

State of Michigan  
Supreme Court  
Appeal from Michigan Court of Appeals  
Cavanagh, P.J., and Jansen and Meter, JJ.

Timothy Pierron,  
Plaintiff-Appellant,

Supreme Court No. 138824  
Court of Appeals No. 282673  
Trial Court No. 99-920324-DM

v

Kelly Pierron,  
Defendant-Appellee.

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**Brief on Appeal - Appellant**

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August 21, 2009

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## Statement of Jurisdiction

This is an appeal from published decision of the Court of Appeals in *Pierron v Pierron*, 282 Mich App 222, 765 NW2d 345 (2009). Appellant's Appendix 1001a-1017a.

The trial court order reviewed by the Court of Appeals was entered by the Hon. Lita Popke of the Wayne County Circuit Court on November 12, 2007. Appellant's Appendix 982a. That order denied the request of the children's mother to remove them from the Grosse Pointe schools and enroll them in the Howell schools. After a six-day evidentiary hearing, the trial court found that the mother did not carry her burden, whether characterized as preponderance or clear and convincing. Trial court opinion, Appellant's Appendix 954a-981a.

The mother appealed and the Court of Appeals vacated the trial court's order and remanded for a determination of whether the mother "has proven, by a preponderance of the evidence, that it is in the children's best interests to attend the Howell Public Schools." Appellant's Appendix 1017a. The father sought leave to appeal the Court of Appeals decision to this Court. This Court granted leave to appeal by Order dated July 17, 2009. Appellant's Appendix 1024a.

## Statement of Questions Presented

A. Whether defendant's unilateral decision to enroll the children in a school district sixty miles from their former school district and from their father's home resulted in a change in the established custodial environment?

Plaintiff-Appellant:	Yes
Defendant-Appellee:	No
Trial Court:	Yes
Court of Appeals:	No

B. Whether the clear and convincing evidence standard governed the defendant's burden of proof?

Plaintiff-Appellant:	Yes
Defendant-Appellee:	No
Trial Court:	Yes
Court of Appeals:	No

C. Whether defendant failed to demonstrate that the school change was in the children's best interests?

Plaintiff-Appellant:	Yes
Defendant-Appellee:	No
Trial Court:	Yes
Court of Appeals:	Did Not Answer This Question

D. Whether the children's preference for the Howell school district was "reasonable?"

Plaintiff-Appellant:	No
Defendant-Appellee:	Yes
Trial Court:	No
Court of Appeals:	Yes

## Statement of Facts

**Overview:** This appeal involves a post-divorce dispute concerning where the minor children should attend school. The children involved are Andrew Pierron ("Andrew"); born May 6, 1994, now age 15 years; and Madeline ("Madeline") Pierron, born January 25, 1999, now age 10½ years. The children's father, plaintiff-appellant Dr. Timothy Pierron ("Dr. Pierron"), filed the current post-judgment proceedings to preclude the children's mother, defendant-appellee Kelly Ann Pierron ("Ms. Pierron"), from unilaterally uprooting the minor children from Grosse Pointe Public Schools, where they attended their entire educational careers.

The parties were divorced on April 20, 2000, after nearly 7 years of marriage. The divorce judgment granted the parties joint legal custody of both children, with physical custody to Ms. Pierron. Jmt of Div, pp 2-3, Appellant's Appendix 1a-17a. Dr. Pierron was granted reasonable and liberal parenting time including alternate weekends, alternate holidays, time during school and summer vacations, and other time agreed-to by the parties. *Id.*

An amended order was entered on June 6, 2001, granting the parties joint legal custody and shared parenting time. Amend Jmt of Div, p 5, Appellant's Appendix 18a-22a. Ms. Pierron's residence was designated as the children's primary residence, but each party's respective residence was declared the legal residence of the children. *Id.* Both residences were located in Grosse Pointe Woods and both children attended the Grosse Pointe public schools.

In early 2007, Dr. Pierron learned of Ms. Pierron's intention to relocate with the children to the Howell area and enroll the children in the Howell public school system. During March and April of 2007, Dr. Pierron initiated discussions with Ms. Pierron to express his concerns about the proposed move's impact on the parties' two minor children.

In an effort to avoid litigation, Dr. Pierron had his attorney send a letter to Ms. Pierron urging her to remain in the Grosse Pointes rather than purchase a condominium in Howell. Letter of April 27, 2007, Pls Tr Exhibit U, Appellant's Appendix 33a-34a. Dr. Pierron offered to sell Ms. Pierron his residence in Grosse Pointe Woods for the same price as the Howell condominium. *Id.* Meanwhile, without informing Dr. Pierron or seeking his concurrence, and without requesting approval from the trial court, Ms. Pierron signed an agreement to purchase a condominium in Howell on April 17, 2007. Jt PT Order, Stip Facts, No. 13, Appellant's Appendix 23a-121a.

When his efforts to find a mutually agreeable resolution failed, on July 13, 2007, Dr. Pierron filed his motion asking for an order that the children continue to attend the Grosse Pointe schools. Register of Actions, pp 4-5, Appellant's Appendix 990a-991a. The trial court conducted an evidentiary hearing on the school enrollment issue over 6 days on September 5, 10, 13, and 17, and October 1 and 22, 2007. Register of Actions, pp 5-7., Appellant's Appendix 991a-993a. The trial court issued its ruling from the bench on November 12, 2007. Appellant's Appendix 954a-981a. After making detailed factual findings and stating its conclusions as to the established custodial environment issue (T 11/12/07, pp 7-10, Appellant's Appendix 960a-963a) and each of the best

interest factors (T 11/12/07, pp 10-25, Appellant's Appendix 963a-978a), the trial court granted Dr. Pierron's motion to keep the children in the Grosse Pointe schools, stating:

In conclusion, the Court finds that Ms. Pierron ***failed to establish by a preponderance of the evidence***, much less the clear and convincing standard that it is in the best interests of the minor children to change their school district. The Pierron children shall remain enrolled in the Grosse Pointe school system until further order of the Court.

T 11/12/07, p 25, Appellant's Appendix 978a. [Emphasis added.]

**Stipulated Facts:** The parties submitted and the trial court accepted a Joint Pretrial Order. That order, and its incorporated Stipulated Facts, was referenced frequently by the parties and the trial court during the evidentiary hearing. T 9/5/07, pp 33, 87; T 9/10/07, pp 56, 74, 85, 90; T 10/1/07, 174-175, 311; Appellant's Appendix 130a, 133a, 141a, 148a, 150a, 151a, 288a-289a, 302a. The stipulated facts presented jointly by the parties to the trial court were:

1. The parties were married on October 22, 1993.
2. The parties have two minor children born during the marriage:  
Andrew Nicholas Pierron, born May 6, 1994 currently 13 years  
Madeline Rose Pierron, born January 25, 1999 currently 8 years
3. A Judgment of Divorce was entered on April 20, 2000.
4. The April 20, 2000 Judgment of Divorce, pages 2-3, provide for the following:

CUSTODY

2. The husband and the wife are awarded a joint legal custody of the minor children...

As joint legal custodians, each parent shall have equal decision-making authority with respect to matters concerning the children's health-care, religious of bringing and education. Both parents shall be fully informed with respect to the children's progress in school and shall be entitled to participate in all school conferences, programs and other related activities in which the parents are customarily involved. Both parents shall have full access to the

children's school records, teachers, counselors, and to their medical records and health-care providers.

3. The Wife is awarded the primary physical custody of the children.

PARENTING TIME

4. Husband shall be entitled to reasonable and liberal parenting time with the minor children, in a manner consistent with the children's best interests, which shall include alternate weekends, alternate holidays, time during school and summer vacations, and as otherwise agreed between the parties.

5. On June 6, 2001, an Amended Judgment of Divorce was entered which provides for the following on page 5:

12. The Custody provisions of the Judgment of Divorce shall be amended to provide that the parties shall have joint legal custody and shared parenting time. The Husband's parenting time shall include overnights and all mutually agreeable times, including first option of parenting time when and if Wife/defendant resumes and/or returns to full time employment or continued education that requires night classes. Wife's residence continues as primary residence; each party's residence is the child's legal residence pursuant to statute. Nothing in this Judgment shall be deemed the basis for the Shared Economic Formula to apply.

6. For the last six (6) years, the Father has lived in, and owned, the same home in Grosse Pointe Woods.

7. Since the entry of the Judgment of Divorce, the Mother and the minor children have lived in Grosse Pointe Woods.

8. The minor child Andrew attended Monteith Elementary School, in the Grosse Pointe School System, through fifth grade and attended Brownell Middle School, in the Grosse Pointe School System, for sixth grade.

9. The minor child Andrew will be entering the seventh grade during the 2007-2008 school year.

10. The minor child Madeline has attended Monteith Elementary School, in the Grosse Pointe School System, through the second grade.

