BEST INTERESTS OF THE MINOR CHILD

Trial courts are required to make "best interests" findings of fact in each of the following circumstances: 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) parenting time requests; 5) requests for removal of a guardian; and 6) custody and parenting time decisions. The probate court has jurisdiction and the family division of the circuit court has ancillary jurisdiction over the first five circumstances; the family division has jurisdiction over the sixth.[1]

Best interests of the child are defined in the Child Custody Act of 1970, MCLA 722.23, MSA 25.312(3). The decision tree 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, 731; 299 NW2d 375 (1980): "[this] determination is much more difficult than merely tallying runs, hits and errors in box score fashion following a baseball game." [2] Also, the weight to be given each factor is ultimately left to the court's discretion. *McCain v McCain*, 229 Mich App 123,; 580 NW2d 485 (1998). The first two preliminary questions and the subparts of the second question are dealt with only when custody, not guardianship, decisions are at issue.

☐ Y ☐ N Is there a custody order now in place?

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.[3]

☐ Y ☐ N Has a proper cause or a change in circumstances been shown? (See endnote 3.) If Yes, proceed to the next questions. If No, stop.

☐ Y ☐ N Is there an "Established Custodial Environment"?
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 preponderence of the evidence.[4]

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

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

Y	N	
☐	☐	parental care
☐	☐	comfort
☐	☐	discipline
☐	☐	love
☐	☐	guidance
☐	☐	security

☐ ☐ stability
☐ ☐ the necessaties of life
☐ ☐ permanence

Then consider the following best interests factors. The court must consider each factor and make specific findings on the record.

Mother Father
☐ ☐ (a) The love, affection, and other emotional ties existing between the parties involved and the child.[5]

Mother Father
☐ ☐ Bonding with and relationship to competing parties–to whom is the child bonded? About whom has the child made statement indicative of bonding?
☐ ☐ When the child has a problem, to whom does the child speak?
☐ ☐ When the child has a triumph, to whom does the child speak?
☐ ☐ Who spends more hours per day with the child?
☐ ☐ Who prepares the child's meals?
☐ ☐ Who has the ability to separate the child's needs from one's own and to empathize with the child?
☐ ☐ To whom does the child openly show signs of affection?

Mother Father
☐ ☐ (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.[6]

Mother Father
☐ ☐ Who bathes and dresses the child?
☐ ☐ Who stays home from work when the child is sick?
☐ ☐ Who takes responsibility for involvement in academic affairs?
☐ ☐ Who takes responsibility for involvement in extracurricular activities?
☐ ☐ Who disciplines the child?
☐ ☐ Who uses preferable discipline techniques?
☐ ☐ Who has preference because of the other's verbal abuse, substance abuse, or arrest record?
☐ ☐ Who has preference because of the ability to provide the child access to an extended family?

Mother Father
☐ ☐ (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 the laws of this state in place of medical care, and other material needs.[7]

Mother Father
☐ ☐ Who makes purchases for the child?
☐ ☐ Who attends to special needs of the child?
☐ ☐ Who has greater earning capacity?
☐ ☐ Who adjusts working hours based on the needs of the child?
☐ ☐ Who has certainty of future income?

☐ ☐ Who has the ability to provide insurance for the child?
☐ ☐ Who attends classes for professional involvement?
☐ ☐ Who has requisite knowledge to meet the needs of the child?
☐ ☐ Who schedules and takes the child to medical appointments?
☐ ☐ Who schedules and takes the child to dental appointments?
☐ ☐ 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 because the court can adjust economic differences with its support orders. The cases in endnote 7 should be read to get a flavor of how the court of appeals views this factor.

Mother Father
☐ ☐ (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.[8]

Mother Father
☐ ☐ Who can provide a safe environment?
☐ ☐ Who can provide continuity?

Mother Father
☐ ☐ (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.[9]

Mother Father
☐ ☐ In whose custody will the family unit not be split? The issue is not an "acceptability of the custodial home" standard. See *Ireland v Smith*, 451 Mich 457; 547 NW2d 686 (1996); *Fletcher v Fletcher*, 200 Mich App 505, 517; 504 NW2d 684 (1993), *rev'd on other grounds*, 447 Mich 871; 526 NW2d 889 (1994).

