FAMILY LAW

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I. ALTERNATIVE DISPUTE RESOLUTION

The *Survey* period is between May 23, 2007, and July 30, 2008. In this period, it was error for a judge to not advise the parties of "mandatory pre-arbitration disclosures" such as the fact that appellate review is available but limited, that arbitration is voluntary, and that the fee for arbitration was unnecessary if they elected to have the court resolve the matter.[1]

The right of a party to arbitrate when either is subject to a PPO or if there are allegations of domestic violence is subject to the court rule that requires the parties to specifically waive the prohibition of arbitration in

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1. Johnson v. Johnson, 276 Mich. App. 1, 739 N.W.2d 877 (discussing MICH. COMP. LAWS ANN. § 600.5072 (West 2008), the "Domestic Relations Arbitration Act," and relying on Harvey v. Harvey, 470 Mich. 186, 680 N.W.2d 835 (2004)).

domestic violence cases.[2] In *Valentine v. Valentine*,[3] there were no PPOs and no allegation of domestic violence in the proceedings.[4] Thus, when the parties consented to arbitrate, the court did not specifically ask them to waive exclusion of the case from arbitration.[5] The issues about domestic violence were raised in the testimony before the arbitrator.[6] The court upheld the arbitration, finding that it was not precluded by statute, that it was not timely raised, and that plaintiff appeared to be raising the issue as an "appellate parachute."[7]

This issue was also discussed in *Hartt v. Hartt*,[8] wherein the husband argued that the Domestic Relations Arbitration Act (DRAA) requirements were not met and thus the arbitration order should be set aside as the arbitration was invalid.[9] The court held that the minimal requirements were met (that agreeing to arbitration was voluntary, binding, had limited appeal and cost money) when the court advised the husband of them on the record.[10] The husband also argued that the court was required to make an independent determination of the best interests factors as they apply to custody; the court rejected that argument, stating that the Revised Judicature Act (RJA) required the court to uphold the arbitrator's custody decision unless the court found that the decision was *adverse* to the best interests of the children.[11] The court noted that the trial court was not required to hold another hearing; rather, the court could review the arbitrator's findings.[12]

II. CHILD CUSTODY

A. Procedural

M.C.L. Section 722.26a(1)[13] requires that the court advise both parents about the opportunity for joint custody of a child. In *Wright v. Wright*,[14] the court of appeals held that the trial court's failure to explain

2. MICH. COMP. LAWS ANN. § 600.5072(2) (West 2008).
3. 277 Mich. App. 37, 742 N.W.2d 627 (2007).
4. *Id.* at 38, 742 N.W.2d at 628.
5. *Id.*
6. *Id.*
7. *Id.* at 39-40, 742 N.W.2d at 629.
8. No. 276227, 2007 WL 4731071 (Mich. Ct. App. Jan. 27, 2007).
9. *Id.*
10. *Id.* at *2.
11. *Id.* at *2-3.
12. *Id.* at *3.
13. MICH. COMP. LAWS ANN. § 722.26a(1) (West 2008).
14. 279 Mich. App. 291, 761 N.W.2d 443, (2008) *leave to appeal denied*, 482 Mich. 858, 752 N.W.2d 47 (2008).

on the record what joint custody means was not error relevant to the court's award of sole custody.[15]

Testimony from children in family law cases is always controversial, and in *Surman v. Surman,*[16] the court of appeals held that the trial court may call a twelve-year-old to testify regarding allegations of abuse if it is relevant to the best interests standards.[17] The court further determined that an in camera interview of the child, designed to protect the child from testifying in front of a parent, would violate due process.[18] This is harmonious with the *Molloy v. Molloy*[19] decision, stating that in camera interviews with children are limited to the child's preference, as venturing beyond that preference presents due process issues.[20]

