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

Timothy Pierron,
Plaintiff-Appellant,

v

Kelly Pierron,
Defendant-Appellee.

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

Scott Bassett (P33231)
Attorney for Plaintiff-Appellant
2407 89th Street NW
Bradenton, FL 34209-9443
941-794-2904

Beverly M. Safford (P31753)
Attorney for Defendant-Appellee
25109 Jefferson Avenue
St. Clair Shores, MI 48081
586-776-9500

Lynn Capp Sirich (P46160)
Miller, Canfield, Paddock & Stone, P.L.C.
Co-Counsel for Plaintiff-Appellant
840 West Long Lake Rd., Ste. 200
Troy, MI 48098-6358
248-879-2000

Brief on Appeal – Appellee

Oral Arguments Requested

Submitted by:
Beverly M. Safford (P31753)
Attorney for Defendant-Appellee
25109 Jefferson Avenue
St. Clair Shores, MI 48081
586-776-9500

September 10, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

COUNTER STATEMENT OF JURISDICTION.....iv

COUNTER STATEMENT OF QUESTION PRESENTED.....v

COUNTER STATEMENT OF FACTS.....1

I. THE ENROLLMENT OF THE MINOR CHILDREN IN A SCHOOL DISTRICT 60 MILES FROM THEIR FORMER SCHOOL DISTRICT AND FROM THEIR FATHER'S HOME DID NOT RESULT IN A CHANGE IN THE CUSTODIAL ENVIRONMENT EVEN IF DONE UNILATERALY.....11

II. THE STANDARD OF PROOF IN THIS CHANGE-OF-SCHOOL ISSUE IS PERPONDERENCE OF EVIDENCE BECAUSE THERE IS NO CHANGE IN CUSTODIAL ENVIRONMENT IF THE MINOR CHILDREN ARE ENROLLED IN THE HOWELL SCHOOLS.....27

III. DURING THE LOMBARDO HEARING, THE DEFENDANT MOTHER DEMONSTRATED THAT THE SCHOOL CHANGE WAS IN THE CHILDREN'S BEST INTERESTS BOTH TO THE STANDARD OF PERPONDERANCE OF EVIDENCE AND TO THE STANDARD OF CLEAR AND CONVINCING EVIDENCE.....31

IV. THE MINOR CHILDREN'S PREFFERENCE WAS REASONABLE WITHIN THE MEANING OF "REASONABLE PREFFERENCE" AS USED IN MCLA 722.23.(I), AND SHOULD HAVE BEEN GIVEN SIGNIFICANT CONSIDERATION IN THE MATTER OF SCHOOL CHOICE.....46

SUMMARY AND RELIEF.....50

TABLE OF AUTHORITIES

Cases:

Baker v Baker, 411Mich 567, NW2d 532 (1981).....19,20,24,28
Becker v Becker, 95 Mich App 370, 290 NW2d 149 (1980).....25
Bowers v Bowers, 190 Mich App 51, 475 NW2d 394 (1991).....47
Bowers v VanderMeulen-Bowers, 278 Mich App 287, 293, 750.....11,12,13
Brown v Loveman 260 Mich App 576, 595, 680 NW2d 432.....25,30
Carson v Carson, 156 Mich App 291, 300, 401.....47
DeGrow v DeGrow, 112 Mich App 260, 315 NW2d 915 (1982).....20,21,30
Dehring v Dehring 220 Mich App 163, 559 NW 2d 59.....29,32
Fletcher v. Fletcher, 447 Mich. 871, 526 NW2d 889 (1994)..... 8,9,27,31,46
Heid v Aaasulewske (After Remand), 209 Mich App 587, 532 NW2d 205 (1995)...32
Lewis v Lewis, 73 Mich App 563, 252 NW2d 237 (1977).....49
Lombardo v Lombardo, 202 Mich App 151, 507 NW2nd 788 (1993)...1,13,14,27,31,37,48
Longhi v Longhi 119 Mich App 41, 325 NW2d 617 (1982).....23
Lustig v Lustig, 99 Mich App 71, 299 NW2d 375 (1980).....32
McCain v McCain, 229 Mich App 123, 580 NW2d 485 (1998).....32
Mogle v Scriver, 241 Mich App 192, 614 NW2d 696 (2000).....23,25
People v Gregg, 206 Mich App 208, 520 NW2d 690 (1994).....47
Pierron v Pierron 282 Mich App 222, 765 NW2d 345.....9,10,12,13,14,24,25,28,31,32,34,38,47
Scott v Scott, 124 Mich App 448, 450, 335 NW2d 68 (1983).....23
Shulick v Richards, 273 Mich App 320, 729 NW2d 533 (2006).....13
Stevens v Stevens, 86 Mich App 258, 273 NW2d 490 (1978).....30
Zawisa v Zawisa, 61 Mich App 1, 232 NW2d 275, 277 (1975).....49

Statutes:

MCL 552.605b..... 27
MCL 722.23.....6,10,13,14,31,32,46,48
MCL 722.23(e)..... 37,38
MCL 722.23(i).....9,13,44,47
MCL 722.26a(7)(b).....13
MCL 722.27..... 19, 22, 27, 28
MCL 722.28.....9,11,27,31,38,46,48
MCL 722.31..... 12, 13,50

COUNTER STATEMENT OF JURISDICTION

This is a choice-of-school issue case. On November 12, 2007, the trial court entered an order requiring the minor children to remain in the school district where they had previously attended which was 60 miles from their current primary residence. Appellant's Appendix p952a.

The trial court entered an order denying the defendant mother Appellee's motion for reconsideration on November 30, 2007. Trial Court's Order denying Motion for Reconsideration Appellant's Appendix p985a.

Defendant mother filed a timely appeal with the Court of Appeals on 12-18-07. The case was dismissed by the Court of Appeals, 1-10-07 and reinstated upon motion of defendant mother as a custody matter on 2-29-08.

The published decision f the Court of Appeals in Pierron v Pierron 282 Mich App 222, 765 NW2d 345 (2009) vacated the circuit court's order denying the defendant mother's request to enroll the minor children in their current home school district and remanded for a Lombardo hearing on the current facts. Appellant's Appendix 1001a-1017a.

This matter in before the Supreme Court on this Court's granting of the application for leave to appeal filed by the Plaintiff Appellant. Docket entries Appellant's Appendix 1025a

COUNTER STATEMENTS OF QUESTIONS INVOLVED

I. DID THE ENROLLMENT OF THE MINOR CHILDREN IN A SCHOOL DISTRICT 60 MILES FROM THEIR FORMER SCHOOL DISTRICT AND FROM THEIR FATHER'S HOME, RESULT IN A CHANGE IN THE CUSTODIAL ENVIRONMENT EVEN IF DONE UNILATERALY?

The trial court answers:
Yes
The Court of Appeals answers:
No
The Defendant-appellee answers:
No
The Plaintiff-Appellant answers:
Yes

II. WAS THE STANDARD OF PROOF IN THIS CHANGE-OF-SCHOOL ISSUE THE PERPONDERENCE OF EVIDENCE, BECAUSE THERE IS NO CHANGE IN CUSTODIAL ENVIRONMENT IF THE MINOR CHILDREN IF THEY ARE ENROLLED IN THE HOWELL SCHOOLS?

The trial court answers:
No
The Court of Appeals answers:
Yes
The Defendant-appellee answers:
Yes
The Plaintiff-Appellant answers:
No

III. DURING THE LOMBARDO HEARING, DID THE DEFENDANT MOTHER DEMONSTRAT THAT THE SCHOOL CHANGE WAS IN THE CHILDREN'S BEST INTERESTS BOTH TO THE STANDARD OF PERPONDERANCE OF EVIDENCE AND TO THE STANDARD OF CLEAR AND CONVINCING EVIDENCE?

The trial court answers:
No
The Court of Appeals answers:
Yes, as to the Standard of Preponderance of Evidence
and did not answer as to the Standard of Clear and Convincing Evidence.
The Defendant-appellee answers:
Yes
The Plaintiff-Appellant answers:
No

IV. WAS THE MINOR CHILDREN'S PREFFERENCE REASONABLE WITHIN THE MEANING OF "REASONABLE PREFFERENCE" AS USED IN MCLA 722.23.(I), AND SHOULD THEIR PREFFERENCE HAVE BEEN GIVEN SIGNIFICANT CONSIDERATION IN THE MATTER OF SCHOOL CHOICE?

The trial court answers:

No

The Court of Appeals answers:

Yes

The Defendant-appellee answers:

Yes

The Plaintiff-Appellant answers:

No

COUNTER STATEMENT OF FACTS AND PROCEEDINGS

This matter is a choice-of-school issue. The mother, fully within the law, moved the primary residence of the minor children to Osceola/Howell, 60 miles from their former primary residence in Grosse Point Woods. The minor children are: son Pierron DOB: May 6, 1994, who was 13 years old at the time of the hearing and daughter Pierron, DOB January 25, 1999,who was 8 years old at the time of the original Lombardo hearing. Lombardo v Lombardo, 202 Mich App 151, 159-160; 507 NW2nd 788 (1993

This matter came before the circuit court on motion of the plaintiff appellant father for custody and to prevent the defendant mother from enrolling the minor children in the Howell public schools. The circuit court ordered that the minor children remain enrolled in the Grosse Pointe public schools. The Court of Appeals concluded that the circuit court committed legal error on a number of major issues and made several findings of fact that were against the great weight of the evidence and remanded. Pierron opinion (Appnt App 1001a)[1]. The plaintiff appealed to the Supreme Court.

The defendant mother has always been the primary caregiver for the minor children, and since the divorce in 2000, the defendant mother has had the primary residence for the children. The plaintiff father confirmed this fact (T 10-1-07 p73;Apee App p 135b) Prior to the mother and minors move to Osceola/Howell, the minor children attended the school in the mother and father's school district in Grosse Pointe Woods.

The testimony showed that the defendant mother signed the offer to purchase the home in Osceola/Howell on April 17, of 2007. (Appee App P 1b)

---

1. Appnt App is Appellant's Appendix
Appee App is Appellee's Appendix

The Plaintiff father sent the mother a letter on April 27, 2007, offering to sell his home to her at $ 1000,000 less than appraised

For taxes. (T 19-5-07 p81; Appee App p 33b) The defendant mother declined stating that she had already purchased a home in Osceola/Howell. The plaintiff father's attorneys sent a letter and a purposed parenting time order, addressed to an attorney, that father's attorney had been told would be out of the office for two months beginning the day after the letter was mailed. (Tran Sept 17, 2007 P 139-140; Appee App P117b-118b)(Exhibit letter to Appellee from Appellant May 23, 2007 Appee App P 8-12)The Defendant mother and minors moved into the Oceola home in June and July of 2007. (T 9-5-07 p10;Appee App p 31b) the father filed a motion on July 13, 2007, for custody or in the alternative to prevent the children from being enrolled in the Howell school district where they now lived.

During testimony, the plaintiff father acknowledged that the minor children lived in Osceola/Howell at the time of the Lombardo hearing. (T 10-1-07 p74;Appee App p 136b)

The plaintiff father's custody issue was denied by the trial judge and is not on appeal.

