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**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

| | |
|---|---|
| Andrew Paul Sabatine,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>Colleen Knecht Sabatine,<br><br>Defendant-Appellant.<br>/ | Michigan Supreme Court No. _____<br>Court of Appeals No. 361068<br>Consolidated COA Appeal 361074<br><br><br><br><br>Leelanau County Circuit Court Case No. 2020-10532-DM |


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# APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

## - CHILD CUSTODY-

## 12/15/2022 Court of Appeals Decision No. 361068

Submitted by:


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The Court of Appeals custody decision contravenes decades of established case precedent – and the intent of the Legislature to prioritize the interests of the children over those of the parents. The Court of Appeals' novel and improper approach resets the established custodial environment of the children at a specific time over 2 ½ years ago, prior to the parties's separation, contrary to the record and established law and ignoring the last 2 ½ years of the children's lives living with their mother. The Court of Appeals remanded to the trial court with instructions to base the burden of proof – clear and convincing evidence – on a custodial environment that ceased to exist in September 2020. ..... 6

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## Statement of Jurisdiction

Defendant Colleen Sabatine files this application for leave to appeal from the Court of Appeals' partial reversal and remand of the trial court's child custody decision in **COA no. 361068.**

On April 18, 2022, both parties filed *separate* appeals of right from the Judgment of Divorce [entered March 29, 2022] issued in the Circuit Court for the County of Leelanau. **Tab A**, Judgment of Divorce. The Court of Appeals consolidated the cases.

In COA docket no. **361068**, Plaintiff-Appellant Andrew Sabatine appealed the trial court's child custody decision. In COA docket no. 361074, Defendant-Appellant Colleen Sabatine appealed only the determination of income and child support.

On December 15, 2022, the Court of Appeals issued its *per curiam* Opinion. **Tab E**, 12/15/22 COA Opinion.

In docket no. 361074 – the support appeal – the Court of Appeals affirmed.

In docket no. 361068 – the custody appeal – the Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings consistent with its opinion.

This application concerns **COA docket no. 361068.**

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## Nature of Order Appealed and Relief Sought

Defendant seeks leave to appeal from a narrow portion of the Court of Appeals decision related to assessment of the established custodial environment and the burden of proof applied on remand. The Court of Appeals affirmed the trial court's best interest determinations supporting primary custody to Defendant Colleen Sabatine.

The Court of Appeals static treatment of the established custodial environment and its remand to the trial court constitute material error.

The trial court appropriately determined custody, including based on the children living with Defendant mother in Fenton, Michigan since September 2020, now 2 ½ years ago. The trial court found a joint established custodial environment recognizing that environment as based on the children's unique circumstances and the weighted allocation of time – living 243-296 overnights with their mother since September 2020, awarded Defendant primary physical custody.

In contrast, the Court of Appeals artificially limits consideration of the children's established custodial environment to the time period **before** the parties separated in September 2020. This is now 2 ½ years in the past and there is a very different environment for the children. At the time of the move the children were 2 and 4 – they are now 5 and 7. The youngest has lived over half of her life since September 2020. The Court of Appeals construction is an *ad hoc*, improper approach.

This application raises the same remand issue recently addressed by this Court in *Butters v Butters*, __ Mich ___ (2022)(December 9, 2022, no. 164888)((the Court of Appeals erred by instructing the Kent Circuit Court on remand to apply the best-interest factors under the clear-and-convincing-evidence standard without regard to any changed circumstances that might have occurred during the pendency of that appeal). **Tab F**. The evidence presented on remand will show the children's custodial environment was at the time of trial and still is with Defendant. Yet the remand instructions impose on the trial court the requirement that it ignore the reality of the children's current custodial situation and instead be bound by a joint established

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custodial environment that has not existed since September 2020. Such a finding would impose a clear and convincing evidentiary burden on Defendant to retain custody of the children. Doing so improperly prioritizes notions of "fairness" to Plaintiff over the interests of the children in stability and continuity. Decades of case law and the intent of the Legislature require that the children's interests take priority over notions of fairness to the parents.

