



PRO BONO ACCESS TO JUSTICE

*Lunch and Learn
Volunteer Training Series*

SESSION #11

***MODIFYING, CUSTODY, PARENTING TIME AND
CHILD SUPPORT ORDERS***

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CORE CONCEPTS

- Best Interests of the Child
 - MCL 722.23 – Definition of Best Interests of the Child
- Established Custodial Environment
 - What is the Established Custodial Environment (“ECE”)?

“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.” MCL 722.27(1)(c).

- How is the ECE created?
 - ECE is a factual determination.
 - ECE can be created:
 - (a) by a court order, or
 - (b) without a court order, or
 - (c) in violation of an order.

Best Interests of the Child

MCL 722.23 "Best 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.
- (e) The permanence, as a family unit, of the 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. 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.

The judge is not required to equally weigh each of the best interests factors. *Berger v Berger*, 277 Mich App 700 (2008).

Custody

- Types of Custody
 - Legal Custody: Authority to make important decisions regarding the decisions affecting the welfare of the child: e.g., healthcare, school choice, driving, potentially hazardous extra-curricular activities, body-piercing and/or tattoos, passport issuance. MCL 722.26a
 - Physical Custody: Day-to-day care of the child; routine matters.
 - Either or both legal and physical custody can be joint or sole (or primary physical custody with child's primary residence with one of the parents).
 - Presumption Against Award of Custody (MCL 722.25)
 - The court is prohibited from awarding custody of a child, who is conceived as the result of criminal sexual conduct (excluding consensual penetration with a person at least age 13, but under age 16), to a parent who has been convicted of that criminal sexual conduct, or who has been found by clear and convincing evidence in a fact-finding hearing to have committed acts of non-consensual sexual penetration, unless after the date of the conviction, or the date of the finding in a fact-finding hearing, the biological parents cohabit and establish a mutual custodial environment for the child and the child's other parent consents to the custody award.
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Changing a Custody Order

- Governing statute: MCL 722.27 Child custody disputes; powers of court; support order; enforcement of judgment or order.
- Steps
 - Threshold Showing of Proper Cause or Change of Circumstances Relevant to At Least One of the 12 Best Interest Factors
 - Wayne Co: FOC Referee determination
 - Form pleading: FD/FOC 4018 Motion To Change Custody
 - Burden of Proof: Preponderance of the evidence showing by the petitioner
 - Purpose: To avoid unwarranted and disruptive changes to the child's stable environment. *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003), *Shade v Wright*, 291 Mich App 17 (2010), *Pennington v Pennington*, 329 Mich App 562 (2019).
 - Evidentiary Hearing by Judge
 - Step 1: Determining whether there is an ECE and which parent or parents is/are the ECE
 - Step 2: Taking evidence on the 12 Best Interest factors
 - Step 3: Applying the correct burden of proof:
 - Preponderance of the evidence if no ECE change
 - Clear and Convincing evidence if ECE change

Changes to Legal Custody

- The same standards that govern changing physical custody apply to changing legal custody (threshold, ECE and best interests of child). *Merecki v Merecki*, 336 Mich App 639 (2021).
- Joint legal custody is inappropriate when the parties are not able to cooperate and generally agree concerning important decisions affecting the welfare of the child. *Wright v. Wright*, 279 Mich App 291 (2008), *lv app denied*, 482 Mich 858 (2008).
- Awarding, or changing to, sole legal custody with joint physical custody is warranted where the parties are continually feuding and unable to agree on important decisions regarding the child's welfare (e.g., medical testing and treatment, education, extracurricular activities, religion). *Dailey v Kloenhamer*, 291 Mich App 660 (2011).

Parenting Time

- Types of Parenting Time
 - 1. Reasonable: As agreed upon by the parents.
 - 2. Specific: According to a specific schedule. See, e.g., Wayne County Circuit Court Co-Parenting Plan/General Parenting Time Plan (FD/FOC 4141)
 - 3. Supervised: In the presence of a supervising adult. Wayne Co. referees and judges commonly use Growth Works to supervise parenting time.
(FD/FOC 4153)
- Governing statute: MCL 722.27a

Parenting Time Factors

- Factors Considered
 - (a) The existence of any special circumstances or needs of the child.
 - (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
 - (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
 - (d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
 - (e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.
 - (f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
 - (g) Whether a parent has frequently failed to exercise reasonable parenting time.
 - (h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
 - (i) Any other relevant factors.

Changing a Parenting Time Order

- Wayne County Designated FOC Parenting Time Referees
 - Referee Gwendolyn Davis-Yancy: For Judges Cholack, Glendening, Harb, Kelly and Pierce
 - Referee Craig Feringa: For Judges Abraham, Cox, Elder, Farhat, Dabaja and Testani
- Form pleading: FD/FOC 4031 Motion To Change Parenting Time
- Threshold Showing
 - *Shade v Wright* standard:
 - More expansive than *Vodvarka* threshold showing required for changing custody.
 - Normal life changes (e.g., changes in child's or parent's schedule) will suffice, so long as the change in parenting time does not change the ECE.
- Burden of Proof
 - No change in ECE: Preponderance of the evidence that parenting time change is in the best interest of the child.
 - Change in ECE: Clear and convincing evidence that parenting time change is in best interest of the child.

