

CUSTODY AND PARENTING TIME

INVESTIGATION MANUAL

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Custody and Parenting Time Investigation Manual
Table of Contents

Introduction	Tab A
Child Custody Evaluations Including :	Tab B
▶ Child Custody Factors	
▶ Established Custodial Environment	
▶ Third Party Custody	
▶ Change of Domicile and Change of Residence	
Introduction to Parenting Time Investigations	Tab C
Parenting Time Factors	Tab D
Gathering Information	Tab E
Additional Recommendations	Tab F
Summary	Tab G
Guidelines for Interviewing Children	Appendix 1
Domestic Violence & Personal Protection Orders	Appendix 2
Sample Forms	Appendix 3
Sample Reports	Appendix 4
▶ Custody, Parenting Time, and Child Support Report	
▶ Custody and Parenting Time Report	
▶ Parenting Time Report	
▶ Change of Domicile Report	

The Custody and Parenting Time Investigation Manual can be viewed at <http://courts.michigan.gov/scao/resources/publications/manuals/>. The State Court Administrative Office has developed a web-based training program on the custody and parenting time factors as outlined in this manual. The training program can be found at: <http://216.120.158.94/custody/login.taf>

Introduction

MCL 552. 505(d) provides, “the friend of the court is to investigate all relevant facts and make a written report and recommendation to parents and to the court regarding child custody....” This manual provides friend of the court investigators with resources to assist them in recommending to the court the amount of contact and decision-making authority the parents will have with a child. This manual is intended to be neither mandatory nor exhaustive. Rather, the contents are guidelines that may help the investigator apply the legal requirements to complete a report and recommendation.

How this manual is constructed

The manual is comprised of several sections divided by tabs. The sections consist of the following: 1) A factor from the Child Custody Act or a statutory consideration (e.g., established custodial environment, third party custody, change of domicile); 2) Interpretation - is an explanation of the factor or legal consideration drawn from appellate court decisions; 3) Considerations - are issues an investigator may wish to consider to help make a determination concerning the factor; and 4) Practice Tips - suggestions that will assist the investigator in obtaining information.

With the exception of the third party custody investigations section, this manual uses the term “parent” to represent parties in a domestic relations case.

In using this manual, the reader should be aware of the following concerning each section:

Interpretation

The information explaining each topic is drawn from appellate court decisions. Unless a court decision has addressed the topic, the explanation will not attempt to further define the topic beyond the statutory language. Appellate courts normally review a case giving deference to the findings of fact made by the lower court. Therefore, the information presented in this manual usually indicates whether it is permissible to consider a fact or to arrive at a conclusion. Unless the court decision requires or prohibits a specific result, an individual should feel free to analyze the facts of a particular case differently.

Considerations

For the purpose of this manual, considerations are issues related to the child custody factors that should be contemplated by the investigator when gathering information relevant to the custody or parenting time investigation. The State Court Administrative Office would like to thank Andrew Crisenbery, Jackson County Friend of the Court, for his contribution to this section of the manual.

Practice Tips

Practice tips are recommendations that can be used to gather information that is necessary to complete an investigation. Practice tips may be structured as questions to ask, or statements that identify the tasks necessary to retrieve information.

What Is a Custody or Parenting Time Investigation?

The word “investigation” means to inquire into or systemically examine a matter in detail.¹ The purpose of a custody or parenting time investigation is to inquire, examine, consider, summarize information, and make a recommendation to the court. The court makes the ultimate custody and parenting time decisions after applying the law to all relevant evidence. The investigator’s responsibility to the court, parties, and children is to do an accurate assessment and make a recommendation to the court for custody or parenting time.

The investigator should inform the children, parents, other parties involved, and attorneys of the purpose, nature, and method of the child custody or parenting time investigation early on in the process.

First Steps in the Investigation Process

The investigator should review the pleadings and questionnaires before interviewing the parents. While reviewing the pleadings and questionnaires, the investigator should attempt to identify any indications of domestic violence as well as other issues that are related to the best interests of the child. If there are indications (e.g., complaints for divorce, pleadings, sworn statements) of domestic violence, the investigator should refer to office policy on screening domestic violence cases and take the appropriate steps. The investigator should attempt to identify and concentrate on those issues that are in dispute and spend less time on those where it appears the parents are in agreement.

The Child Custody Factors

The majority of the information that is gathered for the investigation will come as a result of addressing the Child Custody Act with the parents and the child. Factors of the Child Custody Act must be addressed for both custody and parenting time investigations. The following is a brief description as to the use of the 12 factors of the Child Custody Act when conducting a custody investigation. The application of the Child Custody Act for parenting time investigations is explained in the Introduction for Parenting Time Investigations.

The Child Custody Act addresses the best interests of the child and requires that the investigator evaluate the parties on 12 criteria. “This is not to suggest that the resolution of a custody case

¹ American Heritage Dictionary, Houghton Mifflin Company, 1982

lies in a box score evaluation; the parent who is accorded the winner on [a majority] of the factors should necessarily “win.”² The words of the court of appeals concerning the role of the judge could equally apply to a custody investigation:

“A child custody determination is much more difficult and subtle than an arithmetical computation of factors. It is one of the most demanding undertakings of a trial judge, one in which he must not only listen to what is said to him and observe all that happens before him, but a task requiring him to discern and feel the climate and chemistry of the relationships between children and parents. This is an inquiry in which the court hopes to hear not only the words but the music of the various relationships.”³

In conducting the investigation, the investigator may find that the same facts can be considered under different factors. For instance, “the factors have some natural overlap in that a child’s stated preference to live with one parent may be indicative of greater emotional ties with that parent.”⁴ Nor are all of the factors necessarily equal. When the parents consider a factor to be major, it is appropriate to consider that factor to be more important.⁵ While one factor may offset some of the factors found in favor of one of the parents, it should not completely offset all of the other findings when the other parent either prevailed or was found equivalent.⁶

When there is more than one child in a case, a separate determination must be made for each child if necessary.⁷

When the investigator meets with the parents, requests may be made for references and release forms to be completed. References should be requested from individuals who have seen the parent or parents interact with the children (e.g., child care providers, teachers, and coaches). Release forms are used to gather information from those individuals who have been professionally involved with the family (e.g., doctors, counselors, teachers, etc.), but may not release information without approval from the parents. There is a section found later in the manual dedicated to gathering information.

² *Dempsey v Dempsey*, 96 Mich App 276, 289 (1980).

³ *Dempsey, Supra.* at 289.

⁴ *Carson v Carson*, 156 Mich App 291, 299-200 (1986).

⁵ *McCain v McCain*, 229 Mich App 123 (1998).

⁶ *McCain, supra.*

⁷ *Wiechmann v Wiechmann*, 212 Mich App 436 (1995).

In addition to custody and parenting time investigations, this manual also addresses established custodial environment, change of residence, change of domicile, and third party custody investigations. There are also sections dedicated to gathering information and additional recommendations.

With all investigations it is important to give your report credibility by accurately reporting both positive and negative information concerning the parents and children. The reasons articulated for assigning an advantage to one parent over another should not be limited to the positive information about the favored parent nor to the negative information about the other parent.

Definitions of Custody

The following are descriptions of possible custody arrangements the reader may want to become familiar with before referring to other sections in this manual

Joint Custody: At the request of either parent, the court must consider ordering joint custody.⁸ If the parents agree on joint custody, the court must order it unless the court determines that joint custody is not in the best interests of the child.⁹ The court may consider joint custody without a parent's request. The fact that the trial court must consider an award of joint custody does not create a presumption in favor of it.¹⁰

The statute defines joint custody to include either or both alternating physical custodial arrangements and joint decision-making authority.¹¹ "In order for joint custody to work, parents must be able to agree with each other on basic issues in child rearing-including health care, religion, education, day to day decision-making and discipline-and they must be willing to cooperate with each other in joint decision-making."¹² However, ability to cooperate is not the sole factor to be considered in determining whether parents should have joint custody. Even if the parents cannot cooperate, if they can provide different strengths to supplement each other in raising the children and they can agree on basic child rearing issues, joint custody is an

⁸ MCL 722.26a(1).

⁹ MCL 722.26a(2). If the court does not award joint custody under these circumstances, it must state on the record its reasons. *Arndt v Kasem*, 156 Mich App 706 (1986) (finding the court had failed to state its reasons because the record was devoid of any consideration of the best-interest factors).

¹⁰ *Wellman v Wellman*, 203 Mich App 277 (1994).

¹¹ MCL 722.26a((7).

¹² *Fisher v Fisher*, 118 Mich App 227, 232 (1982); MCL 722.26a(1)(b).

appropriate option.¹³ In the event joint custodians are unable to agree on important matters affecting the child, those matters must be decided using the best interests of the child.¹⁴

Sole Custody: There is no legal definition for sole custody. For the purpose of this manual sole custody is defined as when one parent provides most of the day to day care for a child and has the exclusive right to make major decisions for the child.¹⁵ If the court believes the parents cannot work together for the benefit of their child, sole custody is usually awarded to one parent. The other parent may be given parenting time, as determined by the court. If parenting time is ordered, the non-custodial parent is responsible for making routine and emergency decisions for the child during parenting time.¹⁶

We hope this manual proves to be a valuable asset to those who are responsible for conducting custody and parenting time investigations and making recommendations to the court.

¹³ *Nielsen v Nielsen*, 163 Mich App 430 (1987).

¹⁴ *Lombardo v Lombardo*, 202 Mich App 151 (1993).

¹⁵ It is unclear what role the division of time plays in a definition of sole custody. The statute speaks in terms of alternating time with each parent without setting a minimum period of time. In *Fisher v Fisher*, 118 Mich App 227 (1982). The court while approving a lower court's decision granting custody with parenting time, indicates that sole custody is the exclusive right to make important decisions for the child. "If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children." *Id* @ 233. See also *Lombardo v Lombardo*, 202 Mich App 151 (1993) (one parent had physical custody for not less than 128 days each year).

Factor a: **The love, affection, and other emotional ties existing between the parties involved and the child.¹**

Interpretation:

Factor a examines the mutual relationship between the parent and child. Therefore the factor does not rest solely on a determination of which parent is more loving,² nor whether the parent has a desire to establish a better relationship with the child.³ Rather, it must be determined which of the parents has bonded more closely with the child.⁴ It would be wrong to find that the child is more closely bonded with a parent under this factor if the bonding is the result of an inappropriate relationship between the parent and child.⁵

It is appropriate to find that this factor favors a parent because the child primarily has love and respect for only one of the parents.⁶ It is proper to find that the parents are equal because the parents love their child and the child loves both parents.⁷ It should be noted that there is a natural overlap between some of the factors. For example, it may not be possible to separate a child's emotional attachment to a parent from the child's preference, or other factors examined under the Child Custody Act.⁸ An effort to separate these factors should be made when evidence is available.

¹ MCL 722.23(a).

² *Baker v Baker*, 411 Mich 567 (1980).

³ *Glover v McRipley*, 159 Mich App 130 (1987).

⁴ *Glover v McRipley*, 159 Mich App 130 (1987).

⁵ See e.g. *Brewer v Brewer*, COA 221521 (unpublished 2001), where the relationship between the plaintiff and oldest daughter, while representing a close bond, was described as the daughter acting in the role of a caretaker and confidant to the father.

⁶ *Kurtz v Kurtz*, 32 Mich App 366 (1971).

⁷ *Eigner v Eigner*, 79 Mich App 189 (1977).

⁸ *Carson v Carson*, 156 Mich App. 291 (1986).

Considerations for the Investigator:

- Does one parent show respect, love, affection, and warmth toward the child more than the other parent?

Practice Tip: Determine which parent the child goes to when in need of sympathy or consolation, or to share a victory or an accomplishment.

- Does one parent show kindness and courtesy toward the child more than the other parent?
- Which parent, historically, has provided the day to day care for the child?

