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Damned for Using Daycare: Appellate Brief of Jennifer Ireland in *Ireland V. Smith*

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DAMNED FOR USING DAYCARE: APPELLATE BRIEF OF JENNIFER IRELAND IN *IRELAND V. SMITH*†

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"Where we love is home,
Home that our feet may leave, but not our hearts."

–Oliver Wendell Holmes

INTRODUCTION

At issue is custody of three-and-a-half-year-old Maranda (date of birth: April 22, 1991). The trial court found that Maranda had an established custodial environment with her mother, Jennifer Ireland, but then nominally ordered custody changed to Steven Smith. The court's order changing custody was based on a determination that day care is an inappropriate choice for care of a preschool child, and that no one effectively can be a single parent and a student at the same time. Those findings have no factual basis in the record, no legal basis under Michigan law, and no logical or even common sense basis at all. In addition, the trial court in effect gave custody of Maranda not to Smith, but to his parents, who were not even parties to the custody action.

The trial court's decision is completely contrary to law, has no basis in fact, and appears to be infected with bias against single mothers and non-traditional families. The trial court's decision must be reversed, and Maranda must be allowed to stay in her home with her mother.

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† Ireland v. Smith, 542 N.W.2d 344 (Mich. Ct. App. 1995), *aff'd as modified*, 547 N.W.2d 686 (Mich. 1996).

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Much of the credit for the research and drafting of this brief goes to three outstanding attorneys: Alicia Aiken, M. Caroline Padgett, and Charlotte Croson (all University of Michigan Law School J.D. 1995). Their work on this brief represents just one small part of their excellent work on behalf of the many clients of the now closed Women and the Law Clinic.

STATEMENT OF FACTS

When she was sixteen, Jennifer Ireland gave birth to Maranda.[1] Steven Smith, Maranda's father, was also sixteen.[2] The parties never married or even lived together.[3] When he found out he was going to be a father, Smith urged Ms. Ireland to have an abortion. She refused.[4] He had nothing further to do with Ms. Ireland or her daughter until Maranda was nearly one year old.[5] After Maranda's birth, Ms. Ireland placed Maranda in foster care, anticipating an adoption. Smith signed papers allowing for the adoption.[6] Approximately three weeks later, Ms. Ireland decided that she could, and would, raise her child herself.[7] It was not until over one year later that Smith reconsidered his decision to terminate his parental rights to Maranda.[8]

Ms. Ireland and Maranda lived in Harrison Township, Macomb County. Ms. Ireland fulfilled all of her obligations as a mother while continuing to excel in high school.[9] During this time, Ms. Ireland's mother and sister helped Ms. Ireland care for Maranda.[10] During the first year of Maranda's life, Smith had no contact with her. He did not seek visitation with, nor did he provide any financial support for, his daughter.[11] He continued on in high school and his many sports activities, unencumbered by any recognition or fulfillment of his duties as a

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1. T I, 17–18. The transcripts were not given volume numbers. For convenience, the transcript citations will be assigned volume numbers in chronological order: May 13, 1994 is Volume I; May 31 is Volume II; June 1 is Volume III; June 2 is Volume IIIA; June 3 is Volume IIIB; and June 6 is Volume IV. (Volumes IIIA and IIIB were prepared by reporters other than the court's usual reporter). The post trial hearings are cited: July 25 is Volume V, and July 27 is Volume VI. So the cite "T I, 17–18" refers to Volume I (May 13, 1994), pages 17–18. The trial court's opinion, Smith v. Ireland, No. 93-385-DS (Mich. Dist. Ct. June 27, 1994), will be cited as "Op" with the specific page reference.
2. T IIIA, 196.
3. T IIIB, 53.
4. T IIIA, 197.
5. T IIIA, 200, 294.
6. T IIIA, 202.
7. T IIIB, 182–183.
8. T IIIA, 201–203.
9. T IIIB, 188–190.
10. T IIIB, 184–186; IIIB, 117–119.
11. T III, 323; IIIA, 199–200, 94–95; IIIB, 37, 59, 32–33, 202–203; IV, 357–359.

father.[12] He lived, and continues to live, with his parents.[13] He has no plans to move out of his parents' house and live independently.[14]

From the time Maranda was a year old, with Ms. Ireland's encouragement, Smith had informal visits with Maranda. Many of the visits were also with Ms. Ireland, since the parties had started dating again.[15] Smith and his witnesses described how others were always present during Smith's visits: his mother, Ms. Ireland, Jenny Schulte, or Melissa Roy.[16] Smith's mother was instrumental in caring for Maranda during visits.[17] No one testified to any visit where Smith alone cared for Maranda during the entire visit. Maranda has never lived with Smith.[18] Indeed, as the court below emphasized: "It cannot be ignored that the plaintiff has borne the burden of raising the child up through this period. . . . and the child and the mother are united and that the mother looks to the future to have this relationship continued on a permanent basis."[19]

In late December 1992 and again on January 1, 1993, Smith assaulted Ms. Ireland, pushing, shoving, and bruising her. Maranda was present during at least one of those assaults.[20] Ms. Ireland told friends of the assaults when they occurred,[21] and reported the assaults to the police on January 1, 1993. Because of these assaults, Ms. Ireland stopped informal visitation with Smith; she feared for Maranda's and her safety.[22]

On January 27, 1993, Ms. Ireland filed a complaint for child support. Smith was ordered to pay $62 per week in support.[23] He objected, and the order was reduced to $8 per week.[24] When support was increased to $12 per week by order dated July 12, 1993, Smith

12. T III, 17, 197–198; IIIA, 208.
13. T IIIA, 188; IIIB, 41.
14. T IIIB, 90–91, 95–96.
15. T I, 94–95; IIIA, 97, 213–214.
16. T III, 23, 116, 95, 294; II, 195–196; IIIA, 68–69.
17. Op, 3.
18. T IIIB, 96.
19. Op, 3.
20. T I, 85–87; IIIA, 218–225.
21. T I, 86; II, 200.
22. T I, 88, 95–98.
23. January 29, 1993 Order.
24. March 15, 1993 Order.

objected and asked that it be reduced.[25] Even at that low level of support, Smith was consistently behind and brought into court on enforcement proceedings.[26] According to Friend of the Court records, as of July 27, 1994, the date the custody judgment was signed, Smith was $342.50 behind in child support and owed $183.16 in medical expenses for Maranda.[27] In February, 1993, after being ordered to pay support, Smith petitioned for custody of Maranda.[28] He had never before sought custody of, or formal visitation with, Maranda.

In the fall of 1993, Maranda and her mother moved to Ann Arbor where Ms. Ireland began attending the University of Michigan, having earned several scholarships.[29] Ms. Ireland and Maranda lived in an apartment through University family housing.[30] Maranda attended a University-approved, licensed, home-based child care program while Ms. Ireland attended classes.[31] Smith has never contributed to the cost of child care. In September 1994, Ms. Ireland and her daughter returned to Ann Arbor and are again living in University family housing. Maranda attends the same University-approved child care she attended in 1993, a place where, the trial court found, Maranda had a meaningful experience.[32]

In the summer and fall of 1993, both parties were evaluated by the Macomb County Friend of the Court and Dr. Terrance Campbell of the Psychodiagnostic and Family Services Clinic.[33] Ms. Ireland was evaluated in the context of the independent family unit she had established with her daughter.[34] Smith was evaluated in conjunction with his parents.[35] The Friend of the Court recommended that custody remain

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25. December 8, 1993 Motion for Relief from Order and to Reduce Child Support and to Cancel Arrearages.
26. November 15, 1993 Order of Income Withholding (issued upon a finding of an arrearage in excess of four weeks).
27. Friend of the Court, Statement of Arrearage.
28. February 9, 1993 Motion for Change of Custody.
29. T IIIB, 122, 146, 188–189.
30. T I, 12–13; IIIB, 146.
31. T IIIB, 74, 345–347. Because of the trial schedule in this case, Ms. Ireland had to take a leave from the University during the winter term, 1994. During that time, she worked in a day care center in Macomb County and had Maranda with her at work. T I, 12, 101–102.
32. Op, 7.
33. T IIIB, 52; IV, 395.
34. T IIIB, 52–53.
35. T IIIB, 52–53.

with Ms. Ireland.[36] Dr. Campbell concluded that "Ms. Ireland is responding more than adequately to her daughter as the physical custodian. Removing Maranda from the familiarity of her current custodial environment would only create difficult adjustment problems for her."[37] Dr. Campbell also determined that Ms. Ireland has "defined her status as a single parent as a priority equal to her status as a college student."[38]

Smith rejected the professional recommendations, and this case went to trial in May and June 1994. Although the court is required to follow the Child Custody Act of 1970, there was a great deal of impermissible and irrelevant testimony presented by Smith which went outside the boundaries of the best interests guidelines. Counsel for Smith presented statements—primarily through hearsay or counsel's own arguments—which alleged that Ms. Ireland engaged in sexual activity, and supposedly had had more than one abortion.[39] Although none of the sexual conduct as presented by Smith was even claimed to have occurred within a year of trial, and although objected to as inadmissible, irrelevant, and prejudicial, the court allowed the statements to be made[40] and made comments during trial concerning the testimony by Smith's counsel and the hearsay accusations. These comments wrongly assumed that the allegations were relevant and admissible.[41] Never was there testimony claiming that Ms. Ireland engaged in sexual activity in front of her daughter, that Maranda even knew of any alleged sexual activity, or that any sexual activity in which Ms. Ireland was alleged to have engaged harmed Maranda in any way.