Regardless if the established custodial environment is framed as "joint" based on the allocation of time heavily weighted with Defendant or "solely" with Defendant – it is the same thing. The Court of Appeals decision avoids the children's reality, artificially imposes an improper time period for the established custodial environment, imposes an unworkable remand, and violates established precedent as well as statutory authority. See *Baker v Baker*, 411 Mich 567 (1981)(stressing the importance of maintaining an established custodial environment as set out in MCL 722.27(1)(c)); *Fletcher v Fletcher*, 447 Mich 871 (1994) (remands require trial court address current circumstances affecting children); *Butters v Butters*, *supra*.

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## Question Presented

Should leave to appeal or other relief be granted where:

The Court of Appeals custody decision contravenes decades of established case precedent and the intent of the Legislature to prioritize the interests of the children over those of the parents. The Court of Appeals' novel and improper approach resets the established custodial environment of the children at a specific time over 2 ½ years ago, prior to the parties's separation, contrary to the record, trial court order, and established law and ignoring the last 2 ½ years of the children's lives living with their mother. The Court of Appeals remanded to the trial court with instructions to base the burden of proof – clear and convincing evidence – on a custodial environment that ceased to exist in September 2020?

Plaintiff-Appellee Answers "No"
Defendant-Appellant Answers "Yes"
The Trial Court Did Not Address This Question
Court of Appeals issued its decision.

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## Statement of Reasons Leave to Appeal Should be Granted

MCR 7.305(B) sets out the grounds on which this Court may grant leave to appeal. Appellant satisfies several of those grounds.

The issues presented involve legal principles of major significance to the State's jurisprudence. MCR 7.305(B)(3).The Court of Appeals errs in both its construction of the established custodial environment and in its remand to the trial court. The Court of Appeals decision creates a novel, improper approach to the determination of a child's established custodial environment – making it **static** at a particular time in the past. The Court's determination of the established custodial environment ignores that the children in this case have lived since September 2020 with their mother for 243-299 days (depending on the order) a year. The Court of Appeals construct imposes an artificial time period that ended over 2 ½ years ago that is contrary to established case law and statute as well as the record. *Baker, supra*.

Further, the Court of Appeals remanded to the trial court to apply an inapplicable evidentiary burden of proof based on a situation that no longer exists. In the past several years there have been over 100 decisions from the Michigan Court of Appeals remanding a custody determination to the trial court. In the vast majority of those cases, the trial court is instructed to consider up-to-date information on remand. The trial court must be free to re-assess the children's custodial environment based on the facts existing at the time of the remand hearing even if that new environment differs from the environment that existed when the case was originally decided.

Further, the Court of Appeals decision is clearly erroneous and will cause material injustice by placing the interests of the parents over the children's interest in stability and continuity in their existing custodial environment. MCR 7.305(B)(5)(a). Unpublished decisions are readily available to and used by parties, attorneys, and trial courts.

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And, the Court of Appeals decision conflicts with decades of established case law and the clear intent of the Legislature that the determination of an established custodial environment is child focused and on remand the children's established custodial environment must be determined as of the time of the remand hearing. MCR 7.305(B)(5). Here, the children's established custodial environment would be the same on remand as at the time of the trial – with Defendant mother for over 240 days per year since September 2020.

The Court of Appeals ignores the reality of the children's current custodial situation (since September 2020) and instead focuses on circumstances that existed prior to September 2020. See Opinion, p. 8 ("Both parties had the children for 365 overnights a year in Traverse City...). The Court of Appeals mandates that the trial court apply a clear and convincing evidentiary standard on remand. Id. This imposes a clear and convincing evidentiary burden on Defendant to retain custody of the children. Doing so improperly prioritizes notions of "fairness" to Plaintiff over the interests of the children in stability and continuity. And the Court of Appeals remand concerning the established custodial environment contradicts its affirmance of the trial court's best interest findings. Decades of case law and the intent of the Legislature require that the children's interests take priority over notions of fairness to the parents.

The Court of Appeals erred in substituting its judgment for the trial court, in setting a past date for determining the established custodial environment that is not supported by the record and is contrary to law, and remanding to the trial court – requiring a clear and convincing evidentiary standard – without requiring consideration of up-to-date information concerning the children.

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## Statement of Facts

The parties were married and are the parents of two minor children.