Mother Father
☐ ☐ (f) The moral fitness of the parties involved.[10]

Mother Father
☐ ☐ Who has priority as a result of the other party having an extramarital affair known by the children? Caution: See *Fletcher* discussion in endnote 10.

Has either party engaged in any of the following conduct:
☐ ☐ Verbal abuse
☐ ☐ Drinking problem
☐ ☐ Poor driving record
☐ ☐ Physical or sexual abuse of the child
☐ ☐ Other illegal or offensive behaviors.

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*: "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."

Mother Father

☐ ☐ (g) The mental and physical health of the parties involved.[11]

Mother Father

☐ ☐ Does either party have a physical or mental health problem that significantly interferes with the 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?

Mother Father

☐ ☐ (h) The home, school, and community record of the child.[12]

Mother Father

☐ ☐ 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 reducing the necessity for other agency involvement (the juvenile court, the FIA), or if another agency is involved, who can cooperate more fully?

☐ ☐ Who can more adequately assure the 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.?

Mother Father

☐ ☐ (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.[13]

Mother Father

☐ ☐ Whom does the child favor?

Note: Is this factor to be given strong consideration, based upon an intelligent, unbiased child in an interview using relevant, important factors? See *Wilson v Gauck*, 167 Mich App 90; 421 NW2d 582 (1988); *Flagherty v Smith*, 87 Mich App 561; 274 NW2d 72 (1978); *In re Custody of B*, 66 Mich App 563; 252 NW2d 237 (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.

Mother Father

☐ ☐ (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.[14]

Mother Father

☐ ☐ Who can best cooperate with an appropriate parenting time schedule by the other party?

☐ ☐ Who is least likely to disparage the other parent in the presence of the child based upon past performance?

Mother Father

☐ ☐ (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.[15]

Yes No

☐ ☐ 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?

Mother Father

☐ ☐ (l) Any other factor considered by the court to be relevant to a particular child custody dispute. [in guardianships, MCLA 700.424c(5), MSA 27.5424(3)[5], this factor is: "(k) Any other factor considered by the court to be relevant to a particular dispute regarding termination of a guardianship, removal of a guardian, or parenting time."][16]

Mother Father

☐ ☐ Who can most likely address the special needs of the child?

☐ ☐ Has either parent threatened to kidnap the child?

☐ ☐ Does either party spend excessive time traveling for the child?

☐ ☐ Does either parent have a record of failure to exercise parenting time, failure to notify, or failure to return the child?

☐ ☐ Who has responsibility for the actual and proposed child care arrangements?

Yes No

☐ ☐ 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. MCLA 600.1021, .841, MSA 27A.1021, .841. Some early cases also applied the best interests standards in reviewing a custodial parent's request to change the domicile of a minor child. However, panels of the court of appeals have 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, 393 NW2d 903 (1986); *Dick v Dick*, 147 Mich App 513, 383 NW2d 240 (1985); *Bielawski v Bielawski*, 137 Mich App 587, 358 NW2d 383 (1984); *Scott v Scott*, 124 Mich App 448, 335 NW2d 68 (1983); *Henry v Henry*, 119 Mich App 319, 326 NW2d 497 (1982). The *D'Onofrio* test is (1) generally, will the proposed move improve the quality of the child's and the parent's life, (2) will the move allow reasonable opportunity for parenting time to preserve the parental relationship, (3) is the move inspired primarily by a desire to defeat parenting time, and (4) is the move inspired by a 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*–the custodial parent and child. See Fred Morganroth, *Changing the Minor Child's Domicile–Some New Considerations*, Mich Fam LJ, Special Edition, Child Custody.

