

Factor (f)

The Moral Fitness of the Parties Involved

By Paul J. Mastrangel

Fast Facts

The conduct in question must have significant probative value to how one would function as a parent.

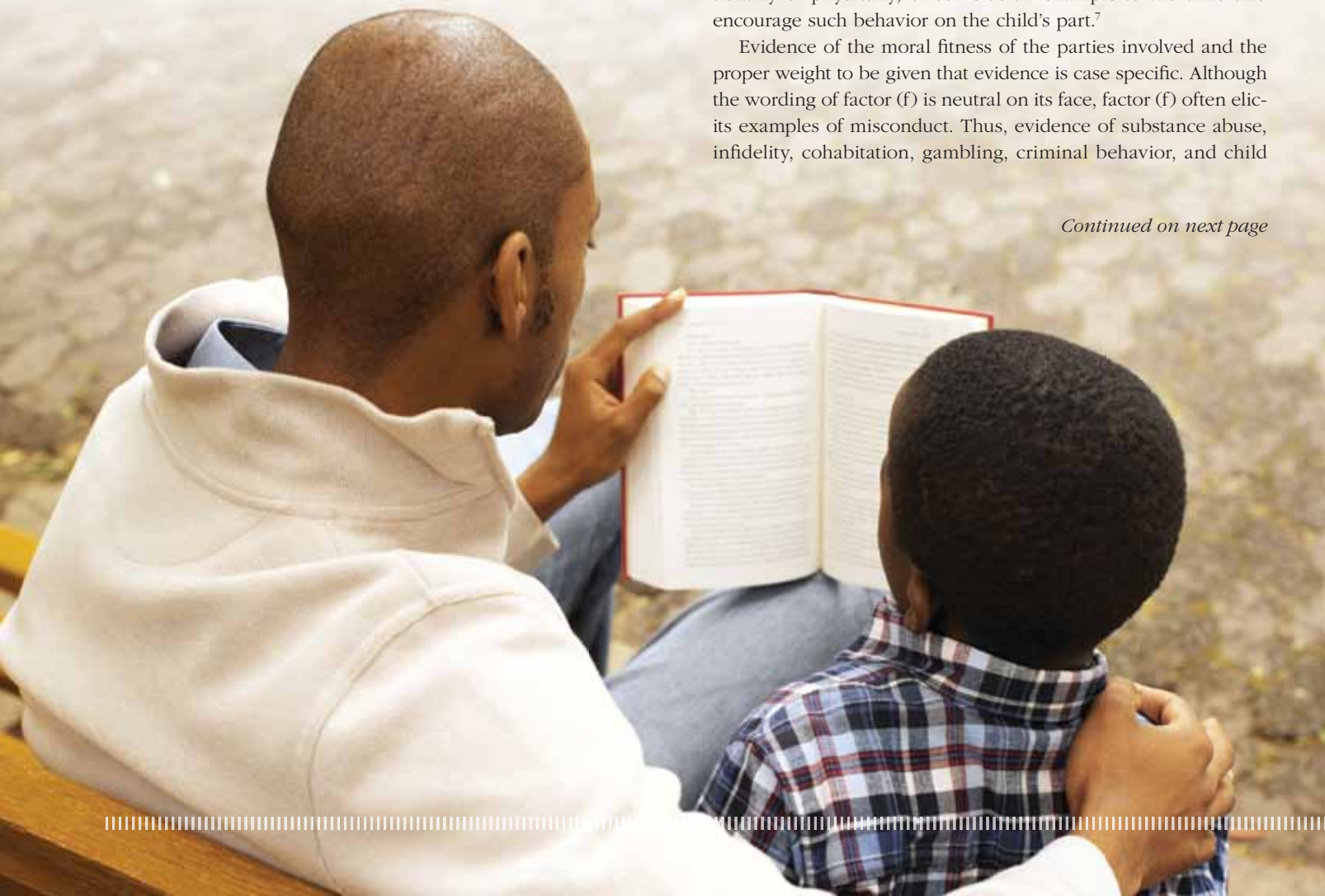
Infidelity, cohabitation, and even criminal acts may not be relevant to the moral fitness of a party.