Smith also presented a great deal of untrue and unsubstantiated hearsay and statements by his counsel alleging that Ms. Ireland and her family were neglectful and abusive of Maranda. By Smith's own admission, the Child Protective Services found that allegations of abuse made by Smith and his family were an attempt to "build a case against Jenny" due to "the upcoming custody battle."[42] Judicial notice was taken of the fact that Child Protective Services found no abuse of Maranda, and the

36. T IIIB, 397; Zeihm report, 3.
37. T IIIB, 54; Campbell report, 2.
38. Campbell report, 2.
39. T I, 17, 19–23, 33, 39–40, 45, 53, 61, 63, 65–79, 114; II, 166–170, 238, 243–256, 265–266, 275; III, 302–303, 309; IIIA, 9, 13, 18–28, 31–33, 36–38, 48–49, 146–147, 209, 214–217.
40. T I, 20.
41. T I, 67, 78; II, 167, 172–173; III, 340.
42. T IIIB, 31.

court remarked: "When they don't act . . . my conclusion would be they found nothing to justify them using intervention."[43] Additionally, Smith and his parents admitted that they routinely follow and spy upon Ms. Ireland and her family.[44]

On June 27, 1994, the court issued its opinion finding an established custodial environment with Ms. Ireland.[45] The court then found the parties equal in all 12 factors under the Child Custody Act of 1970 except factor (e) "[t]he permanence, as a family unit, of the existing or proposed custodial home."[46] The court found that factor (e) "takes on supreme importance in view of the Court's assessment of the remaining issues as being virtually equal."[47] Under factor (e), the court concluded that Smith's *mother* would raise the child *in her home* "for an indefinite period of time."[48]

In his discussion of factor (e), the trial judge gave great weight to the fact that "[u]nder the future plans of the mother, the minor child will be in essence raised and supervised a great part of the time by strangers. Under the future plans of the father, the minor child will be raised and supervised by blood relatives."[49] The Court also found it "pivotal" that Ms. Ireland intended to continue on with her scholarships at the University of Michigan:

> The mother's academic pursuits, although laudable, are demanding and in order to complete her program it necessitates the leaving of the child for a considerable portion of its [sic] life in the care of strangers. There is no way that a single parent, attending an academic program at an institution as prestigious as the University of Michigan, can do justice to their studies and the raising of an infant child. There are not that many hours in the day.[50]

Yet the only evidence pertaining to Ms. Ireland's ability to attend school and adequately care for her daughter was uncontroverted and shows that

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43. T IIIB, 30.
44. T I, 96; III, 302–305, 307–309, 330–331; IIIA, 158–160; IIIB, 101.
45. Op, 3.
46. MICH. COMP. LAWS. ANN. § 722.23 (1993 & West Supp. 1994).
47. Op, 10–11.
48. Op, 7 (emphasis added).
49. Op, 8.
50. Op, 8.

she is quite capable of being a successful single parent and a full-time University student simultaneously.[51]

Smith's ability to care for or provide a stable home for Maranda independently of his parents was not evaluated by the trial court. There was no evidence submitted regarding Smith's plans to raise Maranda alone or outside of his parents' house. Additionally, there is nothing in the record to support a conclusion that Smith's mother is a suitable custodian of Maranda for an extended period. There was nothing presented regarding the benefits or detriments of relative care vs. professional child care to this, or any, child. There was no testimony or evidence as to the type of care Smith's mother would provide Maranda. Testimony was limited to the fact that Smith's mother, a traditional housewife, would be at home all day while the men of the Smith house went to work and to school.

Despite Smith's testimony regarding his admitted assaults of Ms. Ireland, and his family's testimony acknowledging their stalking behavior,[52] the Court found the parties equal on factor (k), the existence of domestic violence. However, and inconsistently with the evidence presented, it was the court's opinion that the evidence of domestic violence was irrelevant and superfluous.[53]

On July 27, 1994, the court entered its judgment ordering the transfer of Maranda to Smith and his parents. Ms. Ireland requested transition counseling for all parties and the minor child, so that three-year-old Maranda could be emotionally prepared for the transfer out of her lifetime home with her mother. That request was refused.[54] On August 9, 1994, this Court stayed transfer of custody of Maranda.

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51. T IIIB, 80–81, 54.

52. The trial judge noted that he understood the Smith family to be engaged in stalking. T III, 336. *See generally* MICH. COMP. LAWS ANN. § 750.411h–.411i (West Supp. 1995).

53. Op, 9–10.

54. T IV, 13–18.

ARGUMENT

I. THE TRIAL COURT'S DECISION IS AGAINST THE GREAT WEIGHT OF EVIDENCE, IS A PALPABLE ABUSE OF DISCRETION, OR SHOWS CLEAR LEGAL ERROR, AND IT IS IN THE BEST INTERESTS OF MARANDA TO STAY WITH HER MOTHER.

A. This Court Must Reverse Without Remand.

Reversal without remand is appropriate where the appellate court "can conclude that the child custody factors taken as a whole were erroneously weighed in favor of the wrong party."[55] Review of the dispositional ruling of the trial court in a custody case is *de novo* where the trial court has made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.[56] The review is also *de novo* for a trial court's conclusions of law, " 'where a finding is derived from an erroneous application of law to facts,' " or " 'where the factual findings may have been influenced by an incorrect view of the law.' "[57] A finding of fact is reviewed under the clearly erroneous standard: "[a] finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed."[58]

Where there is an established custodial environment, the moving party must show by clear and convincing evidence that it is in the best interest of the child to change custody.[59] An established custodial environment is created "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."[60]

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55. Fletcher v. Fletcher, 200 Mich. App. 505, 521, 504 N.W.2d 684, 691 (Mich. Ct. App. 1993).

56. *Fletcher*, 200 Mich. App. at 521, 504 N.W.2d at 691.

57. *Fletcher*, 200 Mich. App. at 510, 504 N.W.2d at 687 (citing Beason v. Beason, 435 Mich. 791, 804–05, 460 N.W.2d 207, 213 (1990)).

58. Harper v. Harper, 199 Mich. App. 409, 410, 502 N.W.2d 731, 732 (Mich. Ct. App. 1993), (per curiam) (citing *Beason*, 435 Mich. 805, 460 N.W.2d at 212); *Fletcher*, 200 Mich. App. at 510, 504 N.W.2d at 687 (citing *Beason*, 435 Mich. at 805, 460 N.W.2d at 212 (1990)).

59. MICH. COMP. LAWS § 722.27(1)(c) (1993).

60. MICH. COMP. LAWS § 722.27(1)(c) (1993).

In this case, there is no factual or legal basis which rises to clear and convincing evidence that Maranda should be removed from the established custodial environment she has with her mother. The trial court decision must be reversed.

B. There Is An Established Custodial Environment Between Maranda And Her Mother.

The trial court correctly found an established custodial environment between Maranda and Ms. Ireland. A finding of an established custodial environment is a determination that there is a:

> relationship of a significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to [her] age and individual needs; an 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.[61]

The best interests standard and Michigan family law place a premium on permanence and stability in custody decisions. Therefore, it takes clear and convincing evidence to change a child's custodial environment.[62] This is in accord with child development research.[63]

Baker requires that where there is an established custodial environment, custody will not be changed "except in the most compelling cases. . . ."[64] That language has been interpreted by this Court to require a more than marginal improvement if custody is changed.[65] The legislature expressed its strong desire to secure stable, final placements for children and requires that the compelling reason supporting a change in custody must be proven by clear and convincing evidence.[66]

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61. Baker v. Baker, 411 Mich. 567, 579–80, 309 N.W.2d 532, 536 (1981) (emphasis added).
62. MICH. COMP. LAWS § 722.27 (1993).
63. *See, e.g.*, JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 33 (1973).
64. *Baker*, 411 Mich. at 577, 309 N.W.2d at 535.
65. Carson v. Carson, 156 Mich. App. 291, 401 N.W.2d 632 (Mich. Ct. App. 1986); Harper v. Harper, 199 Mich. App. 409, 502 N.W.2d 731 (Mich. Ct. App. 1993) (per curiam).
66. Mich. Comp. Laws § 722.27(1)(c); *Carson*, 156 Mich. App. 291, 401 N.W.2d 632.

The record reflects that Maranda lived with her mother from the time she was three weeks old. Maranda has never lived with Smith. The court found as a matter of fact that "the plaintiff has been the custodial parent during the child's entire life,"[67] and that "the child having spent the greatest amount of her life with the plaintiff in the plaintiff's mother's home, looks to plaintiff naturally for guidance, discipline and the necessities of life."[68] The record also shows in no uncertain terms that Smith is completely incapable of providing Maranda even the basic necessities of life; he has petitioned the court to keep his child support payments to $8 per week, and is behind, even at that low level of support. The trial court's findings in regard to Smith show that his relationship with Maranda is quite different than Ms. Ireland's. The trial court notes that Smith's relationship is based on "visitation from about the time the child was one year old."[69] The court found that "[t]he child, while on visitation, appears to have made a normal adjustment to the defendant *and his relatives*, . . . [t]he fact remains, however, that it is only visitation and in many instances the facets of child rearing are not faced during those periods."[70] The record supports that conclusion: no one testified to any visit where Smith alone was responsible for Maranda during the entire visit.

In comparing the differing relationships Maranda has with her two parents, the court found: "the child and the mother are united and that the mother looks to the future to have this relationship continued on a permanent basis. . . . The fact that the child adjusts to periodic visitation cannot be construed as undermining the reality of the day-to-day relationship which the child shares with her mother."[71] The court's finding that there is an established custodial environment with Ms. Ireland is consistent with existing law.

