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State of Michigan
In The Supreme Court
On Appeal from the Michigan Court of Appeals
(Shapiro, Borrello, Yates)

ANDREW PAUL SABATINE, *Plaintiff-Appellee*, V COLLEEN KNECT SABATINE, *Defendant-Appellant*.	Supreme Court No. 165279 Court of Appeals Nos. 361068; 361074 Leelanau County Circuit Court Case No. 2020-010532-DM Hon. Marian F. Kromkowski

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ANSWER TO APPLICATION FOR LEAVE TO APPEAL

This case concerns the custody of minor children.

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STATEMENT OF JURISDICTION

Although no jurisdictional basis is included in Appellant-Mother's brief, Appellee-Father agrees that her summary of the procedural history of this matter appears to be complete and correct. (Application, p. iv). This Court has jurisdiction over this appeal pursuant to MCR 7.303(B)(1), as Appellant-Mother has filed this appeal after the decision by the Court of Appeals.

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COUNTER-STATEMENT OF THE QUESTION INVOLVED

Should this Court grant leave to appeal where the Court of Appeals' decision does not violate case law and does not violate the intent of the Legislature as the Court of Appeals' decision only requires the Trial Court to apply the correct burden of proof in the event a parenting time schedule, as the one present here, modifies the established custodial environment?

Appellee-Father answers: NO.

The Trial Court answered: NO.

The Court of Appeals did not address this question.

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STATEMENT AS TO WHY THIS COURT SHOULD NOT GRANT LEAVE TO APPEAL

Appellant-Mother's application attempts to create an issue where none exists. In reliance on this Court's recent order in *Butters v Butters*, Appellant-Mother attempts to argue that this Court should grant leave because the Court of Appeals opinion "errs in both its construction of the established custodial environment and in its remand to the trial court." Appellant-Mother attempts to argue that the Court of Appeals opinion prevents the Trial Court from considering any changes that have occurred since the parties appeals have been pending and that the Court of Appeals relied on stale facts when constructing the established custodial environment ("ECE"). This Court should not be persuaded by these arguments and should not grant leave for several reasons.

First, this case is not *Butters*. In *Butters*, the Court of Appeals overturned the finding that the children had an ECE only with the defendant in that case and then ordered the trial court would have to consider the best interest factors using the clear and convincing standard. In the present case, the Court of Appeals did not overturn the Trial Court's finding that the children shared an ECE with both parents, a finding that Appellant-Mother chose not to challenge on appeal, rather, the Court of Appeals clarified that, before entering an order that would change the nature of how Appellee-Father interacted with the children, clear and convincing evidence was required. This is consistent with long-existing law.

Second, the Court of Appeals' opinion does not limit the ability of the Trial Court to consider up-to-date evidence on remand. Nowhere in the opinion does the Court of Appeals prohibit the Trial Court from doing so. The only restriction in child custody cases is the children's best interests and the Court of Appeals' remand requires the Trial Court to review the children's best interests under the correct burden of proof. There is no error in said remand.

Lastly, the Court of Appeals opinion will not cause material injustice. The opinion in this case, unlike the opinion in *Butters*, is unpublished and not precedentially binding. While Appellant-Mother makes general reference to the fact that others could access and rely on this opinion, those generalizations do not amount to the level of harm required to be shown in order for this Court to grant leave or revisit the Court of Appeals' opinion.

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Appellant-Mother has not shown any errors on the part of the Court of Appeals as the Court of Appeals opinion comports with existing law. This Court should not grant leave and should deny Appellant-Mother's application.

COUNTER-STATEMENT OF FACTS

While Appellant-Mother has presented this Court with a largely correct procedural recitation of the current case, in order for this Court to properly consider this matter, more context is required. (Application, pp. 3-5).

Relevant Background Information

The parties are the parents of two daughters, now seven-year-old AVS and now five-year-old VLS. (06/07/2021 Recommendation, p. 1). The parties lived for the entirety of their marriage in the three-bedroom, four-bathroom home built by Appellee-Father in 2004 in Traverse City. (04/07/2021 Transcript, pp. 48-49; 06/07/2021 Recommendation, p. 3; 04/13/2021 Transcript, pp. 39-47). Prior to the parties' separation, AVS was enrolled in the Grand Traverse Area Catholic Schools ("GTACS") in a pre-K program five days a week, while VLS was at home with Appellant-Mother during the day or was cared for by a nanny. (04/13/2021 Transcript, pp. 160-162; 04/27/2021 Transcript, p. 211). The parties consistently employed a nanny, even when Appellant-Mother was not working. (05/12/2021 Transcript, p. 72).

Although Appellant-Mother was largely the "stay-at-home parent," both parties cared for the girls and collaborated when making decisions for the family and the family regularly employed a nanny to care for the girls while Appellant-Mother was at work. (04/07/2021 Transcript, pp. 66, 75, 104, 113-114; 04/13/2021 Transcript, pp. 87, 122, 161-162; 05/12/2021 Transcript, p. 88). Appellee-Father's schedule was relatively flexible and allowed him to spend time in the afternoons with the girls or attend appointments and events for the girls. (04/07/2021 Transcript, pp. 64, 68, 202). While the parties lived in the marital home, Appellee-Father was largely responsible for the parties' finances, including providing health insurance, and the up-keep on the marital home, as well as assisting Appellant-Mother with caring for the children. (04/07/2021 Transcript, pp.

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104, 198-199; 04/13/2021 Transcript, p. 87; 04/27/2021 Transcript, pp. 172-174; 04/28/2021 Transcript, pp. 85, 94-95). Appellee-Father frequently involved the girls in the up-keep of the home and the large amount of land the home sits on, including several professionally landscaped nature trails. (04/07/2021 Transcript, p. 154; 04/13/2021 Transcript, p. 33; 05/12/2021 Transcript, pp. 78-79).

The family had a very active, well-rounded life together in Traverse City, with AVS and VLS participating in tumbling and dance, AVS participating in horseback riding lessons and soccer, where she was coached by Appellant-Mother. (04/07/2021 Transcript, pp. 154, 156; 04/13/2021 Transcript, p. 166; 04/28/2021 Transcript, pp. 77-79). Appellee-Father attended every dance recital he could and nearly every soccer game, where he would care for VLS while Appellant-Mother coached the team. (04/13/2021 Transcript, pp. 165-166; 04/27/2021 Transcript, pp. 146-147; 05/12/2021 Transcript, pp. 86-87). The family also frequently visited friends of the parties, including friends who had children the girls' ages, and went on boat trips to Power Island. (04/13/2021 Transcript, p. 167). The girls had friends in their neighborhood, as well as at school and their various pre-school programs, however, the majority of their time was spent in the marital home. (04/07/2021 Transcript, pp. 154-155; 04/13/2021 Transcript, pp. 164, 166-167). As both parties highly value education, both parties made the martial home a learning environment for the girls and the parties frequently took advantage of teachable moments in the girls' lives, including Appellant-Mother subscribing to several childhood education publications and involving the girls in enrichment activities. (04/07/2021 Transcript, pp. 154, 188-189; 04/28/2021 Transcript, pp. 69-72). The family also travelled extensively during the course of the marriage. (04/13/2021 Transcript, p. 172). Neither child has any health issues, and when the girls needed to go to the doctor or the dentist, Appellant-Mother was typically the parent to make the appointment, and Appellee-Father would usually meet Appellant-Mother at the office for the appointment. (04/07/2021 Transcript, p. 205).

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Events of Fall 2020

Appellant-Mother's move to Fenton was not "based on safety concerns." (Application, p. 3). In September 2020, AVS began school at GTACS and Appellee-Father dropped her off for her first day. (04/07/2021 Transcript, p. 75). Appellant-Mother was considering accepting a part-time position with a new employer and the parties had hired a nanny to care for the girls during Appellant-Mother's new work hours. (04/07/2021 Transcript, pp. 65-68, 71, 73; 04/28/2021 Transcript, pp. 185-187). Unbeknownst to Appellee-Father, Appellant-Mother had also recently met with an attorney in Fenton, MI, her hometown and where her parents live, to discuss filing for divorce from Appellee-Father. (04/28/2021 Transcript, pp. 20, 189-190).