The parties were married for approximately 7 years. In 1999, The Judgment of Divorce gave both parties joint legal custody and the defendant mother sole physical custody. Judgment of divorce (Appnt app p1a.) The Amended Judgment of divorce entered in 2000, slightly changed the wording whereby their would be joint legal and physical custody, primary residence with the defendant mother, father would have as parenting time overnights, mutually agreeable times, first option of parenting when and if wife resumes full time employment or goes back to school. (Appnt app 18a)

Father testified to the fact that the mother at all times has maintained the primary custody of the minor children. (T 10-1-07 p73;Appee App p 135b)

The trial court conducted a Lombardo hearing that took over two months to complete in ½ day and full day sessions (Appnt App register of circuit court 987a) During the hearings, a pattern of the father's parenting time was placed on the record by the plaintiff father. It clearly shows that there were no week day overnights and no use of first option. He did take the minors out of town on vacation with his family for 7 to 10 days page 73 Oct 1; (T9-5-07,p -96-97 T 10-1-07 p73; Appee App pp 40b-41b and 135b) The father testified about his usual parenting time as follows:

The COURT: Okay. What - - What was the parenting that you exercised - -
The Witness(father): Any weekend I was not working I had the kids. Did I have them other days? No, many times I was told, no, pick them up Saturday. You can't pick them up Friday night. You can pick up Andrew Friday night, but Madeline's got a play date - -
The COURT: Okay.
The WITNESS: - -so you have to pick them up Saturday. It was acceptable for me because I was a half dozen blocks away and I could very easily say, fine. I will pick her up later, I will pick her up then.
The COURT: Okay.
The WITNESS: We will do it - -
The COURT: But you saw them every weekend that you weren't working?
The WITNESS: Yea.
The COURT: for some portion? Some - -
The WITNESS: YES.
The COURT: or all of the weekend - -
The WITNESS: I also - -
The COURT: Depending on their schedules..
The WITNESS: I also when - -
The COURT: Okay.
The WITNESS: - - I was on afternoons, routinely, like I'm going to do this week, tomorrow, pick up my daughter inaudible and take her out to lunch. Unfortunately with junior high they don't - -
The COURT: Only - - only her?
The WITNESS: Well in junior - - when the - - well I take my son also. It was great because he'd walk to my house. But now my son's in junior high, they don't have a long enough lunch and kids in - -
The COURT: You do that once a week?
The WITNESS: No, I would do it several times a week.
The COURT: But when you were on afternoons.
The WITNESS: Yes, I would - -
The COURT: Which was - - when you were on afternoons?

The WITNESS: I'm on afternoon once out of every seven weeks. There's seven of us in the group. And we divide it up evenly.
The COURT: And you = = that's still your schedule?
The WITNESS: Yes. (T10-1-07; Appee App P 126b-130b)

And for additional parenting time:

The COURT: So what you're saying is that on that - - on the time that you had your afternoon week, then you would go out and take the kids out to lunch - -
The WITNESS: Depending on the –
The COURT: - - to lunch - -
The WITNESS: - - time of day.
The COURT; - - or bring them home?
The WITNESS: I would - - we would do something in day many times. I remember going fishing in the mornings. Actually when - - during '04 and '05 when Andrew and Madeline were having swimming lessons, I got a chance to actually take them to swimming lessons and we'd hang out at the pool all day for those five days.
The COURT: That would be in the summer.
The WITNESS: Yes. (T10-1-07; Appee App P 131b)

Based on his testimony, his usual overnight was Saturday night three Saturdays a month. The father further testified that his regular working hours were: 8:am to 5:00 or 5:30; and that he worked from 3pm until 11pm on the days he worked afternoon which was one week every 7 weeks. (T 9-17-07, p126; Appnt App p267a)

The 39 stipulated facts that the plaintiff appellant quotes in his brief at pages 4-6, discussed the interactions that the father had with the minor children on his Saturday-Sundays and during the day during the one out of seven weeks in the summer and school year when he works evenings. In the summer during his one out of seven weeks working afternoons, the father was able to take the fishing and swimming and during the school year, the father would take the minors to lunch if the school allowed and he was able to talk in person to teachers of the minor children on his one out of seven weeks during the school year. (T 10-1-07 p58-61;Appee App p128b-132b) He never took the minors for one week at his house. (T9-5-07 P 90-93 Appee App P 36b-39b)

During testimony the father stated that he was involved with the children's education. He met with the teachers, attended parent teacher conferences; keep track of the children's progress through electronic means. (T 9-17-07, p24-25; Appnt App p154a-155a)

Because of his work schedule, these personal meetings would have had to occur during the one in seven weeks that he worked evenings or after 5:30pm when he was out of work.

Lynn Parish, Assistant Superintendent for the Howell Public Schools, testified that there was special planning for parents who were non custodial parents in the Howell public schools: the parent could meet with the teacher on appointment if necessary; she testified that the Howell Public Schools were implementing a program to allow parents to keep daily track of their minor children; she further testified that the parents could daily contact the teachers through email at any time. (T 9-13-07 p51-54;Appee App p 73b-77b)

The plaintiff father did acknowledge that, during the two months of hearings, he had attended a Howell Public meeting which discussed school issues in Howell. (T10-1-07 P193-194; Appee App P146b-147b)

The father testified that his relationship with his son, prior to the time the father opposed the children's enrollment into the Howell Public Schools was "great". (T10-1-07 P 49; Appee App P124b)

But he also testified that his relationship with the 13 year old was not that great prior to the move the minors' move to Osceola (T10-1-07 P. 50; Appee App P 126b-130b)

Testimony was that the 13 year old boy became very distressed when they learned that their father was opposing their enrollment in the Howell Public Schools. His relationship with their father deteriorated. The father blamed the mother for moving to Howell. (T10-1-07 P. 50; Appee App P 126b-130b)

There was no supporting evidence to the father's allegation that the mother was interfering with his relationship with the minor children other than the hearsay inside of hearsay that the defendant mother's attorney spoke with the older sibling of the minors. Oct 1, p 48-49 (T10-1-07 P. 48-49; Appee App P 123b,124b)

During the protracted Lombardo hearing, the trial judge expressed distress at the application of best interest factors as outlined in MCL 722.23 to the choice-of-school issue.

> ...The appellate courts have given us a little bit of a, um, what is it, a round hold 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 is- 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 although most parents are - - are able to address all of the factors, you know, at - - at any time But. (T 11-12-07 p 7-8;Appnt App p960a-961a)

During the ruling from the bench the Trial Judge expressed her intention to follow the Court of Appeals Opinions regarding a Lombardo hearing utilizing the best interest factors from MCL 722.23

> The court will not apply - - now apply the 12 best interest factors utilizing the burden just referenced.
> The best interests of the child are codified in MCL 722.23. The Court must look at each factor as it relates to Ms. Pierron's request to change schools and state its conclusion. Fosket. (T 11-12-07 p 10, Appnt App p963a)

In the Lombardo hearing, the plaintiff father referred to a news article dated August 27, 2007 which discussed the choice-of-school issue. (News article dated August 27, 07 Appee App P20b-22b) The defendant mother stated on the record, that the news paper was contacted because prior to the beginning of the hearings, the attorney for the mother did not know how to prove to this trial judge that Howell Public Schools would be the better schools for the minor children. (T10-15-07 P.114; Appee App P 42b) In his brief, the plaintiff father asserted that

mother's attorney stated in the news article that the parent with the primary residence should decide which school to send the children. The actual quote was: "She didn't move 100 miles away so since she is the primary caregiver, she should have the school residence," Safford said. Detroit News article on case . (News article dated August 27, 07 Appee App P20b-22b) This in no way reduces the need for a Lombardo hearing if the parties do not agree. However, the pattern of the plaintiff father to misrepresent the Opinion of the Court of Appeals and the position of the Defendant mother has created a nightmare in this matter.

In her ruling from the bench on November 12, 2007, the circuit Judge stated on the record.

> "There was even testimony that the older child of Ms Pierron, Ian, had met with her attorney to discuss this case. Ms. Pierron contacted the newspaper which printed a story entitled, quote, Divorce Judge to Pick Kids; School." Unquote. (T 11-12-07 p 23 Appnt App p976a)

There was a hearsay statement first made by the father several weeks earlier in a deposition. As the statement says, the Attorney denied ever talking to Ian, the older brother of Andrew. In that hearsay inside of hearsay during the Lombardo hearing, it was clear that the mother's attorney denied she ever talked with the older son of the mother. The statements of the father were made without his attorney asking a question regarding the statements. The father just volunteered the statements. (T10-1-07 P.48-49; Appee App P 123b-124b)

In an unusual move, the trial Judge received objection to the defendant mother's closing argument from plaintiff father's attorney on November 8, 2007 less than two business days prior to the Judge's ruling from the bench. The trial judge also received and a copy of the uncertified transcripts from the plaintiff father on November 8, 2007. Only after many requests, defendant mother's attorney first got a copy of the uncertified transcripts from the father's attorney on January or February of 2008. This was two or three months after the Judge ruled from the bench.

The trial Judge ruled from the bench on November 12, 2007. In her ruling she stated that she did not consider the arguments of the parties as evidence.

> While the testimony of the Assistant superintendent Lynn Parrish, regarding the Howell public school system was quite impressive, there was no showing the Pierron children would 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 p 16-17 Appnt App p969a-970a)

During the entire ruling on November 12, 2007, at no time did she consider the fact that the defendant mother, who clearly had the primary residence of the minor children for the last 7 years, now lives with the minor children in Osceola/Howell. (T 11-12-07 p 3-28,Appnt App p954a-982a)

The attorney for the mother filed an answer to the father's objections to mother's closing arguments on the same date that she filed her motion for reconsideration. (circuit court register of actions; Appnt App p 987a)

Defendant mother filed a motion for reconsideration on 11-26-07. The motion for reconsideration was denied on 11-30-07. (Circuit court register of actions; Appnt App p 987a)

The mother filed her claim of appeal from the November 12th and November 30th 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 the mother's motion for reconsideration, the appeal was reinstated on February 29, 2008. The Court of Appeals published an order in this matter on February 3, 2009. (Appellate Docket Entries, Appnt app #1025a).

The significant difference between the finding of facts as to the best interest factors as outlined in MCL 72.23, of the circuit court and the findings of the Court of Appeals will be addressed systematically in the argument section addressing the children's best interest.

Notably however is the circuit court's ruling on factor (i) of MCL722.23 which is the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference. The minor children were, at the time 13 and 8 years of age. The trial Judge ruled that because the children had never attended the Howell Public Schools, they could not have a reasonable preference for which school they want to attend. The trial Judge also found that both parties agreed that the children would say that they wanted to attend the Howell Public Schools. (T 11-12-07 p 21, Appnt App p974a) That is a plural, both of them.

The Court of Appeals found that the minor children, then age 13 and 8 did have a reasonable preference for the school that they wanted to attend.

In this case the children had a defensible reason for preferring the Howell Public Schools to the Grosse Pointe Public Schools. It made eminent sense for the children to prefer to attend school in the community where they lived with their primary custodial parent. Pierron v Pierron 282 Mich App 222, 22, 765 NW2d 345 (Pierron Opinion; Appee App P 165b)

The Court of Appeals affirmed the circuit court's finding that there was a joint established custodial environment, vacated the circuit court's order keeping the children in the Grosse Pointe Public schools and held that mother's burden of proof was a preponderance of evidence.

