

PRESUMPTION OF JOINT LEGAL CUSTODY AND SUBSTANTIALLY EQUAL PARENTING TIME

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House Bill 4691 (reported from committee as substitute H-2)

Sponsor: Rep. Jim Runestad

Committee: Judiciary

Complete to 6-28-18

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY:

The bill renames the Child Custody Act as the Michigan Shared Parenting Act. Significant revisions are as follows:

- Requires courts to presume, barring evidence to the contrary, that substantially equal parenting time is in a child's best interest.
- Requires courts to advise parents in a custody dispute of the presumption of joint legal custody and substantially equal parenting time.
- Defines "substantially equally parenting time" to provide for alternating periods of time with each parent, not to exceed 200 overnights per year for one parent (unless parents agree otherwise).
- Redefines the role the "best interest of the child" factors play in the court's determination of parenting time and revises the factors constituting the child's best interest.
- Requires a court to grant substantially equal parenting time if an established custodial environment has been created by both parents and creates a rebuttable presumption of established custodial environment unless certain factors (such as domestic violence) can be shown by a preponderance of the evidence.
- Allows the award of sole legal custody only upon a determination that the parents are likely never to cooperate and agree to joint legal custody and provides guidance to the courts as to determining which parent should be awarded sole legal custody of the child or children.
- Allows a parent while on deployment to designate a third party who resides in the deployed parent's home to exercise his or her parenting time unless the court determines that doing so would not be in the child's best interest.
- Allows using one of the parent's addresses as an official residence for the child solely to establish residency for a school district or other governmental or legal purposes.
- Prohibits a parent whose custody is governed by court order from changing the child's legal residence to a location more than 80 miles away (rather than the current 100-mile restriction) and applies the 80-mile limitation to both the current legal residence and the child's school.
- Requires a parent requesting a change in a child's legal residence to show by a preponderance of the evidence certain listed factors, and requires the court to consider and evaluate the factors before permitting a legal residence change

otherwise restricted by the 80-mile limitation. The bill would also modify one of the currently listed factors.

- Requires a court, after determining that the factors support a change in legal residence, to make a determination as to whether an established custodial environment exists if it has not already been presumed to do so. If it does exist, the bill would require the court to determine whether the move would modify or alter that established custodial environment; if it would, the court would be required to determine whether the change in residence is in the child's best interest.
- Allows, rather than requiring, an order determining or modifying custody or parenting time to include a statement regarding the parents' agreement as to how a change in either of the child's legal residences will be handled.

DETAILED SUMMARY:

Among other things, the Child Custody Act declares the inherent rights of minor children and establishes rights and duties to their custody, support, and parenting time in disputed actions. Under the act, when a child custody dispute is before the circuit court, the court may take certain actions for the best interests of the child. These include awarding custody of the child to one or more of the parties involved or to others, and providing for the payment of child support; providing for reasonable parenting time; and modifying or amending the court's previous judgments or orders for proper cause shown or because of a change of circumstances. The court may not modify or amend its previous judgments or orders, or issue a new order changing the child's established custodial environment, unless there is clear and convincing evidence that it is in the best interest of the child.

House Bill 4691 amends most, but not all, of the provisions of the current act; below is a section-by-section description of the changes proposed by the bill.

Section 1: Short title

The bill would rename the act as the Michigan Shared Parenting Act.

Section 2: Definitions

Definitions for the following terms would be added:

“Established custodial environment” means the environment of a child established over an appreciable time where the child naturally looks to the party for guidance, discipline, the necessities of life, and parental comfort.

“Joint legal custody” means that the parents share decision-making authority as to the important decisions affecting the welfare and well-being of the child, including the child's health care, education, and religion.

“Parenting time” means the time the child spends with either parent.

“Substantially equal parenting time” means that the child resides for alternating periods of time with each parent and that the court seeks to provide balance and

equality in overnights, with one parent not to exceed 200 overnights in a year unless otherwise adjusted for or agreed to by the parties.

“Materially compromised” means one or more appropriate grounds that have or could have a significant impact on the child’s life such that an evaluation of the child’s custodial situation should be undertaken.

“Legal recognition of parentage” means that parentage is established under the Paternity Act, Acknowledgment of Parentage Act, Michigan Adoption Code, Chapter X of the Probate Code, or the law of another state.

