

Impact Statement
Michigan Poverty Law Program

Mandatory Joint Custody

HB 5114 (June 16, 2009)
Ballot Initiative (February 26, 2010)

Proposed Legislation: HB 5114 would amend MCL 722.26a and mandate joint physical and legal custody unless either of the following applies:

- The court determines by clear and convincing evidence that a parent is unfit, unwilling, or unable to care for the child.
- A parent moves his or her residence outside the school district that the child has attended during the previous 1-year period preceding the initiation of the action and is unable to maintain the child's school schedule without interruption.

If a parent is unable to maintain a child's school schedule, the court must order mediation to determine "a custody arrangement that maximizes both parents' ability to participate equally in a relationship with the child while accommodating the child's school schedule."

If joint custody cannot be ordered by the court as provided, the court must still determine whether joint custody is in the child's best interests by considering the statutory best interest factors and whether the parents can "maintain the child's school schedule" (which replaces "cooperate") and generally agree about important decisions regarding the child's welfare.

Finally, if joint custody is ordered, the court shall provide that "physical custody is shared by the parents alternately for specific and substantially equal periods of time."

Ballot Initiative: On February 26, 2010, the Michigan Board of Canvassers approved the language of an initiated petition to amend the Child Custody Act of 1970 "to create a rebuttable presumption that the award of joint legal and joint physical custody to the parties of a custody dispute is in the best interest of a minor child of said parties." The full text of the petition mimics the language of HB 5114, as detailed above.

The petition was paid for by Dad and Moms PAC. The State Bar of Michigan, the Family Law Section, and the Judicial Conference have consistently opposed amendments to the Child Custody Act that would have the effect of reducing judicial discretion by creating a presumption for joint custody.

Current Law: MCL 722.26a requires the Court to advise parties of joint custody, consider joint custody at the request of either party and state on the record the reasons for its decision. In deciding joint custody, the Court must determine whether it is in the best interests of the child by considering the 12 best interest factors and "whether the parents will be able to cooperate and generally agree concerning important decision affecting" the child. If the parents agree on joint custody, the Court must order it unless it finds by clear and convincing evidence that it is not in the best interests of the child. Joint custody means that the child resides for alternately periods of time with each parent and/or that the parents share decision-making authority on important decisions affecting the child.

Impact of Proposed Amendments:

- Current law already states a preference in favor of joint custody (the parents shall be advised of joint custody, the court shall consider joint custody at the request of a parent and state reasons for its decision on the record). This bill states a mandate for joint physical custody in nearly all families.
- While joint custody may be appropriate where parents voluntarily commit to such an arrangement, mandating joint custody is inconsistent with the conflict and minimal communication that is characteristic of many parents who seek a judicial determination of custody.
- Mandatory joint custody is likely to lead to worse results for children by forcing parents to cooperate who are unable or unwilling, by continuing parental conflict, and by increasing instability caused by moving between households.
- Mandatory joint custody confuses the child's best interests with parental interests. The best outcomes for children focus on the particular needs of each child on a case-by-case analysis.
- Deciding custody on the basis of a presumption is not probative of what is in the child's best interests because it simply provides the judge with a conclusion without any proof to the contrary.
- The bill would effectively eliminate Michigan's "best interests" standard by mandating joint custody unless there is proof that a parent is unfit or it would negatively impact a child's school location. In most cases, the court would no longer be required to conduct a best interest analysis before deciding custody.

Impact on Domestic Violence Survivors:

- Mandatory joint custody compromises the safety of battered women by providing the batterer with continuing opportunities for control, abuse and violent contacts leading to further victimization of the victim and children.
- Children are adversely affected when they witness domestic violence or are present in homes characterized by violence. This finding was recognized by the Michigan legislature when it adopted domestic violence as one of the best interest factors in custody determinations.
- Exempting cases of domestic violence from the presumption will not provide adequate protection for these families because many victims will not disclose the abuse for many reasons, including failure to identify abuse, lack of evidence, embarrassment and the potential for retaliatory violence from the batterer that may result from disclosure.
- A presumption of joint custody gives batterers an advantage in a custody dispute and unfairly burdens the victim of domestic violence with rebutting the presumption.

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