

IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals

Andrew Paul Sabatine,

Plaintiff-Appellee

MSC Case No. 165279

COA Case No. 361068

Leelanau CC No. 2020-010532-DM

vs.

Colleen Knecht Sabatine,

Defendant—Appellant.

Judith A. Curtis (P31978)

Gail M. Towne (P61498)

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BRIEF OF AMICUS CURIAE
THE FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN

This brief reflects the position of the majority of the Family Law Section of the State Bar of Michigan, taken in accordance with its bylaws regarding the following identified matters. The position taken does not necessarily represent the policy position of the State Bar of Michigan.

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The Amicus Committee of the Family Law Section of the Michigan State Bar believes that the court must look at all of the circumstances surrounding the minor children with an emphasis on the most recent circumstances.

II. 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 <i>Griffin v Griffin</i> , 323 Mich App 110, 128 (2018); but see <i>Butter v Butters</i> , 510 Mich ____ (2022)(Docket No. 164888)?	Error! Bookmark not defined.
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The Amicus Committee of the Family Law Section of the Michigan State Bar believes that the instructions are not sufficiently clear and that they conflict with the mandates of Michigan law.

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STATEMENT OF INTEREST OF AMICUS CURIAE (FLS)¹

The Family Law Council (“The Council”) is the governing body of the Family Law Section of the State Bar of Michigan. The Section is comprised of over 2,700 lawyers in Michigan practicing in, and committed to, the area of family law.

The Section members elect the members of the Council. The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts.

Because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, the Council has an interest in the development of sound legal principles in the area of family law.

The instant case involves the established custodial environment of minor children in a pre-judgment divorce case. The Family Law Section has long been consistent in its position by arguing in prior cases before this Court that the established custodial environment is a fact intensive analysis that must look to all circumstances surrounding the child, particularly the most recent circumstances. Additionally, the Family Law Section feels that this is an issue that frequently is not emphasized at the trial court level and must be addressed by the Supreme Court to avoid the disruption of minor children from their actual custodial environment at the ages and with the present circumstances that exist at the time the custody is reviewed. This is clearly a topic of interest to the Family Law Section. The Family Law Section presents its position on the issues as invited by this Court in its June 9, 2023, Order. The Family Law Section chose to address two of the four questions presented in the June 9, 2023 Order, specifically questions 3 and 4, but not in that order.

¹ Disclosure per MCR 7.312(H)(4): Neither counsel for either party authored this brief in whole or in part. Neither counsel for either party, nor either party, made a monetary contribution intended to fund the preparation or submission of the brief.

STATEMENT OF BASIS OF JURISDICTION

Per MCR 7.303(B)(1), the Michigan Supreme Court has discretion to exercise (or decline to exercise) jurisdiction to review a case after it has been decided by the Court of Appeals. The Court of Appeals issued an unpublished decision on December 15, 2022.

On January 26, 2023, Appellant, Colleen Knecht Sabatine filed an application for leave to appeal per MCR 7.305. On June 9, 2023, this Court issued an Order granting leave to appeal and for oral argument on the application for leave, inviting the Family Law Section and the Children's Law Section of the State Bar of Michigan to file amicus briefs.

QUESTION INVOLVED

- I. 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; 956 N.W.2d 268 (2020)?

Appellant answers:	No.
Appellee answers:	Yes.
Court of Appeals answered:	Yes
Family Law Section answers:	No.

- II. 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; 916 N.W.2d 292 (2018); but see *Butters v Butters*, 510 Mich. ____ (2022)(Docket No. 164888)?

Appellant answers:	No.
Appellee answers:	Yes.
Court of Appeals answered:	Yes
Family Law Section answers:	No.

STATEMENT OF MATERIAL FACTS

The parties in this case were married in 2013. During their marriage, they had two daughters. There were allegations made during the marriage by the Appellant (hereinafter “Ms. Sabatine”) of feeling unsafe in the marriage. In September of 2020, Ms. Sabatine moved from Traverse City, Michigan to Fenton, Michigan in Genesee County to be near her parents. She took the minor children with her, who at the time were ages two (2) and four (4) and had not yet started kindergarten. Appellee (hereinafter “Mr. Sabatine”) remained in Traverse City.

On October 1, 2020, Ms. Sabatine filed for divorce in Genesee County while Mr. Sabatine filed for divorce in Leelanau County on October 5, 2020. The Genesee County case was dismissed, and the Leelanau County action continued as the venue to proceed.

