Maintaining the Child's Best Interest in the Determination of a Child Custody Dispute

By Mark A. Snover and Marcus M. Kasper

MCL 722.21 *et seq.* is known as the Child Custody Act of 1970. It is the statutory authority that has governed child custody determinations since its enactment.

The act provides that "[i]f a child custody dispute is between the parents…the best interests of the child control."[1]

> "[B]est interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (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.
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> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
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> (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.
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> (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. 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.
>
> (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.[2]

Currently, 2015 House Bill 4141 is in committee. It seeks to substantially change the current state of the law regarding child custody determinations. The committee hearings on the proposed bill will likely occur between the writing of this article and its publication.

The Child Custody Act mandates that the primary focus of judicial determinations of custody disputes be the best interest of the child. If HB 4141 is enacted, the primary focus of judicial determinations of custody disputes would be the creation of a presumption favoring joint custody.

Also significant in a comparison of HB 4141 and the Child Custody Act is how a court will determine whether a custodial environment of a child is established and, once that determination is made, the weight a court should give the established custodial environment.

In deciding child custody disputes under HB 4141, the court is initially required to determine if there is an established custodial environment. The bill provides:

> [a] parent is presumed to have created an established custodial environment with his or her child if the following conditions are substantially met:
>
> (A) Strong love, affection, and other emotional ties exist between the parent and child.
>
> (B) The parent has supported the child's educational endeavors, attended to the child's health care needs, or assisted in the child's religious instruction, if applicable.
>
> (C) The parent has helped provide the child with food, clothing, and other necessities of daily life.

> (D) The parent has maintained regular and ongoing contact with the child and the lack of that contact would likely have an adverse impact on the child.[3]

Under the Child Custody Act, a 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.[4]

As stated by the Michigan Supreme Court "in adopting § 7[1](c) of the Act, the Legislature intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment,' except in the most compelling cases."[5]

Under the act, upon the determination of an established custodial environment, "[t]he 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."[6]

FAST FACTS

Currently, the "best interests of the child" controls custody determinations; however, if passed, 2015 House Bill 4141 would change how courts determine child custody disputes.

HB 4141 would place a greater burden of proof on the victim of domestic violence than the current law.

The more relevant information a court has in deciding a custody dispute, the more informed it will be in arriving at its decision. HB 4141 limits the court from considering certain relevant information.

> Children are better served by the court's being able to hear all relevant factors in determining custody disputes.

HB 4141 would limit a court's ability to consider the best interest of the child as defined in the act when there is an established custodial environment. The bill provides:

> If a parent has created an established custodial environment, the court shall presume that it is in the best interest of the child to grant the parents joint physical custody and substantially equal parenting time and to attempt to maximize the parenting time the child has with both parents, unless the court believes a child's health, safety, or well-being would likely be materially compromised by granting custody to a parent. The court may grant sole physical custody to 1 parent if the court determines by clear and convincing evidence that 1 or more of the best interest of the child factors exist in the following manner:
>
> (A) A child's food, clothing, medical care, or other remedial care would likely be significantly diminished during a parent's time with the child.
>
> (B) A child would likely be subjected to child abuse or child neglect as those terms are defined in Section 2 of the Child Protection Law, 1975 PA 238, MCL 722.622, that threatens the child's health and safety.
>
> (C) A parent is unable to provide for the basic needs of a child.
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> (D) A child's academic progress would be significantly harmed.
>
> (E) A parent has a mental condition that threatens the stability of the home.
>
> (F) There is a history of substantiated domestic violence against the other parent or child and an ongoing threat of domestic violence against the other parent or child.
>
> (G) A parent is engaged in criminal activity or substance use disorder that threatens the stability of the home.
>
> (H) If the relationship between the child and the other parent is materially harmed during the child's time with the parent due to actions that attempt to frustrate the relationship or alienate the child from the other parent.
>
> (I) Any other relevant factor that the court considers to be a real and significant threat to the overall well-being of the child.[7]

In some divorce cases, there are times when a parent, unbeknownst to his or her attorney, uses a child as a pawn to obtain a more favorable financial settlement. An example of this is when a parent who does not really want physical custody seeks physical custody knowing that it will coerce the other parent to accept an unjust financial settlement. By creating a presumption favoring joint physical custody in situations when there is an established custodial environment, HB 4141 may increase the bargaining power of the unscrupulous parent.

