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BILL ANALYSIS



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House Bill 5636 (Substitute H-1 as passed by the House)
House Bill 5637 (Substitute H-2 as passed by the House)
Sponsor: Representative James Ryan (House Bill 5636)
Representative Jessie Dalman (House Bill 5637)
House Committee: Judiciary and Civil Rights
Senate Committee: Families, Mental Health and Human Services

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CONTENT

House Bill 5636 (H-1) would amend the Child Custody Act to provide that, in a circuit court action involving a child custody dispute, the court would have to declare the inherent rights of the child and establish the rights and duties as to custody, support, and parenting time of the child in accordance with both the Child Custody Act (as currently required) and the Parenting Plan Act (proposed by House Bill 5637). If a child were the subject of a court-ordered parenting plan as provided in the Parenting Plan Act, the court could order the child's parents to be governed by the parenting plan without designating either parent as legal or physical custodian of the child except for a designation made under Section 24 of the Parenting Plan Act (which concerns parents seeking a temporary parenting plan or modification of a parenting plan). The bill is tie-barred to House Bill 5637.

House Bill 5637 (H-2) would create the "Parenting Plan Act" to:

- Require the establishment of parenting plans for minor children in cases of divorce, separate maintenance, or annulment.
- Require parents to file proposed parenting plans.
- Provide for alternative dispute resolution.
- Prescribe the contents of parenting plans, and require a plan to allocate decision-making authority to one or both parents.

- Require the court to order residential and parenting time provisions for a child.
- Prescribe limitations on parent's parenting time in cases involving willful abandonment; physical, sexual, or a pattern of emotional abuse; or domestic violence or assault.
- Require a court to restrain a parent's contact with a child if the parent were convicted of criminal sexual conduct.
- Allow a court to preclude or limit a parenting plan if a parent's involvement or conduct could have an adverse effect on the child's best interests.
- Provide for temporary parenting plans, periodic plan reviews, and plan modifications.

The bill would take effect on January 1, 1997, and is described in detail below.

Parenting Plan Requirement

In entering a decree of divorce, separate maintenance, or annulment, the court would have to establish a parenting plan for a minor child of the marriage as provided in the bill. A parenting plan would not affect the right of an individual who was not a parent governed by that plan to pursue and establish parenting or grandparenting time with a child as authorized under another Michigan law.

The State Court Administrative Office would have to develop and make available a form for use by a parent in completing a parenting plan. The form would have to indicate the subject matter that had

to be addressed in a parenting plan. The form also would have to contain notice that either party could obtain his or her own legal counsel.

Proposed Parenting Plan

Except as otherwise provided in the bill, in a custody dispute between a child's parents, the parents would have to file with the court, before a hearing on or determination of the child's custody, a proposed parenting plan that was agreed on by the parents and that conformed to the bill's requirements. If there were evidence that either parent had committed domestic violence or the parents did not agree on a parenting plan, each parent would have to file and serve a proposed plan by the earlier of the following dates: 30 days after either parent filed and served a notice requesting a pretrial conference, or 180 days after commencement of the action. The parents could extend the 180-day period by stipulation. ("Domestic violence" would mean an act of physical, sexual, or serious emotional abuse by an individual against his or her spouse or former spouse, or against another individual with whom the individual had a child in common or with whom he or she had resided.)

A parent who filed a proposed parenting plan in compliance with these provisions could move the court for an order of default adopting his or her plan if the other parent failed to file a proposed plan as required. A parent submitting a proposed plan would have to attach a verified statement that the plan was proposed in good faith. Either parent could file and serve an amended proposed plan according to rules for amending pleadings.

If each parent filed a parenting plan or the plan were otherwise in dispute, the parents would have to attempt to arrive at a mutually agreed upon parenting plan by an alternative dispute resolution process either through the Friend of the Court (FOC) mediation services or through another agency or an individual agreed upon by both parties. This provision would not apply if there were evidence that either parent had committed domestic violence.

If an alternative dispute resolution process were unsuccessful or inapplicable, and a mandatory settlement conference were provided by court rule, the parents would have to attend a mandatory settlement conference. A judge or FOC referee would have to preside over the conference and apply the criteria specified in the bill (described below). The parents in good faith would have to

review the proposed terms of the plans and other relevant issues with the judge or referee. A fact or legal issue that was not then in dispute would have to be entered as stipulated for purposes of final hearing or trial in the matter.

