

## GRADER'S GUIDE

### \*\*\* QUESTION NO. 6 \*\*\*

#### SUBJECT: FAMILY LAW

#### 1. Custody Award (70 points)

The trial court's paramount consideration in determining the custody arrangement is the best interests of the child. *See, e.g., West v. West*, 21 P.3d 838, 842 (Alaska 2001); *Bonjour v. Bonjour*, 592 P.2d 1233, 1240 (Alaska 1979); AS 25.20.060(a).

The trial court considers the factors in AS 25.24.150(c) in making the custody determination. That section states:

The court shall determine custody in accordance with the best interests of the child under AS 25.20.060-25.20.130. In determining the best interests of the child the court shall consider

- 1) the physical, emotional, mental, religious, and social needs of the child;
- 2) the capability and desire of each parent to meet these needs;
- 3) the child's preference if the child is of sufficient age and capacity to form a preference;
- 4) the love and affection existing between the child and each parent;
- 5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- 6) the desire and ability of each parent to allow an open and loving frequent relationship between the child and the other parent;
- 7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;
- 8) evidence that substance abuse by either parent or other members of the household directly affects the emotional well-being of the child;
- 9) other factors that the court considers pertinent.

In awarding custody, the court may consider only those facts that directly affect the well being of the child. AS 25.24.150(d). The court must consider each of the statutory factors but in its decision need only discuss those factors that it considers actually relevant in light of the evidence presented in the case. *See West*, 21 P.3d at 842 (citing *Park v. Park*, 986 P.2d 205, 207 (Alaska 1999)). No single factor should be allowed to outweigh the others in analyzing the best interests of the child. *See, e.g., In re J.J.*, 718 P.2d 948, 956 (Alaska 1986)(citations omitted).

(1) & (2) The facts indicate that Harry was not home very much during the marriage and has never put Carl to bed or given him a bath. Since the parties separated in June 2002, he has not had Carl overnight. Born June 4, 1999, Carl is only four and he cannot take care of himself. The court will probably view Wanda as more capable of meeting Carl's physical needs at this point. Similarly, since Harry has not been with Carl that much, the court may view Wanda as being more capable of meeting Carl's emotional and social needs as well. The facts do not indicate that Harry has expressed any desire to have Carl overnight. The facts do not indicate that there is a court order limiting the visitation. Arguably, Harry has put a priority on the chess club and work instead of spending time with Carl. In terms of religious needs, the court can consider the actual religious needs of the child. *See Bonjour*, 592 P.2d 1233 at 1239-1240. "Actual needs" means the expressed preference of a child mature enough to make a choice between a form of religion or lack of it. *See id.* at 1240. Wanda takes Carl to church and Harry is not interested. However, Carl is too young to have "actual religious needs" so the fact Wanda takes Carl to church should not weigh in Wanda's favor.

(3) Carl got mad at Wanda and said he wanted to go live with Harry. Whether Carl would really have that preference if made to choose is unknown. In any event, Carl is four and is too young to be of sufficient age and capacity for the court to give weight to his preference. *See Valentino*, 3 P.3d 337, 340-41 (Alaska 2000) (citing *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977)). Young children's preferences are not reasoned and often unreliable because they are easily influenced by the behavior of parents (or the availability of cookies).

(4) There are no facts indicating that there is not love and affection between Harry and Carl. Carl looks forward to Harry's visits. Harry has seen Carl regularly since the separation and has taken him on outings without Wanda. The facts do not indicate any problem in the relationship between Wanda and Carl.

(5) Regarding the stability of Carl's environment, the facts indicate that both parties intend to remain in Anchorage. Harry has moved out of the rented condo and so if Carl lived with him, he would live in a new place. However, it is unknown if Wanda and Carl will remain in the condo. However, Carl's schedule would be greatly disrupted if Harry were awarded primary custody since Carl has spent no overnights with Harry since the separation. The continuity factor favors Wanda.

(6) Even though Wanda and Harry are not getting along, the facts indicate that Wanda thinks Harry should spend more time with Carl and that she encourages it. There is no indication that Harry is interfering with the relationship between Carl and Wanda so this factor will not weigh against either party.

(7) Wanda and Harry argue but the facts do not indicate there is any domestic violence, child abuse, or child neglect.

(8) Wanda might have a substance abuse problem with excessive wine drinking but the facts do not indicate that at this point Carl is in any way affected by the amount she drinks. The facts state she put on headphones and listened to music because she did not want to talk to Harry. Therefore, Harry was home when Wanda was unable to hear Carl, and Carl was not unattended. It would be difficult for Harry to prove what Wanda does when he is not there. However, if Harry could show that Wanda drinks to excess and, due to headphones, is unable to hear if there is a problem when she is home with Carl by herself several nights a week, then this factor would weigh against Wanda.

On balance, in view of the fact that Harry has not spent much time taking care of Carl, and has put a priority on work and chess, the court will probably find that it is in Carl's best interests to award primary custody to Wanda at this point.

## **2. Custody Modification. (30 points)**

A custody modification is warranted if (1) the non-custodial parent establishes that a change in circumstances has occurred; and (2) the modification is in the best interests of the child. See *Nichols v. Mandelin*, 790 P.2d 1367, 1372 (Alaska 1990) (citations omitted); *Barrett v. Alquire*, 35 P.3d 1, 6 (Alaska 2001). The court has noted that these two conditions are taken directly from AS 25.20.110(a), which provides that an award of child custody "may be modified if the court determines that a change in circumstances requires the modification of the award and the modification is in the best interests of the child." See *Valentino*, 3 P.3d 337 at 340 n. 10.

The burden of proving the change in circumstances is on the moving parent. See *S.N.E. v. R.L.B.*, 699 P.2d 875, 878 (Alaska 1985). The requisite change in circumstances must be demonstrated relative to the facts and circumstances that existed at the time of the custody order that a parent seeks to have modified. See *Nichols*, 790 P.2d at 1372. Therefore, in order to obtain a custody modification, Harry, as a threshold matter, is required to show that a "significant" or "substantial" change in Carl's circumstances had occurred from the time of the previous custody order. See *Valentino*, 3 P.3d 337 at 340.

As a matter of law, a custodial parents' decision to move out of state with the child amounts to a substantial change in circumstances. See *Barrett*, 35 P.3d 1 at 6. Harry is entitled to a hearing on his motion to modify as a matter of law based on a showing that Wanda intends to move. See *id.*

The focus at the hearing will be on whether a modification of custody is in Carl's best interest. *See id.* In determining Carl's best interests, the court will use the criteria stated in AS 25.24.150(c) including whether there are legitimate reasons for Wanda's move and the impact of the move on Carl. *See id.* The Court has commented that a proposed move is legitimate if it is not primarily motivated by the desire to make visitation more difficult. *See Moeller-Prokosch v. Prokosch*, 27 P.3d 314, 316 (Alaska 2001). Wanda's desire to live closer to her aging parents would appear to be a legitimate reason for the move.

The examinee is not given facts sufficient to make a thorough analysis of Carl's best interests under the criteria. However examinees should note that the court would evaluate the effect of the move on the desirability of maintaining Carl's continuity under AS 25.24.150(c)(5). Carl has lived in Anchorage all his life and has ties to his school, friends, and community. The court will consider the desirability of maintaining geographical continuity and will also consider the importance of maintaining relationship stability, each parent's respective ability to maintain a stable and satisfactory relationship between themselves and the child. *See Meirer v. Cloud*, 34 P.3d 1274, 1279 (Alaska 2001).