Section 3: Best interest of the child

Currently, Section 3 defines the “best interests of the child” as the sum of specific listed factors that the court is to consider, evaluate, and determine. The bill would eliminate most of the listed factors and replace them with a similar, but different, set of factors. Most significantly, the bill would require courts to presume that substantially equal parenting time is in a child’s best interest, barring evidence otherwise.

Factors currently included in the act that would be eliminated by the bill include:

- 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.
- 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 the state in place of medical care, and other material needs.
- The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- The permanence, as a family unit, of the existing or proposed custodial home or homes.
- The moral fitness of the parties involved.
- The mental and physical health of the parties involved.
- The home, school, and community record of the child.
- The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

The bill would no longer specifically define the term “best interests of the child” as the sum total of the listed factors, but instead would require a court to consider, evaluate, and determine the sum of the listed factors in making certain decisions in custody disputes. Specifically, under the bill, “courts are to presume substantially equal parenting time unless the court determines by a preponderance of the evidence that it is not in the child’s best interest by considering, evaluating, and determining the sum of the following best interest factors:”

- The love, affection, and other emotional ties existing between the parties involved and the child. (This provision is current law and is not amended.)

- The history of the parents in providing for the following, through financial support or otherwise, and the capacity to do this in the future:
 - The child's education endeavors.
 - The raising of the child in his or her religion or creed, if any.
 - The child's health care needs.
 - Food, clothing, and other necessities of the child's daily life.
- The history of the parents in providing age-appropriate emotional and social development and the capacity to do this in the future.
- The history of the parents in maintaining regular and ongoing contact with the child, the capacity to do this in the future, and the impact on the child if regular and ongoing contact with the parents is not maintained.
- The impact on the child's academics if regular and ongoing contact with both parents is not maintained.
- Any of the following that materially compromises the stability of the home or the health, safety, or well-being of the child:
 - A parent's behavior extending beyond reasonable parenting practices.
 - A mental or physical condition or moral fitness of a parent.
 - If a parent is engaged in criminal activity or substance use.
- The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and 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 *or a person in the child's home*. (This provision is current law; italicized text denotes new language added by the bill.)
- Domestic violence, regardless of whether the violence was directed against or witnessed by the child. (This provision is current law and is not amended.)
- A parent's ability to provide transportation for the child during parenting time or exchanges, either personally or by providing alternative transportation.
- Any other factor considered by the court *that may materially compromise the stability of the home or the health, safety, or well-being of the child*. (The italicized text replaces the phrase "to be relevant to a particular child custody dispute.")

Section 4: Child custody disputes

Currently, a court is required to declare the child's inherent rights and establish the "rights and duties" as to the child's custody, support, and parenting time in accordance with the act. The bill would instead refer to the "responsibilities and duties."

Section 6a: Joint custody and parenting time

Many of the provisions currently in Section 6a regarding joint custody will be eliminated or amended, with the most significant change being that the courts must follow certain *presumptions* that will impact custody and parenting time orders.

Currently, "joint custody" is defined to mean an order of the court specifying that the child must reside alternately for specific periods with each of the parents ***and/or*** that the parents must share decision-making authority as to the important decisions affecting the welfare of

the child. House Bill 4691 would eliminate this definition and instead replace references to “joint custody” with “*joint legal custody*” (defined under Section 2).

Section 6a currently requires parents in custody disputes to be advised of joint custody. Instead, the bill requires—in a custody dispute between parents—that the parents be advised by the court of the presumption of joint legal custody and substantially equal parenting time and of certain deadlines added by the bill.

Currently, the court *must* consider awarding joint custody at the request of either parent and state on the record the reason for granting or denying the request; in other cases joint custody *may* be considered by the court. In determining whether joint custody is in the best interest of the child, the court must consider the best interest of the child factors and whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child. The bill will delete these provisions. Instead, the bill specifies that if, after the parents have been notified of the presumption of joint legal custody and substantially equal parenting time and of certain deadlines, they agree to a custody and parenting time arrangement, the court must grant that arrangement unless it determines that it is not in the child’s best interest.

