

ESSAY QUESTION NO. 8

Answer this question in booklet No. 8

Willa and Howard married in 1995. Their son, Sam, was born in 1996.

At the time they married, Howard owned undeveloped land in Kenai, Alaska, valued at \$3,000. There was no debt against it. Today, the land, still undeveloped, is valued at \$30,000. Minimal property taxes were paid each year from their joint checking account. Title remains in Howard's name.

Shortly before their 1995 wedding, Howard bought an electronics store in Anchorage for \$250,000. Howard worked full time in the business during the marriage. His efforts have resulted in a business expansion with the opening of two more stores. Willa has never worked in the business. Howard's electronics store business is currently worth \$750,000.

Since their separation in April, 2005, Willa has incurred credit card debt of \$6,000 for their son's uninsured braces and \$1,500 for their son's mountain bike. A divorce has now been filed in Anchorage Superior Court.

In the division of marital assets and debts, pursuant to their divorce:

1. What interest does Willa have in Howard's (a) Kenai land and (b) the electronics store business? Discuss.
2. What is Howard's responsibility for the following liabilities (a) Sam's braces and (b) the mountain bike?

GRADER'S GUIDE

*** QUESTION NO. 8 ***

SUBJECT: FAMILY LAW

(1) Property issues (70 pts.)

When dividing property in a divorce, an Alaska trial court must utilize a three-prong approach: (1) determine what property is marital; (2) value that property; and (3) divide the property equitably. Wanberg v. Wanberg, 664 P.2d 568, 570 (Alaska 1983); Lundquist v. Lundquist, 923 P.2d 42, 46 (Alaska 1996).

A spouse's pre-marital separate property can become marital through either "transmutation" or "active appreciation". Harrower v. Harrower, 71 P.3d 854, 857 (Alaska 2003).

The doctrine of "transmutation" is based upon the parties' intent. If separate property is transmuted into marital, then the asset's entire equity is subject to division, not just the increase in value. See Compton v. Compton, 902 P.2d 805, 812 (Alaska 1995).

"Active appreciation" is the increase in value of a spouse's separate property by the infusion of marital money, efforts, or both. See Harrower, 71 P.3d at 857. Only the increase in value is marital property.

The theories of "active appreciation" and "transmutation" are mutually exclusive. If separate property is transmuted into marital, then the asset's entire equity is subject to division, not just the increase in value. Compton, 902 P.2d at 812.

(A) Undeveloped Land

Howard acquired the undeveloped land prior to marriage. Title remained in his name alone throughout their relationship. The undeveloped land could become part of the marital estate only if it became transmuted into marital property by Willa and Howard's intent and conduct by them which reflected that intent. Green v. Green, 29 P.3d 854 (Alaska 2001).

Green outlined four factors that a trial court should use to determine whether a separately owned residence has been transmuted into marital property: (1) whether the parties used it as a marital residence; (2) whether both parties contributed to the ongoing maintenance and improvement; (3) whether both parties held title; and (4) whether the parties used the non-titled spouse's credit to

improve the property. No single factor or combination of the factors is dispositive. Chotiner v. Chotiner, 82 P.2d 829, 832 (Alaska 1992). All four factors need not be present.

Applying those factors to this case, the Kenai land was never used as a marital residence, neither party did anything to improve the land's value, title was held only by Howard, and neither party's credit was used to improve the land. None of the Green factors are present. The payment of minimal taxes is not sufficient to give Willa an interest in the Kenai land. Howard's land would, most likely, remain as his separate property. Willa has no interest.

(B) Electronics Business

Howard's working in the electronics shop full time during the marriage constitutes marital effort being placed into the business. The fact that Willa has never worked in the business is irrelevant.

The increase in the business' value is marital under the theory of "active appreciation". "Active appreciation" differs from "transmutation" because transmutation is based on the parties' intent.

When marital funds, efforts, or both cause an increase in value to a spouse's separate property, then active appreciation has occurred. Harrower, 71 P.3d at 857.

Here, the electronic shop business has appreciated by \$500,000. This appreciation can be attributed to Howard's efforts in building and expanding the business. Willa would have an interest in the appreciation as marital property.

