

EXAMINERS' ANALYSIS OF QUESTION NO. 15

With respect to modifying the custody status of Tim, there must be a preliminary determination of whether there is proper cause or changed circumstances to modify a custody order. MCL 722.27(1)(c); *Parent v Parent*, 282 Mich App 152 (2009). To meet this preliminary determination, the moving party must establish an appropriate ground by a preponderance of the evidence. *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003). An "appropriate ground" should include consideration of at least one of the "best interests of the child" factors and must concern matters having a significant effect on the child's life. MCL 722.23; *Mitchell v Mitchell*, 296 Mich App 513 (2012). Only after a moving party establishes proper cause or change of circumstance does the court review the statutory best interest factors with an eye to possibly modifying a prior custody order. *Id.* MCL 722.27(1)(c).

The twelve best interests of the child factors are set out in MCL 722.23(a)-(1):

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

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

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

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

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

"(f) The moral fitness of the parties involved.

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

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

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

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

"(k) Domestic violence, regardless of whether the violence was

directed against or witnessed by the child.

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

The courts may not modify custody from an established custodial environment unless there is clear and convincing evidence that a modification is in the best interest of the child. MCL 722.27(1)(c), *Mitchell and Parent, supra*.

The examinee should display some familiarity with this type of inquiry in judging Jack's claim for custody after the end of the Christmas vacation. Jack will likely have difficulty in proving by a preponderance of the evidence an appropriate ground to justify the court taking action and, even more so, proffering clear and convincing evidence that a change in the established custodial environment (established over a lengthy period of time) would be in Tim's best interest. Merely having more time to spend with Tim would not meet these criteria, particularly because Diane has been able to manage working and caring for Tim in the past. The fact that Jack's injury is temporary (with recovery anticipated in the middle of next year) also weighs against his custody claim. If Jack were successful with his claim, it would appear the custody issue would need to be revisited again in a short time when Jack resumes work. Frequent custody changes are not favored.

With respect to Diane's claim for physical custody during the Christmas vacation and permanently thereafter, Diane's claim would similarly appear unconvincing. Jack's health as a result of his injury is a best interest factor to be considered, but given Tim's age and ability to care for himself and the fact Jack is not entirely incapacitated, it would not appear to have a significant effect on Tim's life and, even more so, not amount to clear and convincing evidence that any change in the custody order is in Tim's best interest. Jack's foregoing of the benefits raises the question of his ability to provide Tim with food and other material needs, which are best interest factors, but the Christmas holiday is not that long and there is no suggestion Jack is destitute. Also, Jack is scheduled to return to work by the following summer when he again assumes custody of Tim. Therefore, this factor would not warrant a change in the custody.

Therefore, neither Jack nor Diane is likely to prevail on their requests to change the current custody arrangement.

With respect to Jack's request for child support over the Christmas vacation and afterwards (if he were successful with his current custody claim), he would not likely be successful either. Also, even if custody is changed, he appears to be voluntarily

foregoing the monies that are afforded him via workers' compensation, disability insurance, and/or unemployment benefits, and that money may be imputed to him. See *Clarke v Clarke*, 297 Mich App 172 (2012), and Michigan Child Support Enforcement Manual § 2.01. Jack's concern about retaliation for seeking workers' compensation benefits should be ameliorated by the anti-retaliation provision in the workers' compensation statute, MCL 418.301(13). An examinee may discuss Jack's reasoning for deferring receipt of such money (unwillingness to possibly offend the employer) but ought to conclude that this is an insufficient reason so as to require child support. Contrast, *Clark, supra*. In a sense, Jack is voluntarily reducing his income and correspondingly requesting Diane to supplement it over the Christmas vacation--and if Jack's additional custody request was granted--until he returns to work in the middle of the next calendar year. Also, the divorce judgment provided that child support was not allowed unless there was a significant departure from the custody schedule. Jack was already scheduled to have physical custody of Tim over Christmas vacation so there cannot be said to have been a significant departure from the custody schedule, and thus there is no basis for Jack to receive child support for that period if there is no change in custody. If Jack were successful with his custody claim, he would have a stronger child support argument; but, overall Jack's child support argument is unlikely to be successful. The ultimate conclusion here is less important than the quality of the examinee's analysis.