It has long been the requirement in Michigan that a court make findings on all of the "best interests" factors prior to a custody determination.[21] In *Carpenter v. Shepard,*[22] the trial court conducted a de novo review of a referee hearing based on the transcript from the referee hearing.[23] Although the referee had failed to make specific factual findings, the court's specific factual findings, made from the transcript, were sufficient to support a change of custody.[24]

The definition of de novo review of a decision from a referee hearing was clarified in *Dumm v. Brodbeck.*[25] The court of appeals held that pursuant to M.C.L. Section 3.215 (E)(7), a "court may hear a party's objection to a referee's recommendation for an order on the same day as the referee hearing, provided that the parties are notified in advance and given the opportunity to refuse a same-day hearing."[26] The court continued, stating that MCR 3.215(F)(2) "governs the conduct of a judicial hearing following the party's objections to the [Friend of the Court] recommendation," and, "[t]o the extent allowed by law, a court may conduct the judicial hearing by review of the [referee record], but the court must allow the parties to present live evidence at a judicial hearing."[27] The court retains the discretion to:

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15. *Id.*
16. 277 Mich. App. 287, 745 N.W.2d 802 (2007).
17. *Id.*
18. *Id.* at 302-03, 745 N.W.2d at 811-12.
19. 243 Mich. App. 801, 628 N.W.2d 587 (2000).
20. *Id.* at 801, 628 N.W.2d at 587.
21. *See, e.g.*, Mann v. Mann, 190 Mich. App. 526, 476 N.W.2d 439 (1991); Constantini v. Constantini, 171 Mich. App. 466, 430 N.W.2d 748 (1988).
22. No. 276233, 2007 WL 2331898 at *2 (Mich. Ct. App. Aug. 16, 2007).
23. *Id.*
24. *Id.* at *3.
25. 276 Mich. App. 460, 740 N.W.2d 751 (2007).
26. *Id.* at 463, 740 N.W.2d at 753.
27. *Id.*

> (a) prohibit a party from presenting evidence on findings of fact to which no objections were filed; (b) determine that the referee's findings were conclusive as to a fact to which no objection was filed; (c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing; and (d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.[28]

Further, the Michigan Rules of Evidence do not apply to a trial court's consideration of a [Friend of the Court] report and recommendation which is submitted pursuant to M.C.L. Section 552.505(1)(g).[29]

B. Established Custodial Environment

The court held an "established custodial environment" to be as procedurally significant as a specific joint custodial situation in *Earl v. Earl*,[30] holding that a petition which would result in a disruption of a shared established custodial setting required application of the "clear and convincing" evidentiary standard.[31]

C. Cases Where Vodvarka *Threshold Not Satisfied*

In *Vodvarka v. Grusmeyer*,[32] the court established a standard for reviewing challenges to change or modify court decisions granting custody.[33] The court stated that "[i]n order to establish a 'change in circumstances,' [as required by M.C.L. Section 722.27(1)(c),] a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have significant effect on the child's well-being, have materially changed."[34] While conditions must have changed since the last custody hearing,

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28. *Id.*

29. *Id.* at 465, 740 N.W.2d at 754.

30. No. 276049, 2007 WL 3404351 (Mich. Ct. App. Nov. 15, 2007) (citing Hayes v. Hayes, 209 Mich. App. 385, 532 N.W.2d 190 (1995)).

31. *Id.*

32. 259 Mich. App. 499, 675 N.W.2d 847 (2003).

33. *Id.*

34. *Id.* at 513, 675 N.W.2d at 854-55.

circumstances prior to the hearing are nonetheless relevant for comparison purposes.[35]

In *Jeffrey v. Jeffrey*,[36] the court found that the fact that the parents could not have a civil conversation did not reach the *Vodvarka* threshold because that was the case when the original judgment was entered; therefore, circumstances had not changed.[37]

Similarly, in *Leder v. Leder*,[38] the *Vodvarka* standard was not satisfied.[39] The court found that the mother's allegation that the father did not appropriately attend to the children's medical needs was not a change in circumstances because the alleged lack of attention occurred as frequently before the custody order as after the order was made.[40]