In January of 2021, the Leelanau County Court issued a temporary order awarding the parties joint legal custody and awarding Ms. Sabatine primary physical custody of the two minor children. Mr. Sabatine was given specific parenting time that amounted to approximately 69 overnights per year. After evidentiary hearings with the Friend of the Court, in June of 2021, Mr. Sabatine’s parenting time was increased to 117 overnights per year. Following this, objections were filed and the matter was reviewed by the Trial Court judge de novo. In November of 2021, the trial court issued its final custody and parenting time opinion, finding that there was an established custodial environment with the minor children and both parents. Applying a preponderance of the evidence standard, the trial court awarded Ms. Sabatine primary physical custody of the minor children and a Judgment of Divorce was entered.

Shortly thereafter, both parties appealed the trial court’s decision. Mr. Sabatine appealed the custody determination, which is at issue in this appeal with the Supreme Court. On December 15, 2022, the Michigan Court of Appeals issued its decision. As to the issue of custody, the Court of Appeals found that the trial court erred in its finding regarding the established custodial environment. The Court of Appeals found that the trial court should have placed an emphasis on the circumstances surrounding the minor children while the parties were still living together in Traverse City when making the determination as to who had the established custodial environment. The Court of Appeals held that the trial court should have applied a clear and convincing evidentiary standard

when reviewing Ms. Sabatine's request for custody. The Court of Appeals further remanded this case back to the trial court with instructions to "reassess its decision using the proper standard."

At the time of the filing of this brief, the children are now ages five (5) and eight (8) and have lived primarily with their mother in Flint for the past three (3) years, while also having parenting time with their father.

ARGUMENT

I. 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; 956 N.W.2d 544 (2020)?

The Family Law Section does not endorse the Court of Appeals finding, citing the *Bofysil* case, in holding that the emphasis should be placed on the circumstances as they appear *before* any separation. (COA, p. 6). The children in many cases will not each have had a 365-day environment with both parents for some time before the case is filed. Likewise, the children may not spend an equal number of overnights with each parent at either the time of filing or when the case is ultimately decided. In fact, in this particular case, the opinion of the trial court presents a very thoughtful analysis of the evidence presented regarding the environment in Traverse City prior to the move, the circumstances surrounding the separation, and how the children fared in each respective parent's care after separation. The evidence reviewed included Mr. Sabatine's testimony that the children continued to have a very strong bond with him despite the move from Traverse City to Flint, and that there "is continuity in the [sic] all of residences" per the parties' testimony. **Tab B of Appellant's Supplemental Brief**, Decision and Order after De Novo Review, pp. 4, 5, 6 and 12. In its analysis of the evidence presented regarding the circumstances before and until the most up-to-date evidence received, the

trial court found that the established custodial environment that existed with both Mr. and Mrs. Sabatine prior to their separation continued for the minor children.

MCL 722.27(1)(c) states that “[t]he 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.” (Emphasis added). “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.” MCL 722.27(1)(c). In making this determination, it is the child’s standpoint, rather than that of the parents, that is controlling. *Pierron v Pierron*, 486 Mich 81, 90; 782 N.W.2d 480 (2010). “While an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules, this does not necessarily mean that the established custodial environment will have been modified.” *Id.* citing to *Brown v. Loveman*, 260 Mich. App. 576, 595–596, 680 N.W.2d 432 (2004). If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed.” *Id.* at 86–90.

In creating the specific criteria to resolve child custody disputes, the Legislature intended to minimize the prospect of unwarranted and disruptive change of custody orders and desired to erect a barrier against removal of a child from an “established custodial environment”, except in the most compelling cases. *Baker v Baker*, 411 Mich. 567, 577; 309 N.W.2d 532 (1981).

The determination of an established custodial environment in each case will involve a review of the children’s specific circumstances, including *current* information. See *Fletcher v Fletcher*, 447 Mich. 871; 526 N.W.2d 889 (1994). Because child custody cases

are so intensely fact-specific, there should be no holding that seeks to apply a disproportionate emphasis on a remote time period, as suggested in the *Bofysil v Bofysil*, 332 Mich. App. 232, 246; 956 N.W.2d 268 (2020) case and the instant Court of Appeals opinion. A period of time in the past may have very little relevance to a child's life at the time the case is decided. At all times, the emphasis must be child centric. The *Blaskowski v Blaskowski*, 115 Mich. App. 1; 320 N.W.2d 268 (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.

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.

See also *Carson v Carson*, 156 Mich. App. 291; 401 N.W.2d 632 (1986) (“as we explained in *Blaskowski v Blaskowski*, 115 Mich. App. 1, 9; 320 N.W.2d 268 (1982)”).

Because the policy behind Michigan's Child Custody Act is to deter disruption of the stability of that environment, the trial court, and any other court, in evaluating an established custodial environment should not just look at the circumstances at the time of separation, but also as to the ongoing and current circumstances of the minor children.

In addition, they should also analyze who the children look to for guidance, discipline, the necessities of life and parental comfort, which is consistent with long-standing Michigan law.

