

**STATE OF MICHIGAN
IN THE SUPREME COURT**

TIMOTHY PIERRON,
Plaintiff-Appellant,

SUPREME COURT NUMBER: 138824
COURT OF APPEALS NUMBER: 282673
TRIAL COURT NUMBER: 99-920324-DM

v

KELLY PIERRON
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**Amicus Curiae Brief for the
Majority of the Family Law Section of the State Bar of Michigan**

Proof of Service

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

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QUESTIONS PRESENTED

I. Did the defendant's unilateral decision to enroll the children in a school district sixty miles from their former school district and from their father's home result in a change in the custodial environment?

Amicus discusses procedure in cases where change of schools may affect the established custodial environment.

II. What is the appropriate level of evidentiary proof - clear and convincing evidence or preponderance of the evidence?

The appropriate level of evidentiary proof depends upon the existence of an established custodial environment.

III. Did the Defendant demonstrate that the school change was in the children's best interest?

Amicus discusses the general application of the best interest factors.

IV. Are a minor's stated preferences unreasonable merely because he or she has not yet had the opportunity to attend a proposed school?

As a general rule, a minor's preference for a proposed school is not *per se* unreasonable.

STATEMENT OF INTEREST

The Family Law Council (“The Council”) is the governing body of the Family Law Section of the State Bar of Michigan. The Section is comprised of over 2,800 lawyers in Michigan practicing in the area of family law, and it is the section membership which elects 21 representative members to the Family Law Council.

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

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

In its July 17, 2009 Order, this Court requested amicus briefs in this case.

STATEMENT OF FACTS

The Section adopts the facts as set out by the Court of Appeals in its opinion.

I. DID THE DEFENDANT'S UNILATERAL DECISION TO ENROLL THE CHILDREN IN A SCHOOL DISTRICT SIXTY MILES FROM THEIR FORMER SCHOOL DISTRICT AND FROM THEIR FATHER'S HOME RESULT IN A CHANGE IN THE CUSTODIAL ENVIRONMENT?

The focus of this amicus brief is not on the instant facts, but on addressing an overall approach or "blue print" for change of school cases. These cases involve highly fact-based determinations, however, there are basic questions or steps that generally apply.

Where the parties have joint legal custody, one parent cannot make unilateral decisions regarding major issues affecting the welfare of the children, including educational development and schooling. MCL §722.26a(7)(b)¹; *Lombardo v Lombardo*, 202 Mich App

¹ MCL 722.26a Joint custody.

(1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

(a) The factors enumerated in section 3.

(b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

(2) If the parents agree on joint custody, the court shall award joint custody unless the court determines on the record, based upon clear and convincing evidence, that joint custody is not in the best interests of the child.

(3) If the court awards joint custody, the court may include in its award a statement regarding when the child shall reside with each parent, or may provide that physical custody be shared by the parents in a manner to assure the child continuing contact with both parents.

(4) During the time a child resides with a parent, that parent shall decide all routine matters concerning the child.

(5) If there is a dispute regarding residency, the court shall state the basis for a residency award on the record or in writing.

(6) Joint custody shall not eliminate the responsibility for child support. Each parent shall be responsible for child support based on the needs of the child and the actual resources of each

151, 507 NW2d 788 (1993). In *Lombardo*, the Court of Appeals found that the trial court erred in ruling that where parents with joint custody cannot agree on where the child goes to school, the parent who is the primary physical custodian of a child should decide. It is the responsibility of the trial court to determine major issues concerning child welfare when joint legal custodians are in dispute, including determining whether the change of school is in the best interest of the child based on the factors contained in MCL 722.23 of the Child Custody Act.²

Determination of the Established Custodial Environment: Effect of Proposed School Change

There will be times when a proposed change in schools affects the established custodial environment of a child, and hence affect the fundamental custody of a child. In order to identify these cases, a trial court must make an initial determination of the established custodial environment. The established custodial environment focuses on the relationship between parent and child, however, a strong relationship with a child doesn't necessarily constitute an established custodial environment. An established custodial environment exists with the person

parent. If a parent would otherwise be unable to maintain adequate housing for the child and the other parent has sufficient resources, the court may order modified support payments for a portion of housing expenses even during a period when the child is not residing in the home of the parent receiving support. An order of joint custody, in and of itself, shall not constitute grounds for modifying a support order.

(7) As used in this section, "joint custody" means an order of the court in which 1 or both of the following is specified:

- (a) That the child shall reside alternately for specific periods with each of the parents.
- (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

² *Lombardo* stated that a "court should not relinquish its authority to determine the best interests of the child to the primary physical custodian." *Lombardo* remanded the case to the trial court to determine the best interests of the minor child according to the relevant best interest factors contained in MCL 722.23. *Id.* at 160.

the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, considering the child's age and physical environment and the permanence of the relationship between the child and the custodian. *Baker v Baker*, 411 Mich 567, 576-577, 309 NW2d 532 (1981). The established custodial environment is with one parent, or possibly both, and not with a school-related environment.