The court could not issue an order implementing a disputed parenting plan until the court held a hearing on the plan or plans. An action involving minor children governed by the bill would have precedence for hearing and assignment for trial over other civil actions.

Plan Objectives/Provisions

A parenting plan would have to have the following objectives:

- To have the child reared by both of his or her parents unless it were not in the "best interests of the child" (as defined in the Child Custody Act).
- To provide for the child's physical care, including the specification of responsibility for health care expenses and health care coverage.
- To maintain the child's emotional stability.
- To provide for the child's changing needs as he or she grew and matured in a way that minimized the need for future modifications to the plan. This would include consideration of provision for the child's education.
- To set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria specified in the bill.
- To minimize the child's exposure to harmful parental conflict.
- To encourage the parents, as appropriate under the bill, to meet their responsibilities to their minor children through agreements in the plan, rather than by relying on judicial intervention.
- Otherwise to protect the best interests of the child.

The plan would have to contain provisions governing resolution of future disputes between the parents, allocation of decision-making authority, parenting time, and the child's residential schedule. If a plan contained a provision for resolving future disputes through arbitration, the arbitration would have to be conducted in accordance with Chapter 50b of the Revised Judicature Act (RJA).

The parenting plan also would have to include a residential schedule that designated in which parent's home each minor child would reside on given days of the year, including holidays, birthdays of family members, vacations, and other special occasions, consistent with the bill's criteria. If a parent failed to comply with the plan or a child support order, the other parent's obligations under the plan or order would not be affected. The court could hold the noncomplying parent in contempt of court.

(The Child Custody Act defines "best interests of the child" as the sum total of the following factors to be considered, evaluated, and determined by the court:

- The love, affection, and other emotional ties existing between the parties involved and the child.
- 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.
- The capacity and disposition of the parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the State laws in place of medical care, and other material needs.
- The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- The permanence, as a family unit, of the existing or proposed custodial home or homes.
- The moral fitness of the parties involved.
- The mental and physical health of the parties involved.
- The home, school, and community record of the child.
- The reasonable preference of the child if the court considers the child to be of sufficient age to express preference.
- 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.
- Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- Any other factor considered by the court to be relevant to a particular child custody dispute.)

Decision-Making Authority

A parenting plan would have to allocate decision-making authority to one or both parents regarding their child's education, health care, and religious upbringing. The parents could incorporate an agreement related to their child's care and growth in these areas, or in other areas, into their plan consistent with the criteria in the bill. Regardless of the allocation of decision-making authority in the plan, either parent could make emergency decisions affecting the child's health or safety. Each parent could make decisions regarding the child's day-to-day care and control while the child was residing with that parent. If the plan prescribed mutual decision-making, but a mutual decision could not be reached, the parents would have to make a good-faith effort to resolve the issue through an alternative dispute resolution (ADR) process.

The court could approve the parties' agreement allocating decision-making authority or specifying rules in the areas described above if the court found that the agreement was consistent with a limitation on a parent's decision-making authority mandated by the bill; the agreement was made knowingly and voluntarily; and the agreement was in the child's best interests.

If the parties did not reach an agreement on allocating decision-making authority or the court did not approve the parties' agreement, the court would have to allocate decision-making authority based on the child's best interests. The court would have to order sole decision-making to one parent if the court found that a limitation on the other parent's decision-making authority were mandated by the bill; both parents were opposed to mutual decision-making; or one parent was opposed to mutual decision-making and the opposition was reasonable based on the following criteria:

- The existence of a limitation under the bill.
- Each parent's history of participation in decision-making in each of the specified areas.
- Whether the parents had demonstrated ability and desire to cooperate with one another in decision-making in each of the specified areas.
- The parents' geographic proximity to one another to the extent that it affected their ability to make timely mutual decisions.

The court would have to consider each of those criteria in allocating decision-making authority.

