ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

Forest and Milly have three children: Dina and Colleen are 13 year old twins, and Scott is three. The children have lived in Alaska their entire lives. Forest and Milly are divorcing in Alaska. They have agreed to share legal and physical custody of the twins. The twins will reside with each parent on alternating weeks. In other words, they will both stay at Milly's for a week and then they will stay with Forest for a week. As for Scott, they have agreed to share legal custody but he will reside primarily with Milly.

1. Based on the above agreement, what method will the Alaska trial court use to establish child support? Explain.

Two years after the divorce was granted, Milly announces she is relocating with the children to Florida to earn a Masters Degree. During the past two years, the legal and physical custody of the children has remained as initially agreed. Forest has exercised frequent and liberal visitation with Scott since the divorce. During the past two years, the couple has accommodated schedule changes that both have requested until now. Forest and Milly have had no major disputes concerning any of the children.

Dina and Colleen, now high school sophomores, have expressed to both parents they want to remain in Alaska. They are both on the downhill skiing Junior Olympics Team. There are no ski slopes in Florida. Forest was behind in his child support for three months in the last year. Forest refuses to consent to the children moving. Milly has filed a motion for custody modification to relocate the children.

2. How will a court analyze the modification issue? Discuss your analysis.

GRADER'S GUIDE

***** QUESTION NO. 5 *****

SUBJECT: FAMILY LAW

(1) **Child Support** (30 points)
For child support purposes, Forest and Milly have a hybrid physical custody arrangement. Civil Rule 90.3(f)(4) provides "Parents have hybrid custody under the rule if at least one parent has primary physical custody of one or more children of the relationship, and the parents have shared physical custody of at least one child of the relationship".

Milly has primary physical custody of Scott. Forest and Milly share physical custody of the twins.

The Alaska Supreme Court utilized its decision in Turinsky v. Long, 910 P.2d 590, 596-97 n.13 (Alaska 1996) in establishing a method for calculating child support when there is hybrid physical custody. To calculate child support, you must use both the primary and shared calculation of Civil Rule 90.3. In these calculations the Rule 90.3 (a)(2) percentages are adjusted pro rata based on the number of children in each type of custody. The results are combined to determine the net obligation under they hybrid custody agreement. See Civil Rule 90.3 (b)(3).

The first step is to divide the Civil Rule 90.3 (a)(2) percentage of income for the total number of children by the total number children to determine a per-child percentage. In this case, 33% divided by 3 equals 11%.

The second step is to calculate the support each parent owes for any child in the primary custody of the other parent using Civil Rule 90.3(a). This is done by using the per-child percentage of income arrived at in Step 1 instead of using the percentage in Civil Rule 90.3(a)(2). Thus, the per child percentage determined in Step 1 is multiplied by the number of children in the other parent's primary custody. Scott is the only child in the primary custody of a parent. Thus, Forest would owe 11% of his adjusted gross income to Milly for Scott's support.

The third step would be to determine the support for the children in shared physical custody under Civil Rule 90.3(b). Again, the per-child percentage from step one is utilized in the calculation. The percentage is multiplied by the number of children in shared physical custody. Here there are two children, the twins (two children = 22%). To continue the share custody calculation, 22% of each parent's income is determined. That is the amount of annual support they would owe for the twins if the other parent had sole custody. See Civil Rule 90.3 (b)(1)(A).

The resulting income amount is multiplied by the percentage of time the other

parent has physical custody (here, 50%). The court can vary this percentage. See Civil Rule 90.3 (b)(1)(B). The parent with the larger resulting income figure is the obligor parent. The amount of their obligation is the difference between the income figures multiplied by 1.5. See Civil Rule 90.3 (b)(1)(C). In this case, we do not know the income of either parent so it cannot be determined whether Milly or Forest will owe child support at this step.

The final step is to add the support obligations calculated in Steps 2 and 3. Offset the amounts calculated in each step if they are owed by different parents. If the same parent owes in Steps 2 and 3, the obligations are added together.