On September 18, 2020, Appellant-Mother traveled to Fenton in anticipation of traveling to Pittsburgh the following day to care for her ailing grandmother. (04/07/2021 Transcript, pp. 55-56; 04/28/2021 Transcript, pp. 188, 190-191). Appellant-Mother had driven Appellee-Father's vehicle down to Fenton, had only packed a small overnight bag, and had left the girls in Traverse City with Appellee-Father, as it was going to be a very short trip. (04/07/2021 Transcript, p. 56; 04/28/2021 Transcript, p. 189). At 5 p.m. on September 18, Appellant-Mother informed Appellee-Father that she would be returning to Traverse City late that evening to pick up the girls, as she had changed her mind about taking them to Pittsburgh with her. (04/07/2021 Transcript, p. 59; 04/28/2021 Transcript, p. 195). Appellant-Mother and her father, Timothy Knecht, flew to Traverse City in Mr. Knecht's private plane and arrived at the marital home at approximately 10:30 p.m. on September 18. (04/07/2021 Transcript, pp. 59-60; 04/28/2021 Transcript, p. 193). Appellee-Father was awake in bed when they arrived, as the girls had already gone to sleep for the night, and Appellant-Mother spent the night with Appellee-Father in their room of the martial home. (04/28/2021 Transcript, pp. 196-197). The next morning, Appellant-Mother packed two small overnight bags for the girls, a few more items for herself, and a few toys and returned to the airport with her father and the girls. (04/07/2021 Transcript, pp. 59-60, 70). Appellee-Father, knowing that Appellant-Mother is a light traveler, never suspected that she would not be returning to the marital home and she did not communicate

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that she would never be returning. (04/07/2021 Transcript, pp. 84-85; 04/28/2021 Transcript, p. 201).

Appellant-Mother and the girls returned to Fenton from Pittsburgh on September 20. (04/07/2021 Transcript, p. 61). Appellant-Mother, who was in constant communication with Appellee-Father, told Appellee-Father that they were going to be staying in Fenton that night, as they had arrived late in the evening and Appellant-Mother did not want to drive back to Traverse City at such a late hour. (04/07/2021 Transcript, pp. 61, 99, 101). Appellee-Father, knowing that Appellant-Mother frequently takes the girls on trips to see her parents in Fenton, assumed that nothing was out of the ordinary. (04/07/2021 Transcript, p. 62). However, on September 21, Appellant-Mother informed Appellee-Father that she would be taking the girls to Salt Lake City, UT with her and her father to check on the renovations to her parents' condo. (04/07/2021 Transcript, p. 62; 04/28/2021 Transcript, p. 202). While the spontaneity of the trip struck Appellee-Father as odd, he did not object to Appellant-Mother bringing the girls with her. (04/07/2021 Transcript, pp. 62-63, 225-226). While in Utah, Appellant-Mother was again in constant contact with Appellee-Father, including Facetiming with him, sending him a video of her and the girls telling Appellee-Father that they missed him and couldn't wait to be home; continually signing her messages with "I love you," "xo," kissing, and heart emojis; telling Appellee-Father they would be snuggling up when she returned; and agreeing to contact the marriage counseling she had picked for her and Appellee-Father to see. (04/07/2021 Transcript, pp. 52, 91, 93, 96, 99, 226-228; 04/28/2021 Transcript, pp. 204, 206-208, 211).

Appellant-Mother and the girls returned to Michigan on September 26, 2020. (04/07/2021 Transcript, p. 63; 04/28/2021 Transcript, p. 203). Although Appellee-Father consistently asked Appellant-Mother when she and the girls would be returning home, Appellant-Mother never provided a straight answer. (04/07/2021 Transcript, pp. 61-63, 70-71). In the interim, and also without Appellee-Father's knowledge or consent, Appellant-Mother had switched the girls' primary care doctor and dentist from Traverse City to local doctors in Fenton; Appellant-Mother enrolled AVS in therapy; Appellant-Mother had applied for a change of address with the Postal Service and the Secretary of State; Appellant-Mother obtained a new driver's license and voter registration; Appellant-Mother terminated the

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new nanny's employment; Appellant-Mother contacted GTACS, unenrolled AVS, and requested a refund of AVS' tuition; Appellant-Mother registered the girls for Kindercare in Fenton; Appellant-Mother enrolled the girls in counseling, and Appellant-Mother filed for divorce in Genesee County. (04/07/2021 Transcript, pp. 74-76, 85, 105, 191, 197-198; 04/28/2021 Transcript, pp. 134-150, 168, 219-224, 233-240). Appellee-Father was not aware of any of these changes until October 3, 2020, when Appellee-Father drove to Fenton to retrieve his vehicle and his family, or so he thought. (04/07/2021 Transcript, pp. 50-51; 04/28/2021 Transcript, pp. 218-219). When he arrived at Appellant-Mother's parents' home, Appellant-Mother handed Appellee-Father a note, explaining that she would not be returning to Traverse City and that she was keeping the girls with her in Fenton. (04/07/2021 Transcript, pp. 53, 77-78). Appellee-Father was extremely taken aback by this news, and as such could not respond at the time. (04/07/2021 Transcript, pp. 51-52, 77-78). Feeling he had no choice, Appellee-Father returned to Traverse City without the girls, who were confused that Appellee-Father was leaving without them. (04/07/2021 Transcript, pp. 77-79).

Upon his return, alone, to Traverse City, Appellee-Father immediately obtained counsel, filed for divorce in Leelanau County the next business day, and moved to dismiss Appellant-Mother's Genesee County action for lack of jurisdiction. (04/07/2021 Transcript, pp. 50, 80). The Genesee County Circuit Court dismissed Appellant-Mother's action In December 2020 with prejudice. (04/07/2021 Transcript, p. 87). Appellee-Father also filed several motions in the Leelanau action, including a motion to require Appellant-Mother to return with the children within 100 miles of the marital home.

Between October 2020 and January 2021 when the temporary order was entered in this matter, Appellant-Mother insisted that Appellee-Father only exercise parenting time at her parents' home in Fenton. (04/07/2021 Transcript, pp. 115, 119, 121-122; 04/27/2021 Transcript, pp. 19, 122-123). To that end, Appellant-Mother outright denied Appellee-Father's many requests to bring the children to Traverse City. (04/28/2021 Transcript, p. 215). In spite of the inconvenience of that arrangement and the numerous requests Appellee-Father made to see the children, Appellee-Father was able to make it to Fenton at least six times during that four-

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month period to see the girls, and Appellant-Mother allowed Appellee-Father to have an overnight visit in Traverse City with the girls during the Thanksgiving holiday. (04/07/2021 Transcript, pp. 115, 119, 176-177; 04/27/2021 Transcript, pp. 26-27, 124; 04/28/2021 Transcript, pp. 217-218). Appellant-Mother only agreed to this visit because Appellee-Father had put in writing that he would not drink during his parenting time and that he would return the girls to Appellant-Mother. (04/28/2021 Transcript, p. 30; 05/12/2021 Transcript, pp. 63-64). Additionally, Appellee-Father paid child and spousal support to Appellant-Mother during this time, as well as paying Appellant-Mother $7500 for attorney's fees. (04/07/2021 Transcript, p. 124; 05/12/2021 Transcript, p. 51). Once the January 7, 2021 order was entered, Appellee-Father had parenting time with the children in Traverse City every other weekend. (04/27/2021 Transcript, pp. 37-38).

During this time period, Appellant-Mother' parents purchased a home within walking distance of theirs and were renovating it for Appellant-Mother and the girls. (04/28/2021 Transcript, pp. 95-96, 103). Appellant-Mother has no ownership interest in this home and had planned to move into the home once renovations were complete. (04/28/2021 Transcript, pp. 96-97).

The Hearing on Appellee-Father's Motions

The Trial Court Referee held a hearing on Appellee-Father's various motions beginning on April 7, 2021. (04/07/2021 Transcript, p. 4).

Appellee-Father's Testimony

Appellee-Father testified that he did not have any concerns about caring for the children without Appellant-Mother, as he had cared for them their whole lives. (04/07/2021 Transcript, p. 64). Appellee-Father stated that, while AVS was enrolled in a Catholic school, the family did not regularly attend church, but he would not be opposed to the girls growing up in a church environment. (04/07/2021 Transcript, pp. 186-187). Appellee-Father confirmed that he could support the girls on his current salary, that he would continue to go above and beyond what the Trial Court ordered him

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to provide, and that he currently paid for 82% of the parties' bills. (04/07/2021 Transcript, pp. 200-201). Appellee-Father also confirmed that it was his intent to retain the marital home. (04/13/2021 Transcript, p. 49). Appellee-Father testified that he had no mental or physical health issues. (04/13/2021 Transcript, pp. 98-99). Appellee-Father acknowledged that Appellant-Mother had taken the lead on the girls' medical needs and scheduling appointments due to her medical background, however, Appellee-Father was always involved in the decision making, would attend appointments, and would take the girls on his own if that was what was needed for Appellant-Mother's schedule. (04/27/2021 Transcript, pp. 44-45). Appellee-Father also testified that Appellant-Mother had taken the lead on scheduling playdates for the girls as well as involving them in extracurricular activities, and that Appellee-Father would often take the girls on day trips, such as to the children's museum. (04/27/2021 Transcript, pp. 48-50).

