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RECENT DEVELOPMENTS IN CHILD CUSTODY AND PARENTING TIME

Over the last 50 years, there have been dramatic changes to the court's approach to custody and parenting time matters. Through most of the 20th Century, it was assumed that, absent unusual circumstances, the mother of the child was the proper physical and legal custodian of the child. It was common for the courts to award sole physical and sole legal custody of the child to the mother with "reasonable and liberal visitation" to the non-custodial father.

In the 70's, the Legislature enacted the Michigan Child Custody Act. This statute requires the evaluation of each parent's ability to care for their child and to award custody on the basis of the "best interests of the child." The Act provides a list of 12 factors for the court to consider in making this evaluation. The Act controls parenting time as well. It is intended to be "gender blind."

What was formerly termed "visitation" is now called "parenting time". "Visitation" was the parenting time the non-custodial parent enjoyed with the child. In the past, visitation was usually limited to alternate weekends, alternate holidays, and a week or two during the summer.

As the general trend now favors joint physical and joint legal custody of the child for both parents, an award of specific parenting time for each parent has become the norm. Parenting time typically includes some weekday time with the child, usually one or two afternoons after school until 7:30 p.m., responsibility for pickup and drop off of the child at the beginning and end of parenting time, parenting time

on significant dates in the family (birthdays, etc.), religious holidays, school breaks and summer vacation, as well as the traditional alternating weekends and alternating secular holidays.

This movement away from "custodial" versus "non-custodial" parents is attributable, in part, to the growing realization that the court's former manner of handling custody and parenting time often marginalized the non-custodial parent in the child's life. This tended to discourage the development of a meaningful relationship between that parent and the child par-



RECENT DEVELOPMENTS (CONTINUED)

ticularly during the child's formulative years.

Awarding joint physical and legal custody to both parents is intended to encourage and sustain relationships between the child and both parents, incentivize both to continue to be involved in the child's life and encourage both to work together for the best interests of the child. On a more practical level, a parent who shares custody and has significant parenting time is more likely to promptly pay his or her child support than the parent who is not actively involved with the child.

Joint legal and physical custody and

more equal parenting time inevitably increases the frequency of contact and interaction between the parents. Parents are encouraged to set aside their personal differences and work together for the benefit of the child.

Another consequence of giving parents more equal parenting time is the impact that it can have on the child support obligation. Child support is set by the Michigan Child Support Guidelines and is based on the parents' respective incomes, number of children and the number of parenting time overnights. When parenting time is increased to 128 or more overnights with the child per year, the court is

obligated to apply the "shared economic formula" and child support drops off precipitously. To avoid the application of the shared economic formula, parents often agree upon an appropriate amount of child support (more than the formula) or the parent with the fewer overnights waives the application of the formula.

Whether these legislative and judicial trends in custody and parenting time will actually achieve their goal remains to be seen. It may still be too early to evaluate the impact on children and their parents, but most who practice in the family law area believe these developments will prove beneficial to the child.

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VALUATION OF ASSETS

(E.G., BUSINESSES, REAL ESTATE, PENSIONS)

Here are the general rules that apply to valuation of assets in a family law case:

1. The court has discretion to determine the date used to value an asset.

2. When there is conflicting testimony by experts as to value, the trial court can accept the valuation of either parties' expert or value the asset anywhere within the range of values established by expert testimony.

3. The trial court is in the best position to judge the credibility of the parties' experts and the credibility of the valuations offered.

CONCEALED ASSETS

It is common for divorcing parties to conceal assets from each other. The assets are typically cash or bank accounts. The discovery of the existence of the concealed asset usually occurs after the entry of the Judgment of Divorce which is intended to distribute all of the assets of the parties between the parties.

Many Judgments of Divorce contain a provision dealing with the discovery of concealed assets at a later date. These provisions call for the transfer of the concealed asset or its value at the time of concealment to the innocent party.

Absent that kind of provision in the Judgment of Divorce, the court does not apply an automatic forfeiture rule. When a party hides a marital asset from the other party, the trial court may, in keeping with the equities of the entire case, order the asset forfeited to the other party. To do so, the court must examine all of the relevant facts.

A party's attempt to conceal assets is a relevant consideration, but it is only one of the facts that must be weighed. The goal is to achieve equity, not to punish the party who concealed the asset.

In cases where one party suspects that the other is concealing assets or understating income, forensic accounting services can be employed to analyze financial information and determine whether a party has concealed assets or income.



The court rejected the husband's claim that the wife's affair caused the breakdown in the marriage ...

FAULT

Wife who had engaged in an extramarital affair left the marital home with two children in anticipation of filing a complaint for divorce. Husband, who owned auto repossession businesses, set fire to the unoccupied marital home

destroying the home and its contents. He argued that wife's affair caused the breakdown of the marriage and that his act of arson was a "howl of grief" in reaction to his wife's infidelity. The court rejected the husband's claim that the

wife's affair had caused the breakdown in the marriage, noting that the husband also had extramarital affairs which preceded the wife's affair. *League v. League*, Mich. App. No. 261058 (Oct. 19, 2006).

PARENTAL TORT IMMUNITY

A mother and three-year old child went to a shopping mall. While riding down an escalator, the child's hand was caught in the escalator

and her left ring finger was severed. The child sued her mother for negligence. The court held that claims of negligent supervision by a child

against a parent are barred by the doctrine of parental immunity. *Hauswirth v. Hauswirth*, Mich. App. No. 269413 (Sep. 28, 2006).



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*A special thanks
to our clients and
friends for their
referrals.*

Please note that the information contained in this newsletter is not intended to be legal advice because space does not permit comprehensive treatment of all factual and legal issues involved. Consult with your attorney for specific legal advice.

ATTORNEY FEES

A trial court must make certain findings of fact before it can award attorney fees in divorce cases. The court may award attorney fees when the other party has engaged in unreasonable conduct during the proceedings. The court must also determine whether the amount requested is appropriate and whether, if it failed to award attorney fees, the innocent party would be forced to invade their own assets to pay the attorney fees attributable to the misconduct of the other party. *Topelian v. Topelian*, Mich. App. No. 259814 (July 13, 2006).

CHILD CUSTODY—MISCONDUCT

A parent's infidelity can be considered in a child custody proceeding to the extent that his/her misconduct compromised his/her ability to properly parent and raise the children. Infidelity is relevant to a custody proceeding when the wrongdoing reflects how the parent would interact with or raise the child. The trial court may in its discretion consider a parent's alleged misconduct as it relates to his or her ability to be a proper parent. *Button v. Button*, Mich. App. No. 268930 (July 27, 2006).

CUSTODY—NECESSARY MEDICAL CARE

The trial court awarded father custody of the minor child after finding that the child had a number of medical conditions that required frequent doctor, dentist and specialists visits, that the mother cancelled a number of doctor appointments and failed to reschedule them and refused to alter the parenting time schedule to allow the father or his new wife to take the child to various appointments. Mother offered no real explanation as to why she had cancelled the appointments and not rescheduled them when time was not an issue for her because she did not work and was at home with the child during the day. The disposition of the parties to provide the child with the necessary medical care is one factor the court must consider in custody disputes. *Vanvolkenburg v. Naidus*, Mich. App. No. 268313 (July 20, 2006).



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