Therefore, Smith had to prove by clear and convincing evidence that custody should be changed. He has not done so, and the trial court's findings and conclusions to the contrary are in error.

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67. Op, 2.
68. Op, 3.
69. Op, 2.
70. Op, 3 (emphasis added).
71. Op, 3.

II. THE TRIAL COURT IMPROPERLY AND ARBITRARILY TOOK MARANDA OUT OF HER CUSTODIAL HOME BECAUSE OF HER MOTHER'S EDUCATIONAL GOALS AND HER CHOICE TO USE DAY CARE.

A. There Was No Clear And Convincing Evidence Supporting The Court's Conclusion That Ms. Ireland's Choice To Use Day Care Was A Valid Basis For Changing Custody.

The trial court removed Maranda from her mother's custody because of Ms. Ireland's choice to use day care. Although the court below purports to base its decision on findings under factor (e) of the guidelines, the court unquestionably based its analysis on Ms. Ireland's choice to use day care and decided that no one is capable of being a single parent and a student at the same time.[72]

The lower court's decision to change Maranda's custody because of Ms. Ireland's choice to use day care while she betters herself through her studies at Michigan does not amount to clear and convincing evidence and is clear legal error and abuse of discretion and against the great weight of the evidence. In essence, the trial court penalized Ms. Ireland for being something other than a full-time, stay-at-home mother, a determination that has implications for thousands of working parents in Michigan.

1. Daycare is not relevant to factor (e).

Michigan law sets out twelve factors which define the best interests test.[73] Factor (e) demands consideration of "the permanence, as a family unit, of the existing or proposed custodial home or homes." On its face, this language says nothing about a parent's choice of child care environments. In interpreting and applying (e), this Court held that the factor "exclusively concerns whether the family unit will remain intact."[74] The use of day care has no bearing on the intactness of the family unit. By bringing day care and student status into factor (e), the trial court considered irrelevant information. That is legal error requiring reversal.

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72. Op, 8.

73. MICH. COMP. LAWS § 722.23 (1993 & West Supp. 1994).

74. *Fletcher*, 200 Mich. App. at 517, 504 N.W.2d at 690.

2. Maranda benefitted from her day care placement.

Unless it is shown to be detrimental to the child, a custodial parent's choice of child care environments is not relevant to a modification of custody. Without a showing of harm to the child, the mere choice to use one type of child care over another cannot alone rise to clear and convincing evidence needed to change custody. The trial court's decision to the contrary is without legal basis or any factual support and must be reversed.

Michigan law believes that using paid day care is an acceptable parenting choice. For example, the Child Support Guidelines specifically provide for allowances for child care costs as an element of support.[75]

Other states have specifically addressed day care use. In 1986, the California Supreme Court addressed precisely this issue in *Burchard v. Garay*.[76] The court specifically rejected a decision that "care by a mother who, because of work and study, must entrust the child to daycare centers and babysitters, is per se inferior to care by a father who also works, but can leave the child with a stepmother at home."[77]

The court found that status as a working mother must not be used against a parent in a custody dispute:

> [I]n an era where over 50 percent of mothers and almost 80 percent of divorced mothers work, the courts must not presume that a working mother is a less satisfactory parent or less fully committed to the care of her child. A custody determination must be based upon a true assessment of the emotional bonds between a parent and child . . . . It must reflect also a factual determination of how best to provide continuity of attention, nurturing and care. It cannot be based on an assumption, unsupported by scientific evidence, that a working mother cannot provide such care . . . . [A]ny presupposition that single working parents provide inferior care to their children will in

75. *See* FRIEND OF THE COURT ADVISORY COMMITTEE, MICHIGAN CHILD SUPPORT GUIDELINE MANUAL 22 (1994): "Work-related child care expenses include those expenses which allow the parent to look for employment, retain paid employment, or be enrolled in an educational program which will improve employment opportunities."

76. Burchard v. Garay, 42 Cal. 3d 531, 724 P.2d 486 (1986).

77. *Burchard*, 42 Cal. 3d at 540, 724 P.2d at 492.

> practice discriminate against women. Divorced men are more likely to remarry than divorced women, and far more likely to marry a nonworking spouse.[78]

Maranda is not a rarity because she receives care outside of the home by someone other than her mother. Maranda is among a significant majority of her peers: more than two-thirds of pre-school children in the United States between the ages of three and five receive care outside the home.[79] Preschool is common and proven to be beneficial to children.[80] If the trial judge's analysis that the use of day care itself is a clear and convincing reason to change custody, then over 440,000 children in Michigan[81] and millions of children in the U.S.[82] would be at risk of having their established home taken from them.

The fact is, Maranda thrived in her licensed day care setting in Ann Arbor. There was not even a hint that the child care arrangement approved by the University and chosen by Ms. Ireland was harmful to Maranda in any way. Even the lower court conceded that the day care "program at the U of M . . . apparently was appropriate and resulted in the child having a meaningful experience."[83] This finding in itself establishes that the court below committed clear legal error requiring reversal.

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78. *Burchard*, 42 Cal. 3d at 540, 724 P.2d at 492 n.10.

79. *New Report Explores Preschool Care and Early Education*, 22 CHILDREN TODAY No. 2, at 2 (1993) (citing report titled "Profile of Preschool Children's Child Care and Early Education Program Participation," US Dept. of Education).

80. *See Brief of Amici Curiae Child Care Law Center, et al.*, at 14–34.

81. See findings in *Kids Count: Child Care and Early Childhood Education in Michigan*, KIDS COUNT IN MICHIGAN, Sept. 1993, at 9. In 1990 more than 440,000 children under 6 required child care because their parents were in the labor force.

82. See findings of SANDRA HOFFERTH *et al.*, URBAN INSTITUTE REPORT 91-5, NATIONAL CHILD CARE SURVEY, 1990 27–33 (1991) (For example, in 1990 approximately 3.8 million children under 5 were primarily cared for in child-care centers; another 2.0 million received care in family child-care homes.). *Child Care and Development: Key Facts*, a publication of the Children's Defense Fund, Washington, D.C. 1994.

83. Op, 7.

3. The trial court erred by relying on broad, and incorrect, assumptions about paid child care and child development.

a. Blood relatives are not necessarily better caregivers just because they are related, and day-care providers are not "strangers."

There were no facts upon which the trial court could determine that a preschooler is better off with a blood relative than with a "stranger." Indeed, there could be none. Recent research shows that there are *no* benefits to relative care over nonrelative care in terms of quality.[84] The study found that "being *regulated* is more important to quality child care—while being *related* is much less important—than many parents believe."[85] Further, "[r]egulated providers are rated as more sensitive and observed to be offering more responsive care than non-regulated or relative caregivers . . . ."[86]

A corollary to the assumption that blood relatives provide better care than non-relatives is the characterization of paid care providers as "strangers."[87] The court below noted with disapproval that Ms. Ireland's plan for her daughter "necessitates the leaving of the child for a considerable portion of its life in the care of strangers."[88] Care providers are not strangers to the children for whom they care.[89] The trial court's elevation of "blood relative" care over "stranger" care is unquestionably reversible error.

b. Day care is good for children.

Nor was there any factual basis for the trial court's implicit assumption that day care is bad for children.[90] This characterization by the

84. ELLEN GALINSKY ET AL., THE STUDY OF CHILDREN IN FAMILY CHILD CARE AND RELATIVE CARE 1994 (Study by the Families and Work Institute).

85. *See supra* note 84, at 3.

86. *See supra* note 84, at 47.

87. Interestingly, the trial court's limitation of appropriate caregivers to blood relatives would eliminate stepparents as care providers.

88. Op, 8.

89. *See supra* note 84, at 5 ("children are not more likely to be securely attached to providers who are relatives than to nonrelatives"). For more on this issue, see *Brief of Amici Curiae Child Care Law Center, et al.*, at 14–17.

90. Susan Faludi, *The Kids Are All Right: Research Shows Our Bias Against Day Care is Unfounded*, UTNE READER, May/June 1993, at 68. (Responding to the "supposed and

lower court is based on widespread societal myths, not on any facts in the record or any valid legal standard. A trial court's conclusion that is based on a myth by its nature is reversible error. A plausible view of the evidence can be upheld,[91] one based on myth is not based on a view of any evidence, plausible or otherwise. Again, research disproves whatever notions the trial court may have regarding day care's harm to children. In fact, regulated day care has significant developmental benefits for children Maranda's age. Addressing a number of studies conducted over the last eight years, one author observed "[t]hese studies all suggest that children in daycare centers and preschool programs tend to be more socially skilled and intellectually advanced than children at home with their parents, sitters, or in [unregulated] day care homes."[92] The same researcher found that full time, professional day care ranked significantly higher in terms of benefits to children than did care provided at home with relatives.[93] A program comparable to the one Maranda attends was rated 5.5 on a 6.0 point scale evaluating children's verbal ability, cognition, creativity, social competence, cooperation, and social cognition, while care provided in the home by a relative was rated only 1.5.[94]

Finally, the benefits to children are not the only benefits of day care. For many families, child care is essential to family self-sufficiency. This is especially true for female-headed families. A parent's ability to pursue and complete her own education or job training—enabled by placing her children in day care—has direct and immediate consequences for the future welfare of her family.[95]

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much publicized day care child abuse 'epidemic,'" Susan Faludi cites a 1988 study conducted by the University of New Hampshire's Family Research Laboratory: "if there is an 'epidemic' of child abuse, it's in the home—where children are almost twice as likely to be molested as in day care.")