Joint legal custody

A court will be required under the bill to grant joint legal custody to the parents **unless** the parents mutually consent to another agreement or one parent shows by a preponderance of the evidence that a child’s health, safety, or well-being would likely be materially compromised. If the court determines that the parents will not be likely to cooperate or agree concerning important decisions affecting the welfare of the child if awarded joint legal custody, the court will be required to state in its ruling the findings of facts and conclusions of law that justify its decision and could do the following:

- Refer the parents to appropriate services until the parents are able to cooperate and agree on important decisions for the benefit of the child.
- Inform the parents that joint legal custody may be revoked if the child’s health, safety, or well-being would likely be materially compromised by the parents’ inability to agree.
- Order that no changes be made with regard to the child’s schooling or other important decisions until the parents are able to agree on important issues for the benefit of the child or agree to a decision-making process or designee to settle disputes for the benefit of the child.
- Any other action the court considers necessary to bring the parents into cooperation for the benefit of the child.

If the court determines, after attempting to bring the parents to cooperation, that they are likely never to cooperate and agree, the court must state in its ruling the findings and facts and conclusions of law that justify its decision and could award *sole legal custody* to one parent if the lack of cooperation and agreement is likely to materially compromise a child’s health, safety, or well-being. In determining which parent will be awarded sole legal

custody, efforts must be made by the court to determine if one party is not acting in good faith and is primarily at fault for the lack of cooperation and agreement.

Parenting time

The bill requires the court to allow the parents sufficient time to consider and discuss a parenting time arrangement.

Currently, if the parents agree on joint custody, the act requires the court to award joint custody unless it determines on the record, based upon clear and convincing evidence, that joint custody is not in the best interest of the child. The bill revises this provision to instead require—if the parents agree on joint *legal* custody and *parenting time*—the court to award joint *legal* custody *and the parenting time agreement* unless either of those, as determined on the record and based upon clear and convincing evidence, would not be in the best interest of the child (*italics* denote new language).

Currently, *if the court awards joint custody*, the court may include in its award a statement regarding when the child would reside with each parent, *or may provide that physical custody be shared by the parents to assure* the child continuing contact with both parents. The bill will delete the italicized text and instead provide that if the parents do not agree to parenting time, the court may refer the parents to services to come to an agreement in the best interests of the child or include in its award a statement regarding when the child would reside with each parent in a manner to ensure the child continuing contact with both parents.

The bill retains a provision requiring that during the time a child resides with a parent, that parent will decide all routing matters concerning the child and a provision pertaining to the responsibility for child support, though references to “joint custody” have been changed to “joint legal custody”.

Parenting time if an established custodial environment has been created by both parents

Under the bill, **if** an established custodial environment has been created by both parents, the court would be required to grant the parents substantially equal parenting time **unless** the parents’ consent to another agreement, or one parent shows by a preponderance of the evidence, one of the following:

- Domestic violence, regardless of whether the violence was directed against or witnessed by the child. A court could not consider negatively 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.
- The child would likely be subjected to child abuse or child neglect as those terms are defined in Section 2 of the Child Protection Law.
- If the relationship between the child and a parent is materially harmed during the child’s time with the other parent due to actions that attempt to frustrate the relationship or alienate the child from the parent.
- A parent has knowingly made false allegations regarding child abuse, child neglect, or domestic violence in a family court proceeding. For the purposes of this

provision, failure to prove an allegation would not constitute evidence of knowingly making a false or misleading allegation.

- A child has a strong, genuine, and reasonable preference—if the court considers the child to be of sufficient age and maturity to express preference and that preference is not caused as a result of parental alienation. Predominant weight must be given to a child’s preference after the child turns 16 years of age.

If the court determines any of the above factors exist, the court must state in its ruling the findings the facts and conclusions of law justifying its decision and could not grant substantially equal parenting time, but could award a custody arrangement that is in the child’s best interest and parenting time according to Section 7a. If the court determines that there is a reasonable likelihood that the activity will continue, the court could issue an order for counseling or parenting classes for the parents, investigative services, or supervised parenting time or exchanges.

Establishing custodial environment-when parents live together

If the parents reside together at the time the custody or divorce action is filed, the bill states that it be presumed that both parents have established a custodial environment for the purpose of determining custody and parenting time arrangements.

