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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 SUPPLEMENTAL BRIEF on ORAL ARGUMENT

- CHILD CUSTODY-

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Statement of Jurisdiction

This Court has granted an oral argument on application after Appellant filed a timely application for leave to appeal from the Court of Appeals December 15, 2022 decision. **Tab E**, COA decision, attached.

Questions Presented

Should the Court of Appeals Opinion concerning its determination of the established custodial environment and remand to apply a clear and convincing evidentiary standard be reversed or vacated and the trial court custody decision affirmed or alternatively, leave to appeal granted where:.

I. The trial court correctly determined that the children should continue to live with their mother and considered the children's established custodial environment as weighted in favor of Defendant-mother and the Court of Appeals did not correctly address the established custodial environment;

II. The judgment parenting-time terms did not alter the established custodial environment;

III. The remand instructions are not sufficiently clear and conflict with controlling law in *Fletcher* and *Butter*s;

IV. A court "may consider" circumstances at the time of separation or prior to separation, but those circumstances should not be controlling, when the separation was long ago and the children are very young; and

The Court of Appeals decision does not further the best interests of the minor children and this decision as well as *Bofysil v Bofysil*, 332 Mich App 232, 246 (2020) conflict with *Fletcher* and *Butters*?

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Statement of Facts

Overview

The parties were married in 2013 and are the parents of two minor children, both daughters. The parties had long-existing marital problems. In September 2020, Ms. Sabatine moved with the children (ages 4 and 2 at the time) to Fenton, Michigan near her parents based on safety concerns.[1]

Ms. Sabatine 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.

The children are now ages 5 and almost 8 (in October 2023) and have lived with their mother for the past three (3) years.

1/7/21 Temporary Order: Primary Physical Custody to Mother

On January 7, 2021, the trial court entered a Temporary Order for Custody, Support and Parenting Time. **Tab C**. The order provided that the parties have joint legal custody and Ms. Sabatine has primary physical custody. Mr. Sabatine was awarded specific parenting of 69 overnights per year.

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[1] Ms. Sabatine explained during the hearing that she had discussed leaving previously but did not feel safe telling Plaintiff she wanted a divorce while she and the children were 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 previously and she did not want the girls to be in the home to witness more. Tr. 4/28/21, p. 23 (Plaintiff physically superior, afraid, breaking up a table), p. 9 (very concerned about his behavior and anger towards her in front of the children); 20 (anger in front of children, plan for leaving, would not agree about separation), 116 (dragging a dog, throwing things). 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. at 13 (afraid, trying to discuss separation, better when separate).

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Mr. Sabatine did **not** file an interlocutory appeal from the January 7, 2021 temporary order.

FOC Evidentiary Hearing

The parties' positions concerning custody and parenting division were addressed at a multi-day evidentiary hearing held before the Leelanau County Friend of the Court (FOC) referee beginning on April 7, 2021 and continued on April 13, 2021; April 27, 2021; April 28, 2021; May 12, 2021; May 18, 2021; and May 21, 2021. Tab B, p. 2.

June 2021 Order Continuing Primary Physical Custody with Mother

On June 4, 2021, after the evidentiary hearing process, the Referee issued a 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 an order on June 7, 2021 adopting the recommendation. **Tab D**, (FOC recommendation and trial court order).

Trial Court De Novo Review

Defendant objected and the trial court set the matter for a *de novo* review.

The court reviewed the FOC evidentiary hearing transcripts and held a two-day evidentiary 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 (continuing to live in Fenton).

Trial Court Decision

On November 16, 2021, the trial court issued its Decision and Order after De Novo Review. Tab B. The children had been continuously living with their mother since September 2020 in Fenton. The court found that there is an established custodial environment between the children and each of their parents. The court awarded primary custody to Ms. Sabatine. Tab B, p. 21.

The trial court addressed the best interest factors and found that "[t]he parties fare *equally* under five factors a, d, e, f, and g. Factors i and k are not applicable.

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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 trial court applied a preponderance of the evidence standard to Ms. Sabatines' request for custody.

In summary, the court awarded primary physical custody to Ms. Sabatine, joint legal custody to the parties and set out a parenting schedule. 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. **Tab E**. In custody appeal (no. 361068), the Court affirmed in part, reversed in part, and remanded to the trial court. The Court of Appeals *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 Ms. Sabatine's request for custody.

