

# Legislative Analysis



## **CUSTODY DISPUTE: CREATE PRESUMPTION OF JOINT LEGAL CUSTODY**

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**House Bill 4691 as introduced**  
**Sponsor: Rep. Jim Runestad**  
**Committee: Judiciary**  
**Complete to 6-5-17**

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

### **BRIEF SUMMARY:**

Significant revisions of the Child Custody Act by House Bill 4691 include the following:

- Changes the name of the Act to the Michigan Shared Parenting Act.
- Revises the factors that constitute "best interests of the child."
- Creates a presumption of joint legal custody and substantially equal parenting time and defines those terms.
- With some exceptions, requires a court to grant joint legal custody and substantially equal parenting time.
- Requires a "clear and convincing" standard of proof to rebut a presumption of established custodial environment or to demonstrate why joint legal custody or substantially equal parenting time should not be granted.
- Requires, instead of allows, a court to consider certain factors when determining parenting time orders.
- For a child at least 16 years of age, gives predominant weight to the child's preference.
- Prohibits a parent from changing a child's residence over 40 miles (instead of 100) from the child's residence or school unless a court finds that the 40-mile distance negatively impacts the child's access to parenting time and the child's involvement in support groups and extracurricular activities.
- Defines terms.

### **DETAILED SUMMARY:**

Under the Child Custody 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 revises the manner in which a court will determine custody in custody disputes. First, the bill renames the Child Custody Act as the Michigan Shared Parenting Act. In custody disputes between parents, the bill will require parents to be advised by the

court of the presumption of joint legal custody and substantially equal parenting time and of the deadlines to preserve a parent's established custodial environment. If certain circumstances are met, a court would be required to order that it is in the best interests of the child to grant the parents substantially equal parenting time.

"Joint legal custody" is defined to mean the parents share decision-making authority as to the important decisions affecting the welfare and well-being of the child.

"Substantially equal parenting time" means 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.

"Established custodial environment" will mean 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.

#### **Factors in determining best interests of the child**

The "best interests of the child" are factors the court must use in making custody determinations. Under the bill, the current meaning of "best interests of the child" will be replaced with new and/or revised factors and will mean both of the following:

- Maintaining an ongoing relationship with each parent and the right of the child to a substantially equal parenting time arrangement that promotes a strong relationship between a child and his or her parents.
- The sum total of the following factors to be considered, evaluated, and determined by the court, recognizing that both parents, individually and collectively, contribute directly and financially and that parenting includes a division of labor:
  - The love, affection, and other emotional ties existing between the parties involved and the child (this is current law).
  - The capacity and a history of the parents providing for, through financial support or otherwise, the child's education endeavors and health care needs.
  - The capacity and a history of the parents providing, through financial support or otherwise, food, clothing, and other necessities of the child's daily life.
  - A history of the parents maintaining regular and ongoing contact with the child and the impact on the child if regular and ongoing contact with the parents is not maintained.
  - The capacity and a history of the parents to provide age-appropriate emotional and social development.
  - A parent's behavior extending beyond reasonable parenting practices that materially compromises the stability of the home or the health, safety, or well-being of the child.

- A mental or physical condition of a parent that materially compromises the stability of the home or the health, safety, or well-being of the child.
- The impact on the child's academics if regular and ongoing contact with both parents is not maintained.
- If a parent is engaged in criminal activity or substance use that materially compromises the stability of the home or the health, safety, or well-being of the child.
- 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.)
- 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.")

#### **Factors being eliminated**

The current factors to be eliminated 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.
- Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

#### **Section 6a: Presumed established custodial environment and equal parenting time**

Currently, Section 6a requires parents in custody disputes to be advised of joint custody. 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 this provision.

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

If the parents live apart at the time the child custody action or divorce is filed, each party must be given 90 days in which to notify the court and the other party of his or her intention to preserve the established custodial environment. The court must provide the parent with an opportunity for unification with the child and order that an effort for unification of the child with the parent be made, unless the court determines by clear and convincing evidence that unification is not in the child's best interest.

If timely notification is provided as required above, the court must presume that the parent has maintained the established custodial environment for the purpose of determining custody and parenting time arrangements.

A parent may rebut the presumption of an established custodial environment by presenting clear and convincing evidence that maintaining the established custodial environment with the other parent is not in the child's best interest.

If notification is made after the 90-day time period, the parent must be provided 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 by clear and convincing evidence that reunification is not in the child's best interest.

If the presumption is rebutted because that parent was unaware of the parentage or was unable to make routine contact with the child, 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.