11. The minor child Madeline will be entering the third grade during the 2007-2008 school year.

12. The Mother inherited funds on or about July of 2006, from the death of her father, on December 6, 2005.
13. The Mother signed an offer to purchase a home in Howell, Michigan on April 17, 2007, unbeknownst to Defendant. [Emphasis in original.]
14. The Father sent a letter, through his attorney, to the Mother on April 27, 2007. (Pls Tr Exhibit U.)
15. The annual taxes on the Father's property are \$6,600.07.
16. On May 24, 2007, Father's attorney forwarded a letter to Mother's attorney. (With a proposed parenting time order.)
17. The Mother is unwilling and unable to drive in both directions for parenting time exchanges. Mother is willing to drive one (1) way.
18. The Mother does not believe that the Father would actually exercise the parenting time he was requesting but would use the order as an excuse to reduce child support.
19. The Father is involved with a Methodist Church in Grosse Pointe.
20. The Mother was raised Catholic, but has not been a member of, or actively involved with, a Catholic Church since graduation from high school.
21. The minor children routinely and regularly attend church with their Father at his Methodist church in Grosse Pointe when he exercises parenting time.
22. The minor children do not regularly or routinely attend any church services with their Mother.
23. The minor child Madeline is very dedicated to ice skating, crafting and dancing.
24. The Mother is Madeline's ice skating instructor in Grosse Pointe Woods.
25. The minor child Madeline has been very involved in the Turning Pointe dance studio near Grosse Pointe Woods.
26. Andrew was very interested in archery.

27. Both parents were/are able to involve themselves in the daily school activities of the minor children in the Grosse Pointe Public Schools through Pinnacle Internet Viewer and Zangle, Parent Connect. Pinnacle Internet Viewer is a service provided by the Grosse Pointe Public Schools that allows students and parents to log in and check posted grades. Zangle, Parent Connect is a separate service provided by the Grosse Pointe Public Schools that allows parents to check a student's individual reports, grades and assignments.

28. The minor child, Andrew, has a shy and sensitive personality.

29. The Grosse Pointe Public School system has several programs for "struggling" students, from students-helping-students during free time, special tutoring sessions by staff teachers in lieu of elective classes (which Andrew took advantage of during the 2006-2007 school year), etc.

30. There are several private tutoring opportunities in the Grosse Pointe Woods area.

31. Both children have worked with Deb Dixon, a tutor recommended by the Grosse Pointe Public Schools for two (2) years.

32. Both children are interested in swimming classes and in participating in swimming.

33. The Father has had the minor children involved in swimming classes for the past two (2) years through the Grosse Pointe Woods Park Services during the summer months.

34. Grosse Pointe Public Schools offers swimming during regular gym classes in high school and offer competitive swim teams.

35. The Howell School System has school busing.

36. Madeline enjoys playing on the playground. There are playgrounds in Howell. There are playgrounds and parks in the Grosse Pointe area.

37. Madeline is very interested in participating in equestrian activities.

38. Neither child has been identified as having special needs or requiring specialized educational assistance.

39. Father has been diagnosed with Multiple Sclerosis.

Jt PT Order, Stipulated Facts, Appellant's Appendix 27a-32a.

Despite these stipulated facts and the findings of the trial court, the Court of Appeals substituted its view of the evidence for that of the parties and the trial court by suggesting and erroneously relying on alleged facts contrary to the parties' stipulations and the evidentiary record.

**Evidence at Hearing:** In addition to the Stipulated Facts listed above, evidence at the hearing established that Ms. Pierron's failure to work with Dr Pierron to resolve the school enrollment issue prior to relocating with the children to Howell caused the children emotional turmoil and was the primary cause of the strain in the relationship between Andrew and his father. T 9/17/07, pp 42-46, 78-79, 82; T 10/1/07, pp 33, 39-40, 179-180; T 11/22/07, p 11; Appellant's Appendix 183a-187a, 219a-220a, 223a, 275a, 281a-282a, 293a-294a, 964a.

Ms. Pierron's plan to win at any cost, including the welfare of Andrew and Madeline, led her to contact The Detroit News about running a story on the school enrollment dispute. Appellant's Appendix 976a. As a result, an article about the case appeared in the paper on August 27, 2007. Pls Tr Exhibit X. Appellant's Appendix 949a. Andrew saw a copy of the article at his mother's house. T 10/1/07, pp 46-47, Appellant's Appendix 281a-282a. The article further exacerbated an already stressful situation for Andrew. *Id.*

Concerning the important issue of which school district offered higher-quality instruction, the evidence did not support Ms. Pierron's contention that the children would benefit by relocation to Howell. Objective data from Standard & Poors

demonstrated that the Grosse Pointe public schools out-performed the Howell public schools in nearly every area. Pls Tr Exhibit A, Standard & Poor's SchoolMatters, Appellant's Appendix 303a-861a (glossary omitted). The same was true for the individual schools compared (Monteith Elementary vs. Hutchings Elementary; Brownell Middle School vs. Highlander Way Middle School). For example, combined reading and math proficiency for Monteith was 95.6%. Hutchings scored well, but was lower than Monteith at 92.4%. *Id.*, at Tab 5, Appellant's Appendix 326a-330a. Combined reading and math proficiency at Brownell was 91.9%. Highlander Way was considerably lower at 79.9%. *Id.*, at Tab 6, Appellant's Appendix 331a-335a.

The overall advantage of the Grosse Pointe schools was supported by the 2007 Michigan Educational Assessment Program (MEAP) results for the individual schools proposed by the respective parties. Pls Tr Exhibit B, Appellant's Appendix 862a-907a. Monteith's School Report Card showed a score of 99 and a letter grade of A. Hutchings did well with a score of 95 and a letter grade of A, but not quite up to the impressive standard set by Monteith. *Id.*, at Tab 5, Appellant's Appendix 326a-330a. Brownell had a score of 98 and a school grade of A. Highlander Way was lower with a score of 93 and a school grade of A. *Id.*, at Tab 6, Appellant's Appendix 331a-335a. These are not huge differences, but it was Ms. Pierron's burden to prove that the change in school enrollment from Grosse Pointe to Howell was in the best interests of the children. The higher Grosse Pointe scores made such a showing impossible.

There was also evidence on the issue of community safety. Although Ms. Pierron testified to crime she had experienced in Grosse Pointe Woods, FBI crime statistics for

Grosse Pointe Woods and Howell revealed no advantage for Howell. Pls Tr Exhibit H. Appellant's Appendix 908a-910a. Indeed, *per capita* crime was higher in Howell than Grosse Pointe Woods in 4 of 7 categories (rape, assault, burglary, and theft). Grosse Pointe Woods was higher in 2 of 7 categories (robbery and auto theft). There were no murders in either community. *Id.* The Michigan Public Sex Offender Registry listed no registered sex offenders in Grosse Pointe Woods. Pls Tr Exhibit O, Tab 1, Appellant's Appendix 937a-938a. However, there were six registered sex offenders in the 48855 zip code where Ms. Pierron's condominium is located. *Id.*, at Tab 2, Appellant's Appendix 939a-948a. Again, this evidence was not helpful to Ms. Pierron in attempting to sustain her burden.

Community amenities for school-age children are a subjective matter. However, Ms. Pierron cited several features of the Howell community in support of her proposed transfer of the children from the Grosse Pointe schools to the Howell schools. These included alleged advantages in the areas of bike riding (T 9/5/07, p 10, Appellant's Appendix 125a), archery (T 9/5/07, p 11, Appellant's Appendix 126a), horseback riding (T 9/5/07, p 25, Appellant's Appendix 129a), sense of community (T 9/5/07, p 12, Appellant's Appendix 127a), activities (T 9/5/07, p 20, Appellant's Appendix 128a), and the farmers' market (T 9/5/07, p 55, Appellant's Appendix 131a).

However, in each of the above areas, the evidence showed equivalent or better amenities in the Grosse Pointe community. There are bike paths in the city park and along Lake Shore Drive. T 10/1/07, pp 152-153, Appellant's Appendix 286a-287a. Archery was no longer an interest of Andrew's. T 9/17/07, pp 52, Appellant's Appendix

193a. The Grosse Pointe Hunt Club features horseback riding and is near Dr. Pierron's home. T 9/17/07, pp 33-34, Appellant's Appendix 174a-175a. The Grosse Pointe community is more diverse and friendly than its reputation suggests. T 9/17/07, pp 44-45, Appellant's Appendix 185a-186a. There are many activities for school-age children. T 9/17/07, pp 37-45, Appellant's Appendix 178a-186a. Unfortunately, Ms. Pierron chose not to participate in them with the children. T 9/17/07, pp 22-24, 26-27, Appellant's Appendix 163a-165a, 167a-168a. Finally, like Howell, the Grosse Pointes have a farmers' market. T 9/17/07, p 102, Appellant's Appendix 243a; Pls Tr Exhibits N and BB, Appellant's Appendix 911a-936a, 950a-951a. As with the other evidence, this information failed to support Ms. Pierron's request to move the children from the Grosse Pointe schools to the Howell schools and influenced the trial court's view of her credibility.