Appellee-Father expressed that, after Appellant-Mother told him that she was leaving him in front of her entire family, he had felt extremely blindsided and that his next thought was how he was going to get the girls back. (04/07/2021 Transcript, pp. 78, 80). Appellee-Father stated that he was not served with Appellant-Mother's Genesee divorce complaint under October 9 and that Appellant-Mother had never discussed the retrieval of her items from the martial home. (04/07/2021 Transcript, pp. 81, 87). Appellee-Father explained that he had not been present when Appellant-Mother came to collect her belonging from the marital home, so Appellee-Father had no say in what was taken. (04/13/2021 Transcript, pp. 47-48). Appellee-Father testified that he had no idea if the move to Fenton would be temporary because, as far as he was aware, the entirety of the girls' lives was still in Traverse City. (04/07/2021 Transcript, pp. 102-103). However, once Appellant-Mother had moved to Fenton, Appellee-Father found out that "she unilaterally did as she pleased" regarding the girls, including telling the girls that the parties were getting a divorce and forced Appellee-Father to play catch-up. (04/07/2021 Transcript, pp. 105-107, 113). Despite his late start and his disagreement with the enrollments, Appellee-Father was able to contact each of the girls' new providers, including informing the school picked out by Appellant-Mother in Genesee County in writing that Appellee-Father did not agree with the girls' enrollment there. (04/07/2021 Transcript, pp. 107-108, 112). Appellee-Father recalled that

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the decision to enroll AVS at GTACS had been a joint decision, although Appellant-Mother likely filled out the paperwork, and that Appellant-Mother had enrolled the girls in school in Fenton after Appellee-Father had informed Appellant-Mother and her attorney that Appellee-Father did not agree to the girls being enrolled anywhere but Traverse City. (04/27/2021 Transcript, pp. 73-76).

Appellee-Father stated that Appellant-Mother had denied Appellee-Father visitation with the children due to his filing of a divorce complaint in Leelanau County. (04/07/2021 Transcript, p. 115). Appellee-Father reported that Appellant-Mother had told him that the only way he could see the children would be if he dismissed his divorce complaint or if he signed a temporary custody agreement and that any parenting time before the January 7 order was "dictated" by Appellant-Mother. (04/07/2021 Transcript, p. 116; 04/27/2021 Transcript, pp. 12-13). Appellee-Father also reported that Appellant-Mother was restricting his FaceTimes with the children and would only allow FaceTimes if Appellee-Father scheduled them ahead of time, so Appellee-Father was FaceTiming with the girls as often as he was able. (04/07/2021 Transcript, pp. 118, 177; 04/27/2021 Transcript, p. 50). Appellee-Father absolutely denied that Appellant-Mother had been a "single parent," that he was an absentee father, and called Appellant-Mother's claims that the girls are scared of him "100% made up." (04/13/2021 Transcript, pp. 95-98). Appellee-Father also denied that Appellant-Mother was a full stay-at-home parent, as the parties had always had a nanny. (04/27/2021 Transcript, pp. 9, 117-119).

Appellee-Father described the entire process as "devastating" and "heart wrenching" to himself and the children, noting that the children cry quite often and that Appellant-Mother had been "cold," "calculated," and "has got no emotions towards [Appellee-Father] or the kids." (04/07/2021 Transcript, pp. 120-121, 123; 04/27/2021 Transcript, pp. 126-128). Appellee-Father denied Appellant-Mother's allegation that the children are afraid of him and opined that Appellant-Mother was attempting to execute her "plan" at all costs, without consideration of what is best for the girls. (04/07/2021 Transcript, pp. 123-124). "She just wants to do what is right for [Appellant-Mother]…She doesn't care." (04/07/2021 Transcript, p. 124). Appellee-Father expressed that Appellant-Mother's unwillingness to compromise on any issues had also led to the breakdown of the marriage as

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"it was all about [Appellant-Mother] and her desires." (04/07/2021 Transcript, pp. 145-146). Appellee-Father stated that this was not in the children's best interests and that he no longer respected Appellant-Mother's parenting because of "her own personal selfishness." (04/07/2021 Transcript, p. 146; 04/13/2021 Transcript, p. 51). Appellee-Father expressed that he had concerns about Appellant-Mother's parenting during the marriage due to her mental health issues and drug use, however, he did not deny that Appellant-Mother is a loving mother. (04/07/2021 Transcript, pp. 52-58). Appellee-Father testified to his belief that Appellant-Mother was attempting to alienate the children from him and his efforts to combat that alienation, including FaceTiming with the girls regularly, driving to Fenton to see the girls whenever he could, using all of his parenting time, and requesting make-up parenting time. (04/07/2021 Transcript, pp. 130-132).

Appellee-Father gave the example of the issues surrounding his celebration of VLS' birthday. (04/07/2021 Transcript, pp. 135-136). According to the January 2021 order, Appellee-Father was allotted parenting time with VLS for her birthday in Traverse City, as the order required Appellant-Mother to bring the girls to Traverse City for all parenting times except summer parenting time. (04/07/2021 Transcript, pp. 135-136). Despite the order, Appellant-Mother unilaterally determined that Appellee-Father could only exercise parenting time in Fenton for VLS' birthday. (04/07/2021 Transcript, pp. 135-136). As Appellee-Father did not wish to exercise his birthday parenting time around Appellant-Mother's family and he wanted to follow the court order, Appellee-Father offered to meet Appellant-Mother halfway for the exchange, however she refused that as well. (04/07/2021 Transcript, pp. 137, 139, 178-180). Appellee-Father testified that Appellant-Mother had offered an additional overnight, however, she later denied that because Appellee-Father had "missed" VLS' birthday parenting time. (04/07/2021 Transcript, p. 141). Appellee-Father was officially awarded make-up parenting time after he filed a complaint with the FOC, however, Appellant-Mother had denied Appellee-Father's requests for the make-up time or had simply not shown up at the agreed upon time and location. (04/07/2021 Transcript, pp. 142-143; 04/27/2021 Transcript, p. 68).

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Appellee-Father recounted that he cannot even take Appellant-Mother's phone calls any longer, as she records them despite Appellee-Father asking her not to and she continues to harass him. (04/13/2021 Transcript, p. 100). Because of this, Appellee-Father opined that Appellant-Mother had made communication "impossible." (04/13/2021 Transcript, pp. 101, 180). Despite the difficulties caused by Appellant-Mother, Appellee-Father testified that he has a willingness to foster a relationship between Appellant-Mother and the girls, that there was no reason to create a mess around this case, and that it was "100% selfishness" on the part of Appellant-Mother as to why so much acrimony existed in the case. (04/13/2021 Transcript, pp. 104, 183-184). Appellee-Father did not think that Appellant-Mother was willing to facilitate a relationship between him and the children. (04/13/2021 Transcript, pp. 177-178).

Appellee-Father unequivocally stated that it is against the children's best interests to be in Fenton and that the current system was simply unworkable. (04/07/2021 Transcript, pp. 124-127; 04/13/2021 Transcript, pp. 101-103). Appellee-Father requested that the Trial Court order Appellant-Mother to return to Traverse City so that the parties could share equal parenting time, however, should Appellant-Mother choose to remain in Fenton, Appellee-Father requested primary physical custody. (04/07/2021 Transcript, pp. 128-129, 175-176). Appellee-Father expressed that he was not interested in having more expanded parenting time over the summer as a way to come closer to 50/50 custody, as he could not make-up everything he missed throughout the year during the summer. (04/13/2021 Transcript, pp. 189-190). Appellee-Father acknowledged that, should he be awarded custody, he would be employing a nanny, however Appellee-Father did not see this as a negative as the girls had a nanny for the entirety of their lives. (04/27/2021 Transcript, pp. 10-11). Appellee-Father denied that he simply wanted to control Appellant-Mother or the children or that he would ever withhold parenting time from Appellant-Mother, and rather, he expressed that it would be best "that both parents are active and participate." (04/07/2021 Transcript, pp. 147-148, 176). Appellee-Father testified that Appellant-Mother had only recently begun to express concern about his parenting ability. (04/07/2021 Transcript, pp. 157-158). Appellee-Father denied that he was simply a "weekend dad," as he wanted to be involved in all aspects of the girls' lives, including the everyday events like homework and sports practices, but he

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also stated he would follow court orders and be the best co-parent he could be. (04/07/2021 Transcript, pp. 194-196).

