# Child Custody Act of 1970

3

## Custody Generally

The CCA is your Playbook!

### WHAT YOUR JOB IS

- ❖ Declare IRMC
- ❖ Establish Custodial Rights/Duties including PT Support
- ❖ Establish Support (18+)

### FOR WHOM YOU CAN DO YOUR JOB (STANDING)

- ❖ Parent v. Parent
- ❖ Agencies v. Parent
- ❖ Third Parties (e.g. Grand Parents or guardians) v. Parent (add a note/proviso on standing re: ssm and adoption, etc.)

### HOW TO DO YOUR JOB

- ❖ PC/CIC
- ❖ ECE
- ❖ BIF and PT Factors

4

# Custody Generally

DECLARE THE RIGHTS OF THE MINOR CHILD:

What your job is

## JUST PUT IRMC LANGUAGE IN YOUR ORDER

**INHERENT RIGHTS OF THE MINOR CHILD:** THE PARENTS SHALL COOPERATE WITH RESPECT TO A CHILD SO AS, IN A MAXIMUM DEGREE, TO ADVANCE A CHILD'S HEALTH, EMOTIONAL, AND PHYSICAL WELL-BEING AND TO GIVE AND AFFORD A CHILD THE AFFECTION OF BOTH PARENTS AND A SENSE OF SECURITY. NEITHER PARENT WILL, DIRECTLY OR INDIRECTLY, INFLUENCE A CHILD SO AS TO PREJUDICE A CHILD AGAINST THE OTHER PARENT. THE PARENTS WILL ENDEAVOR TO GUIDE A CHILD SO AS TO PROMOTE THE AFFECTIONATE RELATIONSHIP BETWEEN A CHILD AND THE MOTHER AND A CHILD AND THE FATHER. THE PARTIES WILL COOPERATE WITH EACH OTHER IN CARRYING OUT THE PROVISIONS OF THIS ORDER FOR THE CHILD'S BEST INTERESTS. WHENEVER IT SEEMS NECESSARY TO ADJUST, VARY, OR INCREASE THE TIME ALLOTTED TO EITHER PARTY, OR OTHERWISE TAKE ACTION REGARDING A CHILD, EACH OF THE PARTIES SHALL ACT IN THE BEST INTERESTS OF THE CHILD. NEITHER PARTY SHALL DO ANYTHING WHICH MAY ESTRANGE THE OTHER FROM THE CHILD, INJURE THE CHILD'S OPINION OF THE OTHER PARTY, OR WHICH WILL HAMPER THE FREE AND NATURAL DEVELOPMENT OF THE CHILD FOR THE OTHER PARTY.

5

# Custody Generally

The CCA is your Playbook!

## WHAT YOUR JOB IS

- ✓ Declare IRMC
- ❖ **Establish Custodial Rights/Duties including PT & Support**
- ❖ Establish Support (18+)

6

## MCL 722.26a Joint custody.

- ▶ You **shall** advise parents of joint custody
- ▶ You **shall** consider JLC if a party asks for it
- ▶ You **shall** state a reason on the record as to why you are/not awarding JLC
- ▶ If parents want JLC, you **shall** award it, unless clear and convincing evidence otherwise
  - ▶ JLC NOT presumed to be in BIMC!
  - ▶ MAY add proviso about where MC lives OR MAY order that physical custody be shared to promote close and continuing contact (722.26a(b)(3))
  - ▶ MC with parent: Parent makes routine decisions
  - ▶ Dispute re: residency, put your finding on the record.
  - ▶ JLC does not mean no CS

7

## MCL 722.26a JLC Rabbit Hole

### Determine whether JLC is in BIMC by:

- ✓ Considering BIF's and
- ✓ Determining whether parents can play nice and share.

“If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and agree generally concerning important decisions affecting the welfare of the children, the court has no alternative but to determine which parent shall have sole custody of the children.” *Fisher v Fisher*, 118 Mich App 227, 233, 324 NW2d 582 (1982)

JLC means: An order in which **one or both** is specified:

1. MC lives alternately for specific periods with each parent
2. Parents shall share decision making authority

What about Physical Custody?

- ❖ Not statutorily defined but intimated
- ❖ Court Form Rabbit Hole
- ❖ Does “Primary Physical Custody” negate or diminish JLC per statutory definition?

8

# Custody Generally

The CCA is your Playbook!