**Trial Court's Findings and Conclusions:** After hearing testimony over 6 days starting on September 5 and concluding on October 22, the trial court read its decision from the bench in open court on November 12, 2007. The trial court prefaced its ruling with the verification that it did not consider the written closing arguments filed by respective counsel for each party to be evidence. Its ruling was based "solely on the evidence introduced at trial in this courtroom." T 11/12/07, p 4, Appellant's Appendix 957a. This statement was made in response to Dr. Pierron's objections to Ms. Pierron's closing argument going beyond the evidence presented to the trial court. *Id.*

The trial court began its ruling by citing the leading case of *Lombardo v Lombardo*, 202 Mich App 151, 507 NW2d 788 (1993). The trial court held that,

pursuant to *Lombardo*, parents with joint legal custody must share decision-making concerning their children's education, including which school to attend. T 11/12/07, p 4, Appellant's Appendix 957a. Neither parent may unilaterally change the children's school and if a dispute arises, the court must decide the issue based on the children's best interests as defined in MCL 722.23. T 11/12/07, p 5, Appellant's Appendix 958a.

The trial court then noted that ordinarily a change in schools must be shown to be in the best interests of the children by a preponderance of the evidence. *Id.*, p 6, Appellant's Appendix 959a. However, in cases where the change in schools will also disrupt the children's established custodial environment, the party seeking to change schools must present clear and convincing evidence that the change is in the children's best interests. *Id.* The trial court made a factual finding that the parties were in agreement, until the 2007-2008 school year, that the children attend the Grosse Pointe public schools. *Id.*

Next, the trial court addressed whether, based on the facts presented at the hearing, there was an established custodial environment and whether that environment would be changed by enrolling the children in the Howell schools. *Id.*, p 7, Appellant's Appendix 960a. Based on the definition in MCL 722.27(1)(c), the trial court made a factual finding that "Dr. Pierron was involved on a continuing basis with the children's education. He visited the schools regularly, took the children to lunch on occasions, picked them up from tutoring, and saw them regularly despite the absence of a specific parenting time schedule." T 11/12/07, p 9, Appellant's Appendix 962a. Therefore,

there was a joint established custodial environment "of flexibility and continued involvement." *Id.*

Having found the existence of an established custodial environment, the trial court then made a factual finding that "the proposed school change would alter the established custodial environment of these children...." *Id.*, p 10, Appellant's Appendix 963a. The trial court then concluded that Ms. Pierron bore a burden of demonstrating by clear and convincing evidence that the change in schools is in the best interests of the children. *Id.* However, the trial court expressly stated that even under the lower preponderance of the evidence standard, Ms. Pierron failed to carry her burden. T 11/12/07, p 25, Appellant's Appendix 978a.

Having determined the legal standard and burden of proof, the trial court analyzed each of the best interests factors contained in MCL 722.23. Because of the limited nature of the issue before the court, this analysis was not a full custody analysis. It was focused on the issue of the requested change from the Grosse Pointe schools to the Howell schools. *Id.* The trial court's findings and conclusions on the factors were as follows:

*(a) The love, affection, and other emotional ties existing between the parties involved and the child.*

This factor was rated equal. Although the relationship between Andrew and his father became strained over the school issue, the relationship was previously strong. Furthermore, Ms. Pierron's mishandling of the school issue led to the children's emotional turmoil and any estrangement they may feel from their father. *Id.*, pp 10-11, Appellant's Appendix 962a-963a.

*(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.*

This factor favored Dr. Pierron. He had a greater capacity and disposition to educate and raise the children in their religion by continuing them at the Grosse Pointe United Methodist Church. The children attended this church all their lives. *Id.*, p 12, Appellant's Appendix 965a.

*(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.*

This factor favored Dr. Pierron. Although Ms. Pierron claimed that the move to Howell would improve her employment prospects, she remains unemployed and has not sought either full- or part-time employment in the Howell area. Nor had she sought more than sporadic part-time employment while in Grosse Pointe, instead opting to rely on child support. T 9/10/07, pp 63-66, Appellant's Appendix 142a-145a. Furthermore, the parties stipulated that the children would continue to see their established doctor and dentist in the Grosse Pointe area. T 11/12/07, pp 13-14, Appellant's Appendix 966a-967a.

*(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.*

This factor favored Dr. Pierron. It was under this factor that the trial court compared "the suitability of the particular schools for the parties' children." *Id.*, p 14, Appellant's Appendix 967a. As stated by the trial court, it "need not determine which school is the better district in general, but whether the existing school serves the needs

of the children and whether there is any reason to change that school environment." *Id.* The trial court found no factual basis to conclude that a change to the Howell schools would improve the children's educational environment. To the contrary, there were disadvantages to the switch. For example, "the evidence established that Madeline will be on the bus 25 minutes each way, and Andrew as long as 1 hour and 10 minutes at the end of the school day." *Id.*, p 16, Appellant's Appendix 969a.

*(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.*

This factor favored Dr. Pierron. Contrary to Ms. Pierron's argument that the move to Howell would bring the children close to extended family, the testimony revealed that Ms. Pierron's sister actually lives 25 minutes away and her mother resides in West Bloomfield. In addition, the move to the Howell schools would take the children away from Dr. Pierron and his family. His parents have been actively involved in the lives of the children. *Id.*, p 17, Appellant's Appendix 970a.

*(f) The moral fitness of the parties involved.*

This factor was not relevant to the limited issue before the court, and was therefore rated equal. *Id.*, pp 17-18, Appellant's Appendix 970a-971a.

*(g) The mental and physical health of the parties involved.*

This factor was rated equal. Both parties are physically and mentally able to care for the children. Dr. Pierron's multiple sclerosis would limit his ability to relocate geographically to be closer to the children if they were permitted to move to Howell. *Id.*, p 18, Appellant's Appendix 971a.

*(h) The home, school, and community record of the child.*

This factor favored Dr. Pierron. Although Andrew has struggled recently in the Grosse Pointe school system, Madeline has done well. Dr. Pierron provides a private academic tutor for the children at his expense. Ms. Pierron testified that she would discontinue this tutor if the children attend school in Howell. *Id.*, p 19, Appellant's Appendix 972a. The proximity of the current schools to Dr. Pierron's home allows him to attend school functions during the day. *Id.* Andrew's negative attitude toward school did not begin until after Ms. Pierron told the children about the move the Howell. *Id.* Concerning a comparison of the two communities, the trial court found that both had much to offer. However, there was no substantial reason to change the school district the children currently attend. *Id.*, pp 20-21, Appellant's Appendix 973a-974a.

*(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.*

The trial court properly found that the children lacked a sufficient experiential basis for their expressed preference to attend the Howell schools. Therefore, that preference cannot be deemed reasonable. The trial court concluded, "the children have not attended Howell schools as a result of this Court's order that they remain in the Grosse Pointe schools until the Court determines the issue. Therefore, the preference of the children cannot be based on any factual comparison between the two school districts." *Id.*, pp 21-22, Appellant's Appendix 974a-975a.

*(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.*

This factor favored Dr. Pierron. The trial court made numerous findings questioning Ms. Pierron's handling of the school issue and its impact on the children's relationship with their father. These included Ms. Pierron's rejection of all compromise offers made by Dr. Pierron, including the sale of his home to her, the offer to lease a home in the Grosse Pointes for her and the children during the pendency of this dispute, and his attempts to negotiate a parenting time schedule. *Id.*, pp 22-23, Appellant's Appendix 975a-976a. Once the children became aware of their mother's desire to move and their father's desire to prevent it, that issue became a wedge in the parent-child relationship. It created problems between the children and Dr. Pierron. Ms. Pierron attempted to exploit that wedge by contacting a newspaper to have them print a story about the dispute. *Id.*, p 23, Appellant's Appendix 976a. If Ms. Pierron was intent on leaving Grosse Pointe Woods for the reasons in her testimony, there were many nearby communities that would have permitted a continuing close relationship between the children and their father. *Id.*, pp 23-24, Appellant's Appendix 976a-977a.

*(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.*

This issue was deemed not relevant. There were no reports of domestic violence. *Id.*, p 25, Appellant's Appendix 978a.

*(l) Any other factor considered by the court to be relevant to a particular child custody dispute.*

The trial court found that the preceding factors covered all of the issues related to the school decision. Therefore, this factor was inapplicable. *Id.*

In total, 6 factors (b, c, d, h, and j) favored Dr. Pierron's position that the children's established school enrollment should not be disrupted. No factors favored Ms. Pierron's request to change the children to the Howell schools. Three factors (a, f, and g) were rated equal. Three (i, k, and l) were inapplicable.

Based on these findings, the trial court concluded that Ms. Pierron had failed to meet either a preponderance of the evidence or a clear and convincing evidence burden in support of her request to change the children's school enrollment from Grosse Pointe to Howell. *Id.* The trial court also found no basis to award attorney fees to either party and ordered that each bear their own respective fees. *Id.*, pp 24-25, Appellant's Appendix 977a-978a.

**The Trial Court's Orders:** An order incorporating the trial court's ruling was entered at the conclusion of the November 12, 2007, court date. *See* Appellant's Appendix 982a. Ms. Pierron filed a motion and brief seeking reconsideration. In her motion, she relied primarily on her argument that the trial court had been unduly influenced by the objections to her written closing argument filed by Dr. Pierron's counsel. However, the trial court had made it clear when it announced its ruling on November 12 that it did not consider those objections, but relied exclusively on the evidence presented at the hearing. T 11/12/07, p 4, Appellant's Appendix 957a. That motion was denied by order of the trial court entered on November 30, 2007. Appellant's Appendix 985a-986a.

