

GRADER'S GUIDE

*** QUESTION NO. 6 ***

SUBJECT: FAMILY LAW

Equitable division of marital property involves three steps. The first step is determining what property there is to distribute. See *Chotiner v. Chotiner*, 829 P.2d 829, 831 (Alaska 1992). Secondly, the property is valued. See *Wanberg v. Wanberg*, 664 P.2d 568, 570 (Alaska 1983). Finally, the property is equitably allocated. See *id.* The first two questions ask the examinee to deal with issues in the first step, determining what property is marital.

1. Vacation Fund (35 points)

Marital property includes all property acquired during the marriage excepting only inherited property and property acquired with separate property which is kept as separate property. See *Lewis v. Lewis*, 785 P.2d 550, 558 (Alaska 1990). A spouse's premarital separate property can become marital through transmutation or active appreciation. See, e.g. *Harrower v. Harrower*, 71 P.3d 854, 857 (Alaska 2003). Here, the court will evaluate whether Wanda's "vacation fund" became marital property through "transmutation."

Transmutation of property from separate to marital is not based on equities, but on the intent of the owner of the separate property as demonstrated through the owner's words and actions. See *Sampson v. Sampson*, 14 P.3d 272 (Alaska 2000). The source of the property does not necessarily determine its character for distribution but rather the use to which it was put during the marriage. See *Rhodes v. Rhodes*, 867 P.2d 802, 804 (Alaska 1994). Commingling of assets does not automatically establish an intent to jointly hold property, and a court should always consider the property's source when determining what assets are available for distribution. See *Miles v. Miles*, 816 P.2d 129, 132 (Alaska 1991) (citing *Carlson v. Carlson*, 722 P.2d 222, 224 (Alaska 1986)).

Here, Wanda will argue that the sole source of the "vacation fund" is her earnings prior to the marriage. The facts state that she quit contributing to the fund after she got married. Therefore, there are no "marital earnings" commingled into the fund. The account monies that were not spent remained intact in the separate account. Joint ownership is also a factor in determining whether separate property has transmuted into marital property. See *Choitner*, 829 P.2d 829 at 833. Here, the facts do not indicate that Wanda put Harold's name on the account. Joint maintenance or management is also a factor in determining whether separate property has transmuted to marital property.

See *Gardner v. Harris*, 923 P.2d 96, 99 (Alaska 1996). There is no indication that Harold had anything to do with decisions about the account.

Harold will argue that the facts show that after the marriage Wanda viewed the fund as a splurge fund for them to use. Wanda spent half of the account on vacations that they took together. She said to Harold that she had decided the account was to be for “our fun.” Evidence of an oral agreement to convert premarital property to marital is probative. See *Gardner*, 923 P.2d at 99. However, here, the facts do not indicate Wanda ever agreed that the money was to be jointly owned, only that she wanted to spend her money having fun with Harold. The court will likely find that the “vacation fund” did not transmute into marital property and that Wanda did not intend the remainder of the account to be for marital use.

2. Harold’s Sports Shop Interest (45 points)

Wanda’s argument that the increase in value of Harold’s interest in the sports shop is marital property is under the “active appreciation” theory. Unlike, the doctrine of “transmutation” which is based on the parties’ intent, the doctrine of active appreciation is based on equitable considerations. See *Martin v. Martin*, 52 P.3d 724, 728 (Alaska 2002).

Active appreciation occurs when marital funds or marital efforts cause a spouse’s separate property to increase in value during the marriage. See *Harrower*, 71 P.3d 854, at 857.; *Lowdermilk v. Lowdermilk*, 825 P.2d 874, 877-78 (Alaska 1992). Under the active appreciation theory, the asset’s value at the inception of the marriage retains its separate character, but any subsequent increase in the value is treated as marital property to the extent that it results from active marital funds or marital efforts. See *Harrower*, 71 P.3d 854 at 858.

To find active appreciation, the court must find three elements: (1) that the separate property in question appreciated during the marriage, (2) the parties made marital contributions to the property, and (3) the court must find a causal connection between the marital contributions and at least part of the appreciation. *Harrower*, 71 P.3d 854 at 858; *Schmitz v. Schmitz*, 88 P.3d 1116, 1125 (Alaska 2004). Wanda would have to prove the first two elements. Harold has the burden of proving the lack of a causal link between his contributions and the appreciation. *Harrower*, 71 P.3d 854 at 859.

