ANSWER TO OUESTION NO. 11

This is a change of domicile question that raises issues under MCL 722.31, often called the "100-mile rule." The statute applies in cases where the parents share joint legal custody and live within 100 miles of each other at the time the case is commenced. The statute provides that the child's residence is with each parent, and it prohibits the parents from moving more than 100 miles from the legal residence at the time the case was commenced. The statute applies to interstate changes of domicile. *Brown v Loveman,* 260 Mich App 576 (2004), lv den 470 Mich 881 (2004). In order for Betsy to take Sam to Columbus, she will need to either obtain Abe's consent, or obtain the court's permission by filing a motion to change Sam's legal residence. The court would look at the following five factors to make the decision (MCL 722.31):

1. Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent. **Here, it does appear that the change of legal residence would improve the quality of life for Betsy. In Columbus she would earn a stable income, with a good job, with health care benefits, and be near her parents. Betsy would likely argue that the change of residence would benefit Sam because of her increased income, better health care, and the stability of a more permanent home (after she found a place of her own). A single home would be better than moving Sam from apartment to apartment on an almost daily basis--an arrangement that is not sustainable in the long run. In Columbus, Betsy would also be close to her parents, who could aid in caring for Sam. The court might also want to know about the quality of the schools and neighborhoods in both Columbus and Ypsilanti.**

2. The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule. **Although the facts suggest that Betsy increasingly relied on Abe to take care of Sam, there is no indication that she did not exercise parenting time she was given by court order. This factor should not favor either party.**

3. The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order

a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification. **Betsy may need to offer generous parenting time to Abe because this factor works against her. She will assert that it is possible to provide sufficient parenting time for Abe such that he and Sam will continue to have a significant relationship with each other. Distance does not mean no contact--Sam would be able to maintain contact through e-mails, telephone, perhaps a webcam, and other electronic means of communication. Abe should argue that Columbus is too far away for him to maintain the type of contact with Sam that both he and Sam are accustomed to having, and electronic communication is no substitute for face-to-face interaction. He would likely be limited to long weekends, holidays and time in the summer (although Betsy may have summers off, in which case she will want to be with Sam too). At least one Court of Appeals decision has found the disruption of the father's time with his child to be important, holding that §722.31(4)(c) required the denial of the motion to relocate, in part because of the negative impact to the minor child of not having the father involved in his life on an almost daily basis. *Grew v Knox,* 265 Mich App 333 (2005).**

4-5. The extent to which the parent opposing legal residence change is motivated by a desire to secure a final advantage with respect to a support obligation, and domestic violence. **These are not factors here.**

Betsy would have the burden of proving the beneficial nature of the move by a preponderance of the evidence. *Brown, supra* at 600. Good arguments can be made on both sides of this issue, but it does not seem likely that the trial court would approve the move to Columbus if it included both Betsy and Sam, i.e., the trial court might say that Betsy can change her residence, but not Sam's residence.

It is important to recognize that a move such as the one contemplated by Betsy involves a two-step process. If the family court were to determine that Betsy had met her burden with respect to the five factors under MCL 722.31(4), it would next have to determine if the new arrangement amounted to a change in Sam's custodial environment. Abe's response to Betsy's motion should argue that Betsy does not meet the five-part 100-mile test, but that even if she does, the move would alter Sam's established custodial environment and Betsy cannot establish by clear and

convincing evidence that the change would be in Sam's best interest. A custodial environment is established if "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." *Brown, supra* at 595, quoting MCL 722.27(1)(c). In this situation, a custodial environment is very likely established in Ypsilanti, with both parents. The argument *against* an established custodial environment is that when Betsy moved to a new apartment, the environment became "unestablished" and it has not settled into a new established environment because of the uncertainty surrounding the divorce. Here, Betsy would argue that Sam did not have a custodial environment with Abe, or if he did, Sam would be able to maintain that environment when he was with Abe during his parenting time. Abe would argue that he could not maintain the custodial environment in the event of Sam's move to Columbus.

If a custodial environment has been established, and the move would alter that established environment, changing custody would require a hearing wherein Betsy would have to establish, by clear and convincing evidence, that the proposed change was in Sam's best interest. MCL §722.27(1)(c); *Brown, supra; Rittershaus v Rittershaus,* 273 Mich App 462 (2007).

The list of factors a court must consider in determining the best interest of the child are set forth at MCL 722.23. Note that the test-taker should not be expected to provide the whole list, but should focus on a few of the factors that are relevant here.

Specifically, the following factors should be noted: (a) love and affection between parents and child--both parents have strong ties to Sam, and Abe's ties are likely to be disrupted by a long distance move; (b) capacity to provide love, affection and guidance--the question does not state which parent Sam primarily looks to for the provision of his physical and emotional needs, but if there was a clear winner here, it could be important in determining Sam's best interests; (c) capacity to provide food, clothing, medical care, and other physical needs--Betsy would be better able to provide for Sam's care because she will have more money, have better benefits, work a more normal schedule, and have her parents around to assist in childcare--Sam also has his parents close by, though his work at night would make finding care difficult during his work hours; (d) length of time in a stable environment--this factor would tend to favor Abe because Sam has lived in a more or less stable environment with both parents his entire life, although that life was arguably disrupted when Abe and

Betsy separated; (e) permanence of family unit--the permanence of the Ypsilanti environment is questionable because the parties live in apartments and it is clear that the divorce will cause a disruption in the custodial homes; (f) and (g) -- moral, mental and physical fitness are not issues here; (h) home and school records are not at issue; (i) child's preference--Sam is likely too young (4 years old) for the court to give his preference, if any, much weight. Note that there is no "tender years" doctrine in Michigan that would favor Betsy because she is the mother; and (j) (k) and (1)--there is no evidence that either party would be unwilling to encourage the parental relationship of the other, no evidence of domestic violence, and the question does not suggest other factors that are not accounted for in the prior list.

There is no clear answer to the question of what the judge would do. The key here is the test-taker's ability to recognize the issues, articulate the standards, and apply the standards to the facts.