(2) Credit Card Charges for Sam (30 pts.)

Debt acquired after physical separation which leads to divorce is usually separate property. See Dodson v. Dodson, 955 P.2d 902, 910.

(A) Braces

AS 25.20.030 imposes a duty upon each parent to support the parent's child. Civil Rule 90.3(d)(2) provides for an equal allocation between parties of all reasonable uninsured health care expenses unless the court finds good cause to deviate from an equal share. Any reasonable, uninsured expenses exceeding \$5,000 in a calendar year is allocated pro rata under Civil Rule 90.3(d)(2) based upon the parties' relative financial circumstances when the expense occurred.

There are no facts indicating the incomes of either Howard or Willa. The examinee should discuss that the first \$5,000 would be divided equally and the final \$1,000 would be divided proportionally based on the parties' respective incomes.

(B) Mountain Bike

The court would likely find that the mountain bike is a post-separation gift from Willa and that Howard has no obligation to pay for it. Howard's legal obligation for financial support of his son is limited to child support and health care coverage as set out in Alaska Civil Rule 90.3.

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1. Since Wills and Howard have been married for 10 years, their marital assets have merged, including their individual assets they had prior to the marriage. In other words, Alaska court would consider their assets as merged due to the long-term of marriage.

As their assets have merged over time, their marital assets would be viewed as the result of a domestic partnership. Although title in the Kercis property remains in Howard's name, the taxes on it were paid from a joint checking account, indicating there was no understanding between them that the Kercis property was not marital property. As it was paid through a mutual account, it would be viewed as marital property.

Even if Howard could convince the court that the property valued at \$3,000 before the marriage is his alone, the appreciation of the property would go equally between Willa and Howard, since it appreciated over the course of their marriage.

The electronics store and its appreciated value would also be divided between them in an equal proportion. Although Willa did not directly work in the business, she contributed to its growth indirectly by allowing Howard to manage the business without worrying about other things, like housework or childcare.

2. Howard would be expected to pay half the credit debt for his son's braces, because that may be viewed as a health related expense, but

if the bike was a gift to Sam from wills,
Howard would not be expected to pay for any
of that cost.

If wills can show that all credit cards,
including hers, were paid through their joint account
and those debts have been historically viewed
as marital, she may be able to convince a court
to consolidate that debt as marital and factor
it into the division of assets.

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1. Generally property division upon divorce in Alaska proceeds pursuant to the *Wanburg* guidelines. This is three step process whereby the marital property is determined, valued and then equitably distributed.

Marital property is determined generally through the intent of the parties and the time at which the property was acquired. It is often assumed that property acquired during the marriage is marital property unless there is a clear intention of the parties otherwise.

It is not simply enough to look at the title to the property or whether there is simply a commingling of property but instead the court should look to the extent that there was joint management and maintenance of the property as well as the intention of the parties at the time.

Property is generally valued as of the time of trial. If the circumstances require then it will be looked at from the time of the separation.

There is generally an initial assumption that a 50/50 split of marital property is equitable. This is then adjusted by the courts through looking at the situation in the particular case to help determine a truly equitable distribution. The *Merrill* case gave the factors that the courts look to in making some of the determinations, these include; the health and availability of health insurance, when property was acquired, property income and value, the age of the parties, their financial status, who is living in the marital home, who has the care of the children, the necessities and circumstances of the spouse and children, how the other spouse has maintained or disposed of marital assets, the income of the parties and any other factors that must be considered to be equitable.

Howard's Kenai may be found to be his alone. He had acquired it before the marriage and the title has always remained in his name. However, as noted above that may not be enough by itself to take the property out of the marital assets. The taxes were paid for out of the joint checking of the couple and although Howard was the breadwinner Willa made real contributions to the marriage that cannot be overlooked. If she makes no showing that there was more than mere commingling but that that property was intended to be shared by them and that they would jointly decide how to best use it, it may be considered as marital. If she makes no showing then it will likely be found to be Howard's. If that is the case then Howard may simply keep the land. If the court determines that both are entitled then there must be a decision as to sell the land or make up for the giving of the land to one party with other assets for the opposing party.