Residential/Parenting Time Provisions

Based on the child's best interests, the court would have to order residential or parenting time provisions for a child that encouraged each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The residential schedule or parenting time would have to be consistent with the bill's limitation provisions. If those provisions were not dispositive of the child's residential schedule or parenting time, the court would have to consider all of the following factors:

- The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent had taken greater responsibility for performing parenting functions relating to the child's daily needs.
- An agreement by the parties, provided it was entered into knowingly and voluntarily.
- Each parent's past and potential for future performance of parenting functions.
- The child's emotional needs and developmental level.
- The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities.
- The child's wishes if he or she were sufficiently mature to express reasoned and independent preferences as to his or her residential schedule or parenting time.
- Each parent's employment schedule. The residential schedule or parenting time would have to accommodate those schedules.

The court could order that a child frequently alternate his or her residence between the parents' households for brief and substantially equal intervals of time only if the court found that the provisions were in the child's best interests; no limitation under the bill existed; and either the parents had agreed to the provisions and the agreement was knowingly and voluntarily entered into, or the parents had a satisfactory history of cooperation and shared performance of parenting functions and the parents were available to each other, especially in geographic proximity, to the extent necessary to ensure their ability to share performance of the parenting functions.

Alternative Dispute Resolution

Unless precluded or limited by provisions of the bill, the court would have to provide alternatives to court action for resolving disputes, which could include counseling, mediation, or arbitration by a specified individual or agency, including the FOC. An ADR process would have to give preference to carrying out the parenting plan. Unless an emergency existed, the parents would have to use the designated process to resolve disputes relating to implementation of their parenting plan. A written record of an agreement reached in counseling or mediation and of each arbitration award, would have to be prepared and provided to each parent. If the court found that a parent used or frustrated the use of the dispute resolution process without good cause, the court would have to award attorney fees and financial sanctions to the prevailing parent. Upon the petition of either parent, the court would have to review the process and its results.

The court would have to set forth these requirements in the order establishing the parenting plan.

The court could not order an ADR process if the court found that a limitation applied or that either parent was unable to afford the cost of the process. Otherwise, in designating the process, the court would have to consider all relevant factors, including, but not limited to, the following:

- Differences between the parents that would substantially inhibit their effective participation in a designated process.
- The parents' wishes or agreements and, if they had entered into agreements, whether the agreements were made knowingly and voluntarily.
- Differences in the parents' financial circumstances that could affect their ability to participate fully in a given process.

The court could order domestic relations arbitration if all of the requirements of Chapter 50b of the RJA were met.

Limitations

A parenting plan could not require mutual decision-making or designation of an ADR process if the court found that a parent had engaged in any of the following conduct:

- Willful abandonment that continued for an extended period of time or substantial refusal to perform parenting functions.
- Physical, sexual, or a pattern of emotional abuse of a child.
- A history of acts of domestic violence or an assault or sexual assault that caused grievous bodily harm or the fear of that harm.

A parent's parenting time with his or her child would have to be limited if the court found that the parent had engaged in any of the types of conduct described above. A parent's parenting time would have to be limited if it were found that the parent resided with an individual who had engaged any of those types of conduct (other than abandonment). If a parent were convicted as an adult of criminal sexual conduct (CSC) in the first-, second-, third-, or fourth-degree, or assault with intent to commit CSC, the court would have to restrain the parent from contact with a child that otherwise would be allowed. If a parent resided with an adult who had been convicted, or with a juvenile who had been adjudicated, of one of those offenses, the court would have to restrain the parent from contact with the parent's child except contact that occurred outside that adult's or juvenile's presence. If the court found that the individual who resided with the parent were the parent's minor child or ward, and found that the safety and welfare of the child subject to the parenting plan would be adequately protected, the court could permit contact with that parent in that individual's presence.

In limiting parenting time based on conduct described above (willful abandonment; physical, sexual, or a pattern of emotional abuse; or domestic violence or assault), the court would have to consider the amount of time that had passed since the conduct occurred or the last occurrence of the conduct upon which the limitation was based.

The limitations imposed by the court concerning parenting time (based on abandonment, abuse, domestic violence, or assault) would have to be reasonably calculated to protect the child from physical, sexual, or emotional abuse or harm that could result if he or she had contact with the parent requesting parenting time. If the court expressly found, based on the evidence and the record, that a limitation on parenting time would not adequately protect the child, the court would have to restrain the parent requesting parenting time from all contact with the child.