2. *Lustig* and *Baker v Baker*, 411 Mich App 567, 309 NW2d 532 (1981) are case 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 that are prescribed by statute. *Lewis v Lewis*, 73 Mich App 563, 252 NW2d 237 (1977). In *Fletcher v Fletcher*, 200 Mich App 505, 504 NW2d 684 (1993), *rev'd and remanded on other grounds*, 447 Mich 871, 526 NW2d 889 (1994), the court explained that judges 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.

3. In *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994), the court stated:

> 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 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 Mann v Mann, 190 Mich App 526, 476 NW2d 439 (1991); *Schubring v Schubring*, 190 Mich App 468, 476 NW2d 434 (1991). 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. In *Dehring v Dehring*, 220 Mich App 163, 559 NW2d 59 (1996), the court pointed out that an intrastate change in the children's domicile, by itself, does not constitute proper cause or a change of circumstances upon which to base a change in custody.

4. 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, 296 NW2d118 (1980). If there is no established custodial environment, the standard is a preponderance of the evidence. *Lewis v Lewis*, 138 Mich App 191, 360 NW2d 170 (1984). The question whether an established custodial environment exists is preliminary and essential, and it is entirely a factual determination. The trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Ireland v Smith*, 214 Mich App 235, 542 NW2d 344 (1995), *aff'd*, 451 Mich 457, 547 NW2d 686 (1996). In *Mazurkiewicz v Mazurkiewicz*, 164 Mich App 492, 417 NW2d 542 (1987), the court defined 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, and guidance that are age and needs appropriate and where the relationship is marked by qualities of security, stability, and permanence. The judge should look to the situation in the years immediately preceding the action. *Schwiesow v Schwiesow*, 159 Mich App 548, 406 NW2d 878 (1987); *Breas v Breas*, 149 Mich App 103, 385 NW2d 743 (1986) (no custodial environment had been established where mother had physical custody, there was pending divorce, father was seeking custody, and environment provided child was not permanent); *see also Curless v Curless*, 137 Mich App 673, 357 NW 2d 921 (1984) (same result). In *Curless*, the court observed that in cases where the custodian discourages the children from seeing the noncustodial party and fails to cooperate with parenting time, this works against making a finding that here is an established custodial environment. In *Mazurkeiwicz*, 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, 320 NW2d 268 (1982), where the court stated that it makes no difference who the established custodial environment arises, through a temporary or a permanent order, but whether it exists that is important. In *Baker v Baker*, 411 Mich 567, 309 NW2d 532 (1981), the court stated that a mere temporary order does not create an established custodial environment; all the circumstances must be considered. In *Baker*, 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. In *Bowers v Bowers*, 190 Mich App 51, 475 NW2d 394 (1991), the court found 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, 301; 401 NW2d 632 (1986), the court of appeals conceded "that it may be possible to read the 'clear and convincing evidence' test...as 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." In *Overall v Overall*, 203 Mich App 450, 512 NW2d 851 (1994), the court stated that the parties may stipulate that there is no established custodial environment where there is a shred custodial arrangement. In *Gulyas v Gulyas*, 75 Mich App 138, 254 NW2d 818 (1977), Hon. Dorothy Riley states in her dissent that the best interests factors ought not to be used by the trial judge to express outmoded notions of the importance of the mother being near the hearth and home. In *Bowers v Bowers*, 198 Mich App 320, 497 NW2d 602 (1993), the court stated that an expectation of permanence is a factor in determining if a custodial environment has been established. It further stated 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, the 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 the children to the other parent, it does not change the established custodial environment. *Theroux v Doerr*, 137 Mich App 147, 357 NW2d 327 (1984). A court should not change custody based upon violation of court orders. *Adams v Adams*, 100 Mich App 1, 298 NW2d 871 (1980). In *Napora v Napora*, 159 Mich App 241, 406 NW2d 197 (1986), the court showed that the 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. In *Truitt v Truitt*, 172 Mich App 38, 431NW2d 454 (1988), the use of the Friend of the Court report in child custody disputes was explained. It is error to admit the report where objected to and a hearing is requested; the court may consider it, but it may not be introduced in evidence unless stipulated to. In a request for a change of domicile, the 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, 314 NW2d 778 (1981). The court has discretion to use a 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, 280 NW2d 610 (1979). In *Glover v McRipley*, 159 Mich App 130, 406 NW2d 246 (1987), the court instructed 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 *Glover*, 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. Note that a finding of equality or near equality on the best interests factors will not necessarily prevent a party from satisfying the clear and convincing standard. *Heid v AASulewski*, 209 Mich App 587, 532 NW2d 205 (1995) (change to shared custody). If the trial court does not make a finding regarding the existence of an established custodial environment, the court of appeals may make the determination if there is sufficient evidence on the record. Otherwise, the case will be remanded to the trial court. *Jack v Jack*, 239 Mich App 668, 610 NW2d 231 (2000).