In *Meinke v. Meinke*,[41] the mother alleged serious neglect and safety issues on the part of the father, but the court found that the *Vodvarka* standard was not met, as none of the allegations had a "significant impact on the children's well-being."[42]

D. Cases where Vodvarka *Standard Satisfied*

In *Allen v. Belonga*,[43] the court found that the children's behavioral problems, a change in child care providers by the father, change in child's therapists by the father, new relationship for the mother, the father's anger management issues, and the father's baseless protective services referrals and domestic abuse were a sufficient basis to meet the *Vodvarka* threshold and consider a change of custody.[44]

In *Stephenson v. Stephenson*,[45] the *Vodvarka* threshold was met because of the father's non-compliance with the previous order, which formed a sufficient "change in circumstances" to find "proper cause" to review custody.[46]

In *Pears v. Ramsey*,[47] the *Vodvarka* threshold was met because the father alleged that the mother had frequently moved since entry of the order, that the mother and the child were subject to violence at the

35. *Id.* at 519, 625 N.W.2d at 855.
36. No. 278714, 2008 WL 142376 (Mich. Ct. App. June 15, 2008).
37. *Id.* at *1.
38. No. 275237, 2007 WL 2892583 (Mich. Ct. App. Oct. 4, 2007).
39. *Id.*
40. *Id.* at *4.
41. No. 277033, 2007 WL 4209344 (Mich. Ct. App. Nov. 29, 2007).
42. *Id.* at *4.
43. No. 277780, 2008 WL 142384 (Mich. Ct. App. Jan. 15, 2008).
44. *Id.* at *2.
45. No. 272937, 2007 WL 840885 (Mich. Ct. App. Mar. 20, 2007).
46. *Id.* at *5.
47. No. 271820, 2007 WL 1342562 (Mich. Ct. App. May 8, 2007).

mother's home, that the child exhibited disturbing behavior, the father feared that the child was being inappropriately disciplined by the mother's husband, and the child reported abuse.[48]

In *Lundquist v. Lundquist*,[49] the court found that the inability to cooperate and communicate between joint custodial parents met the *Vodvarka* threshold despite the mother arguing that this existed prior to the original judgment and was not a "change."[50] The court found that the severity of the problem was a change in circumstances because the "significant impact on the joint custody arrangement was not fully apparent until after the arrangement was implemented."[51]

The court in *Moore v. Moore*[52] found that successfully proving duress regarding entry of the original order was sufficient to meet the *Vodvarka* standard of proper cause.[53]

In *Jones v. Giannotti*,[54] a mother's frequent and consistent lifestyle changes were sufficient to find "proper cause" to review custody.[55]

In *Riley v. Huey*,[56] a mother's psychiatric hospitalization was deemed sufficient cause to review custody.[57]

Finally, in *Yount v. Yount*,[58] a father's successful rehabilitation from his chemical dependency was held to constitute sufficient cause to review custody when the original custody order was based on his chemical dependency.[59]

E. Best Interests Factors

The factors for determining and modifying child custody awards and support are set forth in M.C.L. Section 722.27. The definition of some of those custody factors were described in *Berger v. Berger*.[60] The court clarified that factor (c) is forward-focused, considering each parties' capacity and disposition to provide for the child's needs after the divorce, and that factor (f) (the morality of the parties) is relevant only to the

48. *Id.* *2.
49. No. 271023, 2007 WL 1864255 (Mich. Ct. App. June 28, 2007).
50. *Id.* *2.
51. *Id.*
52. No. 277533, 2007 WL 2684876 (Mich. Ct. App. Sept. 13, 2007).
53. *Id.* *1.
54. No. 266568, 2007 WL 2051545 (Mich. Ct. App. July 17, 2007).
55. *Id.* *4.
56. No. 273141, 2007 WL 2381257 (Mich. Ct. App. Aug. 21, 2007).
57. *Id.* *2.
58. No. 278890, 2007 WL 4322291, at *3 (Mich. Ct. App. Dec. 11, 2007).
59. *Id.*
60. 277 Mich. App. 700, 747 N.W.2d 536 (2008).

