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STATE OF MICHIGAN
IN THE SUPREME COURT

Andrew Paul Sabatine,

Plaintiff-Appellee,

vs.

Colleen Knecht Sabatine,

Defendant-Appellant.

Michigan Supreme Court No. 165279
Court of Appeals No. 361068

Leelanau County Circuit Court Case No. 2020-10532-DM

/

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APPELLANT'S REPLY BRIEF
- CHILD CUSTODY-

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Summary of Issues

The Court of Appeals materially errs as follows:

A. The Court of Appeals opinion[1] improperly reframes the established custodial environment based on circumstances over 2 ½ years ago, contrary to controlling law.

B. And, the Court of Appeals' remand to the trial court improperly focuses on the children's lives over 2 ½ years ago, requiring the trial court to apply an erroneous clear and convincing evidentiary standard to Appellant-mother's request for child custody at the time of the later trial, trial court opinion, and divorce judgment. The Court of Appeals ignores the past 2 ½ years of the children's lives living with their mother as the primary physical custodian – indeed orders the trial court to ignore that time – and denies the trial court the ability to assess up-to-date information as well as the discretion to apply the appropriate evidentiary standard. The decision violates this Court's opinion in *Fletcher v Fletcher,* 447 Mich 871 (1994) as well as this Court's recent order in *Butter v Butter*, attached as **Tab F.**

C. The Court of Appeals opinion is confusing at best and it and the published case of *Bofysil v Bofysil*, 332 Mich App 232 (2020) are in conflict with *Flectcher* and the more recent *Butters* order issued by this Court.

The children were living with their mother in Fenton *prior* to the filing of the divorce case, *during* the divorce litigation, and have *continued to reside* with her per the judgment as the primary physical custodian during the appeal process.

Overview of Pertinent Facts

In September 2020, Defendant-Appellant Colleen Sabatine moved with the minor children to Fenton Michigan where her parents live. As discussed in her brief

[1] **Tab E**, 12/15/22 COA per curiam opinion.

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in the Court of Appeals, she moved because of safety concerns over Plaintiff's behavior.[2] The move was *prior* to the filing of the divorce action.

The divorce action was filed in December 2020.

The temporary custody order was entered in January 7, 2021 providing that Ms. Sabatine has **primary physical custody** of the children and Mr. Sabatine has alternating weekends with additional time, including summer vacation time. **Tab C**, 1/7/21 Order.

Mr. Sabatine did *not* file an interlocutory appeal.[3]

On November 16, 2021, the trial court entered its Decision and Order after De Novo Review, awarding primary physical custody to Ms. Sabatine. **Tab B**, 11/15/21 trial court decision, p. 22. While the trial court discussed the children's previous lives in Traverse City with both parents, the trial court's disposition recognizes that the children have been living with their mother in Fenton since September 2020 – before the divorce action was filed. The children's established environment is what exists *for them*. The trial court found that the children had a joint established custodial environment based on the children's circumstances and continued the status quo existing since September 2020. The trial court recognized the case-specific custodial environment reality for the children supported by the record in continuing primary physical custody with Ms. Sabatine.

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[2] The parties had long-term marital problems. Ms. Sabatine explains that she had discussed leaving previously but did not feel safe telling Plaintiff she wanted a divorce at their home. She decided for the safety and health of the family she needed to leave with the children. The children had seen Plaintiff being emotionally and verbally abusive to her. Tr. 5/12/21, p. 57. She did not know how Plaintiff was going to react, he had been aggressive and impulsive; she did not want the girls to be in the home to witness more. Tr. 4/28/21, p. 23. She was also concerned because Plaintiff had over 50 guns in the home and kept an unsecured pellet rifle that he would not put away, including when other children were in the house. Tr. 4/28/21, p. 23. Ms. Sabatine had told him that she was afraid. *Id.*

[3] Plaintiff made a decision not to file an interlocutory appeal over two years ago. Things change over time. And custody and parenting time are modifiable.

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On 3/29/22, the trial court entered the Judgment of Divorce. **Tab A**. Mr. Sabatine appealed custody and Ms. Sabatine appealed the trial court's income and child support determinations. The Court of Appeals entered its Opinion on December 15, 2022. Tab E.