In the final step, the court must then decide whether unusual circumstances exists for a variance of the support figure. Hybrid custody is considered an unusual circumstance under Civil Rule 90.3 (c)(1). See Civil Rule 90.3 (b)(3).

(2) **Custody Modification** (70 points)
To modify a custody arrangement a party must prove that there has been a substantial change of circumstances that requires in the best interests of the child that a modification of custody occur. (Cooper v State, 638 P.2d 174 (Alaska 1981), Nichols v Nichols, 516 P.2d 732 (Alaska 1973).

The relocation of a parent outside of Alaska is a substantial change of circumstances. (House v House, 779 P.2d 1204 (Alaska 1989), Barrett v Alguire, 35 P.3d 1 (Alaska 2001).

When a custodial parent desires to relocate with the children, a hearing should be held. (Sherry v Sherry, 622 P.2d 960 (Alaska 1981).

In a relocation custody case, the court must find that there is a legitimate reason for the relocation and that the primary motivation was not a desire to make visitation more difficult. (Moeller-Prokosch v Prokosch, 27 P.3d 314 (Alaska 2001), Veselsky v Veselsky, 113 P.3d 629 (Alaska 2005).

The Alaska Supreme Court has found that relocation to pursue higher education is a legitimate basis for a move. (See House, supra; Veselsky, supra) It is likely that the court will find that the furtherance of Milly's education is a legitimate basis for the move. There is no evidence she is moving to make visitation more difficult.

Once the trial court finds that there is a legitimate basis for the move, the court must then 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 the criteria contained in AS 25.24.150 (c):

1) the physical, emotional, mental, religious, and social needs of the child;

2) the capability and desire of each parent to meet those 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, 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 statutory factor but in its discretion need only discuss those factors it considers actually relevant in light of the case's circumstances.

In a custody modification, a court can also consider a parent's compliance with child support orders. (See AS 25.20.110(b))

On the facts presented, it appears that both Forest and Milly have been meeting the children's physical, social, religious and emotional needs. The girls' status as Junior Olympic skiers could not be maintained if they relocated to Florida since there are no available ski facilities. The social and physical needs of the girls can't be met by mother with the Florida move.

While both parents have exhibited in the past their desire and capability to meet the children's needs, it can be viewed that Milly moving to a state with no ski slopes no longer has the capacity to meet the girls' needs.

An AS 25.24.150(c) factor at issue is the child's preference. Dina and Colleen have expressed a preference to remain in Alaska. Since they are high school sophomores, the court is likely to give their preference weight in its decision. Valentino v. Cote, 3 P.3d 337 (Alaska 2000).

There is nothing in the facts to suggest that there is not love and affection between the children and the parents.

There is no evidence of domestic violence, child abuse or neglect, or substance abuse. Thus, this criteria would not affect the court's decision.

It appears that both Forest and Milly have promoted the relationship between the children and the other parent.

The court could give weight to AS 25.24.150(c)(5) - the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity. The children are life-long Alaskans. This is where their friends are. The twins are halfway through their high school education. They are accustomed to snowy weather and participating in winter sports.

The court would weigh this against the fact that Scott has spent much more of his time with mom and may have stronger emotional bonds with Milly. If Milly was to relocate without Scott, the court would have to consider how Scott would be emotionally and psychologically impacted by such an occurrence.

The court could also utilize Forest's failure to provide child support in its decision making.

It is possible that the court could actually split the primary custody of the children by allowing Milly to relocate with Scott and the twins stay with Forest. There is a preference in Alaska law to keep siblings together. Rhodes v. Rhodes, 370 P.2d 902 (Alaska 1962) But the Alaska Supreme Court has held that this is not a hard and fast rule but is dependent on the circumstances of the individual case. McQuade v. McQuade, 901 P.2d 421 (Alaska 1995) Given the twins' expressed preference, the twins' status as Junior Olympic downhill skiers, and a ten year age gap between the twins and their brother, it is possible that the court would decide to separate the children by allowing Milly to have primary physical custody of Scott and the twins remain in Alaska in Forest's primary custody. The court could also award all the children to Forest.