extent that it impacts how one functions as a parent; it is not a test of who is the morally superior person.[61]

F. Legal Custody

The standard required to change legal custody remains unclear. In *Herschfus v. Herschfus*,[62] the court found "proper cause" to change legal custody when the parties were unable to cooperate and agree regarding the child's medical, dental, religious, and educational decisions.[63] However, in *Jeffrey v. Jeffrey*,[64] the court found that the parties' inability to communicate or to make decisions together was insufficient to warrant revisiting the joint legal custody shared by the parents.[65] This analysis was refined a bit more in *Lundquist*,[66] which found that although it was known that the defendant was uncooperative and hostile to the plaintiff prior to entry of a joint custody order, the continuation of that behavior was a change in circumstances sufficient to justify modification of the order.[67] This was because the inability of the parties to cooperate with joint legal custody could not be known prior to an award of joint legal custody.[68]

G. Parenting Time

The *Vodvarka* threshold was applied to parenting time modifications in *Johnson*,[69] when the court specifically held that the *Vodvarka* threshold of a significant change in circumstance or proper cause must be met prior to considering a change in parenting time.[70]

III. CHANGE OF DOMICILE—100 MILE RULE

It is well understood that M.C.L. Section 722.31 has restricted a parent from moving over 100 miles from their residence at the time of divorce without consent or court order. The precise definition of "100 miles" as described by M.C.L. Section 722.31 was clarified in *Bowers v.*

61. *Id.* at 712-13, 747 N.W.2d at 347.
62. No. 278016, 2007 WL 4555330 (Mich. Ct. App. Dec. 27, 2007).
63. *Id.* at *2.
64. No. 278714, 2008 WL 142376 (Mich. Ct. App. Jan. 15, 2008).
65. *Id.*
66. No. 271023, 2007 WL 1864255 (Mich. Ct. App. June 28, 2007).
67. *Id.* at *2.
68. *Id.*
69. No. 276538, 2007 WL 2744913 (Mich. Ct. App. Sept. 20, 2007).
70. *Id.* at *2.

Vandermeulen-Bowers.[71] The court of appeals upheld the trial court's determination that the geographic restriction referred to radial miles, not road miles.[72] The court clarified that for application of M.C.L. Section 722.31, the 100 miles must be measured using radial miles, not the actual road miles necessary to achieve the parenting time.[73]

In *Powery v. Wells*,[74] the court of appeals considered what standard of review should be applied to a move which was less than 100 miles, but which would nonetheless significantly disrupt the current parenting time arrangement.[75] The parents had roughly similar time with the child, and the plaintiff mother sought to relocate from Ludington to Traverse City.[76] The plaintiff argued that because this was not a request for a change in custody but merely a modification of parenting time, and because the move was less than 100 miles, no evidentiary hearing was required.[77] The court held that this move would require a modification to the current parenting time schedule, which would amount to a change in the current, roughly equal established custodial environment.[78] As a result of these findings, the court found that an analysis under the "best interests" factors was required in an evidentiary hearing, with the burden of proof on the parent proposing the move.[79] The petitioner was required to show that the move was in the best interests of the child.[80] Ultimately, the appellate court affirmed the trial court's finding that the proposed move be denied, and indicated that it would change weekly physical custody during the school year so the child could remain in the same school if the mother chose to relocate despite the court's ruling.[81]

Similarly, in the unpublished case of *Stanzler v. Stanzler*,[82] the plaintiff mother wished to move the child's domicile to England, which would reduce the child's parenting time with the Michigan parent from 145 days to 35 days.[83] After the court considered M.C.L. Section 722.31 (the "*D'Onofrio* factors"), the court was then required to determine whether the move would result in a change of an established custodial

