

# Substantive Legal Issues in Family Law

Rebecca Shiemke

Michigan Poverty Law Program

# What is Domestic Violence?

A **pattern** of **coercive control**,

Exercised using **tactics** such as physical, sexual, emotional, and/or financial abuse, threats, stalking and/or intimidation,

**Chosen** with intent to establish and maintain control over an intimate partner,

Directed at partner, possessions, pets, family members, associates, etc.

- Some tactics are criminal, some are not.

Michigan Batterer Intervention Standards,  
<http://www.biscmi.org/aboutus/michiganstandards.html>

See also, MCL 400.1501

# Why is DV Relevant in Family Law?

- Some studies show that 25-50% of disputed custody cases involve domestic violence.
- Domestic violence harms victims and children.
- Domestic violence is one of the best interest factors in the Child Custody Act. MCL 722.23(k).
- Violence continues post-separation:
  - *Abuse, harassment and stalking continue and may increase.*
  - *Post separation risk of homicide increases.*

# Child Custody Parenting Time Support

# Jurisdiction to Determine Custody

## Home state jurisdiction:

- The child resided in MI with a parent **for at least 6 months before** the date of filing, or
- The child lived in MI with a parent within 6 months before the date of filing and the child is absent from this state but a parent continues to live in this state.

## Other jurisdictional bases

## Temporary emergency jurisdiction

UCCJEA, MCL 722.1101 et seq.

# What is “Custody”

A court order that specifies:

- That the child resides alternatively for specific periods with each of the parents. (physical custody)

And/or,

- That the parents share decision making authority about important decisions affecting the welfare of the child. (legal custody)

# Determining Custody

Based on the best interests of the child:

- The sum total of 12 factors which must be “considered, evaluated and determined” by the court. (MCL 722.23)

Before awarding **joint custody** the court must:

- Consider the best interest factors.

*and*

- Determine whether the parents will be able to cooperate and generally agree concerning important decisions affecting the child’s welfare.

MCL 722. 27; 722.26a(1)

# Applying the Best Interests Factors

Court need not give each factor equal weight. *McCain v McCain*, 229 Mich App 124 (1998).

However, the court must make specific findings on each factor. *Overall v Overall*, 203 Mich App 40 (1994).

Where facts impact multiple factors, court may apply them wherever relevant. *Fletcher v Fletcher*, 229 Mich App 19 (1998).



# Applying the Factors when Domestic Violence is Present

## Balance:

The Act's presumption favoring children's strong relationship with both parents.

with-

Safety concerns raised by domestic violence.

## Show:

Coercive, controlling behaviors impact each factor.

# The Best Interest Factors

a. Love, affection, other emotional ties existing between the parties involved & the child.	b. Capacity, disposition of parties to give child love, affection & guidance, & to continue the education & raising of the child in his / her religion or creed.	c. Capacity, disposition of parties to provide the child with food, clothing, medical care & other material needs.
d. Length of time child has lived in a stable, satisfactory environment, & desirability of maintaining continuity.	e. Permanence, as a family unit, of the existing or proposed custodial home or homes.	f. Moral fitness of the parties.
g. Mental & physical health of the parties.	h. Home, school, & community record of the child.	i. Child's reasonable preference, if the child is old enough to express one.
j. Willingness/ability to facilitate, encourage the child's close, continuing relationship with the other party. Court cannot consider negatively a parent's action to protect child or parent from DV by other parent.	k. Domestic violence, regardless of whether directed against or witnessed by the child.	l. Any other factor the court considers relevant.

(a) The love, affection, and emotional ties existing between each parent and the child.

Abusers use of coercive tactics negatively impacts child's emotion ties.

Examine child's response to violence/abuse.

(b)The capacity and disposition of each parent to give the child love, affection, and guidance and to continue the education and raising of the child in his/her religion or creed, if any.

Abuser's focus on own needs detracts from capacity to give love, affection and guidance.

Abusive behavior is inappropriate role modeling.

( c ) The capacity and disposition of each parent to provide food, clothing, medical or other remedial care.