5. It should probably comes 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.
6. In *Harper v Harper*, 199 Mich App 396 (1993 the court stated that the judge may consider disciplinary techniques of the parties toward the minor child. Here, where the father used his hand in discipline and the mother used a paddle, this could be used against the party using the paddle. There was testimony by an expert that the mother was unable to guide children in a joint task during a session being observed while the father was able to provide the leadership and direction to assist the children accomplish the goal.
7. See *Harper v Harper*, 199 Mich App 396 (1993) (income, employment history, certainty of future income and financial position are factors to be weighed). In *Mazurkiewicz v Mazurkiewicz*, 164 Mich App 492, 417 NW2d542 (1987), the court weighed the husband's income in his favor over the wife's objection that because she was a homemaker she could never prevail on this factor. The court agreed but stated the trial court did not unduly stress this factor. In *Hiliard v Schmidt*, 231 Mich App 316, 586 NW2d 263 (1998), the trial court properly relied on facts regarding defendant's stable employment history rather than on plaintiff's speculation that her income would soon rise when she obtained her degree. Factor "c" can include the disposition to provide for the child's material needs, as shown by the parent's lack of inclination to pursue a job with a minimal income. *McCain v McCain*, 229 Mich App 123, 580 NW2d 485 (1998). 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 suggest 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. In *Bowers v Bowers*, 198 Mich App 320, 497 NW2d 602 (1993), the court stated 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.)
8. In *Bahr v Bahr*, 60 Mich App 354, 230 NW2d 430 (1975), children 13, 12, and 8 were with the nonparent custodians for 6 years. The father sought to change custody. The judge spent an hour with children in chambers and learned that they wished to stay where they were. The judge pointed out that the children seemed well adjusted and desirous of remaining in present custodial arrangement with third parties, but wanted parenting time with their father as well. The court concluded stability would be provided for by leaving the children where they were. In addition, the 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 129, 129 NW2d 430 (1964), and *Rincon v Rincon*, 29 Mich App 150, 185 NW2d 195 (1970), had been changed by the Child Custody Act. In *Hilliard v Schmidt*, 231 Mich App 316, 586 NW2d 263 (1998), the mother's indefinite plan to marry her boyfriend did not demonstrate a permanent relationship.
9. The focus of this factor is the child's prospects for a stable family life. It focuses on the permanence of the family unit, not the acceptability of the homes or child care arrangements. *Ireland v Smith*, 451 Mich 457, 547 NW2d 686 (1996); *Fletcher v Fletcher*, 447 Mich 871, 526 NW2d 889 (1994). In *Fletcher*, the supreme 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." *Fletcher v Fletcher*, 200 Mich App 505, 518; 504 NW2d 684 (1993). The court of appeals specifically rejected "acceptability" of the proposed homes as being relevant because it is addressed under factors "b" and "c." In a pre-*Fletcher* case, *Mazurkiewicz v Mazurkiewicz*, 164 Mich App 492, 417 NW2d 542 (1987), this factor was weighted in the father's favor where the mother had an "inclination" towards "inappropriate relations with other persons during her marriage."
10. In *Feldman v Feldman*, 55 Mich App 142, 222 NW2d 2 (1974), custody was granted to wife who had engaged in two "adulterous affairs" but who was "good mother [and] had been solely responsible for her sons' religious education." Moral fitness is only one factor and on balance it was in the best interests of the children for her to have custody. (In this case, the husband drank toilet bowl cleaner in an effort t commit suicide.) Adultery by itself does not necessarily preclude a party from being awarded custody of the children. *Williamson v Williamson*, 122 Mich App 667, 333 NW2d 6 (1982); *Gulvas v Gulvas*, 75 Mich App 138, 254 NW2d 818 (1977) (Hon. Dorothy Riley in her dissent stated that this factor should not be used by a trial judge to impose work ethic notions.

