

Best Interests of the Minor Child

Hon. John N. Kirkendall⁽¹⁾
Family Division, Washtenaw County Trial Court

Trial courts are required to make "best interests" findings of fact in each of the following circumstances: [**Probate Court and Family Division of Circuit Court (ancillary jurisdiction)**]:⁽²⁾ (1) when a parent seeks to terminate a full minor guardianship; (2) when a parent or the sole parent with right to custody seeks to terminate a limited minor guardianship and the parent has not substantially complied with the limited guardianship placement plan; (3) when the court, following a review if it is in the best interests of the minor child, decides to terminate the guardianship; (4) visitation requests, (5) requests for removal of a guardian, and [**Family Division of the Circuit Court**]: (6) custody and parenting time decisions. Best interests of the child are defined in the Child Custody Act of 1970, MCL 722.23. This grid may be of help to you in making the required determinations, keeping in mind, as was stated in Lustig v. Lustig, 99 Mich. App. 716 (1980), "[This] determination is much more difficult than merely tallying runs, hits, and errors in box score fashion following a baseball game."⁽³⁾

Yes	No	Is there a custody order now in place?
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If the order is short term or temporary, proceed to "Established Custodial Environment." If the order is long term or permanent, determine whether either a proper cause or a change in circumstances has been shown. ⁽⁴⁾		
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Y	N	Has a proper cause or a change in circumstances been shown? (See footnote 4.) If Yes, proceed to the next question. If No, stop.
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Yes	No	Is there an "Established Custodial Environment"?
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Note: If the answer is "Yes," the standard of proof for changing custody is "**clear and convincing evidence**". If the answer is "No," the standard of proof in determining the best

interests of the minor child is "**preponderance of the evidence.**⁽⁵⁾"

The following factors have been identified by the appellate courts as relevant to this determination:

Y	N	Is there a previous custody order?
Y	N	Time: Has the child been with present custodian for significant duration during which child is given :

Y	N	parental care
Y	N	discipline
Y	N	love
Y	N	guidance
Y	N	security
Y	N	stability
Y	N	permanence

		(A) The love, affection, and other emotional ties existing between the parties involved and the child. ⁽⁶⁾
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		Meal Preparation
		Bonding with and relationship to competing parties; to whom is the child bonded?
		When child has a problem, to whom does the child speak?
		When child has a triumph, to whom does the child speak?

<input type="checkbox"/>	<input type="checkbox"/>	Who spends more hours per day with the child?
<input type="checkbox"/>	<input type="checkbox"/>	Statements of child indicative of bonding
<input type="checkbox"/>	<input type="checkbox"/>	Ability to separate child's needs from one's own; empathy with child
<input type="checkbox"/>	<input type="checkbox"/>	To whom does child openly show signs of affection?

<input type="checkbox"/>	<input type="checkbox"/>	(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. ⁽⁷⁾
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<input type="checkbox"/>	<input type="checkbox"/>	Who bathes and dresses the child?
<input type="checkbox"/>	<input type="checkbox"/>	Who stays home from work when the child is sick?
<input type="checkbox"/>	<input type="checkbox"/>	Who takes responsibility for involvement in academic affairs?
<input type="checkbox"/>	<input type="checkbox"/>	Who takes responsibility for involvement in extracurricular activities?
<input type="checkbox"/>	<input type="checkbox"/>	Who disciplines the child?
<input type="checkbox"/>	<input type="checkbox"/>	Who uses preferable discipline techniques?
<input type="checkbox"/>	<input type="checkbox"/>	Who has preference because of the others verbal abuse, substance abuse, or arrest record?
<input type="checkbox"/>	<input type="checkbox"/>	Who has preference because of ability to provide the child access to extended family?
<input type="checkbox"/>	<input type="checkbox"/>	Are there other children, including children not a part of this litigation, whose custody should impact upon the court's decision in this case?

