



Domestic Violence and Children's Best Interests

By Mary Lovik and Rebecca Shiemke

As construed by Michigan's Court of Appeals, the Child Custody Act gives trial courts broad discretion in applying the act's best interest factors.¹ If the factors unequally affect a child's best interests, courts need not give each one equal weight.² Further, if circumstances affect multiple factors, courts may apply them wherever relevant.³ Although these principles promote flexibility in response to diverse individual situations, they offer little guidance for balancing the act's presumption favoring a child's strong relationship with each parent⁴ against the safety concerns raised by domestic violence. This article suggests a framework for balancing these priorities and illustrates how a best interest analysis within it can promote safe, child-centered parenting arrangements.

Weighing the best interest factors

Although safety is foundational to the enjoyment of parent-child relationships, it is not clearly prioritized in the Child Custody

Act. The act restricts courts from awarding custody or parenting time to a parent convicted of sexual assault against a child, a child's sibling, or a child's other parent.⁵ It otherwise affords children "a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health."⁶ Domestic violence and "the reasonable likelihood of abuse" of a parent or child are listed as factors to consider in decision making,⁷ but the significance of these concerns is often underestimated in practice.

At least 24 states and the District of Columbia address safety concerns by presuming that awards of custody or parenting time to domestic violence perpetrators are contrary to children's best interests.⁸ A challenge to implementing this approach arises from the diversity of behaviors encompassed by the term "domestic violence" (described briefly later in this article). Without a clear definition of domestic violence, limitations on judicial discretion could result in unjust, one-size-fits-all interventions that do not

promote child safety or well-being. Some clinicians have suggested a more flexible approach that sets five goals, listed here in order of priority:

- (1) Protect children from violent, abusive, or neglectful environments.
- (2) Enable abused parents to protect their children by providing support and safety.
- (3) Empower abused parents to make autonomous decisions directing their own lives.
- (4) Hold perpetrators accountable by requiring them to take responsibility for past behavior and work for positive change.
- (5) Promote the least restrictive parenting arrangement that benefits the child and honors parents' reciprocal rights.

Fast Facts

Because physical and emotional safety are foundational to the enjoyment of parent-child relationships, the top priority in resolving child custody and parenting time disputes is to protect children from violent, abusive, or neglectful environments.

To understand how domestic violence affects child and parent safety, consider the ways in which an abuser's coercive tactics reach into each sphere of life addressed in the best interest factors.

Ideally, parenting arrangements should achieve all five goals. If this is impossible, lower priorities should yield to higher ones.⁹

The following discussion illustrates how a best interest analysis using the foregoing framework might balance safety concerns with a child's access to his or her parents.

Domestic violence and the best interest factors

The Child Custody Act does not define "domestic violence." The term has varying definitions in other Michigan statutes.¹⁰ In the criminal context, domestic violence is often understood as a single assaultive incident against a spouse, former spouse, past or present dating partner, person with whom the assailant has a child in common, or a past or present household member (e.g., sibling, roommate, child, or parent).¹¹ This definition encompasses one-time actions that are uncharacteristic for the assailant, violence arising from mental illness, and self-defensive acts that do not rise to the level of legal justification. For purposes of this discussion, none of these contexts applies. This discussion addresses coercive criminal and noncriminal behavior occurring within a

pattern of purposefully chosen tactics designed to maintain control over a current or former intimate partner.¹²

Coercive control affects the five spheres of life addressed in the best interest factors. Because perpetrators seek to control their intimate partners, it first affects the adult relationship (factors (j) and (k)). Beyond the adult relationship, controlling tactics have a cascading effect on all other aspects of family life. They affect each parent's ability to raise and nurture a child (factors (b), (f), and (g)), which in turn impacts parent-child relationships (factors (a) and (i)). Coercive control also affects children's development and social adjustment (factor (h)) and their living environments and material well-being (factors (c), (d) and (e)).

1. Relationship between the parents (Factors (j) and (k))

Factor (j) considers the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent. Factor (k) addresses domestic violence, regardless of whether it was directed against or witnessed by the child.

