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THE RELEVANCE OF TEMPORARY CHILD CUSTODY ORDERS TO THE FORMATION OF AN ESTABLISHED CUSTODIAL ENVIRONMENT: A MODEL STATUTE FOR UNIFORM APPLICATION UNDER MICHIGAN LAW

Christine M. Drylie*

Few areas of the law are as turbulent and amorphous as that concerning child custody, especially in the divorce context. The adversaries, usually a mother and a father, are caught up in much more than a child custody dispute. Parents react emotionally rather than rationally. Regardless of the desirability of divorce, their lives and identities are uncertain. They necessarily look at their child's interests through the fog of their own emotions. Children often face the unfamiliar courtroom setting with only vague ideas of what is happening; because of their age or psychological state, many children cannot express their interests to the court. The judge in a child custody dispute is placed in an awkward position. Gathering evidence about which custody alternative will be in the child's best interests is difficult because it requires the judge to anticipate future results. The court must sift through the truths and half-truths presented in the parents' testimony, which will comprise the bulk of the evidence. In deciding what is best for a particular child, there often is no easy answer. Even when both parties are good parents a decision must be made.

Much of the ambiguity and turmoil inherent in child custody battles during a divorce has been alleviated by Michigan's Child Custody Act of 1970. The statute enumerates eleven factors that a court must consider when evaluating a child's best interests. Another statutory provision establishes the evidentiary burden on a parent seeking to modify a child custody order. In

2. Id. § 722.23.
3. Id. § 722.27(1)(c). The statute provides:
cases where the court finds that the child has an established custodial environment with the custodial parent, a more stringent standard applies. In these situations, a noncustodial parent must show by clear and convincing evidence the necessity of modifying a custody arrangement. The stricter standard provides continuity for the child and custodial parent: once a final order has been issued, both may develop a relationship free of uncertainty as to its permanence.

Typically, section 722.27(1)(c) ("the modification provision") applies when a noncustodial parent wishes to change custody several months or even years after the judgment of divorce and the final custody order have been entered. Nevertheless, the modification provision can also be applied in situations that are less typical and less appropriate. For example, courts may impose this higher evidentiary burden on challenges to a temporary custody determination that are made prior to the final divorce and custody decision. In such cases, application of the modification provision with its stricter standard is improper because the custody arrangement is intended to be temporary. Application of this higher evidentiary burden forces parents to contest the temporary order or risk losing custody of their child permanently. Neither the parents nor the legal system is prepared for this dilemma: it exacerbates an unstable situation and trivializes the permanent custody hearings which will follow.

This Note presents a Model Statute that clearly indicates when a court may find that an established custodial environment has arisen out of a temporary custody order. The Model Statute thus clarifies when it is appropriate to apply the clear and convincing evidentiary standard to situations involving tem-

(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may:

(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

4. Id.
5. Id.
6. See id.
temporary child custody orders. Part I of this Note describes the court’s use of temporary custody orders to determine whether an established custodial environment exists. Part II sets forth the Model Statute, which integrates current case law into statutory language designed specifically for temporary custody situations. Part II also analyzes each section of the Model Statute, presenting the case law that guides each provision and discussing the advantages that the Model Statute provides over the existing law.

I. Creation of an Established Custodial Environment from a Temporary Custody Order

In the early stages of a custody dispute, a temporary custody order may ensure continuity in the parent-child relationship. Parents can gain time for discovery and preparation of a legal case, to explore their feelings about custody, and to evaluate their ability to provide emotional and material support as single parents. These benefits could accrue without either parent feeling a need to fight the custody order. Its revocability protects both parents and allows them to present a full case at the final hearing stage. However, the benefits of a temporary custody order can be destroyed if a court treats the arrangement as an established one. As a result, a temporary order, while technically revocable, may become permanent in practice. This will force parents to fight for temporary custody before there has been an opportunity for discovery and often before the parents have been able to think rationally about their child’s future. In addition, it discourages alternative dispute resolution such as mediation because the party with temporary custody may not view judicial resolution as a gamble.


The Child Custody Act of 1970 ("the Act") created greater uniformity in judicial decision making in child custody cases.8 The Act provides a clearer standard for determining custody disputes by requiring judges to analyze the child's best inter-

7. See supra p. 2.
This general child custody standard contains eleven factors that a court must consider in determining the best interests of the child. The court must make specific written findings on each factor. Failure to consider a single factor can result in an order being overturned on appeal.