91. *See Fletcher*, 200 Mich. App. 505, 504 N.W.2d 684.

92. K. Alison Clarke-Stewart, *A Home is Not a School: The Effects of Child Care on Children's Development*, 47 JOURNAL OF SOCIAL ISSUES No. 2 at 105, 109 (1991).

93. Center care was defined as day care provided by regulated, educated providers—the category into which Maranda's program falls.

94. The findings of social scientists are echoed by parents. One article reports that 97% of women are "convinced that their child benefits from (daycare) because it is educational, contributes to personal development, and builds personal skills." Vivian Cadden, *How Kids Benefit from Child Care*, WORKING MOTHER April 1993, at 58. The same study found that mothers' "enthusiasm about the educational value of daycare does not carry over to their assessment of one-on-one care provided by nannies or relatives." *Supra*, at 61. *See also* Clarke-Stewart, *supra* note 92, at 108.

95. See findings in NICOLE POERSCH, GINA ADAMS, AND JODI SANDFORT, CHILDREN'S DEFENSE FUND, CHILD CARE AND DEVELOPMENT: KEY FACTS 4–5 (1994). *See also Brief of Amicus Curiae Child Care Law Center, et al.* 14–34.1.

There is no evidence whatsoever that Maranda was ill cared for in her program in Ann Arbor. There is no evidence she would be better cared for by Grandma Smith. The court's own finding that Maranda's day care program provided her with a meaningful experience, and testimony from a psychologist indicated that Ms. Ireland had chosen well for her daughter:

> Assuming Miss Ireland returns to Ann Arbor in late August or early September of this year and maintains the existing child care or day care arrangements that she had in October of 1993, those arrangements were organized very, very effectively, and I would endorse them if she can duplicate them.[96]

The sum total of the judge's findings regarding Grandma Smith as a caretaker were: "[s]he appears to be in good health and is of an age where she, in the court's opinion, could readily handle a small child."[97] The findings regarding Ms. Ireland's choice of day care were that it "apparently was appropriate and resulted in the child having a meaningful experience."[98] Even reading the court's two conclusions together in the light most favorable to Smith, the findings are neutral as to the care provided under either plan. And neutral evidence by its nature is not clear and convincing evidence that Maranda's best interests support a change in custody away from her lifetime home with her mother. The trial court therefore must be reversed.

B. The Trial Court Improperly Found Ms. Ireland's Educational Goals To Be A Reason To Take Maranda From Her Mother's Custody.

1. The court below wrongly determined that Ms. Ireland's status as a student necessarily made her an unsatisfactory custodian.

Again, there is no legal standard which justifies or any facts in the record at all which support the court's finding that "[t]here is no way that a single parent, attending an academic program at an institution as prestigious as the University of Michigan, can do justice to their studies

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96. T IIIB, 57.
97. Op, 7.
98. Op, 7.

and the raising of an infant child. There are not that many hours in the day."[99] Jennifer Ireland is a young parent facing the challenge of caring for her daughter while also pursuing her education full time. Many single parents devote their energies to education, employment, or a combination of the two. To say it is impossible to do both defies reality.

A sufficient factual basis would have been to demonstrate that every single parent at the University of Michigan either flunked out of school or was charged with child neglect. There was no such record evidence, nor could there have been. What the trial court did was evaluate Ms. Ireland's time outside the home differently than Smith's. This is clear legal error and abuse of discretion. The *Burchard* concurrence clarified that there was an abuse of discretion in the lower court's "assumption that there is a negative relation between a woman's lack of wealth and her need or desire to work and the quality of her parenting. . . ."[100] That court stated:

> When it is no longer the norm for children to have a mother at home all day, courts cannot indulge the notion that a working parent is ipso facto a less satisfactory parent. . . . The presumption is inappropriate because the relationship between maternal employment and the "presumed facts" about the child's best interests is not supported by reason or experience . . . .[101]

Here, Ms. Ireland is being penalized for choosing to place her child in daycare while she pursues her academic goals. Smith was accorded a presumption that he need not sacrifice his outside activities, whether work or football, based on his gender and based on his ability to leave Maranda with his mother while he is not at home. This double standard is contrary to law. The *Burchard* case is again instructive:

> The double standard appears again where, as here, the father is permitted to rely on the care which someone else will give to a child. It is not uncommon for courts to award custody to a father when care will actually be provided by a relative, second wife, or even a babysitter. (citation omitted) However, the implicit assumption that such care is the equivalent of that which a nonworking mother would provide "comes dangerously

99. Op, 8.

100. *Burchard*, 42 Cal. 3d at 541, 724 P.2d at 493.

101. *Burchard*, 42 Cal. 3d at 542–43, 724 P.2d at 493–94.

> close to implying that mothers are fungible—that one woman will do just as well as another in rearing any particular children."[102]

In essence, the lower court here is using the Child Custody Act as a screen with which to hide "outmoded notions of a woman's role being near hearth and home. . . ."[103] Applying such a penalty to a working student mother is reversible error.

2. The lower court misapplies "stability" to mean only geographic stability.

The decision of the lower court imports an irrelevant consideration—namely day care—into its consideration of factor (e). This alone is error mandating reversal. But the court further erred by valuing geographic over emotional stability and in finding that custody of Maranda should go to Smith under that wrong interpretation. That error is contrary to law and an abuse of discretion which this court must reverse.

The question of stable place versus stability and constancy in relationship has been considered by Michigan courts and always in favor of affirming and supporting the *relationship*. In *Baker*, the Michigan Supreme Court awarded custody to the mother who lived in Colorado, rather than to the father who lived in Michigan with his parents, despite the fact that the child was more at home geographically in Michigan.[104] In *DeGrow*, this Court stated: "[t]he definition of a[n] [established] custodial environment elaborated on in *Baker*, *supra*, emphasized the continuity and strength of an established relationship between a custodian and a child. The custodial environment is the family unit which cannot be destroyed by a simple change in geographic location."[105]

The court properly found that Maranda has an established custodial environment with her mother, which necessarily means that the relationship between Maranda and her mother is stable, regardless of where they

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102. *Burchard*, 42 Cal. 3d at 545–46, 724 P.2d at 496 (citing N. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982)).

103. *Burchard*, 42 Cal. 3d at 542, 729 P.2d at 493 (citing Gulyas v. Gulyas, 75 Mich. App. 138, 254 N.W.2d 818 (1977) (Riley, J., dissenting)).

104. *Baker*, 411 Mich. at 573, 309 N.W.2d at 533.

105. DeGrow v. DeGrow, 112 Mich. App. 260, 266–67, 315 N.W.2d 915, 918 (1982). *See also* Adams v. Adams, 100 Mich. App. 1, 298 N.W.2d 871 (1980); Hutchins v. Hutchins, 84 Mich. App. 236, 269 N.W.2d 539 (1978).

reside. No similar finding was made regarding Maranda's relationship with her father: his award of custody by the trial court is based on geography—on the predicate that he will reside with his parents and that his mother will provide care for Maranda.

Applied correctly, factor (e) would have weighed in Ms. Ireland's favor. Permanence as a family unit means more than just geography. It means the desire and the intent to create a family which will endure through material changes, through inconvenience, through relocation, through financial hardship, and through lifetimes. It is more than clear that Ms. Ireland had both the intent and the desire and that she took all possible steps to ensure that the family of herself and Maranda would endure through the many changes and challenges they faced. The trial judge himself found "that the mother looks to the future to have this relationship continued on a permanent basis."[106] Smith can claim no such record. He has made no comparable effort to establish himself and Maranda as a permanent family unit. For the first year of his daughter's life, Smith did not see her at all. He started to see her when he started dating Ms. Ireland. It was not until around Maranda's first birthday that Smith saw his daughter for the first time and began to reconsider his decision about adoption. Smith has never voluntarily provided material or financial support for his daughter. In fact, Smith has repeatedly petitioned the court to ensure that his court-ordered support be as low as allowable by law. While the existence of a bank account, purportedly for Maranda, is laudable, that money has not been used by Smith to provide for his daughter or pay the arrearages on his court-ordered child support or Maranda's medical bills. During the time Ms. Ireland was caring for Maranda and establishing herself and her daughter as a family unit, Smith was playing football and his many other sports. He has made no effort, whether it be emotional, psychological, or financial, to establish himself and Maranda as a family unit.

The Child Custody Act recognizes that parent-child relationships, not geographic locations, are critical to custody determinations. Under the lower court's misguided analysis, any child whose parent is in the military and subject to periodic moves would seem to be in an unstable environment, no matter how loving, caring, concerned, and conscientious her parent or parents. Any child who summers in one home and winters in another with his parents would be deemed to be in an unstable environment regardless of his relationship with his parents or his parents'

106. Op, 3.

ability to care for him. And joint physical custody would never be an option in any case, despite the Child Custody Act's provision for such an arrangement.[107]

For Maranda, "instability" would not come from being in a different bedroom an hour's drive from where she was born: it would come from being taken from her mother's custody. By valuing geography over Maranda's key relationship with her mother, the court below acted contrary to the law and facts and erred in its transfer of custody. That decision must be reversed.

3. The trial court's view of "best interests" evaluates only the short term.

The trial court's decision is contrary to law, because it looks only to the next one or two years and not to the long-term best interests of Maranda. In order to change custody, there must be more than a marginal improvement in the child's life.[108] The trial court looked only at the time between now and when Maranda starts school, at which time she will not be spending the majority of her day in the home. Instead, she will be "supervised a great part of the time by strangers" such as kindergarten and other grade school teachers. If the trial court's decision were actually the law, school itself would be seen as undesirable for children.

