

# New Decision Adds Wrinkle to Joint Legal Custody

by Dion E. Roddy

On June 25, 2014, the Michigan Supreme Court issued its ruling in *In re AJR*, affirming the Court of Appeals decision that reversed the trial court's termination of the parental rights of the biological father who did not have physical custody, but shared legal custody – a parent who had not supported, visited or communicated with the child for more than two years – in order to permit the mother's new spouse to proceed with a stepparent adoption.<sup>1</sup> The highest court interpreted the relevant statute at issue, MCL 710.51(6), to state that only a parent having sole legal custody may employ it to terminate the rights of an absent and non-supportive parent for purposes of stepparent adoption.<sup>2</sup>

This ruling has the potential to add a speed bump in the trend over the past couple of decades for attorneys and courts to facilitate joint custody between parents based on arguments that such arrangements benefit the children and the parents, encourage the payment of child support, reflect modern parenting trends and ease judicial administration.<sup>3</sup> It is safe to say that joint custody, especially as it pertains to legal custody, has become the "default" position of many family law practitioners. In fact, recently proposed legislation has sought to make joint custody the presumption in custody disputes between parents.<sup>4</sup> However, the recent decision in *In re AJR* serves as a reminder that joint custody arrangements may not always be better for the children under certain circumstances. In what situations would an attorney be warranted to advise a client to seek sole custody? In order to properly discuss this question, it is necessary to take a look at the current custody landscape in Michigan.

## *A Brief Overview of Custody*

Child custody under Michigan law is divided into two components: physical custody and legal custody.<sup>5</sup> Physical custody "pertains to where the child shall physically reside."<sup>6</sup> Legal custody, on the other hand, "is understood to

mean decision-making authority as to important decisions affecting the child's welfare."<sup>7</sup> This article addresses legal custody, so I will deliberately limit my discussion to it.

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Legal custody pertains to *important* decisions only. Regardless of whether a parent has legal custody, he or she is responsible for the day-to-day decisions while the children are in the parent's care, either by virtue of physical custody or parenting time.<sup>8</sup> Decisions that fall under the umbrella of legal custody, however, go beyond the everyday, encompassing the overarching matters that have a large impact on how a child is raised and the direction of his or her life.<sup>9</sup> Such matters include, but are not limited to, education, religious training, non-emergency medical treatment and discipline.<sup>10</sup>

Joint legal custody is an arrangement whereby parents share this authority to make choices regarding the welfare of the child.<sup>11</sup> Short of creating a presumption in favor of joint custody, Michigan's statutory scheme nevertheless is set up to promote joint custody between parents.<sup>12</sup> Parents must be advised of joint custody and the court must consider a joint custody award upon the request of either parent.<sup>13</sup> The court, in determining whether an award of joint legal custody is appropriate in a given situation, is governed by the best interest of the child as determined by the statutory factors articulated in MCL 722.23, as well as by whether the parents will be able to cooperate in making important decisions regarding their child(ren).<sup>14</sup> While personal animosity and other issues leading to the breakdown of a marriage may tend to bleed over into areas regarding how the parties' children should be raised, whether the parties get along personally should not be the sole factor in determining whether joint custody is appropriate in a given situation.<sup>15</sup> When parents are fundamentally unable to agree on important matters concerning the child, joint custody should not be awarded.<sup>16</sup>

***The Implications of Joint Legal Custody***

Whether a parent has legal custody has a significant impact on the amount of control the parent can exert over his or her child's, and indirectly the other parent's, life. Three examples are illustrative.

**Change of Domicile.** MCL 722.31 governs changing the residence of a child when parental custody is governed by court order. A parent may not change a child's residence more than 100 miles from the place where the child resided at the beginning of the action unless the parents agree or the court approves the change.<sup>17</sup> In deciding whether to approve a move of more than 100 miles, the court must undertake a complex, multi-tiered analysis.<sup>18</sup> First, it must determine by a preponderance of the evidence whether:

1. The move has the capacity to improve the quality of life for both the child and the parent;
2. Each parent has complied with and utilized the parenting time order governing the parties, and whether the move is motivated by a desire to frustrate the parenting time schedule;
3. It is possible to fashion a modified parenting time arrangement that will continue to preserve and foster the relationship between

the child and the parents, and whether it is likely that the parents will comply with such a modification;

4. The opposing parent is motivated by a desire to secure a financial advantage regarding the governing support obligations between the parties; and
5. Domestic violence has played a role.<sup>19</sup>