71. 278 Mich. App. 287, 750 N.W.2d 597 (2008).
72. *Id.* at 294, 750 N.W.2d at 601.
73. *Id.*
74. 278 Mich. App. 526, 752 N.W.2d 47 (2008).
75. *Id.* at 527-28, 752 N.W.2d at 49-50.
76. *Id.*
77. *Id.* at 528, 752 N.W.2d at 49.
78. *Id.* at 528, 752 N.W.2d at 50.
79. *Id.* at 528-29, 752 N.W.2d at 50.
80. 278 Mich. App. at 529, 752 N.W.2d at 50.
81. *Id.* at 530-31, 752 N.W.2d at 50-51.
82. No. 273884, 2007 WL 3037375 (Mich. Ct. App. Oct. 18, 2007).
83. No. 275706, 2008 WL 142409 (Mich. Ct. App. Jan. 15, 2008).

environment; if so, the court was required to hold a hearing on the "best interests" factors.[84] *Stanzler* is harmonious with the unpublished decision of *Huttunen v. Huttunen*,[85] which held that once the court found the change of domicile factors described in M.C.L. Section 722.31(4) were met, the court must then determine whether the proposed change of domicile would result in a change of an established custodial environment.[86] If it would, the standard of evidence required is clear and convincing, with the focus being on the best interests of the child, not the entire family unit.[87]

These decisions can be contrasted with the unpublished decision in *Holmes v. Roman-Holmes*,[88] which held that the defendant's move—98.86 miles—which resulted in a change in the child's school, was not unreasonable as she moved less than the 100 miles described in M.C.L. Section 722.31 and she had invited the plaintiff to research the child's new school.[89]

Michigan has followed the New Jersey *D'Onofrio* factors in consideration of change of domicile cases for some time, but *Spires v. Bergman*[90] clarified the factors required to move a child's domicile from Michigan in the absence of joint legal custody.[91] The court must first determine whether M.C.L. Section 722.31 (the 100 mile rule) applies.[92] It does not apply to the parent who has sole legal custody.[93] In *Spires*, the mother had sole legal custody, but their order specifically restricted her from moving outside of Michigan without court approval.[94] The court found that M.C.L. Section 722.31 did not apply because mother had sole legal custody of the child and thus, the court was not obligated to consider the *D'Onofrio* tests under MCR 3.211(c).[95] Ultimately, because

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84. *Id.* at *2.
85. No. 275706, 2008 WL 142409 (Mich. Ct. App. Jan. 15, 2008).
86. *Id.* at *1.
87. *Id.* at *2.
88. No. 271936, 2007 WL 4404644 (Mich. Ct. App. Dec. 18, 2007).
89. *Id.* at *2.
90. 276 Mich. App. 432, 741 N.W.2d 523 (2007).
91. *Id.* at 434, 741 N.W.2d at 525.
92. *Id.* at 436-37, 741 N.W.2d at 527.
93. *Id.* at 437, 741 N.W.2d at 527. Specifically, the court stated:

> When the parents share joint custody and one parent is seeking permission to relocate more than 100 miles away, the family court must consider the factors of MCL 722.31(1). However, when the parent seeking the change of domicile has sole legal custody of the child, MCL 722.31 does not apply, and the court need not consider the factors enumerated in subsection 4.

Id.
94. *Id.* at 434, 741 N.W.2d at 527 (citations omitted).
95. 276 Mich. App. at 437, 741 N.W.2d at 527.

the defendant did not have joint legal custody, the court ruled that it was required to grant the change of domicile motion without consideration of the change of domicile factors.[96]