In September 2020, Ms. Sabatine moved with the children (ages 4 and 2 at the time) to Fenton Michigan based on safety concerns. She filed for divorce in Genesee County on October 1, 2020. Mr. Sabatine filed for divorce in Leelanau County on October 5, 2020. The Genesee County case was subsequently dismissed and the Leelanau County action continued. **Tab B**, Decision and Order after De Novo Review, pp. 1-2.

### January 7, 2021 Temporary Order - Primary Physical Custody to Mother

On January 7, 2021, the trial court entered the Temporary Order for Custody, Support and Parenting Time. **Tab C**. The order awarded the parties joint legal custody and Ms. Sabatine primary physical custody in Fenton. Mr. Sabatine was awarded specific parenting of 69 overnights per year. He objected to the order and filed various motions concerning custody and parenting time, which were addressed at the subsequent multi-day hearing. Tab B, p. 2.

### Evidentiary Hearings and Subsequent Orders

The evidentiary hearing was held before the Leelanau Friend of the Court referee on: April 7, 2021; April 13, 2021; April 27, 2021; April 28, 2021; May 12, 2021; May 18, 2021; and May 21, 2021.

June 2021 Order Continuing Primary Physical Custody with Mother

On June 4, 2021, the Referee issued the recommendation continuing joint legal custody with both parties, continuing primary physical custody with Ms. Sabatine, and increasing Mr. Sabatine's parenting to 117 overnights. The trial court signed the order on June 7, 2021 adopting the recommendation. Plaintiff filed timely objections and the trial court set the matter for a *de novo* review. The court read all of the evidentiary hearing transcripts and held a two-day hearing, on October 13 and 27, 2021, addressing custody and support. Tab B, p. 2.

Mr. Sabatine requested primary physical custody in Traverse City. Ms. Sabatine requested that she retain primary custody.

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**Trial Court Decision**

On November 16, 2021, the trial court issued its Decision and Order after De Novo Review. **Tab B**, attached. The court found that there is an established custodial environment between the children and each of their parents. As discussed in the Argument, the court found that the environment was defined by the January 7, 2021 order awarding primary custodial time to Ms. Sabatine. Tab B p. 21. Ms. Sabatine's primary custody was continued in the June 4, 2021 order. Tab D. The children had been living with their mother since September 2020 in Fenton and continue to live with her there.

The trial court addressed the best interest factors and found that "[t]he parties fare equally under factors a, d, e, f, and g. Factors i and k are not applicable. Plaintiff prevails under factor j while Defendant [mother] *prevails under factors b, c and h*." Tab B, p. 21 (emphasis added). The court further found that based on the best interest factors, Defendant mother should continue with primary physical custody of the children.

The court awarded primary physical custody to Ms. Sabatine, joint legal custody to the parties, set out a parenting schedule, and set out a payment schedule concerning parenting exchanges. Tab B, pp. 21-22.

**Judgment of Divorce and Party Appeals**

The Judgment of Divorce was entered on March 29, 2022. Tab A.
The parties filed their appeals. Plaintiff Andrew Sabatine appealed by right and challenged custody. COA docket no. 361068. Ms. Sabatine appealed the trial court's income determination and child support in COA docket no. 361074. The Court of Appeals consolidated the appeals.

**Court of Appeals Decision**

On December 15, 2022, the Court of Appeals issued its decision. In the custody appeal (no. 361068), the Court affirmed in part, reversed in part, and remanded to the trial court. The Court affirmed the trial court's best interest findings but found that the trial court erred in considering the established custodial

environment. The Court of Appeals found that the trial court should have considered the established custodial environment as set while both parties were living in Traverse City (each having custody “365" days per year), id at 8, and that the trial court on remand was to apply a “clear and convincing” evidentiary standard to Defendant-Appellant’s request for custody.

Defendant-Appellant files this application for leave to appeal.

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## Argument

**The Court of Appeals custody decision contravenes decades of established case precedent and the intent of the Legislature to prioritize the interests of the children over those of the parents. The Court of Appeals' novel and improper approach resets the established custodial environment of the children at a specific time over 2 ½ years ago – *before* the parties's separation, contrary to the record, trial court order, and established law, and ignoring the last 2 ½ years of the children's lives living with their mother. The Court of Appeals remanded to the trial court with instructions to base the burden of proof – clear and convincing evidence – on a custodial environment that ceased to exist in September 2020.**

Standard of Review

This case presents questions of law. Questions of law are reviewed de novo. *Matley v Matley*, 234 Mich App 535, 537, *vacated on other grounds*, 461 Mich 897 (1999).