Practice Tip: Look for each parent's routines or rituals (discussing daily activities when tucking into bed, having a weekly game night, etc.) that foster interaction with the child.

- Does either parent demonstrate, frustration, anger, bickering, physical or verbal fighting behavior toward the other parent? Does this occur in the presence of the child?
- Is there any evidence that one parent shares problems with the child demonstrating a inappropriate parent-child relationship?
- Is there a readily apparent difference in the bond that exists between each of the parents and the child?

Practice Tip: Find if each parent gives priority to the relationship with the child. Determine whether a parent routinely invests time in vocations, hobbies, interests, or adult friends over spending time with the child.

- Are facts present in the case that may confuse the child's emotional ties and bonding with other issues?
- With whom does the child consult concerning personal problems or questions?

Factor 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.**¹

Interpretation:

Factor b examines both the willingness and the ability of the parents to provide the child with love, affection, and guidance. This includes whether each parent will continue the child's education and raising the child in his religion or creed, if any. In evaluating the capacity and disposition of the parents to provide education and guidance, it may be necessary to examine which parent is involved more with the child's academic affairs and whom the child asks questions about personal matters.² The effects of substance abuse on a parent's ability to provide guidance may also be considered.³

The effectiveness of the discipline techniques the parents use to keep the children within bounds is an appropriate consideration in determining the parents' capacity and disposition to provide guidance.⁴ Accordingly, when one parent's ineffective discipline resulted in the children being habitually late for school and dawdling, and when they were awake very late on week nights when they should have been asleep, the other parent should prevail on this factor.⁵

A parent's willingness to allow a child to obtain guidance or comfort through religion when the child so desires, can be considered in evaluating the parents on this factor.⁶ Similarly, when one parent stopped attending the church of the

¹ MCL 722.23(b).

² *Fletcher v Fletcher*, 200 Mich App 505 (1993).

³ *Bowers v Bowers*, 198 Mich App 320 (1993) (Plaintiff with drinking problem lied on substance abuse assessment and had second OUIL conviction after testifying that he had problem under control.).

⁴ *Harper v Harper*, 199 Mich App 409 (1993) (The testimony was that one parent planned on using only non-corporal discipline while the other testified that she was counseled by a protective-services worker to use corporal punishment if necessary. The court did not focus on the merits of the techniques but rather on the effectiveness of the discipline in providing guidance.).

⁵ *Harper v Harper*, 199 Mich App 409 (1993).

⁶ *West v Smallman*, COA 223163 (unpublished 2001) (One parent's wife dropped the child off occasionally at church but the other parent made no effort to take the child to church despite the child's requests.).

denomination in which the children were raised and instead attended an alternative home church, the factor could be weighed in favor of the other parent.⁷ Religious participation, by itself, may not be a sufficient basis to allow a parent to prevail on this factor. Rather, the question is whether the parents have instilled or are likely to instill a solid religious foundation in the child's life.⁸ Thus, even though a parent is involved in the child's religion, the fact that the parent's lifestyle is contrary to the doctrines of that religion may be considered in determining which parent should prevail on this factor.⁹

Considerations for the Investigator:

- Try to measure which parent is able to show love and affection for the child? For example, is one parent able to outwardly display signs of affection more than the other (e.g., verbal affirmation, hugging, other non-verbal signs of affection)?

Practice Tips: Instead of assessing this factor as a whole, it may be useful to separate it into several parts: ability and willingness to appropriately cultivate an emotional bond (e.g., providing: love, affection, and guidance) with the child; ability and willingness to promote the child's education; ability and willingness to promote and continue the child's religious practices or spiritual training. It may be necessary to ask each parent to describe the bond each has with the child.

- If the child is of school age, is the child on time for school, tardy, or absent more than normal?
- How is the child performing in school?
- Does the parent help the child complete homework or review it?
- Is the parent involved with academic or extracurricular activities that benefit the child (e.g., conferences, PTA, scouts, clubs, etc.)?

⁷ *McCain v McCain*, 229 Mich App 123 (1998).

⁸ *Carson, v Carson*, 156 Mich App 291 (1986) (The child was merely exposed to religious training through both parents rather than having one parent instill the religion to which the child has been exposed.).

⁹ *Ulvund v Ulvund*, COA 224566 (unpublished 2000).

Practice Tip: Discuss each parent's ability and willingness to promote the child's education both with the child and teachers. Look for who assists the child with homework, attends conferences, or communicates with the teacher(s) regarding the child's education. Ascertain whether or not the child arrives for school on time, prepared, appropriately dressed, and ready to go. Ask each parent to describe their involvement with the child's education and religious practices, if any.

- Is either parent engaged in activities that would impair the parent's ability to exercise good judgement?
- Does one parent more effectively discipline the child?
- Is either parent able to get the child to bed on time?
- Do the parents have physical or emotional impairments that may affect each parent's ability to provide love, affection, and guidance?
- Is the parent able to give priority to the child's welfare over the parent's personal activities?
- Does the child regularly attend religious services or other activities?
- Is one parent primarily responsible for the child's participation in the religious activities?
- Does the parent facilitate the child's practice of the child's religious beliefs?

Practice Tips: Historically, family practices may have been different than the child's current religious practices. Find out what are the child's established religious practices. Will both parents assure the continuation of the child's religious practices?

- Are there any special needs the child has and if so, is it evident that each parent recognizes this and can act on it? Does each parent believe the other parent can also do this?

Factor 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.¹**

Interpretation:

There are two principal aspects of Factor c: The parents' ability to provide for the basic needs of their child and their willingness to provide for the basic needs of their child. A parent with a greater household income compared to the other's minimal earnings can be considered to have the greater capacity to provide for the child's basic needs.² Similarly, a parent who has voluntarily accepted a reduction in income below the parent's earning capacity may be considered to lack the disposition to provide for the child's basic needs.³ A parent who has demonstrated an excellent employment history but who has recently become self-employed, may still be considered to have a greater capacity than a parent who had a less successful employment history and whose earnings in her most recent position depended on future sales.⁴

The amount of income is not the sole basis for determining the capacity of a parent to provide for the needs of a child. The extent to which the disparity in incomes will be counterbalanced by child support may be considered as an offsetting factor.⁵ A disparity in the debt load a parent has incurred will also be a consideration for this factor.⁶

Notwithstanding a parent's earning capacity, the parent must be willing to use the income for the benefit of the child. A parent who had sufficient income to provide secure and adequate housing was found to be lacking in this factor when she decided to save money by sharing an apartment with an adult couple who had

¹ MCL722.23(c).

² *Carson v Carson*, 156 Mich App 291 (1986). See also *Mazurkiewicz v Mazurkiewicz*, 164 Mich App 492 (1987), noting that disparity in income is a factor, but that it should be weighed carefully to avoid placing an undue emphasis on economic factors alone.

³ *McCain v McCain*, 229 Mich App 123 (1998).

⁴ *Harper v Harper*, 199 Mich App 409 (1993).

⁵ *LaFleche v Ybarra*, 242 Mich App 692 (2000).

⁶ *Schuiteboer v Schuiteboer*, COA 224020 (unpublished, 2000).

negative aspects to their relationship and where the children slept on a sofa bed and cot.⁷ Another parent was found to lack a disposition to provide for the children's necessities when she chose to participate in extracurricular activities instead of providing for a child's medical care.⁸

Parents have also been considered to lack a disposition to provide for a child's necessities by acting in ways that make it more difficult for their children to have access to income or benefits available to that parent. A parent was found lacking by his actions in taking on the support of another individual and that individual's children,⁹ and in failing to inform the other parent that medical insurance coverage was available for their children.¹⁰

Considerations for the Investigator (There are two parts to this factor. One is the capacity to provide, and the other is the disposition to provide):

- Is one parent's capacity to provide for the child impacted because of a mental/physical disability?

Practice Tip: In addition to individual income and exercising the parents' earnings potential, given an appropriate payment of support from the other parent, consider whether each parent would be able to provide for the child's physical and medical needs. Gather the parents' income information and calculate a child support recommendation for the different custodial arrangements under consideration.

- Is the parents' education or training sufficient enough to prepare each to earn a wage that provides for the child's needs?
- Do the parents have a capacity to earn a stable income?
- Did one of the parents recently begin a new job and what is the likelihood that income will continue?

⁷ *Fletcher v Fletcher*, 229 Mich App 19 (1998).

⁸ *Moser v Moser*, 184 Mich App 111 (1990).

⁹ *Williams v Williams*, COA 220488 (unpublished, 2000).

¹⁰ *Bowers v Bowers*, 198 Mich App 320 (1993).

- Is one of the parents deliberately earning less than the parent is capable of earning?
- Is one of the parents earning less because of recent self-employment and does that parent have capacity to earn more?
- Does either parent have a large debt that may prevent that parent from providing for the physical needs of the child?
- Did the parents use their incomes for the benefit of the child since the separation (e.g., adequate housing, medical care, food, and clothing)?
- Does either parent's income go to support another individual (present boyfriend, girlfriend, present spouse, or someone's child) instead of the parent's own child?
- Have the parents provided appropriate medical care or its equivalent for the child?
- Have both parents shared medical coverage information that would benefit the child?

Practice Tips: Beyond the past practices, compare the relative ability and likelihood that each parent will care for the needs of the child while in each parents' custody.

- Has one parent been responsible for the child's school clothes being appropriate, clean, and in good repair?
- If the child is of school age, is one parent responsible for waking the child, feeding the child, and making sure the child arrives to school on time?
- If the child has special needs, does one parent have the training necessary to provide for those needs?
- Is either parent willing to receive the necessary training to provide for the special needs of the child?

- Did either parent offer financial assistance to the other parent for the benefit of the child before being ordered by the court to do so?

Practice Tips: If a parent was ordered to pay support or maintain medical coverage, what is the likelihood that parent will not pay it, or try to prevent it from being withheld. If a parent were to receive support payments, what is the likelihood that parent will use it for purposes other than the care of the child?

Factor d:

The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.¹

Interpretation:

Factor d examines the stability of the child's home. For instance, when a child was allowed to stay home alone with no structured activities and no supervision, his parent worked for 6 companies in the last 8 years, and the parent had multiple live-in partners, there was a lack of a stable environment.² Similarly, when a parent moved several times, remarried and divorced in the short time since the parents divorced, and now planned on marrying her boyfriend, the facts did not demonstrate a stable environment.³ Frequent moves by themselves do not conclusively demonstrate a lack of a stable environment. Where the evidence demonstrated that the child was relatively unaffected by the mother's frequent moves and considered her home to be wherever she and her mother resided, the court found that the moves did not weigh this factor in favor of the father.⁴ Although a stable environment may currently exist, if a parent plans to change that environment under circumstances that may lead to instability, it may be necessary to consider the environment unstable.⁵

Considerations for the Investigator:

- Has either parent moved frequently because of evictions, foreclosures, or broken relationships?
- If either parent has moved frequently, what impact has this had on the child?

¹ MCL 722.23(d).

² *Riley v Downs*, COA 224314 (unpublished, 2000).

³ *Hilliard v Schmidt*, 231 Mich App 316 (1998).

⁴ *Phillips v Jordan*, 241 Mich App 17 (2000).

⁵ *Bowers v Bowers*, 198 Mich App 320 (1993) (The father's intention to change a five year stable environment by moving out of his parents' house and perhaps out of state, coupled with his frequent job changes and his drinking problem, made factor equal when compared to the mother who lived with multiple roommates and occasional boyfriend visitors.).

Practice Tip: Moves alone do not conclusively prove a lack of a stable environment. When attempting to determine the stability of a child's environment try to identify the length of key relationships, predictability, and structured activity.

- Where has the child resided since the separation?
- Does either parent's home offer the child a place of comfort, stability, and a settled atmosphere?

Practice Tip: Determine where the child finds a sense of belonging and comfort. Compare the relative security that the child finds in each parent's household.