Michigan's Child Custody Act of 1970 (the Act)¹ was enacted in part to declare the inherent rights of minor children and establish rights and duties in connection with custody, support, and parenting time. The Act enumerates 12 factors related to the best interests of the child that a court must consider, evaluate, and determine when custody and parenting time are at issue.² In custody and parenting-time proceedings, the trial court must explicitly state its findings and conclusions regarding each of the best-interest factors.³ It has discretion to give each factor different weight.⁴ The best interests of the child "means the sum total" of these factors.⁵

Factor (f) is "the moral fitness of the parties involved."⁶ The Act does not define "moral fitness." The "parties involved" may be parents, guardians, grandparents, or any other person with standing in a custody or parenting-time proceeding. The trial court's focus in factor (f) is whether the conduct in question will affect the well-being of the child, enhance the child's well-being, result in the neglect of the child's basic needs, damage the child emotionally or physically, or serve as an example to the child and encourage such behavior on the child's part.⁷

Evidence of the moral fitness of the parties involved and the proper weight to be given that evidence is case specific. Although the wording of factor (f) is neutral on its face, factor (f) often elicits examples of misconduct. Thus, evidence of substance abuse, infidelity, cohabitation, gambling, criminal behavior, and child

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alienation have all been considered by trial courts in connection with factor (f).

In early cases, moral indignation aroused by certain behavior resulted in some trial courts giving undue weight to such evidence or otherwise neglecting their duties under the Act. When a wife's marital infidelity prompted a trial court to refuse to make the required findings of fact with regard to each of the best-interest factors, the Court of Appeals reversed, expressed its concern that the custody decision might have been based on the trial court's feeling that denying the mother's petition for custody was "just punishment for her faithlessness," and found that the trial court had failed to focus on the best interests of the children as there was substantial support in the record for her custody request.⁸ A trial court's moral indignation over parental behavior and the overemphasis it placed on the father's remarks that he had engaged in sexual relations with his girlfriend while the minor children were at his home, that his girlfriend (as well as other unrelated females) frequently slept over on weekends, and that he thought there was nothing wrong with "having lady friends spend the night or weekend" even though the minor children were of a young and impressionable age also resulted in reversal by the Court of Appeals.⁹ When a trial court terminated a father's parenting time because it disapproved of his lifestyle (his relationships outside of marriage) and there was nothing in the record to suggest harm to the children if the father exercised his parenting time in the presence of his female companion under circumstances other than overnight visits, the Court of Appeals reversed the trial court's decision, concluding that the trial court had abused its discretion by basing its decision solely on its disapproval of the father's lifestyle.¹⁰

One case decided soon after enactment of the Child Custody Act illustrated the proposition that egregious spousal misconduct

might not be relevant to a parent's moral fitness in custody disputes. In that case, the mother had engaged in adulterous affairs with two men, made a regular practice of "deceiving and lying" to her husband, was found to be lacking in credibility and judgment, appeared to be an "immature, selfish young lady," and "frequently walked around the house in front of the children partially or totally undressed."¹¹ Despite the foregoing, the trial court concluded when it addressed the mother's moral fitness under factor (f) that she had been a good mother to her two sons; that the children appeared to be normal and well adjusted; that she carried the bulk of the day-to-day responsibilities for the children's education, medical care, and maintenance; that she had a closer, more intimate relationship with the children than her husband; and that she was solely responsible for the children's religious education.¹² While these individual findings of fact were perhaps more appropriate to factors (a), (b), (c), and (h)¹³ than to factor (f), the cumulative effect of this conduct demonstrated the mother's ability and willingness to parent, and the Court of Appeals affirmed the award of custody to her.¹⁴

Twenty-four years after the adoption of the Act, the Michigan Supreme Court sharpened the focus of factor (f) for trial courts and counsel. In *Fletcher v Fletcher*, the Court distinguished spousal misconduct from moral fitness.¹⁵ At issue in *Fletcher* was the mother's extramarital affairs. The Court held that extramarital conduct of a parent that was unknown to the children did not, as a matter of law, bear on that party's moral fitness.¹⁶ Because there was no evidence that the children knew of the mother's extramarital affairs, there was no basis for the trial court's finding that her conduct established "a poor moral example" for the children and that the trial court had committed legal error when it considered this conduct under factor (f).¹⁷ Extramarital relationships are not necessarily a reliable indicator of how one will function



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within a parent-child relationship and may not be probative of how one will interact with or raise a child. If evidence of misconduct is of limited probative value and has a significant potential for prejudicially ascribing disproportionate weight to that fact, extramarital misconduct may be irrelevant to factor (f) and, therefore, inadmissible.¹⁸