A change in schools may affect the established custodial environment. For example, the change in school may so affect a parent's activities and interaction with a child (on which the established custodial environment is based), the parent cannot substantially continue with the interaction. An obvious situation would be a change to a boarding school (for discipline reasons) or placement in some type of residential school and treatment program. A child's parent may be a teacher at a school where the child attends and has significant interaction with the child. A change in schools may affect that parental interaction and custodial environment. Any proposed change in school may so alter parenting schedules and interaction with a child that the established custodial environment is affected. These determinations will depend on the specific facts of each case, but there will certainly be situations where a proposed school change affects the established custodial environment and custody.³

Change of schools is analogous to change of domicile cases. Moves under 100 miles, as well as moves over 100 miles,⁴ may or may not affect the established custodial environment. A

³ In some cases, it will be difficult to determine if it is the change of school or the actual distance of the change that affects the established custodial environment.

⁴ MCL 722.31 (the "100-mile" rule) requires approval of the court for any move over 100 miles in cases involving joint legal custodians. A move under 100 miles, however, is still subject to dispute over its affect on the established custodial environment.

trial court must determine whether its decision concerning a motion for change of domicile would result in a change of an established custodial environment. *Rittershaus v Rittershaus*, 273 Mich App 462, 470, 730 NW2d 262 (2007).

If the granting of a motion to change domicile (or schools for that matter) affects the established custodial environment, a trial court is then faced with a situation that is a potential custody modification. Any change of custody requires a hearing on the statutory best interest factors. See *McCain v McCain*, 229 Mich App 123, 580 NW2d 485 (1998)(requiring specific findings under the best interest factors); *Grew v Knox*, 265 Mich App 333, 694 NW2d 772 (2005) (court order after hearing on motion for change of legal residence necessitated a review of the custody situation based on the best interest factors under MCL 722.23); *Rittershaus, supra*; *Brown v Loveman*, 260 Mich App 576, 680 NW2d 432 (2004) (holding that once the trial court makes a decision regarding a change of domicile, which necessarily affects a custody arrangement, the trial court has to fully consider the best interest factors before permitting the change). The cases provide that when a court order effects a change in the established custodial environment and in custody, it must be premised on a determination of the best interest factors based on proper evidence. See *Mann v Mann*, 190 Mich App 526, 580 NW2d 485 (1991).

In this particular case, it is not clear if the proposed change to Howell Schools would affect the established custodial environment. The children appear to have had a primary environment with their mother prior to the change to Howell, but also a close relationship with their father. If, as noted by the Court of Appeals, the father's time with the children revolved around his work schedule, the proposed change may not affect the custodial environment. The proposed change in schools in this case also merges with the issue of the proposed move to

Howell and the question of distance affecting parenting schedules. The Family Law Section does not take a position on the effect of the school change on the established custodial environment in the instant case. However, if a proposed change in schools does affect the established custodial environment, the trial court is in reality faced with a change in custody issue. A failure to recognize this may permit a parent to modify the custodial environment through a motion to change schools, rather than filing a motion to change custody.

II. WHAT IS THE APPROPRIATE LEVEL OF EVIDENTIARY PROOF - CLEAR AND CONVINCING EVIDENCE OR PREPONDERANCE OF THE EVIDENCE?

There are two levels of evidentiary proof applied in child custody and related cases: preponderance of the evidence or the more stringent standard - clear and convincing evidence. The application of either standard is dependent upon the existence of the established custodial environment. Once there has been a determination of an established custodial environment, that environment may not be disturbed or custody may not be changed except upon a showing of "clear and convincing evidence" that it is in the best interest of the children. MCL 722.27.

MCL 722.21(1)(c) provides in part:

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 the permanency of the relationship shall also be considered. [Emphasis added.]

Lombardo v Lombardo, supra, held that the trial court is required to determine the best interests of the child in resolving disputes over "important decisions affecting the welfare of the child" that arise between joint custodial parents. The court must determine whether the new order affects the custodial environment of the child as required by MCL 722.21, *supra*.

As discussed in Issue I, there are situations in which a choice of school may affect a child's custodial environment. For example: 1) a child is home schooled, 2) a child attends a school where one of the parents may also work, and this circumstance affects the custodial environment in that particular case, or 3) one of the parents proposes a child attend a boarding

school. This list is not meant to be exhaustive, but indicative that these determinations are fact-dependent. As a result, if a parent establishes that the change in school does *not* affect the established custodial environment, the appropriate burden of proof is preponderance of the evidence. However, in some cases, if the other parent proves the established custodial environment may be affected by a proposed school change, the moving parent must be held to the heightened burden of proof, clear and convincing evidence. Otherwise, MCL 722.21 is vulnerable to backdoor attacks by parties attempting to change school districts rather than petitioning the court to modify custody and/or parenting time.