Section 722.27(1)(c) of the Act governs modifications of child custody orders. This section provides that a court shall not modify a previous child custody order to change the established custodial environment of the child unless clear and convincing evidence establishes that the modification is in the best interests of the child. The court applies the clear and convincing standard where its order would change the established custodial environment of the child, regardless of whether the case presents a modification of a prior order or a situation where a single parent custody arrangement developed without legal intervention.

The statute defines a custodial environment as:

established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

The higher threshold promotes stability within a child's life and protects the child against continuous changes in custody between divorced parents. The stricter evidentiary standard pro-

9. See id. § 722.25.
10. Id. § 722.23. These factors include the love, affection, and other emotional ties existing between the parties and the child; the capacity of the parties to provide love and guidance, as well as material needs; the permanence of the proposed custodial environment; the mental and physical health of the parties; the child's preference; and the willingness of each party to facilitate contact between the child and the other party. Id.
12. Id.
14. In most divorce cases, an established custodial environment has been created within the family, but not exclusively with either parent. During the marriage, both parents performed some caretaking functions and the child learned to depend upon both for love and guidance. Clear and convincing evidence, on the other hand, is only needed where one parent has established an exclusive custodial relationship.
16. For an analysis of the importance of continuity to a child's development, see J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973).
vides continuity for a child after the court has entered a permanent custody order.

These benefits, however, do not accrue if the court finds that an established custodial environment has resulted from a temporary custody order, possibly uncontested by one party in a divorce action. In the absence of a court finding that an established custodial environment had arisen out of a temporary custody order, the parent seeking custody would only have to show by a preponderance of evidence that the requested custody was in the child's best interests.\(^7\) A slight advantage in favor of the parent seeking custody would usually be sufficient. But if the court finds an established custodial environment, the parent seeking custody must prove the need for change by clear and convincing evidence.

Although the decisions of Michigan courts do not create a coherent body of law, judicial precedent in the state suggests that the modification provision with its higher evidentiary burden has been, and will continue to be, applied to custody arrangements arising from a temporary order.\(^8\) This practice is in need of statutory reform.\(^9\)

**B. The Effect of Temporary Custody Orders in Determining the Existence of an Established Custodial Environment in Michigan**

To understand the treatment of temporary custody orders under the modification provision, it is first necessary to understand the process followed by courts in dealing with custody modifications. Courts are expected to analyze every custody dispute in terms of whether an established custodial environment has been created.\(^20\) In most cases, neither parent will have devel-

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17. See supra note 13.
19. Application of the modification statute to temporary orders demands a full presentation of available evidence at the temporary stage. The parent who wins temporary custody will face a distinct advantage when the permanent order is litigated. Hence, both parents will try to gain this advantage, rather than treating the temporary order as an interim order of minimal significance. Section 722.27 (1)(c) encourages parents to fight for temporary custody decisions, a practice that is harmful to the child and to the parents’ continuing relationship with each other. After receiving temporary custody, the custodial parent can benefit by drawing out the process as long as possible in order to develop an established environment before the final hearing.
oped an exclusive relationship with the child, and the court will apply the best interests balancing test.\(^\text{21}\) In cases where the court finds that an established custodial environment has been created, it will apply the stricter evidentiary standard.\(^\text{22}\) Thus, the court must first determine whether a change of custody would disrupt an established custodial relationship. If such a relationship does exist, the court must then ask whether the disruption is necessary. The requesting party must prove the necessity of the change with clear and convincing evidence.

These steps, however, do not provide clear guidance. Application of the clear and convincing standard lacks uniformity and predictability\(^\text{23}\) because each judge has great discretion in determining when an established custodial environment exists. The application of the modification provision depends too much upon the judge’s analysis of the intangibles involved in a family relationship.

As a result, temporary custody orders can improperly provide the basis for a court to find an established custodial environment. It is essential that courts carefully examine these temporary arrangements to determine whether an established custodial environment actually exists. One example of a court doing so is found in \textit{Underwood v. Underwood}.\(^\text{24}\) The court granted the father custody of the child by an ex parte interim order.\(^\text{25}\) This arrangement continued for approximately two-and-a-half years, during which time the mother maintained a relationship

\(\text{21}\) In \textit{Stringer v. Vincent}, 161 Mich. App. 429, 411 N.W.2d 474 (1987), the Michigan Court of Appeals noted that in those cases in which an established custodial relationship does not exist, the trial court “may modify a custody order if the petitioning party can produce enough proof to convince the trial court by a preponderance of the evidence that it should give custody to the petitioner.” \textit{Id.} at 435, 411 N.W.2d at 477. The court must balance the eleven factors comprising the child’s best interests. The necessity of the custody decision is assumed because the court is not concerned with disrupting an established relationship.