In *Fletcher v Fletcher*, 200 Mich App 505, 504 NW2d 684 (1993), the court stated that marital affairs of which the child has no knowledge cannot be used 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, the supreme court did not disturb this ruling, but added the following:

> Factor f (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*.

447 Mich 871, 886-887; 526 NW2d 889 (1994) (emphasis supplied by the court). In making that determination, the court refers to this article as it originally appeared in 21 Mich Fam LJ 14 (Oct 1994). The supreme court stated that this article

> provides a list of conduct that, although not exhaustive, represents the type of morally questionable conduct relevant to one' 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.

447 Mich at 887 n6. *See also Hilliard v Schmidt*, 231 Mich App 316, 324; 586 NW2d 263 (1998). In *Bowers v Bowers*, 198 Mich App 320, 497 NW2d 602 (1993), the court showed that a variety of subject can be used under this category. Specifically, the court may consider a drinking problem, arrest record, living with the child's baby-sitter, allowing the son to drink from his beer, verbal abuse, and lying about his past alcohol record. In *Helms v Helms*, 185 Mich App 680, 462 NW2d 812 (1990), the court allowed consideration of a circumstance where plaintiff was pregnant, unmarried, and living with her boyfriend, since the case is not one of unmarried cohabitation "standing alone"; plaintiff's pregnancy was 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. In *Snyder v Snyder*, 170 Mich 801, 429 NW2d 234 (1988), the court stated that in a case where the court is considering morality as an issue in determining parenting time rights, it was error for the judge to cancel parenting time with the father when he moved in with a woman to whom he was not married. Lifestyle cannot be the sole factor by which morality is judged. In *Truitt v Truitt*, 172 Mich App 38, 431 NW2d 454 (1988), cohabitation with a girlfriend does not of itself mean the party is immoral.

11. In *Feldman v Feldman*, 55 Mich App 142, 222 NW2d 2 (1974), where husband drank toilet bowl cleaner in an effort to commit suicide, the court property gave the 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 individuals with disabilities into the responsibilities and satisfactions of family life. *Bednarski v Bednarski*, 141 Mich App 15, 366 NW2d 69 (1985). 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. *Harper v Harper*, 199 Mich App 409, 502 NW2d 731 (1993). In *Straub v Straub*, 209 Mich App 77, 530 NW2d 125 (1995), the trial court gave too much weight to the fact that the grandparents had an established home for many years in contrast to the mother's shorter period since the grandparents were far older.

12. 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.

13. *Gulyas v Gulyas*, 75 Mich App 138, 254 NW2d 818 (1977), was affirmed on appeal where the judge held an in camera discussion with children, no record was made, the parties stipulated to the private conversation out of their presence, and judge did not disclose contents of discussion. 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 frustrated meaningful appellate review and was therefore a clear error on a major issue. *Bower v Bowers* 198 Mich App 320, 497 NW2d 602 (1993), demonstrates the importance of a sealed transcript being made of an in camera interview with a child. In *Bowers v Bowers*, 190 Mich App 51, 475 NW2d 394 (1991), the court stated 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, 386 NW2d 677 (1986), the trial court said since the children were 10 year 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, 357 NW2d 921 (1984), the court did not consider the children's preferences saying they were all too young. In affirming the trial court, the court of appeals explained this is discretionary with the trial court. In *DeGrow v DeGrow*, 112 Mich App 260, 315 NW2d 915 (1982), the court emphasized that the child's preference does not outweigh all other factors, but is just one factor to take into account. In *Swik v Swik*, 89 Mich App 603, 280 NW2d 610 (1979), the trial court was not reversed where it interviewed a six-year-old child and determined based upon the interview that the child was not of sufficient age to express a preference. This is left to the sound discretion of the court. The failure of a trial court to speak with the child in a custody dispute generally requires remand. In *re Stevens*, 86 Mich App 258, 273 NW2d 490 (1978).

