GRADER'S GUIDE

***** QUESTION NO. 8 *****

SUBJECT: REAL PROPERTY

1. What legal arguments should Al raise to enforce his driveway easement (and in defense of Paul's quiet title action)? Explain. 80 %

Al should raise four arguments to enforce his driveway easement and in defense of Paul's quiet title action: (1) that Paul had actual notice of the easement; (2) that Paul had inquiry notice of the easement; (3) that the Court should reform and enforce the easement deed based on the theory of mutual mistake, and (4) that there is an easement by implication.

Based on the first three arguments, the court is likely to conclude that Paul's lot is burdened by Al's easement. Al can show that Paul had either actual or inquiry notice of his easement across lot 4 when Paul purchased the lot. Further, the court would likely reform Al and Betsy's deed to reflect their actual intentions under the theory of mutual mistake. Finally, although it is a close call, the court may find an easement by implication.

a. Actual notice.

Alaska is a race-notice state. AS 40.17.080 provides: "An unrecorded conveyance is valid as between the parties to it and as against one who has actual notice of it."

Here, Paul visited the lot with Betsy and walked around. He certainly would have observed Al's driveway extending from the road over the lot to Al's cabin. The facts also state that the paved driveway on the easement clearly crossed lot 3. Paul's observation of the driveway and his resulting knowledge of it are probably enough for a court to conclude that Paul had actual notice of the easement, even if he did not know its exact terms due to the error in recording. *Methonen v. Stone*, 941 P.2d 1248, 1252 n.6 (Alaska 1997).

b. Inquiry notice.

Further, even if the court were to find that Paul did not have actual notice, his knowledge that Al's driveway crossed his lot would probably be enough to create inquiry notice:

> It is well established that a purchaser will be charged with notice of an interest adverse to his title when he is aware of facts which would lead a reasonably prudent person to a course of

> investigation which, properly executed, would lead to knowledge of the servitude.

Id. at 1252. Paul's duty of inquiry included a duty to inquire about the driveway over the property and whether there was an easement for the driveway. *See id.* & n.6. Because Paul did not fulfill his duty of inquiry, the court will probably find that he had notice of the easement and enforce it, regardless of the recording error.

c. Reformation of the deed to mutual mistake.

Al can probably also prove that he and Betsy made a mutual mistake in recording the easement deed and ask the court to reform the deed to reflect their actual intentions and enforce the easement. Al would bear the burden of showing by clear and convincing evidence that he and Betsy mistakenly listed lot 1 when they meant lot 3. *See Groff v. Kohler*, 922 P.2d 870, 873 (Alaska 1996).

The Alaska Supreme Court has held that the:

> Reformation of a writing is justified when the parties have come to a *complete mutual understanding* of all the essential terms of their bargain, but by reason of mutual mistake . . . the written agreement is not in conformity with such understanding. . . .

Id. (quoting *AMFAC Hotels v. State, Dep't of Transp.*, 659 P.2d 1189, 1192 (Alaska 1983)). The Court in *Groff* further explained the concept of a mutual mistake:

> Mutual mistake in relation to reformation means a mistake shared by both parties. . . . [T]he evidence of the mutuality of mistake must relate to the time of the execution of the instrument, *and show that at that particular time the parties intended to say a certain thing and by mistake expressed another*.

Id. at 874 (quoting *Shoulderblade v. Osborn*, 652 P.2d 836, 838 (Or. App. 1982)) (emphasis in original).

Here, it is likely that Al can meet his burden of showing a mutual mistake. The agreement between Al and Betsy to grant an easement over lot 3 is best shown by Betsy's execution of the erroneous deed, her acquiescence in Al's construction and use of the driveway that crossed her lot, and her acceptance of Al's $5,000 payment for the easement. Because Betsy did not own lot 1, there are no facts that support the notion that either party meant to burden that lot.

d. Easement by implication

The Alaska Supreme Court has recognized the doctrine of easements by implication where a four-factor test is satisfied:

(1) a quasi-easement [exists] at the time of contract of sale or conveyance,
(2) which is apparent,
(3) reasonably necessary for the enjoyment of the land retained or the land conveyed, and
(4) continuous in nature.

Demoski v. New, 737 P.2d 780, 783-84 (Alaska 1987).