\(\text{22}\) An explanation of the stricter evidentiary burden can be found in \textit{Stringer}, \textit{id.} at 434, 411 N.W.2d at 477. \textit{Stringer} involved a petition to change the custody order granted in a judgment of divorce. The court stated:

The first step in deciding any child custody dispute is to determine if there exists an established custodial environment. The Child Custody Act requires that a court refrain from changing custody if it would change the established custodial environment, unless presented with clear and convincing evidence that such change is in the best interests of the child.

\textit{Id.} (citations omitted).


\(\text{25}\) \textit{Id.} at 384, 414 N.W.2d at 172.
with her son, visiting him at the father's home.\textsuperscript{26} The mother filed a counterclaim for divorce and permanent custody shortly after the court entered the interim order, but did not actively pursue it for two years.\textsuperscript{27} The circuit court granted permanent custody to the mother.\textsuperscript{28} The court of appeals remanded for a determination of whether a permanent custodial environment had been established.\textsuperscript{29} The court held that a temporary custody order in itself was not enough to establish a custodial environment.\textsuperscript{30}

Although the \textit{Underwood} court stated that a temporary order alone cannot form a custodial relationship sufficient to impose the clear and convincing standard, the case suggests that behavior of the parties following a temporary order could be used to establish such a relationship. In its decision, the court noted that the father was living with relatives and dependent upon them for money in a situation that was clearly temporary.\textsuperscript{31} The record below was unclear as to the guidance, discipline, and material necessities provided by both the mother and father.\textsuperscript{32} It seems likely that the court would have found a custodial environment with the father if there had been a more stable home environment and regular employment.

The court of appeals also considered whether an established custodial environment can be created from a temporary custody order in \textit{Wealton v. Wealton}.\textsuperscript{33} In that case, the trial court awarded custody of three children to the mother. Seven years later, by stipulation, the court granted the father temporary custody of the youngest son for the summer. At the end of the summer, the father filed a petition seeking permanent custody of that child.\textsuperscript{34} The trial court made no finding concerning the custodial environment.\textsuperscript{35} Instead, it simply placed the burden on the father to prove the necessity of a custody change by clear and convincing evidence.\textsuperscript{36} On review, the court of appeals held that "[t]he court cannot presume an established custodial environment by reference only to a custody order, but must look to
the actual circumstances of each case.”37 The court said that determination as to the existence of an established custodial environment was necessary because the child had lived with his father for a significant amount of time: “The fact that a custody order is labeled ‘permanent’ or ‘temporary’ does not eliminate the requirement that the established custodial environment be determined.”38 Thus, the court of appeals held that a temporary order may only be one factor considered when judges analyze the current custodial relationship.

In contrast to the clarity of Wealton, the court of appeals established more ambiguous precedent in Blaskowski v. Blaskowski,39 where temporary custody of the minor child was awarded to the defendant mother. The court then granted permanent custody to the father. The mother appealed.40 The trial court had held that the clear and convincing evidentiary standard did not apply where the custodial environment was created by a temporary order:

Although the statute does seem to apply [the clear and convincing standard] to any order of the court, . . . it would be an anomaly to apply it to a hearing that was necessitated by a physical separation of the parties before there was an adequate chance for the court and the friend of the court and the parties to prepare all their investigative resources for a full and complete hearing on the merits.41

The trial court emphasized the need for more discovery and for a transitory custody period before the final court hearings.42 On appeal, the court suggested that the elements of an established custodial environment can develop whenever one parent has custody of the child for an extended period of time.43 The court found that whether the custody is pursuant to a permanent or temporary custody order is irrelevant.44 According to the court, labeling an order as temporary should not prevent the creation of an established environment because disruption of a

37. Id. at 410, 327 N.W.2d at 495.
38. Id.
40. Id. at 3, 320 N.W.2d at 269.
41. Id. at 5, 320 N.W.2d at 270.
42. Id. at 5, 7, 320 N.W.2d at 270.
44. Id. at 6, 320 N.W.2d at 270.
custodial relationship created after issuance of a temporary order can be as devastating to the child as the disruption of one created by a permanent order. In sum, the Blaskowski court found that an established custodial environment can be created through a relationship arising from a temporary order, but that the existence of a temporary order alone does not create this environment.

Blaskowski effectively strengthens custodial environments created by temporary orders. Although Blaskowski does not say that a temporary custody order automatically creates an established custodial environment, the case indicates judicial approval for upholding relationships arising from temporary orders. More importantly, it places the burden on the noncustodial parent to prevent the creation of a custodial relationship. It suggests that a temporary custody order, if left in place for a significant amount of time, can become an established custodial environment.

