

EXAMINERS' ANALYSIS OF QUESTION NO. 6

Frank should be told that a motion to change custody will need to 'be filed, served on Mary, and heard by the court. The court may not unilaterally change custody without a motion seeking a change in custody, and may not change custody without a hearing. *Schlender v Schlender*, 235 Mich App 230, 233 (1999). Therefore, a change of custody cannot be made by the court simply interviewing Grant.

Procedural Process

A court does have jurisdiction to change prior custody provisions in a divorce judgment under the Child Custody Act, MCL 722.27(1)(C), but Frank must be told that his motion must establish proper cause or a change in circumstances, since entry of the judgment of divorce, or the court will have nothing to consider. A court must have a basis to re-evaluate a custody award, and should undertake a change in a custody award with caution. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509 (2003). Establishing proper cause or a change in circumstances is no small task.

"[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a re-evaluation of the child's custodial situation should be undertaken." *Vodvarka* at 511. While there is no hard and fast rule, the trial court can look to the twelve factors that articulate a child's best interest and ground its decision on proper cause in those factors, as they relate to the significance of the effect on the child's well-being. *Vodvarka* at 511-512.

As an alternative to "proper cause," Frank would have to a demonstrate "change in circumstances." The "movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka* at 513. "[N]ot just any change will suffice" because "over time there will always be some changes in a child's environment, behavior and well-being" and that the

evidence must amount to "something more than normal life changes (both good and bad) that occur during the life of a child. . ."
Id.

In sum, interviewing Grant will be insufficient and Frank's motion, to proceed forward, must establish proper cause or a change in circumstances.

Should Frank establish this threshold requirement, the court must then determine if Frank or Mary has an established custodial environment with Grant. This determination is significant because it establishes the moving party's burden of proof. MCL 722.27(1)(c). As the statute states, "[t]he 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." As to the burden of proof, the statute provides: "The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id.*, emphasis added.

Once the burden of proof is determined, Frank needs to prove it is in Grant's best interest to change custody. Determining Grant's best interest will involve analysis of the "best interest factors" under MCL 722.23. The court will be obligated to consider the 12 factors listed in the statute in determining Grant's best interest. *Arndt v Kasem*, 135 Mich App 252 (1984).

Frank's chances for success

These legal principles yield the conclusion that Frank's effort will be unsuccessful for a number of reasons. First, the single reason he wants to change custody - Grant is older and wants to live with him - is unlikely to comprise proper cause or a change in circumstances as those terms are defined in *Vodvarka*. While Frank's burden would only be a preponderance of evidence at this threshold stage, *Shann v Shann*, 293 Mich 302 (2011), Grant's desire will not establish proper cause or a

change in circumstances warranting the court to continue to consider Frank's request at an evidentiary hearing to change custody. *Killingbeck v Killingbeck*, 269 Mich App 132, 145 (2005). Not any change will do. See *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 657-658 (2011).

Even if, however, the court found proper cause or a change in circumstances, the court would likely find an established custodial environment with Mary. The facts indicate Mary was the physical custodian of Grant at the time of divorce and for many years later. Frank's parenting time had never been increased. Mary was the parent who provided Grant's medical, educational and other needs, as well as his discipline. No changes had been made in that state of affairs for eight years, reflecting that Mary was the parent who would have the custodial environment with Grant. While Frank was not an absent father, his relationship with Grant cannot be characterized as having an established custodial environment with his son. Accordingly, he would have to demonstrate - by clear and convincing evidence - that it would be in Grant's best interest to change custody.

This burden would unlikely be carried by Frank. A child's express preference is a factor to consider under the best interest factors, 722.23(i), the reasonable preference of the child. However, it is but one factor that does not outweigh automatically all others. *Treutle v Treutle*, 197 Mich App 690 • (1992). Frank has not even mentioned any of the other eleven factors, much less made out a case that he would prevail on any of those factors.

In sum, Frank would have to demonstrate by a preponderance of the evidence, proper cause or a change in circumstances to warrant re-evaluation of the best interest factors and would have to prove by clear and convincing evidence Grant's best interest would be served by a change. He is unlikely to prevail. The delineated process is designed to guard against an unwarranted custodial change and to minimize disruptive changes of custodial orders. See *Baker v Baker*, 411 Mich 567, 576-577 (1981).