The Court of Appeals found:

We conclude that the circuit court committed legal errors on a number of major issues and made several findings of fact that were against the great weight of evidence. MCL 722.28. Pierron v Pierron 282 Mich App 222, 261-262, 765 NW2d 345 (Pierron Opinion; Appee App P166b)

The Court of Appeals remanded specifically for a consideration of up-to-date information before the circuit court could make a determination consistent with the Court of Appeals Opinion:

> On remand, the court should consider up-to-date information in its determination of the choice-of-school issue, including, but not necessarily limited to the current and reasonable preferences of the minor children and any other changes that may have arisen in the interim period. See Fletcher v Fletche 447 Mich. 871, 526 NW2d 889 (1994) Pierron v Pierron 282 Mich App 222, 262, 765 NW2d 345 (Pierron Opinion; Appee App P 166b)

Without ruling on the merits, The Court of Appeals also upheld the trial court's ruling that the trial court was correct when it denied, without prejudice the defendant mother's request for attorney fees because the request first came to the circuit court in a motion for reconsideration. Pierron supra p 264. (Pierron Opinion; Appee App P 167b)

The plaintiff father filed an application for leave to appeal with the Supreme Court an May 6, 2009 (appellate docket entries appnt app #1031a)

I. THE ENROLLMENT OF THE MINOR CHILDREN IN A SCHOOL DISTRICT 60 MILES FROM THEIR FORMER SCHOOL DISTRICT AND FROM THEIR FATHER'S HOME DID NOT RESULT IN A CHANGE IN THE CUSTODIAL ENVIRONMENT EVEN IF DONE UNILATERALY

STANDARD OF REVIEW:

Custody reviews are not de novo but, as prescribed in MCL 722.28, findings of fact are reviewed under the great weight of the evidence standard, discretionary rulings are reviewed under abuse of discretion standard and conclusions of law are reviewed for clear legal error. 447 Mich. 871, 526 NW2d 889 (1994)

ARGUMENT:

This matter is brought to the Court on the sole issue of choice-of-school for the Pierron minor children. The parents disagree about which school the minor children should attend. The choices are: the school district where the minors currently have their primary residence, the Howell public schools and the school district where the minors used to have their primary residence and where their father continues to live, the Grosse Point public schools.

Neither the Court of Appeals through it's opinion in Pierron v Pierron 282 Mich App 222, 765 NW2d 345, nor the defendant mother, have expressed that a unilateral decision to change the school district is appropriate when there is a joint legal custody of the minors. The plaintiff father, in his brief, continually misstates and misquotes the Court of Appeals and the defendant mother, to the point of being misleading and offensive. In the Appellant's brief he states:

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 custodian through 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 the Pierron unilateralism rules and children suffer. Appellant's brief page 25.

The Court of Appeals in this matter did **not** hold that the defendant mother could enroll the minors in a different school district with out a full Lombardo hearing on the issue. The Court of Appeals affirmed the ruling in Bowers v VanderMeulen-Bowers, 278 Mich App 287, 293; 750 NW2d 597 (2008). What the Court of Appeals did say was:

As an initial matter, we wish to make clear that defendant did not act illegally by moving the children's residence to Howell without first seeking the permission of the circuit court or the consent of plaintiff. The Legislature has declared that "a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more then 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued." MCL 722.31 (1). In other words, when a child's custody is governed by court order, neither parent may move that child's residence by more than 100 miles without first obtaining permission from the court or consent from the other party. Bowers v *V*anderMeulen-Bowers, 278 Mich App 287, 293; 750 NW2d 597 (2008). Implicit in MCL 722.31(1), however, is that a custodial parent may move a child's residence by less than 100 miles without first obtaining permission from the court or consent from the other party. See id. The undisputed evidence in this case established that Howell is roughly 60 miles from defendant's former home in Grosse Pointe Woods. We therefore conclude that defendant was free to relocate the children's residence to Howell without first seeking the permission of the circuit court or the consent of plaintiff. See MCL 722.31 (1). Pierron v Pierron 282 Mich App 222, 245-246, 765 NW2d 345 (Apee App. Pb.) (Pierron Opinion; Appee App P 160b-161b)

The plaintiff father further misquoted the defendant's attorney and misleads the Supreme Court by stating:

"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,,, " Appellant's brief page 23.

The Court of Appeals in the Pierron matter discussed how disputes are to be resolved when the parties can not agree upon important issues such as which school the minors will attend.

But the mere fact that one parent may be entitled to move a child's residence by less than 100 miles without permission of the court or consent of the other parent does not relieve the circuit court of its obligation "to the best interests of the child." Bowers v VanderMeulen, 278 Mich

App287, at 296, 750 NW2d 597 (2008) . Indeed, a relocating parent who shares legal custody with another parent does not have the authority to unilaterally make important decisions affecting the welfare of the child, even if the relocating parent is the primary physical custodian. Lombardo v Lombardo, 202 Mich App 151, 159-160; 507 NW2nd 788 (1993). This is because when parents share joint legal custody—as plaintiff and defendant did in this case—they also "share decision-making authority as to the important decisions affecting the welfare of the child.: MCL 722.26a(7)(b). A decision concerning the child's schooling and education is just such an important decision affecting the welfare of the child. Bowers, 278 Mich app at 296; Shulick v Richards, 273 Mich App 320, 327;729 NW2d 533 (2006) (stating that "educational decisions are clearly important decisions affecting the welfare of the children").3 Therefore, parents with joint custody must agree concerning where their children will attend school. Bower, 278 Mich App at 296; Lombardo, 202 Mich App at 159. Pierron v Pierron 282 Mich App 222, p246-247,765 NW2d 345 (Pierron Opinion; Appee App P 161b)

In Pierron v Pierron at page The Court of Appeals went on to discuss how disputes are resolved when the parties can not agree upon important issues such as which school the minors will attend.

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 parties 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." ID.; see also Bowers, 278 Mich App at 297. The court must do so by holding an evidentiary hearing and considering the relevant best-interest factors contained in MCL 722.23. Lombardo, 202 Mich app at 160. We refer to such an evidentiary hearing, held for the purpose of deciding an important issue affecting the welfare of the child, as a "Lombardo hearing." During a Lombardo hearing, the circuit court "must consider, evaluate, and determine each of the factors listed at MCL 722.23" for the purpose of "resolving disputes concerning 'important decisions affecting the welfare of the child that arise between joint custodial parents." Lombardo, 202 Mich App at 160. Pierron v Pierron 282 Mich App 222,247, 765 NW2d 345 (Pierron Opinion; Appee App P 161b)

In this matter, the Court of Appeals went over each factor in MCL 722.23 and carefully illustrated how the 12 issues should be narrowed to apply to the specific choice-of-school issue and what does not apply. Pierron supra P251-262. (Pierron Opinion; Appee App P 162b-166b) It is truly baffling how the plaintiff appellant could read the Pierron opinion and then state in his Brief to the Supreme Court that "The Court of Appeals decision creates a nightmare scenario

for trial courts in that they must struggle to make findings on each best interest factors in MCL 722.23." Appellant Brief page 49.

That said, the custodial environment of the minor children did not change because the mother chose to enroll the minor children in the Howell public schools. The Howell public schools are the local school district for the minor children's primary residence with their mother and 60 miles from the father's house and their former school district. The father acknowledged through his testimony of time he actually spends with the minor children, that the defendant mother is the primary caregiver of the minor children. The only change would be a slight change in the structure of the parenting time. (T10-1-07 P. 58-60; Appee App P 128b-130b)The amount of parenting time would be the same or increase, and the transportation of one and one half hours on good times would be evenly divided between the parties.

First, the defendant mother was of the belief that the choice-of-school was not an issue and only parenting time was an issue when she moved. She expressed, on the witness stand, that she was lead to believe that this matter could have been worked out without a court hearing because of a letter/purposed order that she received.. (9-5-07T 89-90 ; Appee App P35b-36b) During the Lombardo hearing, the plaintiff father was asked about the letter dated May 23, 2007, that the defendant-mother testified she relied on when she concluded that the plaintiff was only concerned about the parenting time: (T9-5-07 P. 89-90; Appee App P 34b-35b)

Q to resolve the matter of the children living in Howell, would it be correct to say that what – what you asked to resolve the matter was the first three weekends of every month from Friday to 6:00 p.m. – I mean from Friday at 6:00 p.m. through Sunday at 8:00 p.m., extended parenting time for six nonconsecutive weeks each calendar, --
A (Dr. Pierron) Um hm.
Q ah, parenting time with the minor children reasonable and liberal during the week; and that you could have contact with them by phone between 5:00 and 6:00 p.m.; and that the mother would be responsible for all transportation.
A I believe so, yes.

Q And that's what it would have taken for this matter to have solved on May 23rd, is that correct?
A Yes, I believe so.
Q So the children would then –
THE COURT: There's no way he understood your question.
THE WITNESS: That's okay. I mean she's –
MS. SIRICH: I was – I was going to get that on redirect.
THE COURT: Not a chance, If that was – if – if – if he understood your question, we've wasted five days.
MS. SAFFORD: All right.
BY MS. SAFFORD:
Is it – it's correct to say the children would then have gone —
THE COURT: Listen, wait a minute.
I'll tell you. She wants to know if you were agreeing in that letter for the children to live in Howell, got to school in Howell, if you could have that parenting time schedule.
THE WITNESS: Yes.
THE COURT: Oh, Okay.
MS. SAFFORD: That's what the whole case – that's – that – I could sit down, but I won't.
THE COURT: Than why are we here?
MS. SAFFORD: Thank you. But –
THE COURT: Ms. Sirich, why are we here if he was agreeing to that parenting time schedule for the kids to live and go to school in Howell?
MS. SIRICH: Not for the kids to go to school in Howell.
THE COURT: That's what I just said to him.
THE WITNESS: I'm sorry. I didn't under – I'm –
THE COURT: That's what I just said to him.
MS. SAFFORD: And that's what he just said, yes, he agreed to.
THE COURT: And that's what he just said yes to\.
MS. SIRICH: Did you understand?
THE WITNESS: No, I'm sorry, I do not understand what – I am tired. Maybe …
MS. SIRICH: This—
MS. SAFFORD: Well, may – no, may I ask some more questions, your Honor?
THE WITNESS: Well, let's --
MS. SAFFORD: Rather than have his –
THE COURT: Well –
MS. SAFFORD: -- attorney helps him out here?
THE COURT: Well, no, I mean, what – what I asked you, Dr. Pierron, is -- MS. SIRICH: He clearly doesn't under – stand.
MS. SAFFORD: Quiet.
THE WITNESS: I'm not –
MS. SIRICH: Otherwise I wouldn't –
MS. SAFFORD: Quiet.
MS. SIRICH: -- be wasting—
MS. SAFFORD: Quiet.
MS. SIRICH: -- time.

MS. SAFFORD: Quiet.

MS. SIRICH: Please don't tell me to be quiet.

MS. SAFFORD: Well I really highly oppose.

THE COURT: Come on, counsel. I expect a little bit better than that.

Which – what – when that letter was sent, that letter does not say, um, it suggests pretty much by it's, ah, failure to mention anything about schooling that you would be, um, agreeing that they could live in Howell with their mother and go to school in Howell if you have that parenting time schedule. And you just said yes to that.

THE WITNESS: I did not understand. I apologize.

THE COURT: Well what did you mean with that – well what did you – what offer did you have your attorney convey to –

(ON THE VIDEO TAPE THERE IS A 9 SECOND GAP OF SILENCE BEFORE THE WITNESS ANSWERED THE QUESTION) (Information added by defendant's attorney)

THE WITNESS: What I –

THE COURT: - Ms. Pierron?