<input type="checkbox"/>	<input type="checkbox"/>	(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
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<input type="checkbox"/>	<input type="checkbox"/>	the laws of this state in place of medical care, and other material needs. ⁽⁸⁾
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<input type="checkbox"/>	<input type="checkbox"/>	Who makes purchases for the child?
<input type="checkbox"/>	<input type="checkbox"/>	Who attends to special needs of the child?
<input type="checkbox"/>	<input type="checkbox"/>	Who has greater earning capacity?
<input type="checkbox"/>	<input type="checkbox"/>	Who adjusts working hours based on the needs of the child?
<input type="checkbox"/>	<input type="checkbox"/>	Who has certainty of future income?
<input type="checkbox"/>	<input type="checkbox"/>	Who has ability to provide insurance for the child?
<input type="checkbox"/>	<input type="checkbox"/>	Who attends classes for professional involvement?
<input type="checkbox"/>	<input type="checkbox"/>	Who has requisite knowledge to meet the needs of the child?
<input type="checkbox"/>	<input type="checkbox"/>	Who schedules and takes child to medical appointments?
<input type="checkbox"/>	<input type="checkbox"/>	Who schedules and takes child to dental appointments?
<input type="checkbox"/>	<input type="checkbox"/>	Who arranges for and supervises child care?

Note: Seasoned observers point out that rarely is this factor decisive at the time the case comes before the court. Reason: the court can adjust economic differences with its support orders. The cases in endnote 8 should be read to get a flavor of how the Court of Appeals views this factor.

<input type="checkbox"/>	<input type="checkbox"/>	(D) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity. ⁽⁹⁾
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<input type="checkbox"/>	<input type="checkbox"/>	Who can provide a safe environment?
<input type="checkbox"/>	<input type="checkbox"/>	Who can provide continuity? ⁽¹⁰⁾

<input type="checkbox"/>	<input type="checkbox"/>	(E) The permanence, as a family unit, of the existing or proposed custodial home or homes. (11)
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<input type="checkbox"/>	<input type="checkbox"/>	In whose custody will the family unit not be split? The issue is not an "acceptability of the custodial home" standard. See <u>Fletcher v. Fletcher</u> , 200 Mich. App. 505, 513 (1993), 447 Mich 871 (1994).
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<input type="checkbox"/>	<input type="checkbox"/>	(F) The moral fitness of the parties involved. (12)
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<input type="checkbox"/>	<input type="checkbox"/>	Who has priority as a result of other party having an extramarital affair known by the children? Caution: See <u>Fletcher</u> discussion in footnote 12 below.
<input type="checkbox"/>	<input type="checkbox"/>	Verbal abuse
<input type="checkbox"/>	<input type="checkbox"/>	Drinking problem
<input type="checkbox"/>	<input type="checkbox"/>	Driving record
<input type="checkbox"/>	<input type="checkbox"/>	Physical or sexual abuse of the child
<input type="checkbox"/>	<input type="checkbox"/>	Other illegal or offensive behaviors

Note: I have been reminded that the elements set forth under this factor illustrate the dangers of the use of checklists in making best interests determinations. Caution: the thrust of all inquiries about the behavior of the contestants should be directed toward the effect of such behaviors upon the child, or as the Supreme Court stated in Fletcher: does the behavior complained of have a significant influence on how one will function *as a parent*?

<input type="checkbox"/>	<input type="checkbox"/>	(G) The mental and physical health of the parties. (13)
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<input type="checkbox"/>	<input type="checkbox"/>	Physical or mental health problem that significantly
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		interferes with ability to safeguard the child's health and well being.
		Age of contestant compared to age of the child; would energies of the child overwhelm the contestant?

		(H) The home, school, and community record of the child. ⁽¹⁴⁾
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		Who can provide leadership to attend school?
		Who can provide leadership in extracurricular activity participation?
		Who is actively involved in school conferences, transportation, and attendance at school events?
		Who can more adequately assist either reducing necessity for other agency involvement (Juvenile Court, FIA) or if other agency is involved who can cooperate more fully?
		Who can more adequately assure child's access to friends and peers useful for the child's development?
		Who can more adequately plan and supervise the child's undertaking of home responsibilities that are appropriate to the child's age and circumstances?
		Who takes responsibility for completion of school assignments?