The Court of Appeals decision, however, ignores the child-based reality. The opinion reversibly modifies what is the established environment for purposes of assessing the best interest findings (which the Court of Appeals did affirm), which was continued by the trial court in its November 2021 opinion and March 29, 2022 judgment, and remands this case without requiring consideration of the current long-existing environmental status of the children. This is contrary to Michigan law.

Argument

I. Michigan Law focuses on a child-centered established custodial environment. The trial court properly recognized an established custodial environment that exists primarily with Defendant in its November 2021 opinion and March 2022 divorce judgment. The Court of Appeals reversibly altered that determination.

Appellee tries to flip Michigan law concerning child custody – without authority and contrary to this Court's opinions and orders. The gist of Appellee's argument is that the Court of Appeals can attempt to correct an alleged early error by directing the trial court to apply a clear and convincing evidentiary standard for "subsequent" best interest analyses. But Appellee provides no legal support for this position and this position is contrary to established law.

The express purpose of the Child Custody Act is to ensure the best interests and welfare of children in custody proceedings. MCL 722.24(1); *Harvey v Harvey,* 470 Mich 186; 680 NW2d 835 (2004)(paramount statutory duty of trial court is to ensure the best interests of children, relying on MCL 722.24(1).[4] A custody case is

[4] "The act makes clear that the best interests of the child control the resolution of a custody dispute between parents, as gauged by the factors set forth at § 722.23. Mich. Comp. Laws § 722.25(1). It places an affirmative obligation on

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not about the best interests of parents or guardians. A child's established custodial environment is a factually dense determination based on the *unique* circumstances of each case. MCL 722.27(1)(c)[5]; *Baker v Baker*, 411 Mich 567, 309 NW2d 532 (1981); *Berger v Berger*, 277 Mich App 700, 706 (2008)(it is both a physical and a *psychological environment* that fosters a relationship between custodian and child and is marked by security, stability, and permanence). Appellee provides an adult-centric argument that is both improperly assumptive concerning Appellant (incorrect and negative speculation and assigning intent to her that does not exist) and does not focus on reality for the children in terms of their day to day lives and to whom they look to for guidance based on allocation of parenting.[6]

Based on established law, the focus is a real time, up-to-date assessment of the children's established custodial environment. In *Fletcher*, *supra* at 889, this Court emphasizes the importance of current, "up-to-date" information on remand, including whom the children have been living with during the appeal. See also

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the circuit court to "declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act" whenever the court is required to adjudicate an action 'involving dispute of a minor child's custody.'" Mich. Comp. Laws § 722.24(1). *Harvey* at 192.

[5] The statute in part provides: "The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered."

[6] Appellee is occupied with Ms. Sabatine leaving with the children in September 2020. She explained her reasons. Factor (j) of the child custody factors incorporates the legislative mandate that a court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child *or that parent* from domestic violence by the child's other parent. See e.g. MCL 722.23(j). And, to the extent that Plaintiff wants a punitive response to the move, there was no requirement that Defendant get permission. The move was prior to any court action and MCL 722.31 was not applicable. *Eickelberg v Eickelberg*, 309 Mich App 694 (2013)(statute only applies if the children are under court order).

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Wilson v Gauck, 167 Mich App 90, 97 (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, citing *Carson v Carson*, 156 Mich App 291; 401 NW2d 632 (1986)); MCL 722.27(1)(c)(statute's use of present tense – to whom a child "looks" to for guidance, etc.).

A. The trial court entered a custody award based on the record.

The trial court's assessment of the established custodial environment as joint was geared to the specific facts of this case and the weighted allocation of parenting to Ms. Sabatine during the school year. The trial court's decision was supported by the record and the great weight of the evidence based on the children's specific circumstances since September 2020. *Blaskowski v Blaskowski*, 115 Mich App 1, 6-7 (1982).[7] Contrary to Appellee's claims, this is an established custodial environment based on how the children live. The trial court discussed the prior environment in Traverse City and the children's circumstances since September 2020. The dispositive opinion (11/2021) and judgment (3/29/2022) recognize and incorporate this schedule – the children with Ms. Sabatine as their primary physical custodial environment.