Establishing custodial environment-when parents DO NOT live together

If the parents do not reside together—but each party has maintained regular and ongoing contact with the child—each party will have 90 days in which to notify the court and the other party of his or her intention to preserve his or her established custodial environment. If the notification was made within the deadline, the court is required to presume that the parent has maintained the established custodial environment for the purpose of determining custody and parenting time arrangements.

If a parent notifies the court after the 90-day period expires, the court must provide the parent with an opportunity for reunification with the child and order that an effort for reunification of the child with the parent be made, unless the court determines that reunification is not in the child’s best interest.

Rebutting a presumption of established custodial environment

A parent could rebut the presumption of an established custodial environment under either of the two scenarios described above by showing by a preponderance of the evidence that maintaining the established custodial environment with the other parent is not in the child’s best interest. If the presumption is rebutted, the court must state in its ruling the findings of facts and conclusions of law that justify its decision and order a custody arrangement that is in the child’s best interest and also parenting time according to Section 7a.

If the presumption of an established custodial environment is rebutted because that parent was unaware of being a parent to the child or was unable to make routine contact with the child due to good cause, the parent must be given 90 days from the date of legal recognition of parentage or from the date the court rebuts the presumption to notify the court that he or she is establishing his or her custodial environment. The court must then provide the parent

with an opportunity for unification with the child and must also order that an effort for unification of the child with the parent be made unless the court determines that unification is not in the child's best interest.

Designation of official residence

The bill revises a provision that currently gives direction to courts when there is a dispute regarding residency to instead specify that if the parents have joint legal custody, the court could designate one of the parents' addresses as the official residence solely for the purpose of establishing residency for a school district and all other state or federal statutes that require a designation or determination of residence. This designation would have no bearing on custody or parenting time. The court would have to state the basis for a residency determination on the record or in writing. (Though no examples are specifically listed in the bill, it is likely that the bill is referring to such things as an address for a state personal ID or driver's license, passport, or an address needed to establish residency for the purpose of receiving certain federal, state or local services.)

Section 7: Child custody disputes; powers of court; support order; enforcement of judgment or order; child custody while parent on deployment

Most of Section 7 remains unchanged. However, some significant changes are proposed. A brief description of the revisions follows:

- The act currently lists several things that a court may do for the best interests of the child in a custody dispute. The bill makes the following changes to some of the listed things the court may do:
 - Currently, the act allows the court to *award the custody of the child to one or more of the parties involved or to others and provide for payment of support for the child until he or she reaches 18 years of age*. The bill will delete the italicized text.
 - The bill deletes a provision that provides for reasonable parenting time by the parties involved, by the grandparents, or by others.
- The bill eliminates a provision that prohibits the court from modifying or amending its previous judgments or orders or issuing a new order that would change the established custodial environment of a child unless clear and convincing evidence that it is in the best interest of the child were presented.
- The bill deletes a provision that states 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 (under the bill, a similar provision becomes the definition for "established custodial environment"). Also deleted is the statement that the age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship must also be considered.
- The bill revises provisions relating to changes in custody when one parent is on deployment. References to "custody" will be changed to "joint legal custody" and include parenting time. References to a "temporary custody order" will be changed to "temporary parenting order". A requirement for the deploying parent to notify

the other parent of an upcoming deployment if the parents share *custody* will instead apply if the parents share *joint legal custody*.

Section 7a: Parenting time

The bill retains most of the current language unchanged, but reorders some of the provisions. For example, subsection (9) of Section 7a specifies that a parenting time order may contain any reasonable term or condition that facilitates the orderly and meaningful exercise of parenting time by a parent, and lists numerous terms and conditions that may be included in the order. The subsection will become subsection (1) but with two minor additions: to the current condition restricting the presence of third persons during parenting time, the bill adds “if it is determined by the court to impact the health, safety, or well-being of the child.” To the current condition requiring that parenting time occur in the presence of a third person, the bill adds “or agency.” Similarly, subsection (10) will also be relocated within Section 7a; the provision contains a prohibition (unless both parents agree) on exercising parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of Child Abduction.

The bill replaces a provision specifying that parenting time be granted in accordance with the best interests of the child with one specifying that if the court awards substantially equal parenting time, it shall be granted in accordance with the best interests of the child and the provisions of Section 6a. If the court orders a parenting time arrangement other than substantially equal parenting time to both parties, the bill specifies certain provisions currently in Section 7a apply.