Appellate review of custody orders is subject to MCL §722.28,[1] which requires affirmance unless findings of fact are against the great weight of the evidence, there is clear legal error on a major issue, or a determination that the trial court committed a palpable abuse of discretion. *Fletcher v Fletcher*, 447 Mich 871, 876-877 (1994). All custody orders must be affirmed on appeal absent the specific grounds set out in MCL 722.28; *Fletcher, supra*; *Berger v Berger*, 277 Mich App 700, 705 (2008). The palpable abuse of discretion standard applies to the trial court's dispositional custody ruling. *Phillips v Jordan*, 241 Mich App 17, 20 (2000). A trial court's decision in child custody cases is entitled to the utmost level of deference by statute. There is an abuse of discretion only if a decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of

[1] **722.28 Child custody disputes; appeal, grounds**. "To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court **shall be affirmed on appeal unless** the trial judge made findings of fact against the great weight of evidence or committed a **palpable abuse of discretion** or a clear legal error on a major issue."(Emphasis added).

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judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Fletcher, supra;Shulick v Richards*, 273 Mich App 320, 323-325 (2006) (reiterating the *Fletcher* standard).

A reviewing court should not substitute its judgment on questions of fact unless they "clearly preponderate in the opposite direction." *Fletcher supra* at 879. Questions of law are reviewed de novo. See *Auto Club v General Motors*, 217 Mich App 594, 552 NW2d 523 (1996) (de novo review of interpretation or application of court rules).

The Court of Appeals substituted its own judgment and improperly redetermined the established custodial environment and remanded for application of the clear and convincing evidentiary standard contrary to long-standing precedent.

**Argument**:

**Applicable Law:** Multiple decisions over several decades from the Court of Appeals and this Court make clear that the custodial environment determination is always, and without exception, a factual one to be made at the time of a trial – not a date that may be a year or two in the past. *Baker, supra* (intensely fact-based decisions). This is required to prioritize the interests of the children over those of the parents. The rule is especially important in cases like this where the two minor children, now ages 7 and 5, have been in the primary physical custody of Defendant for over 2 ½ years (over 240 overnights with their mother).[2]

The seminal case of *Blaskowski v Blaskowski*, 115 Mich App 1 (1982), states at pp 6-7:

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[2] Michigan's statutory scheme concerning children ensures that a child's established custodial environment is not to be disturbed absent compelling circumstances. See MCL 722.27(1)(c). In *Baker*, supra, this Court stressed the importance of maintaining an established custodial environment:

> "In adopting sec. 7(c) of the act, the Legislature intended 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 circumstances." (Emphasis added).

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> Whether or not an established custodial environment exists is a question of fact for the trial court to resolve based on the statutory factors. If the trial court determines that an established custodial environment in fact exists, it makes no difference whether that environment was created by a court order, whether temporary or permanent, or without a court order, or in violation of a court order, ***or by a court order which was subsequently reversed***. The statute represents a policy decision by the Legislature that normally it will not be in the best interests of the child to change an established custodial environment. ***All of the psychological factors which favor maintenance of an established custodial environment are present no matter how the custodial environment was created in the first instance***. [Emphasis added].
>
> ***
>
> We recognize a potential for unfairness to the noncustodial parent if custody pursuant to such a temporary order may ripen into an established custodial environment. ***Nevertheless, the Legislature has decided that the best interests of the child prevail over procedural fairness to the parents and that the best interests of the child generally require continuance of an established custodial environment.*** [Emphasis added].

See also *Carson v Carson*, 156 Mich App 291 (1986)("as we explained in *Blaskowski v Blaskowski*, 115 Mich App 1, 9; 320 NW2d 268 (1982), we consider the statements of policy contained in the Child Custody Act, 1970 PA 91, MCL 722.21 et seq.; MSA 25.312(1) et seq., to be superior to the symmetry of common law appellate remedies and even to the rights of the plaintiff who has prevailed on appeal").