IV. CHILD SUPPORT

The interplay between child support and social security disability payments was clarified in *Fisher v. Fisher*.[97] In this case, the parties were divorced, and the defendant was ordered to pay child support for one child through an income withholding order.[98] In 1999, the trial court found that the defendant's sole source of income was social security disability.[99] The father had accumulated an arrearage in child support from the time he became disabled; however, mother had at that same time begun to receive direct payments from social security disability on behalf of the child (as a result of the father's disability) at the same time, and those benefits exceeded the father's support obligation.[100] The mother was thus receiving both direct withholding from the father's social security disability checks, as well as direct payments from social security.[101] The plaintiff father sought reimbursement rather than a credit for what he believed to be his overpayment.[102] The trial court instead gave him a credit against future support, finding that a credit was barred by M.C.L. 552.603 (which explicitly permits retroactive modification of child support for a period of time during which there is a pending motion for modification, but only from the date that notice of the petition is given to the payer or recipient of support).[103] The court found simply that social security benefits paid directly to a child should be treated like any other change in circumstance, and that a party seeking benefits should petition for modification on the basis of the anticipated change in circumstances, which the court could then defer ruling on until it becomes clear whether the change will or will not occur, thus providing notice to the recipient of the support of the potential for a change.[104]

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96. *Id.* at 444, 741 N.W.2d at 531.
97. 276 Mich. App. 424, 741 N.W.2d 68 (2007).
98. *Id.* at 426, 741 N.W.2d at 70.
99. *Id.*
100. *Id.*
101. *Id.*
102. *See id.* ("Plaintiff moved to abate his child support obligation, to credit the excess payments against his arrearage, and to obtain a refund of any remaining overpayments.").
103. *Fisher*, 276 Mich. App. at 428, 741 N.W.2d at 71.
104. *Id.*

The court considered imputed income in *Stallworth v. Stallworth.*[105] The father's income was reduced as the result of his resignation of his elected position after his criminal conviction.[106] The court found that although the criminal act was voluntary, there was no evidence that he committed the crime with the intent to reduce his income, and, in fact, it was likely that he committed the crime with the intent of increasing his income.[107] Therefore, imputation on the basis of a voluntary reduction of income was incorrect, although the case was remanded on other grounds.[108]

Paternity and child support intersected in *Covert v. Covert.*[109] The father learned six years after their divorce that he was not the biological father of their child, and that the mother knew he was not the father and had put another man's name on the child's birth certificate.[110] The court ordered that support be entirely reimbursed by mother to father; the court held that this was impermissible retroactive modification per M.C.L. Section 552.603.[111]

Fairly significant modifications were made to the Michigan Child Support Formula effective October, 2008.[112] These include the elimination of the Shared Economic Responsibility formula, equalization of child support for children in different custody arrangements, changes to the rules regarding imputation, and an automatic assumption that child care will end on August 31 following the child's twelfth birthday.[113]

V. GRANDPARENT VISITATION

In *Brinkley v. Brinkley,*[114] the court of appeals upheld the constitutionality of Michigan's current grandparent visitation statute,[115] M.C.L. Section 722.276.[116] Specifically, the court upheld the provision that when two fit parents *both* oppose a grandparent's request for grand parenting time, the grandparent's petition must be dismissed, because

105. 275 Mich. App. 282, 738 N.W.2d 264 (2007).
106. *Id.* at 285, 738 N.W.2d at 267.
107. *Id.* at 287, 738 N.W.2d at 268.
108. *Id.*
109. No. 267988, 2007 WL 1611956 (Mich. Ct. App. June 5, 2007).
110. *Id.* at *1.
111. *Id.* at *3.
112. *See, e.g.*, 2008 Michigan Child Support Formula Manual, *available at* http://courts.michigan.gov/scao/resources/publications/manuals/focb/2008MCSFmanual.pdf (last visited Feb. 28, 2009).
113. *See id.*
114. 277 Mich. App. 23, 742 N.W.2d 629 (2007).
115. *Id.*
116. MICH. COMP. LAWS ANN. § 722.27b (West 2004).

there is no fundamental constitutional right for a grandparent to have a relationship with a grandchild.[117]