Blaskowski also clearly indicates that procedural fairness issues raised by parents have no impact on the custodial environment determination. The court of appeals in Blaskowski addressed—and dispensed with—claims of unfairness to the noncustodial parent in allowing use of temporary orders in this manner: "[T]he Legislature has decided that the best interests of the child prevail over procedural fairness to the parents and that the best interests of the child generally require continuance of an established custodial environment." The court concluded that "[t]rial courts and parties should endeavor to avoid having custody pursuant to a temporary order ripen into an established custodial environment by expediting the progress of contested custody cases to trial." The court naively suggests that parties should act quickly to avoid the development of a custodial environment, although often the judicial system prevents this. Parties cannot control crowded court dockets and other facets of the legal system which necessarily slow down resolution of their cases. The court also failed to specify the minimum time necessary to establish a custodial environment, leaving this to the discretion of other judges and leaving parents with an undefined sense of urgency.

After Blaskowski embraced the extended time period approach for finding an established custodial environment and en-

45. Id. at 6-7, 320 N.W.2d at 270.
46. Id. at 7, 320 N.W.2d at 271.
47. Id.
dorsed the use of temporary orders in this effort, the court of appeals has in some instances opted for a different mode of analysis.\textsuperscript{48} Several decisions have relied on case-by-case scrutiny to determine whether a custodial environment exists. For example, in \textit{DeVries v. DeVries},\textsuperscript{49} the court held that the existence of a temporary order does not remove the court's responsibility for determining whether an established custodial environment exists.\textsuperscript{50} In \textit{Breas v. Breas},\textsuperscript{51} the court interpreted \textit{Blaskowski} as allowing case-by-case analysis rather than a rigid application of the clear and convincing evidentiary standard for all relationships created by temporary order.\textsuperscript{52}

The case-by-case approach preferred in these subsequent decisions limits the power of a temporary order to create an established custodial environment, but it also provides little guidance for parents and attorneys trying to predict the influence of temporary custody orders. The flaws in \textit{Blaskowski} and the ambiguity of later decisions interpreting \textit{Blaskowski} point to the need for a more uniform approach to the effect of temporary custody orders in custody decisions.

II. A Model Statute for Consideration of Temporary Custody Orders

As long as the determination of established custodial environments in the postdivorce setting is left exclusively to the courts,

\textsuperscript{50} Id. at 271, 413 N.W.2d at 766. The court found that a custodial environment had been established with the mother because the children had lived most of their lives with their mother on the family farm and had a stable life there. Id. The custodial environment was established not by the temporary order, but by the quality of the relationship between the mother and children.
\textsuperscript{51} 149 Mich. App. 103, 385 N.W.2d 743 (1986).
\textsuperscript{52} Id. at 107, 385 N.W.2d at 745. In Breas, the court awarded temporary custody to the mother. Almost a year later, the trial court found that no established custodial environment existed and awarded joint legal custody with physical custody in the father. Id. at 105, 385 N.W.2d at 744. The mother appealed, claiming that the judge presumed that no custodial environment could exist because the initial custody order was temporary. Id. at 106, 385 N.W.2d at 744. The appellate court held that, "[i]n fact, the trial judge properly stated that the temporary custody order did not, by itself, establish the custodial environment. He expressly acknowledged that he was required to assess all the factors in the statute." Id. at 106, 385 N.W.2d at 745. The court further held that the trial judge had applied the \textit{Blaskowski} doctrine properly: "He did not disregard our decision in Blaskowski v. Blaskowski by focusing only on the 'temporary' nature of the original custody order and failing to assess the factual situation based on the statutory factors." Id. at 107, 385 N.W.2d at 745 (footnote omitted).
judges are apt to make custodial environment determinations unevenly. Even prior decisions that treat a temporary order as inconclusive can be distinguished by later courts based on factual differences. It seems unlikely that a uniform and reliable strategy for applying the established custodial environment test will come from the courts.

Because of this judicial ambiguity, legislative reform is essential. An even application of the test would protect parents and children from unnecessary turmoil and clarify the intangibles involved in the creation of an established custodial environment. Parents and family law attorneys need to be able to forecast accurately what will influence a court’s decisions regarding custody. Judges need a coherent standard to apply in every case. While some case-by-case analysis will always be necessary in child custody situations, greater legislative guidance would identify key factors needed to create a custodial environment. As with the best interests standard of section 722.23, judges should be required to analyze and make findings on a series of factors before determining whether a custodial environment exists.

