EXAMINERS' ANALYSIS OF QUESTION NO. 9

1. When faced with a motion to modify a previous custody award, the court must first consider whether the motion establishes proper cause or a change in circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508 (2003); *Killingbeck v Killingbeck*, 269 Mich App 132, 145 (2005). This threshold inquiry must be made for the court to determine whether to hold an evidentiary hearing to revisit a prior custody award. *Lieberman v Orr*, 319 Mich App 68, 81-83 (2017).

Should this first step be satisfied, the court must next determine whether an established custodial environment exists because this determination in turn establishes the burden of proof of the moving party. If a modification would change the established custodial environment, the movant must demonstrate by clear and convincing evidence that a change is in the children's best interests. *Duperon v Duperon*, 175 Mich App 77, 82 (1989). If no established custodial environment exists, the burden of proof is by a preponderance of evidence. *Hall v Hall*, 156 Mich App 286, 289 (1986).

Finally, the court's ultimate decision on whether to change custody must be based on the best interests of the children as understood by examining the best interests factors delineated in MCL 722.23(a)-(l).

In sum, Michigan case and statutory authority calls for a three step inquiry: an evaluation of proper cause or changed circumstances, a determination of the established custodial environment, and an evidentiary hearing based on the best interests of the child factors.

2. Measuring Gary's request against this backdrop yields the conclusion that Gary's chances for success on his motion to change custody are very weak.

First, a serious question exists as to whether Gary's single-factor motion (MCL 722.23(f) moral fitness) establishes proper cause or a change of circumstances on the facts present here. The facts supporting the motion, whether premised upon proper cause or change in circumstance, must relate to at least one child custody factor. *Vodvarka*, 259 Mich App at 511-512 (To establish proper

cause or a change in circumstance 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 well-being.). Gwendolyn's weekend work was not known to the children and had no stated effect on her parenting, and thus did not impact her moral fitness as a parent. *Foskett v Foskett*, 247 Mich App 1, 9 (2001). A trial court would likely not find this assertion to constitute either proper cause or a change in circumstance.

Second, Gwen has an established custodial environment with the girls. An established custodial environment exists where "over an appreciable period of time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. . . ." MCL 722.27(1)(c). The stated facts here clearly support Gwen having an established custodial environment with the girls. Even when the family was intact, Gary was the "fun parent," while Gwen provided fuller parenting. The girls have grown from toddlers to elementary school age with Gwen, who has provided for them in many ways, e.g. taking them to church, addressing their behavioral problems, facilitating their education and the like. The facts are silent on precisely what Gary provides in these domains. To change custody would upset the established custodial environment, and thus cannot occur without the requisite clear and convincing evidence.

Finally, moral fitness of a parent is a best interest factor. The Michigan Supreme Court held, however, in *Fletcher v Fletcher*, 447 Mich 871, 886-887 (1994) that this factor does not deal with which parent is morally superior. Rather, the factor relates to a person's fitness as a parent. *Id.* No facts exists suggesting Gwen's employment on weekends when the children are with their father impacts her ability to parent. Nor do any facts indicate the children are being shorted their mother's attention or their needs are not being addressed. Even if at the requested evidentiary hearing Gary could show the questionable nature of Gwen's weekend work, this watered down claim of unfitness would not lead to a change in custody.

In sum, Gary will lose his request.