Upon determining that the moving parent has met his or her burden regarding the referenced factors, the court must determine whether an established custodial environment exists with the parent opposing the move.<sup>20</sup> If the court finds that indeed an established custodial environment exists with the parent, then the court must examine whether the move will cause a change in that established custodial environment.<sup>21</sup> If a change would occur, the parent proposing the move must show by clear and convincing evidence that the move is in the best interest of the child.<sup>22</sup> If no change in the custodial environment would ensue from the move, then the modification in the parenting time scheme necessary to facilitate the move must be shown by a preponderance of the evidence to be in the child's best interest.<sup>23</sup>

What is striking is that this four-level analysis does not apply when the moving parent has *sole legal custody*.<sup>24</sup> So, while a parent may not enjoy having his or her child reside with him or her because the other parent has sole physical custody, that same parent may have tremendous control over the child's residence by virtue of joint legal custody.<sup>25</sup>

**Moving out of state.** A parent who wishes to move with his or her minor child out of the state of Michigan must obtain court approval if custody is governed by a court order.<sup>26</sup> In determining whether to grant the move, the court is given no guidance other than that it must comply with MCL 722.31, described *supra*.<sup>27</sup> But MCL 722.31 only applies in situations where the parents share legal custody. When only one parent has legal custody, the court is told it must use its discretion in determining whether to grant the out-of-state move, but without 722.31 to provide a framework, the court has no guidance on how to exercise that discretion.<sup>28</sup> Recent decisions have opined that the trial court has no choice but to grant the request.<sup>29</sup>

**Guardianship.** MCL 700.5204(2)(c) permits the court to appoint a guardian for an unmarried minor when all of the following apply: (1) the parents have never been married to each other; (2) the parent with custody of the child dies or is missing *and the other parent does not have legal custody*; and (3) the proposed guardian is related to the child within the fifth degree by marriage, blood or adoption. Under this statute, a scenario can be imagined where an award of joint legal custody could result in a dying parent's wish that relatives – perhaps grandparents – raise the parent's child would go unfulfilled, with the child instead going to a distant and unavailable noncustodial parent.<sup>30</sup>

Against this background of legal custody set forth above arose *In re AJR*, which addressed MCL 710.51(6), the statute

pertaining to involuntary termination of parental rights in stepparent adoption.

### In re AJR

Petitioner-mother and respondent-father were married and one child issued from the marriage.<sup>31</sup> The parties subsequently divorced with the mother being awarded sole physical custody and the parties sharing legal custody of the minor child.<sup>32</sup> The mother subsequently remarried and the child lived in the home with the mother and stepfather.<sup>33</sup> In 2012, the stepfather, joined by his spouse – the mother – petitioned the court to adopt the child.<sup>34</sup> Prior to the filing of the petition, the father had failed to pay child support or communicate with the child in any meaningful way.<sup>35</sup> Because the child's father would not consent to the termination of his parental rights, the petitioners sought termination pursuant to MCL 710.51(6), which permits the court to terminate the rights of a noncustodial parent when that parent has failed to both comply with a support order and visit or contact the child within the two-year period immediately preceding the filing of the adoption petition.<sup>36</sup> The trial court granted the petition, terminating the father's rights.<sup>37</sup> The respondent appealed. (continued)

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The Court of Appeals reversed the trial court, holding that because the child's parents shared legal custody, the court could not terminate the respondent's parental rights without his consent.<sup>38</sup> The Court of Appeals looked specifically to the language of the statute wherein it provided that if "the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court ... may issue an order terminating the rights of the other parent ..."<sup>39</sup> The court interpreted the article "the" to mean the parent having sole legal custody. The court pointed to the fact that the Legislature used the more general article "a" in the previous section of the statute, MCL 710.51(5). The court reasoned that because the Legislature chose to use the definite article "the" in 51(6) as opposed to the general article "a," it must have intended the effect given by the definite article, and thus the Legislature must have intended that the petitioning parent must be the only parent with legal custody.<sup>40</sup>

The Supreme Court granted leave to appeal in order to address, *inter alia*, the question whether 51(6) requires that the petitioning parent have sole legal custody. In its analysis, the Court drilled down deeper into the adoption code, specifically looking to MCL 710.43(7), which addresses consensual termination of parental rights in a stepparent adoption proceeding.<sup>41</sup> The Court found that 43(7) employed the same phrase used in 51(6), "the parent having legal custody," to refer to the parent joining with the new spouse in petitioning for the stepparent adoption; furthermore, 43(7) contrasted that parent with "the parent not having legal custody," which referred to the other parent whose rights the petitioners were seeking to have terminated. The Court concluded that the Legislature's use of the term "the parent having legal custody" in 43(7) clearly indicated that the phrase was intended to refer to the parent with sole legal custody.<sup>42</sup>