The court found that the grandparents had passed the statutory tests necessary to achieve grandparent visitation in *Keenan v. Dawson*,[118] when the maternal grandparents were denied all parenting time with their grandchild after their daughter's mysterious death (which they believed the child's father committed).[119] The court relied in large part on testimony from a psychologist who testified that the two-year-old child would suffer significant psychological harm as a result of an inability to remember his mother if the child were not allowed access to the maternal grandparents.[120]

In *Coppess v. Atwood*,[121] the court clarified that under M.C.L. Section 722.27b(13), a grandparent's rights for grand parenting time are derivative to the child's parenting time rights.[122] Therefore, if a parent's rights to a child are terminated by adoption, so too are the grandparent's rights to that child.[123] Thus, the court found that M.C.L. Section 722.27b(13) was unambiguous. However, in *Warren v. Brown*,[124] the court found that the adoption of a child by a step-parent is an exception to this rule and does not terminate a grandparent's right to file an action for grandparenting time.[125]

VI. SPOUSAL SUPPORT

Smith v. Jenkins[126] is a spousal support case which contained a relatively common clause: the plaintiff was to pay the defendant spousal support which would terminate "upon such time as the defendant cohabitates with a non-related male."[127] In January 2005, plaintiff moved to terminate spousal support, claiming that the defendant was cohabiting with her boyfriend.[128] The trial court, following an evidentiary hearing, found that the defendant and her boyfriend were not cohabiting.[129] The court of appeals noted that:

117. *Id.* at 29-31, 742 N.W.2d at 634-35.
118. 275 Mich. App. 671, 739 N.W.2d 681 (2007).
119. *Id.* at 672, 682-83, 739 N.W.2d at 682-88.
120. *Id.* at 674-75, 739 N.W.2d at 684.
121. 278 Mich. App. 415, 750 N.W.2d 643 (2008).
122. *Id.* at 436, 750 N.W.2d at 654-55.
123. *Id.*
124. No. 269247, 2007 WL 1163098 (Mich. Ct. App. Apr. 19, 2007).
125. *Id.* at *2.
126. 278 Mich. App. 198, 748 N.W.2d 258 (2008).
127. *Id.* at 199, 748 N.W.2d at 259.
128. *Id.*
129. *Id.* at 199, 748 N.W.2d at 259-60.

> a trial court generally interprets the term of a divorce judgment, such as the term "cohabitation," in the same manner that it interprets a contract. If the term's meaning is unclear or is equally susceptible to more than one meaning, as is the case here, interpretation is a question of fact, and the trial court may consider extrinsic evidence to determine the intent of the parties.[130]

The court noted that the judgment itself did not define "cohabitation," and there are no authoritative Michigan cases defining cohabitation in the context of spousal support.[131] It adopted an Ohio test, the *Birthelmer* test:

> (1) there must be an actual living together, that is, the man and woman must reside together in the same home or apartment. (2) Such a living arrangement must be of a sustained duration. (3) Shared expenses with respect to financing the residence (i.e. rent or mortgage payments) and incidental day to day expenses (e.g. groceries) are the principal relevant considerations.[132]

The Michigan trial court added the following factors:

> [W]hether the parties intended to cohabitate; whether they held themselves out as living together; whether they assumed obligations generally arising from ceremonial marriage; whether a sexual relationship existed; whether marriage was contemplated; whether they used one another's address; whether they kept joint account; whether they were economically interdependent; and whether defendant used her spousal support to subsidize the alleged cohabitation.[133]

The court of appeals upheld this analysis, finding "whether cohabitation exists is a question for the finder of fact. Because no one factor defining a couple's relationship is dispositive on the question of cohabitation, the fact-finder should consider the totality of the circumstances of each particular case."[134] The trial court found factually

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130. *Id.* at 200, 748 N.W.2d at 260 (citations omitted).

131. *Id.*

132. *Smith*, 278 Mich. App. at 202, 748 N.W.2d at 261 (citing Birthelmer v. Birthelmer, No. L-83-046, 1983 WL 6869 at *5 (Ohio Ct. App. July 15, 1983)).