Currently, if the parents agree on parenting time terms, the court is required to order those terms unless it determines on the record *by clear and convincing evidence* that the terms are not in the best interests of the child. The bill will delete the text in italics.

In another provision, instead of allowing the court to consider certain factors when determining the frequency, duration, and type of parenting time to be granted (such as the existence of any special circumstances or needs of the child), the court would be required to consider the listed factors.

Military deployment

The bill adds a provision to Section 7a that in order to ensure and maintain the established custodial environment and stability for the child, the parent on deployment may designate a third party who resides in that parent’s home to exercise the deployed parent’s parenting time while that parent is on deployment unless the court determined that it would not be in the best interests of the child.

Section 11: Legal residence change of child whose parental custody is governed by court order

Currently, a child whose parental custody is governed by court order has a legal residence with each parent for the purposes of Section 11. The bill will add that if the court has ordered joint legal custody, the child whose parental custody is governed by court order has a legal residence with each parent.

Currently, a parent whose custody is governed by court order is not allowed to change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time *of the commencement of the action in which the order is issued*. The italicized text will be deleted, the distance will be reduced to 80 miles, and the distance restriction will also apply to locations more than 80 miles from the child's school. Further, the bill provides that if the court determines, for the benefit of the child, that the distance of 80 miles is too far and would negatively affect the child's access to parenting time, parental involvement in the child's school, or the child's ability to access his or her routine support groups and extracurricular activities, the court must state in its ruling the findings of facts and conclusions of law that justify its decision and order a shorter distance that is more appropriate. The 80-mile distance would be determined as measured by a vehicle's odometer unless otherwise agreed to by the parties.

The bill retains the current exemptions from the distance requirement. However, before permitting a legal residence change otherwise subject to the distance restriction, the act currently requires the *court to consider each of several listed factors, with the child as the primary focus in the court's deliberations*. The bill deletes the italicized text and instead requires the parent requesting the change to show by a preponderance of the evidence, and the court to consider and evaluate, all of the five factors listed in the act.

Of these five factors, four would not be amended. The one that will be eliminated and replaced currently requires the court to consider the degree to which the court is satisfied that it is possible (if the legal residence change were permitted) to order a modification of the parenting time schedule in a manner that could provide an adequate basis for preserving and fostering the parental relationship between the child and each parent, and whether each parent is likely to comply with the modification. The new factor instead requires the requesting parent to show and the court to consider and evaluate "if the court grants the legal residence change, the possibility of creating a parenting time schedule and the likelihood that each parent will comply."

Further, the bill adds that if, after considering and evaluating the listed factors, the court determines that the factors do support a change in legal residence but the presumption of an established custodial environment has not been presumed under Section 6a, the court will be required to determine whether an established custodial environment exists.

If an established custodial environment exists, the court would have to determine whether the change of domicile would modify or alter that established custodial environment. If it is determined that the change in legal residence would modify or alter the child's established custodial environment, the court would then be required to determine whether the change in the legal residence would be in the child's best interest.

Currently, each order determining or modifying custody or parenting time of a child is required to include a provision stating the parent's agreement as to how a change in either of the child's legal residences will be handled. The bill would no longer require such a statement but would allow one to be included in the order.

Lastly, the bill would require the court to state its findings of facts and conclusions of law that justify its decision in its ruling on a parent's motion to change legal residency of a child.

The bill would take effect 90 days after enactment.

MCL 722.21 et al.

FISCAL IMPACT:

House Bill 4691 would have an indeterminate fiscal impact on the state and on local court funding units. Costs could be incurred depending on how provisions of the bill affected caseloads in the courts and court-related administrative costs. There would be increased costs for implementing a system programmed to track new information that is required under the bill, such as parents' notification to courts of establishing or preserving custodial environments. There could be increased costs for the requirement that courts advise parents of the presumption of joint legal custody and substantially equal parenting time, and of deadlines provided in the bill, depending on the method devised by the courts for notification. Also, costs would most likely be incurred for the requirement that courts provide parents with the opportunity for unification with their children, as courts would have to devise a plan to comply with the requirement.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.