ESSAY QUESTION NO. 4

Answer this question in booklet No. 4

During their fifteen year relationship, Meta and Felix had three children: Sam, twelve; Ben, ten; and Grace, who is one year old. The couple never married. They lived together from Sam's birth in 1995 until August, 2004 when they separated. Meta and Felix resumed living together in April, 2006 shortly before Grace's birth. They separated again on July 1, 2007.

During their first separation, the boys lived primarily with Meta. Felix would have the boys every Friday to take them to services at the synagogue. The boys would also spend three weekends a month with Felix from Friday to Sunday.

Felix dated Lola for several months during his first separation from Meta. In January, 2005, Lola obtained an ex parte domestic violence restraining order (DVRO) against Felix. Lola was then granted a long term domestic violence restraining order against Felix when he failed to appear at the hearing.

After Meta and Felix separated the second time, Meta filed a complaint on July, 10, 2007, requesting sole legal and primary physical custody of their three children. Felix's answer and counterclaim requests shared legal and physical custody.

Meta was arrested for Driving Under the Influence last week. Her blood alcohol reading was .12. She pleaded not guilty. Meta has no prior criminal history.

An interim custody hearing for the three children is scheduled for September.

1. Analyze and discuss interim custody.

2. Explain what step or steps the trial court can take to ensure the gathering of independent information on the issue of the children's best interests.

GRADER'S GUIDE

***** QUESTION NO. 4 *****

SUBJECT: FAMILY LAW

I Analysis and Discussion of interim joint legal and shared physical custody. (80 points)

AS 25.20.070 governs interim child custody: "Unless it is shown to be detrimental to the welfare of the child considering the factors under AS 25.24.150(c), or unless the presumption under AS 25.24.150(g) is present, the child shall have, to the greatest degree practical, equal access to both parents during the time that the court considers an award of custody under AS 25.20.060-25.20.130."

The court will apply the same rules and custodial rights to Meta and Felix even though they are not married. The standard the court applies to custody during the interim is somewhat different than at a final custody hearing. This is because AS 25.20.070 creates a preference for "equal access" during the interim. Examinees should get credit for recognizing that while the court has to apply the standards set out in AS 25.24.150(c) when determining interim custody, the court is also bound to try and equalize parental access during the interim unless it is clearly detrimental to do so. There is a preference for joint legal custody. See Farrell v. Farrell, 819 P.2d 896 at n.1 (Alaska 1991). Here there are no facts indicating Meta and Felix are not able to communicate as coparents. However, the domestic violence issue between Felix and Lola will come into play as discussed below.

AS 25.20.070 specifically states that the factors of AS 25.24.150(c) (the "best interest statute") must be considered to determine whether it is detrimental to the child's welfare to have equal access to both parents. Recent legislative amendments have added AS 25.24.150(g) which created a rebuttable presumption against awarding sole or joint legal and/or physical custody to a parent with a domestic violence history.

A. ANALYSIS OF THE AS 25.24.150(c) FACTORS.

The factors outlined in AS 25.24.150(c) are:

"(1) the physical, emotional, mental, religious, and social needs of the child;
(2) the capability and desire of each parent to meet these 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 willingness and ability of each parent to facilitate and encourage a

close and continuing relationship between the other parent and the child, except that the court may not consider this willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health and safety or either the parent or the child;

(7) any evidence of domestic violence, child abuse, or 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 or physical well-being of the child;

(9) other factors that the court considers pertinent.

The examinee should then identify the AS 25, 24.105(c) factors used by the court, recognize that no one factor is dispositive, that the court only has to analyze factors relevant to the facts, and discuss how the facts of this case fit into a AS 25.24.150(c) analysis. The question focuses on identifying and analyzing the relevant factors under the governing laws. The question does not require the test taker to actually identify a custodial choice they assert the court would or should make.

(c)(1)The facts do not indicate, aside from the religious issue, that any of the children have special needs beyond those normal to children of their age. The possibility that continued participation at the Temple is a special need to the children should be recognized.

(c)(2) The facts do not indicate that either Meta or Felix is incapable of meeting the children's needs. The only issue raised by the facts is whether one parent is better able to meet the children's religious needs. The facts do not establish if both parents encouraged the boys' religious instruction while they were an intact family.

While Felix has regularly taken the boys to synagogue, the Alaska Supreme Court in Bonjour v Bonjour, 592 P.2d 1238, 1239-1240 (Alaska 1974) has recognized a minor's religious needs only when a child who is mature enough to make a choice has expressed a religious preference. Seven and nine year olds were found not to be mature enough to make religious choices in Hamilton v. Hamilton, 42 P.3d 1107, 1117 (Alaska 2002). Felix's boys are 12 and 10, older than the children in Hamilton. It is possible that their religious preferences would be considered by the judge.

