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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

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Argument

I. The Court of Appeals erred in focusing on remote, pre-separation circumstances as controlling in determining the children's established custodial environment and corresponding clear and convincing evidentiary level of proof.

The crux of Appellant's argument is that the Court of Appeals erred in focusing on remote, pre-separation circumstances as controlling in determining the children's established custodial environment and the corresponding evidentiary level of proof (clear and convincing evidence) that the trial court was to apply to Ms. Sabatine's request for custody at the time of its decision and judgment. The children have resided with Ms. Sabatine for the past three-plus years, since the September 2020 party separation. Appellee had parenting time during the divorce litigation pursuant to the temporary court orders, originally for 69 overnights per year and then increased to approximately 117 overnights per year. Appellant's **Tabs C** and **D** (January and June 2021 temporary orders). Appellee did not file any interlocutory appeal concerning temporary orders.

Appellant has discussed the length of time the children have resided with their mother in Fenton, the ages of the children at the time of separation and their maturing throughout the litigation (age the children is an express statutory consideration in determining an established custodial environment under MCL 722.27(1)(c)), as well as the children's day to day circumstances. Appellant has discussed the trial court's various comments throughout its opinion. The trial court's dispositive custody decision is based on the children's established custodial environment with their mother as their primary custodian for a significant period of time. The trial court's dispositive custody and parenting time judgment is supported by the great weight of the evidence (with the Court of Appeals affirming the best

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interest findings) and is well within trial court's discretion.[1] The trial court properly applied a preponderance of the evidence to Ms. Sabatine's request for custody.

II. Appellee's argument concerning the *future* effects of the judgment's parenting time provisions are improperly speculative and circumvent Child Custody Act requirements and his arguments concerning the established custodial environment ignore the record.

Appellee's arguments throughout his supplemental brief are assumptive, speculative, and conclusory, ignoring case history. *Adams v Adams*, 100 Mich App 1, 14, (1980)(decisions cannot be based on speculation, assumption, or conclusion). The record does not support Appellee's comment in his Conclusion, p. 44, that this was a situation where "anyone would have thought" the parties would divide the children's time equally. Ms. Sabatine requested custody throughout the divorce litigation.[2] The children's lives cannot be simply "flipped" between their parents. Appellee minimizes or ignores the changes in the children's lives since the 2020 separation, including the effect of the temporary order(s). For over three years, the children have lived approximately 10 months of the year with their mother, attending school in Fenton with Ms. Sabatine as their daily custodian. Appellee's request is adult focused, not child focused, concentrating on remote, pre-separation circumstances.

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[1] MCL 722.28 provides:
"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).

[2] The tone of Appellee's response and his continuing to blame Ms. Sabatine for "choices" she made to protect herself and the children appear inconsistent with his claims of focusing on the children. He ignores the serious reasons Ms. Sabatine left the marriage. See Appellant's Supplemental Brief, Statement of Facts, p. 1.

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The Judgment of Divorce recognizes the children's reality over the past three years and provides for parenting time of approximately 122 overnights per year for Appellee (a slight increase from the June 4, 2021 order). Ms. Sabatine retained primary physical custody, has the children from the Sunday before school begins in August through the first Sunday after the academic year ends in June, with parenting time every other weekend during the summer and one week of uninterrupted summer vacation. Appellee-father has every other weekend parenting during the academic year, with an option of one additional weekend day per month (with 30 days notice) if he wishes to take it. During the summer he has the children, with Ms. Sabatine having every other weekend and a week of vacation. The Judgment provides for phone and other contact between the children and their respective parents and a division of holidays. **Tab A**, Judgment of Divorce, pp. 2-4, Section II.

Appellee's arguments concerning the parenting schedule set out in the judgment are both improperly speculative, *Adams, supra*, as well as static, focused on a remote time period pre-separation. The judgment was entered in March 2022, essentially continuing the custody and parenting time arrangement set out in the 2021 temporary orders. Mr. Sabatine's appeal was filed shortly after, and there is *nothing* in the record (nor could there be) addressing any possible future effect of the judgment provisions on these children. Appellant's statement that "as the girls get older and become more involved, the parenting time schedule established by the judgment **is going to** severely limit the girls' ability to look to Appellee-Father for guidance" highlights the speculative, *future* nature of his argument.[3] It is the role of the trial court to determine the effect of the judgment some time *in the future*, based on *actual* facts raised in a motion to modify filed by Appellee. The trial court would MCL 722.21, *et seq.*, determining: 1) the children's established custodial environment at that time; 2) whether the thresholds of proper cause and change of circumstances

[3] Appellee Brief, p. 44. This argument conflicts with Appellee's claim that he has been able to maintain his established custodial environment with the temporary orders.