Economic control is an abusive tactic.

Higher income alone is not dispositive. *Barringer v Barringer*, 191 Mich App 639 (1991).

- *Property division, child and/or spousal support may equalize imbalance.*

(d) The length of time that the child has lived in a stable, satisfactory environment and desirability of maintaining continuity.

Abuser's use of violence and coercive control creates an unstable home environment.

Undesirable for child to continue to live in an abusive environment.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

May weigh against survivor who flees marital home seeking safety.

- Staying with family/friends = impermanence.

How can a stable family unit be created or preserved?

## (f) The moral fitness of the parties involved.

Includes:

- Verbal abuse, threats, spying, instigating conflict
- Criminal convictions
- False CPS reports

“Immoral” conduct must significantly influence how a party functions as a parent. *Fletcher v Fletcher*, 447 Mich 871 (1994).



(g) The mental and physical health of the parties.

Tricky:

- Abusers have few detectable mental health issues, and perform well on diagnostic tests.
- Survivors often suffer mental/physical effects from the abuse (PTSD, depression, substance abuse).
  - *How does survivor respond?*

(h) The home, school, and community record of the child.

Child's exposure to domestic violence may affect social development.

Which may create difficulties at home, in school, with the criminal justice system.

(i) The reasonable preference of the child if the child is of sufficient age to express a preference.

Process:

- *In camera* interview
- Confidential; not shared with parents
- Limited to custodial preference
- Beginning at about age 7

Is the preference reasonable?

- Considered possible motivations for a child who states a preference for the abusive parent:
  - Fear
  - Identification with more powerful parent
  - Protect abused parent

(j) Willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent. **Court may not consider negatively ... reasonable action taken by a parent to protect child or that parent from sexual assault or domestic violence by the child's other parent.**

The “friendly parent factor” - who is more cooperative.

Used against parents trying to limit contact to protect child from exposure to violence.

Factor amended in 2016 – added **bold** provision.

(k) Domestic violence regardless of whether the violence was directed against or witnessed by the child.

Present evidence of:

- *Violence and abuse*
- *Pattern of coercive, controlling tactics*

Abuser's use of violence and fear interferes with nurturing relationship between abused parent and child.

This negatively impacts the child.

# Parenting Time

## Statutory Provisions:

- It shall be granted in accordance with the child's best interests. The 12 best interest factors apply.
- A strong relationship with both parents is presumed to be in a child's best interests.

A child has a right to parenting time unless clear and convincing evidence establishes it would “endanger the child's physical, mental or emotional health.”

MCL 722.27a

# How does domestic violence impact parenting time?

It provides abuser with access to survivor and child.

Provides opportunity for continued violence.

Continued violence has negative effect on children.

Exposes children to abuser's subsequent abusive relationships.

# Promoting Safe Parenting Arrangements

## Use the statute:

The court may consider 9 factors when determining frequency duration and type. Examples:

Likelihood of abuse or neglect of *child* during parenting time.

Likelihood of abuse of *parent* in the exercise of parenting time.

Specific terms must be granted if requested.

Reasonable terms or conditions may be imposed to facilitate orderly and meaningful parenting time.

MCL 722.27a(6), (7), (8)



# Parenting Time – Sample Terms

- Supervised by an agency or trusted third party.
- Specific dates/times: The first and third weekend of every month from Friday at 6pm until Sunday at 6pm.
- Exchanges: Supervised by a supervised visitation center; at a neutral protected location (police station); by third parties.
- Conditioned on: Enrollment or completion of a batterer intervention program; substance abuse or mental health assessment and/or treatment.

# Orders Must Address Domicile of Child

Child's residence:

- A child has a legal residence with each parent.
- Neither parent may move a child's residence more than 100 miles away from the other without court approval.
- Statute provides factors court must consider.
- Does not apply if one parent is awarded sole legal custody.
  - But, court may need to address whether new residence changes child's established custodial environment and is in child's best interests.

Child's domicile is Michigan:

- Neither parent may change the domicile without court approval.

