

GRADER'S GUIDE

*** QUESTION NO. 5 ***

SUBJECT: FAMILY LAW

1. Unmarried Couples. Mark's interest in the cabin proceeds. 60 %

Mark and Sally are not married so the analysis the court uses to divide the property of married couples does not apply and examinees should get no credit for discussing it.

Property accumulated during cohabitation is divided by determining the express or implied intent of the parties. *See Bishop v. Clark*, 54 P.3d 804 (Alaska 2002)(citing *Wood v. Collins*, 812 P.2d 951, 956 (Alaska 1991)). Absent an express agreement, the court closely examines the facts in evidence to determine what the parties implicitly agreed upon. *See Bishop*, 54 P.3d 804 at 811.

In determining the intent of cohabiting parties, courts consider, among other factors, whether the parties have (1) made joint financial arrangements such as joint savings or checking accounts, or jointly titled property; (2) filed joint tax returns; (3) held themselves out as husband and wife; (4) contributed to the payment of household expenses;(5) contributed to the improvement and maintenance of the disputed property; and (6) participated in a joint business venture. Whether they have raised children together or incurred joint debts is also important. *See Bishop* 54 P.3d 804 at 811.

Here, the parties have no express agreement about the cabin. To support her position that there was no agreement to share ownership, Sally will argue that only her name is on the title to the cabin and the utilities. She alone took out the loan for the roof repair. She paid the entire down payment with her money. The parties were not jointly obligated for debts related to the cabin. The facts do not indicate the parties have any joint financial accounts, and in fact Sally told Mark she did not want him on any of her financial obligations.

Mark can argue that his monthly payments to Sally were intended to pay part of the mortgage and were not based on the rental market. Mortgage contributions have been considered evidence that the parties intended to share ownership in the house. *See Tolan v Kimball*, 33 P.3d 1152, 1154 (Alaska 2001). Mark can argue that he paid less of the mortgage but he did all the routine cabin maintenance. In further support of his claim of half interest, Mark will point out that he also paid half of all other household expenses including half the payoff of the roof repair loan. His payments were beyond what a tenant would pay. Mark also decided to remodel the spare room into

the workroom that he wanted. The fact that Sally allowed him to make a decision regarding home improvement that only a homeowner would normally make has been viewed as evidence of joint ownership intent. See *Tolan v. Kimball*, 33 P.3d 1152 at 1154.

Sally can also argue that remodeling the spare room with scrap lumber was not a major investment of time and money. However, it is likely the court will determine that the parties intended to share ownership of the cabin.

As a fall back position, to asserting Mark has no interest in the cabin, Sally can point out that Mark paid less than half the mortgage so that even if there was an implied agreement to share ownership he should get less than half the sales proceeds. However, as noted, Mark put “sweat equity” into the cabin by doing maintenance. The court will likely award Mark a share of the sales proceeds and he has a chance of being awarded half.

2. Child support in a divided custody situation. 40 %

Mark has primary custody of two children and Sally has primary physical custody of one child. The first step in the process is to determine what each party would owe the other for child support under Alaska Civil Rule 90.3(a) and to offset those amounts. See *Rule 90.3(b)(6) (effective April 15, 2001)*. Here, Sally would owe Mark 27% of her adjusted annual income for the two children in his primary custody. See *Rule 90.3(a)(2)(B)*. Mark would owe Sally 20% of his adjusted annual income for the one child in her custody. See *Rule 90.3(a)(2)(A)*. The facts indicate that Sally’s net income is higher than Mark’s. Therefore, the offset under Rule 90.3(a) will result in Sally owing some amount to Mark for child support.

The second step in the process requires the court to consider whether the support amount should be varied under Civil Rule 90.3(c)(1)(A). See *Rule 90.3(a)(6)*. Civil Rule 90.3(c)(1) states that support can be varied “for good cause, proof by clear and convincing evidence that manifest injustice would result if the support award were not varied.” Under Rule 90.3, “Good cause includes a finding: that unusual circumstances exist which require the award to be varied in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children. The custodial parent’s income is considered in this determination.” *Civil Rule 90.3(c)(1)(A)*.

The Rule 90.3 Commentary notes that a divided custody situation is viewed as a per se “unusual circumstance” under which support can be varied if “just and proper.” See *Civil Rule 90.3 Commentary at V.D*. What constitutes good cause depends on the circumstances of each case. See *Civil Rule 90.3 Commentary at VI.A*. Here, the facts indicate that based on the child’s doctor’s

recommendation, Mark has hired an expensive speech therapist for one of the children. The Commentary to Rule 90.3 notes that an example of an “unusual circumstance” is “health or other extraordinary expenses.” *See Civil Rule 90.3 Commentary at VI.B.* Mark can argue that the support amount Sally pays should be increased over what she would pay under step one of the analysis to include all or part of the cost of the therapist. He can argue the cost is an unusual expense related to the health of the child. The court will look at how much income Mark has when deciding whether to increase Sally’s support payment.

Finally, the facts state that all three children live with Sally every June and July. In other words, Sally has “extended visitation” with the two children not in her primary custody. The court, in its discretion, could reduce the child support Sally owes Mark for these two months by up to 75%. Sally must exercise the visitation in order to get the credit. *See Civil Rule 90.3(a)(3).*