THE DARNEDEST THINGS: Measuring the Child's Preference in Custody Disputes

By Charles P. Farrar and Michelle Simonson

Any attorney who practices in child-custody disputes will agree that parents often have the sincere conviction that their child prefers to be in their custody. And many of them are equally convinced that this preference ought to be a decisive factor in awarding or modifying custody.

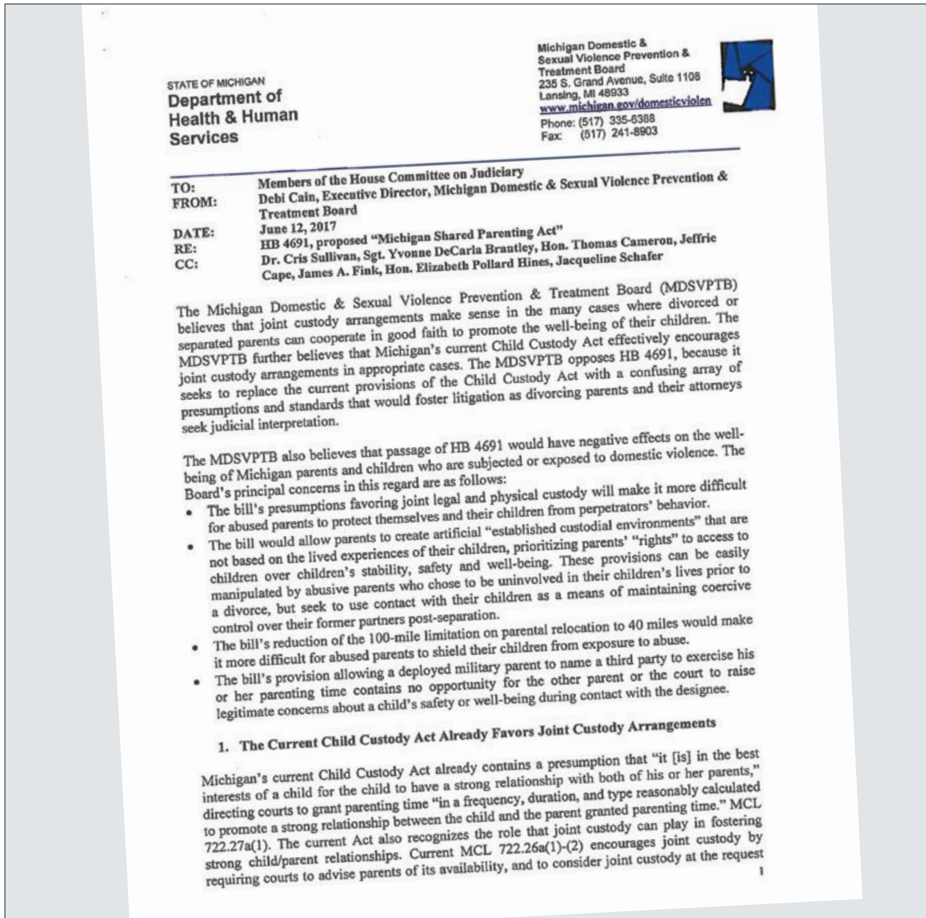
Practitioners therefore need to be prepared in two important areas. One is in ensuring that the court[1] ascertains this preference for itself. The other, alternatively, is in tempering clients' sometimes unrealistic sense of how this preference has been shared with them, how it might be shared to a neutral party, and whether it should be shared at all. This article will attempt to help lawyers understand the utility and the limitations of children's statements about their custody preferences.

According to the Child Custody Act of 1970, one of the 12 "best interests" factors addressed in any custody determination is "the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference."[2] Presumably, the court will only interview the child if it believes the child is old enough and mature enough to express an opinion. And the child's preference must be "reasonable" for a judge to give it weight in the custody decision. For example, a court likely won't lend much value to a child's preference if the child is simply choosing the more lenient parent or the parent with the nicer house. On the other hand, the court might lend significant value to the opinion of a child who prefers a parent who cooks, helps with homework, and attends extracurricular activities.[3] It is worth noting that the law does not require the court to directly interview the child. It leaves open the possibility that a child's preference can be identified circumstantially. (The authors, for example, had occasion to present a client's child's essay for an English class wherein the child expressed their belief that children should have a voice in custody decisions.)