The electronics store is different manner. Again the facts show that it was purchased by Howard just before the marriage. However, to conclude that that means that the profits and everything else are strictly Howard's would be wrong. Here there is more obviously an intent to share the business and it should be treated as a marital asset. Even marketable goodwill is a marital asset. Howard ran the business and Willa supported him and their son. Both made contributions and so the property should be equitably split.

It must be remembered that the goal of the courts is to reach an equitable outcome and that may mean that one party may get more of the marital assets. According to the above factors and for the reason that Alaska disfavors alimony and will instead try to maintain fairness through the proper distribution of property.

2. Howard is responsible for aiding and child support of his children. Often the level will vary according to various formulas based on who has custody. The favored method is shared legal and physical custody. If Willa has their son for example Howard will owe 20% of his income in support. If he has shared custody (more than 30%) his duties may vary. It is clear that for medical costs he bears half of the burden but for the purchase of gifts he owes nothing except the court ordered child support due to his position.

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1) Willa's interest in Howard's land in Kenai.

ALASKA Courts apply a 3 step analysis when determining division of property, under the formula stated in Wanberg v Wanberg.

Courts analyze:

- 1) DEFINE the marital estate as of the time of the couples' final separation;
- 2) VALUE the marital estate, as fair market value minus debt;
- 3) DIVIDE the estate equitably, in which a 50-50 property division is considered equitable.

The general rule for the division of property is: All property acquired during the marriage is presumed marital, with

the exceptions of inheritances & gifts.

The court then applies 8 factors under the criteria developed in Merrill v Merrill to decide how the couple's property should be divided.

The court considers:

- 1) The parties' length of marriage + their "stair steps" in life during the marriage;
- 2) The age & health of the parties;
- 3) The financial capacities of each spouse, inc. their education & training, work experiences, and any absence from the job market as a result of custodial parent duties;
- 4) The parties' health & the availability of health insurance;

5) the desirability of awarding the marital home to the party w/ primary physical custody of the children;

6) The conduct of the parties during the marriage, to the extent that it pertains to the depletion of marital assets;

7) The necessities of the parties; &

8) The income-producing capacity of any property, including the time & manner of acquisition.

Here, the facts indicate Howard already owned the undeveloped Kenai land when he & Willa married. Under Marital Factor No. 8, this will dictate in favor of the land being deemed unmarital property.

Will A could argue that the Kenai property should, however be considered marital property since the taxes on the property were paid from their joint checking account. Under some circumstances a court can deem non-marital property to have been "transmuted" into marital property if the couple treated the property as a

marital asset. To be "transmuted" a couple must usually share responsibilities for the property & manage it jointly. For separate property to be transmuted into marital property.

However, because the Kenai property is undeveloped, & Howard has kept the title in his sole name, the court would probably decline to classify the Kenai property as being part of the marital estate.

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(1)(b) The Electronics Store Business

The facts indicate Howard purchased the store prior to his marriage to Willa, & that he alone worked in this business.

Because there is no evidence to show Willa ever took part in managing or working at the store, & apparently never contributed toward paying any bills or other financial obligations of the store, under factor # 8 of the Merrill criteria, the electronic store should be considered Howard's individual property. Because Howard purchased the store prior to marriage, & apparently without any financial assistance from Willa, she has no equitable claim to

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the electronic store Business.

2 Howard's responsibility for Sam's Braces.

Under ALASKA law, parents have a duty to provide food, shelter, & medical treatment for their children.

Although Willa incurred the audit covered debt of \$6,000 for the Braces After she & Howard separated, this financial responsibility pertains to medical care, & so Howard should be at least one-half liable for the cost of his child's Braces. Willa's \$6,000 purchase doesn't appear to be an unreasonable depletion of marital assets under Merrill factor #6.

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2(b) Howard's financial responsibility for the
MOUNTAIN BIKE.

Under the WAMBERG formula, the
marital estate is determined AS ~~AS~~
what property existed AT the time of
the couple's FINAL separation.

Here, the facts state WILLA BOESCHT
the MOUNTAIN BIKE after the couple
separated IN April, 2005.