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are met allowing a court to address the motion (MCL 722.27(1)(c); 3) the applicable evidentiary standard for findings under the best interest factors; 4) findings under the best interest factors (MCL 722.23); and 5) making any dispositive custody or parenting decision. See e.g. *Vodvarka v Grasmeyer*, 259 Mich App 499, 675 NW2d 847 (2003)(defining threshold proper cause and change of circumstances required to address modification of custody/established custodial environment); *Shade v Wright*, 291 Mich App 17, 805 NW2d 1 (2010) (less stringent thresholds for modification of parenting time not affecting the established custodial environment).

The appellate courts are courts of review. It is not the role of an appellate court to make an original determination in a custody case. There is always the argument that any change in parenting time *may* affect a child's established custodial environment – but that is theoretical (speculative). Our system is based on evidence and requires a hearing and the required case-specific findings for determining how children in each case are affected. *Mann v Mann*, 190 Mich App 526; 476 NW2d 439 (1991)(without considering admissible evidence -- live testimony, affidavits, documents, or other admissible evidence -- a court cannot properly make the determination or make the findings of fact necessary to support its action under the Child Custody Act).[4]

Appellee's argument is also static (as well as assumptive), ignoring the last three years of the girls' lives during which changes have already occurred and instead limiting his focus to pre-separation circumstances. Appellee's involvement in the children's lives has changed because the parties lives and the children's lives have changed and are established post-separation. Appellee does not specifically address this change or the years of litigation. Appellee chose not to appeal the January 2021 temporary order. The temporary orders provided for Ms. Sabatine as primary physical custodian with Appellee having 69 days and then 117 days of parenting. The

[4] For example there is no evidence that Appellee is using his additional weekend day provided in the Judgment.

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judgment provisions essentially continue this division of time, with some variations. Appellee argues as if there has been no change in the children's day to day lives and he *assumes* that the children's established custodial environment is the same as years earlier. Appellee's argument that the established custodial environment is based on pre-separation circumstances fails to recognize the three-plus years since, and to the extent he is arguing that the children have an established custodial environment with him now based on his parenting as set during the divorce litigation and the judgment, then there is no need to modify that environment. His claims about "possible" future effects of the judgment provision are just that – speculative claims.

This case is similar to *Boyfisil v Boyfisil*, 332 Mich App 232 (2020) in which the Court of Appeals determined an established custodial environment based on pre-separation circumstances and remanded for application of a clear and convincing evidentiary standard.

The trial court here did not commit material, reversible, or vacatable error in addressing an established custodial environment with (or weighted with) the children's mother, applying a preponderance of the evidence standard to her custody claim, and entering a parenting schedule determined in the best interest of the children based on record (again, with the Court of Appeals affirming the trial court's best interest findings). The Court of Appeals decisions should be reversed and the trial court affirmed.

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III. The Court of Appeals remand instructions are clear in requiring the trial court to apply a clear and convincing evidentiary standard to Ms. Sabatine's custody request, focusing on the remote 365 overnights a year pre-separation. The instructions are unclear because they are limited, do not require the trial court to consider updated information per *Fletcher*, and conflict with *Fletcher and Butters*.

As set out in Appellant's supplemental brief, the Court of Appeals unambiguously, and erroneously, remanded for the trial court to address a joint established custodial environment focused on the remote period of time prior to the separation, with instructions to apply a clear and convincing evidentiary standard of proof to the parties' custody 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, COA Opinion, p. 8-9 (emphasis added).

The Court of Appeals appears to disregard the 2021 temporary orders. The trial court properly applied a preponderance of the evidence standard to Ms. Sabatine's custody request and correctly determined custody. The instructions do not require the trial court to consider updated information and do not reference *Fletcher v Fletcher,* 447 Mich 871, 526 NW2d 889 (1994). To remand this case now to 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-

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standing decision in *Fletcher*, as well as the more recent *Butters v Butters*, 510 Mich 1096 (2022) order,[5] which require consideration of post-separation and current circumstances as relevant to issues such as the established custodial environment and other required findings under the Child Custody Act. **Tab F,** *Butters*. See also *O'Brien v D'Annunzio*, 507 Mich 976 (2021); *Dempsey v Dempsey*, 409 Mich 495, 496 (1980).