Except for a rebuttal based on unawareness of parentage or inability to make routine contact, if the presumption of an established custodial environment is rebutted, the court is required to order reasonable parenting time according to Section 7a, which pertains to parenting time orders.

Currently, the act requires that in custody disputes between parents, the parents be advised by the court of joint custody. Instead, the bill requires the parents to be advised by the court of the presumption of joint legal custody and substantially equal parenting time and of the deadlines described above. The court must grant joint legal custody to the parents unless the parents mutually consent to another agreement or one parent demonstrates by clear and convincing evidence that a child's health, safety, or well-being would likely be materially compromised. "Materially compromised" means diminished outcomes that exceed minor deviations and that would have a significant and profound impact on the well-being of the child.

If the court determines that the parents, if awarded joint legal custody, are not likely to cooperate or agree concerning important decisions affecting the welfare of the child, the court would have discretion to 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 both parents have created an established custodial environment, a court would be required to order that it is in the best interests of the child to grant the parents substantially equal parenting time unless the parents consent to another agreement or one parent demonstrates by clear and convincing evidence one of the following:

- The child has been exposed to domestic violence, regardless of whether the violence was directed against or witnessed by the child, including violence the child may be exposed to by a family member or an unrelated person whom the parent allows to have contact with the child.
- 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 would be 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 or misleading allegations regarding child abuse, child neglect, or domestic violence in a family court proceeding.
- 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 he or she turns 16 years of age.

Sufficient time must be allowed for parents to consider and discuss a parenting time arrangement. If joint legal custody and parenting time is agreed on, the court must award joint legal custody and the parenting time agreement unless it determines, on the record and based upon clear and convincing evidence, that joint legal custody and the parenting time agreement is not in the best interests of the child.

The court may refer parents who do not agree to parenting time 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 will reside with each parent. The bill deletes a provision allowing the court to provide that physical custody be shared by the parents.

#### **Official residence of a child**

If the parents have joint legal custody, one of the parents' addresses will be designated by the court as the official residence solely for the purpose of all other state or federal statutes that require a designation or determination of custody or residence without respect to parenting time. The basis of the determination must be stated on the record or in writing.

#### **Joint legal custody and child support**

Currently, joint legal custody does not eliminate the responsibility for child support. The bill retains this provision and applies it to joint legal custody. However, the bill adds that if a parent who is responsible for paying support would otherwise be unable to maintain adequate housing for the child and the other parent has sufficient resources, the court could reduce support payments for the benefit of the child.

#### **Allowable actions by a court in a custody dispute**

Currently, if a child custody dispute comes before the court, the act specifies certain action the court may do for the best interests of the child. The bill retains most of the listed actions, but eliminates as an option: awarding custody of the child to one or more of the parties involved or to others; providing for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions; and a provision pertaining to modifications of a previous judgment or order regarding a change to the established custodial environment.

#### **Parenting time order**

Section 7a of the act provides for parenting time. The bill retains most of the current language, but reorders some of the provisions. The bill replaces a provision specifying that parenting time be granted in accordance with the best interests of the child with one specify 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. However, 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**

In provisions pertaining to changes in custody when a parent is on deployment, the bill will refer to joint legal custody (instead of custody) and apply the provisions also to parenting time. The bill adds 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 may exercise the deployed parent's parenting time while that parent is on deployment.

### **Change of child's legal residence**

Currently, a child whose parental custody is governed by court order has a legal residence with each parent, and a parent is not allowed to change a legal residence 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.

Instead, the parent could not change a legal residence to a location more than 40 miles from the child's legal residence or school at the time unless the court determines for the benefit of the child that the distance of 40 miles 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 40-mile distance would be determined by a vehicle's odometer unless otherwise agreed to by the parties. The exceptions currently allowed under the act will be retained but applied to the new 40-mile distance.

Further, before permitting a legal residence change otherwise restricted, the act currently requires the court to consider certain factors with the child as the primary focus. Instead, the bill requires the parent requesting the change to prove the factors by clear and convincing evidence. Certain modifications of the listed factors would be made to comport with the bill's provisions and emphasis on established custodial environment. A factor pertaining to domestic violence would be revised to specify that no domestic violence, regardless of whether the violence was directed against or witnessed by the child is likely to exist in the moving parent's new residence.

Lastly, instead of requiring each order determining or modifying custody or parenting time of a child to include a provision a provision stating the parent's agreement as to how a change in either of the child's legal residences will be handled, the order could include such a provision.

The bill would take effect 90 days after enactment.

MCL 722.21 et al.

### **FISCAL IMPACT:**

A fiscal analysis is in process.

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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.