

OVERVIEW OF CUSTODY

I. CUSTODY

A. INTRODUCTION

Custody Law is a mixture of statutes, case law, court rules, tradition, and local county procedures. Both its' substantive and procedural provisions are mixed together, and jurisdictional issues are ill-defined.

B. WHAT IS CUSTODY

1. Non-Judicial Creation of Custodial Rights

a) *Status and Emancipation of Minors*

MCL 722.1 et seq; MSA 25.249(1) et seq

(1) Rights of Parents

Unless otherwise ordered by a court order, the parents of an unemancipated minor are equally entitled to the custody, control, services and earnings of the minor.... [MCL 722.2; MSA 25.32]

(2) Who is a Parent

"Parents" mean natural parents, if married prior or subsequent to the minor's birth; adopting parents, if minor has been legally adopted; or the mother, if the minor is illegitimate. [MCL 722.1(b); MSA 25.603]

b) *Marriages/Husbands/Fathers*

(1) Presumption of Legitimacy

The legitimacy of all children begotten before the commencement of any action under this act [Divorce] shall be presumed until the contrary is shown. [MCL 552.29; MSA 25.107]

(2) Non-Interference by Putative Fathers

Legislature did not express an intention to grant a putative father standing to establish the paternity of a child born while the mother was legally married to another man without a prior determination that the mother's husband is not the father. We also conclude that a putative father does not have standing to make a similar claim under the Child Custody Act.

Girard v Wagenmaker, 437 Mich 231, 234; 470 NW2d 372 (1991)

c) *Acknowledgment of Parentage Act*

MCL 722.1003 et seq; MSA 25.603 et seq

(1) What it does

A man is considered to be the natural father of a child, born to a woman not married at conception or birth or determined by a court not to be the issue of a marriage, if he joins the mother in executing an acknowledgment of parentage

- (2) Form is valid and effective if signatures of both parents is notarized, in any state, during the lifetime of the child
 - (3) Mother is presumed to have custody of the minor child unless otherwise agreed by the parties and the acknowledgment gives notice. MCL 722.1006 & 1007(c); MSA 25.606 & 25.607
 - (4) Form is a public record filed with the state registrar, constitutes consent to personal jurisdiction of the Michigan courts for custody, parenting time, and support, and is revocable by the Circuit Court
- d) Birth Certificates
- (1) Appearance of a father's name on a Michigan birth certificate does not determine paternity and its derivative custodial rights
 - (2) After June 1, 1997, a father can only be listed on a Michigan birth certificate of a child born to a mother not married at conception or birth, if an acknowledgment of parentage has been executed.
MCL 333.2824(2); MSA _____
 - (3) Before June 1, 1997, the appearance of a father's name on a Michigan birth certificate, in the case of a child born to a mother not married at conception or birth, could indicate either:
 - (a) an acknowledgment of paternity was executed, or
 - (b) more usually, the man merely signed a form, at the birth hospital, consenting to listing his name as father on the birth certificate
 - (4) Significance of a father's name on an out-of-state birth certificate is determined by that state's laws
- e) Third Parties: **Custodial Power of Attorney**
MCL 700.405; MSA 27.5405
- (1) Principal/Agent relationship
 - (2) Maximum of 6 months duration without another execution
 - (3) Revocable by principal
 - (4) Prevents subsequent institution of full guardianships by Michigan Courts
 - (5) Can be made *durable*. [MCL 700.495; MSA 27.5495]
2. Judicially Created Custodial Status
- a) Types of Case
- (1) Divorce
 - (2) Child Support
 - (3) Paternity
 - (4) Custody
- b) Court Ordered Custody
- (1) Custody = legal custody + physical custody
 - (a) Legal Custody
 - (b) Physical Custody