One approach the authors of the Child Custody Act might have taken to guide courts as to when to consult the child and how to assess their stated preference would have been to set forth bright lines. Some jurisdictions across the country have taken that approach, but many, like Michigan, have declined to do that. An examination of how states consider a child's reasonable preference reveals an array of methodologies. Thirteen states do not require this factor to be addressed at all (but do not forbid it either). The others, like Michigan, generally do require it to be considered, but only if the child is sufficiently mature.

Nor is there uniform agreement on a definition of maturity for this purpose. Most states do not set a specific age. Among the jurisdictions that do, 14 is the most common. Three states presume children 14 and older are sufficiently mature, and two others explicitly lend extra weight to the opinions of children in that age range. Four states align maturity with the age of 12. Uniquely, Georgia permits a child 14 or older to make the entire custody decision themselves, subject to the court's approval.[4]

The most recent attempt to revamp Michigan's child-custody law occurred in



STATE OF MICHIGAN
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TO: Members of the House Committee on Judiciary
FROM: Debi Cain, Executive Director, Michigan Domestic & Sexual Violence Prevention & Treatment Board
DATE: June 12, 2017
RE: HB 4691, proposed "Michigan Shared Parenting Act"
CC: Dr. Cris Sullivan, Sgt. Yvonne DeCarla Brantley, Hon. Thomas Cameron, Jeffrie Cape, James A. Fink, Hon. Elizabeth Pollard Hines, Jacqueline Schafer

The Michigan Domestic & Sexual Violence Prevention & Treatment Board (MDSVPTB) believes that joint custody arrangements make sense in the many cases where divorced or separated parents can cooperate in good faith to promote the well-being of their children. The MDSVPTB further believes that Michigan's current Child Custody Act effectively encourages joint custody arrangements in appropriate cases. The MDSVPTB opposes HB 4691, because it seeks to replace the current provisions of the Child Custody Act with a confusing array of presumptions and standards that would foster litigation as divorcing parents and their attorneys seek judicial interpretation.

The MDSVPTB also believes that passage of HB 4691 would have negative effects on the well-being of Michigan parents and children who are subjected or exposed to domestic violence. The Board's principal concerns in this regard are as follows:

- The bill's presumptions favoring joint legal and physical custody will make it more difficult for abused parents to protect themselves and their children from perpetrators' behavior.
- The bill would allow parents to create artificial "established custodial environments" that are not based on the lived experiences of their children, prioritizing parents' "rights" to access to children over children's stability, safety and well-being. These provisions can be easily manipulated by abusive parents who chose to be uninvolved in their children's lives prior to a divorce, but seek to use contact with their children as a means of maintaining coercive control over their former partners post-separation.
- The bill's reduction of the 100-mile limitation on parental relocation to 40 miles would make it more difficult for abused parents to shield their children from exposure to abuse.
- The bill's provision allowing a deployed military parent to name a third party to exercise his or her parenting time contains no opportunity for the other parent or the court to raise legitimate concerns about a child's safety or well-being during contact with the designee.

1. **The Current Child Custody Act Already Favors Joint Custody Arrangements**

Michigan's current Child Custody Act already contains a presumption that "it [is] in the best interests of a child for the child to have a strong relationship with both of his or her parents," directing courts to grant parenting time "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). The current Act also recognizes the role that joint custody can play in fostering strong child/parent relationships. Current MCL 722.26a(1)-(2) encourages joint custody by requiring courts to advise parents of its availability, and to consider joint custody at the request

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May 2017, in House Bill 4691 (aka the "Michigan Shared Parenting Act"). The bill proposed overhauling the current framework by which custody decisions are governed by the court's discretionary "best interests" analysis, in several ways. Key among them, for purposes of this discussion, was a provision that would have required the court to always inquire into and consider the preference of 16- and 17-year-old children.

By not passing this bill, the legislature in effect endorsed the current "best interests" methodology, in general, as the most reliable way to adjudicate custody disputes. And it endorsed it, specifically, as the most reliable way to contextualize and measure the child's preference.