Had the trial court looked at Maranda's long-term interests, it would had to have determined on the record that Ms. Ireland provides the best opportunity for a better life. The record shows that Smith lives with his parents, has a part-time job doing yard work, takes a few classes at a community college with no real goal in mind, and has no plans to change his life for the indefinite future. Ms. Ireland, on the other hand, excelled in school, earned scholarships to one of the top universities in the nation, has created her own home and life with Maranda in Ann Arbor while working toward her degree, and has plans for an advanced degree in business or law. Ms. Ireland is working to create the roots for a successful life for herself and her daughter. As Maranda watches her mother study and work hard on a daily basis while she grows up, Maranda will learn by example and will have a firmer foundation on

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107. MICH. COMP. LAWS ANN. § 722.26a (West 1993).

108. Harper v. Harper, 199 Mich. App. 409, 411–12, 502 N.W.2d 731, 732 (Mich. Ct. App. 1993).

which to make a success of her own life. By ignoring the long-term benefits for Maranda of being with her mother, the trial court committed reversible error.

III. A TRIAL COURT CANNOT DISMISS FACTOR (K) (DOMESTIC VIOLENCE) AS "SUPERFLUOUS."

The trial court committed clear legal error by failing to correctly apply MCL 722.23(k) regarding domestic violence. The trial judge stated: "[t]he issue of domestic violence is not pertinent here. The parties in their youthful way apparently crashed and mauled one another. It is all superfluous and can have no bearing on the issue of custody."[109] Under the statute, the judge does not have the discretion to treat the violence as not pertinent to Maranda's best interests. It is reversible error for the court to have ignored factor (k).

A. Domestic Violence Is A Mandatory Factor.

Before the Child Custody Act (MCL 722.23) was amended in 1993, judges were allowed, but not required, to consider domestic violence when evaluating the best interests of a child. In recognition of the tremendous toll domestic violence wreaks upon children, the Michigan Legislature amended MCL 722.23 to require consideration of "domestic violence, regardless of whether the violence was directed against or witnessed by the child." The amendment "explicitly require[d] a judge deciding on custody of a child to consider and evaluate the existence of any domestic violence in the home of the prospective custodial parent."[110] In other words, the amendment made consideration of domestic violence *non-discretionary.*

There have not yet been any appellate opinions in Michigan reviewing factor (k). Illinois has had a similar factor in its custody statute for nearly ten years: a court must consider "physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or . . . another person."[111] In fact, the presence of domestic violence can be *the decisive factor* in the court's determination.[112]

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109. Op, 10.

110. House Legislative Analysis Section, First Analysis, House Bill 4064, at 1 (1993).

111. ILL. ANN. STAT. Ch. 750, para. 602(a)(6) (Smith-Hurd 1993).

112. *See* Wiley v. Wiley, 199 Ill. App. 3d 169, 176, 556 N.E.2d 809, 814 (1990).

Illinois, like Michigan, recognizes that a battering parent hurts children even when the children have not yet been directly physically battered. A court "need not wait until [the child] herself becomes the victim of physical abuse nor wait until the repeated beatings of her mother cause so much emotional damage that [the child] is permanently affected."[113] Michigan case law must confirm the legislative mandate and refuse to allow trial courts to disregard domestic violence as a best interests consideration.

B. Domestic Violence Includes Emotional As Well As Physical Abuse, And Both Hurt Children.

Smith and his parents perpetrated domestic violence against Ms. Ireland. Domestic violence or battering is characterized by an entire pattern of controlling behaviors punctuated by outbursts of physical violence.[114] Though the criminal law often focuses only on the outbursts of physical violence,[115] social scientists and intervention agencies are clear that controlling behaviors, such as verbal abuse, refusal of financial support, and control over a victim's daily life and routine are an integral part of a batterer's assaultive pattern. Therefore, a criminal conviction for a single assault does not necessarily determine the existence or effect of domestic violence. Victims of domestic violence suffer harm from the batterer's harassment and control measures as well as physical and emotional harm from the outbursts of physical violence. Children of batterers are also harmed physically, emotionally, and psychologically by the batterer's use of a cycle of power, control, and abuse. The American Bar Association ("ABA") recognizes that children suffer harm from a batterer's controlling behaviors. Specifically, the ABA recommends:

> [w]here there is proof of abuse, batterers should be presumed by law to be unfit custodians for their children. There are three characteristics of such unfit custodians. First, the abuser has ignored the child's interests by harming the child's other parent. Second, the pattern of control and domination common to

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113. *In re* A.D.R., 186 Ill. App. 3d 386, 393–94, 542 N.E.2d 487, 492 (1989).

114. *See* LARRY L. TIFFT, BATTERING OF WOMEN: THE FAILURE OF INTERVENTION AND THE CASE FOR PREVENTION 18 (1993).

115. Michigan law recognizes that a batterer's terrorism and assaultive behavior may take non-physical forms. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.411h–.411i (West Supp. 1995) (anti-stalking law).

> abusers often continues after the physical separation of the abuser and victim. Third, abusers are highly likely to use children in their care, or attempt to gain custody of their children, as a means of controlling their former spouse or partner.[116]

The evidence presented at trial supports the finding that Smith and his parents engaged in a pattern of domestic violence which was harmful to Ms. Ireland and Maranda.

This Court cannot lightly ignore that Maranda is at a significant risk of suffering physical abuse perpetrated by her father. In 1985, one study found that sixty-three percent of abusive partners battered their children as well.[117] Another study shows that fifty percent of batterers use violence more severe than pushing, grabbing, spanking, slapping, or throwing their children more than twice a year as opposed to seven percent of nonviolent husbands.[118] The Michigan Legislature was expressly concerned with the fact that "various studies have estimated the percentage of wife beaters who also abuse children in the home to be from 45 to 70 percent. In contrast, only about 20 percent of batterers are violent to individuals outside the home, and may appear quite respectable to the casual judicial observer."[119]

Even if Smith does not assault Maranda directly, it is extremely likely that she will watch him batter another partner besides her mother. The likelihood that a batterer will perpetrate violence in a new relationship ranges anywhere from fifty-seven to eighty-six percent.[120] A child who witnesses abusive behavior will learn that violence, stalking, intimidation, and control are an appropriate mode of interaction with loved ones. The result is that "[w]hen toddlers witness violence, it interferes with their ability to develop autonomy, and they begin to develop shame and doubt their own abilities to do things. Regressive behavior and somatic complaints are common during this time."[121] When a preschooler is exposed

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116. HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN 13 (1994).
117. Jean Giles-Sims, *A Longitudinal Study of Battered Children of Battered Wives* 34 J. APPLIED FAM. & CHILD STUD. 205–10 (1985).
118. Murry A. Straus, *Ordinary Violence, Child Abuse, and Wife-Beating, in* THE DARK SIDE OF FAMILIES, (David Finkelhor et al. eds., 1983).
119. House Legislative Analysis Section, *supra* note 110, at 1.
120. Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOCIAL WORK 51, 53 (1994).
121. Martha Wingerd Bristor, *Growing Up Amidst Violence: The Impact on Children*, MICH. FAM. L.J., Aug. 1994, at 44.

to domestic violence, she may become afraid and be unwilling to explore new opportunities.[122] She may also attempt to "stop the fight by diverting [her] parents' attention to other matters, perhaps even directing the anger toward [herself]."[123] At school age, the child experiencing her father's violence toward her mother will have declining school performance, present a flat affect, and manifest feelings of inferiority.[124]

In addition, Maranda's relationship with her mother will suffer if she is placed in the custody of her mother's assailant. Abusers often try to control ex-partners through the manipulation of the parties' children.[125] Indeed, bringing a custody action itself is a means of perpetuating that control. An abuser may try to control a partner by having the children act as "spies,"[126] which is one of the reasons that the American Bar Association has recommended that there be a presumption against custody with batterers.[127]

The trial judge committed clear legal error when he labeled the evidence of violence "superfluous," and "not pertinent." Trial judges do not have that discretion.

Despite his statement that domestic violence was "not pertinent," the trial judge did find that "the parties in their youthful way apparently crashed and mauled each other." This characterization by the judge that the parties were somehow being like playful puppies is a finding against the great weight of the evidence as well as a view of the evidence that is not plausible.[128] This court must look at the evidence which was before the trial court when it evaluated factor (k). A proper application of factor (k) will lead this court to conclude that MCL 722.23 weighs in Ms. Ireland's favor. The record shows clear evidence of a pattern of assaults, stalking, harassment, and controlling behavior perpetrated against Ms. Ireland by Smith and his agents, and that Smith and his parents expressed no remorse nor intent to stop those behaviors. If the trial court's custody decision is enforced, factor (k) will be a nullity and Maranda's custodial environment will be pervaded by battering behavior which will pose a threat to her physical, psychological, and emotional well-being. The lower court must be reversed.

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122. Bristor, *supra* note 121, at 44.
123. Bristor, *supra* note 121, at 44.
124. Bristor, *supra* note 121, at 44.
125. Saunders, *supra* note 120, at 53.
126. Saunders, *supra* note 120, at 53.
127. *See* DAVIDSON, *supra* note 116.
128. *Fletcher*, 200 Mich. App. at 512, 504 N.W.2d at 687.