- Does either parent intend on moving soon? Would the move cause instability in the child's life?
- Who resides in each parent's home, either on a regular or sporadic basis?
- Has either parent had numerous live-in relationships?
- Has either parent had numerous divorces?
- Does either parent frequently leave the child alone without adult supervision?
- Does either parent frequently leave the child alone without any structured activities?

Practice Tip: Causes of instability may include: evictions, foreclosures, and erratic behavior (substance abuse, mental illness, abuse, etc.) within the household, broken relationships, frequent changes in caretakers, lack of supervision, unreliability of a parent, etc. Try to identify events in the child's life that may have caused instability and what impact this has had on the child.

Factor e: **The permanence as a family unit, of the existing or proposed custodial home or homes.¹**

Interpretation:

The focus of this factor is the child's prospects for a stable family environment,² not the acceptability of the home in which the child will live.³ All information should be considered that indicates which of the parents can provide the child with benefits of a custodial home marked by permanence as family unit. The fact that one of the parents is single should not preclude a finding that there is a stable family environment.⁴ However, it is appropriate to consider a parent's social interests outside the home coupled with frequent use of babysitting which could impact on the permanence and continuity of the custodial family unit.⁵ The fact that a person has had multiple relationships within a short period of time is also an appropriate consideration under this factor.⁶

Considerations for the Investigator:

- Are there indications the current families of each parent will not remain together?
- Does the child have a relationship with siblings (biological or step) in either of the parent's homes?
- Has either parent had a number of non-family members reside in the home?

¹ MCL 722.23(e).

² *Ireland v Smith*, 451 Mich 457 (1996).

³ *Fletcher v Fletcher*, 200 Mich App 505, 517 (1993).

⁴ *Zuziak v Zuziak*, 169 Mich App 741 (1988).

⁵ *Mazurkiewicz v Mazurkiewicz*, 164 Mich App 492 (1987).

⁶ *Hilliard v Schmidt*, 231 Mich App 316 (1998) (Court of Appeals affirmed lower court's finding that mother's living arrangements were not stable when she had remarried and divorced in the five years since her divorce and she claimed to plan on marrying her boyfriend but did not want to rush into anything.); *Riley v Downs*, COA 224314 (unpublished, 2000) (The father had numerous live-in female companions in and out of his house.).

- Is it readily apparent the stability of the child's live is impacted by the frequent use of child care providers? Is it evident that either parent's multiple relationships, including marriages, have impacted the stability in lives of the child?

Practice Tip: Stability of a family unit is demonstrated by the strength of key relationships, reliability of each member, and likelihood of continuing the existing/proposed structure.

Factor f: **The moral fitness of the parties involved.**¹

Interpretation:

This factor examines the parents relative moral fitness. Case law concerning this factor is rare.² Cases that do exist indicate that immorality alone is not sufficient to find in favor of one of the parents on this factor.³ For example, unmarried cohabitation by itself does not show a lack of moral fitness for the purposes of the Child Custody Act. Rather the immorality must have a bearing on the person's ability to function as a parent.⁴ Thus, a father who had two OUIL convictions, was verbally abusive and threatening to the other parent in front of the children, lied about his past alcohol record, lived with the child's babysitter, and allowed the child to drink from his beer, evidenced immorality exceeding that of the mother who allowed her boyfriend to occasionally spend the night.⁵

Considerations for the Investigator:

- Is either parent engaged in the use of an illegal substance?
- Does either parent routinely and excessively consume alcohol?
- Are there indications that either parent provided an illegal substance or alcohol to a child?
- Does either parent promote or rationalize criminal behavior to the child?

¹ MCL 722.23(f).

² Most of the case law centers on a claim that one or both of the parents had engaged in some form of sexual misconduct (unmarried cohabitation or adultery).

³ *Williamson v Williamson*, 122 Mich App 667 (1982) (unmarried cohabitation).

⁴ *Fletcher v Fletcher*, 447 Mich 871 526 NW2d 889 (1994) (error in finding that this factor favored plaintiff; there was no evidence that defendant's extra-marital affairs had any adverse effect on her ability to raise children). See e.g., *Helms v Helms*, 185 Mich App 680 (1990) (plaintiff's pregnancy was an "aggravating factor" when she was unmarried and living with her boyfriend).

⁵ *Bowers v Bowers*, 198 Mich App 320 (1993).

- Has either parent verbally abused or threatened the other parent in the presence of the child?
- Has either parent been prosecuted or convicted of a violent crime?
- Is there any indication that either parent abused the child (physically, sexually, emotionally, or verbally)?

Practice Tip: It may be necessary to contact law enforcement agencies, protective service agencies, and court offices for information about criminal activity.

- Does either parent reside with someone who is involved in the use of an illegal substance?
- Does either parent reside with an individual who routinely and excessively consumes alcohol?
- Does either parent allow another individual who threatens or abuses that parent in the presence of the child?
- Has either parent allowed the child to be threatened or abused by another individual?
- Has either parent been involved with multiple partners?
- If either parent is cohabiting with another individual, is the child's development impacted?

Practice Tips: Try to identify who will reside with or have frequent contact with the child. Ask the parents what effect would the conduct of these individuals have on the child. Should the parent be allowing or limiting the contact between the child and any of these individuals?

Factor g: **The mental and physical health of the parties.¹**

Interpretation:

This factor pertains to whether the parents have physical or emotional health problems that would interfere with their ability to care for the child.² In evaluating the parents for this factor, it must be decided if the parent's mental or physical health poses a potential threat to the child's health and well-being.³ For instance, evidence of a person's drinking problems and outbursts against the other parent may be an indication of poor mental health.⁴

While a person's physical disability and its effect on the child's ability to develop, must be considered it is also necessary to consider whether there can be alternative ways of assisting the child's development. Thus, where a parent's deafness may have impaired the child's oral communication development, the fact that other means of obtaining verbal language stimulation were available, made a decision to remove the child from that parent's custody inappropriate.⁵

Considerations for the Investigator:

- Does either parent have a physical or emotional health condition that would impact that parent's ability to parent? If so, should an appropriate professional conduct an evaluation?

Practice Tip: Ask each parent if that parent or the other parent suffers from any physical or psychological condition that could directly affect the parents' ability to care for the child? If so, ask for details about these conditions.

¹ MCL 722.23(g).

² *Cf. Wilson v Upell*, 119 Mich App 16 (1982).

³ *Harper v Harper*, 199 Mich App 409 (1993).

⁴ *Bowers v Bowers*, 198 Mich App 320 (1993).

⁵ *Bednarski v Bednarski*, 141 Mich App 15 (1985).

- If under the care of a doctor or therapist, does that parent follow recommended treatments and take all prescribed medications?
- Does either parent reject treatment of diagnosed disorders?
- Does either parent show outbursts of anger or other inappropriate behavior directed at the other parent?
- Does either parent have a history of a drinking, drug, or other substance abuse problems?

Practice Tip: Secure a release of confidential information form signed by both parents at the beginning of every investigation. Most health care and mental health care professionals will not discuss or release patient information without being provided with a copy of the release form. See the Appendix 3 for examples of release forms.

- Does the parent have means available to assist with a disability, that provides necessary skills, to raise the child?

Factor h: **The home, school, and community record of the child.¹**

Interpretation:

This factor examines a child's progression and development in three areas: home, school, and community. There are times when it may not be possible to measure this factor, especially when the child is too young to have developed a home, school, or community record² or when the parents would each continue the child in the same church, school, and community.³ However, there may be a difference in the child's record when the child is with each of the parents. When a child does poorly in one parent's care, this factor may favor the other parent.⁴ Similarly, it would be appropriate to find in favor of one parent if there are indications the child showed improvement in school while residing with that parent,⁵ or when the other parent failed to make preparations necessary for the child's education.⁶

Information to consider in examining the community record, includes long-term community contacts evidenced by: attendance at the same school, contact with the same friends or playmates, visits to relatives in the community, and participation in sports programs.⁷

¹ MCL 722.23(h).

² *Wellman v Wellman*, 203 Mich App 277 (1994) (children 6 ½ months and 2 ½ years).

³ *Harper v Harper*, 199 Mich App 409 (1993).

⁴ *Moser v Moser*, 184 Mich App 111 (1990) (poorly performing child missed more school days when she was with the other parent).

⁵ *Hall v Hall*, 156 Mich App 286 (1986).

⁶ *McCain v McCain*, 229 Mich App 123 (1998).

⁷ *Baker v Baker*, 411 Mich 567 (1981); cf *Schubring v Schubring*, 190 Mich App 468 (1991) (The children did well in school, were involved in a number of social activities and extracurricular educational activities, and mother promised to move if necessary to keep them in the same school). The parent's proposed child care arrangements may also be an appropriate consideration under this factor. *Ireland v Smith*, 451 Mich 457 (1996).

Considerations for the Investigator:

Home

- Does the child have a healthy relationship with siblings, step-parents, step-siblings, and others in each parent's home?
- Is the child respectful to other members of each parent's household?
- Do both parents provide appropriate child care for the child?

School

- Does the child show greater academic progress when with one parent?
- Does the child have lower school attendance when with one parent than the other?
- Is the child's homework completed more often when with one parent?
- Has the child been in trouble at school? How did each parent respond?

Practice Tip: Secure a release of confidential information form signed by both parents at the beginning of every investigation. Some school officials will not discuss or release student information without being provided with a copy of the release form. See Appendix 3 for examples of release forms.

Community

- Does each parent encourage the child to become involved with community or extracurricular activities?
- Does each parent enroll and attend the child's community and extracurricular activities?

- If the parents reside in different communities, does either community offer the child interaction with friends and relatives?
- Has the child been in trouble with law enforcement?

Practice Tip: Try to identify situations where the child may have been in trouble, arrested, or exhibited inappropriate behavior.

Factor i: **The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.¹**

Interpretation:

The child's preference must be taken into account if the child is old enough to express a preference.² The exact point at which a child is old enough to express a preference is dependent on the child's age and maturity, and will be different for different children. Thus, it was proper to find that this factor was inapplicable for children who were aged six and a half months and two and a half years,³ but improper not to interview a seven year old to determine whether he was capable of expressing a preference.⁴

While it is generally necessary to speak to a child to determine the child's preference, the preference may be determined in other ways such as when the parents acknowledge that the child has a preference for one of them and that preference is reasonable based on other information.⁵ Similarly, even when a child has expressed a preference, that preference may be disregarded when the child's motivation for the preference is inappropriate⁶ or based on undue influence by a parent.⁷

In a child custody dispute, the parents must be informed of whether a custody preference expressed by the child was considered, evaluated, and determined by the court, but the parents must not be informed of the preference expressed by the child.⁸

¹ MCL 722.23(i).

² *Stevens v Stevens*, 86 Mich App 258 (1978).

³ *Wellman v Wellman*, 203 Mich App 277 (1994).

⁴ *Flaherty v Smith*, 87 Mich App 561 (1978). But see *Harper v Harper*, 199 Mich App 409 (1993) (children ages 7 years and 3 years were too young to express a preference).

⁵ *Fletcher v Fletcher*, 200 Mich App 505 (1993).

⁶ *Hall v Hall*, 156 Mich App 286 (1986) (preference for mother may have been related to her lack of discipline).

⁷ *Baker v Baker*, 411 Mich 567 (1981).

⁸ MCL 552.507(4).

Considerations for the Investigator:

- Does either parent acknowledge that the child has a preference?
- Is it readily apparent the child is aware that the child's choice alone is not the only factor the court will consider in determining the outcome?
- Is the child of an age and maturity to freely express a preference?
- Besides interviews with the child and parents, are facts present that indicate the child's preference?
- Do you see any indication that either parent has attempted to influence the child's preference?
- Do you believe the child's preference is honest and sincere?
- Do any of the child's preferences come out of concern for what will happen to a parent if the child does not live with the parent?
- Are any preferences due to loyalty to a parent, fear of a parent, or what a parent might do?