The petitioners argued that permitting only parents with sole legal custody to employ 51(6) in order to terminate the other parent's rights would lead to an absurd result by making it impossible for a parent sharing joint legal custody to ever succeed with a stepparent adoption without consent of the noncustodial parent.<sup>43</sup> The Court responded by finding nothing absurd in upholding the Court of Appeals' interpretation,<sup>44</sup> reasoning that in order for a parent sharing legal custody to proceed with a stepparent adoption under the statute as enacted, the petitioning parent would first need to acquire sole legal custody of the child as set forth in MCL 722.27. The Court found this additional step in securing a stepparent adoption without the consent of the noncustodial parent not unduly burdensome, but rather consistent with the adoption code and the presumption followed by the courts.<sup>45</sup> In the end, the Court affirmed the Court of Appeals decision.

### Conclusion

The Court's decision in *AJR* has clearly made it much more difficult for a parent sharing joint legal custody to proceed with a stepparent adoption without the consent of the other parent, even when the other parent has failed to support or have any meaningful interaction with the child to be adopted. Now, not only does the petitioning parent have to prove that the other parent has not supported, visited or communicated with the child for the two-year period preceding the filing of the adoption petition, but before that, he or she must seek sole legal custody of the child. A party seeking modification of custody, governed by MCL 722.27, must show proper cause or a change of circumstances that would warrant the court reviewing its current custody order.<sup>46</sup> If the moving party is successful in meeting this threshold determination, he or she must then show by a preponderance of the

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evidence that the change of custody is in the best interest of the child.<sup>47</sup> *AJR*'s holding has put a petitioning parent sharing legal custody with the other parent in the position of having to show that it is in the best interest of the child that the other non-supportive, uninvolved parent not continue to have legal custody; a fact that seems evident by the other parent's lack of support and involvement. The hoops that the Court has required petitioning parents without sole legal custody to jump through seem redundant at best. One must also consider whether the motion to modify custody would give the other parent time to start paying child support and/or exercising parenting time, thereby thwarting the stepparent adoption that prompted the motion in the first place.

In rendering its decision, the Court did note, "to the extent that petitioners are dissatisfied with the remedy available to them ... they may seek recourse with the Legislature."<sup>48</sup> I suspect that an effort may already be underway to take the Court up on its suggestion. Regardless, *AJR* may have caused more problems than it has attempted to solve.

The result handed down by our highest court in *AJR* and the resulting consequences for petitioning parents seeking a more stable situation for their children only underscore the larger questions at hand of whether a predilection for joint

legal custody by attorneys, judges and others involved in overseeing custody arrangements serves the children best. As has been illustrated, joint legal custody can severely restrict the movements and decisions of a parent with sole physical custody of the children, while at the same time subjecting the other parent to virtually no restrictions or requirements regarding his or her residence or obligation to support or be involved with the children.<sup>49</sup> The respondent-father in *AJR* had no obligation to support or visit his children, yet he retained all of his rights as a joint legal custodian. He exercised those rights in no way other than to prevent an involved and supporting stepfather from making official the role he appeared to be performing much better than the respondent father with legal custody.

Joint legal custody may in some instances be the best situation for children. Two parents who are motivated and cooperative enough to put aside the differences that led them to part from one another in order to do what is best for their children may be ideal candidates for joint legal custody. However, I would submit that most situations are not so ideal. Many, if not most, parents are not able to get past their differences and may use joint legal custody to make a difficult situation even worse by being unreasonably uncooperative, relying on the fact that the other parent will be unwilling to engage in a change-of-custody battle in court.

Lawyers must be aware of their client's intentions before presuming that joint legal custody is even a viable option in a particular case. Is the client planning on moving to another region of the state? To another state altogether? For unmarried parents, is the client unwilling or reluctant to allow the other parent to raise the children in the event of his or her death, but instead wishes another family member to raise them? Has a prosecutor filed a complaint against another parent seeking support or a determination of paternity and has the custodial parent remarried and established a stable home for the child? An affirmative answer to these and other questions should prompt an attorney to consider whether sole legal custody may be in his or her client's best interest.