Under the bill, the parent who is not materially compromising the "child's health safety, or well-being[,]" referred to as the "innocent parent," would be presumed to be fit to have joint custody; however, because of the other parent's failings, the bill would require the innocent parent to prove by clear and convincing evidence that sole custody should be awarded to him or her. This creates a different standard for determining the appropriateness of a parent to be awarded sole custody as opposed to the appropriateness of a parent to be awarded joint custody. Under the Child Custody Act, use of "the best interests of the child" analysis by the court avoids such anomalies.

Factor (F) of HB 4141 would substantially change Factor (k) of the act by requiring that in order for domestic violence to be a relevant consideration in a determination of a child custody dispute, there must be a finding that "[t]here is a history of substantiated domestic violence against the other parent or child and an ongoing threat of domestic violence against the other parent or child."[8] The bill would place a greater burden of proof on the victim of domestic violence than the act. The focus of the law should be in the child's best interest. Roadblocks should not be created to hamper this.

Under HB 4141, the following best interest factors set forth in the act would be removed:

> (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 the existing or proposed custodial home or homes.
>
> (f) The moral fitness 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.[9]

In many custody cases, a final determination is made on the basis of only a few of the best interest factors set forth in the act because many parents are fairly equal relative to the other factors. Children are better served by the court's

being able to hear all relevant factors in determining custody disputes.

Even though the child's preference factor (i) of the act would not be included in the bill's best interest analysis, HB 4141 provides that:

> A court may grant sole custody to 1 parent if 1 or more of the following apply:
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> ***
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> There is a strong, genuine, and reasonable preference of the child for 1 parent, if the court considers the child to be of sufficient age to express preference and that preference is not caused as a result of parental alienation. Predominant weight shall be given to a child's preference after his or her fourteenth birthday.[10]

This provision could have unanticipated consequences. It enables a court to award sole custody to a parent based strictly on a 14-year-old's preference, provided the preference is not caused by parental alienation. It places undue weight on the child's preference by making it the predominant factor for a court to consider in a child custody dispute.

An example of how rubber-stamping a child's preference could lead to an undesirable result is when there is more than one child whose fate is to be determined; it is known by each child that each of them wishes to live with the same parent; each of them loves both of their parents and their sibling(s); and one of the children, so as not to hurt the feelings of the other parent, expresses to the court his or her preference to live with that parent. Under HB 4141, the child's preference is given predominant weight over the bill's other factors. Under the Child Custody Act, the child's preference is given appropriate weight along with the act's other best interest factors.

There have been cases in which a teenager has expressed a custodial preference, and the court, based on an analysis of all the best interest factors, made a ruling contrary to the child's preference. The court, not the child, can better assess what is in the child's best interest.

It is meaningful to appreciate what a trial court goes through in its decision-making process in a custody case.

> A child custody determination is much more difficult and subtle than an arithmetical computation of factors. It is one of the most demanding undertakings of a trial judge, one in which he must not only listen to what is said to him and observe all that happens before him, but a task requiring him to discern and feel the climate and chemistry of the relationships between children and parents. This is an inquiry in which the court hopes to hear not only the words but the music of the various relationships.[11]

The more relevant information a court has, the more informed it will be. The Child Custody Act enables the court to acquire all relevant information. HB 4141 places restrictions on what a court may or may not hear. That is not in the child's best interest. ■

Authors' Note: On May 31, 2017, subsequent to this article being written, HB 4691 (2017) was introduced. It would substantially change the current state of the law regarding child custody determinations. It is the evolution of HB 4141 (2015).

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ENDNOTES

1. MCL 722.25(1).
2. MCL 722.23.
3. 2015 HB 4141 (3)(A)(1).
4. MCL 722.27(1)(c).
5. *Baker v Baker*, 411 Mich 567, 576–577; 309 NW2d 532 (1981).
6. MCL 722.27(1)(c).
7. 2015 HB 4141 (3)(A)(3).
8. 2015 HB 4141 (3)(A)(3)(F).
9. MCL 722.23(d),(e),(f), (h), and (i).
10. 2015 HB 4141 (3)(A)(5)(C).
11. *Dempsey v Dempsey*, 96 Mich App 276, 289; 292 NW2d 549 (1980).