# Child Support

## Child Support includes:

- Base support adjusted for overnights
- Medical support
- Child care expenses

## Michigan Child Support Formula (MCSF):

- The court must apply the formula
- The court may deviate only if application would be “unjust or inappropriate”
- 2017 formula available on the SCAO website:

<http://courts.mi.gov/administration/scao/officesprograms/foc/pages/child-support-formula.aspx>

# Determining Income for Child Support

Income does not include means tested sources:

- TANF, Food Assistance, Federal Earned Income Credit, SSI.

Income may include “potential income.”

- When a parent is voluntarily unemployed or underemployed or has an unexercised ability to earn.
- Court must use factors to determine if parent has:
  - Actual ability to earn, and*
  - Reasonable likelihood of earning the potential income*
- It's based on individualized facts

# Deviation from the Support Formula

If application of the formula would be “unjust or inappropriate” the Court may deviate.

Court may consider any relevant factor, including factors listed in MCSF.

Is domestic violence relevant?

- Child or parent has extraordinary medical expenses.
- Child has special needs.
- Parent’s income is reduced due to jointly accumulated debt.

# Other Issues in a Divorce Action

Jurisdiction

Spousal Support

Property Division

Name Change

# Divorce

## Basis for a divorce:

- No-fault
- Statutory grounds only:
  - *Breakdown of the marriage relationship;*
  - *No reasonable likelihood that the marriage can be preserved.*
- *MCL 552.6*

## Jurisdiction:

- Either party must reside in:
  - Michigan for 180 days, and
  - The county for 10 days,

Immediately before the complaint was filed.

- Subject matter jurisdiction and cannot be waived. *Stamadianos v Stamadianos*, 425 Mich 1 (1986).
- *MCL 552.9*

# Spousal Support

The court must consider these factors:

- Length of marriage;
- Ability of parties to work;
- Source of and amount of property awarded;
- Age;
- Ability to pay alimony;
- Present situation;
- Needs;
- Health of parties;
- Prior standard of living and whether either is responsible for the support of others;
- Past relations and conduct; and
- General principles of equity.

MCL 552.23, *Sparks v Sparks*, 440 Mich 141 (1992)



# Spousal Support...

## Continuing Nature:

- Must be modifiable based on change in circumstances, unless parties agree otherwise.
- Must end on death of recipient to be entitled to tax treatment (income to recipient; deductible to payer.)
- May end on remarriage of recipient or other conditions.
- Death of payer does not terminate the obligation; it may be enforced against the payer's estate.

# Property Division

## Equitable Distribution:

No requirement that property awards be precisely equal.

But, must be fair under all the circumstances.

*Sparks v Sparks*, 440 Mich 141 (1992)

# Property Division...

An “equitable distribution” considering the following factors:

- duration of marriage;
- contribution of parties to marital estate;
- age of the parties;
- life status of the parties;
- necessities and circumstances;
- earning abilities;
- past relations and conduct (i.e., fault);
- general principles of equity.

*Sparks v Sparks*, 440 Mich 141 (1992)

# Property: Marital v. Separate

## Marital:

- Property accumulated as a result of one or both parties' contributions or efforts during the marriage.
- Subject to division by the court.

## Separate:

Property owned before the marriage, a gift or inheritance.

Separate property generally awarded to its owner, unless:

The other spouse contributed to acquisition, improvement or accumulation of property; or

Award out of marital assets is insufficient for the other spouse's support.

MCL 552.401; 552.23

# Retirement Benefits

Are part of the marital estate and subject to division.

Division usually requires a Qualified Domestic Relations Order (QDRO) or DRO – in addition to judgment.

Pro bono cases – referral to QDRO preparer available through State Bar of Michigan.

MCL 522.101

# Wife's Change of Name

At the request of the woman, court may:

- Restore her birth name

- Restore a surname prior to this marriage

- Allow her to adopt another surname if the change is not sought with “fraudulent or evil intent.”

MCL 552.391

# Questions



Rebecca Shiemke

[rshiemke@mplp.org](mailto:rshiemke@mplp.org)

(734) 998-6100 ext 127