Unlike the BRACES, which were also
purchased ~~post~~-separation, a BICYCLE IS
NOT A NECESSITY. Howard should not
be held financially liable for the
\$1,500.00 cost of the MOUNTAIN
BIKE. Here, WILLA has UNREASONABLY
depleted the marital estate via an ill-

considered purchase, & she should bear
 the sole responsibility for purchasing
 their child a toy (or recreational
 item). It would be inequitable for the
 court to hold Howard responsible for
 the Mountain Bike, as it isn't a
 necessity, & it was purchased after
 the couple's final separation.

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1) Assets

In Alaska, when a couple is getting divorced, the court must first identify marital property as of the time of separation, value the property as of the time of trial, and equitably apportion the property between the two individuals. A 50/50 split of marital property is deemed equitable, outside of mitigating factors. The Merrill factors for equitable apportionment are of no incident in this analysis, because there is no issue raised re: equitable apportionment.

(a) Kenai land

The Kenai land concerns an issue of identification of the marital property. Separate property is any property a party held before the marriage and has not been dedicated to the marriage, and any property that was received as a gift or through inheritance. Here, the land at issue was held by Howard before the marriage, but has appreciated in value during the marriage.

Property that is separate property can become "marital property" if the parties evidence an intent to do so. The court will consider whether the asset was commingled with other assets, whether title was put in joint ownership, whether the property or asset is jointly managed, whether the efforts of the marriage improved the property, and whether a non-title-holding spouse's income has been dedicated to improving the land/property.

Here, the Kenai land is a separate asset, and Willa does not have any interest in the land. This is because the asset was originally Howard's (he held title before the marriage), the land was

never put into joint ownership with Willa (she was never added to the title), there have been no improvements to the land whatsoever during the marriage (it simply stayed undeveloped for the entirety of the marriage), neither Willa nor Howard jointly managed the property, and none of the efforts of the marriage (monetary or otherwise) were used to improve the property. The only argument Willa would have is that the property taxes were paid each year from her and Howard's joint checking account, and this satisfies the "commingling" test. Willa's argument would fail. The payment of property taxes is minimal in this case, and the court would otherwise be extremely hesitant to declare this type of an asset, with so little contacts to the marriage, a "marital asset" based on only one small element. Therefore, the Kenai land belongs to Howard.

(b) Electronics store business.

Will has an interest in the electronics store business. Property that is separate property can become "marital property" if the parties evidence an intent to do so. The court will consider whether the asset was commingled with other assets, whether title was put in joint ownership, whether the property or asset is jointly managed, whether the efforts of the marriage improved the property, whether a non-title-holding spouse's income has been dedicated to improving the land/property, and whether the contributions to the property consisted of "time spent away from the marriage" and was done in exchange for the other spouse's maintenance of other aspects of the traditional marriage.

Where a spouse expends much of his marital energy cultivating a business for the benefits of the marriage, and the time he spends with that business is time spent away from marriage, the property acquired through that time and effort is marital property. Here, although Willa did not

contribute any time or money to the electronics store business, but Howard's efforts in the store were incident to the marriage. Willa (presumably) took care of Sam when Howard was working, and the time Howard spent working at the store was time that he was not at home with Willa and Sam. The fact that the store had been acquired shortly before the marriage has no effect on this analysis, because its value appreciated during the marriage. Howard's ability to work was due to Willa's efforts at home, supporting Howard, and thus the electronics business would be "marital property." Had Howard's involvement in the business been minor or as a shareholder or the like, or had the business simply maintained its original value, it is possible that the court could have found otherwise, but since the business succeeded and appreciated due to the joint efforts of the couple, Willa has an equitable interest in the electronics store.

2) Howard's responsibility for liabilities.

In Alaska, parents are generally jointly liable for the debts incurred in favor of their children during the marriage. Here, however, it appears that Willa has sole custody of Sam, and has been paying for his accoutrements by credit card during the separation.

(a) Sam's braces.