		(I) The reasonable preference of the child, if the court considers the child to be of sufficient age to express a preference. ⁽¹⁵⁾
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		Whom does the child favor?
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Note: Is this factor to be given strong consideration, based upon intelligent, unbiased, child in interview who uses relevant, important factors? See Wilson v. Gauck, 167 Mich. App. 90 (1988); Flaherty v. Smith, 87 Mich. App. 561 (1978); In Re Custody of James B., 66 Mich. App. 133 (1975); Lewis v. Lewis, 73 Mich. App. 563 (1977). The court should articulate how much emphasis it is placing on this factor. Age, maturity, cohesiveness of reasoning, existence of external pressure, and continual "flip-flopping" in preferences are all relevant.

<input type="checkbox"/>	<input type="checkbox"/>	(J) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. ⁽¹⁶⁾
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<input type="checkbox"/>	<input type="checkbox"/>	Who can best cooperate with an appropriate visitation schedule by the other party?
<input type="checkbox"/>	<input type="checkbox"/>	Who is least likely to disparage the other parent in the presence of the child based upon past performance?

<input type="checkbox"/>	<input type="checkbox"/>	(K) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. ⁽¹⁷⁾
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<input type="checkbox"/>	<input type="checkbox"/>	Have there been incidents of violence in the home by any party against any party? If so, has there been a police report, arrest, or conviction? Has there been a pattern of violence whether reported or not reported?
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<input type="checkbox"/>	<input type="checkbox"/>	(L) Any other factor considered by the court to be relevant to a particular dispute regarding termination of a guardianship, removal of a guardian, or visitation. ⁽¹⁸⁾
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<input type="checkbox"/>	<input type="checkbox"/>	Who can most likely address the special needs of the child?
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		Threats of kidnaping
		Excessive time involved in traveling for the child
		Record of failure to exercise visitation, failure to notify, failure to return the child
		Failure to complete court reports; investigation reveals unsatisfactory conditions
		Are there other children, whether a part of this litigation or not, whose custody is relevant to this child's best interests?
		Are there significant others or new spouses whose relationship with the child affects the child's best interests?

Endnotes

1. The author gratefully acknowledges contributions from the following lawyers and judges: Craig S. Ross, Esq., Washtenaw County Friend of the Court's Office; Norman N. Robbins, Esq., domestic relations practitioner, author and lecturer; Hon. Bruce A. Newman, Genesee County Probate Judge; Hon. Joan E. Young, Oakland County Circuit Judge; and Monika H. Sacks, domestic relations practitioner, author and lecturer. They have reviewed the chart and suggested additions and improvements. I thank Stuart D. Lurie, law clerk, who has helped revise the chart since its first publication. Errors are mine. The chart should be viewed as "evolving", not "finished." Therefore, the reader's suggestions and comments will be helpful.

2. MCL 600.1021; 600.841. Some early cases also applied "best interests" standards in reviewing a custodial parent's request to change the domicile of a minor child. Panels of the Court of Appeals have most recently adopted the test formulated in D'Onofrio v D'Onofrio, 144 NJ Super 200, 365 A2d 27 (1976). See Mills v Mills, 152 Mich App 388 (1985); Dick v Dick, 147 Mich App (1985); Bielawski v Bielawski, 137 Mich App 587 (1984); Scott v Scott, 124 Mich App 448 (1983); Henry v Henry, 119 Mich App 319 (1981). The latest line of Michigan cases rejected the "best interests of the child" test applied earlier in the cases of Watters v Watters, 112 Mich App 1 (1981) and Hutchins v Hutchins, 84 Mich App 236 (1978). The D'Onofrio test is, generally, will the proposed move 1) improve quality of life of child and parent; 2) allow reasonable opportunity for visitation to preserve parental relationship; and is move 3) inspired primarily by desire to defeat visitation 4) inspired by desire for financial advantage with respect to child support obligations. Emphasis rather than being on the best interests of the minor child, is now "what is in the best interests of the *new family unit*, i.e. custodial parent and child." See Fred Morganroth, "Changing the Minor Child's Domicile -- Some New Considerations," Michigan Family Law Journal, Special Addition, Child Custody (spring, 1996).