C. Smith's Tactics Are Typical Of Batterers' Methods Of Power And Control Over An Intimate Partner.

In late 1992 and early 1993, Smith assaulted Ms. Ireland twice within a week, both times in response to a disagreement over visitation.[129] Smith admitted that on December 24, 1992, he assaulted Ms. Ireland and "grabbed her by her arms." Ms. Ireland then tried to free herself from him by biting him on the wrist.[130] Twenty-month old Maranda saw her father assault her mother.[131] Ms. Ireland reported this assault to the police.[132]

Ms. Ireland testified that just a week later, on January 1, 1993, Smith came to her friend's home and "pushed me up against the wall and pulled me back down the stairs; tried to grab me [sic] arm and hands."[133] Smith's own testimony revealed his threatening behavior toward Ms. Ireland. Smith testified that he went to Ms. Ireland's home and was told that she was gone.[134] He then tracked her down at her friend's home. While Smith's father waited in the driveway, Smith entered the home.[135] Smith testified that, "Jenny was gone. Obviously she knew what was going on and felt that she was in trouble. Jennifer ran into the basement and tried to lock herself into a bathroom."[136] Smith himself told the court that he knew that Ms. Ireland was afraid of him.

After she fled to the basement, Smith testified that he followed her, pushed open the bathroom door, and accused her of not giving him visitation. Smith said that when Ms. Ireland tried to escape, he "did stand in her way so she couldn't run again."[137] In her continued attempts to escape, Ms. Ireland pushed Smith to the stairwell, and Smith admitted that "I did push her back from me." He then claimed that Ms. Ireland started up the stairs and fell down while he was behind her.[138]

This is not a question of "he said, she said." Both versions show Smith's assaultive and threatening behavior toward Ms. Ireland. Ms.

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129. T IIIA, 218, 222–225. Both assaults were promptly reported to the appropriate police agencies, weeks before any action regarding Maranda was filed in Circuit Court.
130. T IIIA, 219.
131. T IIIA, 219.
132. T I, 86.
133. T I, 86.
134. T IIIA, 221–222.
135. T II, 30; IIIA, 222.
136. T IIIA, 223.
137. T IIIA, 223.
138. T IIIA, 223–224.

Ireland testified that Smith pulled her down the stairs. Under Smith's version of the assault, Ms. Ireland fell down the stairs in her frantic attempt to escape from Smith after he had purposely trapped her in a basement bathroom.

Smith's violence was emotional as well as physical: he testified that he made a surreptitious tape recording of this event so that "Jennifer . . . couldn't twist anything around, I would have something backing me up."[139] His failure to produce this tape at trial or to any police investigator suggests that in fact the tape recording would have verified his assaultive and threatening behavior toward Ms. Ireland on January 1, 1993.[140] Even more importantly, this secretive tape recording of his encounter with his child's mother (before *any* litigation had been instituted by either party) is yet another example of Smith's attempts to harass and control his former partner.

Although the trial judge implied that the assaults were mutual, the evidence shows that Smith assaulted and terrorized Ms. Ireland. The testimony demonstrates a concrete pattern of controlling and abusive behavior by Smith when he does not get what he wants from Ms. Ireland. The trial court disregarded and diminished the testimony about the assaults apparently because of an erroneous and unsubstantiated myth that women make false charges of violence in order to win custody cases. Ms. Ireland reported Smith's assaults in a timely fashion to the local police agencies before she brought the complaint for child support, which Smith countered with a custody motion. Ms. Ireland's realization that discussions with Smith were likely to end in assaults caused her to turn to the court system for assistance and intervention.

The trial court also failed to recognize that Smith's physical outbursts are only a portion of the violence which he perpetrated and continues to perpetrate against Ms. Ireland and to which he subjects Maranda. Social workers with Domestic Abuse Intervention Project in Duluth, Minnesota have identified typical behaviors exhibited by batterers in order to exert power and control over their current or former

139. T IIIA, 225.

140. This Court is entitled to draw a negative inference against Smith for his failure to produce the tape recording. *See* Fontana v. Ford Motor Co., 278 Mich. 199, 270 N.W. 266 (1936); Dowagiac Mfg. Co. v. Schneider, 181 Mich. 538, 148 N.W. 173 (1914).

partners.[141] The characteristics described in the Duluth Project's "Power and Control Wheel" provide a useful road map of Smith's behaviors in the present case.[142]

1. "Using Isolation."

Smith and his parents consistently stalked Ms. Ireland and her family and evidenced no remorse nor recognition that their behavior was threatening as well as illegal. Charles Smith, Appellee's father, testified specifically:

Q: Do you ever drive by Jennifer's house?
A: Every night.
Q: And what time?
A: Usually after work.
Q: What time would that be?
A: Somewhere between 11:00 and midnight.[143]

On cross-examination, the witness explained his daily drive-bys:

Q: Today you testified that you drive by the house every single day?
A: Every single day I work.
Q: Why?
A: Just more or less to find out who was going over there; what was going on.[144]

* * *

Q: You know if Jennifer goes to church?
A: Since we started the trial, yes.
Q: How do you know that?
A: Because I have been sitting around the church for a couple years . . .
COURT: Is that your Parish, Mr. Smith?

141. Tifft, *supra*, note 114, at 18–20.
142. *Reprinted in* TIFFT, *supra* note 114, at 20.
143. T III, 302.
144. T III, 330.

A: No, it is not.
COURT: You went over just to check up on them; is that the idea?
A: Yes. More or less, yes, your honor.[145]

Grandpa Smith also admitted following Ms. Ireland's mother.[146] Later, Deborah Smith acknowledged her own stalking:

> My husband drives by Jenny's at night on the way from work and if I'm asleep he will leave me a note or wake me and let me know Matt is there. It's like 12:00, 12:30 at night, and I am an early riser so sometimes 6:15 and 7:30 I would drive by to see if the car is still there.[147]

She testified that she drove past Ms. Ireland's workplace repeatedly.[148] One morning, Smith and his mother eyed the Ireland home, called the Ireland residence from a phone booth, returned to the home, and laid in wait for Ms. Ireland to come out of her house.[149] Grandma Smith admitted that she was aware that this stalking behavior was upsetting to Ms. Ireland when she testified, "she wants to stop me from doing it because she doesn't want us to know what's going on."[150] Through these statements, Smith and his parents blatantly admitted that they intended to keep track of Ms. Ireland's every move on a daily basis. Two separate stalking complaints were filed against all three of the Smiths during the course of the trial, but they refused to curtail their behavior or to recognize that it was controlling and assaultive.[151]

In addition to following her and monitoring her home, Smith and his mother tape recorded conversations with Ms. Ireland and her mother without their knowledge. Smith testified that he recorded Ms. Ireland on January 1, 1993, while he attacked her.[152] Deborah Smith testified that she surreptitiously tape recorded Ms. Ireland's mother on November 14, 1993.[153] Smith and his mother are open and notorious about their

145. T III, 304.
146. T IIIA, 307–308.
147. T IIIA, 146.
148. T IIIA, 157.
149. T IIIA, 157.
150. T IIIA, 138.
151. T III, 301; IIIA, 4.
152. T IIIA, 225.
153. T IIIA, 162.

stalking behavior and their attempts to monitor and control Ms. Ireland. It was impermissible error for the trial judge to dismiss this evidence in his evaluation of the Smith's proposed custodial environment.

2. "Using Children."

Smith called Protective Services twice to accuse Ms. Ireland of abuse or neglect.[154] The agency took no action because they believed Smith was only inventing accusations for the custody case.[155] The trial judge acknowledged that the evidence of child abuse was not credible.[156] Unfortunately, the trial court failed to recognize that Smith's accusations were a battering tactic used to threaten and control Ms. Ireland, which must be evaluated under MCL 722.23(k).[157]

3. "Using Economic Abuse."

Batterers commonly withhold support in order to impoverish and punish their former partners. Smith claims that he was putting money in a bank account for Maranda.[158] However, he made no support payments until the court required him to do so, by which time Maranda was nearly two years old. Smith's use of this battering tactic shows he is unable to put his daughter's welfare ahead of his need to control his former partner.

4. "Using Emotional Abuse."

When a battered woman seeks counseling, this often is presented as evidence of emotional instability and parental unfitness. Through these accusations a batterer intends to dissuade his victim from seeking help so he can continue to control her. At trial, Smith's counsel attacked Ms.

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154. T IIIA, 187.

155. T IIIB, 31.

156. T IIIB, 30.

157. Another example illustrates Smith's use of this tactic: rather than cooperate with his former partner about their daughter's needs, Smith concentrated his efforts on attempting to manipulate and control Ms. Ireland. Mrs. Smith testified that Smith would often draw barely perceptible lines on Maranda's medicine bottles to monitor whether Ms. Ireland was giving the minor child medicine. T IIIA, 134. In other words, Smith was more concerned with "trapping" Ms. Ireland and collecting "evidence" against her than with ensuring proper medical treatment for his daughter.

158. T IIIA, 204–205.

Ireland for seeing a psychiatrist and then implicitly suggested that Ms. Ireland was taking Prozac.[159] In essence, Smith would have the trial court believe that a teenage mother who is battered by her former partner should be punished for seeking help.

At the same time, Smith is more interested in how he thinks things will look in court than he is with the effect that the transfer would have on Maranda. His refusal of transition counseling shows control of Ms. Ireland rather than concern for Maranda.[160] For Smith, controlling his ex-partner has and will always take priority over his daughter's financial, physical, and emotional needs.

5. "Minimizing, Denying, Blaming."