133. *Id.*

134. *Id.* at 204, 748 N.W.2d at 262.

that the defendant was not cohabitating in this case, and the court of appeals upheld that determination.[135]

In *Berry v. Berry,*[136] the court reiterated that fault is but one factor in the determination of spousal support. Reliance on only one factor is error.[137]

VII. JURISDICTION

The definition of a party's "10 day residence" as required to file for divorce was clarified in *Berger v. Berger.*[138] In *Berger*, the marital home was located in Jackson, but the plaintiff wife lived in Ann Arbor during the week during the school year to attend the University of Michigan.[139] The plaintiff filed in Jackson, and the defendant alleged that her temporary absence during the ten days immediately preceding the complaint divested Jackson of jurisdiction. The court rejected the position that M.C.L. Section 552.9(1) requires "[p]laintiff's continuing physical presence in Jackson County for 10 days immediately preceding filing for divorce," but rather requires only that "plaintiff have established her residence for the '10 days immediately preceding the filing of the complaint.'"[140] The court went on to find that "[o]nce Plaintiff established and intended for Jackson County to be her residence . . . her temporary absence did not destroy it."[141] The court found that it was a party's intent to remain, which is indicative of residency.[142]

VIII. PATERNITY

The court untangled some complicated family relationships in *Bay County Prosecutor v. Nugent.*[143] The defendant had signed an affidavit of parentage acknowledging paternity of a child (conceived while he was married to another woman), but subsequent DNA analysis showed the biological father of the child to be the defendant's fourteen-year-old

135. *See id.*
136. No. 273427, 2007 WL 2120517 (Mich. Ct. App. July 24, 2007).
137. *Id.* ("[A] court must consider all relevant factors.").
138. 277 Mich. App. 700, 747 N.W.2d 336 (2008).
139. *Id.* at 704, 747 N.W.2d at 343.
140. *Id.* at 703, 747 N.W.2d at 342.
141. *Id.*
142. *Id.* at 703-04, 747 N.W.2d at 342.
143. 276 Mich. App. 183, 740 N.W.2d 678 (2007).

son.[144] The State of Michigan then brought a suit under M.C.L. Section 722.1011[145] to revoke the acknowledgment of paternity, which the defendant opposed because he wished to remain the child's legal father.[146]

The court found that the State had the right to bring the action on the son's behalf under M.C.L. Section 722.1011, and that unchallenged DNA evidence alone was sufficient to establish a mistake of fact sufficient to satisfy M.C.L. Section 722.1011(2)(a).[147] However, the court continued that the ultimate resolution—revocation of defendant's acknowledgement of paternity—still required consideration of the equities of the case, despite the unrefuted DNA evidence.[148] The court remanded for consideration of evidence regarding whether the parent/child relationship between the defendant and the child established a due process liberty interest worthy of protection on the part of the child.[149]

144. *Id.* at 185, 740 N.W.2d at 680. The mother was ultimately arrested and charged with criminal sexual conduct for this sexual relationship and ultimately relinquished her rights to the child as part of a plea agreement. *Id.*

145. MICH. COMP. LAWS ANN. § 722.1011 (West 2008).

146. *Nugent*, 276 Mich. App. at 185-86, 740 N.W.2d at 680.

147. *Id.* at 190, 740 N.W.2d at 682 ("Presentation of the unchallenged DNA evidence was sufficient to establish mistake of fact.").

148. *Id.* at 190-91, 740 N.W.2d at 682-83. The court so held, referencing M.C.L. Section 722,1011(3), which provides that "[t]he party filing the claim for revocation has the burden of proving by clear and convincing evidence, that the man is not the father and that, considering the equities of the case, revocation of the acknowledgement is proper." MICH. COMP. LAWS ANN. § 722.1011(3) (West 2008).

149. *Nugent*, 276 Mich. App. at 192, 740 N.W.2d at 683.