3. Lustig and Baker v Baker, 411 Mich. 567 (1981) are cases affirmed on appeal where a less than full fact finding was undertaken by the trial court. The Baker court said, "Neither the Child Custody Act nor the General Court Rules require a trial court deciding a child custody dispute to comment upon every matter in evidence or declare its acceptance or rejection of every proposition argued by the parties." The Child Custody Act directs a trial court to award custody after evaluation and consideration of particular factors which are prescribed by statute. Lewis v Lewis, 73 Mich. App. 555 (1977). Fletcher v Fletcher, 200 Mich. App. 505 (1993), explains that courts must truly do a balancing of the factors, that is, list both the strengths and weaknesses of each party on each issue--not just the strengths of one. On appeal, [Fletcher v Fletcher 447 Mich 871 (1994),] the court reverses and remands on other grounds.

4. Rossow v Aranda, 206 Mich App 456, 458 (1994). "MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. It therefore follows as a corollary that where the party seeking to change custody has not carried the initial burden of establishing either the proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors. See MCL 722.27(1)(c); Schubring v Schubring, 190 Mich App 468 (1991); Mann v Mann, 190 Michigan 526 (1991). In an unpublished case (Kuehnle v Kuehnle, unpublished opinion per curiam of the Court of Appeals, decided July 2, 1996, Docket No. 184220) the Court of Appeals found effective denial of visitation rights a proper cause for modification of a judgment. In Kuehnle visitation was subverted by placing numerous conditions on the one month's visitation provision. In Schubring, the court found that a father's contemplated move to Florida with the minor child constituted a change of circumstances sufficient for the court to revisit the issue of custody. Dehring v Dehring, 220 Mich 163 (1996) points out that an intrastate change in the children's domicile, by itself, does not constitute proper cause or change of circumstances upon which to base a change in custody.

5. There are two separate levels of sufficiency of evidence for "best interests" findings of fact. When there is an established custodial environment, clear and convincing evidence is the standard. McMillan v McMillan, 97 Mich. App. 600 (1980). If there is no established custodial environment, the standard is preponderance of evidence. Lewis v Lewis, 138 Mich. App. 191 (1984). See footnote 18.

6. It should probably come as no surprise that trial courts often find the parties equal on this factor. Both parties are struggling to receive custody of the child and therefore have strong emotional ties to the child.

7. Harper v Harper, 199 Mich. App. 409 (1993) states that the court may consider disciplinary techniques of the parties toward the minor child. Here where one party used his hand in discipline and the other used a paddle, this could be used against the party using the paddle. There was testimony by an expert also that the paddle using party was

unable to guide children in a joint task during a session being observed while the other party was able to provide the leadership and direction to assist the children to accomplish the goal.

8. Harper v Harper, 199 Mich. App. 409 (1993). Income, employment history, certainty of future income and financial position are factors to be weighed. Mazurkiewicz v Mazurkiewicz, 164 Mich. App. 492 (1987) weighed husband's income in his favor over objection of wife that because she was a homemaker she could never prevail on this factor. Court agreed but stated the trial court did not unduly stress this factor. In Dempsey v Dempsey, 409 Mich. 495 (1980), the Supreme Court agreed that the trial court placed undue emphasis on economic factors in awarding custody. The cases are strongly suggestive that while this factor must be weighed, the court must use care in not placing a good deal of reliance upon economic factors in making a custody decision. Bowers v Bowers, 198 Mich. App. 320 (1993) states that eligibility for health insurance, taking managerial classes, and informing other party of insurance benefits for children are all relevant facts to consider. (The court here also referred to a tug of war by the parties over child's clothing.)

9. Bahr v Bahr, 60 Mich. App. 354 (1975). Children 13, 12, and 8 were with non-parent custodians for 6 years. Father seeks to change custody. Judge spend an hour with children in chambers. They wished to stay where they were. Judge pointed out children seemed well adjusted and desirous of remaining in present custodial arrangement with third parties, but wanted visitation with their father as well. Court concluded stability would be provided for by leaving children where they were. In addition, court found that it could engage in a comparison between the custodial home and the proposed alternative, since the law prior to the Child Custody Act as reflected in In re Ernst, 373 Mich. 337 (1964) and Rincon v Rincon, 29 Mich. App. 150 (1970) had been changed by the Child Custody Act.