THE WITNESS: -- was trying to do was get a negotiation with actually speaking to someone. Having them communicate to figure out that can we do. I wanted to try and keep contact with my kids. Keep them in Grosse Pointe schools. In fact, I specifically said I am not going to sign off for them going – leaving Grosse Pointe schools. That was the exact term I used, I am not going sign off on that.

THE COURT: But this – let me see the letter. But this letter doesn't say anything about school. So it doesn't say anything about schools. The cover letter doesn't say anything about school, and that order doesn't say anything. It just says about parenting time. And you were going to get these weekend and the six nonconsecutive weeks, and where did you think they were going to go to school?

THE WITNESS: But we never received a response from that either?

THE COURT: Well that – that's not my question. My question was when you made the offer, what was your assumption with respect to where they'd go to school?

THE WITNESS: Honestly, my hope was they were going to stay in Grosses Pointe.

THE COURT: Well then why would you offer a parenting time schedule that talked about you seeing them three weekends a month, and –

THE WITNESS: -- Trying to --

THE COURT: -- and –

THE WITNESS: -- actually get some negotiation and discuss it. Was I going to get them to stay in Grosse Pointe schools? I didn't know.

THE COURT: Okay. Go ahead, Ms. Safford.

MS. SAFFORD: All right.

(T9-17-07 P. 129-136; Appee App P 107b-118b

The attorney who did step in as the defendant mother's attorney in this change-of-school issue had been medically restricted for two months beginning exactly one day before the letter was delivered to her office. (T9-17-07 P.137; Appee App P 117b-118b)

The attorney was not available to represent the defendant mother so the letter was forwarded by the attorney's secretary to the defendant mother. (T9-5-07 P.90; Appee App P36b) The father acknowledged that the minor children have always been in the primary care of the defendant mother. (T10-1-07 P. 73; Appee App P 135b) They have always had parenting time with the Plaintiff father. (T9-5-07 P.90-91; Appee App P36b-37b) The move to Osceola/Howell did not change those relationships. There was testimony that the father's opposition to the change in school districts stressed the relationship between the minor son and the father. (T10-1-07 P. 48; Appee App P 123b) The plaintiff father believed that the mother's choice-of-schools caused distress between the minors and their father, but other than the belief of the plaintiff father, there was not credible testimony that the new location for the minors' primary residence, Osceola/Howell did anything to damage the children/father relationship.

Prior to the move to Howell, the father saw the minors on a regular basis, but only as his schedule allowed Saturday night through Sunday evening; during the days one out of 7 weeks when he worked evenings, he took them for trips out of the state once or twice a year. The father testified about his usual parenting time as follows:

The COURT: Okay. What - - What was the parenting that you exercised - -
The Witness (father): Any weekend I was not working I had the kids. Did I have them other days? No, many times I was told, no, pick them up Saturday. You can't pick them up Friday night. You can pick up Andrew Friday night, but Madeline's got a play date - -
The COURT: Okay.
The WITNESS: - -so you have to pick them up Saturday. It was acceptable for me because I was a half dozen blocks away and I could very easily say, fine. I will pick her up later; I will pick her up then.
The COURT: Okay.
The WITNESS: We will do it - -
The COURT: But you saw them every weekend that you weren't working?
The WITNESS: Yea.
The COURT: for some portion? Some - -
The WITNESS: YES.
The COURT: or all of the weekend - -
The WITNESS: I also - -

The COURT: Depending on their schedules..
The WITNESS: I also when - -
The COURT: Okay.
The WITNESS: - - I was on afternoons, routinely, like I'm going to do this week, tomorrow, pick up my daughter inaudible and take her out to lunch. Unfortunately with junior high they don't - -
The COURT: Only - - only her?
The WITNESS: Well in junior - - when the - - well I take my son also. It was great because he'd walk to my house. But now my son's in junior high, they don't have a long enough lunch and kids in - -
The COURT: You do that once a week?
The WITNESS: No, I would do it several times a week.
The COURT: But when you were on afternoons.
The WITNESS: Yes, I would - -
The COURT: Which was - - when you were on afternoons?
The WITNESS: I'm on afternoon once out of every seven weeks. There are seven of us in the group. And we divide it up evenly.
The COURT: And you- - - that's still your schedule?
The WITNESS: Yes. (T10-1-07 P. 58-60; Appee App P128b-129b)

And clarification on the issue of parenting time:

The COURT: So what you're saying is that on that - - on the time that you had your afternoon week, then you would go out and take the kids out to lunch - -
The WITNESS: Depending on the –
The COURT: - - to lunch - -
The WITNESS: - - time of day.
The COURT; - - or bring them home?
The WITNESS: I would - - we would do something in day many times. I remember going fishing in the mornings. Actually when - - during '04 and '05 when Andrew and Madeline were having swimming lesions, I got a chance to actually take them to swimming lessons and we'd hang out at the pool all day for those five days.
The COURT: That would be in the summer.
The WITNESS: Yes (T10-1-07 P.61; Appee App P130b)

The father testified that he worked from 8.00am to 5:00 or 5:30pm (T10-1-07 P.56; Appee App P 126b)

and he testified that after the mother drove them to tutoring, he sometimes picked the minors up for dinner from tutoring, (T10-1-07 P68.; Appee App P134)

The defendant mother testified that prior to her purchase of the home in Osceola/Howell, the father never had the minor children at his house for one week, ever. Not during the summer, the spring break or the winter breaks from school. (T9-5-07 P.91; Appee App P37b)

The legislature has defined custodial environment in MCL 722.27 (c) as:

The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in such 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.

Our Supreme Court has described an established custodial environment as:

Certainly the orders of custody „„did not, of themselves, establish the custodial environment with which we are concerned here. Such an environment depended instead upon a custodial relationship of a significant duration in which (the child is) provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; and environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence. Baker v Baker, 411Mich 567, 579-580; NW2d 532 (1981).

The operative word in this paragraph from Baker supra, (actually one very long sentence) is relationship. The defendant mother has the obligation of showing that the RELATIONSHIP between the father and the minor children is not changed because she attempted to enroll or enrolled the minor children in the Howell public schools. The custodial environment that is in question in this case is the school and the relationship between the father and the minor children.

The second operative word in the paragraph from Baker supra , and what the trial court did not focus on was, the "child." "the child naturally looks to the custodian in that environment." "The age of the child." "The inclination of the custodian and the child as to the permanency of the relationship." The focal point is the child and the child's perspective as to the relationship between the child and the custodian.

Similar to Baker v Baker 411 Mich 567, 581-583; 309 NW2d 532 (1981), which was an award of custody case, in this case, which is a choice-of-school issue, the minor children no longer have the same environment in the Grosse Point schools that existed prior to their move to Osceola/Howell because significant elements of that environment have changed. The home that the children live in is no longer in Grosse Pointe school district. The minors now live 60 miles from the Grosse Ponte school district. When the minor children had their primary residence in Grosse Pointe, the minor children were always driven to school by their mother and always picked up from school by their mother. (T10-1-07 P.56, 58-62; Appee App P126b,128b-132b)

The minor children had the comfort of their maternal home in Grosse Pointe, which was their primary home, when they attended the Grosse Ponte public schools. They now have their primary residence in the Howell Public School district. Their primary custodian, the defendant mother, lives 60 miles from the Grosse Pointe School district. The change in the environment as to the school is evidenced by the minor children's preference for attending the Howell public schools. This change in the environment was not related to a change in schools, but was relevant to the change in primary residence from one school district to another school district. Baker v Baker 411 Mich 567, 581-583; 309 NW2d 532 (1981).

A school is not a custodial environment in which the child naturally looks to the mother or father for guidance, discipline, the necessities of life and parental comfort. The school is expected; during the time the child is at school, to exercise In Loco Parentis as to guidance, discipline, the necessities of life (an education) and comfort as appropriate. A school is not a permanent relationship. Children maturate and are graduated into the next higher level of school.

Public Schools, which both school districts are, are established by the laws of the State of Michigan and regulated by the local boards duly elected.

The court of appeals has held that "It is possible to have a domicile change that is more than one hundred miles away from the original residence without having a change in the established custodial environment" DeGrow v DeGrow, 112 Mich App 260, 267; 315 NW2d 915 (1982) In that case as in this case, the minor children resided principally with their mother. In the DeGrow case, when the mother moved more that 100 miles away the Court of Appeals held that "custodial environment was not disturbed by the move from Michigan to Ohio.

In his brief, the plaintiff father complained about travel time being longer and being at peak rush hours for parenting time and school involvement. From the father's perspective this is difficult. However, the minor children will see no difference in the custodial environment. The Howell public schools will accommodate the father in parent teacher meetings. (T9-13-07 P.51; Appee App P 73b) Additional time issues are resolvable by implementing some common sense. Parenting time will be from Friday afternoon, when the defendant mother drives the minors, to the Sunday evenings when the Plaintiff returns the minors; there is no "rush hour" traffic. The examples of excessive, possibly dangerous, travel time between Howell and Grosse Pointe referred to by the plaintiff father in his brief page 30-31, are dangers of the minor children traveling every morning to school in Grosse Pointe from Howell during the winter months and the opinion of the plaintiff father based on driving in rush hour or his exaggeration. The defendant mother, who made the trip almost 5 days a week for a little more than two months, quoted the travel time to be about one hour. (T9-5-07 P.48; Appee App P31.5b)

In most circumstances, such as this one, school is not a custodial environment. Each child hopes to leave the classroom he or she is in and move to the next class room. In almost all schools, the children have a different teacher each year. Accordingly, the "environment" would change each year and be expected to change. Each child hopes to leave the school he or she is currently in and move to the next higher school of learning. The school does not offer the same environment as the presence of a father or mother whether it be at home or church or in a park. The minor child does not look to the school for permanency which is part of the custodial environment, MCL 722.27 (c). Taken from the child's perspective, the school is less of a custodial environment than home, church and the community where the minors are in the company of the plaintiff father or under the control of the plaintiff father.

The school environment becomes a custodial environment only as the minors relate to their parents through the school environment. In this matter, the father not attended classes with the minors. There was no testimony that the father talked with the teachers and the children together or with the children present. The only change caused by the minors enrolling in the Howell public school district is the school the children will attend and the distance between the father's house and the school. If, however, the minors remain in the Grosse Pointe public schools, the change in the custodial environment would be significant in that the minors would not be attending a school in their home school district and the travel distance for them would be 120 miles a school day.

The change in school districts in no way interferes with the minor children's relationship with the father in his home his church and the community where he lives. Plus accommodations will be made for the father in the Howell public schools. (T9-13-07 P.51-54; Appee App P73b-77b) There was testimony that the minors attended church with the father. Plaintiff brief page

40. The minors would continue to attend church with the plaintiff father exactly as often or more often then before the change in school districts. The minors would be able to participate in all of the activities that they shared with their father before the move, but they might have to stay a few more overnight at their father's house to avail themselves of these opportunities.

In the trial Judge's ruling from the bench on November 12, 2007, the trial judge found that there was an established custodial environment based on the father being 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 parent time schedule". (T 11-12-07 p 9 Appnt App p962a)

However, the trial Judge failed to mention that the father was able to do this only one out of seven weeks and did not consider that he could continue to visit the children's schools in person with the accommodation at the Howell public schools.. (T 11-12-07 Appnt App p954a-981a) (T10-1-07 P. 58-62; Appee App P128b-131b) September 17, 2007 (T9-13-07 P. 51-54; Appee App P 73b-77b.