Clinicians report that domestic violence perpetrators adopt an attitude of entitlement to justify their behavior. They demand special rights and privileges from their partners with no accompanying sense of their own responsibilities, using any tactics necessary to enforce these demands.¹³ Beyond criminal acts like assault, common noncriminal tactics include withholding money, isolating partners from social supports, harming partners' pets or property, belittling partners, and blaming partners for the abuse.

Relevant to factor (k), coercive tactics generally continue after separation as perpetrators seek to regain lost control. In some cases, the risk of physical violence increases to serious or lethal levels.¹⁴ The focus of abuse may shift from household matters to parenting arrangements. If threats or violence occur during parents' contacts for purposes of parenting time, physical or emotional harm to children may result. Some perpetrators use children as weapons, deliberately neglecting, threatening, or endangering them to intimidate or retaliate against a former partner.¹⁵ This link between the safety of the child and the abused parent requires that great weight be given to coercive tactics under a safety-focused framework.

Relevant to factor (j), perpetrators' self-centered attitudes and desire for control often make them "unfriendly parents," who actively undermine their former partners' relationships with children. Many perpetrators interfere with their partners' parenting, insult their partners in front of children, or use children as monitors to enforce the abused parent's isolation.¹⁶ Sometimes abusers use factor (j) against parents seeking to shield children from exposure to domestic violence. These efforts are often labeled as "unfriendly," especially if there is little corroborating evidence of abuse or the abused parent's demeanor is angry or uncooperative. In response, 6 of the 32 states with a "friendly parent" factor in their best interest statutes do not apply it in cases involving domestic violence.¹⁷ Under a safety-focused framework, decision makers should consider the risks of abuse and support efforts to protect children from exposure to it.

2. Each parent's ability to raise and nurture the child
(Factors (b), (f), and (g))

Factor (b) examines the capacity and disposition of parents to give children love, affection, and guidance and to continue their education and upbringing in their religion or creed, if any. Factor (f) addresses the parties' moral fitness, and factor (g) their mental and physical health.

Domestic violence perpetrators consistently demand priority for their own needs. Relevant to factor (b), this self-centeredness detracts from their capacity and disposition to give children love, affection, and guidance. They are often unwilling to adapt their lifestyles to children's needs. They may ignore children's schedules and preferences or exhibit intolerance of crying babies, noisy play, or children's needs for autonomy and independence. In some cases, parent-child roles are reversed or emotional boundaries eroded, so that children must meet the abuser's needs rather than vice versa. Many abusers view children as extensions of themselves, taking credit for children's successes and holding the abused parent responsible for children's failures.¹⁸

Coercive tactics are relevant to factor (f) ("moral fitness"), assessing conduct with a significant influence on how a party functions as a parent.¹⁹ The Court of Appeals has upheld findings against parents on this factor on the basis of verbal abuse and threats against a former spouse in front of the children, spying on a former spouse, filing spurious reports with Children's Protective Services, instigating conflicts, and undermining children's therapy sessions.²⁰

Clinicians working with domestic violence perpetrators stress that few have detectable mental health problems,²¹ which means they may perform well on diagnostic tests. Thus, factor (g) may apparently favor the perpetrators. In contrast, many abused individuals suffer negative mental and physical effects resulting from domestic violence. While these difficulties may adversely affect their capacity to care for children, a safety-focused analysis would also consider the risks presented by a perpetrator along with a framework to support the abused parent's recovery. One risk is the potential for post-separation exposure to domestic violence, since perpetrators tend to abuse multiple partners over the course of their adult relationships.²²

3. Existing relationship between the child and each parent
(Factors (a) and (i))

Factor (a) considers the love, affection, and other emotional ties between each parent and the child. Factor (i) addresses the reasonable preference of a child deemed old enough to express one.