III. DID THE DEFENDANT DEMONSTRATE THAT THE SCHOOL CHANGE WAS IN THE CHILDREN'S BEST INTEREST?

Amici will not include a factual analysis of the statutory best interest factors in the instant case, but will discuss how the factors ought to be addressed by courts when the issue is whether a change in schools is in a child's best interests.

In this case, the Court of Appeals concluded that it was likely Defendant met her burden to show that the school change was in the children's best interest, but remanded the case finding that the trial court erred legally and factually in its consideration of the best interest factors. Specifically, the Court of Appeals found that although the trial court considered all of the best interest factors, it failed to narrowly focus its consideration to the specific important issue before it; that is, whether the change in school was in the children's best interest. This finding is consistent with past decisions.

In *Lombardo v Lombard, supra*, the Court of Appeals held that a trial court must determine the best interests of the child in resolving disputes concerning "important decisions affecting the welfare of the child" and, at a hearing, "must consider, evaluate, and determine each of the factors listed at MCL 722.23." *Id. at 160.* *Lombardo* remanded the case with the specific instruction that the trial court to determine the best interest of the minor child according to the relevant best interest factors contained in MCL 722.23. *Id. at 160.*

In *Parent v Parent, 282 Mich App 152, 762 MW2d 553 (2009)*, a recent decision that was decided just prior to the decision in the instant case, the trial court failed to address all of the best interest factors and instead limited its review to those factors it believed were relevant to the school issue. This was error. The Court provided that the trial court should consider all of the

statutory best interest factors in determining whether a proposed school change is in the best interest of the child. All of the factors must be reviewed because:

in a child custody dispute, the "best interests of the child" is defined by statute as including a consideration of *all* factors enumerated in MCL 722.23. The trial court must at least make explicit factual findings with regard to the applicability of each factor. *Id. at 156-157.*

Although the instant case did not address the *Parent* decision, it is simply a further refinement of the holding in that case. The *Pierron* court applied a narrow focus when reviewing *each* best interest factor, concentrating on the change of school-related considerations. Thus, when a trial court is called upon to resolve a dispute concerning joint legal custody issues, it must consider each and every statutory best interest factor, however, it must narrowly focus its consideration of each factor to the important decision affecting the welfare of the child that is at issue. A wide-ranging review of issues not relevant to the issue is not proper in a change of school case.

However, if the proposed change of school affects the established custodial environment, there must be a full or in depth analysis of each best interest factor as required in a change of custody case, as in the parallel change of domicile situation. See, e.g., *Rittershaus, supra*, 273 Mich App at 470-471.

IV. ARE A MINOR'S STATED PREFERENCES UNREASONABLE MERELY BECAUSE HE OR SHE HAS NOT YET HAD THE OPPORTUNITY TO ATTEND A PROPOSED SCHOOL?

In resolving disputes between joint custodial parents concerning the "important decisions affecting the welfare of the child", the trial court must consider the best interests of the child as set out in the Child Custody Act. *Lombardo, supra*. As discussed, MCL 722.23 requires that the trial court must consider and explicitly state its findings and conclusions on the record under each of the best interest factors of the Child Custody Act. *Bowers v. Bowers*, 190 Mich App 51, 55, 475 NW2d 394, 396 (1991).

One of the factors to be considered is the "reasonable preference of the child, if the court deems the child to be of sufficient age to express preference." MCL 722.23(i). The court must take the preference of the child into account if it decides that the child is old enough to express a preference. *Flaherty v. Smith*, 87 Mich App 561; 274 NW2d 72 (1978). Although this factor is to be considered by the court, it does not necessarily outweigh the other factors when all things are equal. *Treutle v. Treutle*, 197 Mich App 716, 495 NW2d 836 (1992). However, this factor alone could be the deciding factor in a custody determination. *Lustig v. Lustig*, 99 Mich App 716, 299 NW2d 375 (1980). When the issue of custody "is close", "an expression of preference by an intelligent, unbiased child might be the determining factor in deciding what the 'best interests' of the child are." *In re Custody of James B.*, 66 Mich App 133, 134, 238 NW2d 550, 551 (1975).

When making the determination as to the weight that should be given to the preference of the child, the court must first consider the age of the child and secondly consider whether or not

the preference is “reasonable.” Courts have held that it was not improper for a court to disregard the preference of a four-year-old child, and that children of at least six years of age and older are generally considered old enough to express a reasonable preference. *Burkhardt v. Burkhardt*, 286 Mich 526, 282 NW 231 (1938); *Bowers, supra*, 190 Mich App at 55-56; *Stringer v. Vincent*, 161 Mich App 429, 434, 411 NW2d 474 (1987).