Thus, we can see that, in contrast with other jurisdictions across the country, as well as the theoretical Michigan Shared Parenting Act, our courts have relatively broad discretion. Their only statutory guidelines are the terms "reasonable" and "sufficient age." Practitioners should be aware of how case law has sharpened the significance of these terms.

For instance, when evidence suggests that the child is able to express a reasonable preference, the court must make the relevant determination.[5] However, the child's preference should not necessarily be the determining factor.[6] The child's preference need not "be accompanied by detailed thought or critical analysis."[7] The term "reasonable" is not a term that should be understood strictly: It simply means that the court can exclude preferences that are "arbitrary" or "inherently indefensible."[8] School enrollment decisions may be subject to a child's reasonable preference.[9] A child's fragile emotional state is a valid reason to exclude consideration of their preference;[10] this is because such a child is susceptible to a parent's improper influence.[11] The court need not necessarily consult a child as young as 6[12] but should consult a 9-year-old.[13] That said, given certain facts, the court need not necessarily consult a child as old as 10.[14] The court's interview of the child need not include the other parties and does not need to be recorded.[15] Determination of a child's preference may be made circumstantially, without forcing children to explicitly state their custodial choice.[16]

An advantage of effectively submitting the issue to the court's relatively broad discretion is that it enables the court to weigh the various competing interests before determining whether to consult the child or otherwise consider the child's stated preference — and, if the court does consider the child's stated preference, it will be able to determine how much weight to ascribe to such a statement. In any given case, these interests can potentially include the child's need to be heard; protecting the child's mental health; protecting the child from retribution from a parent or sibling; the child's preference to remain with siblings; the parents' due process right to be fully involved in the evidentiary process; the court's interest in maintaining its procedural integrity; and, of course, everyone's need to achieve a custodial award in keeping with the child's best interest.[17]

See illustration.

The parent's attorney needs to keep these competing interests in mind in advocating for an appropriate way to contextualize the child's statement. If done well, honoring all the competing interests in play, the court's determination of this factor will, along with the other factors, help establish a coherent set of findings to underpin custodial orders most in line with the child's best interests. And, just as important, if done well, the exercise of communicating with the child, itself, may effectively achieve the goals of the process. After all, what better way to remember what this is all about than for the parents and lawyers to momentarily yield the floor to the person most influenced by the decision?