10. Craig Ross has added this useful insight: "Richard Gardner points out that change is stressful for all humans, and most stressful for children. Thus, he suggests, changes for children in a divorce be kept to a minimum. This would include school, presence of siblings, neighborhoods, etc. This is tempered, of course, by the child's age and his/her desires. Again, there is a seamlessness and overlap that is difficult to evaluate by a checklist. Your notion "who can provide continuity" (or who wants and appreciates this for the child) is probably good enough."

11. Mazurkiewicz v Mazurkiewicz, 164 Mich. App. 492 (1987), this factor is to be weighted in father's favor where mother had an "inclination" towards "inappropriate relations with other persons during her marriage." (This case may be important to remember where there is adultery involved; if the court is precluded from considering the relationships under the morality factor, Mazurkiewicz says it may be relevant under the permanence factor.) Caution: since this note was originally written, the Supreme Court has gone to some length to explicate how trial courts should apply the morality factor. [See Fletcher v Fletcher, 447 Mich 871 (1994).] In Fletcher, the court recited extramarital conduct of which the children were unaware, and also supported the Court of Appeals

treatment of permanence: "In this case, there was no danger of the family unit splitting up, regardless of which party was awarded custody. Because the evidence favors neither party, we find the parties to be equally positioned to provide permanence as single parent family units." The court specifically rejects "acceptability" of the proposed homes as being relevant because it is addressed under b and c. Fletcher v Fletcher, 200 Mich App 505 (1993) at p 518.

12. Feldman v Feldman, 55 Mich. App. 147 (1974), custody granted to wife who had engaged in two "adulterous affairs" but who was a "good mother and was in charge of sons' religious education." Moral fitness is only one factor and on balance it is in best interests of children for her to have custody. (In this case husband drank toilet bowl cleaner in an effort to commit suicide.) Mother's act of unfaithfulness or of adultery does not necessarily preclude her from being awarded custody of her children. Bednarski v Bednarski, 141 Mich. App. 15 (1985). Gulyas v Gulyas, 75 Mich. App. 138 (1977): Hon. Dorothy Riley in her dissent states, parenthetically, that this factor should not be used by a trial judge to impose work ethic notions. Fletcher v Fletcher, 200 Mich. App. 505 (1993) states that the court may not use marital affairs of which the child has no knowledge against such parent with respect to morality. The trial judge used morality test wrongfully and in addition let it influence the court in balancing the other factors as well. On appeal, (Fletcher v Fletcher, 447 Mich 871 (1994), the Supreme Court did not disturb this ruling, but added the following: "[moral fitness], like all the other statutory factors, relates to a person's fitness *as a parent*. To evaluate parental fitness, courts must look to the parent child relationship and the effect that the conduct at issue will have on that relationship. Thus, the question under factor f is not "who is the morally superior adult"; the question concerns the parties' relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct. We hold that in making that finding, questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*." In making that determination, the court refers to this article as it originally appeared in 21 Mich Fam LJ 15 (Oct, 1994) in footnote 6. The Supreme Court states this article "provides a list of conduct that, although not exhaustive, represents the type of morally questionable conduct, relevant to one's moral fitness as a parent. It includes: verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors. While the list also includes consideration of 'extra-marital conduct known by the children,' we believe that today's decision sufficiently addresses the relevance of that fact." Bowers v Bowers, 198 Mich. App. 320 (1993) shows that a variety of subjects can be used under this category, specifically, the court may consider a drinking problem, arrest record, living with child's baby sitter, allowing son to drink from his beer, verbal abuse, and lying about past alcohol record. Helms v Helms, 185 Mich. App. 680 (1990), allows consideration of a circumstance where plaintiff is pregnant, unmarried, and living with her boyfriend, since the case is not one of unmarried cohabitation "standing alone"; plaintiff's pregnancy is an aggravating factor. Since moral fitness was not the sole basis for the decision, it was proper to make a custody award taking this factor into account as one of the relevant factors. Snyder v Snyder, 170 Mich. App. 801 (1988), states that in a case where the court is considering morality as an issue in determining visitation rights, it is error for the judge to cancel