In the trial court's order denying reconsideration, it once again emphasized that it was not influenced by the objections to Ms. Pierron's closing argument:

The Defendant relies upon the notion that the Court erred by being influenced by Plaintiff's Objections to the Defendant's Closing Statement; however, this Court's ruling was based solely on the testimony and admitted exhibits from the evidentiary hearing held in this matter.

Order Denying Defendant's Motion for Reconsideration, 11/30/07, p 2, Appellant's Appendix 986a.

Ms. Pierron also included a request for attorney fees and disqualification of the trial court in the brief supporting her reconsideration motion. This request was dismissed without prejudice as being improperly presented to the trial court. As stated in the trial court's order:

IT IS FURTHER ORDERED that the Defendant's request for disqualification and request for attorney fees is DISMISSED WITHOUT PREJUDICE as they were improperly filed. The Defendant's request was not made by Motion as required, but made in the Defendant's "Brief in Support of Motion for Reconsideration." Such requests must be made by motion and have supporting documentation and/or legal briefs. This is also necessary to permit the opposing party to respond to these issues, as they would not be allowed to do so within the realm of a Motion for Reconsideration pursuant to MCR 2.119(F)(2).

*Id.* The Register of Actions filed by Ms. Pierron with her Claim of Appeal shows that she did not preserve either the attorney fee or disqualification issues by filing an appropriate motion as suggested by the trial court in its November 30 order before her Claim divested the trial court of jurisdiction to modify or amend the order appealed.

**Appeal to Court of Appeals:** Ms. Pierron filed her Claim of Appeal from the trial court's November 12 and 30 orders on December 18, 2007. The Court of Appeals administratively dismissed her appeal on January 10, 2008, finding that it was from a post-judgment domestic relations order not affecting child custody. However, on Ms. Pierron's motion for reconsideration, the appeal was reinstated on February 29, 2008.

Ms. Pierron's brief was filed on May 30, 2008. Dr. Pierron's brief followed on July 18, 2008. Ms. Pierron then filed a reply brief that included as exhibits two recently created factual affidavits, one signed by Ms. Pierron and the other by her counsel, improperly expanding the record with factual allegations not made in the trial court. On Dr. Pierron's motion, the Court of Appeals struck the affidavits from Ms. Pierron's reply brief. Appellant's Appendix 1000a.

After oral argument on January 13, 2009, the Court of Appeals issued its published decision (authored by Jansen and joined by Cavanagh and Meter) on February 3, 2009. Appellant's Appendix 1001a-1017a. The Court of Appeals reversed the trial court's order keeping the children in the Grosse Pointe public schools, held that Ms. Pierron's burden of proof was a preponderance of the evidence, affirmed the trial court's finding that there was a joint established custodial environment ["the circuit court properly found that an established custodial environment existed in both parents' homes" p 16], but oddly determined that the proposed move from one edge of a large metropolitan area to the exurbs at the opposite edge of that area would not impact that joint custodial environment. The panel also found error in the trial court's handling of several of the "best interest" factors in MCL 722.23.

Notably, the Court of Appeals expressly stated that Ms. Pierron's "60-mile move to Howell with the children, coupled with the accompanying change in the children's school environment, would likely constitute a sufficient change of circumstances to warrant consideration of a change of custody" if Dr. Pierron were to file such a motion

on remand in the trial court. *Pierron, supra*, 263-264, Appellant's Appendix 1016a-1017a.

In its effort to anticipate further trial court proceedings ["Regardless of how the circuit court decides the change-of-school issue, it might well be required to ultimately decide a change-of-custody issue as well" p 23], the Court of Appeals attempted to predetermine the presumptions and burdens of proof that would apply to a subsequent change of custody proceeding based on evidence that would be two years old at the time of that proceeding. Specifically, the decision stated at 264:

Because any change of custody sought by plaintiff in this regard would alter the children's established custodial environment with defendant, plaintiff would be required to prove by clear and convincing evidence that the requested change of custody would be in the children's best interests.

The panel ignored the long-standing legal requirement that the burdens and presumptions to be applied in the yet-to-be-held custody proceeding must be based on the facts and circumstances extant at that time. The facts existing two years earlier when the trial court held its hearing on the school enrollment issue would not be relevant, much less determinative.

Both children continue to reside with Dr. Pierron in Grosse Pointe Woods during each school week throughout the entire school year and have done so for nearly two full academic years. This arrangement alters the established custodial environment and the resultant burdens and presumptions to be applied during the upcoming custody hearing. For at least one of the children, the joint established custodial environment found by the trial court and affirmed by the Court of Appeals may have transformed into a sole established custodial environment with Dr. Pierron. Whether that is true

cannot be prejudged based on evidence from a hearing conducted two or more years earlier.

On the school enrollment issue, the Court of Appeals ignored the trial court's superior view of the credibility of the witnesses. Although the Court of Appeals affirmed the trial court's finding of a joint custodial environment in the homes of both parents, the panel incongruently determined that the proposed move to the far side of the Detroit metropolitan area would not negatively affect the joint established environment. The Court gave inadequate consideration to Dr. Pierron's greater participation in the children's education, medical care, church attendance, and extracurricular activities, all of which were geographically centered in the Grosse Pointes and none of which would be the same if the proposed school change to Howell were allowed.

The Court of Appeals also second-guessed the trial court's findings and conclusions on "best interest" factors a, b, c, e, h, and i. Much of the testimony on which the trial court based its decision involved its assessment of the credibility of certain witnesses. The Court of Appeals ignored entirely the trial court's superior position to determine the credibility of competing parties and witnesses.

Finally, the Court of Appeals rejected Ms. Pierron's claim that the trial court improperly denied her request for attorney fees. Dr. Pierron filed a timely and narrowly crafted motion for reconsideration alleging that the Court of Appeals effort to predetermine the burden of proof in subsequent change of custody proceedings he may decide to file was contrary to well-established Michigan law. Appellant's Appendix 1018a-1022a. Despite the fact that Ms. Pierron's answer to that motion conceded the

legal correctness of Dr. Pierron's position on the burden of proof issue, the Court of Appeals denied the motion without explanation by order entered on March 25, 2009. Appellant's Appendix 1023a.

## **Argument**

**Introduction:** The decision of the Court of Appeals effectively nullifies Michigan's joint legal custody law found at MCL 722.26a(7)(b) [parents with joint legal custody "shall share decision-making authority as to the important decisions affecting the welfare of the child." The Court of Appeals decision is dangerous because it approved unilateral decision-making by one legal custodian to the exclusion of the other. The decision undermines joint legal custody in Michigan, creates unnecessary conflict, and harms children.

If either parent with legal custody is able to alter some important aspect of a child's life such as school enrollment, medical care, religious upbringing, etc., without first consulting with the other parent, or, failing that, seeking permission from the court, children will be exposed to wholesale disruptions of their lives as frequently as they move between their parents' respective homes. Such a view guts the joint custody statute and renders the case law established by *Lombardo v Lombardo*, 202 Mich App 151, 507 NW2d 788 (1993), and its progeny meaningless.

Michigan law gives no preference to one joint legal custodian over the other when making important decisions. MCL 722.26a(7)(b) does not default to the primary residential parent. Nor does *Lombardo* permit such favoritism. A policy favoring the decision by the physical custodian was expressly rejected in that case. *Id.*, at 160. In

accord is *Novak v Novak*, 446 NW2d 422 (Minn App 1989). Other states such as Alaska have adopted such a preference for primary-parent decision-making. See *Bird v Starkey*, 914 P2d 1246 (Alaska 1996). Michigan, with its emphasis on full post-divorce involvement of both parents in the lives of their children, as evidenced by the aforementioned joint custody statute, the *Lombardo* line of cases, and the parenting time statute found at MCL 722.27a, expressly rejects unilateral decision-making by parents for all but "routine" decisions. Ripping children from their established community and schools is anything but a routine decision.

It is backward to suggest, as do defendant and the Court of Appeals, that a parent may make unilateral decisions on important matters affecting the children and force substantial change in the lives of the children without *prior* agreement by other parent with legal custody or *prior* approval by the court. Giving the aggrieved legal custodian an "after-the-fact" right to a court hearing to undo a unilateral decision by the other parent is inconsistent with the interests of children our courts are obligated to protect. Under Michigan law, the security and stability of children is a paramount consideration not well-served by the view asserted by defendant and the Court of Appeals.

The Court of Appeals was wrong when it wrote that appellee "did not act illegally" when making her unilateral school enrollment decision. Her unilateral actions directly violated the joint custody statute when she made the important school enrollment decision. Only "routine" decisions may be made unilaterally by the parent

with whom the child resides at that particular time. MCL 722.26a(4). As stated in *Bowers v Vandermeulen-Bowers*, 278 Mich App 287, 295-296, 750 NW2d 597 (2008):

When parents have joint legal custody of a child, the 'parents shall share decision-making authority as to the important decisions affecting the welfare of the child.' MCL 722.26a(7)(b); *Lombardo v Lombardo*, 202 Mich App 151, 157, 507 NW2d 788 (1993).