Practice Tip: Try to determine each child's reasoning for any preferences given. Try to determine if the preference is reasonable.

Practice Tips: For additional information about interviewing children please refer to the Appendix 1 for "Guidelines for Interviewing Children About Custody."

Factor 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.¹

Interpretation:

The focus of this factor is whether each parent has the ability and willingness to encourage a close relationship between the child and the other parent. When a parent had demonstrated such vindictive behavior toward the other that he would likely attempt to destroy the other's relationship with the child, this factor was weighed against that parent.² Lesser actions, such as a parent's reluctance to allow parenting time in the early stages of a divorce action have also been found to make it less likely that the parent would encourage a close relationship between the child and the other parent.³ Other circumstances that allow a finding against a parent for this factor are a parent's uncooperative attitude toward parenting time,⁴ allowing the child to make other plans for weekends when the other parent is scheduled to have parenting time,⁵ or berating the other parent in the children's presence.⁶ On the other hand, a parent who seeks the other parent's input before making decisions involving the child would be more likely to prevail on this factor.⁷

In determining whether a parent has acted sufficiently to determine that this factor should be weighed against the parent, it is important to determine the parent's motivation for acting as the parent did. Thus, it was permissible not to weigh this factor against a parent who denied parenting time on the advice of a psychologist.⁸

¹ MCL 722.23(j).

² *McCain v McCain*, 229 Mich App 123 (1998).

³ *Wellman v Wellman*, 203 Mich App 277 (1994).

⁴ *Barringer v Barringer*, 191 Mich App 639 (1991).

⁵ *Bowers v Bowers* 198 Mich App 320 (1993).

⁶ *Hilliard v Schmidt*, 231 Mich App 316 (1998).

⁷ *Fletcher v Fletcher*, 229 Mich App 19 (1998).

⁸ *Hillard v Schmidt*, 231 Mich App 316 NW2d 263 (1998).

Considerations for the Investigator:

- Does either parent insult or berate the other parent in the presence of the child?
- Does one parent allow the child to make plans during the other parent's scheduled time without consulting with the other parent first?
- Prior to a court order, did each parent allow the other parent access to the child?
- Does one parent show an uncooperative attitude toward parenting time?
- Does one parent allow other adults to interfere with the relationship between the other parent and the child?
- Is it apparent that each parent seeks input from the other about decisions regarding the child?
- Historically, did one parent have legitimate reasons for denying parenting time (e.g., recommendation of mental health professional, or the child was extremely ill)?

Practice Tips: Ask each parent to describe the co-parenting relationship with the other parent. Does each parent think both will be able to work together for the best interests of their child in the future?

Factor k:

Domestic violence, regardless of whether the violence was directed against or witnessed by the child.¹

Interpretation:

Very few appellate cases have addressed this factor. Those cases that address domestic violence were decided before this factor became a separate consideration. The fact that one parent struck and shoved the other many times, attempted to force her way into his truck, and reached through the truck window to slap him can be weighed against that parent.² In the same case, there was testimony that the parent threatened to slash her wrists with a razor blade if her stepdaughter would not say she loved her. The court has also found that the fact that a father insulted, berated, and threatened the mother could be weighed against the father.³

Considerations for the Investigator:

- Are there indications that an act of physical violence was committed by either parent against another individual?
- Are facts present that either parent verbally, mentally, or emotionally abused (e.g., tormented, berated or threatened) the other parent or another family member including the minor child, live-in relationships, and stepchildren?
- Does one parent have a personal protection order against the other parent?

¹ MCL 722.23(k).

² *Harper v Harper*, 199 Mich App 409 (1993) (This case was decided before the domestic violence factor was added to the custody factors. The court weighed the facts in this case under the mental and physical health factor.).

³ *Bowers v Bowers*, 198 Mich App 320 (1993) (This case was decided before the domestic violence factor was added to the custody factors. The court weighed the facts in this case under the willingness and ability of each parent to facilitate and encourage a close relationship between the child and the other parent.).

Practice Tips: For questions and issues regarding domestic violence please refer to Appendix 2 for Domestic Violence & Personal Protection Orders, by Ms. Carol Hackett-Garagiola, and Ms. Joyce Wright.

Factor 1: **Any other factor considered by the court to be relevant to a particular child custody dispute.¹**

Interpretation:

This factor examines any other issues that relate to the best interests of the child that were not addressed in the previous 11 factors.

An appropriate consideration under this factor is the relationship between the parents and their families. Thus, the fact that the parents have had difficulty in communicating and cooperating could be considered in determining whether to order joint custody.² And the fact that a father left his wife with one child while she was pregnant with another could be weighed against him.³ This factor has been weighed in favor of a parent when custody with that parent could keep a child together with a sibling.⁴ However, if the best interests of the individual child will be better served by separate custody of the children, that custody arrangement should prevail.⁵

The ability of the parents to consider the interests of the child is also a consideration. When a parent has exhibited a willingness to defer to the best interests of the child in previously voluntarily relinquishing custody, that fact may be weighed in her favor under this factor.⁶ On the other hand, when a mother's anger toward the father interfered with her ability to consider the needs of her children and when she tended to blame others, including the children for her problems, the factor may be weighed against her.⁷

¹ MCL 722.23(l).

² *Wellman v Wellman*, 203 Mich App 277 (1994) (considering whether joint custody was appropriate).

³ *Wellman v Wellman*, *supra*.

⁴ *Helms v Helms*, 185 Mich App 680 (1990) (stepsister).

⁵ *Wiechmann v Wiechmann*, 212 Mich App 436 (1995); *Bowers v Bowers*, 198 Mich App 320 (1993).

⁶ *Zuziak v Zuziak*, 169 Mich App 741 (1988).

⁷ *Hilliard v Schmidt*, 231 Mich App 316 (1998).

The special needs of a child and the manner in which each parent's home can satisfy those needs may be considered. Thus, it is permissible to find that a two-parent home is preferable to a single-parent home when a child had special needs that were better met with the permanence and stability offered by that home.⁸ Child-care arrangements are also a relevant consideration.⁹

While it is appropriate to consider a number of issues under this factor, it is inappropriate to interject a personal philosophy when it contravenes public policy. It is, therefore impermissible in weighing this factor to consider a parent's association with a person of another race.¹⁰

Considerations for the Investigator:

- Do the parents have difficulty communicating and cooperating with each other?
- Is it readily apparent that the children should be kept together?
- Does one parent put the child's best interest above the parent's own interest more than the other parent?
- Did one parent voluntarily relinquish custody because it was in the child's best interest?
- Do you see any indication that one parent has such anger for the other parent that it interferes with the ability to consider child's needs?
- Does one parent blame the child for the parent's own problems?
- Does each parent's home provide for the special needs of the child?
- Can the child's special needs be better met by living in a two parent home, and does either parent live in a two parent home?

⁸ *Mogle v Scriver*, 241 Mich App 192 (2000).

⁹ *Ireland v Smith*, 451 Mich 457 (1996).

¹⁰ *Edel v Edel*, 97 Mich App 266 (1980).

- What are each parent's child care arrangements?
- Has the child been pressured by either parent to make a decision regarding the child's preference, or other decisions the child must make?

Practice Tip: Look for issues that are possibly unique to this family that may not have been addressed in the previous 11 factors that the court should be aware of before making a custody decision.

Established Custodial Environment:

The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. 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.¹

Interpretation:

The court may be required to apply different standards of proof in deciding a case, depending on whether a custody dispute occurs before or after a custody order has been entered. In both situations, the twelve custody factors must be examined. To order custody before the initial custody order has been entered, the court must decide only that the evidence supports a finding that the best interests of a child are served by the custody order.² Once custody has been established in an order, the court must determine whether an established custodial environment exists with a parent before considering whether custody should be changed.³ If an established custodial environment does not exist, the requirements are the same as those in cases in which a custody order has not yet entered.⁴ If an established custodial environment with a parent exists, the court may only modify the custody arrangement if the evidence is clear and convincing that a change in custody is in the child's best interests. The court is required to find that in the examination of the factors there is clear and convincing evidence of a compelling reason for a change in custody.⁵

Given the different standards of proof involved when there is a post-judgment custody dispute, the question arises concerning the proper role of the investigator. Should the investigator make custody recommendations based on the 12 factors alone, or should the recommendation also consider the sufficiency of the

¹ MCL 722.27(c).

² *Cf. Helms v Helms*, 185 Mich App 680 (1990) (stating rule but finding that trial court reached correct result despite having used a higher standard of proof).

³ *Baker v Baker*, 411 Mich 567 (1981).

⁴ *Baker v Baker*, 411 Mich 567 (1981).

⁵ *Carson v Carson*, 156 Mich App 291 (1986).

evidence to satisfy the burden of proof imposed on the case?

Unfortunately there is no clear legal authority for what an investigative report should encompass. Normally, decisions concerning burden of proof are for the court. However, a report that does not clarify whether it considered the burden of proof may not be of much use to the court or to the parents. Therefore, an investigator should determine how the trial judge wants the issue of the established custodial environment handled in the report.

While the determination of an established custodial environment usually involves a choice between parents, an established custodial environment can exist in more than one home simultaneously.⁶ When this occurs neither parent's established custodial environment can be disrupted except on a showing by clear and convincing evidence, that such a disruption is in the childrens' best interests.⁷ An established custodial environment can also exist in the home of a person who is not a parent or party to the case.⁸

While a court order determines custody it does not necessarily establish a custodial environment.⁹ "Such an environment depend[s] instead upon a custodial relationship of a significant duration in which [the child is] provided the parental

⁶ *Duperon v Duperon*, 175 Mich App 77 (1989) (joint physical custody). An established custodial environment can exist in the homes of each of the parties, notwithstanding the order's provisions concerning custody. *Foskett v Foskett*, 247 Mich App 1 (2001) (joint legal custody with mother having physical custody).

⁷ *Id.* @ 8. Clear and convincing evidence is not necessary to change the terms of a custody order when a change in those terms will not change the established custodial environment. *Mills v Mills*, 152 Mich App 388 (1986).

⁸ *LaFleche v Ybarra*, 242 Mich App 692 (2000) (but the court did not reach the question whether this would be a defacto grant of custody to the grandparents that may not be permissible). *Zuziak v Zuziak*, 169 Mich App 741 (1988). More recent opinions have held that when there is a custody dispute between a parent and a third party, the burden is upon the third party to establish that all relevant factors, including the existence of an established custodial environment and all best interest concerns clearly and convincingly demonstrate that the child's best interests require placement with the third person. *Heltzel v Heltzel*, 248 Mich App 1 (2001); *Greer v Alexander*, 248 Mich App 259 (2001). See also *Eldred v Ziny*, 246 Mich App 142 (2001) where the court applied the parental presumption without finding an established custodial environment.

⁹ *Blaskowski v Blaskowski*, 115 Mich App 1 (1982); *Hayes v Hayes*, 209 Mich App 385 (1995).

care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability, and permanence.”¹⁰

The primary focus of the inquiry is whether an established custodial environment exists, not the circumstances that allowed the custodial environment to be established. Thus, a custodial environment could be established unwittingly or by a person’s wrongful actions.¹¹

An established custodial environment does not exist without parental care, love, guidance, and attention appropriate to the child’s age. Thus, the fact that the mother was frequently away from home leaving her children to the care of babysitters,¹² or a father’s work and extensive involvement with other activities¹³ may keep the parent from establishing a custodial environment. Similarly, an established custodial environment did not exist when the mother’s relationship with the child was marked by tension and the mother’s extremely close relationship with the maternal grandmother interfered with the mother’s interactions with the child, such that child looked primarily to father for guidance and discipline. To determine the existence of an established custodial environment, the circumstances surrounding the care of the children immediately preceding the trial can be examined to determine what interaction the child has had with the parents.¹⁴

¹⁰ *Baker v Baker*, 411 Mich 567, 579-80 (1981).