A. Proposed Model Statute

In order to ensure judicial uniformity in interpretation of temporary custody orders when determining whether an established custodial environment exists, the Michigan Legislature should amend the Child Custody Act to include this proposed section:

Be it enacted:

In custody disputes arising from divorce, the court may find that an established custodial environment was created by a relationship arising through a temporary custody order of the court only after considering, evaluating, and determining the sum total of the following factors:

(a) The parties' awareness of and treatment of the relationship as established;
(b) Any court-ordered review of the temporary custody order;
(c) The amount of time that has passed within the temporary environment;

(d) Visitation by the noncustodial parent;
(e) Any other factors incident to the divorce that may have detracted from the stability and permanence of the established relationship, including, but not limited to, emotional disorder and geographic moves.

The Model Statute is designed to identify distinct factors needing consideration in determining the existence of an established custodial environment, while allowing some judicial discretion. It also aims to distinguish challenges to temporary custody orders from requests for custody modifications after a divorce is final, which require clear and convincing evidentiary proof of necessity.

Factors (a)-(d) specifically limit the circumstances under which an established environment can be found to have developed. To some degree, the factors serve as a guide to parties seeking to prevent the development of an established custodial environment. For example, a noncustodial parent can use visitation privileges to maintain a relationship with the child with the knowledge that the court will consider this factor.

Some judges may claim that this statute is unduly burdensome because it requires detailed analysis of a greater number of factors than is presently required. But application of this provision should be no more burdensome than assessment of the best interest factors required under section 722.23. The same type of specific findings are required under the best interests standard.

With the greater guidance provided by the Model Statute, the outcome of child custody cases should become more predictable. Interested parties can use the Model Statute to estimate the likelihood that a specific temporary arrangement will result in an established custodial environment. Most typical divorce custody disputes will not implicate all of the Model Statute factors. In these cases, a court would not impose the clear and convincing standard against the parent without temporary custody. Only in unusual situations—for example, where the custodial parent’s relationship with the child is enhanced by other factors—would an established custodial environment be found.
B. Analysis of the Model Statute Factors in the Context of Michigan Case Law

The Model Statute seeks to incorporate and unify Michigan case law relating to modification of custody. Prior decisions have often been based upon individual circumstances rather than any overarching principle. Although the outcomes may have been beneficial to individuals involved, they have not provided guidance for future disputes. The statute furnishes a uniformity lacking in the prior cases and builds upon these past decisions. Each section of the Statute draws from Michigan case law, tying the factual differences together into a single standard.

1. Awareness and treatment of a relationship as established—The factor that assesses awareness and treatment of a relationship as established adopts an approach taken by several courts which have looked at the intent and knowledge of the parties to determine whether an established custodial relationship has been created. The premise is that an established relationship cannot develop if all parties consider the arrangement to be of limited duration. One case recognizing the importance of the subjective intent of the parties is Curless v. Curless,54 where the Michigan Court of Appeals held that a temporary custody order does not guarantee an established custodial environment.55 Examining the specific facts of the case to determine the nature of the relationship,56 the court considered two important factors: the father’s statement that he was going to contest custody at the time of the temporary award and the amount of time the children spent with their father.57 The court found that the temporary relationship was not stable, and that the children were aware that the custody arrangement was temporary.58 Thus, the court held that no custodial environment had been established.

Similar precedent is found in Vander Molen v. Vander Molen.59 During divorce proceedings, the plaintiff mother filed for and was awarded temporary custody of the parties’ four children. The defendant filed objections to this decision.60 At the trial level, the mother argued that she had been the primary

55. Id. at 656, 357 N.W.2d at 923.
56. Id. at 675-76, 357 N.W.2d at 923.
57. Id. at 677, 357 N.W.2d at 923.
58. Id., 357 N.W.2d at 924.
60. Id., 418 N.W.2d at 109.
caretaker for the children before the divorce. Additionally, she claimed that the father’s long work hours prevented him from spending time with the children. The father denied all allegations of neglect. A Friend of the Court employee testified that the girl had indicated a preference to remain with her mother, while the oldest boy wanted to live with his father. The other two boys were too young to state a preference.

The trial court found that an established custodial environment existed with the mother for only one child, the daughter. No such environment was found for the three remaining boys and permanent custody was awarded to their father. The trial court supported its findings:

"[W]e would observe that under the statute a custodial environment becomes established . . . when . . . the affected parents and the children view it as an established custodial environment or treat it as a custodial environment in terms of their conduct and their attitude toward each other and desire that relationship to continue."