Appellee-Father described the parenting time he had with the girls as the "best time ever." (04/07/2021 Transcript, p. 166). Appellee-Father stated that he had taken the week off from work, so he was able to spend the entire week with the girls for spring break, that they did many activities, as well as keeping the same routine that they had when they lived in the martial home. (04/07/2021 Transcript, pp. 168-169). "[W]e did all the wonderful things that a dad does with his two loving children who love him." (04/07/2021 Transcript, p. 169). Appellee-Father also testified that the current parenting time schedule of every other weekend did not offer him much time with the girls, as they usually arrived late in the evening on Friday and then had to be in the car by early afternoon on Sunday in order to make it on time to the exchange point. (04/07/2021 Transcript, pp. 169-174). Appellee-Father then would attempt to fit an entire weekend's worth of activities into the single full day of parenting time he had with the girls, including playing with the friends they still had in Traverse City. (04/07/2021 Transcript, pp. 171-172). Appellee-Father stated that the girls voice their unhappiness on Sunday afternoons, that the girls get concerned about leaving on Saturday nights, and Appellee-Father simply reassured them that he loves them and that he will see them soon. (04/07/2021 Transcript, pp. 174-175; 04/13/2021 Transcript, pp. 34-37).

Appellee-Father adamantly testified that his bond with the girls had not changed since the move to Fenton. (04/07/2021 Transcript, p. 178). Appellee-Father described his relationship with the girls as "[w]onderful. Loving, wonderful, they respect me, they love me, they look up to me." (04/07/2021 Transcript, p. 180). Appellee-Father stated that the transition had been hard on the girls and that they did not understand why they could not see him more often. (04/07/2021 Transcript, pp. 180-181). Appellee-Father described AVS as "extremely, extremely smart…very timid, very book-oriented, extremely learning, you know. She is about learning, and arts and crafts," while VLS "is more tomboyish…she is more throw down, wrestle kind of bullish girl." (04/07/2021 Transcript, pp. 181-182). Appellee-Father confirmed that both girls come to him individually for comfort, that they would come to him as much as they would go to Appellant-Mother for comfort, that the girls are always happy to see him,

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and that he did not dispute that the girls have a strong relationship with Appellant-Mother. (04/07/2021 Transcript, pp. 182-183). Appellee-Father readily acknowledged that Appellant-Mother cared about the girls "all the time," that she loves them and cares about them, however Appellee-Father was concerned that Appellant-Mother did not have "their best interests front and center." (04/27/2021 Transcript, p. 99). Appellee-Father testified that he did not have a reason to discipline the girls due to their age, however, when necessary, he would sit and talk them through things. (04/07/2021 Transcript, pp. 184-185).

Appellee-Father stated that, while VLS was too young to express a preference and AVS likely could express a preference, asking AVS to do so would likely confuse her and Appellee-Father did not want to put her through that. (04/13/2021 Transcript, pp. 175-177). "She has gone through enough already being taken from her father and moved to a different home, and I can't do that to her." (04/13/2021 Transcript, pp. 176-177). Appellee-Father acknowledged that both his parents and his brother had predeceased him, that he had not blood relatives in the Traverse City area, and that the majority of Appellant-Mother's family live in Fenton. (04/27/2021 Transcript, pp. 96-97).

Appellant-Mother's Testimony

Appellant-Mother testified that she had resided in Fenton since September 19, 2020. (04/27/2021 Transcript, p. 179). Appellant-Mother stated that she had prepared to leave Appellee-Father earlier than that, however, Appellee-Father had begged her to stay and help him, and Appellant-Mother wanted to give counseling another try. (04/28/2021 Transcript, pp. 15, 17). However, Appellee-Father's participation, according to Appellant-Mother, was not meaningful and Appellee-Father continued to disregard Appellant-Mother's requests not to drink during the week. (04/28/2021 Transcript, p. 15). Appellant-Mother described how she was fearful of Appellee-Father's "drinking rage," which she and the girls would have to hide out of fear from him. (04/28/2021 Transcript, pp. 15-16). Appellant-Mother testified that she had stayed longer than she planned to because Appellee-Father "talked her down" as he was her husband, 20 years older, and she felt as though she had an obligation to be there. (04/28/2021 Transcript, p. 18).

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Appellant-Mother testified that she had met with the family law attorney in Fenton on September 18, which is why she did not bring the girls with her as she did not want them around during that meeting. (04/28/2021 Transcript, pp. 20, 192). Appellant-Mother confirmed that, despite her "great concerns" about leaving the girls in Appellee-Father's care, she left them with Appellee-Father any way, even though she had family in Fenton who could have cared for the girls during her meeting. (04/28/2021 Transcript, pp. 190-192). Appellant-Mother knew that she wanted to move to Fenton and tell Appellee-Father about the divorce from Fenton so she could be around her family and that she was not comfortable asking Appellee-Father for a divorce in the Traverse City home because she was afraid that Appellee-Father would be angry and unpredictable. (04/28/2021 Transcript, p. 21).

Appellant-Mother admitted that she had been communicating with Appellee-Father daily and that it was never a secret where she and the girls were. (04/28/2021 Transcript, p. 22). Appellant-Mother explained that her texts to Appellee-Father were a way of "keeping the peace" until she could complete her divorce filing. (04/28/2021 Transcript, pp. 24-25). Appellant-Mother testified that she had packed extra bags for the girls when she returned to Traverse City on September 18 while Appellee-Father was in the shower and then hid the bags in the car under a blanket so Appellee-Father wouldn't see them. (04/28/2021 Transcript, p. 22). Appellant-Mother denied that she was being sneaky and clarified that she thought she was being safe, as she did not know how Appellee-Father would react, Appellee-Father is physically superior, who has shown aggression previously, and who owns several guns. (04/28/2021 Transcript, pp. 22-23). Appellant-Mother testified that she had wanted her father around when she was leaving because Appellee-Father and her father have a good relationship and Appellee-Father "never acted out much in front of my parents." (04/28/2021 Transcript, p. 24). Appellant-Mother recalled that, when she and her father arrived at the marital home on September 18, Appellee-Father was not drunk and she assumed that Appellee-Father had fed the girls and gone through their nighttime routine with them. (04/28/2021 Transcript, pp. 196-197).

Appellant-Mother stated that her main reason for cutting back her work hours after AVS was born was because she was worried about Appellee-

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Father having to care for AVS alone on the weekends and Appellee-Father's drinking. (04/27/2021 Transcript, p. 184; 05/12/2021 Transcript, pp. 5-6). Appellant-Mother recalled that Appellee-Father had requested that Appellant-Mother not work weekends and that she was very concerned about his drinking, which would usually start early in the day on the weekends, although Appellee-Father would try to not drink until Appellant-Mother returned home. (04/27/2021 Transcript, pp. 186-187). Appellant-Mother testified that conversations about Appellee-Father's drinking were a regular occurrence in the marriage, that Appellee-Father had not stopped drinking when she became pregnant like she had expected him to, and that she was "shocked" that Appellee-Father did not know "what it would take to be a parent." (04/27/2021 Transcript, pp. 187, 199). "I think if I would have had a spouse who was willing to participate in actual childcare and share the parenting responsibilities more then it wouldn't have been an issue that I worked one weekend a month." (04/27/2021 Transcript, p. 188). Appellant-Mother stated that it "was definitely a family decision" for her not to work as much, that Appellee-Father had told her that her work schedule stressed him out, and that, after she reduced her hours, Appellee-Father told her that had helped with his stress and the situation in the household did improve a bit after that. (04/27/2021 Transcript, pp. 196, 203; 04/28/2021 Transcript, p. 6).

Appellant-Mother explained that Appellee-Father would often be rude to her in front of the children, specifically that he would become belligerent and call her names in front of the girls. (04/28/2021 Transcript, pp. 6-7). Appellant-Mother described how Appellee-Father would slam doors and walk away from her during arguments, that COVID made everything worse, and that he was teaching the girls that it was ok for men to treat women that way. (04/28/2021 Transcript, pp. 7-8, 10). Appellant-Mother testified that she had started leaving Appellee-Father notes about his behavior and that she really only took issue with it when it occurred in front of the girls, as she was afraid the girls would use the behavior as justification to treat others the same or that the girls would witness Appellee-Father battering her. (04/28/2021 Transcript, p. 8; 05/12/2021 Transcript, p. 57). Appellant-Mother later admitted that Appellee-Father had never been physical towards her. (05/12/2021 Transcript, p. 57). Appellant-Mother expressed that she was fearful of Appellee-Father when he drank as he was

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unpredictable and that she had asked him not to drink during the week. (05/12/2021 Transcript, pp. 34-35).

