

Domestic Relations

**CHILD CUSTODY IN
DIVORCE PROCEEDINGS**

By: Bernard F. Finn

Whenever the unhappiness of divorce is visited upon a family where there are minor children, questions arise about the custody of the children and with which parent the children should live. It is obvious that the children cannot be divided in half either physically or numerically, and arrangements need to be worked out with regard to where the children will live and the time to be spent with the parent with whom the children do not live.

Before the Family Court (which is the court that has jurisdiction over divorces and child custody matters in Michigan) can make any decision with regard to the custody of minor children, it must determine whether there exists a "custodial environment" with one parent or the other. The law provides that the court may not amend or modify a previous judgment or issue a new order so as to change an established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. A "custodial environment" 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.

If the court is satisfied that there exists in one parent or another a "custodial environment" then the court may not change custody unless it is

Child Custody (cont'd)

satisfied, by clear and convincing evidence, that it is in the best interest of the child or children. If, on the other hand, the court is satisfied that there exists no custodial environment with one parent or the other, the court will decide by a preponderance of the evidence which parent should have custody based upon the best interests of the children.

In deciding what is in the “best interests of the children,” the court is obligated to consider, evaluate, and determine certain factors. Those factors are:

- 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, guidance, and continuation of the educating and raising of the child in its religion or creed, if any.
- c. The capacity and disposition of the parties involved to provide the child with food, clothing, medical care and 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.

Child Custody (cont'd)

- 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 deems the child to be of sufficient age to express preference.
- j. The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the 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 the particular child custody dispute.

As you can see, many factors, including considerations associated with the children, the family unit, and each of the competing parents are considered by the court.

At the time the court makes determinations as to who shall have custody of the minor children, consideration must be given as to what is in the best interest of the children in determining and setting forth a parenting time schedule for the parent who does not have principal custody of the children.

Weighing and evaluating the interests of the children and the parents as to questions of custody and visitation is a complex and difficult task. The likelihood of the court pleasing either or both of the parties is slim. It is for this reason that the parties are in a much better position to make these decisions for

Child Custody (cont'd)

themselves through an agreed upon settlement, as opposed to allowing the court to undertake this task.

(1) TYPES OF CUSTODY

A. Joint Custody. Under present Michigan law, in any custody dispute between parents, the parents are to be advised of the existence of a joint custody arrangement. At the request of either parent, the Family Court is obligated to consider an award of joint custody and state reasons for granting or denying such a request. In determining whether joint custody is in the best interest of the children, the court is required to consider all the previously mentioned factors relating to the “best interests” of the child. In addition, the court is required to consider whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child. The court is obligated to award joint custody unless the court determines by clear and convincing evidence that joint custody is not in the best interests of the children.

In establishing a joint custody arrangement, the court must set forth when the child shall reside with each parent or provide that the physical custody be shared by the parents in a manner to insure the child’s continuing contact with both parents. The term “joint custody” as used by the law means that either the children shall reside alternately for specific periods with each of the parents and/or that the parents shall share decision-making authority as to the important decisions affecting the welfare of the minor children.

“True joint legal and physical custody,” is the children residing one week with one parent and one week with the other parent, simply will not work in a majority of cases. This sort of joint custody requires the parties to get along and communicate in a fashion which is consistent with a positive marital relationship. If the parties are having difficulty getting along such that they should get divorced, it would be an unusual circumstance for them to get along

Child Custody (cont'd)

well enough to be the joint custodial parents of the minor children. This “true joint custody” is, however, an objective that parties clearly can work towards and attempt to facilitate under the right circumstances.

B. Joint Legal Custody. A variation of the “joint legal and physical custody” is an arrangement which is known as joint legal custody with primary physical custody being with one parent or the other. This arrangement is not dissimilar to the classic custody/visitation arrangement which had been in existence prior to the 1970s. An arrangement wherein the parties have joint legal custody but primary physical custody rests with one party or the other, involves the parties continuing to work together and consult with each other as it relates to major decisions affecting the minor children, however, the children remain principally with one parent or the other, and the “non-physical custodial parent” enjoys what has classically been considered to be parenting time.

C. Custody/Visitation. A classic and more commonplace circumstance of custody has been that one parent would have custody of the minor children and the other parent would enjoy parenting time. Under this circumstance, the children live with one parent and enjoy parenting time with the other parent. A schedule for parenting time along the following lines is not uncommon:

1. Every other weekend from Friday at 6:00 p.m. to Sunday at 6:00 p.m.;
2. One or more evenings or overnights during the “off-week”;
3. Alternate holidays;
4. Substantial periods of time during the summer;
5. Either alternate school, spring, and winter vacations or splitting of these times;
6. Any and all other times that the parties may mutually agree upon.

As noted above, the family court has jurisdiction to modify provisions associated with custody and visitation, and if either party believes that a

Child Custody (cont'd)

modification is necessary or appropriate, they may ask the court to intervene. Once again, it should be noted that if there is an “established custodial environment,” it will be necessary for the party who is asking the court to change the physical custody arrangement to prove, by clear and convincing evidence, that a modification of the present arrangement is in the best interests of the minor children.

(2) FRIEND OF THE COURT

Under law, each county has a “Friend of the Court.” The responsibility of the Friend of the Court is to assist the court and the parties in matters associated with the minor children. The Friend of the Court should be perceived as an ally of the children, and helpful to the parties. They have a most difficult job and should attempt to be fair to each of the parties.

The Friend of the Court will be called upon to make initial evaluations and recommendations as to what the custodial arrangement should be and will be called upon both before and after the divorce to assist the court and the parties in this difficult decision-making process.

The judicial and extra judicial aspects of a child custody dispute are very complex and require the attention of qualified legal counsel for each of the parties.