

Custody [2010-04-02]

A. Legal vs. Physical Custody

First of all, there are two types of custody, legal and physical. Legal custody is the right to make decisions regarding medical issues, choice of school, choice of day care provider and any other significant decisions affecting the minor child. Physical custody determines with whom the child resides. Most Courts will grant joint legal custody in order to keep both parents involved in the major decisions regarding the minor child's life. Exceptions to this would be cases where there is domestic violence or where the parties are unable to make joint decisions.

B. What's in the Best Interest of the Child

In determining which of the parties should have primary physical custody of the minor child(ren), the Court is required to determine what is in the best interest of the child(ren). MCLA 722.23 defines this as the sum total of the following 12 factors to be considered by the Court.

Sec. 3. As used in this act, "best interest 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 performance, 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 significant 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.
- 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.

C. Not every factor is given equal weight

Not every factor is given equal weight by the Court. Not every factor will apply to every case. For example, an infant will not have any school or community record nor would the child be able to express a preference for either parent. In my experience, the Courts put significant weight on Factor J, the willingness and ability of each the parties to encourage a close parent-child relationship between the child and the other parent.

D. Burden of Proof

The Court is first required to make a finding as to what is the "established custodial environment". This term is defined as the parent to whom the child looks for daily comfort, guidance, and support. If one parent has been the primary care taker of the child, while the other party has not due to work, hours of employment or other factors, the Court will favor maintaining the child predominantly with the parent who has been most responsible for taking care of her or him. If the Court finds that one parent has been the primary care taker of the child, the other parent must prove by "clear and convincing" evidence that it is no longer in the best interest of the child to maintain that relationship. If both or neither parent was the primary care taker, the issue of custody is determined by the legal standard of "preponderance of the evidence".