Ms. Sabatine filed an application for leave to appeal in this Court, which granted oral argument on application, setting out specific questions.

Appellant files this Supplemental Brief addressing the questions posed by this Court.

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Argument

Overview: In this Supplemental Brief, Appellant addresses each of the questions set out by the Court. The controlling principle throughout all of these questions and answers is that the law focuses on the children in custody disputes. The Child Custody 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 MCL 722.23. MCL 722.24 and 722.25(1).*Harvey v Harvey*, 470 Mich 186, 190, 680 NW2d 835 (2004).[2]

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,[3] 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

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[2] As explained in *Harvey*, the Act places an affirmative obligation on 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. Taken together, these statutory provisions impose on the trial court the duty to ensure that the resolution of any custody dispute is in the best interests of the child. Id. (citations and quote omitted).

[3] **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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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 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.

I. Whether the Leelanau Circuit Court and the Court of Appeals correctly determined that the children have an established custodial environment with each parent, see *Baker v Baker*, 411 Mich 567 (1981); *Rains v Rains*, 301 Mich App 313 (2013)?

A. The trial court correctly determined that the children should continue to live with their mother and considered the children's established custodial environment as weighted in favor of Defendant-mother.

The trial court correctly found that it was in the best interests of the children to continue to reside with Ms. Sabatine, with whom they have lived all of their lives, including primarily the last three (3) years since the September 2020 separation.

Whether the trial court used the label 'joint" established custodial environment with both parties, which it weighted with Ms. Sabatine as evidenced by

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its custody order, or an established custodial environment with Ms. Sabatine alone, the end result is the same.[4] The focus is on the reality for the children.

MCL 722.27(1)(c) provides in pertinent part that:

> "The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established **if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort**. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered."

An established custodial environment is based on the perspective of the child, whom *the child* **looks to over an appreciable time as the custodian in that environment –** the adult who provides continuing guidance, discipline, and the necessities of life for the child on a day to day. As discussed in *Baker, supra*, such an environment depends on a custodial relationship of a significant duration in which a child was provided the parental care, discipline, love, guidance, and attention appropriate to his age and individual needs, and a relationship between the custodian and child marked by qualities of security, stability, and permanence. Id. at 579-580.

1. Remote vs. Recent Time Periods

The determination of an established custodial environment will involve a review of children's case- specific circumstances, including *current* information. See *Fletcher v Fletcher*, 447 Mich 871, 526 NW2d 889 (1994).

There should not be an disproportionate emphasis on a remote time period, which may be more adult-centric, but not necessarily child focused. The statute specifically identifies a child's age as a factor to be considered. A remote time period may have more relevance for older children, who retain more memories and may have spent a significantly longer time and portion of their lives with both parents

[4] This is to a significant extent a matter of semantics.

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prior to any separation. For younger children, a remote period may have far less relevance. These are all relative considerations, based on the ages of the children and the circumstances of each individual case.

2. Remote considerations not controlling here

Here, the creation of an established custodial environment is based on the totality of circumstances, the passage of time, and the children's maturing during the lower court proceedings and this appeal period, and the children's daily reliance on Ms. Sabatine . The parties' daughters were two (2) and four (4) years old at the time of separation and move in September 2020. The temporary order was issued in January 2021. The FOC evidentiary hearing took place from April to June 2021. Plaintiff never appealed the January or June 2021 temporary orders. See Statement of Facts, p. 2 (discussing the temporary orders).[5] The *de novo* hearing took place in October 2021. When the trial court issued its November 2021 decision after the two-day de novo hearing, it was over a year later and the children were ages three (3) and six (6) and had been continuously living with their mother. By the time of the March 2022 divorce judgment, the children were four (4) and six (6). They are now 5 and almost 8 (as of October 2023). The youngest child will be 6 in January 2024. The youngest child has lived over half her life since September 2020 and the oldest child has aged from age 4 to almost 8. The children have matured significantly since September 2020 in their current environment primarily with their mother.