This subjective standard was upheld by the appellate court, which stated that the conduct and attitudes of the parents and child must be scrutinized to determine whether an established custodial environment exists.

61. *Id.* at 452, 418 N.W.2d at 110.
62. *Id.* at 453, 418 N.W.2d at 110.
63. The Friend of the Court is a Michigan agency of the circuit court. *MICH. COMP. LAWS ANN.* § 552.503 (West 1988). The Friend of the Court was created by statute to aid the court in resolving domestic cases, and often makes custody recommendations to the court after meeting with both parents. *Id.* §§ 552.501, 552.503.
65. *Id.* at 453, 418 N.W.2d at 110.
66. *Id.* at 457, 418 N.W.2d at 112.
67. *Id.* *Vander Molen* suggests that if the parties, or at least one of the parties, do not view the order as permanent, then a custodial environment cannot be established. Yet Sedlar v. Sedlar, 165 Mich. App. 71, 419 N.W.2d 18 (1987), a case decided a month after *Vander Molen*, tempers this analysis. In *Sedlar*, the plaintiff mother was awarded temporary and ultimately permanent custody of her minor daughter following the parties’ divorce. *Id.* at 73, 419 N.W.2d at 18. Nine months later, the mother asked the father to take custody of the child while she resolved problems in a new relationship, and consented to a new order giving custody to the father. A month after that, the mother petitioned for a change of custody. *Id.*, 419 N.W.2d at 19. A court referee found that an established custodial environment existed with the father and denied the change. *Id.* at 74, 419 N.W.2d at 19. The mother appealed, claiming that because she understood the change to be temporary, a custodial environment could not have resulted. *Id.* at 75, 419 N.W.2d at 19. The court held that “the change in custody order did not explicitly indicate that it was for a temporary amount of time.” *Id.* at 76, 419 N.W.2d at 20. Legal custody was changed by the agreement. *Id.* The court found that a custodial environ-
2. *Court-ordered review*— The court-ordered review factor in the Model Statute provides a safeguard for parents in a temporary custody situation. By determining that review of a custody arrangement is essential, a court recognizes the possible temporary nature of the environment. A court may order review because of facts indicating that the temporary arrangement may not be stable or beneficial to the child. Review underscores the impermanence of the custodial environment in the minds of the parties, and allows temporary placement when the court is unable to foresee the outcome with certainty.

In *Becker v. Becker*,\(^6\) for example, the father was awarded custody of the child with an automatic review in six months. After the review, custody was changed to the mother. On appeal, the father claimed that a custodial environment had been established and that the court improperly ignored section 722.27(1)(c).\(^9\) In rejecting the father's arguments, the appellate court emphasized that automatic review had been ordered by the original trial court: "Under the facts of this case, particularly in view of the automatic review which the trial judge provided for in the divorce judgment, it cannot be urged persuasively that in the interval a permanent custodial environment had been established."\(^7\) Thus, automatic review can be treated as prima facie proof that there is no established relationship.

3. *Amount of time passed within the temporary environment*— The factor assessing the amount of time that has passed under a temporary order recognizes that the element of time is a strong safeguard for parents seeking to avoid creation of an established custodial environment. According to section 722.27(1)(c), a custodial environment must be established "over an appreciable time."\(^7\) As a result, a noncustodial parent has an interest in speedy resolution of a custody dispute to prevent the formation of an established custodial environment, while the custodial parent may seek to lengthen the procedure, hoping that an appreciable period of time will pass before the final ad-

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\(^9\) Id. at 373, 290 N.W.2d at 151.
\(^7\) Id. at 374, 290 N.W.2d at 151.
\(^7\) MICH. COMP. LAWS ANN. § 722.27(1)(c) (West Supp. 1989).
judication. The time factor in the Model Statute ensures that courts will scrutinize this issue.

One example of time in a temporary environment being critical in a custody dispute is *Meyer v. Meyer,*\(^7\) where the trial court granted temporary custody of two boys to their mother. Permanent physical custody was granted to the father with legal custody vested in the Friend of the Court.\(^7\) After a rehearing, physical custody of one child was changed to the mother with legal custody remaining in the Friend of the Court.\(^4\) The trial judge made no findings as to an established custodial environment, but on review the appellate court concluded that none existed.\(^7\) The court stated: "We do not believe that either of the three-month periods constituted an 'appreciable' period of time which would support a finding that an established custodial environment existed as to either party."\(^7\) The court concluded that these periods were unstable and did not result in the children turning to either parent primarily "for 'guidance, discipline, the necessities of life and parental comfort.'"\(^7\)

Neither prior decisions nor the Model Statute specifically define appreciable time. This concept is impossible to define precisely because its definition must vary with the age and emotional make-up of the child and the interaction with both parents.\(^7\) The individual nature of each custody dispute will cause the appreciable time to vary depending upon the facts. The Model Statute does not define appreciable time; it requires the court to make precise findings regarding time spent in the environment and to consider this factor in deciding whether a custodial environment has been established.