The court must place on the record its findings as to whether or not it considered the age of the child appropriate to express a preference. *In re Custody of James B. supra.*, at 134. In this case, at the time the children expressed their preference to the trial court, the children were ages 13 and 8, respectively. There was no dispute that the children were not of sufficient age to state a reasonable preference.

However, should the court find that the child is of sufficient age, then the court must consider the preference of the child unless it finds that the preference is not considered “reasonable.” The trial court in this case found that the children’s expressed preferences were unreasonable because they had never attended the Howell Public Schools. *Pierron v. Pierron* 282 Mich App 222, 259, 765 NW2d 345, 369 (2009).

The Court of Appeals overturned the trial court’s ruling, holding that the child’s preference in accordance with the statute merely must be “reasonable” and does not have to be based on a demonstrative history of experience to support that preference. As stated by the Court of Appeals, “the word ‘reasonable’ is susceptible to multiple meanings (citing *People v. Gregg*, 206 Mich App 208, 213, 520 NW2d 690 (1994)). . . . [They] 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, [they] 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.”

Pierron v. Pierron 282 Mich App 222, 259-260, 765 N.W.2d 345, 369 - 370 (2009). The Court of Appeals cited *Carson v. Carson* 156 Mich App 291, 401 NW2d 632 (1986), which found the preference of the child significant and persuasive even if influenced by the child’s mere desire to live with her stepsister and her preference for her father’s neighborhood, even though she had not had the experience of living there before.

A child’s “lack of experience” in relation to preference does not equate to having “no knowledge of alternatives” nor does it equate to being unreasonable. For example, in any initial custody determination and in custody modifications, a child must express his or her preference for living with one parent or the other (or perhaps neither or both). In many cases, the child has not yet had the opportunity to reside with just *one* parent to sufficiently *know* what the experience would be like. However, it is still considered reasonable for a child to base his or her custodial preference on the personal experiences and opportunities available to the child at that time. The determination of the *weight* to be given to the stated preference is in the trial court’s discretion.

Similarly, a child of appropriate age would have information available to him or her to formulate why he or she might prefer one school over another without having to have actually attended the school. Some of these factors may be the location of the school, the distance of the commute from the child’s custodial environment to the school, whether or not transportation was available, the relationship with the other parent and the community activities and neighborhood surrounding the school. A child could also reasonably consider his or her relationships with current teachers and peers (good and bad), and whether a new school would offer new and fresh

opportunities. Additionally, it would be reasonable to assume that a daily sixty mile commute from school to home would not be preferable to anyone, no less a minor who may be involved in extra-curricular activities and must also divide up his or her time between two divorced parents. It is hardly arbitrary, particularly for children of the ages of 13 and 8, who are already familiar with school routines, extra-curricular activities and divorced parents, to understand and articulate why they prefer a proposed school as compared to their existing school.

It would be unrealistic to expect parents to “experimentally” enroll their children in a proposed school (such as private school, or a school of “choice”) in order to obtain the “experience” before the child’s preference could be considered. Such a notion would be remarkably unreasonable, not to mention burdensome on the children, the school system and the State.

Each day decisions are made based on the circumstances as they exist at the time, just as our courts are asked to do in custody disputes, and without the specific knowledge of what the outcome or experience may be like in actuality. Sometimes the outcomes of those decisions may not turn out as expected, but that does not make them *unreasonable*. No where in the record was it stated that the children based their preferences on the promise of a pony or some arbitrary rationale.⁵

Both parties in this case emphasized the importance of keeping the family unit together in a school district that was close to the established custodial environment. At least for one of the children, there was apparently hope for a “fresh start” away from the school he had been

⁵Appellant further argues that the Court of Appeals erroneously equated “sufficient age” with “reasonable preference.” That does not seem to have been the Court of Appeals analysis.

attending where there were allegations of bullying, as well as self-esteem issues associated with being held back one grade. There is no certainty that the environment of the new school would be an improved experience, but to prefer a change based on past unsatisfactory experiences is indeed in a general sense reasonable and in most cases, prudent.

As a general proposition, a child's preference for a proposed school district is not per se unreasonable.

RELIEF

The Family Law Section respectfully requests that this Court consider this brief in the above case.

Respectfully submitted,

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all signed w/permission by
Lisa R J

September 25, 2009

STATE OF MICHIGAN
IN THE SUPREME COURT

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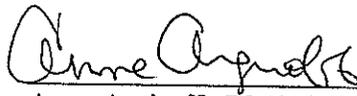
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PROOF OF SERVICE

On the date below, the undersigned served copies of the Family Law Section's Amicus Brief and all related documents on the parties, addresses above, by first-class mail as prescribed by MCR 2. 107.

 w/ permission September 25, 2009
Anne Argiuff P37150