As for factor (c)(3), the court must consider a child's preference if the child is of sufficient age and capacity to form a preference. The facts don't indicate the preference of any of the children. Grace, an infant, clearly is not of a sufficient age**.** The boys, at 10 and 12 are older and their preference may be a factor. Neither the statute nor case law has established an age at which a child's

preference is presumptively factored in, or is dispositive of custodial placement. The trial court has to assess, on a case by case basis, if the child is of sufficient age and maturity to have a preference, and if it is in that child's best interest to follow the preference. The weight that a trial court accords to a child's preference, or any of the other factors of AS 25.24.150(c), is given broad discretion by the appellate court. Horutz v. Horutz, 560 P.2d 397 (Alaska 1977).

There is no evidence given on factor (c)(4) for Felix or Meta.

Factor (c)(5) is the length of time that the child has lived in a stable environment and the desirability of maintaining continuity. The children have lived with Meta their entire lives. While Felix did have significant contact with the boys during the first lengthy separation, this factor probably weighs in Meta's favor.

During their initial separation, Felix had regular contact with the boys. There is nothing to indicate that either Meta or Felix has hindered the other parent's contact or relationship with their sons. Thus, factor (c)(6) appears to be favorable to both.

Factor (c)(7) is the consideration of domestic violence in the proposed custodial household or a history of violence between the parents. The facts do not suggest a history of violence between the couple. The D.V order issued to Lola would be a factor if the court determined that Felix was likely to be violent to the children or violent to others in front of the children. However, under (c)(7), the court can recognize the possibility of future domestic violence, but still, weighting in the other factors, grant shared or sole custody to Felix.

A finding of some domestic violence in (c) (7) can create custodial presumptions under AS 25.24.150(g). Examinees should recognize that the provisions of AS 25.24.150(g) are analyzed separately. [See below]

(c)(8) There is some evidence that substance abuse by Meta may affect the emotional or physical well-being of the children. The fact that Meta has pled Not guilty, and that the criminal case is still pending should be noted. Also, the fact that the court would likely want more information…e.g were the children in the car, is this an isolated incident…should be noted. Again, the best answer will note that the role of alcohol use by a parent is different in factor (c)(8) than in its role in overcoming a presumption in 150(g) (h)).

(c)(9) The court will consider whether keeping the children together is in their best interest. Theire isno overriding preference for keeping the children together. See Craig v. McBride, 639 P.2d 303, 306 (Ak. 1982).

B. DISCUSSION OF AS 25.24.150

AS 25.24.150(g) states "There is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child."

AS 25.24.150(h) defines what "a history of domestic violence" is and how the presumption of AS 25.24.150(g) can be overcome. "A parent has a history of perpetrating domestic violence under (g) of this section if the court finds that, during one incident of domestic violence, the parent caused serious physical injury or the court finds that the parent has engaged in more than one incident of domestic violence. The presumption may be overcome by a preponderance of the evidence that the perpetrating parent has successfully completed an intervention program for batterers, where reasonably available, that the parent does not engage in substance abuse, and that the best interests of the child require that parent's participation as a custodial parent because the other parent is absent, suffers from a diagnosed mental illness that affects parenting abilities, or engages in substance abuse that affects parenting abilities, or because of other circumstances that affect the best interests of the child."

Here there isn't evidence of inter - family domestic violence, however facts in the question should elicit a discussion of AS 25.24.150(g). First, the court decides if the facts support a finding that Felix has a history of domestic violence under the act. If the facts support that finding, then the court is bound by the rebuttable presumptions set out in AS 25.24150(g) unless facts are presented to overcome the presumption.

(1) Do the facts support application of AS 25.24.150(g) presumptions?
The examinee should recognize that the facts do not give enough information to decide this issue. The mere fact that Lola obtained a long term court order is not enough. As stated in AS 25.24.150(h), the custodial presumptions do not apply if there has been only one incident of domestic violence unless that assault caused serious physical injury. There is no information given as to what the domestic violence was between Felix and Lola, how often it occurred, or the seriousness of the domestic violence itself.

The custodial presumption will also apply if there is a history of domestic violence. A history of domestic violence is defined as two or more incidents, regardless of the degree of injury. AS 25.24.150(h). Again, the facts do not discuss whether there were more than one incident between Felix and Lola and there is no evidence of domestic violence by Felix against Meta or the children.

Examinees should get credit for discussing the differences between the ex-parte order and the uncontested long term order. The ex-parte order does not have res judicata application on the finding that Felix committed domestic violence because he had no opportunity to present evidence. If the court finds that Felix

had notice and an opportunity to defend against the long term order, then the finding of domestic violence may have res judicata application.

