

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LORI TRIERWEILER WEISS f/k/a LORI  
TRIERWEILER GROSS,

Plaintiff-Appellant,

v

DEAN MICHAEL GROSS,

Defendant-Appellee.

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UNPUBLISHED  
July 17, 2012

No. 308804  
Ionia Circuit Court  
Family Division  
LC No. 2005-023900-DM

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

In this child-custody dispute, plaintiff appeals as of right the trial court's order denying her motion to change the school district of the parties' minor child (DOB 11/24/02) from Portland to Williamson. Because we conclude the trial court's factual findings were not against the great weight of the evidence and the trial court did not abuse its discretion or commit clear legal error, we affirm.

**I. BACKGROUND**

Plaintiff and defendant divorced in 2005, with plaintiff receiving primary physical custody and the parties having joint legal custody of their child. Since that time, defendant has consistently exercised his parenting time, which has always occurred between Mondays and Thursdays due to defendant's weekend work schedule of 4:00 a.m. to 4:00 p.m. every Friday, Saturday, and Sunday. Defendant currently watches the minor child Monday through Wednesday during the school year and has multiple, non-consecutive weeks in the summer. One of the child's counselors testified that the child liked consistency and knowing where he was going to be, that he enjoyed spending time with both parents, and that he was happy with the current schedule.

The child has attended Portland schools his entire life. The child has a medical condition that requires him to take medication and have certain accommodations at school in the event of an emergency created by his condition. Both parents have spoken with various members of school staff and administration, including the principal, school nurse, and the child's teachers, regarding the condition and necessary accommodations. Defendant feels that the Portland school district has been responsive to the child's needs and has an adequate plan in place, while plaintiff

believes that the child's needs are either ignored or insufficiently addressed. The condition also requires the child to have frequent blood draws and doctor's appointments which have resulted in the child missing a significant amount of school given the location of the providers involved.

In August 2011, plaintiff filed a motion requesting permission to change the child's school district from Portland to Williamston in anticipation of a move she and her current husband wished to make to Williamston. Plaintiff indicated that the move would increase her husband's chances at job promotion and reduce his drive to work. Plaintiff also believed the Williamston schools would be more responsive to the child's needs and the location would place the child closer to his medical providers, reducing school time lost to appointments. Defendant objected to the change. A referee hearing was held on the motion, during which the referee conducted an in camera interview with the child. The referee recommended that the child remain in the Portland school district.

After the recommendation was issued, plaintiff unilaterally decided to move to Williamston and to enroll the child in extracurricular activities there because he expressed that he no longer wished to participate in Portland activities. Plaintiff also requested a de novo hearing, but both parties sought to expand the record, so the case was remanded back to the referee for another hearing. At the conclusion of this hearing, the referee again concluded that it was in the child's best interests to remain in the Portland school district. Plaintiff then requested a de novo review hearing from the trial court. After considering the evidence from the referee hearings and the parties' arguments, the trial court also concluded that it was in the child's best interests to remain in the Portland school district.

On appeal, plaintiff argues that the trial court made multiple legal and factual errors resulting in conclusions that were against the great weight of the evidence. Plaintiff maintains that the evidence overwhelmingly supported her motion to change the child's school district.

## II. STANDARD OF REVIEW

All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. Clear legal error occurs when a trial court incorrectly chooses, interprets, or applies the law. [*Powery v Wells*, 278 Mich App 526; 752 NW2d 47 (2008) (quotation marks, citations, and alterations omitted).]

“[A] reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderates in the opposite direction.” *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) (quotation marks and citations omitted).

### III. ANALYSIS<sup>1</sup>

#### A. EXISTENCE OF AN ESTABLISHED CUSTODIAL ENVIRONMENT

When parents share joint legal custody and cannot agree on important decisions, such as changing the school district, the trial court must resolve the issue in the best interests of the child. *Id.*

When resolving important decisions that affect the welfare of the child, the court must first consider whether the proposed change would modify the established custodial environment. The established custodial environment is the environment in which “over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of line, and parental comfort.” MCL 722.27(1)(c). [*Id.* at 85-86.]

The existence of an established custodial environment is a question of fact. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001). An established custodial environment can exist with both parents, even if the child’s primary residence is with one parent. *Jack v Jack*, 239 Mich App 668, 671; 610 NW2d 231 (2000).

The trial court concluded that there was an established custodial environment with both parents. Plaintiff argues that this conclusion was against the great weight of the evidence. The parties do not dispute that the child has an established custodial environment with plaintiff. Therefore, the only issue we must resolve is whether the child also has an established custodial environment with defendant. We conclude that he does.