¹¹ *Moser v Moser*, 130 Mich App 97 (1983) (alleged violation of custody agreement); *Trackhtenberg v Trackhtenberg*, COA 224600 (unpublished 2001) (alleged fraudulent sexual abuse allegations). Both courts noted that the other party’s actions might be considered under the child custody factors to determine the best interests of the children. See also, *Heltzel v Heltzel*, 248 Mich App 1 (2001).

¹² *Mazurkiewicz v Mazurkiewicz*, 164 Mich App 492 (1987). The fact that a parent uses babysitters does not preclude that parent from establishing a custodial environment. *Treutle v Treutle*, 197 Mich App 690 (1992).

¹³ *Zuziak v Zuziak*, 169 Mich App 741 (1988).

¹⁴ *Schwiesow v Schwiesow*, 159 Mich App 548 (1987) (mother absent from home during weekdays to attend school, had thereafter been in a coma for three to four months and then had recuperated in another state for 3 ½ months).

The time spent with the child is not the only factor to be considered. The maintenance of a home in the same area, continuation of participation in extracurricular activities, attendance at the same church, regular trips to extended family, financial contributions to the child's well-being, and the child's response to the parent's requests, all were found to support the existence of an established custodial environment.¹⁵

An expectation of permanency in the relationship should also be considered as part of an established custodial environment. The lack of permanency can prevent the establishment of a custodial environment. Thus, when the parents had an upcoming custody trial, there could be no expectation of permanency of the arrangement that had been established by a temporary order.¹⁶ Once an established custodial environment exists, it can be destroyed by the shifting back and forth of a child between custodial homes.¹⁷ However, when the court found that there was an established custodial environment with both the mother and father and that the mother had voluntarily relinquished custody temporarily in order to attend school pursuant to an agreement between the parties, the burden was on the father to establish by clear and convincing evidence that the custodial environment should be changed to him.¹⁸

Considerations for the Evaluator:

- Are there indications the child looks to one parent for guidance, discipline, attention, the necessities of life, and parental comfort?

¹⁵ *Zuziak v Zuziak*, 169 Mich App 741 (1988); *Duperon v Duperon*, 175 Mich App 77 (1989).

¹⁶ *Bowers v Bowers*, 198 Mich App 320 (1993) (child in custody of Mother for one month before trial).

¹⁷ *Baker v Baker*, 411 Mich 567 (1981) (five and one-half month period saw child living with mother in Colorado for one month, his mother and father in Alpena for a week, his mother in Colorado for six weeks, and his father in Alpena for seven weeks in his grandparent's residence).

¹⁸ *Theroux v Doerr*, 137 Mich App 147 (1984). See also *Straub v Straub*, 209 Mich App 77 (1995) (voluntary transfer of custody to grandparents with understanding that the arrangement was to be temporary). More recent authority states that the policy favoring enforcement of agreements to surrender custody voluntarily is not determinative but rather is a factor that must be considered along with other factors in the case. *Heltzel v Heltzel*, 248 Mich App 1 (2001).

Practice Tip: Try to identify specific examples when the child looked to a parent for guidance, discipline, attention, the necessities of life, and parental comfort.

- Is it readily apparent the child looks to one parent for stability, security, and permanence?
- What is the age of the child?
- Does either parent provide love, guidance, and attention appropriate to the child's age?
- Does either parent frequently work an excessive amount of hours?
- Does either parent have an over-reliance on child care providers?
- Has the child moved frequently between the parent's homes?
- Has the child lived in the same community for an extended period of time?
- Has the child participated in the same extracurricular activities, and attended the same religious services for an extended period of time in the same community?
- Does the child have a relationship with extended family members in one community?
- Has either parent contributed financially to the child's well-being?

Third Party Evaluations: When a dispute is between the parent or parents and a third person or agency, it is presumed that the best interests of the child are served by awarding custody to the parent(s). To overcome the parental presumption, the court must find by clear and convincing evidence that the best interests factors indicate that custody should be granted to the third person.

Interpretation:

When a custody dispute arises between a child's parents and a third party,¹ the court must presume that giving one of the natural parents custody is in the child's best interest. Consequently, in order to overcome the presumption in favor of parental custody, it is not sufficient that the evidence is clear and convincing to establish an advantage with the non-parent. Rather, it is necessary to find that, when all of the best interests factors are collectively considered, the third party has established clearly and convincingly that the best interests of the child require custody with the non-parent.² This is true even though there may be an established custodial environment with the third party.³

¹ A third person is anyone other than the child's biological or adoptive parents. However, only certain third parties may bring forward an original action for custody. Those persons are prospective adoptive parents (MCL 722.26c), persons related to the child where the parents did not marry and the custodial parent is dead or missing (MCL 722.26c(1)(b)), and guardians (MCL 722.26b).

² *Eldred v Ziny*, 246 Mich App 142 (2001) (The court found that the third party grandparent met her burden when the child's father had three felony convictions, smoked marijuana regularly, perjured himself and admitted converting his daughter's settlement proceeds.).

³ *Henrikson v Gable*, 162 Mich App 248 (1987). Two lines of cases had developed concerning the competing presumptions. The other line of cases would have the presumption of parental custody and the established custodial environment standards cancel each other out making the custody decision one that is based on a preponderance of evidence. In attempting to resolve the conflict, *Heltzel v Heltzel*, 248 Mich App 1 (2001) found that the recent United States Supreme Court decision in *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2nd 49 (2000), required the adoption of the test set forth in the text. See also *Greer v Alexander*, 248 Mich App 259 (2001). For earlier cases see: *Zuziak v Zuziak*, 169 Mich App 741 (1988) (holding that under either a preponderance of the evidence or clear and convincing standard, the third party would prevail but finding that the burden of persuasion was on the mother and not the third party who had an established custodial environment with the child); *Rummelt v Anderson*, 196 Mich App 491 (1992) (establishing a preponderance of the evidence test and placing the

In addition to the presumption in favor of parental custody, public policy considerations also favor returning custody to a parent who voluntarily relinquishes custody to a third party in order to resolve difficulties the parent is having.⁴

NOTE: For more information on changes in custody, please review “Established Custodial Environment” found in Tab B. Third person custody is also addressed in the Michigan Custody Guideline published by the State Court Administrative Office.

Considerations for the Investigator:

- Are there clear and convincing reasons the third party should be granted custody of the child?
- Was the child ever abused (emotionally, physically, sexually, or psychologically) by either or both parents?
- Has either or both parents ever abandoned the child?
- Are there indications of neglect by either or both parents?

Practice Tip: It is necessary to identify clear and convincing reasons a third party should be granted custody over a parent before a recommendation can be made that a third party receive custody.

burden of persuasion on the parent challenging the established custodial environment with the third party); *Glover v McRipley*, 159 Mich App 130 (1987) (using preponderance of the evidence test and placing the burden of persuasion on the parent challenging the established custodial environment with the third party); *Deel v Deel*, 113 Mich App 556 (1982) (stating that each presumption should be recognized equally but not weighted equally and recognizing burden of persuasion with third party); *Bahr v Bahr*, 60 Mich App 354 (1975) (recognizing both presumptions but finding that the presumption in favor of parental custody had been rebutted).

⁴ *Straub v Straub*, 209 Mich App 77 (1995) (finding that the parent had overcome the difficulties and that the parties were otherwise equal).

Changing the Child's Domicile or Residence

Change of Legal Residence (100 miles)

The Child Custody Act, MCL 722.31(1) states, "A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not 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."

Change of Domicile

According to Michigan Court Rule, MCR 3.211(C)(1), "A judgment or order awarding custody of a minor must provide that (1) the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody or the judge's successor...."

Interpretation:

With two exceptions, a parent may move a child to another location. The first exception is the court rule requirement that a parent who has custody of a child may not change the child's permanent residence from the state of Michigan until the judge approves the move. The second exception is the statutory requirement that a parent whose custody or parenting time is governed by a court order may not move the child to a location more than 100 miles from the other parent's residence until the judge approves of the move.

There is no requirement for court approval for a move to another place in Michigan when:¹

- The other parent agrees to the move.
- The judge ordered sole legal custody to one of the child's parents.
- The parents were already living 100 miles apart when the judge decided custody.

¹ MCL 722.31(2) & (3).

- The move results in the child's two legal residences being closer to each other than before the move.

If the custodial parent wants to move the child to another state, even to a location closer than 100 miles from the other parent's residence, the court must approve the move based on the following factors, commonly referred to as the *D'Onofrio* test:²

- **Whether the prospective move has the capacity to improve the quality of life for both the child and the relocating parent.** This factor does not require proof that an actual improvement in the quality of life will occur, rather the potential for improvement is all that is necessary.³ Under this factor, an appropriate consideration is the financial benefit of a move,⁴ including the attendant ability of a parent to cut back on work hours and spend more time with the children,⁵ or the ability to further a parent's career.⁶ However, financial aspects of the move are not an exclusive measure of the potential for improvement of the life of the child and parent. When a prospective move presented the custodial parent with a larger salary, less demanding hours, increased educational opportunities and allowed the children to attend a larger school, more church activities, violin lessons, and a longer skiing season, the court found that the day to day presence and relationship

² The test is named for a New Jersey case. *Anderson v Anderson*, 170 Mich App 305 (1988), adopted the *D'Onofrio* test as the standard to be used in Michigan. Although two earlier cases used other tests, (see e.g., *Hutchins v Hutchins*, 84 Mich App 236 (1978) (Beasley, J concurring) (best interests factors); *Watters v Watters*, 112 Mich App 1 (1981) (Glaser, J dissenting) (adopting four pronged test as a guide but requiring best interests of child factors to be considered), the prevailing view since that time has been the four pronged test stated here. The test has been stated somewhat differently depending on which cases have been cited (compare for instance the language in *Dick v Dick*, 147 Mich App 513 (1985) to the language in *Anderson*, supra.).

³ *Phillips v Jordan*, 241 Mich App 17 (2000) (Phillips, J, dissenting) (marriage and potential career in real estate would allow part-time work to conform to child's school schedule).

⁴ *Scott v Scott*, 124 Mich App 448 (1983) (husband's job in Ohio paid more); *Bielawski v Bielawski*, 137 Mich App 587 (1984).

⁵ *Anderson v Anderson*, 170 Mich App 305 (1988); *Mills v Mills*, 152 Mich App 388 (1986); *Phillips v Jordan*, 241 Mich App 17 (2000).

⁶ *Overall v Overall*, 203 Mich App 450 (1994); *Scott v Scott*, 124 Mich App 448 (1983).

with their father outweighed the added enticements of a move to Colorado.⁷

- **Whether the move is inspired by that parent's desire to defeat or frustrate the parenting time schedule and whether the custodial parent is likely to comply with the substitute parenting time orders where he or she is no longer subject to the court's jurisdiction.**⁸ The fact that the parents cooperate and are willing to encourage an ongoing relationship between the other parent and child is sufficient to indicate that the parent is not attempting to defeat or frustrate the parenting time schedule with the proposed move.⁹ Similarly, a mother demonstrated good faith by her willingness to pay expenses that would be incurred in returning the child to Michigan for parenting time.¹⁰
- **The integrity of the noncustodial parent's motives in resisting the removal and the extent to which, if at all, the opposition is motivated by a desire to secure a financial advantage with respect to a support obligation.** Only the latter half of this factor has been referenced in recent court cases. It is unclear whether the omission is intentional or whether it has occurred as a result of continued citations to a case which included a concise summary of the factors but which did not address this particular factor.¹¹ In a case decided before the current test was adopted, the court examined a father's opposition to a proposed move to

⁷ *Dick v Dick*, 147 Mich App 513 (1985) (The children's father had formal parenting time on alternating weekends and every Wednesday evening and who also was a Cub Scout leader, took the children to hockey practices and games, coached their little league team, participated in their religious instruction and attended their parent-teacher conferences.).