visitation with father when he moves in with a woman to whom he is not married. Lifestyle cannot be sole factor by which morality is judged. Truitt v Truitt, 172 Mich. App. 38 (1988) explains that cohabitation with girlfriend does not of itself mean the party is immoral. A now out of print publication by the State Court Administrative Office has this to say: "Is there a pattern of behavior in the realm of morals and ethics on the part of either party that might have an adverse effect on the moral or ethical development of the children? This question may be answered in regard to two basic issues: example and psychological impact. In the first, repeated illegal or immoral behavior conducted by the parent in the presence of the child, or behavior of which the child is likely to learn, can serve as a negative example to the child and may encourage such behavior on the child's part. In the second instance, behavior on the part of the parent such as use of drugs or repeated liaisons with multiple partners could cause neglect of the child's basic needs or disruption in the child's ability to bond with significant adult figures...it is only the task of the investigator to note any differences between the behavior of the parents which impacts on the moral or ethical development of the child."

13. Feldman v. Feldman, 55 Mich. App. 147 (1974), where husband drank toilet bowl cleaner in an effort to commit suicide, court properly gave wife credit under this factor. Deafness, while a physical disability, should not be used against a person in a custody case where to do so would defeat public policy favoring integration of the handicapped into responsibilities and satisfactions of family life. Bednarski v. Bednarski, 141 Mich. App. 15 (1985). Harper v. Harper, 199 Mich. App. 409 (1993) states that where mental health interferes significantly with the ability of a party to safeguard the children's health and well being, it will weigh in favor of the other party.

14. In cases where the courts have found the children too young to express a preference, the court may also determine that the children are too young to have established a home, community, and school record. Therefore, in very young children, this may turn out not to be a relevant factor.

15. Gulyas v Gulyas, 75 Mich. App. 138 (1977), where judge held *in camera* discussion with children, no record made, parties stipulated to the private conversation out of their presence, and judge did not disclose contents of discussion, affirmed on appeal. Hon. Dorothy Riley in a strong dissent states that the failure of the trial court to provide substantive account of an *in camera* interview effectively frustrates meaningful appellate review and is therefore a clear error on a major issue. Bowers v Bowers, 198 Mich. App. 320 (1993) demonstrates importance of sealed transcript being made of an *in camera* interview with child. Bowers v Bowers, 190 Mich. App. 51 (1991) states that children ages 6 and 9 are not too young to express their preferences as a matter of law. In Wilkins v Wilkins, 149 Mich. App. 779 (1986) the trial court said since the children were 10 years of age and younger, they were not of sufficient age to express a preference. (This point is apparently not important to the court where factors were all considered and no prejudice results.) In Curless v Curless, 137 Mich. App. 673 (1984) court did not consider children's preferences saying they were too young. In affirming the trial court, the Court of Appeals explains this is discretionary with the trial court. DeGrow v DeGrow, 112 Mich. App. 260 (1982), emphasizes that child's preference does not outweigh all other

factors, but is just one factor to take into account. Siwik v Siwik, 89 Mich. App. 603 (1979) shows that the trial court will not be reversed where it interviews a 6-year-old child and determines based upon the interview that the child is not of sufficient age to express a preference. This is left to the sound discretion of the court. Stevens v Stevens, 86 Mich. App. 258 (1978) states that failure of a trial court to speak with child in custody dispute generally requires remand. Burghdoff v Burghdoff, 66 Mich. App. 608 (1976) states that an *in camera* conference is generally the best way for the judge to determine the preference of the child. The conference should be restricted in scope. The child should not be involved in assisting the court determine the moral fitness of the parties. The test in determining whether the child is of sufficient age is not the test for a witness in a courtroom, e.g., "child has the intelligence and sense of obligation to tell the truth" and the trial court does not have to make such a finding. The child should not be expected to testify in open court. In Roudabush v Roudabush, 62 Mich. App. 391 (1975), the court declined to interview the child. The case was remanded for further proceedings. The appellate court states that the statutes permits but does not require trial court to consider the preference of a child involved in a custody dispute, but where there is a significant environmental difference between the parties, the court should speak informally with the child, preferably in chambers. While many trial judges emphathize with the need for the appellate courts to know what occurs in chambers during interviews with minor children, they are also mindful of the effects on children of bringing into chambers the trappings of the courtroom -- a reporter and recording equipment, for example.