The Court of Appeals in Scott v Scott, 124 Mich App 448, 450; 335 NW2d 68 (1983), held that if the parenting time is the same, joint physical custody is not effected by the move. In this case, the school relationship between the minors and the plaintiff father will be unchanged.

This Court has recognized that a change in domicile will almost always alter the parties' parenting time schedule to some extent, and has, thus, held that the parenting time schedule need not be equal to the prior parenting time schedule in all respects. Mogle v Scriver, 241 Mich App 192, 204; 614 NW2d 696 (2000). Longhi v Longhi 119 Mich App 41, 325 NW2d 617 (1982)

While the father did on occasion pick the minors up from tutoring for a week night dinner, (T10-1-07 P.68; Appee AppP134b) he could spend as much or more time with them by having them overnight at his home more nights per week during the summer and during the

school breaks and have longer weekends with them. This fact is not based on the facts as outlined in the testimony of the other parties. This fact is a rational deduction from known data as to how many days there are in a year, and how many over nights the father testified that he utilized during the years before the plaintiff mother purchased the home in Osceola/Howell. The father in his own words had the children at his house usually on Saturday afternoon until Sunday evening every three out of 4 weekends. And he interacted with the minors during the day one week out of seven when working on afternoons. (T10-1-07 P. 58-60; Appee App P128b-129b)

The Court of Appeals in Pierron supra found that the change in parenting time would not constitute a change in custody. Pierron v Pierron 282 Mich App 222, page 249,765 NW2d 345

The Court of Appeals considered the issue of change-of-school and found that:

The circuit court erred, however, when it found that the proposed change of school districts would alter the children's established custodial environment. We first note that the proposed change of school districts would not have changed the actual custody arrangements in this case. Defendant has at all times had primary physical custody of the children since the parties' divorce, and plaintiff has seen and interacted with the children only during his parenting time. Enrollment of the children in the Howell Public Schools would not alter this arrangement in any way—defendant would still maintain primary physical custody, and plaintiff would still be free to exercise liberal and reasonable parenting time just as he had done before the change of school districts. Pierron v Pierron 282 Mich App 222, p248-249,765 NW2d 345(Pierron Opinion; Appee App P 161b-162b)

Minor modifications do not alter custodial environments because, as stated in Baker supra, the custodial environment is based on the relationship between the custodian and the minor. In the Pierron matter, the relationship between the father and the minors does not change just because the father has the minors at his house more over nights than he did before the change in school districts. The Court of Appeals in Pierron went on to say:

Since the divorce, defendant has always been the primary physical custodian of the minor children. In contrast, plaintiff has seen the children and exercised parenting time only when his personal and work schedules have accommodated it. Enrolling the children in the Howell Public Schools quite simply would not alter this arrangement. Plaintiff would still be free to exercise parenting time with the children after school and on weekends and holidays. Such a schedule

would not be materially different then plaintiff's current parenting time schedule. We cannot conclude that enrollment of the children in the Howell Public Schools would so alter plaintiff's parenting time schedule as to change the established custodial environment Pierron v Pierron 282 Mich App 222, 250-251, 765 NW2d 345 (Pierron Opinion; Appee App P 162b)

There was testimony from Lynn Parish, the assistant superintendent for the Howell public schools, that the father is able to email on a daily basis to keep in touch with the teachers of the minor children, Howell schools have a comparable daily parent teacher communication through email and web sites, the Howell public school was implementing Web-grader in its school system to give the parents daily access to the student's work progress, and that the father could meet with the teachers on appointment. (T9-13-07 P 25-79.; Appee App 40b-102b)

The father testified that during the hearings in September and October he had already attended a Howell Town Hall Meeting on a school issue. (T10-1-07 P.194; Appee App P147b)

The Court of Appeals in Brown v Loveman 260 Mich App 576, 595, 680 NW2d 432 citing Mogle v Schriver 241 Mich App 192, 204; 614 NW2d 696 (2000), held that altering a parent's parenting time schedule did not equate to a change in custodial environment.

"This Court has recognized that a change in domicile will almost always alter the parties' parenting time schedule to some extent, and has, thus, held that the parenting time schedule need not be equal to the prior parenting time schedule in all respects." Mogle v Scriver, 241 Mich App 192, 204; 614 NW2d 696 (2000),

The change involving the Grosse Pointe school district was created by the move of the mother and children to Osceola/Howell. The former relationship that the minors had with the Grosse Pointe Schools was severed by the move to Osceola Howell, not by the enrollment of the minors in their home school district, Howell public schools.

> The Legislature, in enacting the Child Custody Act, sought to spare children from the detrimental effects of constantly being shuffled between parents involved in ongoing custody battles. Becker v Becker, 95 Mich App 370; 290 NW2d 149 (1980).

In this matter, it is undisputed that the minor children have their primary residence with their mother, the appellee. (T10-1-07 P.73; Appee App P 136b)

Because the minors would have to travel 120 miles each day or have to find alternative housing during the school week,. keeping the minors in the Grosse Pointe pubic schools would constitute a more significant change in custodial environment than changing the school district to their home school district, the Howell Public School district.

II. THE STANDARD OF PROOF IN THIS CHANGE-OF-SCHOOL ISSUE IS PERPONDERENCE OF EVIDENCE BECAUSE THERE IS NO CHANGE IN CUSTODIAL ENVIRONMENT IF THE MINOR CHILDREN ARE ENROLLED IN THE HOWELL SCHOOLS

STANDARD OF REVIEW:

Custody reviews are not de novo but, as prescribed in MCL 722.28, findings of fact are reviewed under the great weight of the evidence standard, discretionary rulings are reviewed under abuse of discretion standard and conclusions of law are reviewed for clear legal error. Fletcher v. Fletcher, 447 Mich. 871, 526 NW2d 889 (1994)

ARGUMENT:

Because the defendant mother and plaintiff father could not agree on which school district the minor children should attend after the minors moved their primary residence to Osceola/Howell, it is the court's duty to determine the issue in the best interests of the child. Lombardo v Lombardo 202 Mich App151, at 159; 597 MW 2d 788 (1993).

The Legislature in MCL 722.27 (1)(c) gives clear instructions as to the burden of proof for the change in a child's life involving an important issue if the change would be a change in the minor's custodial environment.

MCL 722.27 Child custody disputes; powers of court; support order; enforcement of judgment or order.
Sec. 7.

(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the

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

The Court of Appeals in Pierron v Pierron correctly outlined the burden of proof when it wrote:

In general a Lombardo hearing will involve one parent seeking to change the child's position with respect to an important issue, and the other parent seeking to maintain the child's status quo with respect to that issue. For example, in the present case, defendant sought to change the minor children's school district by enrolling them in the Howell Public Schools, but plaintiff sought to maintain the status quo with regard to the issue of education by keeping the children enrolled in the Grosse Pointe Public Schools. When this occurs and the purposed change would not alter the child's established custodial environment, the proponent of the change has the burden of proving by a preponderance of the evidence that the change would be in the child's best interest. However when the proposed change would alter the child's established custodial environment the proponent of that change must prove by clear and convincing evidence that the change would be in the child's best interest. See MCL 722.27 (1)(c). Pierron v Pierron 282 Mich App 222, 247-248, 765 NW2d 345 (Pierron Opinion; Appee App P161b)

The mother has always acknowledged that there is a custodial environment between the father and the minor children. Exactly what kind of custodial environment was not so clear to the defendant mother. The Court of Appeals opinion held that the plaintiff father has a custodial environment with the minor children and there is a custodial environment at the father's house. .

As in this matter, if the proposed change would not change the child's established custodial environment, the proponent of the change has the burden of proving by a preponderance of the evidence that the change would be in the child's best interest. Baker v Baker 411 Mich 567, 579; 309 NW2d 532 (1981).

In this matter, the minor children have always had their primary residence with the defendant mother. (T10-1-07 P73; Appee App P 135b)

The parenting time that the father lists during the hearing was a pattern of Saturday overnights three weeks a month, dinner occasionally during the week, yearly vacations out of the state of Michigan once or twice a year, daily activities when he worked evenings one out of seven weeks. Oct1, 58-62,73. (T10-1-07 P. 58-62,73; Appee AppP 128b-132b,135b). He testified to talking with the teachers, attending parent teacher meetings and being in touch through electronic means with the schools. September 17, p25-26. September 17, 2007 (T9-17-07 P.; Appnt App P166a-167a) The father acknowledged that the defendant mother had the primary custody of the minor children (T10-1-07 P73; Appee App P 135b).

The circuit court held that the purposed school change would alter the established custodial environment of these children and that the plaintiff mother had the burden of establishing by clear and convincing evidence that the change is in the best interests of the children. (T 11-12-07 p 10 Appnt App 963a)

The Court of Appeals has repeatedly found that a move of less than 100 miles does not trigger a change in custody. Dehring v Dehring 220 Mich App 163, 165-166,559 NW 2d 59. Therefore, the Defendant still has the primary residence of the minor children and the children live with her in Oceola. The plaintiff father still has the parenting time schedule he had prior to the minors enrolling in the Howell Public Schools. This schedule as developed by actual time spent with the minors.

The actual travel times for the established parenting time would occur on non rush hours by the defendant mother driving to Grosse Pointe right after school and the plaintiff father driving the minors home to Osceola/Howell on Sunday evening.

The Court of Appeals has found on several occasions that not all modifications to one party's parenting time amount to a change of the established custodial environment that exists

with that party. See Brown v Loveman, 260 Mich App 576, 595; 680 NW 2d 432(2004), Stevens v Stevens, 86 Mich App 258, 270; 273 NW2d 490 (1978).

The minors attending the Howell public schools does not significantly change the established parenting time schedule of the plaintiff father nor does it change the custodial environment. Possibly there will be small modifications, but not changes. The weekend parenting time would be completely unchanged except to be increased by the father having the minors at this home two over nights three times per month if he wanted the increase in overnights. Having dinner during the week days would occur on Friday rather than on Wednesday or Thursday. The day time activity one out of seven weeks could be unchanged if the father agrees to keep the minors at his home overnight for the one out of seven weeks he works evenings during the summer. (T10-1-07 P. 56-63; Appee App P126b-133b)

Distance is not itself determinative of the issue of change in custodial environment. DeGrow v DeGrow 112 Mich App 260, 267; 315 NW 2d 915 (1982) held that the children's custodial environment was not disturbed by the move from Michigan to Ohio where the mother had primary custody.

Because there is minuscule or no change in the parenting time and no change in custodial environment, the defendant mother's burden of proof is preponderance of evidence.

III. DURING THE LOMBARDO HEARING, THE DEFENDANT MOTHER DEMONSTRATED THAT THE SCHOOL CHANGE WAS IN THE CHILDREN'S BEST INTERESTS BOTH TO THE STANDARD OF PERPONDERANCE OF EVIDENCE AND TO THE STANDARD OF CLEAR AND CONVINCING EVIDENCE

STANDARD OF PROOF: Custody reviews are not de novo but, as prescribed in MCL 722.28, findings of fact are reviewed under the great weight of the evidence standard, discretionary rulings are reviewed under abuse of discretion standard and conclusions of law are reviewed for clear legal error. Fletcher v. Fletcher, 447 Mich. 871, 526 NW2d 889 (1994)

ARGUMENT:

The only issue before the circuit court is the choice-of-school issue. Each of the 12 factors in MCL 722.23 are to be considered as they apply to the choice-of-school issue and should be focused on that issue, Lombardo v Lombardo, 202 Mich App 151,; 507 NW2nd 788 (1993). Not in issue is the move of the minor's primary residence to Osceola/Howell 60 miles from their former primary residence, former school district and plaintiff father's home.