⁸ The statutory language for change of residence is similar but adds: "The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child." It is unclear whether this is an additional requirement or merely a codification of part of the third factor sometimes omitted in quoting the *D'Onofrio* test "the integrity of the noncustodial parent's motives in resisting the removal." See note 12 for cases examining a parent's use of parenting time.

⁹ *Mills v Mills*, 152 Mich App 388 (1986).

¹⁰ *Bielawski v Bielawski*, 137 Mich App 587 (1984).

¹¹ *Anderson v Anderson*, 170 Mich App 305 (1988).

California and found that he was a parent who was indifferent in exercising parenting time and would not be greatly put out or concerned by not being able to exercise parenting time afforded in the judgment if the other parent were to move.¹²

- **The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can 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 and old parenting time arrangements need not be equal in all respects. The requirement is that there be a realistic opportunity for preserving and fostering the parental relationship. Thus, replacing alternate weekends with one-half the summer vacation, all of Christmas vacation and alternate spring vacations was considered an acceptable alternative.¹³ However, substituting two or more months per year plus frequent mail and telephone communication was not considered to be an adequate substitute for alternating weekends and every Wednesday evening when the father was also involved with the children in other extracurricular activities.¹⁴ In order to allow a move, a court may fashion orders to facilitate the parenting time. Thus, a court could enter an order requiring the parties to share the cost of transportation.¹⁵

¹² *Lem v Lem*, 12 Mich App 174 (1968) (The father had contested the move and sought custody despite having the children only 5 days in 4 years.). See also, *Lorenz v Lorenz*, 70 Mich App 356 (1976). (The court found that the children were being “horsed around by both sides.”).

¹³ *Anderson v Anderson*, 170 Mich App 305 (1988). See also *Mills v Mills*, 152 Mich App 388 (1986) (The court approved replacing schedule of all but one weekend in a month and a six week summer vacation with plan for eleven weeks in the summer, a three day weekend each May and October, a week each Christmas, and each school break between the Christmas and Easter school breaks.).

¹⁴ *Dick v Dick*, 147 Mich App 513 (1985).

¹⁵ *Scott v Scott*, 124 Mich App 448 (1983).

When a parent asks the judge to approve a move of a child's legal residence to a point more than 100 miles from the earlier residence, the judge must consider the foregoing factors¹⁶ and must also consider the following:

- **Domestic violence, regardless of whether the violence was directed against or witnessed by the child. If a parent seeking to change that legal residence needs to seek a safe location from the threat of domestic violence, the parent may move to such a location with the child until the court makes determination.**¹⁷

Considerations for the Change of Domicile for the Investigator:

- Will the change in domicile improve the quality of life for both the child and the relocating parent?
- Have both parents followed the court order for custody or parenting time?
- Is the parent who is requesting to move motivated by a desire to defeat or frustrate the parenting time schedule of the other parent?
- If the court grants the move, will it be possible for a parenting time schedule and other arrangements to be made that would provide an adequate basis for preserving and fostering the parental relationship between the child and

¹⁶ With the exception of the addition of a domestic violence factor, the factors are similar but are worded differently in the statute, just as they are sometimes worded differently in the cases. The most striking difference between the wording of the statute and case law requires the consideration of "The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule." This may be a reformulation of requirement that the court examine the integrity of the parent's motives in resisting the change by examining the previous use of parenting time, or it may be a new, and as yet undefined, element.

¹⁷ No cases have yet been decided concerning this factor. See Tab B, Child Custody Factor k, for cases involving domestic violence.

each parent?

Practice Tips: It is necessary to determine if the same relationship could continue, if the court were to grant permission for the relocation.

- If the court does modify the current order for parenting time is it believed that each parent will comply with the modification?
- Is the parent who opposes the move doing so as a means to pressure the other parent to reduce the child support obligation?

If the investigator is required to conduct an investigation regarding changing the child's legal residence of 100 miles or more from the other parent, the previous considerations should be applied to the investigation with the addition of the following:

- Have there been any incidences of domestic violence, either directed at the child or witnessed by the child, by either parent?

Introduction for Parenting Time Investigations

As with custody, MCL 505(1)(d) sets forth the friend of the court's responsibility to investigate parenting time: "To investigate all relevant facts, and to make a written report and recommendation to the parties and to the court regarding child custody or parenting time, or both, if there is a dispute as to child custody or parenting time, or both, and domestic relations mediation is refused by either party or is unsuccessful, or if ordered to do so by the court." Thus, the statute provides for the friend of the court to complete two types of parenting time investigations: Parenting time can be investigated and analyzed at the same time custody is addressed, or parenting time can be addressed as a part of a separate proceeding.

When a dispute exists concerning the custody of a child, the court may provide for reasonable parenting time of the child by the parties, by the grandparents, or by others.¹ The law requires that the parenting time factors set forth in MCL 722.27(a) be addressed, as well as the best interests factors set forth in MCL 722.23.² This means the investigator will have to address the 12 factors of the Child Custody Act for parenting time investigations (even if instructed to do a parenting time investigation only). The objective of the analysis is to insure:

"..... parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time."³

The investigator will need to follow many of the same procedures required for a custody investigation when required to complete a parenting time investigation. This includes:

- ▶ Send out contact letters and questionnaires. The contact letters should indicate the date and time the parties are to appear for their appointment with the investigator.
- ▶ Review the pleadings and questionnaires.
- ▶ Check for Domestic Violence (if there are indications of domestic violence the investigator should refer to office policy on screening domestic violence cases and take the appropriate steps).

¹ MCL 722.27(1).

² *Terry v Affum*, 237 Mich App 522 (1999) (it is error not to evaluate parenting time without examining child custody factors); *Stevens v Stevens*, 86 Mich App 258 (1978).

³ MCL 722.27a(1).

- ▶ Identify and concentrate on those issues that are in dispute and spend less time on those where it appears there is agreement.
- ▶ Address the 12 best interest factors of the Child Custody Act, MCL 722.23.
- ▶ Interview the child or children.
- ▶ Secure signed release forms from both parents (see Appendix 3 for samples of release forms).
- ▶ Gather information for the investigation (see Tab E for Gathering Information Recommendations).
- ▶ Write and proofread the report (see Tab F for Additional Recommendations).

Generally, parenting time must be granted unless the court finds, by clear and convincing evidence, that it would endanger the child's physical, mental, or emotional health.⁴ Thus, a court erred when it changed parenting time based on the fact that blood tests determined the legal father was not the biological father of the child.⁵ However, a court did not abuse its discretion in denying a father all parenting time rights when the father had abandoned the child for eight years, the father had only requested parenting time in response to an attempt to collect delinquent support, and the proposed parenting time would change the child's established custodial environment.⁶

NOTES: At the time this manual was published, very few appellate cases had addressed the parenting time factors. Because of this, explanation of some factors or legal considerations drawn from appellate decisions will be limited.

In the *Troxel v Granville*,⁷ the United States Supreme Court ruled that a Washington statute that permitted grandparents to seek visitation violates a parent's right to make decisions regarding the child's care, custody, and control. Relying on this decision, the Michigan Court of Appeals found that the Michigan grandparenting time statute was unconstitutional.⁸ Because of

⁴ MCL 722.27a(3). *Rozek v Rozek*, 203 Mich App 193 (1993) (noting that there are a multitude of terms and conditions that can be attached to parenting time to best serve the interests of, and protect, a child).

⁵ *Hawkins v Murphy*, 222 Mich App 664 (1997).

⁶ *Stevenson v Stevenson*, 74 Mich App 656 (1977).

⁷ *Troxel v Granville*, 530 US 57 (2000); 120 S Ct 2054; 147 L Ed 2d 49 (2000).

⁸ *Derosé v Derosé*, 249 Mich App 388 (2002).

these decisions, the Investigators Manual will not address grandparenting investigations. In the event the Supreme Court revisits grand parenting time, the manual will be updated.

The following section of the Investigators Manual will review the nine parenting time factors of the Child Custody Act.⁹ The term “parent” will be used to refer to the parent seeking parenting time in the “considerations” and “practice tips” sections following the factors.

⁹ Contained in MCL 722.27a(6).

Factor a: **The existence of any special circumstances or needs of the child.**¹

Interpretation:

In examining this factor, both the emotional and physical needs of the child must be considered. The fact that a child was emotionally sensitive, and the possibility that the father's belated involvement might traumatize the child, was an appropriate consideration in denying any parenting time to the father.² And, when the children suffered from an illness that caused them to be underweight, hyperactive, allergic, and to have an abnormal disease immunity, the court was required to recognize the health needs of the children in fashioning a parenting time schedule.³

When addressing this factor, any special circumstances that may impact parenting time must be considered. For example, a court erred when it did not determine before entering a parenting time order whether a child with cerebral palsy was able to cope with a dual custody environment.⁴

Considerations for the Investigator:

- What emotional impact will the parenting time have on the child?
- How long has it been since the child spent significant time with the parent?
- Does the parent have the ability to accommodate the special needs of the child during parenting time?
- Does the parent have the inclination to accommodate the special needs?

¹ MCL 722.27a(6)(a).

² *Stevenson v Stevenson*, 74 Mich App 656 (1977).

³ *Lorenz v Lorenz*, 70 Mich App 356 (1976).

⁴ *Stevens v Stevens*, 86 Mich App 258 (1978) (Whether a child with cerebral palsy is able to cope with dual custody environment.). See also Michigan Parenting Time Guideline for suggestions concerning a child's medical needs, age issues, extracurricular activities, and safety issues.

- Are there any remedial needs of the child and is the parent prepared to assist the child with these needs?
- Is the parent aware of any medications the child is receiving and does the parent know when those medications are to be taken?

Practice Tips: It is necessary to determine if the parent is attuned sufficiently to the children's needs (both physical and emotional). This would include whether the parent's home is adequately equipped for the needs of the child. It may also be necessary to consider agency, third party, or therapeutic parenting time. Therapeutic parenting time provides for a gradual establishment of a relationship between the child and the parent with the goal of moving towards a more standard form of parenting time.

Factor 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.¹

Interpretation:

Currently, no published cases address this factor. The following should be considered for a child who is very young or nursing.

Considerations for the Investigator:

- What is the age of the child?
- Does the child have special needs as a result of its infancy and is the parent aware of these needs?
- Does the parent have the inclination necessary to provide for these needs?
- Does the parent have the ability to provide for the child's needs?
- What is the nursing schedule of the child?
- Can the child's nutritional needs be met if a parenting time schedule is implemented?
- Can the child's nutritional needs be met by means other than nursing (e.g., the use of formula)?
- Can the mother's milk be provided for the child during parenting time?
- Can parenting time be arranged around the child's nursing schedule?

Practice Tip: It is necessary to determine what impact, the child's age and nursing of the child will have on parenting time.

¹ MCL 722.27a(6)(b).

Factor c:

The reasonable likelihood of abuse or neglect of the child during parenting time.¹

Interpretation:

MCL 722.27a(3) states: “A child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health.” This parenting time factor examines possible physical, emotional, or psychological abuse of the child by the non-custodial parent or third parties during parenting time.

MCL 722.27a(8)(c) allows the court to place restrictions on the presence of third persons during parenting time. The court may place other conditions on parenting time necessary to protect a child. Therefore it was reasonable for the court to restrict parenting time to five hours every other Saturday afternoon and to forbid the use of alcohol or cursing in the non-custodial parent’s home during parenting time.² Supervised parenting time is proper if there is evidence of physical abuse or excessive physical discipline³ by the parent or a third party who is present during parenting time.

Considerations for the Investigator:

- Are there indications that an act of physical violence was ever committed by the parent against any individual?
- Are there any indications the parent ever physically abused the child?
- Is information available that indicates the parent verbally, mentally, or emotionally abused (e.g., tormented, berated, or threatened) the child, another family member, including live-in relationships, or stepchildren?

¹ MCL 722.27a(6)(c).