16. Shortly after this factor was added to the Child Custody Act, a trial court failed to consider it, because it did not know of the amendment. Remand was necessary. Failure to consider this, or presumably any factor under the Child Custody Act, is grounds for remand. Blaskowski v Blaskowski, 115 Mich. App. 1 (1982). (The trial court also failed to find whether an established custodial environment existed in order to determine the standard of proof.)

17. There are no published cases.

18. Freeman v Freeman, 163 Mich. App. 493 (1987). Court may not determine a biological preference exists without reference to its relevance or whether it is substantiated by evidence. Here court awarded a daughter to her mother and articulated that a natural biological preference dictated the result. Wilcox v Wilcox, 100 Mich. App. 75 (1980) dealt with joint custody. The Court ordered two children 9 and 12 to live with each parent every other week. While joint legal custody (ability of parents to make decisions that significantly affect the life of the child, such as education and health care) was appropriate, joint physical custody (decisions about immediate supervisory control) was not appropriate because the parties were mutually unable to agree to such an arrangement. The court points out that a mere objection by one parent does not preclude joint custody award. (The appellate court may also have been reacting here to what was an obviously awkward solution to a custody problem.) In re Weldon, 397 Mich. 225 (1976), deals with third party custody. In a convoluted termination of rights and adoption case, the Supreme Court points out that third parties may be awarded custody over a parent, even though the parent is not unfit and had not neglected or abandoned the child.

Presumption that parental custody is in the best interests of the child may be rebutted by evidence of the best interest of the child which does not relate to parental fitness.

Modification of prior orders. Bowie v Arder, 411 Mich 23 (1992) overrules In re Weldon: "...the decision in Weldon is in conflict with our holding in Ruppel [Ruppel v Lesner, 421 Mich 559 (1984)] that the Child Custody Act does not create substantive rights of entitlement to legal custody of a child. Further, the decision in Weldon is also called into question by the legislature's subsequent amendment of the act explicitly giving guardians, and not other third parties, standing to petition for custody. Because the Weldon decision, giving standing under the act to a third party who does not have a legal right of entitlement to the custody of a child, is inconsistent with Ruppel and our decision here, it is overruled." The court later stated: "Therefore, we affirm our holding in Ruppel that a third party cannot create a custody dispute by simply filing a complaint in Circuit Court alleging that giving legal custody to the third party is in the best interests of the child. A third party does not have standing to create a custody dispute not incidental to divorce or separate maintenance proceedings unless the third party is a guardian of the child or has a substantive right of entitlement to custody of the child. The legislature has not created a substantive right to custody of a child on the basis of the child's residence with someone other than a parent, and this Court is not in a position to do so." McMillan v McMillan, 97 Mich. App. 600 (1980) provides that clear and convincing evidence is the standard when one seeks to modify a previous child custody order. Of what relevance is this case to a situation where a parent seeks to terminate a limited guardianship where the terms of the placement plan have been fulfilled; where the terms have not been fulfilled; where a parent seeks to terminate a full guardianship where there is no placement plan but there is evidence that the purpose of the guardianship as understood by the parties has been accomplished; where there is not such evidence and an established custodial environment can be shown? Moser v Moser, 130 Mich. App. 97 (1983) states that even if mom and dad had an agreement that she would receive custody upon establishing herself financially, once she obtained that status, she would still have to prove by clear and convincing evidence that it was in the best interests of the children to change their established custody under the order. (The wife in this case characterized this as "custody by trick".) There are other cases cited in the case going the other way on this "conditional custody" theory. This case may have particular relevance to a guardianship where mom agrees to get the children back after prison, successfully completing drug rehabilitation, and so on. Mazurkiewicz v Mazurkiewicz, 164 Mich. App. 492 (1987) defines an established custodial environment as one where time is an important factor. It should be of significant duration during which the child is given parental care, discipline, love, guidance that are age and needs appropriate and where the relationship is marked by qualities of security, stability, and permanence. One should look to the situation in the years immediately preceding the action. Schwiesow v Schwiesow, 159 Mich. App. 548 (1987); Breas v Breas, 149 Mich. App. 103 (1986) where it was held that no custodial environment had been established where mom had physical custody, there was a pending divorce, dad was seeking custody and where the environment provided the child was not permanent. Also see Curless v Curless, 137 Mich. App. 673 (1984) with the same result. Curless makes the observation that in cases where the custodian discourages the children from seeing the non-custodial party and fails to cooperate with visitation, this works against making a finding that there is an established custodial environment. In