The trial court decision and Judgment providing that Ms. Sabatine retain primary physical custody in Fenton is consistent with *Baker's* emphasis on a custodial relationship of a significant duration in which a child is provided the parental care, discipline, love, guidance, and attention appropriate to his age and individual needs, marked by qualities of security, stability, and permanence. The children had this on a

[5] His arguments are waived. Plaintiff has commented that Ms. Sabatine has not appealed the trial court custody decision. She did not appeal the custody provisions of the final judgment because she was awarded "primary custody" and significant time with the children and was not aggrieved.

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consistent daily basis with Ms. Sabatine. Plaintiff has argued that the children have an established environment with him. That environment, however, is based on the parenting set in the orders and Judgment (weekends, on-line communication, and summer parenting) – with their mother 243 overnights and their father 122 overnights. Again – the focus is on the children and their perspectives. An established custodial environment with each parent does not have to be equal time – it can be weighted.[6]

The trial court did comment on the children having an environment with both parents prior to the separation. The trial court made a number of comments. And, the trial court's dispositional custody decision after the de novo hearing (incorporated into the custody provisions in the March 2022 judgment awarding primary physical custody to Ms. Sabatine) correctly recognized the reality of children's lives. The trial court's best interest findings – affirmed by the Court of Appeals – support its dispositional custody decision. *Harvey, supra*. No matter how it is "labeled," the children's established custodial environment is an environment **weighted** by time/involvement with Appellant-mother. The trial court correctly determined custody.

B. The Court of Appeals did not correctly address the established custodial environment.

The Court of Appeals' improperly focused on a remote time period, now three years ago prior to separation, in its analysis of the trial court's decision and the established custodial environment. The approach taken by the Court of Appeals is adult-centered – not focused on the child as required under MCL 722.27(1)(c).

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[6] See e.g. *Lieberman v Orr,* 319 Mich App 68, 900 NW2d 130 (2017) (recognizing that a joint established custodial environment is not necessarily equal and that significant changes in parenting time can modify that joint environment; plaintiff in *Lieberman* seeking to flip parenting schedules). The parent seeking to change that joint environment would have a burden of proof by clear and convincing evidence.

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Blaskowski v Blaskowski, 115 Mich App 1 (1982), addresses the creation of established custodial environment focused on the child, stating at pp 6-7:

> 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].
>
> ***
>
> 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"). As discussed in subsection IA, as of the time of the trial, court decision and judgment, the children's established custodial environment was primarily with Ms. Sabatine (regardless of how it is labeled).

The Court of Appeals remanded with instructions to apply a clear and convincing evidentiary standard of proof to the parties' custody

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requests:

> Both parents had the children for 365 overnights a year in Traverse City, and the custody order entered by the court was not only giving plaintiff significantly fewer overnights, it was also substantially changing the nature of his interaction with the children. **Accordingly, the trial court should have applied a clear-and-convincing evidence standard, and a remand is warranted.** Obviously, in most divorce situations, a child's overnights with a parent will *necessarily* be reduced or even halved, and such changes will not necessarily amount to a change in the ECE. But here, plaintiff is receiving substantially less than 50% of the parenting time and is becoming a weekend parent. ...
>
> A remand is warranted so that the trial court can reassess its decision using the proper standard.

Tab E, p. 8-9.

The trial court properly applied a preponderance of the evidence standard to Ms. Sabatine's custody request and correctly determined custody. To remand this case now and apply a clear and convincing evidentiary standard based on a remote time period prior to the party separation is erroneous, contrary to MCL 722.27(1)(c), and this Court's long-standing decision in *Fletcher*, as well as the more recent *Butters v Butters*, 510 Mich ___ (2022) order. **Tab F**. See Issue III, *infra*.

II. Whether parenting-time terms incorporated into the judgment of divorce altered a potential established custodial environment, see *Pierron v Pierron*, 486 Mich 81 (2010)?

As addressed in Issue I, the parenting-time terms incorporated into the March 2022 judgment of divorce did not alter the established custodial environment of the children who had been living primarily with their mother since September 2020.

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III. Whether the Court of Appeals remand instructions are sufficiently clear to guide the circuit court on remand as to what evidentiary burden it must apply, see *Griffin v Griffin*, 323 Mich App 110, 128 (2018); but see *Butters v Butters*, 510 Mich ____ (2022) (Docket No. 164888)?