The label of joint does not mean a rigid definition. Parenting does not have to be evenly allocated to have a joint established custodial environment. The children

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[7] " 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].

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have an established environment when they are with each parent, looking to each for guidance when with that parent. But the joint environment must reviewed as a whole – made up of 2/3 of the time with their mother – mostly during the school year – and 1/3 with their father. The trial court's decision and disposition recognizes the children's reality, including a total environment weighted with Defendant, and appropriately applies a preponderance of the evidence standard to Ms. Sabatine's custody request based on the established custodial environment at the time of trial and trial court decision and judgment. *Wilson, Blaskowski, supra.*

B. The Court of Appeals reversibly recharacterized and modified the children's established custodial environment.

The Court of Appeals' decision treats the environment as static based on a period prior to the filing of the divorce action. The children are over two years older and are both in school. They are at different developmental ages and maturity. *Baker, Berger, supra.* 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 improperly determined for the trial court that it must apply a clear and convincing evidentiary standard to Ms. Sabatine's request for custody. Appellee fails to provide authority to support its position, and ignores *Fletcher* and the other controlling cases.

Appellee's arguments that *flipping* custody would not be a change in the established custodial environment and presumably would not affect the children are without merit.

Finally, in response to Appellee's additional claim, Ms. Sabatine would not and could not have appealed the trial court's final custody order and judgment provisions concerning custody because the court awarded her primary physical custody of the children. See Tab C, Opinion after De Novo Hearing, p. 22; Tab D, Judgment of Divorce. She was **not** an aggrieved party in terms of custody.

Conclusion: The trial court's decision recognizes the reality of the children's lives. The Court of Appeals decision, however, incorrectly reframes the established

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custodial environment, resulting in material error. The trial court did not err or abuse its discretion in awarding Ms. Sabatine primary physical custody. The record supports an established custodial environment soundly weighted with Ms. Sabatine. The trial court did not err or abuse its discretion in applying a preponderance of the evidence standard to her request for custody.

II. The Court of Appeals materially erred in remanding the case and requiring the trial court to apply an inappropriate clear and convincing evidence standard to Defendant's request for custody, conflicting with Fletcher and Butters.

The trial court appropriately determined custody. See Issue I, *supra.* But even assuming it did not, the Court of Appeals remand removes any ability of the trial court to address up-to-date information and the discretion to apply the correct evidentiary standard to determining the children's best interests. The Court of Appeals remand requires application of a clear and convincing evidentiary standard. In light of the past 2 ½ years, the joint environment is primarily with Ms. Sabatine. And at the time of the trial court decision, the children had been with her for over a year. The trial court appropriately applied a preponderance of the evidence standard to her request and should apply a clear and convincing evidentiary standard to Plaintiff's custody modification request.

Butters v Butters, __ Mich ___ (2022) is applicable. Appellee argues that the facts differ. The facts differ in all of these cases. But the children in this case are entitled to the same deference to their established custodial environment as all children are. And as acknowledged in *Blaskoski, Wilson*, and by this Court in *Daly v Ward*, 507 Mich 897 (2017), there is 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.**" *Blaskowski,* p.7.

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Conflict: The Court of Appeals opinion (and *Bofysil*, which held that a court should consider a pre-litigation environment over the environment existing for years during the litigation and cannot use up-to-date information) are in conflict with *Fletcher* and *Butters*, focusing on up-to-date information.

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. *Butters, Fletcher, supra.*

Relief

Defendant-Appellant requests that this Court grant leave to appeal and reverse or vacate 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 immediate order addressing the Court of Appeals' errors and vacating or reversing the Court of Appeals decision and affirming the trial court custody decision.

Respectfully submitted,

/s/ Anne Argiroff

Attorney for Appellant

March 17, 2023

Certification

"Appellant's reply brief complies with formatting requirements, including a total of 3,146 words for the *entire* document through this certification." MCR 7.212(G) sets a limit of 3,200 words.