² *Van Koevering v Van Koevering*, 144 Mich App 404 (1985) (The children described the mother’s home as a place where those present drank, cursed, and smoked marijuana, and where a drunken man once crawled into the daughter’s bed.).

³ *Booth v Booth*, 194 Mich App 284 (1992).

- Has there ever been a personal protection order issued against the parent?
- Has child protective services ever investigated the parent for child abuse or neglect?
- Has the parent left the child unattended for extended periods of time?
- Has the child been properly feed and clothed?
- Are there indications the parent failed to provide a safe environment for the child?
- Has the parent allowed another individual to threaten or abuse the child?
- Has a third party who is present during parenting time ever been investigated for child abuse or neglect?
- Has a third party who is present during parenting time ever been convicted of a violent crime?
- Has the parent berated or threatened the other parent in the presence of the child during parenting time?
- Can parenting time be ordered that would eliminate any risks of the child being abused?
- Should there be supervised parenting time?

Practice Tips: Are there indications of threats to the child's safety during parenting time? If the child's safety is a consideration, determine what safeguards must be in place to protect the child. The Michigan Judicial Institute, Friend of the Court Domestic Violence Resource Book addresses parenting time and child abuse.

Factor d:

The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.¹

Interpretation:

This factor concerns the risk that either parent could suffer some form of abuse when parenting time is exercised. Thus it was appropriate that the parenting time schedule require twelve hours advance notice of the exercise of parenting time when the relationship between the parents was replete with animosity and strife.² Michigan statutes provide for alternative parenting time arrangements to guard against such abuse.³ The Michigan Parenting Time Guideline provides suggestions concerning arrangements when abuse is present in a case.

Considerations for the Investigator:

- Does either parent insult or berate the other parent during parenting time?
- Does either parent threaten the other parent during parenting time?
- Does either parent emotionally or psychologically abuse the other parent during parenting time?
- Has there been a history of conflicts between the parents during the parenting time?
- Is there evidence that an act of physical violence was committed by either parent towards the other?
- Has either parent been prosecuted or convicted of a violent crime?
- Has a third party insulted or berated one of the parents during parenting time?

¹ MCL 722.27a(6)(d).

² *Thames v Thames*, 191 Mich App 299 (1991) (Where the mother attributed breakdown of marriage to abuse by the father among other reasons.).

³ MCL 722.27a(8)(f) and MCL 722.27a(8)(c).

- Has a third party threatened one of the parents parent during parenting time?
- Is it possible for the parents to exchange the child in a manner that would eliminate any possibility of abuse (exchange the child in a public place)?

Practice Tips: Are there legitimate concerns for the safety of either parent during parenting time? It is necessary to identify if contact between the parents poses a threat to either person. If so, then safeguards should be put in place that would protect both parents from harm.

Factor e:

The inconvenience to, and burdensome impact or effect on, the child traveling for purposes of parenting time.¹

Interpretation:

This factor considers the impact traveling will have on the child. For example, under this factor it was considered error not to consider the impact that a parenting time scheme involving travel between Nebraska and Michigan would have upon the health of the children.²

Considerations for the Investigator:

- Will traveling between the parent's homes have an impact on the child's health?
- Is the age of the child appropriate for amount and means of travel required for parenting time?
- If the parent cannot transport the child, can someone who the child feels comfortable with transport the child?
- Does the child have special needs that must be considered for transportation purposes?
- Would the means of transportation for parenting time cause the child anxiety or stress(e.g., airplane, bus, train)?

Practice Tips: For purposes of parenting time, this factor examines impact traveling will have on the child. Try to identify difficulties the child may have when traveling between the parent's homes and how parenting time can be structured to eliminate those difficulties.

¹ MCL 722. 27a(6)(e).

² *Lorenz v Lorenz*, 70 Mich App 356 (1976).

Factor f: **Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.¹**

Interpretation:

This factor examines whether the proposed parenting time order is reasonable under the circumstances. When the circumstances indicate that a parent might not comply with the order, the court may impose conditions to ensure compliance. For example, the court may include a provision that one parent not tell the children what to say to the other parent during parenting time.² The parenting time schedule also should be one the parent can reasonably comply with. Consequently, the court has found that it was necessary to require parenting time during the Sabbath day of the children's religion because other options would disrupt the father's work schedule.³

Considerations for the Investigator:

- What circumstances have changed that prevents the parent from exercising parenting time (e.g., new job, health conditions, second family)?
- Is the child significantly older since the entry or modification of the court order for parenting time?
- Is the child involved with more school and extracurricular activities now than when the order was entered or modified?
- Does the child make plans that interfere with parenting time?
- Has the parent been late when picking up or dropping off the child?
- Has the parent ever withheld the child from the other parent?
- Has the parent ever been charged with parental kidnapping?

¹ MCL 722. 27a(6)(f).

² *Van Koevering v Van Koevering*, 144 Mich App 404 (1985).

³ *Deal v Deal*, 197 Mich App 739 (1993).

Practice Tips: It may be necessary to determine if circumstances have changed that make it impossible for the parent to spend time with the child. It may also be necessary to determine if it is likely the parent will obey the court order.

Factor g: **Whether a parent has frequently failed to exercise reasonable parenting time.¹**

Interpretation:

This factor reviews how consistent a parent has been in exercising the court ordered parenting time. For example, parenting time for the non-custodial parent would be inappropriate where the request was made after a period of abandonment of the child and in response to recent attempts to collect child support.² Likewise, when the parents did not exercise their previous parenting time rights with any regularity, the court could conclude that the parents were not entirely earnest in their desire to modify the court's custody, parenting time, and support orders.³

Considerations for the Investigator:

- Are there indications that the parent has failed to spend time with the child as ordered by the court, or as agreed to by the parents?
- Has the parent routinely contacted the child at the last minute to cancel plans?
- Has the parent gone long periods with no attempts to contact the child?
- Does the parent routinely invests time in hobbies, interests, or adult friends over spending time with the child?
- Does the parent raise parenting time issues, only during child support enforcement proceedings?
- Is there any indication the parent has interfered with the other parent's time with the child?
- How much time does the parent actually spend with the child?
- Is there an over-reliance on the use of a child care provider or third party to watch the child?

¹ MCL 722. 27a(6)(g).

² *Stevenson v Stevenson*, 74 Mich App 656 (1977).

³ *Lorenz v Lorenz*, 70 Mich App 356 (1976).

Practice Tips: Try to identify how consistent the parent has been in spending time with the child. It is critical that you distinguish unexercised parenting time oppose to situations where parenting time was denied.

Factor 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. ¹

Interpretation:

The court must examine the likelihood that the child will be improperly detained, and order reasonable conditions on parenting time. For example, it was appropriate for a court to impose restrictions on parenting time of a resident of Ireland that included surrender of the father's passport and a bonding requirement.² When the threat of a violation has passed, continued restrictions may not be necessary. For example, the court properly reviewed and rejected an attempt to prevent parenting time for a parent who had previously detained the child when that parent had subsequently fully abided by the court orders regarding custody and parenting time for approximately two years.³

Considerations for the Investigator:

- Has the parent ever concealed the child from the other parent?
- Has the parent ever been charged with parental kidnapping?
- Has the parent ever abducted the child from the other parent's home, the child's school, or child care providers?
- Has the parent ever made threats to take the child to another state or country and not return?
- Does the parent refuse to provide the other parent with information regarding vacation plans (e.g., location, dates, phone numbers, and address)?

¹ MCL 722.27a(6)(h).

² *Farrell v Farrell*, 133 Mich App 502 (1984).

³ *Mauro v Mauro*, 196 Mich App 1 (1992).

Practice Tip: It is necessary to determine if the parent has any history of concealing the child from the other parent. Try to look for examples of the parent reluctance to return the child or statements made that indicate a legitimate threat.

Factor i: **Any other relevant factors.¹**

Interpretation:

This factor examines any other issues that were not addressed in the previous eight parenting time factors of the Child Custody Act. Among the circumstances that may be considered are the disruption to the child's stable home environment² and the children's need to have more time with their father (which could outweigh the fact that the parenting time would occur during the Sabbath day of the children's religion).³

Considerations for the Investigator:

- Should parenting time be structured so the child has consistent contact with siblings and step siblings?
- Is the child involved with community and school activities that may interfere with parenting time?
- Is each parent able to discuss the parenting time schedule with the other parent?
- Does the parent have the opportunity to spend time with the child (e.g., afford transportation, money for activities)?
- Is the parent likely to exercise parenting time if the court ordered it?
- Is there any other issue that has not been addressed that may interfere with the parent spending time with the child?

¹ MCL 722.27a(6)(i).

² *Stevenson v Stevenson*, 74 Mich App 656 (1977).

³ *Deal v Deal*, 197 Mich App 739 (1993) (Although a psychiatrist testified that it was preferable to have the children stay with the mother during the Sabbath, he admitted that the failure to do so would not result in harm to the children. Sunday only parenting time would not have provided enough time for the children to stay with the father, and allowing the children to stay until Monday would disrupt their schooling and the father's work schedule.).

Practice Tip: Look for issues that are unique to this family that may not have been previously addressed that the court should be aware of before making a parenting time decision.

Gathering Information

Determining information that is relevant to the investigation and how the investigator can obtain that information.

MCL 552. 505(1)(d) provides that the friend of the court is “to investigate all relevant facts, and to make a written report and recommendation to the parties and to the court regarding child custody or parenting time, or both....” To complete a thorough report, it is necessary to gather information from multiple sources and to verify the information provided. The investigator should review the pleadings and other statements of the parents to determine what information is likely to be needed in the investigation.¹ For instance, the investigation that follows from a pleading that avers that a child is exposed to controlled substances with one parent may be quite different than one that avers that a child is not being raised in his faith. The investigator should immediately secure the signatures on the proper release forms from the parents. Examples of release forms can be viewed in the Appendix 3. After obtaining signatures on the release forms, the investigator should consider carefully who should be interviewed and what agencies should be contacted to complete the investigation.

Considerations for the Investigator:

- Is it necessary to schedule a home call? Home inspections should be conducted only for cases where there is a question of whether one or both homes do not meet the minimum standards of health and safety necessary to maintain the children.

Practice Tip: Home inspections are primarily comparative studies. An investigator’s function is to weigh the merits and deficiencies of physical environments proposed by each competing parent and give the advantage on that basis.

- What interviews should be conducted with individuals who have had direct observation of the child and the parents, including interactions between them?

¹ Not every issue will need to be investigated with the same zeal. *McCain v McCain*, 229 Mich App 123 (1998) (When the parties have viewed a particular issue as having a significant magnitude, it is proper to give the issue more weight.).

Some examples:

- ▶ Teachers
 - ▶ School Officials
 - ▶ Coaches
 - ▶ Day Care Providers
 - ▶ Neighbors
 - ▶ Scout Leaders
 - ▶ Counselors
 - ▶ Doctors
 - ▶ Probation/Parole Officers
 - ▶ Protective Service Workers
 - ▶ Church Youth Group Leaders
 - ▶ Family Friends
- Which reports and documents will provide the investigator with additional information useful to complete the report?
Some examples:
 - ▶ School Records
 - ▶ Child Protective Service Reports
 - ▶ Police Reports-with a Criminal History
 - ▶ Court Records
 - ▶ Income Verification-Copies of Paychecks, Tax Returns, and Child Support Payment Histories
 - ▶ Medical Records
 - ▶ Counseling Records
 - Is it necessary to schedule a time to observe the interactions between the child and the parent?
 - If either parent has another friend of the court case, should that case be reviewed for additional information (e.g., indications of abuse, denial of parenting time)?
 - Is it necessary to secure an administrative or judicial subpoena to gather information?

Practice Tip: Gathering documents, and interviewing individuals outside the family assists in the verification of information the parents have provided. It is critical that you secure a release form from each parent, and then identify what sources of information would be most beneficial to the court.

Additional Recommendations

After the investigator has drafted the report the following recommendations will improve its quality.