## WHAT YOUR JOB IS

- ✓ Declare IRMC
- ✓ Establish Custodial Rights/Duties including PT & Support
- ❖ **Establish Support (18+)**

(THERE'S THAT SUPPORT PART TOO, BUT WE ARE IGNORING THAT TODAY)

9

# Custody Generally

The CCA is your Playbook!

## TELLS YOU:

### WHAT YOUR JOB IS

- ✓ Declare IRMC
- ✓ Establish Custodial Rights/Duties including PT Support
- ✓ Establish Support (18+)

### FOR WHOM YOU CAN DO YOUR JOB (STANDING)

- ❖ Parent v. Parent
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10

# Custody Generally

The CCA is your Playbook!

## FOR WHOM YOU CAN DO YOUR JOB (STANDING)

- ❖ **Parent v. Parent**
  - ❖ Includes parents related to the child by birth, but with no genetic connection.
  - ❖ Presumption in favor of the parents
- ❖ **Agencies v. Parent**
  - ❖ Can include MDHHS, adoptions, etc.
- ❖ **Third Parties (e.g. Grand Parents or guardians) v. Parent**
  - ❖ Very limited and must meet requirements
  - ❖ Includes Grandparenting Rights
  - ❖ MI includes equitable parents (ex: same sex marriages)
    - ❖ Same sex relationships distinguished because MC not born during a marriage

11

# Custody Generally

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### WHAT YOUR JOB IS

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### FOR WHOM YOU CAN DO YOUR JOB (STANDING)

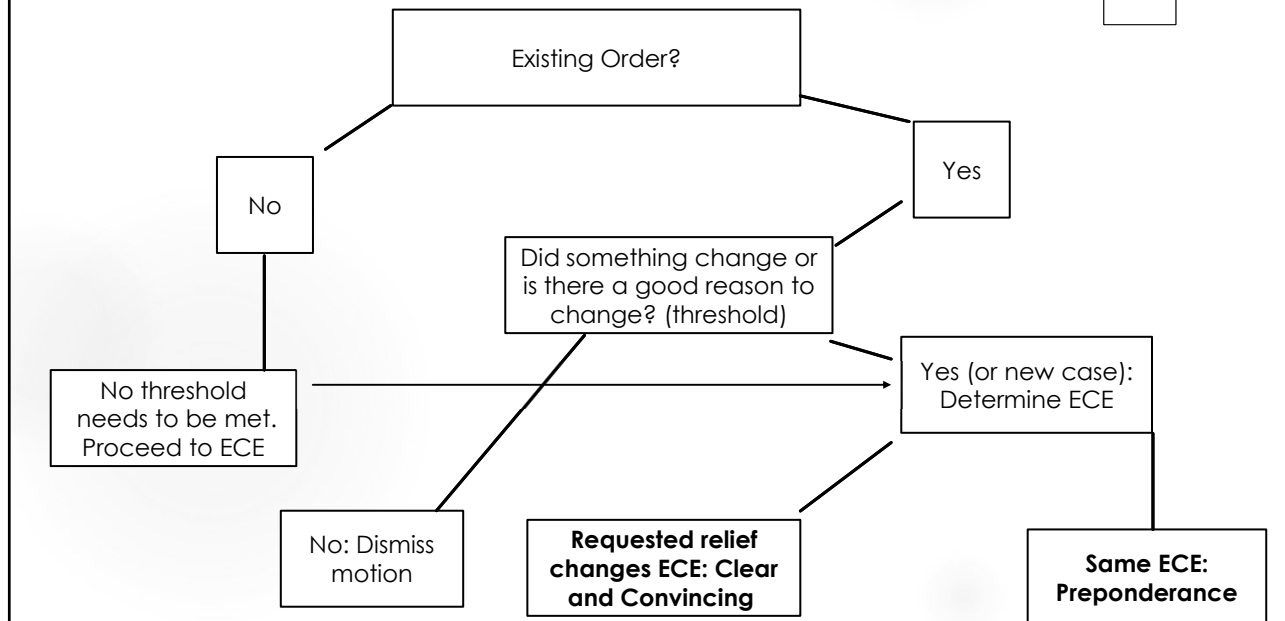
- ✓ Parent v. Parent
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### HOW TO DO YOUR JOB

- ❖ PC/CIC
- ❖ ECE
- ❖ BIF and PT Factors

12

## Custody Decision Flow Chart



13

## Custody Generally

The CCA is your Playbook!