Unlike the practice required for general change-of-custody hearings, during Lombardo hearings the court must narrowly focus its consideration of each best-interest factor on the specific "important decision affecting the welfare of the child" that is at issue. Pierron v Pierron 282 Mich App 222, 253-254, 765 NW2d 345. (Pierron Opinion Page 253-254; Appee App P163b)

The plaintiff appellant presented to this Court, especially in his reply brief, that the Court of Appeals had ruled in Pierron supra, that the custodian with the primary residence could make unilateral decisions on important issues affecting the minor children. This is obviously untrue and misleading to the Supreme Court. Pierron v Pierron 282 Mich App 222, 765 NW2d 345. (Pierron Opinion; Appee App P151b-169b)

The plaintiff father brought the issue of choice-of-school to the circuit court for a finding on the best interest of the minor children. It is uncontested that at that time, the minor children

had their primary residence in Osceola/Howell. (T10-1-07 P.73-74; Appee App P135b-136b. The defendant mother realizes that she was wrong about the plaintiff father's desire to resolve this matter through a parenting time agreement and now understands that all issues involving legal custody must be in writing. .(T9-5-07 P.89-92; Appee App P35b-38bb)

The Court of Appeals focused on the change-of-school issue. What the trial court did in its ruling was to incorporate the trial judge's disapproval of the defendant mother's unilateral move to Osceola Howell as a basis for the trial court's finding of facts. The trial judges finding of facts violated Dehring v Dehring 220 Mich App 163, 165-166,559 NW 2d 59, which held that the primary custodial parent may move less than 100 miles with out court or the other custodial parent's approval. It is understood that the issue of choice-of schools would still need to be determined by the circuit court. The Court of Appeals pointed out that the move was not part of the issue of change-of-schools issue.

As noted previously, defendant, as the proponent of the proposed change of school districts was required to prove by a preponderance of the evidence that removing the children from the Grosse Pointe Public Schools and enrolling them in the Howell Public Schools would be in their best interest. We note that "the statutory best interests factors need not be given equal weight." McCain v McCain, 229 Mich App 123, 131; 580 NW2d 485 (1998) (emphasis in original). Neither the circuit court nor this Court is required to "mathematically assess equal weight to each of the statutory factors." Id. Nor does a finding regarding one factor necessarily countervail the findings regarding the other factors. Winn v Winn, 234 Mich App 255, 263; 593 MW2d 662 (1999). In light of our analysis above, we conclude that defendant likely satisfies her burden of proof on the change-of-school issue in this case. Heid v Aaasulewske (After Remand), 209 Mich App 587, 593; 532 NW2d 205 (1995) (observing that "a finding of equality or near equality on the factors set out in MCL 722.23; MSA 25.312(3) will not necessarily prevent a party from satisfying the burden of proof"). Moreover, we cannot omit mention that it is certainly in the children's best interests to attend school in the community where they live with their primary physical custodian. When all else is equal, "[t]he overwhelmingly predominant factor is, as always, the welfare of the child," Winn, 234 Mich app at 263, and , in the end, we are "duty-bound to examine all the criteria in the ultimate light of the child's best interests," Heid, 209 Mich App at 596. Lastly, as both parties acknowledged during the Lombardo hearing, the children clearly preferred the Howell Public Schools to the Grosse Pointe Public Schools. While it is true that "[t]he child's preference does not automatically outweigh the other factors," Treutle, 197 Mich app at 694, in close cases, the children's reasonable preference may be the ultimate determining factor, see Lustig v Lustig, 99 Mich App 71, 731; 299 NW2d 375 (1980).

Pierron v Pierron 282 Mich App 222, 260-261, 765 NW2d 345. (Pierron Opinion P260-261; Appee App P 166b)

FACTOR A. Love and affection and other emotional ties between the parties and the child.

The children are more closely bonded with their mother. This is a simple fact that was ignored by the trial Judge. Both parents agreed that the minor children primarily resided at the mother's house. (T10-1-07 P73-74; Appee App P 135b-136b) They agree that the minor children now reside in Osceola/Howell. (T10-1-07 P74; Appee App P 136b) The parties agree that the minors want to attend the Howell public schools. (T 11-12-07 p 21 Appnt App p974a)

While the mother testified that she did not know that the school issue was a school issue, And the father testified that he did not mail any objection to the change of schools, (T9-5-07 P.90-92; Appee App P36b-38b) (T9-17-07 P.129-140; Appee App P107b-118b).

The trial judge incorporated in her opinion the belief that the Defendant mother was wrong to move before resolving the school issue.

> Ultimately it is Ms. Pierron who must bear the responsibility for the current struggles facing her children. She should have ensured the school issue was resolved before moving to another community. (T 11-12-07 p 11Apnt App p964a)

The fact that the minors are expressing a desire to attend the Howell public schools supports the love, affection and bonding with the mother and the less affection and bonding with the plaintiff father. The plaintiff father acknowledges that he has problems in relating to the 13 year old boy. (T10-1-07 P.75; Appee App P137)

In his brief on this factor, the plaintiff father blames the defendant mother for his estrangement with the children by stating:

"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. Appellant's brief on appeal p 39.

However, no credible evidence was presented to the court to support the theory that the mother in any way encouraged the minors to reject the Grosse Point Schools or to reject their father's position on the school issue. It is the plaintiff father who stated on the record that his relationship with his son was previously strained. He stated he did not discuss much with the minors (T10-1-07 P136 Appee App P145b) . He did state that his relationship was "fantastic" prior to the choice-of-school issue, however no examples as to how it was "fantastic" were given during the hearings (T10-1-07 P.49; Appee App P 124b)

The circuit court found that:

"Andrew has exhibited resistance to the Grosse Pointe School system, argues with his father, swore at him, and even ran away from school. His resentment toward his father suggests that the emotional ties between him and his father are strained." (T 11-12-07 p 10-11 Apnt App p963a-964a)

The uncontroverted evidence clearly proves that the children wanted to attend the Howell Public Schools and had already grown emotionally attached to the idea of living with their mother in Howell. Factor A favors enrolling the minor children in the Howell public schools.

Factor B: Capacity and disposition of the parties involved to give the children love, affection, and guidance and to continue to educate and raise the children in his or her religion or creed, if any.

The trial judge stated on the record that because the father took the minors to church, his position that they should not go to school in the Howell public schools was favored in factor B. The Court of Appeals clearly stated that the issue of church was not part of the school issue. Pierron v Pierron 282 Mich App 222, 254, 765 NW2d 345. (Pierron Opinion P254; Appee App P163b-164b) Of course, the father having week-end parenting time, would still be able to take the minors to church. It is unclear why the trial judge missed this point.

The plaintiff father deferred to the defendant mother as the primary custodian choosing to only have the minor children over night at his house only on Saturday night three weeks out of the month. (T10-1-07 P. 58-60; Appee App P128b-131b) Trial court's register of actions shows that at no time, prior to the defendant mother's move, did the plaintiff father filed a motion for increase in parenting time. The circuit court docket entries (Apnt app: page1025a). Because the defendant mother had the minor children in her care the vast majority of the time, she has demonstrated a greater capacity to give the minor children love affection and guidance. This factor favors the minor children attending the school district where they have their primary residence, the Howell public schools.

FACTOR C The capacity and disposition of the parties to provide the child with food, clothing, medical care.

In this factor, the trial judge exhibited a discounting of the defendant mother when the trial judge found that:

"Ms Pierron is unemployed. She does some upholstery work and teaches figure skating earning approximately $8,000 to $11,000 per year. Her primary source of income, however, is the over $28,000 per year in child support she received from her ex-husband. (T 11-12-07 p 13 ; Appnt App p966a)

The fact that Ms Pierron has two part time businesses, and takes full time care of the minor children, was totally discounted by the trial judge in favor of the Plaintiff father's obvious large income in excess of $200,000 a year. The trial judge called the defendant mother unemployed even though she was earning up to $11,000 a year. (T 11-12-07 p 12 ; Appnt App p965a)

There was no testimony that the defendant mother failed to meet any of the food or clothing needs of the minor children. And no testimony that the future child support and future working or business of the defendant mother would be inadequate for the needs of the minor

children. Testimony was that the father did not often take the minors to the doctor, the mother took the minors to the doctor most of the time and also took them to the dentist. (T10-1-07 P. 58-60; Appee App P128b-129b)

The plaintiff father is a doctor who works from 9 to 5 and some weekends. (Tran 10-1-07 P 56; Apee App P126b) The defendant mother works from her home. If the minor children need medical care while at school, the defendant mother would be the most available person to take the minors to medical care if an emergency arises. The plaintiff father would likely be unavailable to assist the minor children due to his working. (Tran 10-1-07 P 88; Apee App P138b) Because the defendant mother lives in Osceola/Howell, the children would be much better served if they attend the local school district in Howell. Enough evidence is on the record that this factor goes to the defendant mother.

FACTOR D the length of time the children have lived in a stable satisfactory environment and the desirability of maintaining continuity.

In this factor, the trial judge states on the record that, as to the Grosse Ponte schools, "The schools are located close to the parties' home." (T 11-12-07 p 15 Appnt App p968a) This quote is a clear demonstration of the trial judge's inclusion of the issue of the defendant mother and the minor children's move to Osceola/Howell in her decision making process. The schools are not located close to the parties' home, the Grosse Pointe Schools, which the trial judge was referring to, are located close to the plaintiff father's home and 60 miles from the defendant mother and the minor children's primary residence.

Both the trial judge and the Court of Appeals erroneously felt that this factor favored the Plaintiff's request to keep the children enrolled in the Grosse Pointe public schools. The trial judge and the Court of Appeals both looked at the experience in the Grosse Pointe Pubic Schools

the minors have had. However minors and their mother now have their primary residence in Oceola/Howell. While the father remains in Grosse Pointe, the mother that drove the minors to school each day, picked them up after school, drove them to and from the tutors, the mother that helped them get dressed and helped them with their school work, (T10-1-07 P. 73; Appee App P135b) now lives in Osceola/Howell. Their solid foundation is no longer in the Grosse Pointe school district. The Grosse Pointe schools are not the same schools by virtue of the fact that their mother and they do not live in the Grosse Pointe school district.

"Ms. Pierron has the burden of showing that the Grosse Pointe Schools do not provide a stable and satisfactory environment for her children." (T 11-12-07 p 14; Appnt App p967a)

There is no law that supports the trial Judges conclusion of law. What the defendant mother has to show is that it the Howell public schools are in the best interest of the minors. See Lombardo v Lombardo, 202 Mich App 151, 507 NW2nd 788 (1993).