- (2) Joint Custody
- (3) Types of Custody
 - (a) Full Custody to one party (sole legal & physical custody)
 - (b) Joint Legal Custody with Physical Custody to one party
 - (c) Joint Custody (joint legal & physical custody)
- c) Other Accompaniments: inherent right to parenting time/support
MCL 722.24; MSA 25.312
- d) Third Parties
 - (1) Guardianships (Suspension of Parental Rights)
 - (a) Full Guardianship (Involuntary)
MCL 700.424; MSA 27.5424
 - (i) Involuntary
 - (ii) Jurisdiction
 - (a) Termination or suspension of parental rights by court order, Death, Mental Incompetence, Disappearance, Imprisonment
 - (b) Parents permitted child to reside with another without providing legal authority for their care
 - (b) Limited Guardianship (Voluntary)
MCL 700.424a; MSA 27.5424a
 - (i) Voluntary
 - (ii) Placement Plan
 - (2) Standing of Third Parties (Affirmative Suits/Intervention)
 - (a) Guardians. MCL 722.26b
 - (i) Full Guardians: Any Time
 - (ii) Limited Guardians: If Placement Plan not substantially complied with
 - (iii) Intervene in existing custody action or file new custody action, in guardianship venue, if no existing custody action.
 - (iv) Guardianship stayed
 - (v) Guardianship judge should be assigned to custody case
 - (b) Other Third Parties. MCL 722.26c, d, e
 - (i) Placed for adoption with third party, placement still in effect, and placement has lasted at least six months
 - (ii) Parents unmarried, parent with custody dies/missing, other parent does not have legal custody order, third person is related to child
 - (c) More Third Parties
 - (i) No standing'
 - (ii) Constitutional Issues
 - (3) Award of Custody by Court to Non-Party

MCL 722.27(1)(a); MSA 27.312(7)[1][a]

C. WHERE WILL CUSTODY BE DECIDED

1. State Court or Tribal Court: Indian Child Welfare Act
2. What State Court?
 - a) Key definition: **Home State** means the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as a parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of the named persons are counted as part of the 6-month or other period. MCL 600.652(e); MSA 27A.652(e)
 - b) Uniform Child Custody Jurisdiction Act (UCCJA)
MCL 600.651 et seq; MSA 27A.651 et seq
 - (1) Michigan must establish jurisdiction before it can make an initial or modification custody determination (custody, parenting time, adoption, guardianships, abuse proceedings, but not support)
 - (2) Four Possible bases for jurisdiction [MCL 600.653; MSA 27A.653]:
 - (a) **"Home State Jurisdiction"**
*This state is the home state of the child of the child at the commencement of the proceeding or has been the home state **within 6 months before the commencement** of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as a parent continues to live in this state*
 - (b) **"Significant Connection Jurisdiction"**
*It is in the best interest of the child that a court of this state assume jurisdiction because the child **and** his parents, or the child **and** at least 1 contestant, have a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships*
 - (c) **"Emergency Jurisdiction"**
The child is physically present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent
 - (d) **"Last resort Jurisdiction"**
It appears that no other state would have jurisdiction under the prerequisites substantially in accordance with subdivisions (a), (b), or (c) or another state has declined jurisdiction on the ground that this state is the

more appropriate forum to determine the custody of the child and it is in the best interest of the child that this court assume jurisdiction

- (e) Other than "Home State Jurisdiction" there is no preference for any of the other bases
- (3) Declining Custody Jurisdiction
 - (a) Simultaneous Proceedings (first usually wins, weighted toward Home State Jurisdiction)
 - (b) Inconvenient Forum
 - (i) Take into account the other bases:
 - (a) another state recently home state
 - (b) another state has closer connections
 - (c) another has more substantial evidence
 - (d) jurisdiction would contravene purpose of the act
 - (c) Unclean Hands/Reprehensible Conduct (Wrongful Taking)
 - (4) Reasonable notice and opportunity must be given. Judgment binding on all who received notice or submitted to jurisdiction, and is conclusive on all issues of law and fact
 - (5) Modification of Another State's Orders or Assumption of Jurisdiction from Another State
 - (6) Enforcement of other State's Orders
- c) Parental Kidnaping Prevention Act (PKPA)
28 USC 1738A
 - (1) Full Faith & Credit to other state's custody determinations
 - (a) ensures enforcement of orders of "Home State" jurisdictions
 - (b) only state that entered initial order can modify
 - (2) Michigan very emphatic about PKPA purposes
In re Clausen, 442 Mich 648, 502 NW2d 649 (1993)