The court could not enter an order for limited parenting time if the parent were found by clear

and convincing evidence in a civil action, or by a preponderance of the evidence in an action under the juvenile code, to have sexually abused the child. The court could not enter an order allowing a parent to have contact with the child if the parent resided with an individual who was similarly found to have sexually abused a child. If the court found that the individual who resided with the parent was the parent's minor child or ward, and found that the safety and welfare of the child subject to the parenting plan would be adequately protected, the court could permit contact with that parent.

If the court limited parenting time by requiring supervised contact between the child and the parent, the court could not approve of a supervisor who had engaged in physical, sexual, or a pattern of emotional abuse of the child. The court could not approve of a supervisor unless he or she accepted that the harmful conduct (abandonment, abuse, domestic violence, or assault) occurred, and was willing to and capable of protecting the child from harm. The court would have to revoke approval of the supervisor upon finding, based on the evidence and the record, that the supervisor had failed to protect the child or was no longer willing or able to protect the child.

If the court expressly found, based on the evidence and the record, that contact between the parent and the child would not cause physical, sexual, or emotional abuse or harm to the child, and that the probability that the parent's or another individual's harmful or abusive conduct would recur was so remote that it would not be in the child's best interests to apply limitations on parenting time, the court would not have to apply limitations. This provision would not apply if the court found that a limitation would not adequately protect the child.

The court could preclude or limit a parenting plan if a parent's involvement or conduct could have an adverse effect on the child's best interests as evidenced by the existence of any of the following factors:

- A parent's neglect or substantial nonperformance of parenting functions.
- A long-term impairment resulting from drug, alcohol, or other substance abuse that interfered with the performance of parenting functions.
- The absence or substantial impairment of emotional ties between the parent and the child.
- The parent's abusive use of conflict that created the danger of serious damage to the child's psychological development.

- A parent's withholding of access to the child from the other parent for a protracted period without good cause.
- Other factors the court expressly found adverse to the child's best interests.

In determining whether such conduct had occurred, the court would have to apply the civil rules of evidence, proof, and procedure. In entering a parenting plan, the court could not draw a presumption from the provisions of a temporary parenting plan.

Temporary Parenting Order

A parent seeking a temporary order relating to parenting time would have to file and serve a proposed temporary parenting plan by motion. If contesting the proposed plan, the other parent would have to file and serve a responsive proposed parenting plan. Either parent could move to have a proposed plan entered as part of a temporary order. The parents could enter an agreed-upon temporary parenting plan at any time as part of a temporary order. The proposed temporary plan could be supported by relevant evidence and would have to be accompanied by an affidavit that stated at least all of the following:

- The name, address, and length of residence with the individual or individuals with whom the child had lived for the preceding 12 months.
- Each parent's performance during the last 12 months of the parenting functions relating to the child's daily needs.
- The parents' work and child care schedules for the preceding 12 months.
- The parents' current work and child care schedules.
- Any of the circumstances described above (concerning limitations) that were likely to pose a serious risk to the child and that warranted limitation on the award to a parent of temporary residence or parenting time with the child pending entry of a permanent parenting plan.

The FOC would have to make a determination and proposed order regarding a temporary parenting plan. If the FOC could not reach a determination or there were objection to the proposed order, either party could make a motion to the court to proceed with a hearing and determination.

At a hearing on the motion, the court would have to enter a temporary parenting order incorporating

a temporary parenting plan that included all of the following: a schedule for the child's parenting time with each parent when appropriate; designation of a temporary residence or residences for the child; temporary support for the child; a personal protection order, if applicable; and allocation of decision-making authority, if any. Absent allocation of decision-making authority consistent with provisions of the bill concerning court approval or allocation by the court, neither party could make a decision for the child other than decisions relating to day-to-day or emergency care of the child, which would have to be made by the party who was present with the child.

A parent could make a motion for an order to show cause and the court could enter a temporary order, including a temporary parenting plan, upon a showing of necessity. A parent could move for amendment of a temporary parenting plan, and the court could order amendment to the plan, if the amendment conformed to the limitations of the bill and were in the child's best interests. If a proceeding for divorce, separate maintenance, or annulment were dismissed, any temporary order or temporary parenting plan would be vacated.