In *Bowers*, the primary physical custodian unilaterally decided to relocate with the child and enroll the child in a different school. The other parent, who had joint legal custody of the child, went to court to block the move. The trial court in that case initially entered a restraining order against a change in the child's school enrollment. But when the trial court determined that the move was less than 100 miles and MCL 722.31 was inapplicable, lifted the restraining order and immediately allowed the unilateral relocation and re-enrollment to take place without considering the child's best interests.

The Court of Appeals reversed the trial court and rejected the notion that the primary physical custodian may unilaterally change a child's school enrollment. The panel in *Bowers* made it clear that the primary physical custodian is barred from changing a child's school enrollment "even if on a temporary basis" until the court has conducted a best interest hearing and determined the school change is in the child's interests. *Id.*, at 296-297. *Bowers* makes it clear that while a parent may relocate within the 100 mile limit, the trial court is obligated to maintain "the prohibition on the change in schools pending resolution of the dispute." *Id.*, at 297. On this question, *Bowers* was binding on the *Pierron* panel pursuant to MCR 7.215(H)

The Court of Appeals determination that defendant acted properly in unilaterally deciding school enrollment not only violated the binding precedent of *Bowers*, it gave a green light to legal custodians throughout Michigan that they are free to make unilateral decisions on important matters such as education, religious upbringing, or medical care without **first** consulting with the other legal custodian or, failing that, **first** obtaining permission from the court. Under *Pierron*, unilateralism rules and children suffer.

**A. Defendant's unilateral decision to enroll the children in a school district sixty miles from their former school district and from their father's home resulted in a change in the established custodial environment.**

**Standard of Review:** A trial court's findings as to the existence of (or disruption of) an established custodial environment is a purely factual inquiry. *Foskett v Foskett*, 247 Mich App 1, 8, 634 NW2d 363 (2001). As such, the great weight of the evidence standard applies. Accordingly, finding as to the existence of (or disruption of) an established custodial environment should be affirmed unless the evidence clearly preponderates in the opposite direction. *Berger v Berger*, 277 Mich App 700, 704-705, 747 NW2d 336 (2008).

**Applicable Law:** Pursuant to MCL 722.27(1)(c), a custodial environment 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.

This Court held that an established custodial environment consists of both the physical environment and the psychological relationships of a child. *Baker v Baker*, 411 Mich 567, 579-580, 309 NW2d 532 (1981) ["an environment in both the physical and psychological sense" including "long-term community contacts"]. Among the factors this Court found to be important in determining the existence of an established environment was the child's "attendance at a single school, association with familiar playmates in a familiar neighborhood, close familial ties, regular visits with grandparents, and continuing participation in the neighborhood hockey program. It is certainly true that these contacts and associations contributed importantly to the custodial environment." *Id.*, at 580.

Whether an established custodial environment exists is purely a question of fact. *Mogle v Scriver*, 241 Mich App 192, 197, 614 NW2d 696 (2000). It is not dependent on the existence of a court order for joint physical custody. *Blaskowski v Blaskowski*, 115 Mich App 1, 320 NW2d 268 (1982). Children may have an established custodial environment with more than one parent. *Mogle, supra*, at 197-198; *Jack v Jack*, 239 Mich App 668, 610 NW2d 231 (2000), and *Duperon v Duperon*, 175 Mich App 77, 80, 437 NW2d 318 (1989). An established custodial environment exists in both homes where the children look to both parents to provide them with "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). The fact that children reside primarily with one parent post-divorce does not preclude an established environment with both parents. *Jack, supra*, at 671; *Nielsen v Nielsen*, 163 Mich App 430, 433-434, 415 NW2d 6 (1987).

A change in school districts, if accompanied by a sufficient geographic relocation, may disrupt a child's established custodial environment. In such cases, custody is implicated and the trial court must engage in the required "best interest" review. This is analogous to relocation cases which do not *on their face* present a custody issue, but which have the effect of disrupting a child's established custodial environment. In such cases, the trial court is obligated to revisit the best interest factors if the relocation would affect the established custodial environment. *Rittershaus v Rittershaus*, 273 Mich App 462, 730 NW2d 262 (2007). *See also, Grew v Knox*, 265 Mich App 333, 694 NW2d 772 (2005); and *Brown v Loveman*, 260 Mich App 576, 680 NW2d 432 (2004).

The recent decision of the Court of Appeals in *Bowers v Vandermuelen-Bowers*, 278 Mich App 287, 750 NW2d 597 (2008), illustrates how this rule applies to issues involving a disputed change of school districts. In *Bowers*, as in the instant case, the parents shared joint legal custody, but physical residence was granted primarily to one of them. The other parent had reasonable and liberal parenting time. *Id.*, at 290. As in this case, the primary residential parent proposed to relocate with the child and change the child's school district. *Id.*, at 290-291. Initially, it appeared that the move would be in excess of 100 miles, invoking the provisions of MCL 722.31, commonly called the "100 Mile Rule." However, when the evidence indicated that the primary physical custodian's move was less than 100 miles, the trial court vacated its prior order blocking the move and the transfer of the child to a new school district. *Id.*, at 291-292. It failed to directly address the disputed school district change.

The Court of Appeals reversed the trial court. Irrespective of the primary custodian's move to another community just under 100 miles away, the trial court remained obligated to resolve the school district dispute in the best interests of the minor child:

Although Robert [the father] has sole physical custody of Calin [the child], Robert shares joint legal custody of Calin with Jennifer [the mother]. When parents have joint legal custody of a child, the "parents shall share decision-making authority as to the important decisions affecting the welfare of the child." MCL 722.26a(7)(b); *Lombardo v Lombardo*, 202 Mich App 151, 157; 507 NW2d 788 (1993). Because Calin's placement in a particular school district is an important decision affecting his welfare, both Robert and Jennifer must agree on that decision. *Lombardo, supra* at 157-159. If they are unable to agree, the trial court must resolve the dispute according to Calin's best interest. *Id.*, at 159.

*Id.*, at 295-296.

In *Bowers*, the Court of Appeals cited with favor its earlier decision in *Grew, supra*. If a primary custodial parent is legally free to relocate, but that relocation to a different school district will result in a change to the established custodial environment (as was the case in *Bowers* and *Grew*, and is also true here), the trial court must first conduct a best interests hearing before determining whether that change can be allowed. *Bowers, supra*, at 296-297. As will be shown in Argument B of this brief, at such a hearing, because the change affects the established custodial environment, the proper evidentiary standard is clear and convincing.

**Argument:** In the Court of Appeals, Ms Pierron ignored the trial court's well-supported finding that the children's custodial environment spanned the homes of both parents. She continually cited the divorce judgment and amendatory order designating her home as the children's "primary residence." Nonetheless, Ms. Pierron conceded at

p 5 of her brief to the Court of Appeals that there exists a custodial environment with Dr. Pierron, but that it is "lesser" than with her. She cited nothing in the record that supports her view of a "lesser" custodial environment with Dr. Pierron. Nor did she cite any law supporting the concept of greater or lesser custodial environments.

Contrary to Ms. Pierron's argument, the trial court found a shared established custodial environment to exist on the facts it was presented. T 11/12/07, pp 8-10, Appellant's Appendix 961a-963a. The Court of Appeals affirmed this finding, stating:

The testimony established that although defendant had primary physical custody and the children lived with her the majority of the time, the children did look to both of their parents 'for guidance, discipline, the necessities of life, and parental comfort.' MCL 722.27(1)(c). The testimony further showed that the children had permanent, secure, and lasting relationships with both plaintiff and defendant. \* \* \* ...the circuit court properly found that an established custodial environment existed in both parents' homes.

*Pierron, supra*, at 248.

The trial court further found that the established environment would be disrupted by removing them from the Grosse Pointe schools and enrolling them in the Howell schools. T 11/12/07, pp 9-10, Appellant's Appendix 962a-963a. The trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Ireland v Smith*, 214 Mich App 235, 542 NW2d 344 (1995), *aff'd*, 451 Mich 457, 547 NW2d 686 (1996). Here, however, the Court of Appeals failed to give proper deference to the trial court's findings. With no realistic assessment of the impact of a round trip between Grosse Pointe and Howell, the appellate panel concluded contrary to the record that the proposed change of school districts "would require only minor modifications" to Dr. Pierron's parenting time and therefore "would not affect the

children's established custodial environment *with plaintiff.*" *Id.*, at 259. [Emphasis added].

Having on the previous page affirmed the trial court's finding of an established custodial environment in both homes, the Court of Appeals incredibly made no mention whatsoever of the impact this change would have on the children's established custodial environment *with Dr. Pierron.* The panel seemed inexplicably oblivious to the disruption a 120 mile round trip drive from one side of a large metropolitan area to the exurbs at the opposite extreme, most of which would necessarily take place during rush hour, would have on a shared established custodial environment. This was clear error.

The trial court began its analysis of this issue with an extensive discussion that included the statutory and case law definitions of established custodial environment. T 11/12/07, pp 6-8, Appellant's Appendix 959a-961a. It then examined the existing order and noted the "shared parenting time" and "first option" language. *Id.*, p 8; Jt PT Order, Stip Fact No. 5, Appellant's Appendix 28a. Next, it noted that the proposed 60 mile move to the Howell school district would impact the above-referenced "shared parenting time" arrangement. Overnight parenting time during the week would be impractical, as would the first right of refusal. T 11/12/07 p 9, Appellant's Appendix 962a.