Defendant cares for the child Monday through Wednesday each week during the school year and for multiple, non-consecutive weeks in the summer. While the child is in his care, defendant sees to all of the child’s necessities, including food, clothing, medication, and transportation to and from school. Defendant also transports the child to doctor and counseling appointments when necessary and takes him to religious education classes. Defendant participated in school parties, sports, and other activities. He attended parent-teacher conferences and met with the principal and nurse at Portland schools regarding accommodations for the child’s medical condition.

Plaintiff asserts that the child does not go to defendant for guidance because defendant admitted that the child did not tell him about his social struggles or about getting into trouble at school. However, defendant also testified that the child’s teachers never mentioned he was having any trouble adjusting socially. Further, defendant asserted that the child usually told him things, including social aspects of school, and that the two previously had discussions regarding

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<sup>1</sup> Although plaintiff did not include all her issues in her statement of the issues presented, we have elected to consider them because they have been fully briefed by both parties. See *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

concerns the child had expressed about disruptive children in class. Defendant also testified that the child was making friends.

Defendant admitted he did not coordinate play dates, but testified that play dates tend to occur on weekends, when the child lives with plaintiff. In addition, defendant testified that the child played with a neighbor child and that the child works hard at his academics on school nights, leaving no time for play.

In light of the evidence in the record, we conclude that plaintiff has failed to show that the trial court's finding that a joint custodial environment existed was against the great weight of the evidence.

## B. CHANGE OF ESTABLISHED CUSTODIAL ENVIRONMENT

The trial court concluded that there would be a change in the custodial environment because the change of schools "would significantly negate the father's ability to spend time with the child. From the child's perspective, the increased loss of day-to-day contact with his father would be significant." Plaintiff argues that *Pierron*, 486 Mich 81, and *Gagnon v Glowacki*, 295 Mich App 557; \_\_\_ NW2d \_\_\_ (2012), are dispositive of this issue and require the conclusion that there would be no change in the established custodial environment. We acknowledge that whether the established custodial environment with defendant would be changed is a close question; however, we cannot conclude that the trial court's decision is against the great weight of the evidence.

In *Pierron*, 486 Mich at 84, our Supreme Court considered whether the defendant's 60-mile relocation and subsequent attempt to enroll the children in the new school district constituted a change in the established custodial environment with the plaintiff. This Court concluded that there was no change because "the distance of the new schools from plaintiff's home would require relatively minor adjustments to plaintiff's parenting time." *Id.* at 87. The Supreme Court agreed, but clarified that it was not holding "that a proposed change of school will *never* modify an established custodial environment. Rather, we merely hold that, under the specific facts of this case, this particular change of schools does not modify the established custodial environment." *Id.* at 93 n 6 (emphasis in original).

Plaintiff asserts that her approximately 35-mile move is analogous to the 60-mile move in *Pierron* and will not alter the parenting time schedule. However, the facts in *Pierron* are markedly different than those in the instant case.

In *Pierron*, the children visited the plaintiff's home three out of every four weekends, from Saturday afternoon to Sunday evening and, prior to the action being filed, there were no overnights on weeknights during the school year. *Id.* at 87. The plaintiff "occasionally" picked up the children from tutoring and took them out to dinner during the week and, one week out of seven, took them out to lunch. *Id.* Given this evidence, the Supreme Court concluded that the plaintiff's weekend parenting time would be unaffected, the one week out of seven during the daytime was dictated by work and would not be altered, and the 60-mile difference was not so far as to prevent the plaintiff from continuing occasional midweek activities. *Id.* at 88.

In this case, defendant watches the child Monday through Wednesday, and has done so for most of the child's life. Defendant has been responsible for taking the child to school and picking him up multiple days every week, something that simply was not an issue in *Pierron*. In addition, weekend visits are not possible because of defendant's work schedule. If the school district was changed any afterschool activities on Monday or Tuesday evenings would interfere with defendant's parenting time. Defendant's parenting time could not be made up with weekend time because of his work schedule.

Plaintiff's contention that defendant's parenting time would not change is only true if one looks at the hours the child is *scheduled* to have with defendant, as opposed to the actual time defendant could spend with the child. Indeed, plaintiff herself testified that during the long commute to school, the child read or slept. One can hardly argue that this is the same type of quality time defendant and the child would share at defendant's home. When considering the amount of time defendant and the child would actually be able to share, it is clear that defendant's parenting time would be markedly reduced by changing the child's school district.

Moreover, the fact that the child has already begun to stop doing activities in Portland is indicative of the impact changing school districts would have on defendant's parenting time. The child is spending less and less time in Portland even though he still attends school there. Were the school district actually changed to Williamston, the child would likely spend no time in Portland except for the evenings spent with defendant, during which defendant would be responsible for making sure the child did his school work.

