ESSAY QUESTION NO. 9

Answer this question in booklet No. 9

Hugh and Wendy, lifelong Alaskans, were married in 1990. They are the parents of seven year old twins, whom they adopted from the State of Alaska three years ago. Because the twins were classified as hard to adopt, the couple receives a monthly stipend of $1,600 for the twins.

Shortly after the couple adopted, Hugh was diagnosed with a heart condition. He is unable to work. Therefore, Hugh receives Social Security disability payments every month. Because of Hugh's disability, the twins each receive $195 a month in Social Security benefits. The family also receives the Alaska Permanent Fund Dividend.

Wendy is employed full time as an office manager at a medical clinic. She earns $40,000 a year and receives twenty-one days of annual leave. Wendy currently has fifty days in her leave bank.

In 1992, Hugh's parents gave him a commercial building in downtown Anchorage. The building is managed by a rental company. The building generates an after tax profit each month of $4,000. Half is deposited into the couple's joint savings account. Both spouses would occasionally withdraw money from the savings account or transfer savings into joint checking. The other $2,000 is deposited into the couple's joint checking account and used for their living expenses.

The couple lives in a home Wendy purchased in 1985. Both the title and mortgage are still in Wendy's name only. The home has increased in value.

A divorce has been filed in the Superior Court in Anchorage. The couple has agreed to shared legal and physical custody of the twins.

1. What financial resources will the court consider when calculating child support?

2. Discuss how the court will analyze whether the commercial building, the rental income, Wendy's leave, and the marital residence are marital property.

GRADER'S GUIDE

***** QUESTION NO. 9 *****

SUBJECT: FAMILY LAW

(1) (30 points)
Since the parties have agreed to shared physical custody, child support would be calculated under Alaska Rule of Civil Procedure 90.3(b).

To calculate support, the court would have to consider all the couple's revenue sources. These would include Wendy's earnings from the medical clinic, their Alaska Permanent Fund Dividends, the adoption stipend, Hugh's Social Security Disability payments, and the building rents. (See Commentary to Rule 90.3, Section III(A)).

Since the couple are lifelong Alaskans, they both receive an Alaska Permanent Fund Dividend. Both parents' PFDs are considered income under the Commentary to Civil Rule 90.3 and should be attributed to each as income.

Wendy's income would consist of her earnings and her PFD. Hugh's income would include his Social Security Disability and his PFD. Depending on how the court divides the building's rent between Hugh and Wendy, that rental income would also be income for child support.

The children's PFDs are not included as income on either parents' side.

The adoption stipend would be considered an unusual circumstance under Civil Rule 90.3 (c)(1). It would fall to the trial court's discretion as to how to allocate the stipend between the parties. The court could simply credit it equally to each parent or proportionally divide it based on their other individual income.

The twins' Social Security benefits are based upon Hugh's condition. The children's two Social Security Disability payments would be added to Hugh's income. See Miller v. Miller, 890 P.2d 574 (Alaska 1995).

Miller, supra at 577 held that Civil Rule 90.3 does not preclude Social Security benefits from being utilized as an offset of a child support obligation. Depending on the amount, this can be a full or partial offset of an obligor's required support payment. Thus, Hugh's monthly income would be his Social Security Disability, his PFD, any building rents awarded to him and each twin's $195. After determining what his monthly child support obligation was, (if Hugh was determined to be the obligor parent) then the twins' Social Security monies would be credited against the obligation. For example, if Hugh's obligation was $600 per month, he would only have to actually pay out of

pocket $210. If his obligation was $300 per month, he would have to pay nothing out of pocket because the twins' Social Security benefits ($390) more than covers it.

(2) (70 points)

An Alaska trial court must utilize a three-prong approach when dividing property in a divorce. The trial court must (1) determine what property is marital or non-marital; (2) value of 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, 46-47 (Alaska 1996).