Dr. Pierron's testimony was that the drive from Grosse Pointe to Howell "is a two-hour drive one way, best case scenario coming after work. T 9/17/07, p 66; T 10/1/07, p 62, Appellant's Appendix 207a, 283a. Indeed, Ms. Pierron complained about being "forced" to make this trip (in the opposite direction) during "high traffic hours" to

take the children from her home to school in Grosse Pointe pending the trial court's decision. Defendant's Closing Statement, pp 31-32, Appellant's Appendix 952a-953a. She further referred to this drive as "a dangerous drive" in the winter. Defendant's Brief Supporting Motion for Reconsideration, p 18, Appellant's Appendix 984a. The drive was made more dangerous because the children were exposed to Ms. Pierron's second-hand cigarette smoke. T 9-10-07, pp 45-47, Appellant's Appendix 138a-140a. She made it clear she was "unable and unwilling" to make that round-trip drive. Jt PT Order, Stipulated Facts, p 4, Appellant's Appendix 27a-28a. Yet she insists that it would not be disruptive of the children's environment with Dr. Pierron if he is forced to make that drive. It is worth noting that Ms. Pierron was unemployed and had no work schedule to accommodate when she complained of the lengthy drive. She never explained how the trip could be so burdensome to her, yet should not be considered a disruption to the portion of the shared established custodial environment that was with Dr. Pierron.

Next, the trial court made a factual finding based on the testimony that "Dr. Pierron was involved on a continuing basis with the children's education. He visited the schools regularly, took the children to lunch on occasions, picked them up from tutoring, attended parent-teacher conferences, and saw them regularly despite the absence of a specific parenting time schedule." T 11/12/07, p 9, Appellant's Appendix 962a.

The trial court's factual finding on this issue is well-supported by the testimony of Dr. Pierron. T 9/17/07, pp 18-21, Appellant's Appendix 159a-162a. Dr Pierron closely

monitored the children's progress and engaged a tutor at his sole expense to assist the children with academic problems. T 9/17/07, pp 33, 39-41; T 10/1/07, p 151, Appellant's Appendix 174a, 180a-182a, 285a. This was verified by the children's tutor, Deborah Dixon. T 10/1/07, pp 176-177, 181-182, 184-187, Appellant's Appendix 290a-291a, 295a-296a, 298a-301a.

Dr. Pierron testified to exercising parenting time each weekend for at least part of the weekend. T 9/17/07, pp 15-16, 44-48, Appellant's Appendix 156a-157a. There was also parenting time during weekday mornings and afternoons when he worked afternoon shift, which occurred once every 7 weeks. *Id.* He also took the children to church with him regularly. T 9/17/07, p 49, Appellant's Appendix 190a. Ms. Pierron did not. T 9/10/07, p 68, Appellant's Appendix 146a Dr. Pierron drove Madeline to her weekly dance class at Turning Point. T 9/17/07, p 32, Appellant's Appendix 173a. There was also testimony of establishing involvement of the children's paternal grandparents, Grosse Pointe residents, in the lives of Andrew and Madeline. T 9/17/07, p 75, Appellant's Appendix 216a.

In her brief to the Court of Appeals, Ms. Pierron confused the lack of a specified parenting time schedule with the lack of regular and extensive parenting time. The Court of Appeals made the same mistake when it held that "only minor modifications" to Dr. Pierron's parenting time would be required by the school change. In fact, the proposed change to entirely upend and substantially alter Dr. Pierron's parenting time and his relationship with Andrew and Madeline. The record establishes that parenting time was regular and substantial, even if not set forth in specific terms in a court order.

Ms. Pierron misunderstood the trial court's reference to *Vodvarka v Grasmeyer*, 259 Mich App 499, 675 NW2d 847 (2003), at p 5 of its decision. *Vodvarka* was cited by the trial court in reference to cases where there already existed an order specifying school attendance and the threshold standard for seeking modification of such an order. The trial court then acknowledged that with no such order in this case, a parent need not meet that threshold. However, the best interests of the child test must still be applied. T 11/12/07, pp 5-6, Appellant's Appendix 958a-959a. This discussion by the trial court was a prelude to its established custodial environment analysis at pp 6-10 of its decision. The Court of Appeals affirmed this analysis when, quoting *Lombardo, supra*, at 159, it held that:

At times, of course, joint legal custodians will not be able to agree on important decisions, such as schooling, that affect their children's welfare. Thus, 'where the parents as joint custodians cannot agree on important matters such as education, it is the court's duty to determine the issue in the best interests of the child.'

**Conclusion:** Dr. Pierron has been involved in all aspects of his children's lives. He is the parent primarily involved in their education, attending school functions and parent-teacher conferences. He is also the parent primarily involved in the children's extracurricular and community activities, including taking the children to church on a regular basis. Despite the lack of a fixed parenting time schedule, he exercised extensive parenting time. So much so that the trial court found an established custodial environment in both parents' homes. That finding was affirmed by the Court of Appeals.

The new schools proposed by Ms. Pierron are up to a four-hour round trip from the children's prior community where Dr. Pierron continues to reside. If the change is permitted, that distance will fundamentally alter Dr. Pierron's ability to be involved in the children's education, extracurricular, and community activities. It will destroy that portion of the joint established custodial environment that exists in his home.

For this reason, the trial court's determination that the proposed move will alter the shared established custodial environment should be affirmed. The Court of Appeals improperly reversed that determination and should be reversed on this issue.

**B. The clear and convincing evidence standard governed the defendant's burden of proof.**

**Standard of Review:** Proper application of the burden of proof in the trial court is a question of law that the appellate court reviews *de novo*. *Pickering v Pickering*, 253 Mich App 694, 697, 659 NW2d 649 (2002).

**Applicable Law:** This question is governed by the determination whether there exists an established custodial environment in the homes of both parents and whether the proposed school change will change that environment. *See* Argument A. If so, MCL 722.27(1)(c) mandates that Ms. Pierron carry her burden by ***clear and convincing*** evidence. That statute provides that a "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."

It does not matter that the issue was presented to the trial court as something other than a change of custody motion. When a modification of parenting time would

change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest. *Phillips v Jordan*, 241 Mich App 17, 25, 614 NW2d 183 (2000). Based on *Bowers, supra*, and *Grew, supra*, that is also the case when a proposed change in school enrollment would change the established custodial environment. Preservation of an established custodial environment is a strong priority under Michigan law. *Bahr v Bahr*, 60 Mich App 354, 230 NW2d 430, *lv den* 394 Mich 794 (1975).

**Argument:** If, as properly found by the trial court, the children's custodial environment has become established in the homes of both parents, and if, as also properly found by the trial court, the proposed change in schools will change that environment, Ms. Pierron faces a clear and convincing evidence burden. The only exception to imposition of this high burden on a moving party is in disputes between parents and third party custodians. In such cases, the parental presumption of MCL 722.25(1) outweighs the established custodial environment burden of MCL 722.27(1)(c). *Hunter v Hunter*, \_\_\_ Mich \_\_\_, \_\_\_ NW2d \_\_\_ (2009), Slip Opinion, p 13. In all other disputes, the moving party must prove his or her case by clear and convincing evidence.

**Conclusion:** If this Court affirms the trial court's rulings on the existence of an established custodial environment and that the environment would be changed by the proposed move, it must also apply well-established Michigan to impose a clear and convincing evidence burden on the moving party, Ms. Pierron.

**C. Defendant failed to demonstrate that the school change was in the children's best interests.**

**Standard of Review:** An appellate court is not at liberty to ignore a trial court's factual findings based on mere disagreement with the trial court's view of the evidence. The proper standard is of review is whether the factual findings are "against the great weight of the evidence." *Fletcher v Fletcher*, 447 Mich 871, 876-877, 526 NW2d 889 (1994). The reviewing court may reverse the trial court's factual findings only if, on all the evidence, is left with a definite and firm conviction that the trial court made a mistake. *Beason v Beason*, 435 Mich 791, 805, 460 NW2d 207 (1990). This standard does not authorize a reviewing court to substitute its judgment for that of the trial court. *Id.* If the trial court's view of the evidence is plausible, the reviewing court may not reverse. *Berger v Berger*, 277 Mich App 700, 717-718, 747 NW2d 336 (2008); *Johnson v Johnson*, 276 Mich App 1, 11, 739 NW2d 877 (2007)..

**Applicable Law:** The trial court's factual findings are accorded substantial deference. *Sparks v Sparks*, 440 Mich. 141, 147, 485 NW2d 893 (1992). The trial court has a superior opportunity to determine factual questions, and that the trial court's factual determinations are entitled to due regard. *Beason, supra*, at 801. MCR 2.613(C) states: "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."

**Argument:** The Court of Appeals devoted a substantial portion of its decision to its disagreement with the trial court's findings and conclusions on the MCL 722.23

"best interest" factors. The Statement of Facts in this Brief contains a comprehensive summary of the trial courts findings and conclusions with proper citations to the record. It will not be repeated here.