In *Burghdoff v Burghdoff*, 66 Mich App 608, 239 NW2d 679 (1976), the court stated that an in camera conference is generally the best way for the judge to determine the preference of the child. The test in determining whether the child is of sufficient age is not the test for a witness in a courtroom--e.g. the "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, 233 NW2d 596 (1975), the court declined to interview the child. The case was remanded for further proceedings. The appellate court stated that the statute permits but does not require the 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 emphasize 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. As to what may be covered in the in camera interview, *Hilliard v Scmidt*, 231 Mich App 316, 321; 586 NW2d 263 (1998), held that the interview may cover "any matter relevant to the trial court's custody decision." In *Hilliard*, the court's interview of a brother, whose custody was not in dispute, was proper. The court of appeals panels are continuing to follow the broad discretion granted trial judges by *Hilliard* for in camera interviews with children. One panel recently complained about the effects of this procedure on due process. The panel nevertheless followed *Hilliard* and allowed it. *Molloy v Molloy*, 243 Mich App 595, _____ NW2d _____ (2000). *Hilliard* also makes it clear the judge need not state the preference of the child on the record. These cases show the effort the court is making to weigh the interests of the children with the rights of their parents. Children are in an almost impossibly awkward position. If the conversations are revealed, lasting effects on the parent-child relationship can be predicted. On the other hand, parents who are struggling to win one of the most important cases of their lives are hamstrung by not knowing what happened in chambers. The balancing by appellate courts to date favors fostering of the parent-child relationship.

14. In *McCain v McCain*, 229 Mich App 123, 580 NW2d 485 (1998), despite the trial court's belief that defendant would attempt to destroy the relationship between plaintiff and her children, that finding did not outweigh other best interests findings under which defendant prevailed over plaintiff or was found to be equal. Failure to consider this, or presumably any factor under the Child Custody Act, is grounds for remand. *Blaskowski v Blaskowski*, 115 Mich App 1, 320 NW2d 268 (1982) (trial court also failed to consider whether an established custodial environment existed in order to determine the standard of proof.)

15. There are no published cases. Note that this factor is not listed in MCLA 700.424c, MSA 27.5424(3), relating to the best interests of a minor in a guardianship proceeding.

16. *See* MCLA 722.23(l), 700.424c(5)(k), MSA 25.312(3)[l], 27.5424(3)[5][k].

Interracial factors in determining custody are irrelevant. *Edel v Edel*, 97 Mich App 266, 293 NW2d 792 (1980).

In most cases, it is in the best interests of each child to keep brothers and sisters together; however, this does not outweigh the best interests of an individual child. *Wiechmann v Wiechmann*, 212 Mich App 436, 538 NW2d 57 (1995).

The court may not determine a biological preference exists without references to its relevance or whether it is substantiated by evidence. In *Freeman v Freeman*, 163 Mich App 493, 414 NW2d 914 (1987), the court awarded a daughter to her mother and articulated that a natural biological preference dictated the result.

While child care arrangements are properly considered under the best interest standard, the supreme court in *Ireland v Smith*, 451 Mich App 457, 547 NW2d 686 (1996), declined to establish any broad rules regarding whether in-home child care or day care is more acceptable.

In *Hilliard v Schmidt*, 231 Mich App 316, 321; 586 NW2d 263 (1998), the court properly considered the emotional pressure endured by the child by being caught between the two parties and noted that plaintiff did not take responsibility. There was evidence that plaintiff's anger toward her ex-husband interfered with her ability to consider the needs of her children and that she tended to blame others, including her children, for her problems.