AS 25.24.160(a)(4) gives the trial court broad discretion to equitably allocate property. (See Keturi v. Keturi, 84 P.3d 408, 412 (Alaska 2004)).

Marital property includes all property acquired during a marriage except for inherited property and property acquired with separate property which is kept as separate property. (Hansen v. Hansen, 119 P.3d 1005, 1009 (Alaska 2005)).

A spouse's pre-marital or 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 defined as the appreciation 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) COMMERCIAL BUILDING

Hugh acquired the commercial building during the marriage. Title remained only in his name. The building could become part of the marital estate only if it became transmuted into marital property by the couple'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 (Green, 29 P.3d at 858). No single factor or combination of the factors is dispositive. (Chotiner v. Chotiner, 829 P.2d 829, 832 (Alaska 1992). All four factors are not required to exist.

When applying the Green factors, the commercial building was never utilized as a marital residence. Title was only in Hugh's name. There are no facts that show that either spouse contributed to its improvement or ongoing maintenance expense. Actually, the facts seem to indicate that the rents more than covered the building's costs because it generated after-tax profits each month. Also, neither Wendy or Hugh's credit was utilized to improve the property.

The depositing of rental profits alone into a couple's joint savings and checking accounts is not sufficient to show an intent to transmute the commercial building into marital property. Krize v. Krize, Krize, 145 P.3d at 485-86 (Alaska 2006), found that the depositing of rental payments into a couple's joint checking account was akin to periodic gifts to the marriage. The rental payment deposits were held to be insufficient to show an intent to transmute separate property (the commercial building) into a marital asset. (See also Sampson v. Sampson. 14 P.3d 272 (Alaska 2000). The Krize court emphasized that because Mr. Krize retained the right to stop at any time the rents from being deposited into the couple's joint account, his actions should be viewed as periodic gifts of the income rather than a complete assignment of future income.

Under these facts, no marital money or efforts were utilized in the maintenance or improvement of the building. Any increase in the building's value occurred due to passive circumstances, i.e. upswing in real estate market.

The facts do not suggest any words or conduct by Hugh to show that he intended future rents to be marital.

There is no active appreciation. There was no transmutation so Wendy has no interest in the property.

Even if there is no marital interest in the building, AS 25.24.160(a)(4) allows a trial court to consider when deciding how to divide the couple's estate the invasion of separate property (such as an inheritance) if the equities require it.

(B) JOINT SAVINGS ACCOUNT

Although the monies in the parties' joint savings account were primarily from

the building's profits, the depositing of them into an account which is jointly titled is evidence of an intent to transmute the property into a marital asset. Also, the facts are that both spouses withdrew and transferred monies from the joint savings account. Thus, both exercised control. The trial court would likely hold the joint savings account to be a marital asset.

(C) WENDY'S HOUSE

As for Hugh's interest in Wendy's house, again the Green, supra analysis would be applied. Factor one is present - the parties used the home as a marital residence. They lived in it the entire length of the marriage - 17 years, which is a significant time period.

The second factor - whether both parties contributed to the ongoing maintenance and improvement - is also present. The facts are that there is still a mortgage on the house. The mortgage would have been paid from their joint checking account which both spouses contributed to. Also in 17 years, the home would have required ongoing maintenance.

The third factor is not present. Title is held only in Wendy's name.

There is no evidence that either spouse's credit was used to improve the residence.

Although only factors one and two are present, the trial court will hold it is a marital asset. There are no Alaska appellate cases where the Supreme Court has found that the couple's residence was not transmuted into the marital estate.

(D) WENDY'S LEAVE

Wendy has fifty days of leave coming to her. In Schober v. Schober, 692 P.2d 267, 268 (Alaska 1984), unused personal leave which may be either used or converted to cash, was held to be a marital asset subject to division.

There is nothing in the facts that indicate Wendy's leave is cashable but since she has accrued a leave bank, it is still available for her use. The leave is a marital asset which would be given a monetary value by the court. It, too, will be equitably divided.