- THE LOVE, AFFECTION AND OTHER EMOTIONAL TIES EXISTING BETWEEN THE PARTIES INVOLVED AND THE CHILD.
- 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.
- 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.
- THE LENGTH OF TIME THE CHILD HAS LIVED IN A STABLE, SATISFACTORY ENVIRONMENT, AND THE DESIRABILITY OF MAINTAINING CONTINUITY.
- THE PERMANENCE, AS A FAMILY UNIT, OF THE EXISTING OR PROPOSED CUSTODIAL HOME OR HOMES.
- THE MORAL FITNESS OF THE PARTIES INVOLVED.
- THE MENTAL AND PHYSICAL HEALTH OF THE PARTIES INVOLVED.
- THE HOME, SCHOOL AND COMMUNITY RECORD OF THE CHILD.
- THE REASONABLE PREFERENCE OF THE CHILD, IF THE COURT CONSIDERS THE CHILD TO BE OF SUFFICIENT AGE TO EXPRESS PREFERENCE.
- 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 OR THE CHILD AND THE PARENTS.
- DOMESTIC VIOLENCE, REGARDLESS OF WHETHER THE VIOLENCE WAS DIRECTED AGAINST OR WITNESSED BY THE CHILD.
- ANY OTHER FACTOR CONSIDERED BY THE COURT TO BE RELEVANT TO A PARTICULAR CHILD CUSTODY DISPUTE.

14

## Custody Generally

The CCA is your Playbook!

- For kicks, parenting time has its own factors to be considered too:
- 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

15

## What is the Established Custodial Environment anyway?

MCL 722.27(c)

Subject to subsection (3), 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. If a motion for change of custody is filed while a parent is active duty, the court shall not consider a parent's absence due to that active duty status in a best interest of the child determination.

16

## What is the Established Custodial Environment anyway?

Higher Court further narrows the definition in 1981 with *Baker v. Baker*:

“a custodial relationship of a significant duration in which [the child is] provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both **the physical and psychological sense** in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence.”



17

## What is the Established Custodial Environment anyway?

Higher Court adds further definition in 2000 with *Lafleche v. Ybarra*:

“Factors regarding whether an established custodial environment exists include **[t]he age of the child, the physical environment, and the inclination** of the custodian and the child as to **permanency of the relationship.**”

....And then again with *Bofysil v. Bofysil*, in 2020:

Which again gives us 2 elements: **a psychological component and physical component**

A parent cannot be faulted for being a full time working parent, and the other parent be rewarded for being a full time stay at home parent, when the children live with both parents full time.



18

## What is the Established Custodial Environment anyway?

- More than one person can have an ECE
- NO person can have an ECE (Destroyed)
- It can—or cannot—be established by a temporary order



19

## What is the Established Custodial Environment anyway?

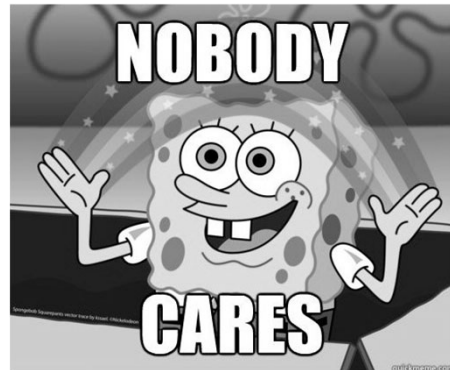
- Literally your job to make a finding on ECE
- Viewed from the lens of the child **NOT** the parent
- ECE BOP = POE
- You need to make a finding of ECE even in "pre" cases (Kessler)
- Significant Duration: look at the preceding year(s)
- Not about what is ordered, rather what is **actually happening**
- Temporary orders do not automatically create ECE (and sometimes they do)
- Presumption given to natural parents
- Can't play nice with each other: maybe no ECE
- Nobody cares how you got there! (order, bad behavior, etc.)



20

# Temporary Orders and the Red Herrings they create

- Temporary Order? Nobody cares! It's all about what happens between point A and point B.
- Temporary order that specifies ECE may not be limited by court order? Nobody cares! (because you cannot limit the trial court from doing their job as the fact finder)
- Temporary Order causing a "delay in game" thereby shifting the ECE? Nice try.
  - You must hold your hearing within 56 days after the request/order for a custody hearing, or if mediation is requested and fails, 56 days after that.
- Temporary Orders are Temporary: They do not preclude a party from a full evidentiary hearing on the premise that the CIC should only count from entry of the temp order (Thompson v. Thompson)



21

# What is the Established Custodial Environment anyway?

Sum of (to name a few):

- ✓ Physical Environment
- ✓ Passage of time
- ✓ Age of the child
- ✓ Inclination of MC and party to have a connection
- ✓ Security
- ✓ Stability
- ✓ Permanence



22

# Determine custody applying a BIF analysis Best Interest Factors

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

23

Why is the ECE such a big deal anyway?