Coercive control distorts children's emotional ties with both parents. A child's desire for a closer relationship with an abusive parent may be mixed with confusion, anger, fear, or disappointment. The uninvolved parenting of many perpetrators may increase their value in children's eyes, making children eager to spend time with these inaccessible parents.²³ On the other hand, children may distance themselves from abused parents out of fear of the abuser, shame, or guilt about the abuse. Many children learn

to disrespect the abused parent, joining the perpetrator in blaming that parent for the abuse or even in acts of abuse.²⁴

If domestic violence is present, children's stated preferences must be weighed cautiously under factor (i), considering all possible motivations for a child's preferences and recognizing that a child's preference is not reasonable if it is arbitrary or inherently indefensible.²⁵ Children may:

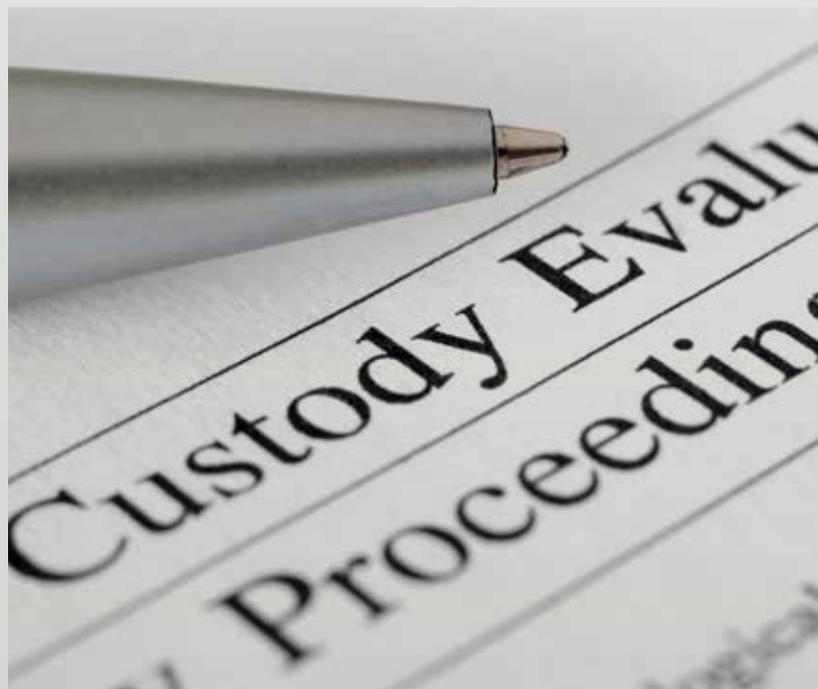
- Feel unsafe resisting contact
- Identify with or fear the more powerful parent
- Want to stay near friends or familiar surroundings
- Seek to protect the abused parent by appeasing the perpetrator
- Grieve the loss of an abusive parent who does not visit or blame themselves for that parent's absence
- Worry about a parent's welfare²⁶

4. Child's development and social adjustment (Factor (h))

Factor (h) examines children's home, school, and community records.

Domestic violence may interrupt a child's development, hindering social adjustments. Key developmental tasks include forming attachments, appropriately expressing emotions, engaging with schoolmates and teachers, and forming an adult identity.²⁷ Interrupting these tasks may cause difficulties for children in their homes, schools, and communities.

Successful social adjustment does not necessarily indicate that exposure to domestic violence is insignificant to a child's well-being, because all children do not develop resulting emotional and behavioral problems. A combination of factors affects outcomes, including a child's age and developmental status when the exposure occurred; the frequency, duration, and severity of the violence; and the relationship between the child and the perpetrator.²⁸



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5. Child’s material well-being and living environment
(Factors (c), (d) and (e))

Factor (c) considers the parties’ capacity and disposition to provide food, clothing, and medical or other remedial care. Factor (d) addresses the length of time a child has lived in a stable, satisfactory environment and the desirability of maintaining continuity. Factor (e) examines permanence, as a family unit, of the existing or proposed custodial home or homes.

Abusers frequently entrap their partners using economic control. They may withhold assets or prohibit or interfere with a partner’s efforts to obtain or keep employment. Factor (c) often weighs against parents subjected to these tactics. However, higher income alone is not dispositive of this factor,²⁹ and a perpetrator’s fault may be considered in adjudicating property and spousal support questions.³⁰ Under a safety-focused analysis, economically abused parents would be empowered to provide for their children by appropriate property division and awards of spousal support.