In a dispute narrowly focused on the choice of school districts, several of the best interest factors are either irrelevant or only marginally relevant. The trial court recognized this when it stated:

...the appellate courts have given us a little bit of a, um, what is it, a round hole to put the square peg into when it comes to school issues. They have not identified specific issues or factors that the Court should look at in school iss — in school choice cases. What they've done is say we have to measure this under the best interest factors of the child custody formula because it's a joint legal custody decision. Yet, as we all know, the majority of the factors don't really apply to the narrow issues of schools...."

T 9/17/07, pp 7-8, Appellant's Appendix 154a-155a. Despite this concern, in order to fully comply with *Lombardo*, the trial court addressed each factor. There was conflicting testimony on many of these factors. The trial court properly exercised its discretion to assess the credibility of the respective witnesses in resolving the conflicting testimony. Not having the same advantage, the Court of Appeals was led astray in its review of the best interest factors. The Court of Appeals took the extraordinary step of reversing the trial court's factual findings on factors a, b, c, e, h, and i. Such a pervasive and overwhelming intrusion into the trial court's fact-finding function is rare, if not unprecedented.

It is also clear that the Court of Appeals failed to assess the factors based on Ms. Pierron having the burden of persuasion, irrespective of whether the proper burden of proof is clear and convincing or the lesser preponderance of the evidence standard.

Berger v Berger, 277 Mich App 700, 710, 747 NW2d 336 (2008). Her failure to prevail on any particular factor must result in that factor being weighed against her. In other words, because Ms. Pierron also bears the burden of persuasion, a tie on any factor goes to Dr. Pierron.

*(a) The love, affection, and other emotional ties existing between the parties involved and the child.*

This factor was rated equal by the trial court. The Court of Appeals reversed that finding, disregarding the credible testimony of Dr. Pierron on this issue. Dr. Pierron testified and the trial court found that the relationship deteriorated because of Ms. Pierron's mismanagement of the school enrollment dispute and her involvement of the children in that dispute. T 9/17/07, pp 42-46; T 11/12/07, pp 10-11, Appellant's Appendix 963a-964a. Sadly, the Court of Appeals not only misunderstood the facts, it rewarded Ms. Pierron for her manipulation of the school enrollment issue

The Court of Appeals was misled by Ms. Pierron's argument that she was "tricked" into making a unilateral decision to relocate to Howell and change the children's school enrollment. Ms. Pierron claimed to have been unrepresented by counsel at the time Dr. Pierron initially objected to the proposed school change. This is a half-truth bordering on a non-truth. The trial court's Register of Actions shows that her trial and appellate counsel, Ms. Safford, filed her first papers on Ms. Pierron's behalf two years earlier on March 18, 2005. Register of Actions, p 2, Appellant's Appendix 988a. No withdrawal of Ms. Safford's appearance is listed in the Register of Actions between March 18, 2005, and the inception of the dispute over school enrollment. Ms. Pierron knew, or should have known with reasonable and prudent consultation with

counsel, that as a joint legal custodian she could not unilaterally make important decisions affecting the welfare of the children, including removing them from the schools they'd attended all their lives.

Furthermore, Dr. Pierron clearly denied telling Ms. Pierron that he would not "sue her" if she removed the children from the Grosse Pointe schools. T 9/17/07, p 147, Appellant's Appendix 271a. To the contrary, he told her that he "was not going to sign off on where my kids were going to school." *Id.* There is no basis for Ms. Pierron's objections to the trial court's findings and conclusions as to factor (a).

It is improper to reward a parent when that parent unilaterally manufactures a situation that strains the relationship between a child and the other parent – especially where, as here, the evidence shows that no such strain previously existed. Allowing the Court of Appeals decision to stand will encourage parents to manipulate and harm a child's relationship with the other parent solely to gain advantage on factor a. We owe more to the children in these disputes than to allow them to be harmed by a parent for self-serving reasons. The Court of Appeals interference with the trial court's finding on this factor should be reversed.

*(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.*

The trial court found this factor to favor Dr. Pierron's position that the children should remain in the Grosse Pointe schools. Once again, the Court of Appeals overstepped its proper reviewing authority and reversed the trial court's findings. The trial court found the parties equally capable of giving the children love, affection, and

guidance. T 11/12/07, p 12, Appellant's Appendix 965a. Although not mentioned by the trial court in relation to this factor, there was ample evidence of Dr. Pierron's involvement in the children's education. This involvement was fully addressed in the trial court's analysis of factor (h). T 11/12/07, pp 18-21, Appellant's Appendix 971a-974a. It was also addressed in the trial court's findings concerning the shared established custodial environment. T 11/12/07, p 9, Appellant's Appendix 962a. The Court of Appeals ignored this compelling evidence when assessing factor (b).

In addition, with the parties essentially equal on the many of the elements that make up this factor, it was not improper for the trial court to use Dr. Pierron's undisputedly more substantial role in taking the children to church and raising them in their religion as a "tie-breaker". Doing so was not "clear legal error on a major issue" as alleged by the Court of Appeals.

*(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.*

The trial court found this factor to favor Dr. Pierron's position that the children should remain in the Grosse Pointe schools. Contrary to the Court of Appeals view of this factor, the trial court's conclusion was based on much more than merely Dr. Pierron's higher income. Ms. Pierron attempted to justify ripping the children from their established schools on the basis that she could more easily find employment in Howell. Yet, she testified that she had not sought nor had she obtained full-time or part-time employment since moving. This influenced the trial court's assessment of Ms. Pierron's

disposition to provide for the children's material needs. The evidence supported the trial court's findings and conclusions on this factor.

*(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.*

The trial court found this factor to favor Dr. Pierron's position that the children should remain in the Grosse Pointe schools. The Court of Appeals agreed. There was no error.

*(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.*

According to the trial court, this factor favored Dr. Pierron's position. The Court of Appeals reversed because it incorrectly believed that the trial court's only basis was that the children's paternal grandparents lived in the Grosse Pointe area. The Court of Appeals ignored evidence showing that the children's entire lives have been spent in the Grosse Pointes. Any proposed custodial home in a different community, such as Howell, impacts the children in nearly every aspect of their lives, including education, social relationships, extracurricular activities, and relationships with grandparents and other extended family members.

*(f) The moral fitness of the parties involved.*

The trial court found that this factor was not relevant to the limited issue before the court, and was therefore rated equal. *Id.*, pp 17-18, Appellant's Appendix 970a-971a. The Court of Appeals affirmed the trial court on this factor. There was no error.

*(g) The mental and physical health of the parties involved.*

This factor was rated equal by the trial court. The Court of Appeals concurred. There was no error. *Id.*, p 18, Appellant's Appendix 971a.

*(h) The home, school, and community record of the child.*

The trial court found this factor favored Dr. Pierron's view that the children should stay in the Grosse Pointe schools. The Court of Appeals disagreed. It was on this factor perhaps more than any other that the Court of Appeals ignored the trial court's assessment of witness credibility (in particular, the highly-credible testimony of tutor Deb Dixon and Grosse Pointe Assistant Superintendent Susan Allan). It also failed to recognize that it was Ms. Pierron's burden to prove that the children would benefit from being removed from the Grosse Points schools and enrolled in Howell. If all she could prove is that the Howell schools are nearly as good as those in Grosse Pointe, her requested move of the children to Howell schools must be denied.

It is worth quoting at length a portion of the trial court's factual findings. Although these findings appeared under factor (d) in the trial court's decision, they apply equally to factor (h):

Analyzing this factor in a school decision case requires the Court to look at the educational environment which existed for the children and whether it was stable and satisfactory. It is under this factor that the Court can compare the suitability of the particular schools for the parties' children.

The Court need not determine which school is the better district in general, but whether the existing school serves the needs of the children and whether there is any reason to change that school environment. The existing school environment in this case is the Grosse Pointe public school system. Ms. Pierron has the burden of showing that the Grosse Pointe schools do not provide a stable and satisfactory environment for her children.

Andrew and Madeline have attended school in this district throughout their educational lives. The children and their parents are known to their teachers and administrators. The schools are located in close proximity to the parties' home. Dr. Pierron has regularly attended parent/teacher conferences. Ms. Pierron attended the conferences but failed to do so in 2006, 2007 claiming it was unnecessary to do so.

Grosse Pointe scores at the top of the scale in terms of graduation rates, MEAP scores, and student/teacher ratios. Susan Allen [sic], the Assistant Superintendent for Curriculum Development, testified regarding the Grosse Pointe school system and the programs it offers students. Counselors and student support teams are available for shy or struggling students such as Andrew. No-cut athletic programs are also available for less athletically competitive students like Andrew. The school system is stable and satisfactory.

Ms. Pierron argued that the Grosse Pointe schools were not satisfactory because they did not properly address the bullying of Andrew. Other than her testimony no evidence was introduced to support the argument that Andrew was, in fact, bullied or that this was any significant educational occurrence. In fact, Andrew's tutor, Deb Dixon, testified that Andrew said he was teased. Both Grosse Pointe and Howell have antibullying policies to address inappropriate behavior. Neither policy appears to be superior.

Ms. Pierron also argues that Howell has busing which will benefit her children. Ms. Pierron failed to establish, however, how busing the children will help their educational development. Moreover, the evidence established that Madeline will be on the bus 25 minutes each way, and Andrew as long as 1 hour and 10 minutes at the end of the school day.

