

ANSWER TO QUESTION NO. 4

1. This is a modification of custody order question: The test taker needs to recognize that a motion to change custody requires three separate inquiries: (1) whether the movant carries the initial burden of establishing "proper cause shown" or a "change of circumstances;" (2) whether there is an established custodial environment; and (3) whether the modification is in the best interest of the child. Note also that a trial court may not change custody without first holding a hearing. *Dick v Dick*, 210 Mich App 576, 587 (1995); MCL 3.210(C)(1).

A. Pursuant to MCL 722.27(1)(c), when there is a request for a change of custody from an existing custody order, the first issue to be considered is whether the movant has shown "proper cause" or a "change of circumstances." To establish the "proper cause" or "change of circumstances" necessary to revisit a custody order, a movant must prove **by a preponderance of the evidence** the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's wellbeing. There must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. An evidentiary hearing is not necessary to make this determination. *Vodvarka v Gxasmeyers*, 259 Mich App 499, 512-514 (2003).

Barbara will argue that Alex essentially abdicated his role as primary physical custodian of Claire, and that in addition, because his new girlfriend could not be left alone with Claire, this is both proper cause and a change of circumstances. The fact that Claire was not in the day-to-day care of either of her parents is relevant to a number of the best interest factors, including (a) the love, affection, and other emotional ties between child and parent, (b) the capacity of the parent to give the child love, affection, and guidance and contribute to the child's education, and (c) the length of time the child lived in a stable environment. See MCL 722.23. Alex's extended absence was also likely to have a significant impact on Claire's well-being. Alex will argue that he has not abandoned Claire and the fact that he has a new girlfriend who cannot be left alone with her is irrelevant. Here, the court should find proper cause or a change in circumstances.

B. The next question is whether an established custodial

environment exists. Answering that question is critical for determining the burden of proof. 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." MCL 722.27(1)(c).

Barbara should argue that Alex's absence meant that Claire no longer looked to him for guidance, discipline, etc. Moreover, a custody order, by itself, does not establish a custodial environment, and an existing custodial relationship can be destroyed, for example, by "repeated changes in physical custody and uncertainty created by an upcoming custody trial". *Bowers v Bowers* (After Remand), 198 Mich App 320, 326 (1993). Barbara will argue that Alex essentially deserted Claire, thus at least temporarily relinquishing custody and destroying the custodial environment. Alex will argue that he spent enough time with Claire to maintain the established custodial environment. He might argue that the arrangement was only temporary because he was not married to his girlfriend and he was considering a move back to Kalkaska. A court would likely find that Alex did not have an established custodial environment with Claire, however, because his absence from her daily life was extensive and regardless of his future plans, any established custodial environment was destroyed at the time the motion was filed.

C. If a custodial environment was established, a change in custody could only be **made on clear and convincing evidence** that the change is in the best interests of Claire. MCL 722.287(1)(c); *Rittershaus v Rittershaus*, 273 Mich App 462, 470 (2007). If no established custodial environment existed, custody could be modified by a showing of **a preponderance of the evidence** that a change would be in Claire's best interest. *Hall v Hall*, 15 Mich App 286, 289 (1986). The best interest factors for a change of custody are the same as those for determining custody in the first instance: MCL 722.23. The test taker does not need to list the best interest factors, but should identify those that are relevant based on the facts presented in the question.

Here, the following should be noted: (a) Love and affection between parents and child--given Alex's conduct, this factor would tend to favor Barbara; (b) capacity to provide love, affection and guidance--tends to favor Barbara given that Alex's girlfriend cannot be with Claire alone; (c) capacity to provide food, clothing, medical care, and other physical needs--Barbara earns more but economic disparity could be ameliorated by child support

payments; (d) length of time in a stable environment--Alex disrupted Claire's environment, so she was not in a stable environment; (3) the permanence, as a family unit, of the existing or proposed custodial home or homes--favors Barbara because Alex is not stable; (f) the moral fitness of the parties involved--probably neutral; and (g)-(h) no fact indicates a problem with physical or mental health, the home or school environment, or the preference of the child. Note that there is no "tender years" doctrine in Michigan which would favor Barbara because she is the mother.

2. This is a modification of child support question: MCL 552.603(2) provides that a child support order is not subject to retroactive modification. There is a limited exception for fraudulently reporting income, but the exception is not applicable here. Support may be modified, however, for the period during which the motion is pending. Note that although Alex arguably violated the requirement to notify the Friend of the Court of his change in address, he is only subject to paying a fee for that error; it does not render child support retroactively modifiable. Barbara's motion to modify support should be granted, but support may only be modified as of the date that Barbara's motion was pending.