The defendant mother did not testify as to her attending parent teacher conferences and when her attorney tried to cross examine the plaintiff father on the fact that they may have attended at different times; because of objections, the issue was not able to be placed on the record. (T10-1-07 P125-126. Appee App 142b-143b)

The trial judge held that "the testimony of the Assistant superintendent, Lynn Parrish, regarding the Howell public school system was quite impressive", and that "Howell, does well, in it's scoring." She then pointed out that Howell does not score as high as Grosse Pointe in graduation rates, MEAP Scores, or student teacher ratio. (T 11-12-07 p 15-16 Appnt App p968a-969a) (T9-13-07 P.25-79; Appee App P 47b-102b)

Based on all of the testimony and all of the evidence in the Lombardo hearings the trial Judge found: "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 p 16-17 Appnt App p987a-999a)

Because Howell is a fine school district and because the minors want to attend Howell schools, and because the minors have their primary residence in Howell 60 miles from Grosse Pointe schools, this is factor was proven by the defendant mother to favor the change of school to the Howell public schools.

Factor E. The permanence as a family unit of the existing or proposed home or homes.

The Court of Appeals found that the parties were equal because the change in school would have no effect on the mother/minors/older sibling/cousins/aunts/uncles maternal grandmother and the change in school would have no effect on the father/minors/paternal grandparents. The trial judge found that the move would have a negative impact on the paternal grandparent's relationship with the minor children. However this factor does favor the mother's choice of enrolling the minors in the Howell public schools.

On this factor, the Court of Appeals held

" Next, we concluded that the circuit court committed legal error on a major issue by failing to narrowly focus its consideration of factor e. MCL 722.23(e), to the specific change-of-school decision pending before it. MCL 722.28. The circuit court found that factor e favored plaintiff's request to keep the children enrolled in the Grosse Pointe Public Schools because the proposed change of school districts would hamper the children's relationship with their paternal grandparents. While defendant's move to Howell may have already hampered the relationship between the children and their paternal grandparents, the proposed change of school districts, itself, would not further affect this relationship. Nor would the proposed change of school districts, itself, further the children's relationship with defendant's sister or mother. The parties were equally situated with respect to factor e. Pierron v Pierron 282 Mich App 222,255,256 , 765 NW2d 345 (Pierron Opinion P 255-256; Appee App P164b)

The trial judge stated:

Ms. Pierron maintains that one of the reasons she moved to Howell was to be closer to her sister and her mother. In fact, Ms Pierron's sister lives about 25 miles away and her mother lives in West Bloomfield. The move to Howell did not improve the family unit of the children. (T 11-12-07 p 17 Apnt App p970a)

Here the trial Judge again is focusing on the move of the minor's primary residence and has failed to recognize that the Defendant-appellant has always been the primary physical custodian of the minor children. The testimony was clear that the Plaintiff-father had parenting time only on weekends usually Saturday night. He never utilized overnights during the school weeks and never had the minors for a full week of over nights, even in the summer. (T10-1-07 P. 58-62; Appee App P128b-131b) (T9-5-07 P.96-97; Appee App P40b-41bb)

In this factor, trial Judge has placed the value of the Plaintiff father's extended family, including his parents; over the family primary family unit that the minor children have lived in for the last 8 years: Andrew, Madeline, their mother (Defendant-appellant), and their older brother Ian. The Plaintiff father testified that the defendant mother has always been the primary care giver of the minor children. (T10-1-07 P73; Appee App P 135b)

This factor has been proven to favor the defendant mother in that she has always been the primary care giver for the minor children. (T10-1-07 P73; Appee App P 135b)

FACTOR F Moral fitness: The trial Judge and the Court of Appeals found that each party was equal on this factor. However, the trial Judge uses this factor to shows a bias against the Defendant mother and her attorney. This bias was likely created because he defendant mother moved with out the permission of the plaintiff father or the court.

"There was even testimony that the older child of Ms. Pierron, Ian, had met with her attorney to discuss this case." (T 11-12-07 p23; Apnt Appp967a)

In context, it is used as a reason to believe that the Defendant-appellant is in a systematic process of alienating the minor children from their father. Most significantly the trial judge added the words that the attorney for Ms Pierron **had met with** Ian **to discuss this case**. The plaintiff father before, making this statement on the record, knew that attorney Safford denied ever talking to the older brother Ian. He even acknowledged this fact in his statement.

Yet the trial judge relied on this unreliable statement for her conclusion adding such significant words as "**met with**" and "**to discuss this case**"

In the actual statement during the testimony, the Plaintiff-appellant did not say, "**to discuss this case**" or "**met with**" The actual statement was "talking to" , and "talks to. "

THE WITNESS: When I asked him what happened and why he did it, as I said in my deposition, I said, what happened, Andrew? Why'd you do that? He didn't just hang up on me. He called me an asshole and hung up the phone because he's never sworn at me before. I asked him why did you do that, Andrew? And he said, well, Ian came in and said he was talking to Ms. Safford on the phone and he was so mad that he punched the wall and I didn't want to talk to you any more.

And I asked him again, in fact last night – yesterday, I said, you know, during the deposition Ms. Safford says that she has never talked to Ian about this. And he became very quiet and said, yeah, he did. He talks to her all the time. (T10-1-07 P48-50; Appee App P123b-125b)

This statement was blurted out by the plaintiff father during testimony. There is no reason to believe that this was done for any reason other than to mislead the trial judge, which it did. This is immoral. That is immoral. This factor favors the defendant mother's request to change the minor children to the Howell public schools.

FACTOR G The mental and physical health of the parties involved: The trial judge and the Court of Appeals found this factor to be equal. However, the trial court and the Court of Appeals did not consider the fact that the plaintiff father's multiple sclerosis was progressing to the point that the plaintiff father needed a wheel chair when he took the minors to Disneyland 6 months prior to the Lombardo hearing. (T10-1-07 P135-136; Appee App P 144b-145b)

If today this does not affect the minors attending the Grosse Pointe Public Schools, it still projects a future disability that will prevent the plaintiff father from being fully able to assist the minors if they attend the Grosse Pointe public schools and need a parent to go to the schools for any reason. This would include a medical emergency or discipline problems. There is no reason to believe that the defendant mother would be unable to assist the minors if they attend

the Howell public schools but she would be 60 miles away from the Grosse Pointe public schools when needed.

The trial judge stated: "On the other hand, Ms. Pierron has no physical limitations that would limit the location where she could live. (T 11-12-07 p 18; Appnt App p971a)

This again shows that the trial judge was ignoring the reality that the minor children reside primarily in the Osceola/Howell area. The trial judge suggests here that the defendant mother could move back to the Grosse Pointe area. This factor favors the defendant mother's request to enroll the minors in the Howell Public schools because of her long term ability to be available for emergencies for the minor children.

FACTOR H: the home, school and community record of the children.

The circuit court disregarded the evidence that Andrew was teased or bullied while attending the Grosse Pointe public schools. Both parties and the tutor testified that he had mentioned the issue. (T9-15-07 P.52; Appee App P32b) (T 11-12-07 p15-16 Appnt Appp p 970a-971a) Also, Andrew had been held back in the first grade. In the Howell public school district, the 13 year old boy would have a chance to reintroduce himself as a young adult. The 13 year old boy was adamant that he wanted to make a change in his school environment. (T10-1-07 P.75; Appee App P137b)

The parties agree that Andrew is not a great student. (T9-5-07 P.52; Appee App P 32b) The more relaxed atmosphere in the Howell public schools offered him a break from the extreme competitiveness of the Grosse Pointe Public Schools. Sept 13, 2007, page 25-79. (T9-13-07 P.25-79; Appee App P 47b-102b)The circuit court wholly failed to consider defendant's testimony in this regard. The trial judge then refused to consider the preference of the minors who have to attend the Grosse Pointe schools. All of the above shows that the 13 year old boy

was very unhappy with the Grosse Pointe public schools and clearly wanted a change. The 8 year old girl expressed a desire to change schools also. This should be sufficient to understand that there is no reason to continue the school system that they reject.

The trial judge, found that the schools were about equal in quality, both offered numerous educational and recreational opportunities. (T 11-12-07 p 19;Appnt App p972a)

The qualities and opportunities were specifically identified by Lynn Parrish, assistant superintendent for the Howell public schools. . (T9-13-07 P.25-79; Appee App P 47b-102b) The trial judge found that:

The proximity of the school to Dr. Pierron's home permitted him to attend functions during the day on occasion including having lunch with his children, attending graduation ceremonies, ice cream socials, and other activities. Dr. Pierron would be unable to participate in daytime and afterschool functions in Howell because of the distance and his work schedule (T 11-12-07 p Apnt App p972a)

Significantly, the trial Judge ignored the reality that the defendant mother had moved the primary residence of herself and the minor children to Osceola/Howell. The fact that the plaintiff father testified that he worked from 8:00 am until 5:00 pm each week day for 6 out of 7 weeks. That left it impossible for him to partake of the minors' school activities for 6 out of 7 weeks in Grosse Pointe. (T10-1-07 P58-62; Appee App P128b-132b) Further more the defendant father could attend Howell public school functions on the one out of seven weeks by driving on non rush hours to Howell. (T9-13-07 P.51-52; Appee App P73b-74b)

The fact that the minor children and defendant mother, the primary care giver of these minor children, now live 60 miles from the Grosse Pointe school system was ignored by the trial judge in this factor. The trial judge found fault with the defendant mother who was unable to take the minors to tutoring because of the 120 mile drive she was doing each day to keep the minors in the Grosse Pointe Public schools. (T 11-12-07 p 19; Appnt App p 972a)

As to the communities, the trial Judge found:

The parties presented extensive evidence on the communities of Grosse Pointe and Howell. Both communities offer a wide variety of cultural, educational, and athletic opportunities to their citizens. The evidence did not establish, however, that the Howell community offered more to the Pierron children than the Grosse Pointe community such that the Court should change their school system.

Again, the focus is not on the communities, but on whether there are substantial reasons to change the school district the children currently attend." (T 11-12-07 p 20 Appnt Appp p 973)

Because the minors no longer have any emotional or special connection with the Grosse Pointe school system, this factor favors the minors change to the Howell public schools where they are now more emotionally attached. Madeline has always attended school in the same district as her brother and therefore this factor favors her also.

FACTOR I The reasonable preference of the child if the Court considers the child to be of sufficient age to express a preference.

This factor clearly favored the defendant-mother and had a direct impact on some of the other factors as well. Both parties agree that both of the minor children want to attend the Howell public schools. (T 11-12-07 p 21;Apnt App 974a)

This factor will be discussed in depth in the next argument.

FACTOR 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.

The Court of Appeals erroneously concluded that the minor children would become closer to their father if they remain in the Grosse Pointe Public Schools and agreed with the trial judge after stating that they disagree with her reasoning. However the fact that both minors want to attend the Howell public schools is well documented. (T 11-12-07 p 21;Appnt App 974a) Logically, the thwarting of that desire is simply more likely to create hostility and anger than it is to create a warm close feeling. This factor has been proven to favor the defendant mother and her request to transfer the minor children to the Howell Public schools.

The trial judges reasoning which the Court of Appeals found sprawling on this factor I includes the trial judges comment:

"There was even testimony that the older child of Ms. Pierron, Ian, had met with her attorney to discuss this case." (T 11-12-07 p 23 ; Appnt App p976a)

In context, it is used as a reason to believe that the Defendant-appellant is in a systematic process of alienating the minor children from their father. As outlined in a previous factor, most significantly the trial judge added the words that the attorney for Ms Pierron **had met with** Ian **to discuss this case**.