Appellant-Mother opined that Appellee-Father had an untreated anger issue and that she had suggested that Appellee-Father attend anger management, however, Appellee-Father had never voluntarily participated in nor engaged meaningfully in any kind of counseling. (04/28/2021 Transcript, pp. 116-118). Appellant-Mother admitted that she had never seen Appellee-Father direct any anger at the girls and that she had no proof of his anger issue, however she was very concerned about it; that the children had never been seriously harmed while in Appellee-Father's care, and that Appellee-Father did have a regular counselor that he really liked. (04/28/2021 Transcript, pp. 118, 212; 05/12/2021 Transcript, pp. 6, 58). Appellant-Mother also admitted that, in spite of her fears, she had never contacted the police or Child Protective Services, and she had never attempted to obtain a PPO against Appellee-Father. (05/12/2021 Transcript, p. 50). Appellant-Mother clarified that her fears were based on what she believed Appellee-Father was capable of, not what he had done. (05/12/2021 Transcript, p. 130).

Appellant-Mother recalled that she knew the marriage was over when she disclosed to her doctor during her routine physical in July 2020 that Appellee-Father was abusing her. (04/28/2021 Transcript, pp. 11-12). As she did not feel comfortable being in the same home as Appellee-Father, Appellant-Mother asked Appellee-Father for a separation, something they had done in the past when Appellee-Father's employment required him to work in Birmingham, Michigan. (04/28/2021 Transcript, p. 13). Appellant-Mother stated that Appellee-Father "ridiculed" her for "running away" to her parents' home in Fenton, that she had started stockpiling clothes and other items for her and the girls at her parents' home in the summer of 2020, and that she had not wanted to take the girls away at first, but Appellee-Father refused to leave the marital home, so Appellant-Mother took the girls. (04/28/2021 Transcript, pp. 13-14). Despite this, Appellant-Mother opined that Appellee-Father had handled the relocation with love and respect for her and the girls, and she could not say that she did the same. (05/12/2021 Transcript, pp. 103-105). Appellant-Mother acknowledged that, following her relocation to Fenton, she did not think to include

Appellee-Father on any of the decision making and she just continued to be a single mom. (04/28/2021 Transcript, p. 242).

Appellant-Mother stated that Appellee-Father had not told her that he had filed for divorce, that he had her served with the complaint on October 9 when she came to get her things, and that "[t]o me it was just another way where I feel like [Appellee-Father] wasn't respectful of my decision for divorce." (04/28/2021 Transcript, pp. 25-26). Appellant-Mother did not think that Appellee-Father would have used the legal system against her and it caused her to lose faith in him. (05/12/2021 Transcript, pp. 107-108, 110). Appellant-Mother described Appellee-Father's request for full custody as "baffling." (04/26/2021 Transcript, p. 26). Appellant-Mother denied that she had denied Appellee-Father parenting time on VLS' birthday and instead blamed Appellee-Father for not getting back to her in time with his plan for parenting time. (04/28/2021 Transcript, pp. 63-64). Appellant-Mother stated that, when Appellee-Father did contact her the week of VLS' birthday and requested that Appellant-Mother bring VLS to Traverse City, Appellant-Mother declined to do so as she "did not think that that would be in the best interest of [VLS]." (04/28/2021 Transcript, pp. 64-65). Appellant-Mother further stated that she had never denied Appellee-Father's requests to see the children, although she agreed that, despite Appellee-Father's requests, she did not bring the children to Traverse City between September 18 and Thanksgiving of 2020. (04/28/2021 Transcript, pp. 215-217).

Appellant-Mother opined that the two full days of parenting time Appellee-Father was awarded was "more parenting time since this parenting time order than he ever parented the girls before." (04/27/2021 Transcript, p. 213; 05/12/2021 Transcript, p. 41). Appellant-Mother testified that Appellee-Father was never interested in parenting prior to the separation, to the point that Appellant-Mother would bring in extra care to supplement Appellee-Father's care if she was going to be gone. (04/27/2021 Transcript, pp. 213-214). Appellant-Mother stated that the only positive about Appellee-Father's parenting was his "playful relationship" with the girls and, while she was not comfortable calling herself a "single parent" like she had put in her pleadings, Appellant-Mother often felt like she was the person carrying all of the parenting responsibilities. (04/28/2021 Transcript, pp. 214-215).

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Appellant-Mother recalled that Appellee-Father had told her that it was too overwhelming to care for the girls overnight, that Appellee-Father never wanted to care for the girls overnight or on his own, and that she was always worried about his drinking. (04/27/2021 Transcript, p. 214; 05/12/2021 Transcript, p. 44). Appellant-Mother stated that Appellee-Father was worried that he would not get up with the girls in the middle of the night, as that was Appellant-Mother's responsibility, and that, at one point, Appellee-Father had told Appellant-Mother he never wanted to care for the girls overnight again. (04/27/2021 Transcript, p. 216). Appellant-Mother described how she was very hurt by that declaration, and she did not leave the girls alone with Appellee-Father overnight for a year after that. (04/27/2021 Transcript, pp. 217-218). Appellant-Mother could not recall how the overnight care went when she did leave the girls overnight with Appellee-Father. (04/27/2021 Transcript, p. 218). Appellant-Mother stated that the parenting time schedule that was ordered by the January 7 order adequately fostered the relationship between Appellee-Father and the girls as it "reflects his overall parenting interest that were displayed before we moved to Fenton." (04/28/2021 Transcript, p. 163).

Appellant-Mother recalled that she had to leave the girls with Appellee-Father when she had hip surgery, however, she had her mother come up from Fenton as she knew that Appellee-Father could not care for the girls on his own and Appellant-Mother was going to need additional help. (04/27/2021 Transcript, p. 219). Appellant-Mother testified that Appellee-Father had not been interested in being the primary caregiver and he did not take any time off from work during her recovery, so Appellant-Mother also had her sister come for a week and had help from the nannies. (04/27/2021 Transcript, pp. 219-220). Appellant-Mother stated that, during her recovery, Appellee-Father had helped with some of the grocery shopping, however, Appellant-Mother was still providing the majority of care for the girls, including nighttime care. (04/27/2021 Transcript, p. 220). Appellant-Mother explained that she had set up a bed near the girls' room as Appellee-Father had made it clear that he was not going to assist with the nighttime care. (04/27/2021 Transcript, pp. 220-221). Appellant-Mother recalled that it had been a similar situation after VLS had been born, with Appellee-Father and her mother both caring for AVS while Appellant-Mother cared for VLS. (04/27/2021 Transcript, p. 221).

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Appellant-Mother stated that she was responsible for all the day-to-day care of the girls, including doing the grocery shopping, buying clothing for the girls, cooking all the meals, disciplining, and bathing the girls. (04/27/2021 Transcript, pp. 203-204; 04/28/2021 Transcript, pp. 73-74, 81-84). Appellant-Mother testified that Appellee-Father would only ever grocery shop for himself, as he liked specialty meats and alcohol. (04/27/2021 Transcript, pp. 203-204). Appellant-Mother confirmed that she had taken the lead on enrolling the girls in extracurricular activities and making medical appointments and that, while Appellee-Father had attended almost all of AVS' soccer games, "it was like pulling teeth to get [Appellee-Father] to come to those games sometimes. He never wanted to come, because that was disturbing his – you know, it was like all day on Saturday." (04/28/2021 Transcript, pp. 77-79, 86-87). Appellant-Mother recalled that she had arranged quasi-parent-teacher conferences with the girls' various care providers while in Traverse City and that Appellee-Father did not regularly attend or pay attention during them, even when they were in the marital home. (04/28/2021 Transcript, pp. 79-81).