3. Venue in Michigan

- a) If No Existing Case
 - (1) "[C]ounty where the child resides or may be found"
MCL 722.26(2); MSA 25.312(6)[2]
 - (2) Unless separate basis for jurisdiction (divorces)
- b) Other Existing Michigan Cases
MCR 3.204 & 3.205
 - (1) Full and Valid exercise of jurisdiction allowed if separate jurisdictional grounds (Divorce)
 - (2) Notice to Prior Court
 - (a) To clerk and judge
 - (b) 21 days before hearing
 - (c) Notice not jurisdictional, but only interim orders can be entered

- (d) Prior Orders
 - (i) remain in effect until superseded
 - (ii) due consideration of prior order, with no inconsistency except as provided by law
- (e) Prior Officials
 - (i) must send copies
 - (ii) may appear

D. HOW IS CUSTODY DETERMINED

1. Criminal sexual conduct
MCL 722.25; MSA 25.312(5)
 - a) Court shall not award custody to the parent convicted for act of criminal sexual conduct resulting in the conception of the child
 - b) Parent who is convicted of criminal sexual conduct with his or her own child (not a step child) shall not be awarded custody of that child or siblings without the other parent's consent and the child's consent, if of sufficient age to express desire
2. Best Interests of the Child Control [MCL 722.25; MSA 25.312(5)]
Best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
[MCL 722.23; MSA 25.312(3)]
 - a) The love, affection, and other emotional ties existing between the parties involved and the child
 - 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
 - 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
 - d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity
 - e) The permanence, as a family unit, of existing or proposed custodial home or homes
 - f) The moral fitness of the parties involved
 - g) The mental and physical health of the parties involved
 - h) The home, school, and community record of the child
 - i) The reasonable preference of the child, if the court considers the child to be of

- sufficient age to express preference
 - 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
 - k) Domestic Violence, regardless of whether the violence was directed against or witnessed by the child
 - l) Any other factor considered by the court to be relevant to a particular child custody dispute
3. Burden of Proof
- a) Preponderance of the evidence
 - b) Parental Presumption [MCL 722.25; MSA 25.312(5)]
In a dispute between parents and third parties, it is presumed in child's best interest to award custody to the parents unless the contrary is show by clear and convincing evidence
 - c) Modification of Existing Order
MCL 722.27(1)(c); MSA 25.312(7)[1][c]
 - (1) proper cause shown
 - (2) change in circumstances
 - d) Modification of Established Custodial Environment
MCL 722.27(1)(c); MSA 25.312(7)[1][c]
 - (1) *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.*
 - (2) Order not required, looks to reality
 - (3) Clear and convincing evidence that it is in the best interest of the child to change custody
 - e) Algorithm

E. PROCEDURES

- 1. Ex Parte Custody: MCR 3.207(B)
 - a) Motion Requirements
 - (1) Affidavit or verified pleading
 - (2) Allege either:
 - (a) Irreparable Injury, Loss or Damage will result from delay, or
 - (b) Notice will Precipitate Adverse Action
 - (3) Must Include Required Notice
 - (a) Written objection within 14 days
 - (b) Becomes Temporary Order unless objected to

- b) Preserve Issues
- 2. Custody Hearings
 - a) FOC Referees/Hearings
 - FOC Act: MCL 552.501 *et seq*; MSA 25.176(1) *et seq*
 - (1) Basis:
 - (a) MCL 552.507; MSA 25.176(7)
 - (b) MCR 3.215
 - (2) Hearing recommendations/decisions within 21 days
 - (3) Objections/De Novo Hearing
 - (a) Object to recommendations within:
 - (i) 14 days of service if order is for income withholding
 - (ii) 21 days if order is for any other matter
 - (iii) What if order contains both????
 - (4) Orders Take Effect
 - (a) Immediately if an income withholding order
 - (b) Within 21 days, if no objections
 - b) Trials/Judges
 - (1) Cannot Use (unless parties consent)
 - (a) FOC recommendations
 - (b) referee hearings evidence
 - (2) Evaluations/FOC Reports
 - (3) Other Procedural Rights
 - (a) full evidentiary hearing
 - (b) best interest factors
- 3. Local Procedure
- 4. Appeals

