ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

Wanda and Harvey married in Fairbanks Alaska in 1988. They had one child that year. They separated in 2000 and Harvey moved into an apartment with his friend John. Wanda filed for divorce in January 2001. A peace officer delivered a copy of the summons and divorce complaint to John at the apartment he shared with Harvey. Unbeknownst to anyone but John, Harvey had moved out the week before.

In April 2001, the trial court held a hearing on Wanda's request for interim orders regarding child support and custody. Harvey appeared and participated. He acknowledged receiving "the divorce papers." The parties agreed on a small interim child support amount, with the final amount to be decided at a later hearing set for July 7, 2001. They agreed Wanda would have custody of their child.

After the April hearing, Harvey disappeared and could not be located. The court held the July 7, 2001 hearing as scheduled. Harvey did not appear. The child support amount was addressed at the hearing. Wanda testified that Harvey usually earned about $35,000 a year. The Judge asked if it was her testimony that Harvey earned at least $35,000 a year in 2000. Wanda testified "oh yes" despite knowing that Harvey had only earned $12,000 in 2000.

The court entered a judgment of divorce in July 2001 and as part of the judgment ordered Harvey to pay an amount of child support based on Wanda's testimony that he earned $35,000 in 2000.

Harvey paid very little child support over the years. The State of Alaska, Child Support Services Division (CSSD) garnished his annual federal tax refunds and occasionally attached his wages at various jobs. In 2008 CSSD located Harvey working for John's gravel business. Under its statutory authority, CSSD sent a garnishment order to John to begin garnishing Harvey's wages to pay the child support ordered under the 2001 divorce decree. Harvey's ongoing child support had stopped in 2006, when the child turned 18, but Harvey still owed arrearages. John began withholding part of Harvey's wages for child support.

In April 2008, Harvey filed a motion in the divorce case asking for relief from the 2001 divorce judgment.

Do not discuss the prohibition against retroactive modification of child support in Civil Rule 90.3(h) in answering the following questions.

1. In his motion for relief from the judgment, Harvey argues he was not served properly in the divorce and therefore the divorce judgment is void. How should the court rule? Discuss.

2. In his motion for relief from judgment, Harvey also argues that he should be granted relief from the child support judgment because Wanda committed fraud when she testified about his earnings. He provides the parties' 2000 federal income tax return, signed by both of them, to the court. The return shows his income was $12,000. After reviewing the tax return, and a transcript of the 2001 hearing, the court finds Wanda's testimony was fraudulent. Can Harvey get relief from the 2001 judgment? Discuss.

3. John, Harvey's employer, knows CSSD has the authority to garnish wages to pay an employee's child support arrearages. But he thinks CSSD is being unfair to Harvey and the garnishment is an administrative hassle for him. He intends to intervene in Harvey's lawsuit against CSSD. Will the court allow John to intervene? Discuss.

GRADER'S GUIDE

***** QUESTION NO. 2 *****

SUBJECT: CIVIL PROCEDURE

Child support orders are treated like judgments. Trial courts will look to Civil Rule 60(b) for guidance in determining when relief is available. See *State v. Maxwell*, 6 P.3d 733 (Alaska 2000).

Alaska Civil Rule of Civil Procedure (ARCP) 60(b) provides:

(b) **Mistakes-Inadvertence-Excusable Neglect-Newly Discovered Evidence-Fraud-Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
(1) mistake, inadvertence, surprise or excusable neglect,
(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment should have prospective application; or
(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the date of notice of the judgment or orders as defined in Civil Rule 58.1(c). A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to grant relief to a defendant not personally served, or to set aside a judgment from for fraud upon the court. Writs of coram nobis, coram vobis and audia querela are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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1. Is the divorce judgment void because Harvey was not served properly? (20 points)

ARCP 60(b)(4) provides for relief from a judgment if it is void. See ARCP 60(b). The court also has the power to entertain an independent action to grant relief to a defendant not properly served. See ARCP 60(b)(6). A judgment is void if the court that entered the judgment was without jurisdiction to act, or if that court acted in a manner inconsistent with due process of law. *State v. Maxwell*,

6 P.3d 733 (Alaska 2000). There is no time limit on a motion attacking a judgment as void. See *Kennecorp Mortgage v. First Nat. Bank*, 685 P.2d 1232 (Alaska 1984). Therefore, Harvey's argument in 2008 that a 2001 judgment is void is not time barred.

Under ARCP 4(d)(1) service on an individual can be made by delivering a copy of the summons and complaint at the individual's dwelling house or usual place of abode with someone of suitable age and discretion who lives there. See ARCP 4(d)(1). The facts indicate that a peace officer delivered a copy of the summons and complaint to John, Harvey's former apartment mate. If Harvey had been living at John's, service would have been properly made. There is nothing to indicate that John is not someone of "suitable age and discretion." However, Harvey had moved out so service was not effective.

