Is Mandatory Joint Custody (HB 4141) In The Best Interests of Children?

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Currently pending in the Michigan Legislature is House Bill 4141 introduced February 5, 2015. This Bill would amend the Michigan Child Custody Act at MCL 722.26a to provide that in a custody dispute between parents, the court must order joint custody unless the court determines by clear and convincing evidence "that a parent is unfit, unwilling, or unable to care for the child." The proposed statute goes on to state that a parent may only be determined to be unfit…if the parent's parental rights are subject to termination under the very specific language contained within the Michigan Probate Code, which terminates parental rights.

This author has little problem with the award of "joint legal custody" for parents who can communicate and work together as parent partners for their children on matters pertaining to their children's education, religious training, and medical treatment. What I do have a problem with is the language contained in this proposed bill that mandates joint custody, unless it is otherwise "***determined by clear and convincing evidence that a parent is unfit, unwilling or unable to care for the child"*** and that a family court judge **must award substantially equal periods of specific parenting time for each parent, as well as provide that physical custody is shared by the parents.**

In a perfect world, the concept of removing disputes regarding custody and parenting time of children from the court process, by mandating through legislation, the results of any child custody case (substantially that the parties would have joint and equal custody and parenting time of their children) would at first blush appear to be logical and in a child's best interests. Certainly removing children from the center of family disputes can only help bring harmony and reduce acrimony. However, the real world just does not always follow what occurs in family court.

I do not support this mandatory law. I do not support it because despite its good intentions, it fails to recognize the reality of the times in which we live, and it will change more than a half century rule, which we have followed, to wit: "the best interests of the child shall govern." This proposed law would replace that public policy with "the best interests of the adult are more important."

Let me discuss some of the problems I see with this proposed law:

Mandatory guidelines bind family court judges from the discretion on which they rely when they hear and judge family law disputes. Unlike most other areas of law, which deal with black and white issues, often plugged into black and white laws, with the court possibly coming to a black or white conclusion, family law deals with more than just the law. In fact, I would say family law and the cases dealing with family law, especially divorce and custody cases, have more emotional and behavioral science ramifications to their makeup than the actual legal statutes themselves. That is why most cases must be decided on a "case-by-case basis." That means that discretion must be left to an individual family court judge to make determinations based on the family and the facts that come before them. Certainly, the presumption under our current law, which mandates that parents should have joint legal custody of their children, is a good presumption. That means that parents, unless otherwise incapable, should share the major decision making responsibilities regarding their children's education, religious training, and medical treatment. However, to mandate a child's physical parenting schedule, by law, without any regard for the specifics of a case, completely disregards the rights of children and puts them second to the needs of their parents. That is unfair and unfortunate to the innocent victims of divorce, namely, the children. Remember—they did not ask for the divorce, but must learn to live with the result of their parents' actions and decisions.

Mandating that there must be substantially equal parenting time assumes that both parents are equally capable and able to handle such a significant burden and task of co-parenting appropriately. In my experience if that is possible, and parents do have comparable parenting skills and abilities, equal or substantially equal parenting time can be a major benefit to the entire family, especially the children. However, as unfortunate as it might be, we live in a society where good men-

tal health, as well as parenting abilities, should not be taken for granted. I'm not talking about individuals who are unfit and should have their parental rights terminated. I'm talking about the parent who may not be appropriate for one or many reasons to serve as a co-parent on an ***equal*** basis regarding parenting time with their children. That is why guidelines, such as the twelve best interest factors, are presently in our statute for judges to weigh, evaluate and adjudicate. This proposed law appears to replace our twelve factors of the Child Custody Act by mandating a requirement that the court must order joint and equal parenting time.

No consideration is provided as to whether or not this would be in a child's best interest. No consideration is involved as to where the parents live, or if the parents are able to maintain the child's school schedule. No consideration is given as to whether or not children are enrolled in their own activities and events, such as school teams and extracurricular activities, outside sports teams, or religious training, all of which improve their health, education, and development. No consideration is given for the age of the child or any special needs of a child and which parent may be better able to provide for those special needs. Sometimes it is just not possible to fulfill this 50/50 requirement. Sometimes it is just not possible or appropriate, based on a specific reason or set of reasons. Sometimes it's just not in a child's best interest and sometimes it will only create more problems and more harm for a child in order to make parents feel good that neither one of them "lost."

The concept of changing our public policy mentality of "the best interests of the child" to "the best interests of the parents" is not progress. It is true that everything should be done to keep and incorporate both parents actively in the lives of their children. It is important to make sure that good communication and sharing of information exists. It is desirable for parents to work together to ensure a positive relationship between children and both parents. But, to tie the hands of family court judges and preclude them from having the discretion, which currently exists, to make decisions to protect the welfare and best interests of children is not moving forward.

The emotional upheaval and uncertainly that children face when their parents are litigating their divorce are unfortunate. But at least with the current law, parents are put to the challenge of customizing and creating a specific parenting time plan for their children based on their children's actual needs. If they cannot, then the friend of the court and/or the judge is allowed to do it for them. The children benefit from a plan designed expressly for them. Under the proposed legislation, the mandatory and presumptive equal parenting time language creates a recipe for post-judgment disaster, as parents for whom this plan does not work are forced to live the nightmare of this proposed law with their children after the final Judgment of Divorce is entered.

About the Author

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