(2) Impact of Presumptions
The examinee should mention the impact of the presumptions if the court decides that the facts support application of AS 25.24.150(g) presumptions: Felix cannot be awarded joint or sole legal or physical custody. Also if the court finds that a parent meets the definition of a history of domestic violence, (AS 25.24.150(h), supra) the court can only allow supervised visits.

(3) Are there any facts to overcome the presumption?
An examinee could argue that Meta's DUI might allow the court to award Felix custodial rights if the court determined that she engaged in substance abuse that impaired her parenting abilities. On the other hand, A single unresolved DUI probably may not raise to the level needed to overcome the presumptions. An examinee may list or identify the other AS 25.24.150(h) factors than could overcome the presumption. But none of those factors are applicable here.

C. DISCUSSION OF AS 25.20.090.

Examinees should note that since Felix is requesting shared legal and physical custody, the court must also consider the factors listed in AS 25.20.090. Some of these are a duplication of the factors listed in AS 25.24.150(c).

Sec. 25.20.090. Factors for consideration in awarding shared child custody. "In determining whether to award shared custody of a child the court shall consider:

(1) the child's preference if the child is of sufficient age and capacity to form a preference;
(2) the needs of the child;
(3) the stability of the home environment likely to be offered by each parent;
(4) the education of the child;
(5) the advantages of keeping the child in the community where the child presently resides;
(6) the optimal time for the child to spend with each parent considering
    (A) the actual time spent with each parent;
    (B) the proximity of each parent to the other and to the school in which the child is enrolled;
    (C) the feasibility of travel between the parents;
    (D) special needs unique to the child that may be better met by one parent than the other;
    (E) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, except that the court may not consider this willingness and ability if one parent shows that

the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child;

(7) any findings and recommendations of a neutral mediator;

(8) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;

(9) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;

(10) other factors the court considers pertinent."

II Steps the court can undertake to obtain independent information. (20 points)

As set out below, the court has the ability to appoint a child custody investigator, a guardian ad litem, or an attorney for the child to assist in the development of independent evidence on custody, access, and visitation issues.

Examinees may also recognize that the court can: interview the child (in court or in chambers); ask direct questions of the witnesses during court, refer a case to Office of Children's Services, and order a party to submit to a physical or mental examination. Discussions of what witnesses the parties should call, or what discovery the parties can or should use is not relevant.

A Guardian Ad Litem (GAL) can be appointed under Civil Rule 90.7. Guardian Ad Litem are appointed when the court finds separate representation of the best interests of the minor is necessary because either the proceeding is quite complex or the GAL will present evidence that likely will not be presented to the court.

A Guardian Ad Litem may also be appointed under AS 25.24.310(c).

The appointment of an attorney to represent a child in a divorce or custody case is authorized under AS 25.24.310(a).

The Commentary to Civil Rule 90.7 outlines the differences between the roles the custody investigator, a GAL, and an attorney for the child.

***custody investigator*:** A custody investigator is an expert witness appointed by the court. The custody investigator's duty is to conduct a thorough investigation and give an expert opinion on the custody arrangement that is in the best interests of the child. A custody investigator does not participate in court proceedings, other than to testify as an expert witness. The court or

parties can seek the appointment of a custody investigator pursuant to Ak.Civ.R.90.6.

***guardian ad litem*:** A guardian ad litem has the duty to conduct a thorough factual investigation. Based on this investigation, the guardian ad litem must decide what course of action is in the child's best interests. The guardian ad litem must then advocate this course of action, regardless of whether the child agrees with the guardian ad litem's position. The guardian ad litem participates as a party in court proceedings that affect the child, but only testifies in exceptional circumstances and then only as to factual matters. The guardian ad litem never testifies as an expert witness."

attorney for child: A child's attorney represents the child, and it is the child who ultimately decides what position will be advocated in court. The attorney's duty is to conduct a thorough investigation, advise and consult the client, and zealously advocate the client's position in court."

The appointment of an attorney for a child is a rarity. The attorney/client privilege exists between the child and counsel.

Even if the GAL or the custody investigator is an attorney, there is no attorney/client privilege.

The Commentary to Civil Rule 90.7(a) advises the GAL should not be routinely appointed in custody/visitation cases but that the custody investigator be appointed instead since the custody investigator is an expert witness who can testify on the "best interests" issue while a GAL, who is a party, cannot testify on the ultimate issue.

The appointment of a custody investigator, a GAL, or an attorney for the child does not prevent a party from presenting other expert or lay witnesses on the custodial/access/visitation issues. A custody investigator is limited to giving an opinion only on the custodial/access/visitation issues. This limitation is not placed on either the GAL or the child's attorney. The GAL and child's attorney can present evidence on child support and other financial issues related to the child.