4. Visitation — The Model Statute factor requiring court review of visitation by the noncustodial parent recognizes that visitation is a powerful tool with which the noncustodial parent can prevent the creation of an established custodial environment. Frequent visitation prevents a child from developing the complete attachment to only one parent required by the established custodial environment definition in section 722.27(1)(c).\(^7\)

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73. *Id.* at 421, 395 N.W.2d at 66.
74. *Id.* at 422, 395 N.W.2d at 66.
75. *Id.* at 423, 395 N.W.2d at 67.
76. *Id.* at 424, 395 N.W.2d at 67.
77. *Id.* (quoting MicH. COMP. LAWS § 722.27(c) (1979)).
78. See generally J. Goldstein, A. Freud & A. Solnit, *supra* note 16.
For example, time spent with the children was an important factor in *Schwiesow v. Schwiesow*. The Michigan Court of Appeals analyzed the mother’s absence from the child before the divorce and found that her absence had contributed to the development of a custodial environment. Under a similar analysis, parents who fail to visit, even through no fault of their own, may find that an established custodial environment has developed in their absence. Parents who visit regularly can argue that the child still looks to them for support. Visitation may also be a sign that the parties are aware of the temporary nature of the relationship.

5. Other factors incident to the divorce that may detract from the stability of the relationship—Because divorce involves change and turmoil, judges must look into this confusion to determine the stability of the parent-child relationship. The fifth Model Statute factor allows judges to exercise discretion in examining other factors in a particular divorce in addition to assessing the four factors required in all temporary custody cases. This provides some room for discretionary determinations without allowing discretion to define totally the custodial environment.

   a. Example of a discretionary factor: special divorce circumstances—An example of the exercise of discretion by a court in a case with special circumstances is found in *Baker v. Baker*. The case involved a custody dispute between two divorced parents. No custody order had been entered at the time of the divorce, but both parents had agreed that the two children should live with the mother. Several months after the mother and children moved to Colorado, the father physically removed one child from the mother’s custody and received a temporary custody order from the court. One month later, the trial court awarded custody of both children to the mother.

   Upon review, the Michigan Supreme Court held that an established custodial environment had not existed with the father. For guidance, it relied upon the legislative intent to prevent disruptive and unwarranted custody changes. The court stated

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81. Id. at 556-57, 406 N.W.2d at 881.
83. Id. at 572, 309 N.W.2d at 532.
84. Id. at 574, 309 N.W.2d at 533.
85. Id. at 574-75, 309 N.W.2d at 533.
86. Id. at 575, 309 N.W.2d at 534.
87. Id. at 582, 309 N.W.2d at 537.
88. Id. at 576-77, 309 N.W.2d at 534-35.
that the legislature intended that custody should be modified only in compelling situations. In dismissing the effect of the temporary custody orders, the court found that:

[T]he orders of custody . . . did not, of themselves, establish the custodial environment with which we are concerned here. Such an environment depended instead upon a custodial relationship of a significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence.

The father contended that a custodial environment was established in Michigan because the child had lived there from birth until the divorce. The court rejected that assertion: "Certainly those repeated custodial changes and geographical moves, with the necessarily attendant emotional implications, destroyed the previously established custodial environment in which the boy was living and precluded the establishment of a new one, at least until after the trial." When the child returned to Michigan with his father, a new custodial relationship was established from which a new custodial environment could have—but had not yet—grown.

*Baker* points to some of the difficulties that arise in creating an established custodial environment out of a temporary custody relationship. Assessing those kinds of issues should be left to the discretion of the court. The emotional turmoil stemming from the geographical moves in the postdivorce period may prevent development of this environment even if there is a fairly long time period between the temporary and permanent orders. A child is unlikely to look to one parent for support and guidance if the family life remains disrupted and unstable. Parents cannot devote the required emotional energy needed to establish a custodial relationship when both their lifestyle and their child's lifestyle seem impermanent.