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...there was no showing the Pierron children would be better served in Howell. Howell, although it does well, does not score as high as Grosse Pointe in graduation rates, MEAP scores, or student/teacher ratio.

While Howell appears to be a fine school district, there is no showing that the Pierron children's school district should be changed.

T 11-12-07, pp 14-17, Appellant's Appendix 967a-970a. The Court of Appeals failed to recognize that findings of fact may apply to more than one best interest factor. *Fletcher, supra* at 25-26. These findings clearly apply to factor (h) as well as (d). The

bottom-line is that there was no substantial reason to change the school district the children currently attend. T 11-12-07, pp 20-21, Appellant's Appendix 973a-974a.

*(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.*

This factor will be discussed in Argument D to follow.

*(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.*

The trial court found this factor to favor Dr. Pierron's argument that the children should continue in the Grosse Pointe schools. The Court of Appeals found fault with some of the trial court's discussion on this factor, but affirmed its conclusion that this factor favored Dr. Pierron.

**Conclusion:** The trial court's findings and conclusions on each best interest factor were well supported by the record. The Court of Appeals violated its responsibility as a reviewing court by substituting its view of the evidence for that of the trial court. The trial court was in a superior position to judge the credibility of the parties and their respective witnesses.

Even accepting the Court of Appeals' analysis of the factors at face value, Ms. Pierron did not carry her burden whether characterized as preponderance or clear and convincing. The Court of Appeals found factors a, h (as to Andrew only), and i favored moving the children to Howell schools. It found that factors d and j weighed against doing so. This is far below the applicable clear and convincing threshold and likely fails to meet Ms. Pierron's preponderance of the evidence burden, especially as to Madeline.

The Court of Appeals' usurpation of the trial court's proper fact-finding role should be reversed. The trial court's findings were not against the great weight of the evidence. The trial court's order denying Ms. Pierron's request to move the children to the Howell schools should be affirmed.

**D. The children's preference for the Howell school district was not "reasonable."**

**Standard of Review:** A trial court's findings on the factors in MCL 722.23 are reviewed under the great weight of the evidence standard. *Berger v Berger*, 277 Mich App 700, 705, 747 N.W.2d 336 (2008). Its findings concerning each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* The meaning of the term "reasonable preference" in MCL 722.23(i) is a question of law. A question of law is reviewed de novo on appeal *Pickering, supra*, at 607.

**Applicable Law:** MCL 722.23(i) requires the court in custody disputes to consider "the reasonable preference of the child, if the court considers the child to be of sufficient age to express a preference." There is no dispute that the trial court interviewed the children in chambers to determine their preference. The dispute centers of the trial court's determination that the children's expressed preference was not "reasonable" as required by the statute. There is also a question as to whether the Legislature intended the child's custodial preference to be weighed strongly, or at all, when the court decides disputes such as school enrollment, medical care, religious upbringing, etc.

**Argument:** The trial court found that the children lacked a sufficient experiential basis for their expressed preference to attend the Howell schools. T 11-12-

07, pp 21-22, Appellant's Appendix 974a-975a. Therefore, despite the children's ages, the trial court determined that their preference was not "reasonable" and need not be strongly weighed. The Court of Appeals disagreed because it erroneously equated "sufficient age" with "reasonable preference." A child must be of sufficient age to express a reasonable preference, but not all children of a sufficient age express a preference that is reasonable. If the Court of Appeals view of this factor were correct, the Legislature would not have inserted the qualifier "reasonable" at the beginning of the factor or it would have indicated that all preferences expressed by children of sufficient age are reasonable by inserting "reasonable" between "express" and "preference" at the end of this factor.

In a custody dispute, a child of sufficient age might express a preference to live with parent A over parent B because that parent provides no structure and permits him/her to stay out late at night and avoid responsibility for household chores. Such a preference would not be reasonable. Yet if the Court of Appeals view were to prevail, that unreasonable preference would receive considerable weight. This result could not have been intended by the Legislature.

In the context of this case, a preference based on no knowledge of the alternatives is inherently arbitrary and therefore not reasonable. A trial court must be permitted the discretion to take lack of reasonableness into account when assessing this factor. The trial court's view that the child's experiential base for his/her preference in determining the weight given a preference finds support in *Marriage of Rosson*, 178 Cal App 3d 1094, 1103 (1986). *See also, Sumra v Sumra*, 561 NW2d 290, 294 (ND 1997).

On important issues such as changing a child's surname, Kansas courts have held that consideration of a child's preference may depend not just on the child's age, but also on a child's experience. *JNLM v Miller*, 130 P3d 1223, 1228 (Kan App 2006). *See also Christensen v Christensen*, 941 P2d 622, 624 (Utah App 1997). In Rhode Island, a preference is considered only if the child is of sufficient intelligence, understanding, and experience. *Duhamel v Duhamel*, 704 A2d 212, 214 (RI 1997).

Trial judges recognize that MCL 722.23(i) was intended by the Legislature to allow the court to consider a child's "custodial" preference. There is no indication that it was intended to allow children potentially determinative input into important decisions reserved to the parents, such as education, religion, medical care, etc. As stated by the trial court below, it has not been customary to interview children as to their preference in school enrollment cases. T 9/17/07, pp 7-8, Appellant's Appendix 960a-961a. The Court of Appeals' emphasis on the children's preference in school enrollment cases may encourage abuses where a child unhappy with the school attended in the primary residential parent's community could enlist the aid of the other parent to bring the issue into court and to seek a *de facto* custody change. The possibility of mischief having nothing to do with a child's best interests is too substantial to overlook. The prospect is more frightening if a child is allowed what may rise to the level of veto power over medical care decisions made by a parent.

Per *Lombardo, supra*, when joint legal custodians are unable to agree on important matters such as education, medical care, or religious upbringing, it is the court that must decide, ***not the child***. This is not a custody decision. As is true with

parenting time, not all of the factors will be relevant and the court should not be required to weigh and make findings on irrelevant or uncontested factors. *Hoffman v Hoffman*, 119 Mich App 79, 83, 326 NW2d 136 (1982) Neither the appellee nor the Court of Appeals demonstrated the Legislature intended custodial preference to be a decisive consideration in a school enrollment dispute any more than a desire not to visit the non-custodial parent will presumptively result in suspension or termination of parenting time.

In her answer to Dr. Pierron's application for leave to appeal, Ms. Pierron cited the newspaper article about this case that she precipitated in support of her argument that the trial court was "confused" about the preference issue. Appellant's Appendix 949a. Yet not one of the lawyers quoted in the article mentioned the child's preference as an important consideration in school enrollment disputes. Furthermore, in the article Ms. Pierron's counsel is quoted as stating that Ms. Pierron, as the primary residential parent, should automatically get to decide school enrollment. That may be the view in some jurisdictions such as Alaska, but per *Lombardo* it has been expressly rejected in Michigan.

Ms. Pierron's answer to Dr. Pierron's leave application also overstated the facts concerning her preference argument. While Andrew admittedly had a strong preference to attend Howell schools, there is no evidence that Madeline "adamantly" wanted to do so. Ms. Pierron's sweeping statements about "the children" are inaccurate because the record supports such statements only as they apply to Andrew,

not Madeline. Madeline's welfare is just as important as Andrew's. Despite the fact that she is younger than Andrew, she is not merely a hitchhiker on this ride.

**Conclusion:** In summary, the Court of Appeals decision creates a nightmare scenario for trial courts in that they must struggle to make findings on each best interest factor in MCL 722.23 when those factors were never intended to apply to school enrollment disputes and many are clearly inapplicable to this narrow issue. When a trial court succeeds in finding something to say about each factor, it risks reversal when the aggrieved party appeals and asserts error because the findings on one or more factors are not strictly limited to the school enrollment issue. No wonder the trial court expressed frustration when making its ruling.

However, even if the trial court erred and should have weighed the children's preference, that is but one factor to be considered. With the other factors lining up so strongly against the proposed school change, it is clear that Ms. Pierron failed to carry her burden.

### **Conclusion/Relief Requested**

The trial court showed considerable patience during the six days it heard testimony on the school enrollment issue. In a hearing limited to the choice of school districts, only a handful of the MCL 722.23 best interest factors will be crucial. Yet the parties and the trial court felt compelled by *Lombardo* to analyze the issue in light of each of the factors. This Court now has an opportunity to streamline future *Lombardo* hearings, saving parties and courts considerable resources, by holding that only the

relevant best interest factors need be considered and ruled upon. This has long been the rule in parenting time disputes.

Here, the trial court's ruling was especially complete and well-considered. Its decision was supported with ample factual findings based on voluminous evidence. The Court of Appeals improperly usurped the trial court's fact-finding role, and committed clear error, when it erroneously found that the established custodial environment in the homes of both parents would not be changed the proposed enrollment of the children in Howell schools. Because the established environment would be altered, Ms. Pierron faced a clear and convincing evidence burden. She did not carry that burden.

Even if the Court of Appeals was correct on the preference of the child issue (a point Dr. Pierron does not concede), it is but one factor. Consideration of all best interest factors collectively demonstrates that Ms. Pierron did not prove her case. The Court of Appeals decision should be vacated and the trial court's order affirmed.

Respectfully submitted,



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