Here, it is clear that the facts would satisfy factors 1, 2 and 4. First, at the time of the conveyance from Betsy to Paul, a quasi-easement existed on Lot 3 (in the form of the completed, paved driveway). Second, the easement was apparent (see discussion in inquiry notice section, above). Finally, the easement was continuous in nature in that Al's only access to his cabin was through the easement.

However, it is not clear that Al can show that the easement is reasonably necessary for the enjoyment of his land. The facts state that Al sought the easement because access over Betsy's lot was easier than over his, not because it was the only practical route . Under the circumstances, it is not clear that Al could carry his burden in convincing a court that the easement was reasonably necessary for the enjoyment of his property. *Compare Demoski*, 737 P.2d at 784 (not necessary to show that easement is only access to satisfy reasonable necessity element) *with O'Buck v. Cottonwood Village Condo. Assoc.*, 750 P.2d 813, 819-20 (Alaska 1988) (citing Restatement of Property and suggesting that reasonable necessity may require that no practical use of property can be made without easement); *cf. Norken Corp. v. McGahan*, 823 P.2d 622, 631-32 (Alaska 1991) (discussing "reasonably necessary" requirement).

e. Other theories that may be discussed

Some examinees may discuss the doctrine of easements by necessity. That doctrine would not apply here. The Alaska Supreme Court has stated that an easement by necessity exists only where:

> [A]n owner of land conveys to another an inner portion which is entirely surrounded by lands owned by the conveyor or by the conveyor and another. In such a situation a right of access across the retained land of the conveyor is normally found, based upon public policy which is

favorable to full utilization of land and [the] presumption that parties do not intend to render land unfit for occupancy.

Freightways Terminal Co. v. Industrial & Comm'l Constr., Inc., 381 P.2d 977, 984 n.16 (Alaska 1963) (citations omitted). Here, there is no indication that Al's lot is surrounded such that his only access to the road would be through lot 3. Further, there is no indication that Betsy, or her predecessor, conveyed lot 2 to Al.

Some examinees may discuss the theory of adverse possession. The facts do not support a claim of adverse possession since only four years had passed since Al built his driveway, not the ten required for adverse possession. AS 09.45.052(a).

[NOTE: The Disclosures in Residential Real Property Transfers Act would not apply to the facts of this case. Even if Besty had a duty to disclose the easement, her failure to disclose the easement to Paul cannot invalidate either her sale to Paul or the granting of the easement to Al. *See* AS 34.70.090(a) ("A transfer that is subject to this chapter is not invalidated solely because a person fails to comply with this chapter.").]

2. Is Charlie's lot burdened by the easement recorded against it? Explain. 20 %

Charlie's lot is presumed to be burdened by the easement because property is presumed to be burdened by documents recorded against it. AS 40.17.080. Charlie's lot would therefore have a cloud on its title until Charlie does something to clear the title.

In practice, however, Charlie's lot probably would not be subject to the easement recorded against it because Al, as recorded grantee of the easement in favor of lot 2, could not prevail in any attempt to enforce the recorded easement. If Al were to take the position that he had an easement across lot 1, he would be in the untenable position of showing some basis for that easement either in the chain of title or otherwise.

Here, the recorded easement was purportedly granted by Betsy. The facts state the Betsy did not own any interest in lot 1, so she had nothing to convey. There is no basis for an actual conveyance of the easement.

Al could assert a claim of adverse possession to an easement in favor of his lot based on his recorded easement. *See e.g. Hubbard v. Curtiss*, 684 P.2d 842, 848 (Alaska 1984) ("[T]he fact that possession was taken under mistake or ignorance of the true boundary lines is immaterial."). Al's adverse possession claim would, in any event, fail. He has not met the seven year time period for

adverse possession under color of title. *See* AS 09.45.052(a). There is also no indication in the facts that Al used any easement across lot 1 as described in the recorded deed, so Al could not satisfy the element of showing physical possession of the easement on lot 1. *See id.* [It is also likely that the description of the easement in the recorded deed would place the physical location of the easement on the other end of Charlie's lot 1 (because Al's lot was between lots 1 and 3), which would make any such easement useless to Al].

In short, although the mistaken deed created a cloud on Charlie's title, it is unlikely that the mistake would actually burden Charlie's lot with an easement.