Mazurkiewicz, it may also have helped that the Friend of the Court had made the determination that there was no custodial environment. See Blaskowski v Blaskowski, 115 Mich. App. 1 (1982), where the court states that it makes no difference how the established custodial environment arises, through a temporary or a permanent order, but whether it exists that is important. Baker v Baker, 411 Mich. 567 (1981) states that mere temporary order does not create an established custodial environment. One must look at all the circumstances. In the Baker case, the court determined that the child's contacts with the community developed when the family was together and are not sufficient to make an established custodial environment for purposes of the custody dispute at this time. Bowers v Bowers, 190 Mich. App. 51 (1991) makes it clear that an established custodial environment may be in place as a consequence of a temporary court order. It is the existence of the environment and not how it came into being that is important. Further, once established, a custodial environment may not be changed absent clear and convincing evidence. In Carson v Carson, 156 Mich. App. 291 (1986), the Court of Appeals explains that the "Clear and convincing evidence is not merely an evidentiary rule which would allow a change of custody based upon clear and convincing evidence that a marginal improvement in the child's life would occur." Overall v Overall, 203 Mich. App. 450 (1994) provides that parties may stipulate that there is no established custodial environment where there is a shared custodial arrangement. In Gulyas v Gulyas, 75 Mich. App. 138 (1977), Hon. Dorothy Riley states in her dissent, parenthetically, that best interests factors ought not to be used by trial judge to express outmoded notions of importance of mom being near the hearth and home. Bowers v Bowers, 198 Mich. App. 320 (1993) states that expectation of permanence is a factor in determining if custodial environment has been established. It further states that if over an appreciable period of time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort, that should be considered. The court further points out that the age of the child, physical environment, and the inclination of the custodian and the child regarding the permanency of the relationship must be considered. Custody orders alone do not establish a custodial environment. Also, where a parent voluntarily and temporarily released children to father, it does not change the established custodial environment. Theroux v Doerr, 137 Mich. App. 147 (1984). A court should not change custody based upon violation of court orders. Adams v Adams, 100 Mich. App. 1 (1980). Interracial factors in determining custody are irrelevant. Edele v Edele, 97 Mich. App. 266 (1980). Napora v Napora, 159 Mich. App. 241 (1986) showed that parties' stipulation regarding custody was not binding upon the trial court that was required to make a determination in the best interests of the minor child irrespective of the agreement. Truitt v Truitt, 172 Mich. App. 38 (1988) explains the use of the Friend of the Court report in child custody disputes. It is error to admit the report where objected to and a hearing is requested; court may consider it, but it may not be introduced in evidence unless stipulated to. In a request for a change of domicile, best interests factors are appropriate to consider and the standard of proof is a preponderance of the evidence. Watters v Watters, 112 Mich. App. 1 (1981). The Court has discretion to use child psychologist in determining a child custody matter and the weight to be given the testimony is subject to the court's discretion. Siwik v Siwik, 89 Mich. App. 603 (1979). Glover v McRipley, 159 Mich. App. 130 (1987) instructs trial courts how to proceed when there is a collision of presumptions: that is, there is a presumption in favor of a

natural parent and there is a presumption in favor of not changing an established custodial environment. In this case, the burden of persuasion is with the parent challenging the established custodial environment with the third party custodian. Proof is by a preponderance of the evidence.