*In re AJR* serves as a reminder to family law practitioners that the "default" position of joint legal custody may not always be the best arrangement between parents. Depending on the type of action undertaken – whether it is a change of domicile, a guardianship or a stepparent adoption – the difference between sole and joint legal custody can mean a significant difference in the amount of litigation necessary to get the desired result.



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*Champion. Dion is an award-winning musician and audio producer, and enjoys reading, travelling, and spending time with his wife and daughter.*

## Footnotes

- 1 *In re AJR*, 300 Mich LEXIS 1258 at 26 (2014).
- 2 MCL 710.51(6).
- 3 *Id.*; See also *Lopez-Negrete v Kariann*, 2009 Mich App LEXIS 1178 (2009) at 50 (unpublished).
- 4 See HB 4120 *infra*.
- 5 See *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013).
- 6 *Id.*
- 7 *Id.*
- 8 MCL 722.26a(4); *Lombardo v Lombardo*, 202 Mich App 151, 157; 507 NW2d 788 (1993).
- 9 See *Lombardo supra*.
- 10 See *Pierron v Pierron*, 282 Mich App 222, 246-47; 765 NW2d 345 (2009); *Shulick v Richards*, 273 Mich App 320, 327; 729 NW2d 533 (2006); *Fisher v Fisher*, 118 Mich App 227, 232-33; 324 NW2d 582 (1982).
- 11 MCL 722.26a(7)(b); *Lombardo supra* at 157.
- 12 *Wellman v Wellman*, 203 Mich App 277, 285-86; 512 NW2d 68 (1994). HB 4120, introduced in January 2013, would amend MCL 722.26a by providing that a court "shall order joint custody unless [it] determines by clear and convincing evidence that a parent is unfit, unwilling, or unable to care for the child." (emphasis added) The bill goes on to provide that the court ordering joint custody shall also issue a specific parenting time schedule that would reflect the shared physical custody arrangement, *i.e.*, equal parenting time. This legislation would codify the default position already in effect with many family law practitioners and jurists, switching the burden from the party seeking joint custody to the party seeking sole custody. The bill is currently awaiting action in the Judiciary Committee.
- 13 MCL 722.26a(1).
- 14 *Id.*; See *Shulick supra* at 326-27.
- 15 *Fisher supra* at 233; See *Selvaggio v Cole-Adams*, 1998 Mich App LEXIS (1998) at 39 (unpublished).
- 16 *Dailey v Kloenhamer*, 291 Mich App 660, 668-69; 811 NW2d 501 (2011).
- 17 MCL 722.31(1); MCL 722.31(2). However, MCL 722.31(3) provides that Section 1

- does not apply if the child's two residences are already 100 miles apart at the commencement of the action, or if the move would bring the residences closer together.
- 18 See *Generally Rains v Rains*, 301 Mich App 313 (2013).
- 19 MCL 722.31(4).
- 20 *Rains supra* at 327.
- 21 *Rains supra* at 328.
- 22 *Id.*
- 23 *Rains supra* at 340.
- 24 MCL 722.31(2).
- 25 See *Singer & Reynolds supra*.
- 26 MCR 3.211(C)(1); *Spires v Bergman*, 276 Mich App 432, 439; 741 NW2d 423 (2007).
- 27 MCR 3.211(C)(3); *Spires* at 439.
- 28 *Brauch v Hendry*, 297 Mich App 732, 743; 825 NW2d 110 (2013).
- 29 *Id.*
- 30 See *Deschaine v St Germain*, 256 Mich App 665; 671 NW2d 79 (2003).
- 31 *In re AJR*, 2014 Mich LEXIS 1258 (2014) at 2.
- 32 *Id.* at 2-3.
- 33 *Id.*
- 34 *Id.*
- 35 *Id.* at 4.
- 36 *Id.* at 3; MCL 710.51(6).
- 37 *In re AJR supra* at 4.
- 38 *Id.*
- 39 *Id.* at 4; MCL 710.51(6) (emphasis added).
- 40 *In re AJR supra* at 5.
- 41 *In re AJR supra* at 9-13.
- 42 *Id.* at 11-12.
- 43 *Id.* at 13.
- 44 *Id.* at 13-14, 25.
- 45 *Id.* at 25-26.
- 46 MCL 722.27(1)(c).
- 47 See *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). It is virtually impossible that a court would find an established custodial environment, thus raising the burden of proof to change custody to clear and convincing evidence, under circumstances that would give rise to seeking relief under MCL 710.51(6).
- 48 *In re AJR supra* at 26.
- 49 *Singer & Reynolds supra* at 505.

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