Factors (d) and (e), focusing on continuity and the prospects for a stable family environment,³¹ may weigh against parents living in impermanent housing situations after fleeing the family home to seek safety. However, a safety-focused analysis would consider children’s relationships and environment as well as physical housing. Continuity in the relationship with a protective parent is a critical protective asset that promotes recovery from exposure to abuse. Additional protective assets include interactions with other caring adults and supportive community and social attachments.³² Thus, parental mobility that maintains the continuity of children’s connections with protective supports should be viewed favorably under factors (d) and (e),³³ and perpetrators’ efforts to isolate children and abused parents from sources of support should be weighed against them. ■

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ENDNOTES

- MCL 722.23.
- Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006); *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).
- Fletcher v Fletcher*, 229 Mich App 19, 24–25; 581 NW2d 11 (1998).
- MCL 722.27a(1).
- MCL 722.25(2)–(3); 722.27a(4)–(5).
- MCL 722.27a(3).
- MCL 722.23(k); 722.27a(6)(c)–(d); 722.31(4)(e).
- American Bar Association Commission on Domestic Violence, *Child Custody and Domestic Violence By State*, February 2008, available at <<http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Custody.authcheckdam.pdf>>. All websites cited in this article were accessed January 14, 2014.
- Crooks, Jaffe & Bala, *Factoring in the Effects of Children’s Exposure to Domestic Violence in Determining Appropriate Postseparation Parenting Plans*, in Hannah & Goldstein, eds, *Domestic Violence, Abuse, and Child Custody: Legal Strategies and Policy Issues* (Kingston: Civic Research Institute, 2008), ch 22, p 15.
- See, e.g., MCL 400.1501(d); MCL 764.15c(5)(b).
- MCL 750.81(2).
- This article’s description of coercive tactics is not exhaustive. Each perpetrator’s pattern of abuse is unique, as are its impacts on family members. Additionally, this article assumes a case without allegations of child abuse or neglect. Studies estimate that in families where a male partner is violent toward his spouse, children are also direct victims of violence in 30–60 percent of cases. Edleson, *The overlap between child maltreatment and woman battering*, 5 *Violence Against Women* 134–154 (February 1999).
- Bancroft & Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Thousand Oaks: Sage Publications, 2002), pp 7–9.
- Jaffe, Lemon & Poisson, *Child Custody and Domestic Violence: A Call for Safety and Accountability* (Thousand Oaks: Sage Publications, 2003), pp 8–9, 29.
- Bancroft & Silverman, n 13 *supra* at 73.
- Id.* at 37.
- ABA Association Commission on Domestic Violence, n 8 *supra*.
- Bancroft & Silverman, n 13 *supra* at 34–36.
- Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994).
- See *Bowers v Bowers*, 198 Mich App 320, 331; 497 NW2d 602 (1993); *Wright v Wright*, 279 Mich App 291; 761 NW2d 443 (2008); see also Mastrangel, *Factor (f): The moral fitness of the parties involved*, 91 Mich B J 41 (February 2012), available at <<http://www.michbar.org/journal/pdf/pdf4article1994.pdf>>.
- Bancroft & Silverman, n 13 *supra* at 21.
- Id.* at 19.
- Id.* at 39–41, 51.
- Id.* at 33–34, 51, 71.
- Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010).
- Crooks, Jaffe & Bala, n 9 *supra* at 22–16–22–17.
- Id.* at 22–6–22–11.
- Id.* at 22–5.
- Dempsey v Dempsey*, 409 Mich 495; 296 NW2d 813 (1980).
- Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992).
- See *Ireland v Smith*, 451 Mich 457, 465–466; 547 NW2d 686 (1996).
- Edleson, *Emerging Responses to Children Exposed to Domestic Violence* (October 2006) <http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=585>.
- The Michigan Supreme Court has acknowledged that “a child can benefit from reasonable mobility and a degree of parental flexibility regarding residence....” *Ireland*, n 31 *supra*.