Consistent with typical battering behavior, Smith blames Ms. Ireland for his violence. Smith claimed that he grabbed Ms. Ireland by the arms because she wanted him to leave.[161] He refused to leave her home when asked to do so. He explained that refusal by saying that he wanted her to face her problems.[162] As to the assault on January 1, 1993, he testified that he "had" to physically block Ms. Ireland's escape from the bathroom to force her to listen to his accusations.[163] He also claimed that it was Ms. Ireland's own fault that she fell down the stairs; in reality, even if Smith did not drag her down the stairs, she fell in her frantic attempt to escape him.[164]

Another battering behavior especially relevant to the present case is that a batterer will "raise the attributes of power through . . . withdrawing, through withholding emotional support or himself."[165] This perfectly describes Smith's method of punishing Maranda. Smith testified that he disciplines Maranda by telling her "Daddy doesn't like that."[166] Additionally, Mrs. Smith testified that "when she does something wrong all he has to do is say, 'Maranda, Daddy is not happy with what you did' and that just breaks her heart. She doesn't want that to happen. Usually,

159. T I, 27.
160. T V, 15–17.
161. T IIIA, 218.
162. T IIIA, 218. Apparently, he at least acknowledges that he is her problem.
163. T IIIA, 223.
164. T IIIA, 223–224.
165. TIFFT, *supra* note 114, at 35.
166. T IIIA, 237.

that's all it takes."[167] Smith explained his controlling behavior by saying "it seems to be real effective because she always wants me to be happy. That's the big thing for her for me to be happy and to—it's a big thing for me."[168] Smith's tactics illustrate the value he places on teaching Maranda how to be a victim. As an adult, Ms. Ireland had the ability to understand this manipulation; Maranda does not. Maranda is learning that her only job is to keep her father happy. He responded to Ms. Ireland's insubordination (valuing other people, such as her own mother, more than him)[169] with violence and efforts (such as stalking) to maintain control. If Smith is ever responsible for Maranda all day every day, rather than a few hours at a time during visitation at his parents' home, he is likely to become frustrated if Maranda doesn't succeed in keeping him happy. When he became frustrated with Ms. Ireland, he responded with violence; it is likely that he will respond to Maranda with violence as well.

Through his own direct actions, his parents' actions, and his misuse of the court system, Smith has assaulted, intimidated, stalked, threatened, and harassed Ms. Ireland. Ms. Ireland has attempted to protect herself and her daughter by avoiding contact with Smith, filing police reports, and using the courts instead of risking assaultive negotiations. These actions have limited the success and number of Smith's direct physical assaults, yet he is no less of a batterer, because "[b]attering is the pattern of intimidation, coercion, terrorism or violence, the sum of all past acts of violence and the *promises of future violence* that achieves enhanced power and control for the [batterer] over [the] partner."[170] His violent and controlling behavior, as well as his refusal to address his battering, fits squarely within the dangers contemplated by factor (k) of the best interests test. That factor should weigh in favor of Ms. Ireland and prevent any finding of clear and convincing evidence that Maranda could ever be placed safely in her father's physical custody.

If physical custody of Maranda were to be given to Smith, Maranda would be raised by a batterer. She would likely suffer physical and emotional abuse at the hands of her father,[171] she would observe her father's abuse of subsequent partners, and her relationship with her

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167. T IIIA, 119.

168. T IIIA, 237.

169. T IIIA, 214.

170. TIFFT, *supra* note 114, at 19.

171. His methods of discipline demonstrate that he in fact already has emotionally abused Maranda.

mother would be poisoned by stalking and suspicion. These are the reasons the Michigan Legislature *mandated* that trial judges consider domestic violence; these are the reasons that Appellant must not be awarded custody. The error of the lower court requires reversal.

IV. THERE IS NO FACTUAL OR LEGAL BASIS TO EFFECTIVELY AWARD CUSTODY TO NON-PARTIES.

The trial judge's decision is a *de facto* award of custody to Smith's parents. Rather than decide which *parent* will have physical custody of Maranda, the trial court decided that neither parent met his ideal of a custodian for Maranda, so he looked outside the law and found his ideal in Grandma Smith.[172] The trial judge's *de facto* award of custody to Smith's mother is a palpable abuse of discretion, clear legal error, against the great weight of the evidence, and mandates reversal.

A. Smith's Parents Are Not Parties, And Cannot Be Awarded Custody.

Under well settled Michigan law, Defendant's parents have no standing to either sue for custody of Maranda or intervene in this case. The Michigan Supreme Court has prohibited original third party complaints for custody in a Circuit Court.[173] By elevating Smith's parents to the status of *de facto* parties, and then essentially granting them custody of Maranda, the trial judge allowed third parties with no rights in the case to interfere with Ms. Ireland's and Maranda's rights to the natural parent-child relationship.[174] That elevation of Smith's parents is reversible error.

B. The Trial Court Evaluated Smith's Parents As Custodians, Rather Than Smith.

The trial court clearly anticipates the paternal grandparents as the primary caregivers of Maranda if Smith has custody. "The paternal

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172. T IIIB, 610.

173. *In re* Clausen, 442 Mich. 648, 682, 502 N.W.2d 649, 663–64 (1993); Bowie v. Arder, 441 Mich. 23, 490 N.W.2d 568 (1992); Ruppel v. Lesner, 421 Mich. 559, 364 N.W.2d 665 (1984) ("It is not enough that a person assert to be a 'contestant' or 'claim' a right to custody with respect to a child. . . . The Court of Appeals has correctly read our decision in *Bowie* as requiring the existence of some substantive right to custody.").

174. *Clausen*, 442 Mich. at 686–87, 502 N.W.2d at 665–66.

grandparents have made a very adequate and suitable place for the grandchild."[175] "[Smith's] parents would welcome the minor child to *their* home."[176] There is no discussion as to what Smith alone has done or has not done, or what he is capable of doing, to support or care for Maranda. The trial judge treats Smith's parents as parties and thus avoids a discussion of what each actual *party* has or has not provided. This substitution of Smith's parents for the real party, Steven Smith, allows the trial judge to bypass consideration of Smith's nonsupport of his child, which is clear legal error and an abuse of discretion mandating reversal.

The court's opinion leaves no doubt that the court decided to change custody on the grandparents' willingness and ability to financially support Maranda. On cross-examination, Ms. Ireland was asked:

> Q: If the Court were to award custody of Maranda to Steven, he is living with his parents, *would you say that his parents would be able to provide, with him, good home and health care for Maranda*?
> A: His parents might be able to support Maranda and provide for Maranda because Steven can't provide what they can provide for her. . . .[177]

Smith's mother testified about her and her husband's financial support of Maranda:

> Q: Have you and your husband ever paid any expenses or bills for Maranda?
> A: Yes. [. . .]
> Q: What kind of things did you buy?
> A: Everything that a child needs. We bought a highchair, we bought a couple of car seats, we bought a youth bed, all of her—well, we would split her clothes.[178]

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175. Op, 5.
176. Op, 7.
177. T I, 144–145 (emphasis added).
178. T IIIA, 104–105.

Craig Smith [Grandpa Smith] was questioned along similar lines.[179] Defendant's Exhibit D is a collection of receipts purportedly totalling $5,743.79 for items Smith's parents bought for Maranda between April of 1992 and May of 1994.[180]

The grandparents' willingness and ability to provide financial support for Maranda is irrelevant in this custody action.[181] The proper legal question is not whether a housewife who is not employed outside the home is the ideal custodian for Maranda; the question is whether Smith has demonstrated by clear and convincing evidence that the custodial environment should be changed. He has not. Though the testimony may well show that the grandparents are willing to take care of Maranda,[182] the family unit to be evaluated under factor (e) is *not* Maranda and her grandparents, but rather Maranda and her father. By substituting Smith's parents into the equation, the trial court committed reversible error.

The trial judge did not consider *Smith's* "capacity and disposition" to provide support for his daughter. The trial judge states that "this suit was filed in order to *force* the defendant into making some form of monetary payment to assist the raising of the child."[183] The judge presumed Smith's inability to meet his financial responsibilities and ignored the fact that Smith has an obligation to provide support for his child and has made little or no effort to meet his obligation. Smith testified he has a job, and a bank account, purportedly for Maranda.[184] Smith has never voluntarily contributed to his daughter's support and, according to the Friend of the Court records, owes child support and medical expense arrearages for Maranda. The trial judge merely substituted Smith's parents for Smith. Had the trial judge considered the proper evidence, he would have kept Maranda in her mother's home.

Given the clarity of Michigan law regarding third-party custody, the trial judge's insertion of Smith's parents into the best interests evaluation

179. T III, 316–317.

180. T IIIA, 110–112.

181. Additionally, their voluntary financial support of their granddaughter is *not* dependent upon Smith having physical or legal custody, as the court seemed to think. They could help support Maranda no matter who is the custodian; they have chosen not to provide direct support to Maranda while she is in her mother's custody.

182. T III, 311–312; T IIIA, 125–126, 128; T IIIB, 24.

183. Op, 5 (emphasis added).

184. T IIIA 189–192, 204–207; Exhibit I. Smith and his parents are all named on the bank account.

and his *de facto* award of custody to Smith's parents was a clear legal error and an abuse of discretion. The trial court must be reversed.

V. THE TRIAL COURT'S DECISION WAS INFECTED WITH AN IMPERMISSIBLE BIAS AGAINST WORKING MOTHERS AND IN FAVOR OF "TRADITIONAL" TWO-PARENT FAMILIES.