Here, the facts indicate that the value of Harold’s interest in the business appreciated during the marriage so the first element is satisfied. Regarding the second element, marital contributions to the property, it is not necessary for the *non-owning* spouse to contribute marital fund or marital effort. See *Harrower*, 71 P.3d 854 at 858, n.5.

A significant amount of time spent during the marriage by the owner spouse has been found to be a marital contribution to the property. *See Harrower*, 71 P.3d 854 at 859. In *Harrower*, the proceeds from sale of husband's premarital stock in mining company were held to be marital property under the active appreciation theory. The court found that the record supported the trial court's finding that the husband had "contributed significant marital effort" to the property. During the marriage, the husband spent time finding a buyer for the stock under a marketing agreement with the other shareholders. *See id.* at 857.

In *Schmitz*, the increase in the value of an accounting business and of a clothing store were at issue. Under the second element of the active appreciation theory, the court found that the wife had proven marital contributions to the accounting business because the husband testified he worked there eleven hours a day, seven days a week during tax season. *See Schmitz*, 88 P.3d 1116 at 1126. However, with regard to the clothing store, the court found that she failed to prove marital contributions. The husband attended one annual meeting, prepared the store's tax return, and performed some accounting. The court commented that the husband's involvement with the clothing store was "quite limited." *See id.* at 1127.

Here, Wanda will argue that Harold's contributions of marital time to the sports shop were not "limited" like the husband's involvement in the clothing store in *Schmitz*. Harold contributed significant marital time to the property. He spent four evenings a month at the shop, and attended monthly owners' meetings.

Harold will argue that the four evenings a month he donated at the shop, and one day-long meeting every month were not a significant amount of time. He will point out that he had a full time job and if he had not worked at the sports shop it cannot be said that he would have spent the time working another job. He can argue that the time he spent at the shop was more akin to spending time on a hobby. This is a close question and the examinee's analysis is more important than the conclusion. The court will likely find that the amount of time Harold spent on the sports shop amounts to a significant contribution of marital time.

Regarding the third element, Harold will argue his efforts did not really contribute to the success of the shop because he was not the store manager and he only owned a small interest in the shop. However, Wanda will likely prevail on this issue. The facts show that Harold participated in the monthly partnership meetings where decisions were made about how to run the shop. The exact amount of influence Harold had need not be shown. The court has noted that where the value of the resulting appreciation is greater than the value of the efforts which were used to create it, the appreciation should still be marital property. *See Harrower*, 71 P.3d 854, at 859. The court will likely

conclude that the increase in value of Harold's interest in the shop is marital property under the active appreciation theory.

3. Kayak Sale (20 points)

The examinee should recognize that the kayak is marital property since the facts state Harold bought it during the marriage with joint funds. It does not matter that Wanda never used it. *See Lewis v. Lewis*, 785 P.2d 550 at 558.

The facts indicate that Harold sold the kayak after the parties' separated. When marital property is sold after the parties' separation but prior to trial, the sale proceeds should retain their character as marital property. *See Foster v. Foster*, 883 P.2d 397, 399 (Alaska 1994). If the proceeds are then spent for a marital purpose or necessarily expended for normal living expenses, they need not be taken into account in the final property division. *See id.* at 399-400. However where there is evidence that a marital asset was dissipated, wasted, or converted to a nonmarital form, the court can "recapture" that asset crediting all or part of it to the account of the party who controlled the asset. *See e.g., Gallant v. Gallant*, 882 P.2d 1252 1994 at 1255; *Jones v. Jones*, 835 P.2d 1173, 1175 (Alaska 1992).

The facts state that \$500 was a "fair price" for the kayak. Wanda will argue that the court should credit \$500 to Harold because he sold a marital asset for his own purposes, a party. Harold will argue that the house warming party was a normal living expense and therefore the kayak proceeds should not be taken into account in the property division. Wanda will likely prevail on this issue. The court will find that the proceeds were not "necessarily" expended for normal living expenses. Harold converted a marital asset and dissipated the proceeds.