The plaintiff father before, making this statement on the record, knew that attorney Safford denied ever talking to the older brother Ian. He even acknowledged this fact in his statement. Yet the trial judge relied on this unreliable statement for her conclusion adding such significant words as "met with" and "to discuss this case"

In the actual statement during the testimony, the Plaintiff-appellant did not say, "**to discuss this case**" or "**met with**" The actual statement was "talking to" , and "talks to. "

> THE WITNESS: When I asked him what happened and why he did it, as I said in my deposition, I said, what happened, Andrew? Why'd you do that? He didn't just hang up on me. He called me an asshole and hung up the phone because he's never sworn at me before. I asked him why did you do that, Andrew? And he said, well, Ian came in and said he was **talking to** Ms. Safford on the phone and he was so mad that he punched the wall and I didn't want to talk to you any more.
>
> And I asked him again, in fact last night – yesterday, I said, you know, during the deposition Ms. Safford says that she has never talked to Ian about this. And he became very quiet and said, yeah, he did. He **talks to her** all the time. (T10-1-07 P48-50; Appee App P123b-125b)

The trial judge found that "Ms. Pierron contacted the newspaper which printed a story entitled, quote, "Divorce Judge to Pick Kids' School," unquote" (T 11-12-07 p 23; Appnt App 967a) The trial judge does not explain why she feels that this effort alienates the minors from their father.

The news article had been explained during the hearing. All statements made during the hearings on this issue, were that the Defendant-appellant did not contact the newspaper. Her attorney contacted the newspaper to follow up on a news article on the quality of the Howell

Public Schools. (T9-5-07 P.113; Appee App P42b) The reporter for the Newspaper assisted the attorney for the Defendant by suggesting that she contact the assistant Superintendent of the Howell Schools, Lynn Parish. Lynn Parish became the Defendant's expert on the Howell Public Schools. See (T9-13-07 P.25-79; Appee App P 47b-102b) The trial Judge mentioned that Lynn Parish did a good job describing the qualities of the Howell Public Schools. (T 11-12-07 p 16;Appnt App 969a) Here the trial Judge is blaming the Defendant-appellant for needing assistance and for being willing to let the public know of the legal quagmire of legal custody and moving less than 100 miles and the choice-of-school issue has become. (Newspaper Article dated August 27, 2007; choice of school issue; Apee App P 20b-22b).

The defendant mother had the primary residence for the minor children 6 nights a week and the plaintiff father got to take the minors great places on his one in seven weeks of day time parenting time and on his Saturday-Sunday parenting time three times a month. (T10-1-07 P. 58-60; Appee App P128b-131b)

This factor favors the change to the Howell public school because the plaintiff father logically will most likely develop a stronger relationship with the minors when they are in the environment that they reasonably want to be in with their primary care giver, the defendant mother. And the fact that the plaintiff father will have in his care and responsibility the minors for more time when the minors attend the Howell Public schools.

FACTORS K AND L : there is no allegation of domestic violence and no other issues

IV. THE MINOR CHILDREN'S PREFFERENCE WAS REASONABLE WITHIN THE MEANING OF "REASONABLE PREFFERENCE" AS USED IN MCLA 722.23.(I), AND SHOULD HAVE BEEN GIVEN SIGNIFICANT CONSIDERATION IN THE MATTER OF SCHOOL CHOICE.

STANDARD OF REVIEW:

Custody reviews are not de novo but, as prescribed in MCL 722.28, findings of fact are reviewed under the great weight of the evidence standard, discretionary rulings are reviewed under abuse of discretion standard, and conclusions of law are reviewed for clear legal error. If an error or abuse of discretion is found, the case is remanded back to the trial court. Fletcher v. Fletcher, 447 Mich.871, 526 NW2d 889 (1994)

ARGUMENT:

The trial judge refused to consider the expressed preference of the minor children. The father acknowledged that the minors live in Osceola/Howell and that the defendant mother was the primary caregiver of the minor children. (T10-1-07 P. 73,74; Appee App P135b-136b) The trial judge expressed that the minors preference was to attend the Howell public schools.

"The Court has interviewed Andrew and Madeline Pierron and taken their views into consideration. Dr. Pierron and Ms. Pierron both concede that the children would prefer the Howell school system"
The Court notes, however, 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. (T 11-12-07 p 21; Appnt App 974a)

There has never been a requirement that the opinion of the minor be a factual comparison between the choices that the circuit court must make when the parties can not agree. The minors live in Howell with their mother who has been their primary custodian for the last 7 years. They want to go to school where they live. (T10-1-07 P. 73,74; Appee App P135b-136b) That is reasonable.

The plaintiff father again misstates the opinion of the Court of Appeals when he states. "The Court of Appeals disagreed (with the trial court's ruling) because it erroneously equated "sufficient age" with "reasonable preference." Appellant's brief page 46. The plaintiff father totally ignored the Court of Appeals opinion:

The defendant mother agrees with the legal analysis of the Curt of Appeals on the issue of reasonable preference of the minor children. The Court of Appeals held in Pierron v Pierron 282 Mich App 222, 765 NW2d 345

Under factor I, the circuit court "must consider... the 'reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.'" Treutle v Treutle, 197 Mich App 690, 694; 495 NW2d 836 (1992), quoting MCL 722.23(i).At the time of the Lombardo hearing, Andrew was 13 years old and Madeline was 8 years old. The children were consequently "of sufficient age to express preference" within the meaning of MCL 722.23(i). Bowers v Bowers, 190 Mich App 51, 56: 475 NW2d 394 (1991) (holding that six-year-old is old enough to have his preference given some weight under factor i). Thus, assuming that the children's preferences were "reasonable," the circuit court was required to take them into consideration in ruling on the choice-of-school issue.

The circuit court found, and plaintiff argues on appeal, that because the children had never attended the Howell Public Schools, any preference that they might have had for the Howell Public Schools could not have been "reasonable," We disagree. MCL 722.23(i) merely requires that the child's preference by "reasonable." It is true that the word "reasonable" is susceptible to multiple meanings. See People v Gregg, 206 Mich App 208, 213; 520 NW2d 690 (1994). But we cannot conclude that by including the word "reasonable" in MCL 722.23(i), the Legislature intended to require that a child's preference be accompanied by detailed thought or critical analysis. Instead, we think it clear that by including the word "reasonable" in the language of MCL 722.23(i), the Legislature simply intended to exclude those preferences that are arbitrary or inherently indefensible.

In this case the children had defensible reasons for preferring the Howell Public Schools to the Grosse Pointe Public Schools. It made eminent sense for the children to prefer to attend school in the community where they lived with their primary custodial parent. In addition, the evidence showed that Andrew was unhappy and struggling in the Grosse Pointe Public Schools and that he would have a greater potential for success in a new educational environment where he could effectively "start over." And although Madeline was apparently not as unhappy in the Grosse Pointe Public Schools as was Andrew, her preference for the Howell Public Schools was not unreasonable merely because it was influenced by her feelings and her emotional attachment to defendant. See Carson v Carson, 156 Mich App 291, 300; 401 NW2d 632 (1986).

The minor children were of sufficient age to express their preferences with respect to the change-of school issue, Bowers, 190 Mich App at 56, and we conclude that their preferences were "reasonable" within the meaning of MCL 722.23(i). The circuit court clearly erred on the

major legal issue when it failed to consider the children's reference for enrollment in the Howell Public Schools. MCL 722.28. With respect to both Andrew and Madeline, factor i favored defendant's request to enroll the children in the Howell Public Schools. Pierron v Pierron 282 Mich App 222, 260, 765 NW2d 345 (Pierron Opinion P258-260 P; Appee App 165b)

This quote from the Court of Appeals opinion, in no way supports the irrational conclusion of the plaintiff father.

The Judge's ruling ignores the case law in which the Judge is required to follow all of the Best Interest Factors as outlined in MCL 722.23. Lombardo v Lombardo, 202 Mich. App. 151 at 161. The trial Judge has in this case ignored the law to apply the reasonable preference of the minor children by creating a unique exclusion to the minors' reasonable preference factor.

The trial judge totally failed to consider the fact that the minors live in Osceola/Howell with their mother. This was not a hearing about where the minors should live. This is a change-of-school issue that the trial judge needed to resolve.

It is reasonable for minors 13 and 8 years of age to choose to attend a school where they live with their primary care giver. It is reasonable to choose the school district that is their home school district. It is reasonable, if the minors desire to continue to live with their primary care giver, their mother, to express a preference to attend their local school district, the Howell Public school district. The trial judge failed to consider what the choice is saying. The defendant mother has been the primary care giver of the minor children all of their lives. They live with their mother in Osceola/Howell. (T10-1-07 P73, 74; Appee App P 135b-136b)

The minors, age 13 and 8, are willing to leave the school that they had attended all of their lives. They are not looking back to their old community as their community. They are looking to the future in the Osceola/Howell community. This is in no way a rejection of their father. This is however, a rejection of their former community and former school in favor of their future. That is reasonable,

Witnesses testified that 13 year old had been teased/bullied. (T9-05-07 P 52; appee App P 32b) (T 10-1-07 P 241 appee App P 148b) The mother testified that the 13 year old boy had been held back (flunked?) first grade. The mother testified that the 13 year old felt bad about his pears knowing that he flunked his first grade. His desire to change school districts was very reasonable.

While not binding on the Supreme Court of Michigan, other panels of the Court of Appeals have held that the trial court's failure to interview the children was itself error requiring reversal. Lewis v Lewis, 73 Mich App 563, ; 252 NW2d 237 (1977).

Where the trial court has failed to analyze the issue of child custody in accord with the mandates of MCLA 722.23; MSA 25.312(3) and to make reviewable findings of fact under GCR 1963, 517.1, the proper remedy is to remand for a new child custody hearing. Zawisa v Zawisa, 61 Mich App 1, 3; 232 NW2d 275, 277 (1975). Lewis v Lewis, 73 Mich App 563p 567; 252 NW2d 237 (1977).

The reasonable preference of the minor children is to attend the Howell public schools, and the factor J favors the mother's choice of having the minor children attending the Howell public schools.

The combination of the factors favors the mother's choice to enroll the minor children in the Howell Public Schools. The factors support the mother's position both to the preponderance of evidence and to the clear and convincing evidence standard. It is irrational to keep minor children in a school that is 60 miles from their primary residence and from the school that they want to attend.

SUMMARY AND RELIEF REQUESTED

SUMMARY: The Michigan law as drafted by the Legislature allowing a parent to move the resident home of a minor less than 100 miles without going to court or getting the permission of the other parent. MCL 722.31. The evidence as placed on the record during the Lombardo hearing clearly demonstrated that enrolling the minor children in the Howell public schools is in the best interest of the minor children. The testimony substantiated that the Howell public schools district is a good school district. The uncontested testimony of the parties was that the minor children have their primary residence with the defendant mother in Osceola/Howell. The testimony plus the reasonable preference of the minor children met the burden of proof as to the preponderance of evidence as is required in this case or the clear and convincing evidence standard. The minor children should be allowed to attend their home school district, the Howell public schools.

RELIEF REQUESTED:

The defendant mother is requesting:

1. That the minor children be enrolled in the Howell public schools as soon as is legally possible.

2. Remand to the circuit court if necessary, for a Lombardo hearing and order as to the choice of school issue consistent with the Court of Appeals ruling.

Respectfully submitted,

Beverly Safford
Attorney for Defendant-Appellee
25109 Jefferson
St. Clair Shores, MI

Dated: September 11, 2009