Appellant-Mother explained that she was also responsible for arranging the girls' bedtime routine, that the girls went to bed at the same time every night after brushing their teeth and washing their faces, and then Appellant-Mother would read books to them in bed. (04/27/2021 Transcript, pp. 204-205). Appellant-Mother recalled that it was very difficult for her to get Appellee-Father involved in the girls' nighttime routine, as he did not understand the importance of a nighttime routine. (04/27/2021 Transcript, p. 205). Appellant-Mother testified that Appellee-Father would only be involved in the routine if she begged him and that he usually had a cocktail with him when he did. (04/27/2021 Transcript, p. 205). Appellant-Mother reiterated that Appellee-Father never took a leadership role in the nighttime routine, that he only read to the girls about half the time, and that Appellee-Father had called the routine "miserable." (04/27/2021 Transcript, pp. 206-207). Appellant-Mother opined that, since the move to Fenton, the girls were sleeping very well, had an established bed-time routine that they executed on their own, and that the girls sleep more after returning from visits with Appellee-Father. (04/28/2021 Transcript, pp. 106-108). Appellant-Mother described a similar situation with the girls' morning routine, although she did note that Appellee-Father would occasionally play with the girls while he was completing his own routine and that the nanny

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would simply take over care of the girls once she arrived. (04/27/2021 Transcript, pp. 207-208).

Appellant-Mother testified that the last time she needed a nanny, or a babysitter was February 2020 and that she had enrolled the girls in KinderCare in fall 2020 in Fenton for socialization and play time. (04/27/2021 Transcript, p. 212; 04/28/2021 Transcript, pp. 130, 237). Appellant-Mother stated that, going forward, her plan was to work on the days both girls were in school. (04/28/2021 Transcript, p. 167). Appellant-Mother opined that the girls transition schools very well and find friends and that the girls were better off without the "high stress environment" of the parties living together. (04/27/2021 Transcript, p. 213; 04/28/2021 Transcript, p. 106). Appellant-Mother stated that the girls had not been damaged by the move to Fenton, as they had virtual contact with Appellee-Father, however, Appellant-Mother also stated that, had Appellee-Father used the same tactics as Appellant-Mother had, that the girls would have been damaged. (05/12/2021 Transcript, pp. 68-69).

Appellant-Mother described the activities that the girls did in Fenton, which was limited to horseback riding, and noted that they had friends, with whom Appellant-Mother had organized play dates. (04/28/2021 Transcript, pp. 130-131; 05/12/2021 Transcript, pp. 86-87, 129). Appellant-Mother stated that, following the move to Fenton she "immediately tried to facilitate parenting time with [Appellee-Father]," noted that Appellee-Father had proposed the alternating weekend schedule, and expressed that she was not comfortable, at the time, with Appellee-Father exercising parenting time anywhere but Fenton. (04/28/2021 Transcript, pp. 29, 32-39). Appellant-Mother testified that her biggest concern was whether Appellee-Father was remaining sober. (04/28/2021 Transcript, p. 29). Appellant-Mother denied ever preventing Appellee-Father from being able to contact the girls, that Appellee-Father had honored her request to FaceTime the girls when he had them, and that, while she did not regularly FaceTime the girls when they were with Appellee-Father as she did not think it was necessary, she would like a schedule for FaceTiming. (04/28/2021 Transcript, pp. 41-42, 45, 56-59).

Appellant-Mother stated that the parties currently communicate a few times per week, however, it was only over text or FaceTime, as Appellee-Father was not comfortable having phone calls for fear of being recorded.

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(04/28/2021 Transcript, pp. 27-28). Appellant-Mother admitted to recording Appellee-Father's phone calls over his objection, as Appellee-Father would deny that they had conversations about issues involving the girls. (04/28/2021 Transcript, pp. 165, 170, 245-246). Appellant-Mother described the exchanges as uncomfortable and explained that she would prefer to exchange at a neutral halfway point because the girls want Appellant-Mother to come into the marital home with them. (04/28/2021 Transcript, pp. 28, 133). Appellant-Mother testified that she has a very strong bond with the girls and that Appellee-Father also had a strong bond with the girls, however, Appellant-Mother believed that the girls would be more likely to go to her for comfort and would only go to Appellee-Father if they wanted something as "they knew that [Appellee-Father] was more of a permissive parent." (04/28/2021 Transcript, pp. 68-69). Appellant-Mother reiterated that Appellee-Father loves the girls, and the girls love him; that he is a fun, energetic dad; that girls and Appellee-Father have a good relationship; and the girls "like to have him around, they like to have him read books to them, they like to build things." (05/12/2021 Transcript, pp. 90-91, 94). Appellant-Mother explained that only Appellee-Father has the ability to support the girls on his own but critiqued Appellee-Father's providing, as Appellant-Mother believed that Appellee-Father "spoil[ed]" the girls. (04/28/2021 Transcript, p. 85; 05/12/2021 Transcript, p. 143). Appellant-Mother recalled that "[i]t was very rare for [Appellee-Father] to have the girls independently on the weekends," as Appellee-Father wanted to use the weekends to work on projects on his own and that he would usually start drinking by mid-morning on the weekends. (04/28/2021 Transcript, pp. 72-73).

Appellant-Mother did not think that the girls were old enough to express a preference or old enough to the consequences of expressing said preference. (04/28/2021 Transcript, pp. 131-132). Appellant-Mother stated that she was encouraging the relationship between Appellee-Father and the girls and agreed that communication with Appellee-Father had been difficult. (04/28/2021 Transcript, p. 132). Specifically, Appellant-Mother complained that it was difficult to get responses from Appellee-Father, but Appellant-Mother expressed that she would like to continue to communicate with Appellee-Father. (04/28/2021 Transcript, pp. 132-133). Appellant-Mother acknowledged that, under the January 7 order, she was required to communicate with Appellee-Father regarding decisions about

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the girls. (04/28/2021 Transcript, p. 243). Appellant-Mother explained that her family in Fenton was her parents, her grandfather for half the year, some cousins, and one of her aunts. (05/12/2021 Transcript, p. 47). Appellant-Mother noted that her parents were planning to start spending more time in Utah and that Appellee-Father had an established network of lifelong friends in Traverse City. (05/12/2021 Transcript, pp. 48-49).

The Referee Recommendation on Custody

The Referee first found that the children's lives since the separation had "been marked with disruption and uncertainty." (06/07/2021 Recommendation, p. 6). As such, the Referee found that "the children do not yet have an ECE with either parent, which physically excludes the other parent." (06/07/2021 Recommendation, p. 6). The Referee then applied the preponderance of the evidence standard to the best interest analysis. (06/07/2021 Recommendation, p. 6).

The Referee found that the majority of the best interest factors were equal between the parties. (06/07/2021 Recommendation, pp. 6-20). The Referee found that factors (b) and (c) favored Appellant-Mother, that factor (h) slightly favored Appellant-Mother, that factor (j) favored Appellee-Father, and factor (l) slightly favored Appellee-Father. (06/07/2021 Recommendation, pp. 6-20). The Referee recommended that the parties be awarded joint legal custody, with Appellant-Mother being awarded primary physical custody. (06/07/2021 Recommendation, pp. 22-23). Appellee-Father objected to the Referee recommendation, which was then set for de novo review. (10/11/2021 Transcript, p. 4).

The De Novo Review Hearing

Appellee-Father testified that, although the Referee recommendation had noted that there was housing insecurity regarding the marital home, since the recommendation had been entered, Appellee-Father had been awarded the home as part of the mediation agreement and he intended to continue to reside there. (10/11/2021 Transcript, pp. 25-28). Appellee-Father recounted that he had been the primary care giver for the girls over the summer, as he had not hired a nanny, and that the girls had very quickly

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fallen into a routine over the summer. (10/11/2021 Transcript, pp. 31-32). Appellee-Father described the various activities they had participated in over the summer, including going to the beach and trips to Wisconsin to see Appellee-Father's family. (10/11/2021 Transcript, pp. 34-35). Appellee-Father stated that the girls have always looked to him as a father, they have always come to him for comfort and love, and that he has maintained a strong bond with the girls such that their relationship remains consistent. (10/11/2021 Transcript, p. 35). Appellee-Father did not note any issues with potty training over the summer. (10/11/2021 Transcript, p. 55).

Appellee-Father opined that both parties had been following the parenting time order and that he had made some concessions for Appellant-Mother, such as allowing the girls to stay with Appellant-Mother for an extra week to attend horse camp and visit with their cousins from California. (10/11/2021 Transcript, pp. 37, 41-42). Appellee-Father stated that he had been very, very flexible and that he "continue[d] to do what I believe is in the best interest of my children." (10/11/2021 Transcript, p. 43). Appellee-Father confirmed that he had simply started his summer parenting time a week late and had not complained, and that he had not travelled to Fenton to attend any of the girls' events since the Referee hearing as he was not aware that the girls were involved in anything. (10/11/2021 Transcript, pp. 43-44, 46).