Proof Reading

- Use spell check and other computer software applications (e.g., thesaurus, grammar check, and spacing codes) to review the report.
- Proofread the report, then have someone else in the office proofread the report. Ask the individual to pay particular attention to:
 - ▶ Misspellings
 - ▶ Typographical Errors
 - ▶ Missing Words
 - ▶ Grammar
 - ▶ Appropriate Style
 - ▶ Proper Formatting
 - ▶ Correct Fonts
 - ▶ Page Setup
 - ▶ Correct Page Numbering
- Verify pertinent case record information contained within the report:
 - ▶ Custodian's Names
 - ▶ Children's Names
 - ▶ Children's Ages, Dates of Birth, and with Whom they reside
 - ▶ Attorney's Names
 - ▶ Attorney's Addresses
 - ▶ Domestic Violence Screening Results

NOTE: If the investigator uses a template, it is important to modify it as the court rules and statutes change.

Filing of the Report

The procedure by which a custody investigation is delivered to the court is a matter that should be considered carefully. Under the law, custody or parenting time investigations are not admissible into evidence unless the parties or their attorneys have so stipulated. However, the

judge or referee may consider the report.¹ The report is not a public record, in contrast to pleadings, responses and orders. Therefore, the report should be delivered to the referee or judge in a manner so that it **will not be placed with other documents in the court file**.

It is recommended the report be brought to the court sealed and labeled for placement in a temporary file. In the alternative, a note should be attached to the report indicating it should **not** be placed in the court file.

A copy of the report should be retained in the friend of the court file. The statute requires that it be made available to the parties and their counsel.² The report submitted to the court should always be complete and be accompanied by the supporting documents (such as psychological reports).

MCR 3.218(A)(3)(a) lists notes from investigations as “confidential information.” Although the report and recommendation must be made available to the parties, notes used in preparing the report are confidential information. A party who wishes to view these notes must obtain a court order to do so.

¹ *Duperon v Duperon*, 175 Mich App 77 (1989); *Nichols v Nichols*, 106 Mich App 584 (1981); *Hoffman, Hoffman*, 119 Mich App 79 (1982). At the time of publication, legislation was pending which would amend Subsection 17d(4) of the Friend of the Court Act effective December 1, 2002. The amendment allows the court to use the report from parenting time investigation to establish facts to the extent no other evidence is presented and if the parties stipulate or do not object to its use.

² MCL 552.507(4).

Summary

Custody and parenting time investigators contribute a valuable service to the court, families, and attorneys by gathering and evaluating information the court and the parents need to make decisions involving the care, custody, and support of a child. Completing a report and recommendation is a complex task, which requires the investigator to understand applicable law when analyzing information and applying it to issues related to the family. Recognizing the challenges required to complete these investigations, the State Court Administrative Office (SCAO) developed the SCAO Custody and Parenting Time Investigation Manual.

The purpose of this manual is to provide friend of the court investigators with a resource that can be referred to when completing an investigation. This manual provides:

- Factors from the Child Custody Act, and other statutory considerations.
- Interpretations of the factor based on legal analysis drawn from appellate court decisions.
- Considerations for the investigator when evaluating the factors.
- Practice Tips for obtaining information during the investigation.

In addition, specific sections of the manual are dedicated to common informational gathering techniques and report preparation. Sample forms, sample contact letters, and sample reports, along with the Michigan Judicial Institute's Publication on Domestic Violence & Personal Protection Orders, can be found in the appendices of this manual.

Before referring to this manual, investigators should become familiar with the local court and office policies and procedures regarding custody and parenting investigation. This manual is intended to supplement those policies and procedures, as well as to assist local offices and courts in determining whether the local policies and procedures should be modified. Friend of the court offices are encouraged to include local policies and procedures within this manual so that investigators can refer to a single source. Once an investigator becomes familiar with the materials in the manual, it may only be necessary to refer to it for specific issues that emerge during an investigation.

For all investigations, the quality of the report and recommendation is a direct reflection on the investigator and the court. Providing a quality report should always be the investigator's goal.

NOTE: This manual addresses requirements for investigations as they exist at publication. The SCAO will be providing updates to the manual as changes occur in statutes, court rules, and user's needs.

SAMPLE

DATE

XXXXXX
XXXXXX
XXXXXX
XXXXXX

Re:

Dear Sir or Madam:

Under the Statutes of the State of Michigan, the Friend of the Court is a judicial service agency for the Circuit Court. We conduct all domestic relations investigations on behalf of the Court and the information being requested is an integral part of the investigation involving the above cited case.

Please provide me with any and all counseling records/reports pertaining to the following individual(s):

Please be advised that we are required by law to prepare a recommendation in this case within a specified time frame. Your return of these documents is requested within the next 10-15 days.

If you have any questions regarding this matter, please feel free to contact this office. Thank you.

Yours truly,

XXXXX
XXXXX
XXXXX

XXX/XX

SAMPLE

DATE

XXXXX
XXXXX
XXXXX
XXXXX

Re:

Dear Sir or Madam:

This is to certify that the XXX Judicial Circuit of Michigan has jurisdiction in the above-entitled matter, and that the name and birth date of each affected child is as follows:

Please be advised that we are required by law to prepare a recommendation in this case within a specified time frame. Your return of these documents is requested within the next 10-15 days.

Please complete and return the enclosed report. Thank you for your cooperation.

Yours truly,

XXXXX
XXXXX
XXXXX

XX/XX

SAMPLE

DATE

Michigan State Police

XXXXX

XXXXX

XXXXX

Re:

Dear Sir or Madam:

Under the Statutes of the State of Michigan, the Friend of the Court is a judicial service agency for the Circuit Court. We conduct all domestic relations investigations on behalf of the Court and the information being requested is an integral part of the investigation involving the above cited case.

Please provide me with any and all *incident reports* pertaining to the following individual(s):

Please be advised that we are required by law to prepare a recommendation in this case within a specified time frame. Your return of these documents is requested within the next 10-15 days.

If you have any questions regarding this matter, please feel free to contact this office. Thank you.

Yours truly,

XXXXX

XXXXX

XXXXX

XX/XX

SAMPLE

DATE

XXXXX
XXXXX
XXXXX
XXXXX

Re:

Dear Sir or Madam:

Under the Statutes of the State of Michigan, the Friend of the Court is a judicial service agency for the Circuit Court. We conduct all domestic relations investigations on behalf of the Court and the information being requested is an integral part of the investigation involving the above cited case.

Please provide me with any and all records/reports pertaining to the following individual(s):

Please be advised that we are required by law to prepare a recommendation in this case within a specified time frame. Your return of these documents is requested within the next 10-15 days.

If you have any questions regarding this matter, please feel free to contact this office. Thank you.

Yours truly,

XXXXX
XXXXX
XXXXX

XX/XX

SAMPLE

DATE

XXXXX
XXXXX
XXXXX
XXXXX

Re:

Dear Sir or Madam:

Under the Statutes of the State of Michigan, the Friend of the Court is a judicial service agency for the Circuit Court. We conduct all domestic relations investigations on behalf of the Court and the information being requested is an integral part of the investigation involving the above cited case.

Please provide me with any and all medical records/reports pertaining to the following individual(s):

Please be advised that we are required by law to prepare a recommendation in this case within a specified time frame. Your return of these documents is requested within the next 10-15 days.

If you have any questions regarding this matter, please feel free to contact this office. Thank you.

Yours truly,

XXXXX
XXXXX
XXXXX

XX/XX

SAMPLE

DATE

XXXXX
XXXXX
XXXXX
XXXXX

Re:

Dear Sir or Madam:

Please advise whether either of the above individuals or minor child(ren) listed as follows receive Social Security Benefits or Supplemental Security Income and from whose benefit/disability:

Also, please advise as to whom payments are being made. Thank you for your cooperation in this matter.

Please be advised that we are required by law to prepare a recommendation in this case within a specified time frame. Your return of these documents is requested within 10-15 days.

Yours truly,

XXXXX
XXXXX
XXXXX

XX/XX

SAMPLE

DATE

XXXXX
XXXXX
XXXXX
XXXXX

Re:

Dear Sir or Madam:

Under the Statutes of the State of Michigan, the Friend of the Court is a judicial service agency for the Circuit Court. We conduct all domestic relations investigations, including support, on behalf of the Court, and the information being requested is an integral part of the investigation involving the above referenced individuals.

I am hereby requesting a printout and/or written verification of any and all Unemployment Compensation Benefits received in the past 12 months by the following individual(s):

Please be advised that we are required by law to prepare a recommendation in this case within a specified time frame. Your return of these documents is requested within the next 10-15 days.

Yours truly,

XXXXX
XXXXX
XXXXX

XX/XX

SAMPLE

Date

XXXXX
XXXXX
XXXXX
XXXXX

Re:

Dear Parties:

The Friend of the Court has been directed to conduct an investigation and file a recommendation with regard to custody and Parenting Time of the minor child in this case. An appointment for you to be interviewed at this office by Investigator XXXXX has been made for:

Mr. _____, Wednesday, April 31, 3009 at 10:30 a.m.

Ms. _____, Wednesday, April 2, 3009 at 1:00 p.m.

Please DO NOT bring the minor child to this interview as an alternate date and time will be established for Ms. XXXXX to meet with her if required.

We request only your presence at this meeting. Please plan on your appointment lasting approximately 30 minutes. Bring anything you want considered (regarding the disputed issues) in writing so you can refer to it during your meeting, but please keep your list as brief as possible.

If you haven't come so already, please supply our office with copies of your four (4) most recent pay check stubs and most recently filed Federal Income Tax Return including attachments (W2s, 1099s, Schedules, etc.). If you are self-employed, please supply our office with your last three years' Federal Income Tax Returns as well. Also, a Child Care Verification Form is enclosed for your day care provider (if you presently have one) to complete and return to our office. Please provide our office with all requested information within the next 10-15 days or at the time of the meeting noted above.

If you are unable to make your appointment, please contact our office immediately. Thank you for your cooperation, and we look forward to seeing you.

Yours truly,

XXXXX
XXXXX
XXXXX

XX/XX
Enclosures

State of Michigan
____ Judicial Circuit
____ County

SCHOOL REPORT

Case No.

Address

Telephone Number

Attn: Investigator

DATE:

CHILD'S NAME:

SCHOOL:

DATE OF BIRTH:

TEACHER:

PRESENT GRADE:

PRINCIPAL:

A. General appearance (circle one)

(1) Excellent

(2) Good

(3) Fair

(4) Poor

Explain (if necessary)

B. General adjustment at school (circle one)

(1) Excellent

(2) Good

(3) Fair

(4) Poor

C. Attendance for the last marking period completed:

Number of absences:

Number of unexcused absences:

Number of times tardy:

D. Specific disabilities or problems which might hinder achievement:

E. Academic progress--PLEASE PROVIDE GRADES FOR THE LAST MARKING PERIOD.

F. School comments:

Signature of person preparing form
Date:

Thank you for completing and returning this form promptly.

State of Michigan

_____ Judicial Circuit

DAY CARE REPORT

Case No.

_____ County

Friend of the Court Address:

Telephone No:

_____ County Courthouse

Address:

DATE:

CHILD'S NAME:

DATE OF BIRTH:

DAY CARE CENTER:

NAME OF PARENT WHO ENROLLED CHILD:

A. General appearance (circle one):

(1) Excellent

(2) Good

(3) Fair

(4) Poor

Explain (if necessary)

B. General adjustment at day care center (circle one):

(1) Excellent

(2) Good

(3) Fair

(4) Poor

C. Does the child appear to be happy?

D. Can child dress him/herself?

E. Is the child toilet trained?

F. Does this child appear to be in good health?

G. Does the child have any specific disabilities?
(If yes, please explain.)

H. (1) Who drops the child off?

(2) Who picks the child up?

I. Teacher Comments:

Date: _____

Signature of person preparing form

Thank you for completing and returning this form promptly.