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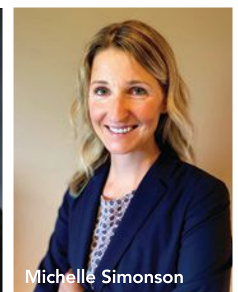
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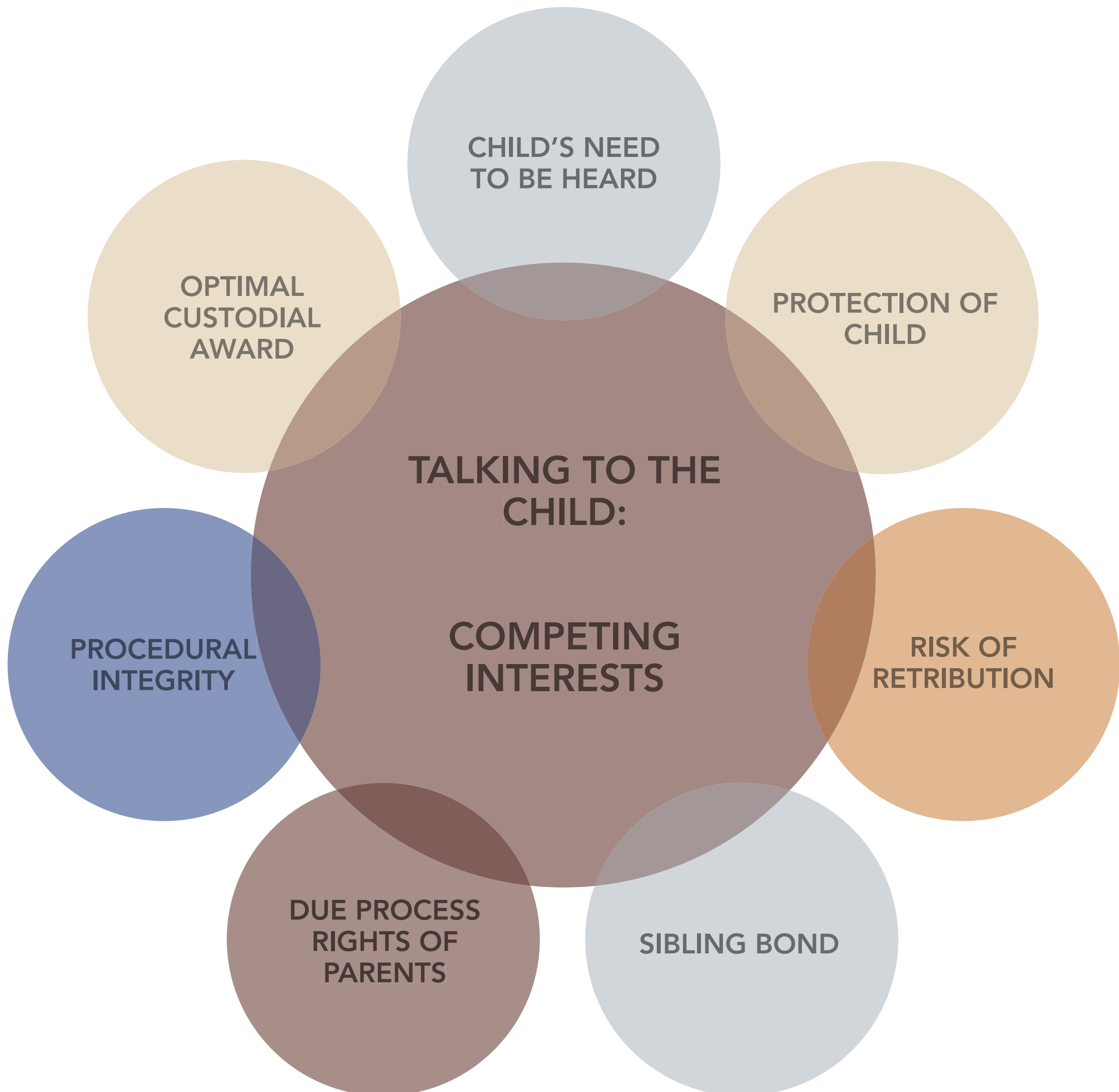

Footnotes:

1. The law would allow either the judge or the Friend of the Court referee to conduct such an interview. Indeed, sound practice also allows, for example, for the Friend of the Court professionals to assist in the interview. For ease of reading, this article will simply describe the fact finder as "the court."
2. MCL 722.23(i).
3. *divorcenet.com/resources/a-childs-preference-michigan-custody-proceedings.html* (last accessed May 25, 2021).
4. *custodyxchange.com/topics/research/custody-preferences-children.php* (last accessed May 25, 2021).
5. *Flaherty v. Smith*, 87 Mich. App. 561, 274 N.W.2d 72 (1978).
6. *DeGrow v. DeGrow*, 112 Mich. App. 260, 315 N.W.2d 915 (1982); *Siwik v. Siwik*, 89 Mich. App. 603, 280 N.W.2d 610 (1979).
7. *Pierron v. Pierron*, 282 Mich. App. 222, 765 N.W.2d 345 (2009), aff'd, *Pierron v. Pierron*, 486 Mich. 81, 782 N.W.2d 480 (2010).
8. *Id.* at 259.
9. *Id.* at 260.
10. *Maier v. Maier*, 311 Mich. App. 218, 874 N.W.2d 725 (2015).
11. *Id.* at 226.
12. *Treutle v. Treutle*, 197 Mich. App. 690, 495 N.W.2d 836 (1992), app. denied, *Treutle v. Treutle*, 442 Mich. 881, 500 N.W.2d 477 (1993).
13. *Stringer v. Vincent*, 161 Mich. App. 429, 411 N.W.2d 474 (1987).
14. *Roudabush v. Roudabush*, 62 Mich. App. 391, 233 N.W.2d 596 (1975).
15. *Lesauskis v. Lesauskis*, 111 Mich. App. 811, 314 N.W.2d 767 (1981).
16. *Patrick v. Patrick*, 99 Mich. App. 132, 297 N.W.2d 635 (1980).
17. This idea was adapted from Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 Ariz. L. Rev. 629, 629 (2003).