Appellant-Mother testified that she had seen some regression with VLS' potty training over the summer and that VLS had been crying more, as well as acting cowardly and scared. (10/11/2021 Transcript, pp. 47-48). Appellant-Mother stated that when she had asked Appellee-Father about these issues, she had not gotten much of a response. (10/11/2021 Transcript, pp. 48-49). Appellant-Mother noted that the communication issues between the parties had continued and that they had been unable to coordinate on setting coparenting goals for the children because of Appellee-Father's lack of response. (10/11/2021 Transcript, pp. 49-50). Appellant-Mother stated that there had also been difficulties setting her week-long summer parenting time, as Appellant-Mother had requested July 4 weekend when her family would be in town. (10/11/2021 Transcript, pp. 50-51). When Appellee-Father denied that weekend based on it being his holiday under the parenting time order, Appellant-Mother went to the FOC and was awarded her week for later in the summer. (10/11/2021

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Transcript, pp. 50-51). Appellant-Mother did not think it was fair that Appellee-Father had the ability to veto her choice of summer parenting time, as he had vetoed two different weeks. (10/11/2021 Transcript, p. 51). Appellant-Mother also expressed concerns as to whether Appellee-Father had consistently given the girls their sleeping aids they use while in Appellant-Mother's care, as she could not get a straight answer from Appellee-Father. (10/11/2021 Transcript, pp. 51-52).

Regarding the issue of July 4, Appellee-Father clarified that Appellant-Mother had waited until July to submit her request and that Appellant-Mother's request was for nine days of uninterrupted time, rather than the seven she was granted in the order. (10/11/2021 Transcript, pp. 55-56). Appellee-Father had asked Appellant-Mother to pick a different date or for Appellant-Mother to alter the request such that the girls could still see Appellant-Mother's family, however, Appellant-Mother had refused and requested all or nothing. (10/11/2021 Transcript, p. 56). Appellee-Father explained that, after Appellant-Mother took the issue to the FOC without his knowledge, the FOC agreed with Appellee-Father and denied Appellant-Mother's request, on the basis that she was requesting nine days of parenting time rather than seven. (10/11/2021 Transcript, p. 57).

The Trial Court issued its decision on Appellee-Father's objections on November 17, 2021. (11/17/2021 Opinion). The Trial Court found that the children had an ECE with both parents and applied the preponderance of the evidence standard to the best interest determination. (11/17/2021 Opinion, p. 6).

The Trial Court found that factors (b) and (c) continued to favor Appellant-Mother, based on her level of involvement in and taking the lead on the children's medical and educational decisions, despite the finding that both parties attended to those needs. (11/17/2021 Opinion, pp. 7-12). Factor (h) also continued to slightly favor Appellant-Mother, based on the greater opportunities for socialization for the children at Appellant-Mother's residence. (11/17/2021 Opinion, pp. 15-16). Factor (j) continued to favor Appellee-Father, based on the fact that "[b]ut for [Appellee-Father]'s efforts to stay involved with the girls, have frequent phone calls and energetically exercise all of his parenting time, [Appellant-Mother]'s act of moving to Fenton could have had a much more deleterious effect on the parent-child relationships." (11/17/2021 Opinion, pp. 16-17). The Trial

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Court found all other factors to be equal or unapplicable. (11/17/2021 Opinion, pp. 6-22).

The Trial Court went on to note:

> [c]andidly, the Court looks very, very unfavorably upon the way the move to Fenton occurred and the impact it now will have on the family. This is not a case where any reasonable person would think that Plaintiff would end up with minimal parenting time. Nor it is a case where any reasonable person would find that Defendant would be in danger by staying in Traverse City and relocating to another residence in the Grand Traverse area or that the children's needs could not adequately be met here. The move to Fenton will mandate frequent 3 and ½ hour care rides for the children winter, spring, summer and fall and just with an every other weekend schedule a combined 10,400 miles a year. Even meeting at a half-way point for the exchange, the receiving parent will have driven a total of 3 and ½ hours and still have to be fresh and ready to remain a focused parent upon arrival home with the children. This is less than ideal. Whether the ride gets easier or harder on the children, at times it will be a painful and stressful long haul. If this court could lawfully require the parties to live in the same city or each move to a new city equidistant to their current locations, it would do so in a heartbeat.

(11/17/2021 Opinion, pp. 20-21). The Trial Court determined that the parties were not contesting joint legal custody, that Appellant-Mother should be awarded primary physical custody, and, due to her choice to move to Fenton, that Appellant-Mother should bear more of the transportation burden. (11/17/2021 Opinion, pp. 21-22).

Following the incorporation of the Trial Court's November 17, 2021 custody ruling into the Judgment of Divorce and the entry of the Judgment. (03/29/2022 Judgment; 03/24/2022 Transcript, pp. 18-19).

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The Parties' Appeals and the December 15, 2022 Court of Appeals Opinion

Both parties filed appeals from the Judgment of Divorce. (COA Docket Nos. 361068; 361074). Despite filing her own appeal and attempting to improperly raise several arguments to the best interest factors in her Appellee's Brief in Docket No. 361068, Appellant-Mother did not appeal any issues related to custody, including the Trial Court's determination of the ECE. (12/15/2022 COA Opinion, pp. 1, 5).

The Court of Appeals affirmed the Trial Court's determinations regarding the best interest factors and the Trial Court's child support related rulings. (12/15/2022 COA Opinion, pp. 3-5, 9-13). Regarding the ECE, the Court of Appeals noted the Trial Court had applied the preponderance of the evidence standard "indicating that the ECE was with both parents at all times" and that the joint ECE had continued post-separation. (12/15/2022 COA Opinion, p. 6). The Court of Appeals, relying on the *Bofysil v Bofysil*, 332 Mich App 232; 956 NW2d 544 (2020) case, was not persuaded by Appellant-Mother's argument that the Trial Court should have looked only post-separation to address the children's ECE. (12/15/2022 COA Opinion, p. 6).

Next, the Court of Appeals addressed the Trial Court's conclusion that the custody award would not change the ECE because the children would continue to look to both parents for guidance, discipline, and the necessities of life. (12/15/2022 COA Opinion, p. 6). The Court of Appeals held, even if this was the case, based on the opinion in *Liebermann v Orr*, 319 Mich App 68; 900 NW2d 130 (2017), because the custody award changed the nature of Appellee-Father's interaction with the children, as well as a substantial reduction in overnights from the situation prior to the separation, the trial Court should have applied the clear and convincing burden. (12/15/2022 COA Opinion, pp. 6-8). As such, the Court of Appeals ordered a remand to the Trial Court to address the best interest factors under the clear and convincing standard. (12/15/2022 COA Opinion, pp. 8-9, 13).

This appeal follows.

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STANDARD OF REVIEW

Appellee-Father agrees that the standard of review as reiterated in Appellant-Mother's brief appears to be complete and correct. Appellee-Father does not agree that the Court of Appeals "substituted its own judgment" for that of the Trial Court.

ARGUMENT

I. This Court should deny Appellant-Mother's application for leave because the Court of Appeals' decision does not violate case law and does not violate the intent of the Legislature as the Court of Appeals' decision only requires the Trial Court to apply the correct burden of proof in the event a parenting time schedule, as the one present here, modifies the ECE.

A child's right to maintain a custodial relationship with his or her parents is at the center of the Child Custody Act. MCL 722.27(1)(c) prevents courts from modifying a child's ECE without clear and convincing evidence that doing so is in the best interests of that child. It was the Legislature's intent to "minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment', except in the most compelling cases." *Baker v Baker*, 411 Mich 567, 577; 309 NW2d 532 (1981).

This Court's opinion in *Fletcher v Fletcher*, 447 Mich 871, 526 NW2d 889 (1994), set the stage for everything that followed. That appeal hinged on the trial court's best interest analysis under MCL 722.23. The Court of Appeals found that the trial court had made clearly erroneous findings of fact and committed clear legal errors on several factors. Applying a *de novo* standard of review, the Court of Appeals reversed the trial court's decision and awarded custody to the defendant. *Id* at 876. This Court directed "that upon a finding of error, appellate courts should remand to the trial court unless the error was harmless." *Id. at 882*. This Court stated:

> We further hold that on remand, the court should consider up-to-date information, including the children's current and reasonable preferences, as well as the fact that the children

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> have been living with the plaintiff during the appeal and any other changes in circumstances arising since the trial court's original custody order.