In its November 16, 2021 decision, the trial court found that the children looked to both of their parents for care and guidance and have an established environment with each party, citing MCL 722.27(1)(c). But that determination does not mean that the children spent equal time with each parent – as acknowledged by the trial court – nor does it require a determination that the children must spend equal time with each parent (or return to a situation that existed almost two years ago which is not the children's established environment now). The reality is the children annually spend over 240 overnights with Defendant – who cares for them on a day-to-day basis during the school year. Whether the trial court called this time

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allocation a "joint" established custodial environment (based the children's experience with weighted time with their mother) or simply an established custodial environment with Defendant, it is the same thing. The trial court ordered that the children are in the primary physical custody of their mother.

The Court of Appeals' reliance on *Bofysil v Bofysil*, 332 Mich App 232 (2020) is unavailing. The facts of *Bofysil* are not in any way similar to this case. Likewise, the Court of Appeals discussion of *Lieberman v Orr*, 319 Mich App 68 (2017) is not applicable here. The Court's reliance on *Lieberman* ignores that the children's established custodial environment is based on the fact that they have lived with their mother since September 2020, and she is their primary physical custodian on a day-to-day basis over 240 overnights per year. Finally, the Court of Appeals affirmed the trial court's best interest findings, including under factor b – a significant factor concentrating on the capacity and disposition regarding love, affection, guidance, education, religion.[3]

Finally, if there is a remand, the trial court should not be bound to applying clear and convincing evidence standard.

In *Wilson v Gauck*, 167 Mich App 90, 97 (1988), the Court of Appeals held:

> ***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***. *Carson v Carson*, 156 Mich App 291; 401 NW2d 632 (1986). We are aware that this will work to defendant's disadvantage as it is likely that the court will find an established custodial environment with plaintiff based on the fact that the children have been in his custody since July 1986; nevertheless, the defendant is entitled to her day in court. [Emphasis added].

In December 2022, this Court issued *Butters, supra*, which provides:

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[3] Factor b focuses on the day to day presence and guidance in a child's life and the parties' disposition to provide children with a good education, the parties' inclinations with regard to methods of discipline and guidance, e.g., *Fletcher v Fletcher*, 229 Mich App19, 26-27 (1998)(reversed in part on other grounds, 447 Mich 871 (1994)) found in favor of Defendant mother and

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> The Court of Appeals correctly explained that, on remand, the trial court " 'should consider up-to date information, including the children's current and reasonable preferences' " when determining whether a modification of the previous custody order is warranted. *Butters v Butters*, ___ Mich App ___, ___ (2022); slip op at 6, quoting *Fletcher v Fletcher*, 447 Mich 871, 889 (1994). However, the Court of Appeals erred by instructing the Kent Circuit Court on remand to apply the best-interest factors under the clear-and-convincing-evidence standard without regard to any changed circumstances that might have occurred during the pendency of this appeal. When nonharmless errors occur in child custody cases that necessitate a remand to the circuit court for reevaluation, those courts should address the circumstances of the child as they exist at the time of remand. See *O'Brien v D'Annunzio*, 507 Mich 976 (2021); *Fletcher*, 447 Mich at 889; *Dempsey v Dempsey*, 409 Mich 495, 496 (1980).

Here, the Court of Appeals decision acts to stop the trial court from considering up-to-date information and determining any evidentiary standard based on that information. The Court of Appeals determined for the trial court that it must apply a clear and convincing evidentiary standard.

**Conclusion**: It was improper for the Court of Appeals to mandate a custodial environment finding based on facts and circumstances that last existed over 2 1/2 years ago. Doing so elevates the interests of a parent over the best interests of the children and is directly contrary to the Legislative mandate in the Child Custody Act and longstanding Michigan public policy that the interests of the children are superior to those of the parents. The Court of Appeals should be reversed.

Further, if there is any remand, the trial court should not be bound to a clear and convincing evidentiary standard. A trial court must consider up-to-date information concerning the children. That assessment will determine the proper burden of proof to be applied on remand.

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**Relief**

Defendant-Appellant requests that this Court grant leave to appeal and ultimately reverse the Court of Appeals on its determination of the established custodial environment and ordering the trial court on remand to apply a clear and convincing evidentiary standard, or issue other relief, including an order addressing the Court of Appeals' errors in lieu of granting leave to appeal.

Respectfully submitted,

***/s/ Anne Argiroff***

Attorney for Appellant

January 26, 2023