*Gagnon*, 295 Mich App 557, is similarly distinguishable. In *Gagnon*, the plaintiff sought to change the child's residence from Michigan to Windsor, Ontario. *Id.* at 563. This Court concluded that the move would not alter the established custodial environment with the defendant. *Id.* at 570. However, in *Gagnon*, the defendant was awarded an additional weekend per month in parenting time. *Id.* at 572. The trial court determined that even if the defendant could no longer exercise his mid-week overnights, his total number of overnights per month remained the same, and the additional weekend time would compensate for the weekday hours the defendant was going to lose. *Id.*

In the present case, the record evidences not only a change in defendant's parenting time, but that the offers plaintiff made, even if ordered by the trial court, would not adequately compensate defendant in a manner that would maintain the child's custodial environment with him. During the de novo review hearing, plaintiff's counsel indicated that plaintiff was willing to give defendant an additional week of parenting time in the summer. However, given that defendant works 12-hour shifts Friday, Saturday and Sunday, an additional week in the summer would not provide a full seven days.

Based on the above evidence, we conclude that the trial court did not err in concluding that the move would result in a change of the established custodial environment. Accordingly, we also conclude that the trial court properly held that plaintiff's burden was to show by clear and convincing evidence that the change was in the child's best interests. MCL 722.27(1)(c); *Pierron*, 486 Mich at 86.

### C. BEST INTEREST FACTORS

Plaintiff argues that there was clear and convincing evidence to show that her proposed school district change was in the child's best interests.

The child's best interests are evaluated under factors set forth in MCL 722.23:

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

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

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

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

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

(f) The moral fitness of the parties involved.

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

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

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

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

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

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

In the instant case, the trial court evaluated the above factors and concluded that factors a, b, and g were equal; factors c, i, and k were "non-factors"; factors d, e, f, h and j favored defendant; and factor l favored plaintiff. On appeal, plaintiff challenges the trial court's conclusions as to d, f, h, i, and j, as well as a singular finding from factor c.

## 1. FACTOR C

Plaintiff argues that the trial court's statement that both school districts had "504 plans<sup>[2]</sup> or procedures in place for the minor child's medical needs" was against the great weight of the evidence because there was no 504 plan in place at the Portland schools. Plaintiff does not argue that the trial court's conclusion that it was a "non-factor" was erroneous. We find that when the court's statement regarding 504 plans is read in context, it clearly recognizes alternative responses, and the evidence was clear that the child's school had implemented procedures to address the child's medical condition. Therefore, the trial court's conclusion that the school had procedures in place to address the child's medical needs was not against the great weight of the evidence.

Plaintiff also argues that defendant has done nothing to address the child's medical issues. This assertion is belied by defendant's testimony regarding his conversations with school administration and staff, including the child's principal, teacher, and nurse. In addition, simply because plaintiff has taken the lead on these issues does not mean that defendant lacks "the capacity and disposition" to do so. MCL 722.23(c). In fact, defendant testified that he was willing to take over the blood draw appointments, but had not attempted to in order to prevent a dispute with plaintiff. We cannot find that the trial court's finding of equality was against the great weight of the evidence under these circumstances.

## 2. FACTOR D

Plaintiff next argues that the trial court erred by concluding that factor d favored defendant. Plaintiff maintains that factor d should be weighted equally because the child has always resided with her and the Portland schools have not been a good fit.

There is no question that continuing in Portland schools provides continuity, as it is the only school district the child has ever attended. The question is whether maintaining that continuity is desirable. The undisputed evidence showed that the child had excelled academically in the Portland schools and there was some evidence, although disputed, that he had friends there. Plaintiff contests the trial court's conclusion that the child had friends in Portland, but the trial court referenced "friends/acquaintances," and plaintiff herself testified that the child had "lots of acquaintances" at the Portland schools. Moreover, the evidence to the contrary was all testimony by plaintiff and the weight of that evidence was determined solely by the trial court's determination of credibility, a matter we are scrupulously careful not to second-guess. *People v Hill*, 257 Mich App 126, 140-141; 667 NW2d 78 (2003).

As for the adequacy of the school district's response to the child's medical needs, plaintiff cites her own testimony to support her position, while ignoring defendant's testimony, which supports the trial court's conclusion. It is clear that plaintiff believes that the Portland schools are not responding in the way she would like relative to her child's needs. However, the evidence does not support the conclusion that they are not being responsive at all.

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<sup>2</sup> Section 504 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 29 USC § 794.

Although plaintiff makes assertions that a 504 plan – and, by inference, Williamston schools – would solve the problems she perceives with Portland schools, both parties testified that the principal at Portland schools told them the child was ineligible for a 504 plan and plaintiff failed to provide any evidence to indicate that the principal’s assertion was wrong. Ultimately, this issue comes down to the fact that plaintiff does not like how the trial court resolved the factual disputes related to the evidence. But, in light of how the trial court did resolve those issues, its conclusion that the factor favored defendant was not against the great weight of the evidence.