Fletcher discusses remand and the proper disposition of custody cases following appellate review. *Fletcher* provides that upon a finding of error there should be a remand for re-evaluation, *unless* the error is harmless. Here there was no material error made by the trial court in its custody decision. *Fletcher* next holds that on remand, the court is to consider up-to-date information. Id. at 889.

Appellee in his supplemental brief lists a series of cases where the Court of Appeals remanded to the trial court with instructions to apply a clear and convincing evidentiary standard. But these cases, including unpublished opinions, are not instructive where there is no context beyond generalized quotes. Every family law case is unique and Appellee does not explain why these cases are relevant.

For example, *Berman v Berman*, 84 Mich App 740, 747 (1978) and *Lyons v Lyons*, 125 Mich App 626, 632-633 (1983) are pre-*Fletcher*. *Lyons* involved a situation where the Court noted the children had lived for at least two years during the pendency of the action with the Defendant and there was an established custodial environment – the trial court had erred in finding there was none. Likewise, *Berman* contains different facts than this case. And, although prior to *Fletcher*, the *Berman* court stated that on remand the trial court may require additional information about the parties competing for custody that was not available at the time of the earlier

[5] "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." *Butters, supra*.

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orders. Id. at 746-747. The *Berman* court – pre-*Fletcher* – provided more instruction than the Court of Appeals in this case. See *Butters, supra.*

Appellant addressed *Griffin v Griffin,* 323 Mich App 110 (2018) in her supplemental brief. In *Griffin* (an appeal of a post-judgment order modifying long-standing custody), the parties had alternated weekly custody for years, creating a true joint established custodial environment. And *Griffin* specifically remands to the trial court in that case for consideration of up-to-date information concerning the child, citing *Fletche*r:

> On remand, the trial court shall conduct a new best-interest hearing, during which it must consider all relevant, up-to-date information. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).

Id. at 128.

A trial court on remand cannot exceed the scope of the remand order, *K & K Constr, Inc v Dep't of Environmental Quality (After Remand)*, 267 Mich App. 523, 544-545 (2005). A trial court must act consistently with the holdings in the remand decision and it is improper for a lower court to exceed the scope of that."It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court." *K &K, supra* at 545, citing *Rodriguez v General Motors Corp (On Remand)*, 204 Mich App 509, 514 (1994). In *K &K*, the trial court did not adhere to the Supreme Court's mandates on remand.[6] *Rodriguez* emphasizes that there is a strict duty to comply – finding that the Workers Compensation Appeal Board acted outside the scope of remand, abused its discretion and erred in dismissing an appeal where the Court of Appeals remanded with detailed instructions to make specified findings concerning entitlement to benefits. Remand is not an invitation for a fishing expedition. See *Tompkins v Tompkins*, unpublished April 22, 1997, No. 193777 (trial

[6] The trial court did "not comply with our Supreme Court's remand instructions with respect to determining the value of the denominator parcel. Because we so conclude, we hold that the trial court's findings of fact with respect to the value of the denominator parcel are clearly erroneous, and its decision is reversed." *K & K* at 547.

court must act consistently with the remand decision; affirming the trial court's *denial* of a motion to reopen proofs for discovery of evidence of changed circumstances for alimony modification beyond the scope of remand). **Tab G**, *Tompkins*.

The determination of whether a remand instruction is clear, and not erroneous, is dependant upon the circumstances each case. Here, the Court of Appeals expressly remanded based on an erroneous interpretation of the established custodial environment – focused on the pre-separation circumstances – and for application of a clear and convincing evidentiary standard to be applied to Ms. Sabatine's request for custody, neither of which takes into consideration the temporary orders and the children's lives from September 2020 onward. The Court of Appeals does not discuss consideration of any other information on remand, does not reference *Fletcher* (as did *Griffin*) and fails to set out that a trial court is to consider more recent as well as up-to-date information to ensure the best interests and welfare of a child. *Harvey v Harvey,* 470 Mich 186; 680 NW2d 835 (2004)(trial court paramount statutory duty under the Child Custody Act is to ensure the best interests of children, citing MCL 722.24).

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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 and parenting time judgment provisions. Alternatively, Appellant requests that this Court grant leave to appeal.

Respectfully submitted,

/s/ Anne Argiroff

Attorney for Appellant

October 6, 2023

Certification

"Appellant's reply brief complies with formatting requirements, including a total of 2,841 words for the Argument and signature block."