A parent is jointly responsible for debts incurred by medical necessity of his child. There has not yet been a custody decree, which would complicate this analysis, so it is a presumption that Howard is jointly responsible for the cost of Sam's braces. Howard might argue that the braces are not a medical necessity, but we don't know whether this assertion would be supported by any facts. Additionally, if Sam had the braces prior to the separation of his parents, the choice

for Sam to get the braces would have been a marital choice, that Howard would have likely taken part in, and he would be liable for 1/2 of the cost of the braces.

(b) Mountain bike

Willa's ability to recover for 1/2 of the cost of Sam's mountain bike is contingent on the circumstances surrounding its purpose. One spouse may be liable for contribution or support for the other spouse for general living expenses, etc., when the spending spouse is in a worse-off financial situation. However, a spouse who depletes marital assets either negligently or intentionally, will have her property apportionment decreased by the value of the depletion. Here, if Howard can show that the mountain bike wasn't reasonably necessary or was an excessive expenditure, he may be able to avoid liability for its purchase under the "unlawful depletion of marital assets" concept. Otherwise, the court may divide accordingly or attribute all the cost of the bike to Willa, depending on the circumstances surrounding its purchase.

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Property division in Alaska is a three part process. The court must first determine what property is separate and available for distribution. Separate property is property received through gift or inheritance, before marriage, or after separation. Separate property remains separate unless there is a demonstration by the owner for an intent to make it marital property. The property is then valued at the time of trial. The court must then equitably divide the property using the statutory Merrill factors. The Merrill factors include Availability of Health insurance, acquisition (time and place) of the property, living situations of the parties, financial situation of the parties, needs and circumstances of the parties, earning capacities, equitable considerations, value of the property owned, and other equitable factors including duration of marriage,

ONE:

a. Kenai Land:

The Kenai land was owned by Howard at the time they married. No debt against it and the land is still undeveloped. Minimal property taxes were paid each year from their joint checking account. Title remains in Howards name. Based on these facts, a court would likely find that Harold kept this property as separate property. No indication that joint contribution was put into the property, and the appreciation was not based on any marital effort. While Willa has a good argument that joint funds paid the taxes on the property, this factor taken alone, will not show the court an intent for the property to become marital. Because of this, the court would not likely find it to be marital. Had the property been jointly used and enjoyed by the couple, or effort put into the land, this may change the outcome. However, under these facts this is not the case.

Because the appreciation was merely incidental, she will not have a claim for it.

b. Electronics Store:

A business which has used joint marital efforts, and joint marital credit is a marital asset if done over an extended period of time. A business' good will is also a marital asset if it is marketable. Here, the business was bought before the parties were married. However, Willa has a strong case for this property being marital property under the "appreciation theory". The factors include: Marital efforts, the effect of the contributions on the marriage to the business, and the causal relationship between the two. Howard worked full time in the business during the marriage and his efforts have resulted in a business expansion with the opening of two more stores. While Willa never worked, this will not matter in an appreciation theory case. But, Harold's contribution to the business, his efforts he put into the business, a court would likely find had an effect on the marriage. Because of this, Willa will receive a portion of the appreciated value. She will have no claim in the initial \$250,000 that Harold put into the business. She will only have a claim to half of the appreciated value (as the other half will go to Harold). So she has a good claim for \$250,000 of the appreciated value. However, Harold will argue that it was his sole contributions and efforts that made the business succeed. He will likely fail in this argument.

TWO:

a. Braces:

A determination of what Harold owes in total child support will be based on his ability to pay.

There is no minimum child support. The maximum child support is based on an adjusted annual income of \$100,000. This will be divided by 20 percent because there is only one child. As there has been no child support awarded because of the separation and not it has not been finalized, he will be held liable for 50 percent of the braces if the court finds that braces are a necessary expenditure for a child. Braces are now so common that courts hold parents liable for joint payment where they can afford to.

b. Mountain Bike:

Willa will be stuck with the \$1500 bike. Because the court will not consider this a necessary expenditure for the child, Willa's buying the bike will be viewed as a gift, and unless Harold agrees to pay half (or all of it) he will not be liable for any payment for it. Willa may, but this is a factual determination for the court, be liable to Harold for depleting marital assets in spending this amount on a bike. However, this it up to judicial discretion.