An established custodial environment is based on the perspective of the child. This includes whom *the child* looks to over an appreciable time as to who is giving that child continuing guidance, discipline, and the necessities of life for the child appropriate to that child's age and individual needs, while also looking at the relationship between the custodian(s) and the child and seeing if it is one of security, stability, and permanence. *Baker* at 579–580. Creating a rule that places an emphasis on a limited period of time, particularly one that has now long since passed, ignores the specific factual circumstances of each individual child's environment and how any disruption in his or her current environment may affect the custodial relationship.

As noted in discussion by both the trial court and the Court of Appeals in this case, there will be some inherent disruption in the child's life in all initial custody orders. The Court of Appeals' focus on children being with both parents 365 days per year prior to separation makes little sense and is otherwise inconsistent within its own opinion, but also with long-standing Michigan law. The Court of Appeals acknowledged this specifically in its holding stating "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." **See Tab B of Appellant's Supplemental Brief, 12/5/22** Court of Appeals Decision—*Sabatine v Sabatine*, p. 8. The Court of Appeals opinion stated that "from all accounts the children would have been equally happy in *either* environment, even if the Fenton environment had been the girls' primary home base for a shorter period." *Id.* at p. 4. This acknowledgment seems to

conflict with their overall holding that the move from Traverse City to Fenton significantly affected the established custodial environment.

The Court of Appeals, while acknowledging that overnights will be changed in a divorce situation, then went on to place great emphasis in this case on the idea that the pre-separation status was largely one where both parties spent most nights with the children in Traverse City. If every divorce case contemplates that the children will not continue to reside in the same household with both parents and thus not spend 365 with both parents, then it only seems rational to consider the circumstances that will surround a child once that environment naturally changes and how that will affect who the child is looking to for guidance, discipline, necessities of life and parental comfort.

The trial court was very thorough in its analysis of the best interest factors and the relation to the established custodial environment. The *Fletcher* case further recognized that “trial courts are in a superior position to make accurate decisions concerning the custody arrangement that will be in a child's best interests. Although not infallible, trial courts are more experienced and better situated to weigh evidence and assess credibility.” *Fletcher v Fletcher*, 447 Mich. 871, 889–90; 526 N.W.2d 889 (1994).

In this case, the trial court had the benefit of doing just that by looking at that evidence over an *appreciable time*, comparing and contrasting the lives of the children before separation and thereafter, including a consideration of the most recent circumstances. The parties in this case were already separated for seventeen (17) months by the time the trial court opinion was issued. Even more specifically, despite its ultimate holding to emphasize a focus on a pre-separation time of these young children, the Court of Appeals seemed to disregard that the Trial Court considered the testimony of Mr.

Sabatine when he specifically stated that after seven (7) months had gone by since the children had been moved to Flint, he “managed to continue that bond and that bond was strong. . . it was strong, it maintains strong, and it has come through this, and you know, they are good, we are good. . .”. Thirteen (13) months after the move, Mr. Sabatine again testified that he and his daughters continued to maintain a strong bond, one that is “100% consistent and strong.” Mr. Sabatine’s relationship remained strong with the children, and therefore, the separation did not change the established custodial environment from the children’s point of view. **Tab B of Appellant’s Supplemental Brief**, Decision and Order After De Novo Review, p. 6. If we are to focus on the *relationship* of the child with each parent, then this testimony alone would indicate that this custody order did not affect the relationship between Mr. Sabatine and his children.

Those statements, coupled with the other evidence supporting the environment of stability in Ms. Sabatine’s residence in Flint, a home that the children were “very familiar with,” clearly denotes that the established custodial environment had not changed over this appreciable period of time in that both parents managed to continue to maintain the established custodial relationship and environment. So, despite that the children now spent more overnights with Ms. Sabatine in Flint for seventeen (17) months, an appreciable time for such young children, even with looking at their relationship with each parent prior to separation but focusing on what is relevant in their lives now, the established custodial environment was not altered by this living situation or parenting time. As also acknowledged, an established custodial environment with each parent does not have to be equal time. *Lieberman v Orr*, 319 Mich. App. 68; 900 N.W.2d 130 (2017) (recognizing that a joint established custodial environment is not necessarily equal).

All child custody determinations are and should be factually intensive and case specific. The parents will no longer be living together in the same household and a child is going to be dividing up their time with each parent and in each new household. That change may be less of a disruption to a younger child, particularly one who has not started school yet, than it may be for an older child who has established themselves in a steady routine of school, activities, bonded peer relationships, neighborhoods, etc. It may be less so for children who have moved around quite a bit during his or her lifetime or have had adjustment or attachment issues. But, even in those cases, a child may still look to a particular parent rather than an environment, and it could even be the parent that they spend less physical time with. However, this analysis will depend on each factual situation that must consider the specific child or children in each individual case, specifically current and up-to-date information.