Fletcher defined moral fitness as follows:

Factor (f) (moral fitness), like all the other statutory factors, relates to a person's fitness *as a parent*. To evaluate parental fitness, the courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor (f) is *not* “who is the morally superior adult”; the question concerns the party's relative fitness to provide for their child given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor (f) only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*.¹⁹

The *Fletcher* Court did not promulgate a standard of moral conduct nor did it subscribe to a “what a child doesn't know won't hurt the child” approach when evaluating custody factors.²⁰ It did note that punishing spousal infidelity at the risk of jeopardizing a child's best interests would contravene the overriding purpose of the Child Custody Act.²¹ To be admissible under factor (f), questionable conduct must “necessarily” have a significant influence on how one functions as a parent.

Like marital infidelity, postjudgment cohabitation, standing alone, is not enough to preclude a parent from obtaining or retaining custody of a child.²² When the evidence led a trial court to conclude that a mother's extramarital relationship did have an identifiable adverse effect on the parties' children because her affair caused her to be frequently absent from the marital home, the Court of Appeals affirmed the trial court's findings in favor of the father on factor (f).²³ Cohabitation outside of marriage is not the issue; the issue is the effect, if any, that such cohabitation has had or will have on the child.

Although unmarried cohabitation standing alone is insufficient to warrant denial of custody or parenting time, a mother's pregnancy while unmarried and cohabitating has been considered an “aggravating factor.”²⁴ When the evidence that the unmarried mother was pregnant and cohabitating was not the sole basis for

the trial court's decision to award custody of the child to the father, that decision was not treated as an abuse of discretion.²⁵

In another case, a trial court's consideration of a party's “living situation” (i.e., unmarried cohabitation) was treated as “harmless error” given there was also evidence of that party's verbal and physical abuse of the other parent while in the presence of the children.²⁶ Although unmarried cohabitation standing alone might not be relevant to moral fitness, evidence of a mother's having lived with “several men both with and without the sanction of matrimony” might be relevant to factor (e) (the “permanence, as a family unit, of the existing or proposed custodial home or homes”)²⁷ when the stability of the proposed home for the child is at issue.²⁸

While an extramarital affair may not be a reliable indicator of a party's parenting ability, the trial court's use in *Berger v Berger* of a party's extramarital affair as evidence of “character flaws” reflecting on that party's parenting ability and its finding that factor (f) strongly favored the other party was not against the great weight of evidence.²⁹ In *Berger*, the father chose “self-gratification” (having seduced the mother's cousin who was the children's nanny) over the children's interest. His conduct demonstrated that he lacked insight and exercised extraordinarily poor judgment regarding the potential effects of his conduct on everyone in the household, including the children.³⁰ The father's argument that the trial court failed to adequately consider evidence that the mother had engaged in extramarital relations was dismissed because the “logical link” (required by *Fletcher*) did not exist between the mother's extramarital relations and her fitness to parent the children.³¹

Evidence relevant to other best-interest factors may also be relevant to moral fitness and vice versa. Evidence of misconduct collected under factor (g) (the “mental and physical health of the parties”)³² has been held to be relevant to factor (f) despite the fact that moral fitness implies a conscious choice of behavior whereas mental or physical health does not. The blurring of the lines between factor (f) and factor (g) was illustrated in *Barringer v Barringer*, where the unsupported allegations by the mother that the father had sexually abused their son and her coaching the child to falsely accuse his father reflected on both her moral fitness and her mental health.³³ In another case, the trial court found the parties “equal” on factor (f) and treated a mother's egregious parental misconduct as evidence of her mental health, ultimately finding that factor (g) favored the father because the record was replete with evidence of the mother's uncontrollable and inappropriate displays of anger in the child's presence.³⁴

Some criminal behavior may be relevant to factor (f) considerations. As with other evidence of conduct, criminal behavior is relevant when it meets the *Fletcher* test: the conduct must have some probative value on how one will function as a parent. Isolated criminal acts or criminal behavior remote in time that do not reflect a party's present or future ability to parent are irrelevant. A continuing pattern or recent instances of unlawful behavior, however, may be probative of that party's ability to parent and the risk to the child's well-being associated with that parenting. A

father's drinking problem evidenced by two convictions for operating a motor vehicle while under the influence of liquor and lying about past alcohol use coupled with verbal abuse and threats against the mother in front of the children was factor (f) evidence that favored the mother despite her occasionally allowing her boyfriend and her roommate's boyfriend to spend the night.³⁵