In this case, the Court of Appeal unambiguously instructed the trial court to use a clear and convincing evidentiary standard on remand for the custody requests, based on 365 days per year joint established custodial environment before separation. The remand instructions are erroneous and unclear to the extent they require an artificial and limited focus on a remote time period, and the instructions do not mention (thus conflict) with this Court's order in *Butters v Butters* and opinion in *Fletcher v Fletcher*, *supra*, which require that trial courts address current circumstances of the children.

In *Griffin*, the Court of Appeals found that the trial court had erred in applying a preponderance of the evidence standard to a motion to modify custody (which would have changed the established custodial environment). This case does not involve the same circumstances as *Griffin*. In *Griffin,* the parties had alternated weekly custody for years pursuant to their divorce judgment. Here – the children's established custodial environment at the time of the trial court's decision and the judgment was with Ms. Sabatine (however labeled). A preponderance of the evidence standard is appropriate because her request to maintain primary custody would not alter the children's established custodial environment.

The purpose of the Child Custody Act is to focus on children: the established custodial environment is child focused, and the Legislature emphasizes in MCL 722.27(1)(c) maintaining stability and preserving that environment absent compelling circumstances. *Baker, supra.* The Court of Appeals remand instructions ignore the children's reality in this case – their established environment weighted with their mother – and applies an approach and evidentiary level of proof that is

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adult centered, factually inappropriate and erroneous, ignoring *Fletcher* and the recent *Butters*.

IV. Whether in an initial judgment of divorce, a court should consider the circumstances of the parties at the time of separation or prior to their separation to determine the child's established custodial environment, see Bofysil v Bofysil, 332 Mich App 232, 246 (2020)?

All child custody determinations are factually intensive and case specific. Theoretically, everything that has happened in a child's life is relevant to their custody. But as discussed in Issue I, time periods that are more remote may be relevant as to the established custodial environment when children are older and have spent, for example, 15-16 years with both parents before a divorce is filed. As set out in MCL 722.27(1)(c), the ages of children are significant in determining an established custodial environment, as would be other considerations such as the length of time of divorce proceedings, etc. Here, the children were very young at the time of separation and have matured significantly during the litigation. The trial court must be able to look at current circumstances per *Fletcher* and the Court of Appeals remand does not allow that. A court "may consider" circumstances at the time of separation or prior to separation, but those circumstances should not be controlling (and may not be particularly relevant), when the separation was long ago and the children are very young. To preclude consideration of what has happened to children during the lower court proceedings and during an appeal – over the past three years – is antithetical to what is in the best interests of the children.

Here, the children were 2 and 4 at the time of the separation. The youngest child may not recall specifics from that time. They have lived their lives since then (3 years) primarily with their mother. So here - while a court may acknowledge what occurred pre-separation, that is not the sole or primary focus. The issue is what is the custodial reality for the children in each individual case.

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Bofysil was based on the same error that has occurred here – improperly limiting the focus on a remote time period without considering the children's reality since that time. This case, and *Bofysil*, conflict with *Fletcher* and *Butters*.

The trial court properly determined custody and parenting time in the judgment of divorce. The Court of Appeals, however, improperly focuses on a remote time period and not on the children's changing ages and developmental levels and their reality since 2020.

Conclusion:

Change has to be determined through the eyes of a child. Ms. Sabatine's request for maintaining the custodial status quo created during the divorce proceedings does not change the children's established custodial environment and the trial court properly applied a preponderance of the evidence standard to her request. In contrast, Plaintiff's request to flip the children's lives 180 degrees would be appropriately reviewed under a clear and convincing evidentiary standard.

The trial court did not err in its awarding primary physical custody to Ms. Sabatine (i.e. in its division of parental/custodial time between the parties). The Court of Appeals erred in reversing in part and remanding custody.

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Relief

Appellant requests that this Court reverse or vacate the Court of Appeals concerning its determination of the established custodial environment and ordering the trial court on remand to apply a clear and convincing evidentiary standard and affirm the trial court custody decision. Alternatively, Appellant requests that this Court grant leave to appeal.

Respectfully submitted,

/s/ Anne Argiroff

Attorney for Appellant

September 8, 2023

Certification

"Appellant's reply brief complies with formatting requirements, including a total of 5,107 words for the entire document."