A court “may consider” circumstances at the time of separation or prior to separation, but those circumstances should not be controlling. The trial court must be able to look at current circumstances per *Fletcher*. The *Bofysil* case ignores long-standing Michigan law and the circumstances of the living environment realistically and rationally changing when parties divorce or separate. We cannot create black-letter law that improperly limits the focus of who a child looks to on a specific or remote time period without considering all aspects of the life of a child, particularly his or her current situation. The Court of Appeals holding, as well as the *Bofysil* case, conflict with *Fletcher* and *Butters* and the policy behind Michigan’s Child Custody Act. The trial Court must be allowed to freely look to all circumstances and must look at the most current situation,

the current situation being the established custodial environment that is at risk of being disrupted.²

II. 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; 916 N.W.2d 292 (2018); but see *Butters v Butters*, 510 Mich. ____ (2022) (Docket No. 164888)?

The remand instructions in this case are not sufficiently clear and appear to be contradictory in nature, particularly considering the holding in the *Butters* and *Fletcher* cases. *Butters v Butters*, 510 Mich. ____ (2022) (Docket No. 164888) and *Fletcher v Fletcher*, 447 Mich. 871, 889; 526 N.W.2d 889 (1994). First, the Court of Appeals instructed the trial court to use a clear and convincing evidentiary standard on remand for the custody requests, based on the reasoning that the parties had a 365 days per year joint established custodial environment before separation. Second, the Court of Appeals also opined that the trial court must essentially place an emphasis on the pre-separation environment. Third, in the Court of Appeals final comment on this topic, they concluded that “[a] remand was warranted so that the trial court can reassess its decision using the *proper standard*.” Emphasis added. These instructions complied together are confusing and contradictory.

If the trial court is to review this matter on remand, particularly after its prior thoughtful and careful review, then the instructions must be clear and consistent. The Court of Appeals remand instructions are not child focused and not consistent with long-standing Michigan law. The Family Law Section has noted that many trial court judges

² It is of some import to note that Father/Appellee did not file an interlocutory appeal on the temporary orders that provided Mother/Appellant with even more overnights than the final order in this matter.

have not had and do not have significant family law experience, and therefore it is abundantly important to ensure that the instructions are clear.

The proper instruction must be for the trial court to properly focus on all circumstances, including the current, up-to-date information, consistent with the *Fletcher* case. The Court of Appeals remand does not allow that by directing an emphasis on the pre-separation environment, which was over three years ago. Application of the “proper standard” in this particular case could very likely be a preponderance of the evidence standard for the reasons stated in our analysis of issue I.

The Family Law Section supports the Supreme Court instructing the trial court to consider all facts surrounding the established custodial environment with an emphasis on the current circumstances of the children consistent with long-standing Michigan case law. See *Butters v Butters*, 510 Mich. ____ (2022) (Docket No. 164888); *Fletcher v Fletcher*, 447 Mich. 871, 889; 526 N.W.2d 889 (1994). If the court then finds that there is an established custodial environment after that fact intensive inquiry, and that the established custodial environment is potentially being changed, then the clear and convincing evidence standard would be applied. If the court finds that the established custodial environment is not altered by the custody order, then the court would apply a preponderance of the evidence standard.

Conclusion

The trial court in this matter, if required to review the established custodial environment, must be instructed to do so in accordance with the legislative intent behind the Michigan Child Custody Act and long-standing Michigan case law. As seen in this specific case, the trial court was able to analyze evidence from an appreciable time and compared the lives of both children from both before and after the separation of Mr. and

Ms. Sabatine. Through this, the trial court found that there was an established custodial environment with both Mr. and Ms. Sabatine and applied the standard that after careful analysis, did not alter that custodial environment. On remand, the trial court in this matter must consider the specific facts and circumstances of the case in front of them with an emphasis on the most current situation in that the current situation is the established custodial environment that is most at risk for disruption.

The Court of Appeals has also failed to adequately instruct the trial court on remand as the instructions are not sufficiently clear and are also somewhat contradictory in nature. The Court of Appeals has placed heavy emphasis on the pre-separation environment and has also instructed the trial court to do so on remand. In doing so, they have ignored *Fletcher* and the need to analyze all circumstances and information, including placing an emphasis on current and up to date information. As a result, the Court of Appeals remand instructions are unclear and ultimately, confusing in nature.

Relief

Amicus respectfully requests that this Court reverse the Court of Appeals on their determination of the child's established custodial environment and requests the court to address the issue of the sufficiency of the Court of Appeals remand instructions.

Respectfully submitted,

/s/ **Gail M. Towne (P61498)**

/s/ **Judith Curtis** (P31978)

Certification

"Amicus' brief complies with formatting requirements, including a total of 4592 words for the entire document."