Disruptive and harassing conduct directed at a spouse may also be relevant to a party's moral fitness. In *Wright v Wright*, a father who initiated an investigation and criminal prosecution of his stepson destroyed his credibility as a caring father.³⁶ Other conduct (such as not zealously pursuing custody, closely monitoring his ex-wife's activities, scrupulously reporting her most minor transgressions, instigating a confrontation in the marital home, and injecting rancor into the children's therapy sessions) all supported the inference that he was willing to sacrifice the children's stability and well-being for a tactical advantage in the divorce, and was relevant to his moral fitness under factor (f).



Whether a party was a good spouse or a morally superior adult is not the focus of factor (f). Factor (f) behavior must be probative of a party's ability or disposition to parent. In custody and parenting-time proceedings, evidence of questionable conduct offered in connection with factor (f) is only relevant when it "necessarily has a significant influence on how one will function as a parent." ■

Paul J. Mastrangel recently retired from the practice of law. His articles have appeared in the Michigan Bar Journal, Michigan Real Property Review, The Michigan CPA, Laches, and the Michigan Family Law Journal.

FOOTNOTES

1. MCL 722.21 *et seq.*
2. MCL 722.23(a) through (l).
3. *Bowers v Bowers*, 190 Mich App 51, 54-55; 475 NW2d 392 (1991).
4. *Sinicropi v Mazurek*, 273 Mich App 149, 155, 184; 729 NW2d 256 (2006).
5. MCL 722.23.
6. MCL 722.23(f).
7. See *Fletcher v Fletcher*, 447 Mich 887; 886-887 NW2d (1994), citing Kirkendall, *Best interests of the minor child*, 21 Michigan Family LJ 10 (October 1994).
8. *Zawisa v Zawisa*, 61 Mich App 1, 4-5; 232 NW2d 275 (1975).
9. *Truit v Truit*, 172 Mich App 38, 46; 431 NW2d 454 (1988).
10. *Snyder v Snyder*, 170 Mich App 801, 807; 429 NW2d 234 (1988).
11. *Feldman v Feldman*, 55 Mich App 147, 150; 222 NW2d 2 (1974).
12. *Id.* at 151.
13. MCL 722.23(a), (b), (c), and (h).
14. *Feldman*, 55 Mich App at 152.
15. *Fletcher*, 447 Mich at 879-880.
16. *Id.* at 886.
17. *Id.*
18. *Id.* at 887.
19. *Id.* at 886-887.
20. *Id.* at 887.
21. *Id.* at 888.
22. *Id.* at 886.
23. *Droste v Droste*, unpublished opinion per curiam of the Court of Appeals, issued February 11, 2000 (Docket No. 213294).
24. *Helms v Helms*, 185 Mich App 680, 684; 462 NW2d 812 (1990).
25. *Id.*
26. *Hilliard v Schmidt*, 231 Mich App 316, 324; 586 NW2d 263 (1998).
27. MCL 722.23(e).
28. See *Fish v Fish*, 21 Mich App 183, 184; 175 NW2d 343 (1970).
29. *Berger v Berger*, 277 Mich App 700, 712-713; 747 NW2d 336 (2008).
30. *Id.*
31. *Id.* at 719.
32. MCL 722.23(g).
33. *Barringer v Barringer*, 191 Mich App 639; 479 NW2d 3 (1992).
34. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 457; 705 NW2d 144 (2005). The evidence included assaultive behavior; telling the child that the plaintiff was a "shitty father," that he was an "alcoholic" and worked outside the home to "hurt [you]," and that the child's paternal grandparents were Nazis; not allowing the child to use the Pinewood Derby car that he had built with plaintiff; sleeping with the child after the child expressed discomfort over this arrangement; discussing the divorce action with the child and accusing the child's psychologist of lying in his report; locking the child in his room overnight as a punishment with a can in which to relieve himself; cutting the wires to the child's video game; throwing some of his belongings on the garage floor; and removing the child's television console from the house. *Id.* at 456-458 & nn 26, 28.
35. *Bowers v Bowers*, 198 Mich App 320, 331; 497 NW2d 602 (1993).
36. *Wright v Wright*, 279 Mich App 291; 761 NW2d 443 (2008).