

**FEBRUARY 2017 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES**

EXAMINERS' ANALYSIS OF QUESTION NO. 1

1. Abby's Request to Relocate:

Abby is incorrect that all she must do is seek permission and the court must grant it, without more. Arthur is correct that he is entitled to a hearing or, at the very least, a judicial determination on the factors listed in MCL 722.31.

The salient components in the fact pattern that trigger the statute are 1) the parties have joint legal custody, and 2) the move to Colorado is more than 100 miles. The statute is therefore triggered and Abby must do more than simply request permission; she must satisfy the statute (see also MCR 3.211(C)(1)). Section (2) of the statute states, inter alia, that "[t]his section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents" (emphasis added). Abby does not have sole legal custody. [Contrast *Brecht v Hindry*, 297 Mich App 732 (2012), holding that permission to leave the state with the minor children is to be granted, without more, at the request of the sole legal custodian.] Because Abby and Arthur share joint legal custody, Abby being the sole physical custodian does not negate statutory compliance.

2. Arthur's Request to Modify Parenting Time:

Abby's position that Arthur's request for additional parenting time necessarily fails because the facts he alleges do not amount to proper cause or changed circumstances - as those terms are understood in custody modifications - is incorrect. While Arthur's averments may not reopen the prior physical

custody award to Abby, the same is not true when only parenting time is involved. In *Vodvarka v Grassmyer*, 259 Mich App 499 (2003), the court determined that MCL 722.27 legitimately restricted custody changes to situations where proper cause or a change of circumstances were present. *Vodvarka* explained that the instability brought about by frequent changes in custody was to be avoided by limiting revisiting prior custody awards.

However, in *Shade v Wright*, 291 Mich App 17 (2010), the court drew a distinction between requests to change custody and requests to change parenting time. For the former, the phrase "proper cause or a change in circumstances" must be read restrictively to serve the statute's goal of unwarranted hearings on custody changes. As to parenting time, the phrase should be read more expansively. As the court stated:

Thus, the very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of considerations that trial courts should take into account in making determinations regarding modification of parenting time. Therefore, we hold that, in a case where a modification of parenting time does not alter the established custodial environment, the fact that a child has begun high school and seeks to become more involved in social and extracurricular activities (normal life changes that do not constitute a change of circumstances under *Vodvarka*) constitutes a change of circumstances sufficient to modify parenting time. *Shade*, pp. 30-31.

Shade, however, left open the possibility that if modification of parenting time changed the established custodial environment, more would be required of the petitioner.

An established custodial environment is defined by MCL 722.27(1)(c):

. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. . . .

3. Arthur's Request for Modification:

On the facts presented and Arthur's position, no real issue exists that Abby has an established custodial environment with the boys. However, the salient issue is whether the proposed change would change that custodial environment. Arthur's request deletes his Wednesday evenings which in turn leaves the boys with Abby. He picks up a few more hours on the front end of his weekend and a few more hours on the back end, plus an additional overnight while the boys are in school. Abby would be hard-pressed to maintain that this limited amount of additional time would alter the established custodial environment because the children would still naturally look to her ". . . for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).