II. MOVING OUT-OF-STATE

- A. Court Rule Requirement for Every Order
 - 1. MCR _____
 - 2. Inform client at the beginning of every case
 - 3. Inquire if client will want to move out of state in future
- B. Standard:
 - Dick v Dick*, 147 Mich App 513; 383 NW2d 240 (1985)

1. Improvement for custodial parent **and** child
2. Integrity of Motives
 - a) Defeat or frustrate visitation
 - b) Likelihood to comply with substitute visitation
3. Integrity of non-custodial parent's resistance
4. Realistic opportunity for visitation

III. VISITATION/PARENTING TIME

A. Parents

MCL 722.27a; MSA 25.312(7)[a]

1. Granted in accordance with best interests of the child
2. Presumed child should have a strong relationship with both parents
3. **Child** has the right to parenting time unless it is shown by clear and convincing evidence that visitation would endanger either:
 - a) Physical health
 - b) Mental health
 - c) Emotional health
4. Unconnected with Payment of Support
5. Court shall not award parenting time to:
 - a) Parent convicted of an act of criminal sexual conduct resulting in the conception of the child, or
 - b) Parent who was convicted of criminal sexual conduct with his own child (not a step child) shall not be awarded parenting time with that child or siblings without the other parent's consent and the child's consent, if of sufficient age to express desire
6. Factors in Determining Frequency, Duration and Type of Parenting Time
 - a) Special circumstances/needs of child
 - b) Nursing
 - c) Likelihood of abuse or neglect
 - d) Abuse of parent
 - e) Traveling inconvenience
 - f) Likelihood to exercise parenting time under ordered conditions
 - g) Likelihood to exercise parenting time
 - h) Threat of detention
 - i) Other relevant factors

7. Specific parenting time shall be granted instead of reasonable parenting time if requested
8. Order may contain reasonable terms and conditions to facilitate the orderly and meaningful exercise of parenting time
9. Ex Parte Interim Orders: see court rule
10. Parenting Time Enforcement
11. PRACTICE TIP: If client desires specific parenting time, special restrictions or supervision, have them prepare the exact details ahead of the hearing, with alternates. Plan your first offer. Know which detail would be more acceptable to the other parent.

B. Grandparents Visitation

MCL 722.27b; MSA 25.312(7)[b]

1. Independent Action
 - a) Unmarried parent has died, that parent's parents may file
2. Existing "Child Custody Dispute"
3. Form: Complaint or Motion to Show Cause
 - a) Affidavit setting forth facts
 - b) Best interests
 - c) Reasonable Grand parenting Time
 - d) File only once every 2 years
 - e) Can't restrict moving of parent
 - f) Creates no parental rights for grandparents
 - g) Can't interfere with subsequent changes of custody

IV. SUPPORT

A. Spousal Support

B. Child Support

1. Child Support Guidelines
2. Child Care Expenses
3. Shared Economic Responsibility

CUSTODY ALGORITHM

- 1 Is there a prior court order?
 - a Yes, proceed to 2
 - b No, proceed to 3
- 2 Has the moving party shown either:¹
 - a Proper cause, or
 - b Change in circumstances
- 3 Is there an actual established custodial environment?²
 - a Yes, proceed to 4
 - b No, proceed to 5
- 4 Has the moving party shown by clear and convincing evidence that the change in custody is in the child's best interest?³
 - a Yes, proceed to 6
 - b No, proceed to 7
- 5 Has the moving party shown by a preponderance of evidence that the change in custody is in the child's best interest?⁴
 - a Yes, proceed to 6
 - b No, proceed to 7
- 6 Custody Modification Granted
- 7 Custody Modification Denied

¹ See *Rossov v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994), and MCL 722.27(1)(c); MSA 25.312(7)(c).

² See MCL 722.27(1)(c); MSA 25.312(7)(c). See also *Bowers v Bowers*, 198 Mich App 320, 325; 487 NW2d 602 (1993), and *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

³ See *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993), and MCL 722.27(1)(a); MSA 25.312(7)(c).

⁴ See *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993).