By its nature, a custody case is about which single parent is the better custodian for a minor child. The traditional, mom-and-dad, two parent family is not part of the custody dispute equation. The expectation that it should be part of a custody case, and the assumption that it is always necessarily the better alternative, hurts single mothers who cannot meet that ideal of a traditional, full-time, stay at home, non-working mother.

In this case, the trial judge did not make his custody determination on the basis of the parties before him. The trial judge based his determination on what he thought the "ideal" family should look like. In his application of the guidelines, the trial judge was not guided by factors (a)–(k), he was guided by his preference for the traditional two-parent family. Because Smith's parents looked most like the "ideal" family, he awarded custody to them. In the first paragraph of his opinion the trial judge describes Ms. Ireland as "an unmarried person."[185] Nowhere does the trial judge apply similar language to Smith. While discussing Ms. Ireland's future care arrangements for Maranda, the trial judge states: "[t]he mother's program would require that the child be in day care. . . . It would be the mother's intention to continue this on until such time as she either graduates, as previously stated, *or her marital circumstances change.*"[186] The trial judge is nowhere as preoccupied with Smith's marital status. Ms. Ireland's family is denigrated in comparison to the nuclear family preference. As the trial judge describes Ms. Ireland's family, "the plaintiff, her mother and sister, have constituted a support group for the child." They are not even accorded the status of family.[187] There is a double standard applied, to Ms. Ireland's detriment. Ms. Ireland is judged by a standard of single parenthood wherein single parents are presumed to be bad. It is clear from the court's decision that the operative presumption applied to single parents, especially those attending a university, is that they are neglectful—neglect which can only be offset by the presence

185. Op, 1.
186. Op, 7 (emphasis added).
187. Op, 2.

of the second parent. Whether based on a bias against day care, teenage mothers who work hard to attend college and better their lives and the lives of their child, or an outmoded view of what a mother should do and be, the trial court's decision is in error and must be reversed.

The trial judge's narrow definition of family is also infected by impermissible gender bias. In 1989, the Michigan Supreme Court Task Force on Gender Issues in the Courts issued its final report. The Report identified five "stereotypes that influence some judges and disadvantage mothers." Four of those five stereotypes are evident in the lower court's opinion:

> a. Fathers who exhibit any interest in parenting should be granted custody despite years of primary caretaking by mothers.
>
> b. Women who place great emphasis on careers . . . are sometimes considered less fit to be awarded custody than men who place a similar emphasis on their careers.
>
> c. Women's . . . social relationships are sometimes judged by a stricter standard than are men's.
>
> d. When judges look to financial status or the presence of a stay-home mother as a factor in deciding custody, the lower post-divorce economic status of women—caused in part by inequitable maintenance, property and child support awards—disadvantages the mother seeking custody.[188]

The Task Force recommended that "[e]ducational programs for judges should emphasize that the 'best interest' of the child should specifically relate to the individual parenting ability of each party and not the societal role placed upon their gender."[189] The gender bias in the trial court's decision is palpable and consistent with pervasive stereotypes which have been found to be used in custody cases to disadvantage mothers. A decision infected with bias is necessarily not based on the law or the facts in the record, making reversal the only remedy.

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188. MICH. SUP. CT., FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS 69 (1989).

189. MICH. SUP. CT., *supra* note 69, at 72.

Nowhere in his opinion does the trial judge apply a negative standard of single parenthood to Smith. Smith's marital status was not important to the trial judge. The lower court applied a different standard to Jennifer Ireland than to Steven Smith when determining the threshold of what constitutes good or acceptable parenting. As a result of this bias, mothers are held to a higher standard than fathers in judgments about parenting skills.

The court's analysis of the evidence makes this different standard clear. Ms. Ireland is "relegat[ing] maternal obligations" when she relies on the support and guidance of her own mother in caring for her daughter;[190] Smith is providing an appropriate custodial home, in which the devoted attentions of *his* mother are instrumental in providing care for Maranda.[191] Ms. Ireland is characterized as "continuing on in a vein that was really inconsistent with being the mother of a new born child;" the father's similar actions are referred to only as "basically doing the same thing," or continuing on with his activities and making progress toward his graduation from high school.[192] While Ms. Ireland's time away from Maranda is referred to as forcing her child to "be in essence raised and supervised a great part of the time by strangers,"[193] Smith's time away from Maranda is allowing his mother to "devote her entire time to raising the child."[194] The court went so far as to characterize the evidence as "establishing the fact that plaintiff was sexually indiscriminate as a young girl." As to Smith, he "wasn't much better."[195] Again and again, Ms. Ireland is criticized in specific, degrading language, and Smith gets by with generalities, an excusing tone, and always (unwarranted) favorable comparisons with Ms. Ireland.

The best interests standard is meant to be a flexible, breathing tool for making decisions in an area always fraught with uncertainty. The Child Custody Act dictates that decisions which determine custody must be made with reference to one paramount concern: the best interests of the child. Decisions infected by gender bias are contrary to the best interests of a child.[196] The enumerated factors are meant to counteract the influence of a judge's own idiosyncratic values and biases in this highly

190. Op, 4.
191. Op, 7.
192. Op, 4.
193. Op, 10.
194. Op, 7.
195. Op, 8.
196. MICH. SUP. CT., *supra* note 188, at 62.

personal area of law. As a policy matter, Michigan law reinforces the notion that parents must be free to raise their children as they choose, within reasonable limits. Courts must affirm the parents' choices, so long as the care their children receive meets a minimum threshold of acceptability.

Yet what the trial court ignored is that the family of Maranda and her mother is in the most desirable ways exactly like the traditional family. To Maranda, family has always been her mother. Other than the first three weeks of life, she has always lived with her mother. She has always been primarily cared for by her mother. Her extended family, including maternal grandmother and aunt, are an important part of her life. With her mother, she has love and security. She has stability in that relationship. She is happy and thriving. As described by more than one witness, and noted by the trial court, Maranda and her mother are a team: "the mother and the child are united and . . . the mother looks to the future to have this relationship continued on a permanent basis."[197] What the court failed to note, though, is that Maranda also looks to the future to have her family continue as it has: living with her mother, even though she may not be sleeping in the same bedroom every night between now and her eighteenth birthday. Where Maranda loves is home, and that means her mother.

CONCLUSION

There was no clear and convincing evidence presented justifying a change of custody. The trial court's decision must be reversed outright, and custody of Maranda must remain with her mother.

POSTSCRIPT

On December 27, 1994, after the briefs were filed in this case, the Michigan Supreme Court decided the case of Fletcher v. Fletcher,[198] which altered the standard of review in custody cases. Under *Fletcher*, the reviewing court is required to remand a case where factual or dispositional error is found.[199]

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197. Op, 3.

198. Fletcher v. Fletcher, 447 Mich. 871, 526 N.W.2d 889 (1994).

199. *Fletcher*, 447 Mich. at 889, 526 N.W.2d at 897.

In March 1995, the Court of Appeals granted Jennifer Ireland's application for leave to appeal on the issue of whether Judge Cashen should be disqualified because of bias or the appearance of bias. Ms. Ireland's request for disqualification was based in part on Judge Cashen's statements to the media which were critical of Ms. Ireland's abilities as a parent, and contrary to his judicial findings.

On November 7, 1995, the Michigan Court of Appeals held that it was clear legal error for the trial court to consider the use of day care as relevant to the Child Custody Act factor which is directed to the permanence of the existing custodial home,[200] and that there was no factual basis for the trial court's finding that a single parent could not be a student and a parent at the same time.[201] The Court of Appeals found an established custodial environment with Ms. Ireland,[202] and found the parties equal on eleven of the twelve child custody factors.[203] The Court remanded the case, as it was required to do so under the newly-decided ruling in *Fletcher*, and ordered that a new judge hear the remand, finding that the trial judge at least appeared to be biased because of his derogatory statements to the media about Jennifer Ireland.[204]

In late November 1995, Steve Smith filed an application for leave to appeal to the Michigan Supreme Court.

On May 21, 1996, the Michigan Supreme Court, in lieu of granting leave to appeal, modified the judgment of the court of appeals and remanded the case to the circuit court for further proceedings. Ireland v. Smith, 1996 WL 267743 (Mich. 1996). The supreme court clarified the court of appeals' directions on remand, and ordered that the remand could consider evidence since June 1994 on all factors in evaluating the best interests of Maranda. *Ireland*, 1996 WL 267743 at *5. The court remarked on the fact that 61 amici filed in support of Ms. Ireland and stated that "placement of a child in a good day-care setting can have many benefits and is in no sense a sign of parental neglect." *Ireland*, 1996 WL 267743 at *5.

The court also concluded that "[i]n light of all the circumstances, this case should go forward with the judge to whom it has now been

200. Ireland v. Smith, 214 Mich. App. 235, 246, 542 N.W.2d 344, 349–50 (1995).
201. *Ireland*, 214 Mich. App. at 245–46, 542 N.W.2d at 349.
202. *Ireland*, 214 Mich. App. at 249, 542 N.W.2d at 348.
203. *Ireland*, 214 Mich. App. at 249, 542 N.W.2d at 351.
204. *Ireland*, 214 Mich. App. at 250–51, 542 N.W.2d at 351–52.

assigned" although the court "located in this record no basis for the disqualification of the first judge." *Ireland*, 1996 WL 267743 at *5.

The remand hearings were scheduled for July, 1996. Given the reviewing courts' opinions, there is no risk that Ms. Ireland's choice to place Maranda in day-care will be held against her. Maranda was scheduled to start kindergarten in September, 1996 in Ann Arbor, Michigan.