### 3. FACTOR F

Plaintiff contends that the trial court erred by considering factor f because our Supreme Court has concluded that it is inapplicable to requests to change school districts. Plaintiff relies on the following statement in *Pierron*, 486 Mich at 90: “For instance, factor f, pertaining to the ‘moral fitness of the parties involved,’ MCL 722.23(f), while highly relevant in making a custody determination between parents, has no discernible bearing on determining whether a proposed change of school is in a child’s best interests.” Regardless of whether we characterize this as a complete prohibition, it is inapplicable to the present case because this case involves a change in the established custodial environment. “If the proposed change would modify the established custodial environment of the child . . . the trial court *must consider all* the best-interest factors . . . .” *Id.* at 92-93 (emphasis added). Therefore, the trial court’s consideration of factor f in this case was not erroneous.

### 4. FACTOR H

Plaintiff also contests the trial court’s conclusion that factor h favored defendant. Defendant testified that the child had friends at school and both parties testified regarding how well the child was doing academically. Although plaintiff testified that she encouraged the child to participate in activities associated with Portland, her testimony was full of statements that she did not require the child to do anything that he did not want to do with respect to this matter.

Contrary to plaintiff’s assertion that there was no testimony regarding what the child and his friends did, defendant testified that the child talked to and played with friends at school, with the children in his religious education classes, and with a boy who lived next door. The child had participated in soccer and other sports in Portland before plaintiff enrolled the child in Williamston activities. Therefore, the record supported the trial court’s conclusion that the child had been doing well socially in Portland prior to the move to Williamston.

Finally, plaintiff again takes issue with the trial court’s conclusion that the Portland schools had “addressed the child’s medical condition.” As discussed above, the evidence does show that Portland schools had addressed the matter, albeit not to the degree plaintiff thought appropriate. Thus, the trial court’s conclusion that factor h favored defendant was not against the great weight of the evidence.

### 5. FACTOR I

Plaintiff contends that the trial court erred by failing to interview the child because he was old enough to state a preference and its failure to interview him required reversal. Plaintiff's argument appears to be based on the belief that the trial court relied only on the parties' testimony in reaching its conclusion. However, the record is clear that the trial court received a summary of the referee's in camera interview with the child, which it considered in rendering its opinion.<sup>3</sup> Therefore, plaintiff's argument that the child's preference was not considered is meritless. To the extent that plaintiff also challenges the trial court's conclusions with respect to factor *i*, after a thorough review of the record, we cannot say that the trial court's conclusions were against the great weight of the evidence.

Furthermore, even if plaintiff was arguing that the trial court erred by relying on the summary from the referee rather than conducting its own interview, we would still find no error. Both MCL 722.23(i) and Michigan case law require only that the child's reasonable preference be considered. See *Pierron*, 486 Mich at 92. We are unaware of any case law that mandates a trial court interview a child to determine that preference if it is available some other way and plaintiff has provided none.

## 6. FACTOR J

Plaintiff contends that the trial court's conclusion that factor *j* favored defendant was against the great weight of the evidence. As an initial matter, plaintiff's contention that the trial court erred by considering actions that had occurred prior to the entry of the last custody order is meritless. Although the determination of whether proper cause or change in circumstances exists must be so limited, the determination of the best-interest factors is based on all evidence in the record and is not time barred to actions occurring since the entry of the last custody order. *Vodvarka v Grasmeyer*, 259 Mich App 499, 514-515; 675 NW2d 847 (2003).

The trial court supported its conclusion by citing plaintiff's previous denials of parenting time to defendant; her unilateral change of the child's counselor even though medical decisions were to be joint decisions; her "continued unsuccessful motions" attempting to reduce defendant's parenting time; and the instant motion "to justify her intended relocation and 'hopeful' change in parenting time." The court found these actions "reflective of her apparent desire to minimize the father's contact with the child." The court also noted the child's refusal to participate in any Portland activities and plaintiff's unilateral move to Williamston after the referee had determined that a change of school district was not in the child's best interests. Regardless of plaintiff's motivation, the record supports the trial court's conclusion that factor *f* favored defendant. Accordingly, the trial court's findings were not against the great weight of the evidence.

## IV. CONCLUSION

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<sup>3</sup> Likewise, we have reviewed the summary in reaching our decision.

After reviewing the record, we conclude that none of the trial court's factual findings were against the great weight of the evidence, and it did not abuse its discretion or commit clear legal error.

Affirmed.

/s/ Douglas B. Shapiro  
/s/ Joel P. Hoekstra  
/s/ William C. Whitbeck