*b. Example of a discretionary factor: parent-child relationships during marriage*—Some courts seeking to determine the

89. *Id.* at 577, 309 N.W.2d at 535.
90. *Id.* at 579-80, 309 N.W.2d at 536.
91. *Id.* at 578, 309 N.W.2d at 535.
92. *Id.* at 581, 309 N.W.2d at 536.
existence of a custodial environment have examined the parent-child relationships that existed prior to divorce. This is another area that should be left to judicial discretion. A strong and nearly exclusive relationship between the child and one parent may facilitate the development of an established custodial environment after the divorce. In Schwiesow v. Schwiesow, for example, the plaintiff mother was away from the father and two children for significant amounts of time prior to the divorce while she finished her education and recovered from serious injuries from a car accident. During this time, the children lived with their father on the family farm. The permanent order granted joint legal custody with physical custody to alternate between parents annually. The father appealed the permanent order, arguing that he had established a custodial environment for the children.

The Michigan Court of Appeals found that a custodial environment had been established with the father. The mother’s absences from the home before the divorce and the father’s role of primary caretaker during this period played a large part in this decision: “We examine the circumstances surrounding the care of the two minor children in the years immediately preceding the divorce trial to determine whether they were being cared for in an established custodial environment.”

Although the Schwiesow situation appears unique enough to mandate this scrutiny into the marriage to determine the existence of a custodial environment, Schwiesow and Mazurkiewicz v. Mazurkiewicz both appear to contradict the Baker court’s statements that a custodial environment must begin anew after a substantial change in the family situation such as divorce.

94. Id. at 552, 406 N.W.2d at 879.
95. Id. at 554, 406 N.W.2d at 880.
96. Id.
97. Id. at 556, 406 N.W.2d at 881.
98. Id.
99. Id. at 557, 406 N.W.2d at 881.
100. 164 Mich. App. 492, 417 N.W.2d 542 (1987). Mazurkiewicz, where the court found that no custodial environment existed, cited this aspect of the Schwiesow decision: “[R]ecently, this Court has suggested that, in order to determine whether an established custodial environment exists, we need to examine the circumstances surrounding the care of the children in the years immediately preceding the divorce trial.” Id. at 498, 417 N.W.2d at 545. The court found that the defendant was the children’s primary caretaker and visited regularly with the children after the parents’ separation. During the marriage, the plaintiff frequently relied on baby-sitters while she was away from home. Id. at 499, 417 N.W.2d at 546.
101. See supra text accompanying note 92.
These holdings give the primary caretaker an advantage which should not be present in a best interests analysis. The same line of reasoning could also prevent a parent who did not serve as primary caretaker before the divorce from establishing a custodial environment after the divorce, even though that parent had assumed all caretaker duties. Thus, these cases may be potentially harmful to fathers who seek permanent custody but who were not primary caretakers during the marriage.

III. Conclusions

Under the broad provisions of the current Michigan child custody law, Michigan courts have great discretion in determining whether an established custodial environment exists. A temporary custody order sometimes provides the catalyst a judge needs to find the existence of such an environment, which in turn will determine the outcome of custody disputes. But a judge can also view a temporary custody order as inadequate evidence of an established custodial environment. Under current case law either outcome is valid and, if accompanied by a decision properly discussing the possibility of a custodial environment, is likely to be upheld on appeal. Under these circumstances, attorneys and parents involved in child custody disputes may justifiably be unsure of how to structure an argument that a custodial environment has not been created.

The strongest bar to the establishment of a custodial environment is the inherent turmoil in postdivorce periods. The parties may think of any arrangement as temporary simply because they have not yet restructured their lives. This time is also emotionally difficult for children—they are unlikely to turn exclusively to the parent with temporary custody for support and guidance. Many children hope that their parents will reconcile; others want to avoid choosing between parents. If both parents maintain contact with the child, it is unlikely that an established relationship with either one of them will develop, regardless of a temporary custody provision.

For these reasons, legislative reform is essential. The proposed Model Statute, building upon current case law, offers a uniform approach for assessing a temporary custody order when determining whether an established custodial environment exists. It adds clarity and certainty to an otherwise ambiguous doctrine. Because most custody decisions arising from divorce will not satisfy the factors needed under the Model Statute to establish a
custodial environment, courts can distinguish between custodial arrangements sought through divorce and those requested through later custody modifications. As a result, generally only those noncustodial parents seeking to modify custodial arrangements after a divorce should be required to prove the necessity of the change through clear and convincing evidence. The stricter standard would only apply to temporary custody situations when an established custodial environment as set forth by the factors in the Model Statute clearly exists. The ultimate beneficiaries of the uniformity provided by the Model Statute would be the children.