**It can impact a family for the entirety of a child's life!**

It sets the stage for the entirety of the custody matter moving forward.

Determines the BOP for the motion

Changes ECE:  
CI & Con

Does not  
change:  
Preponderance

NO ECE:  
Preponderance

24

Greatly influence each other and makes the ECE a huge battleground

Blf's (especially earlier factors and community/residence factors.)

Some facts considered to determine ECE are also applicable when determining custody

## Continuum of Custody and the Custodial Environment

25



Custody/ECE Continuum:  
How they are similar

26

# Similarities

## ECE

- ✓ Physical Environment
- ✓ Passage of time
- ✓ Inclination to have a connection
- ✓ Security
- ✓ Stability
- ✓ Permanence

## Custody

- ✓ MC lives with parent for a period of time
- ✓ decision making authority
- ✓ Parents play nice together
- ✓ Parents make decisions re: health, well-being, etc.
- ✓ Show MC affection

27

# Similarities

## ECE

- ✓ Physical Environment
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## Custody

- ✓ MC lives with parent for a period of time
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- ✓ Show MC affection

28



## Custody/ECE Continuum: How they are different

29

## Differences

### ECE –from the eyes of the child

- ✓ Physical Environment
- ✓ Passage of time
- ✓ Inclination to have a connection
- ✓ Security
- ✓ Stability
- ✓ Permanence

### Custody: generally, from the eyes of the parties.

- ✓ MC physical environment is not always an indicator of parental control/decision making
- ✓ Parents play nice together
- ✓ Affection is from Party's experience, which can be different from child's experience
- ✓ Security and stability speak to parties' abilities (capacity and disposition) to provide those things for MC

30

## CASE LAW AND OTHER CONSIDERATIONS

Threshold questions on temporary orders are not required.

Change to the ECE: must hold an evidentiary hearing

Third party? BOP is on them, even if they have the ECE.

Presumed that BIMC to grant custody to a natural parent.

If the ECE is equal, they do not cancel each other out, making there no ECE. It's ok to have ECE with both parties.

Parent and child live with grandparents could mean ECE is with grandparents. If grandparents were not seeking custody, elevates it for the other parties to clear and convincing.

You MUST make a finding! Reversible Error!

31

## Case law and other considerations

Just because a MC COULD handle a change in custody it doesn't mean there should be one.

You can have a ECE finding, and still lose the custody battle on the BIF's.

Stips as to ECE findings do not matter.

Repeated changes and inconsistency can destroy an ECE

Using babysitters during your pt does not diminish ECE necessarily.

BOP is for the court to decide, not the parties

If a stip changes the ECE, the court can still require that clear and convincing evidence be shown to demonstrate.

A parent voluntarily relinquishing control of a child temporarily so they can get back on their feet does not destroy the ECE.

32

## Case law and other considerations

- ECE with Parent 1, legal custody with Parent 2, BOP for parent 1 is preponderance. (possible that they differ)
- ECE cannot be presumed by what the order states.
- ECE was found with mom on a domicile motion because the MC's moved with her.
- Repeated moves and changes can destroy any ECE
- Instability in a new relationship can destroy ECE
- Temporary Orders do not necessarily change ECE when MC looks to father's home for guidance and discipline.
- Status quo should not be changed unless in BIMC
- ECE can be destroyed even if there are temporary orders.
- Custody order reversed on appeal, does not mean the actual time the MC spent with that parent should not be considered.
- Parent giving up custody voluntarily and temporarily to protect the BIMC, does not mean ECE is destroyed, and courts are encouraged to give custody back.
- Equal (or near equal) BIF findings = Judge should not order a change of custody.

33

## Thank You!

**Larissa Zubac**  
Senior Litigation Attorney  
**734-655-0000**  
**315 E. Eisenhower Parkway**  
**Suite 305**  
**Ann Arbor, MI 48108**  
**lzubac@cordelllaw.com**



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34