When the Parenting Time Change Amounts to a Custody Change

- The label a party gives to the motion is not determinative. The court has to look at the effect of the requested parenting time change. *Lieberman v Orr*, 319 Mich App 68 (2017).
- A change in parenting time that substantially reduces the other parent's time with the child can amount to a change in custody and a change in the ECE.
 - *Lieberman*, supra: Reduction of 85 overnights constituted a change in primary physical custody.
 - *Brown v Loveman*, 260 Mich App 576 (2004): Changing roughly 50/50 parenting time to one parent having child during the school year and the other during the summer would amount to a change in the child's ECE.
 - *Rains v Rains*, 301 Mich App 313 (2013): Reduction of 27 overnights per year (2.25/month) did not change custody.

Child Support

- Michigan Child Support Formula (MCSF) MCL 552.605 - Mandatory use and entry of order in accordance with MCSF
- What Counts As Income (Partial List) MCSF 2.01
 - Use Medicare wages and tips amount, not taxable gross income, for W-2 wages. MCSF 2.01 (C)(1)
 - Social Security benefits (SSDI, SSOA, SSR), including dependent benefits paid for the child in common with the other parent, are counted as income for the parent on whose earnings record the benefit is paid. MCSF 2.01 (I),(J),(K)
 - Market value of in-kind benefits (e.g., free room and board when parent living with relative). MCSF 2.01 (D)
 - Spousal support paid by someone other than the other parent. MCSF 2.01 (F)

Child Support – cont'd

- What Does Not Count As Income
 - Monies received for a child not in common with the other parent (e.g., Child support, Social Security dependent benefits). MCSF 2.01 (L)
 - Means-Tested Income (e.g., Temporary Assistance to Needy Families (TANF), Family Independence Program (FIP), Foodstamps (FAP), Earned Income Credit (EIC), Supplemental Security Income (SSI). MCSF 2.04 (A)
 - Do not count SSDI or SSR when parent receives both SSDI or SSR and SSI. (Office of Child Support Enforcement, 06-25-2018 Policy Directive)
 - Child's income, including SSI benefits. MCSF 2.03

Child Support – cont'd

- Imputation of Income MCSF 2.01 (G)
 - Required Findings For Imputation
 - 1. Parent is voluntarily unemployed, underemployed, or has an unexercised ability to earn income.
 - 2. Consideration of the factors listed in MCSF 2.01 (G)(2).
 - Practice tip: Imputing 20 hours of minimum wage, based only on a finding that the parent is literate and not disabled is not permissible.
 - When NOT to impute income
 - 1. When parent is working full-time (35 hours or more per week). MCSF 2.01 (G)(1)(b)
 - 2. When parent's reduced earning capacity is the result of a criminal conviction, unless the crime was committed for the purpose of reducing income. MCSF 2.01 (G)(4)(d); *Stallworth v Stallworth*, 275 Mich App 282 (2007).
 - What NOT to impute as income MCSF 2.01 (G)(1)(a) and (b)
 - 1. More than 40 hours of work per week, potential overtime or shift premium pay. MCSF 2.01 (G)(1)(a) and (b)
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Child Support – cont'd

- Income Deductions MCSF 2.07, 2.08
 - Mandatory retirement contributions, health care insurance premiums, union dues, support order for other child(ren), spousal support paid to someone who is not the other parent, and court-ordered life insurance policy premiums when child(ren)-in-common is/are the beneficiaries.
 - Deviation From MCSF Amount MCSF 1.04
 - Governing statute: MCL 552.605
 - Deviation factors: MCSF 1.04 (E)
 - UCSO (SCAO foc 10) and UCSO Deviation Addendum (SCAO foc 10d)
 - Dependent Benefit Credit (aka, Social Security dependent benefit offset) MCSF 3.07
 - When a parent has no income (e.g., pension) other than his/her SSDI, SSOA or SSR benefit, the Social Security dependent benefit amount will exceed the MCSF support amount. When the dependent benefit is paid directly to the child support payee, no child support should be ordered.
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Modifying A Support Order

- Hearing: Assigned judge's FOC Referee
- Threshold:
 - Change in circumstances (e.g., income, new parenting time order)
 - Minimum for modification: 10% of current support order, or \$50/month, whichever is greater. MCSF 4.05 (A)
 - Form pleadings:
 - FD/FOC 4035
 - MC 97 for defendant: Protected Personal Identifying Information
 - MC 97a for plaintiff: Addendum to Protected Personal Identifying Information
- Effective date of support order:
 - 1st of the month following the filing of the Motion to Modify Support

Modifying A Support Order – cont'd

- Exemption from FOC Services
 - 1. Parties must execute Advice of Rights Regarding Use of Friend of the Court Services (SCAO FOC 101).
 - 2. Court must enter Order Exempting Case From Friend of the Court Services (SCAO FOC 102)
 - 3. Use UCSO/No FOC Services (SCAO foc 10a)
 - 4. Exemption not allowed if:
 - (a) There is evidence of domestic violence or of an unequal bargaining position between the parties in the case.
 - (b) Granting the parties the relief they have requested would be against the best interests of any child in the case.
 - (c) Either party receives public assistance.
 - (d) Money is due a governmental entity because of past public assistance in the case.
 - (e) Any arrearage or violation of the custody or parenting-time order in the last 12 months in this case.
 - (f) Either party has reopened a friend of the court case in the last 12 months.
 - Registering support account on MiChildSupport
 - Web link: <https://micase.state.mi.us/micaseapp/public/home.html>
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Questions



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