Id. at 889. This Court made no statement as to the determination of the children's ECE, as that was not directly at issue in the case. Indeed, this Court noted:

> We do not suggest that the events which have taken place during the appellate process give rise to an "established custodial environment" that, pursuant to MCL 722.27(1)(c); MSA 25.312(7)(1) (c), alters the burden of proof in favor of the party who has enjoyed custody during the appeal.

Id. at 889 n 10. This Court's decision addressed the balance of "expediency over accuracy," not the ability of the Court of Appeals to direct the correction of legal errors on remand. *Id.*

It is true that *prior* to *Fletcher*, the Court of Appeals had previously directed trial courts to hold new evidentiary hearings on remand and acknowledged that an ECE may have been created while the appeal was pending. *Blaskowski v Blaskowski*, 115 Mich App 1, 320 NW2d 268 (1982) (remanding for the trial court to make an established custodial environment for the first time prior to entering an initial custody determination); *Carson v Carson*, 156 Mich App 291; 401 NW2d 632 (1986) (acknowledging that during the new evidentiary hearing on remand "it may be proven that an established custodial environment has been created in the home of the defendant father during this appeal"); *Wilson v Gauck*, 167 Mich App 90, 97; 421 NW2d 582 (1988) ("The trial court must determine whether an established custodial environment exists as of the date of rehearing rather than the date of the hearing held herein."). However, Appellant-Mother does not establish, nor is there precedent to suggest, that the Court of Appeals, after affirming a trial court's findings on the ECE, *cannot*, in correcting a harmful error such as application of the incorrect burden of proof, direct the trial court apply the appropriate burden of proof for the subsequent best interest analysis. Indeed, Court of Appeals' precedent suggests exactly the opposite. *See Griffin v Griffin*, 323 Mich App 110, 123-125, 128; 916 NW2d 292 (2018).

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Appellant-Mother's argument that the children's ECE exists only with her is not only unpreserved, but is also legally erroneous. (Application, pp. 8-9). Appellee-Father did not challenge the Trial Court's factual findings as to the ECE, only the Trial Court's application of the preponderance of the evidence standard. (Appellant's Brief in Docket No. 361068, pp. 50-51). The Court of Appeals did not overrule the Trial Court's finding that the children have, at all times, had an ECE with both parties. (12/15/2022 COA Opinion, pp. 6-7). Despite filing her own appeal, Appellant-Mother did not challenge any of the Trial Court's rulings on custody. (12/15/2022 COA Opinion, pp. 1). Thus, to the extent that Appellant-Mother now attempts to argue this issue for the first time to this Court, that issue is unpreserved. *Blackwell v Citizens Ins Co*, 457 Mich 662, 673-674; 579 NW2d 889 (1998).

Should this Court nonetheless consider this issue, Appellant-Mother's contention that the children's sole ECE lies with her because she has primary physical custody is not supported by Michigan law. (Application, pp. 8-9). The ECE depends

> upon a custodial relationship of 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.

Baker, *supra*, at 579-580 (emphasis added). Michigan law has long established that a child may have an ECE with both parents, even where parenting time, or parental contributions, are not necessarily equal. *See Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000). As the Court of Appeals found in *Bofysil*, "Although [the child] might have looked to her parents to fulfill different needs and likely understood at some level their distinct household roles, both provided her with security, stability, and permanence." *Bofysil*, *supra*, at 244 (internal quotation marks omitted). The same is true for this matter, as the Court of Appeals concluded. (12/15/2022 COA Opinion, pp. 6-8). The Court of Appeals' discussion of *Liebermann* further supports this contention, however, Appellant-Mother would have this Court rely solely on "the fact that [the children] have lived with their mother since September 2020, and she is their primary physical

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custodian on a day-to-day basis over 240 overnights per year." (Application, p. 9). Appellant-Mother cites no law for this contention, as it is clearly contrary to Michigan law, as discussed *infra*. (Application, p. 9). To the extent that Appellant-Mother attempts to rely on facts for this contention, this Court should note that throughout the entirety of this matter, no one has disputed that the children have an ECE with Appellant-Mother and Appellant-Mother is the only person who has disputed Appellee-Father's ECE and relationship with the children. (12/15/2022 COA Opinion, pp. 6-8). Appellant-Mother has consistently and unrelentingly attempted to devalue Appellee-Father's contributions as a parent, something the Trial Court admonished Appellant-Mother for and something that negatively affected Appellant-Mother's credibility. (11/17/2021 Opinion, pp. 5-12, 17). Appellee-Father continually requested to see his children or have them returned to him; he exercised his parenting time to the greatest extent possible, both before and after the entry of a court order; he maintained almost constant contact with the children; and he continued to foster his relationship with the girls as much as he could, even in the face of direct opposition from Appellant-Mother. (04/07/2021 Transcript, pp. 130-132, 178, 180; 11/17/2021 Opinion, p. 17).

Appellant-Mother has summarily concluded that the *Bofysil* case does not apply to this matter as "[t]he facts of *Bofysil* are not in any way similar to this case." (Application, p. 9). However, the facts of *Bofysil* are markedly similar to the case at bar. In *Bofysil*, one of the parents withheld the child from the other for over a month until a temporary parenting time order was entered. *Bofysil*, *supra*, at 238-239. In this matter, Appellant-Mother surreptitiously relocated the children to Fenton, filed for divorce even though she did not reside in the area for the statutorily mandated period, and only "allowed" Appellee-Father to see his children if he came to Fenton for what amounted to supervised visitation. (04/07/2021 Transcript, pp. 74-76, 85, 105, 115, 119, 121-122, 191, 197-198; 04/27/2021 Transcript, pp. 19, 122-123; 04/28/2021 Transcript, pp. 134-150, 168, 219-224, 233-240). This arrangement continued until the January 2021 order was entered. (04/07/2021 Transcript, pp. 115, 119, 121-122; 04/27/2021 Transcript, pp. 19, 122-123). In *Bofysil*, despite one parent being largely the "stay-at-home" parent before and after the separation, the Court of Appeals found that, when the parties lived as an intact family and psot-separation, the child could look to each of her parents to fulfill different

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needs, and thus the child had an ECE with both parties. *Bofysil*, *supra*, at 243-244. This Court did not disturb that finding. *Bofysil v Bofysil*, 507 Mich 1020; 961 NW2d 204 (2021) (order denying application for leave). In this matter, the parties had a similar division of responsibilities when living as an intact family, however, both parties were actively involved with the children and the children could look to both parents to fulfill their needs. (12/15/2022 COA Opinion, pp. 6-8). This did not change with the separation of the parties. (12/15/2022 COA Opinion, pp. 6-8).

Appellant-Mother relies heavily on this Court's recent order in *Butters v Butters*, however, the Court of Appeals in *Butters* reversed the trial court's ECE finding and then remanded on the basis of the Court of Appeals' new ECE finding, requiring the trial court to apply the clear and convincing burden. *Butters v Butters*, ___ Mich App ___ (2022), slip op p. 12-13. Clearly, the situation at hand is markedly different, as the Court of Appeals affirmed the Trial Court's underlying ECE finding, the Court of Appeals merely remanded for the Trial Court to apply the correct burden of proof, as the custody arrangement modifies the ECE the children share with Appellee-Father. (12/15/2022 COA Opinion, pp. 5-9). This ruling comports with long-standing Michigan law. *See* MCL 722.27(1)(c). Additionally, nowhere in the Court of Appeals' opinion does the opinion prohibit the Trial Court from considering updated evidence on remand. (12/15/2022 COA Opinion).

Based on the foregoing, Appellant-Mother has failed to provide any basis for this Court's intervention in this matter. This Court should deny Appellant-Mother's application for leave to appeal.

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CONCLUSION AND RELIEF REQUESTED

One thing Appellant-Mother has made very clear throughout this matter is that she does not view Appellee-Father as a parent, and she does not view his contributions to or relationship with the children as valuable. Appellant-Mother's appeal to this Court only furthers this motive. Appellant-Mother has failed to provide any basis grounded in the law, rather than Appellant-Mother's legally erroneous interpretation of the law, as to why this Court should grant leave to appeal from the unpublished decision of the Court of Appeals at issue in this matter.

Appellee-Father, Andrew Sabatine, respectfully requests this Court deny Appellant-Mother's January 26, 2023 Application for Leave to Appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212(B). I certify that this document contains 10,812 countable words. The document is set in Georgia Pro, and the text is in 12-point type with 1.5 line spacing and 12 points of spacing between paragraphs.

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