After considering the affidavit accompanying the proposed temporary plan and other relevant evidence presented, the court would have to order a temporary parenting plan that was in the child's best interests. In making this decision, the court would have to give particular consideration to both of the following: which parent had taken greater responsibility during the last 12 months for performing parenting functions relating to the child's daily needs, and which parenting arrangements would cause the least disruption to the child's emotional stability while the action was pending. The court also would have to consider the factors used to determine a residential schedule or parenting time in a permanent parenting plan.

Plan Review/Modification

At the end of each five-year period during which a parenting plan was in effect, and upon the filing of a petition by one of the parties governed by the plan, the court would have to hold a hearing to review the plan as to whether it continued to address the child's best interests. If the court found that modification was in the child's best interests, the court would have to modify the plan.

Otherwise, the court could not modify a permanent parenting plan unless the moving party showed

proper cause for a modification or a change of circumstances since entry of the parenting plan order. If the moving party made the required showing, the court would have to modify the plan upon presentation of clear and convincing evidence that the modification was in the child's best interests. In addition, the court could order adjustments to a parenting plan upon a showing of a change in circumstances of either parent or of the child if the proposed modification were one or more of the following:

- Modification of the dispute resolution process.
- Minor modification in the residential schedule that did not either change where the child was scheduled to reside in the majority of the time, or exceed 24 full days in a calendar year or five full days in a calendar month.
- Based on a change of residence or an involuntary change in work schedule by a parent that made the residential schedule in the parenting plan impractical to follow.

If the court found that a petition to modify an earlier parenting time was brought, or a refusal to agree to a modification was made, in bad faith, the court would have to assess the attorney fees and court costs of the nonmoving parent against the moving party.

A parent seeking a temporary parenting plan or modification of a parenting plan would have to submit, together with his or her petition, an affidavit setting forth facts supporting the requested plan or modification. The parent also would have to give notice, together with a copy of his or her affidavit, to other parties to the proceedings, who could file opposing affidavits. The court would have to deny the petition unless it found that adequate cause for hearing the motion was established by the affidavits, in which case it would have to set a date for hearing on an order to show cause why the requested plan or modification should not be ordered. A parent could file a petition for modification of a parenting plan only in the county of the court that issued the order implementing the plan.

Other Provisions

The court could interview a child in chambers to ascertain the child's wishes as to his or her residential schedule in a proceeding for divorce, separate maintenance, or annulment. In its discretion, the court could permit counsel to be present at the interview. The court also could seek the advice of professional personnel, whether

or not they were employed on a regular basis by the court. The advice given would have to be in writing and made available by the court to counsel upon request. Counsel could call for cross-examination a professional consulted by the court.

The bill provides that, solely for the purposes of other State or Federal statutes or other legal requirements that required a designation or determination of legal or physical custody "for purposes such as, by way of example and not limitation, tax exemptions or health care benefits", the court could designate in a parenting plan or by separate order a child's legal or physical custodian or custodians. This designation would not affect either parent's rights and responsibilities under the parenting plan. In the absence of such a designation, the parent with whom the child was scheduled to reside the majority of the time would have to be considered the child's custodian for those purposes.

The bill is tie-barred to House Bills 5627, 5628, 5635, and 5636. House Bill 5627 (H-1) would require the FOC to use electronic means to receive and disburse support payments. House Bill 5628 (H-2) would require the FOC Bureau to develop and recommend a spousal support formula. House Bill 5635 (H-4) would require couples to complete premarital education or counseling in order to receive a marriage license within three days.

MCL 722.23 et al. (H.B. 5636)

Legislative Analyst: S. Margules

FISCAL IMPACT

House Bill 5636 (H-1) would have no fiscal impact on State or local government.

House Bill 5637 (H-2) would require additional resources by the State Court Administrative Office in developing a form for completing a parenting plan. Although this cost is not assumed to be substantial, it would nonetheless require additional resources.

The bill could possibly require additional court time for alternative dispute resolution processes, mediation services, and hearings on parenting plans that differed among the parties involved or on plans that were not complied with by either parent.

The assignment of costs associated with the implementation of this bill is indeterminate. If the objectives of the bill were met, then there would be

a potential for reduced court cost and time associated with conflicts with current court orders. At the same time, because a parenting plan could provide for different alternatives for parents in serving the best interest of their child, more court time and court personnel could be utilized by parents trying to agree on the right plan.

Fiscal Analyst: M. Ortiz

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This Analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.