But Harvey voluntarily appeared at the April 2001 hearing and acknowledged that he received the divorce papers. Alaska Statute 9.05.01 provides that the voluntary appearance of the defendant is equivalent to personal service of a copy of the summons and complaint. See AS 9.05.01. Harvey's appearance equals personal service. See *Kenai Peninsula Borough v. English Bay Village*, 781 P.2d 6, 9 (Alaska 1989). The 2001 judgment is not void due to lack of personal service.

2. <u>Should Harvey be granted relief from judgment on the ground of fraud</u>? (40 points)

An examinee should recognize that Rule 60(b) deals with two types of fraud. Clause 60(b)(3) provides for relief from a judgment for fraud, misconduct or misrepresentation of an adverse party. See Civil Rule 60(b)(3). A judgment can also be set aside for "fraud upon the court." See Civil Rule 60(b).

A motion for relief from judgment under clause 60(b)(3) has to be made not more than a year after the date of notice of the judgment. See Civil Rule 60(b)(3). Here, seven years has passed since the 2001 judgment and two years has passed since Harvey last owed child support so the Harvey's request for relief is time barred.

Harvey could argue that he did not have notice of the judgment, but this argument would likely fail. He appeared at the hearing where interim child support was set and he also knew that the final amount was to be set at a later date. In fact the court set the date for the later hearing when he was there and he did not appear. Also, the facts indicate that CSSD garnished his federal tax refunds and his wages through the years so he certainly was on notice he owed child support.

Harvey might have a better argument that the judgment should be set aside for "fraud upon the court." There is no specific time limit to seeking relief for

"fraud upon the court" but the motion to set aside a judgment must be made within a reasonable time in light of all the circumstances and interests involved. See ARCP 60(b); *Mallonee v. Grow*, 502 P.2d 432, 437 (Alaska 1972).

The court looks at whether circumstances beyond a party's control caused the delay in filing the motion for relief. See *Propst v. Propst*, 776 P.2d 780 (Alaska 1989) (reversing a denial of 60(b)(5) relief where husband's delay was based on wife's agreement not to raise passage of time to defeat a motion to modify child support award, and where the CSED falsely represented that it would not enforce the order).

Here there are not enough facts about why Harvey delayed in dealing with the child support order to evaluate whether his motion for relief has been made "within a reasonable time." But an examinee should recognize that timeliness is an issue. The motion was made seven years after the order was entered. Harvey knew the final child support would be set at a later date but then he disappeared. He knew the order was being enforced because of collection actions through the years. The facts given do not indicate why he did not challenge the order earlier.

If the court finds Harvey's request was brought in within a reasonable time, the question becomes whether Wanda's conduct rises to the level of "fraud upon the court." "Fraud upon the court" is conduct so egregious that it involves a corruption of the judicial process. See *Village Chefornak v. Hooper Bay Const*, 758 P.2d 1266, 1271 (Alaska 1988). Fraud on the court is limited to very unusual cases involving 'far more than an injury to a single litigant.' See *Higgins v. Anchorage*, 810 P.2d 149, 154 (Alaska).

In *Higgins*, the court found that relief for fraud upon the court was appropriate when a municipal attorney had "at least" recklessly misrepresented to the court the municipality's arbitration policy in an employee reclassification dispute and violated the duty of honest dealings with the court. *Id.* On the other hand, a party's failure to disclose the true value of marital property at the time of divorce was not fraud upon the court. The court found the other party had the opportunity to contest the property values and do their own appraisal. Thus the wrong was between the two parties and not "a direct assault on the integrity of the judicial process". See *O'Link v O'Link*, 632 P.2d 225, 231 (Alaska 1981).

Here, Wanda lied to the court at the 2001 hearing about Harvey's 2000 income. She knew what she said was false in response to a direct question from the court. The court found the testimony to be in direct contradiction to her sworn assertions on her federal income tax return. The court based Harvey's child support order on Wanda's false testimony. Arguably, Wanda's lie corrupted the judicial process. Wanda could argue that Harvey could have easily challenged

the testimony had he shown up and therefore the wrong is only between the two parties. Because Wanda lied directly to the court, there is a good argument for "fraud upon the court" but an examinees' analysis is more important than the conclusion.

Civil Rule 60(b)(6) provides for relief from judgment for "any other reason justifying relief." However the provision does not apply here.

Rule 60(b)(6) is not available unless circumstances justifying relief are extraordinary and do not come within the reasons listed in clauses (1) – (5). See *Village of Chefornak*, 758 P.2d 1266 (Alaska 1988). Here, if clause 60(b)(3) is applicable 60(b)(6) would not be available.

If the court finds Wanda's fraud rises to the level of "fraud upon the court" then it is addressed in the savings clause of the rule and not under 60(b)(6). See *O'link v. O'link,* 632 P2d 225, 231 (Alaska 1981); *Stone v. Stone*, 647 P.2d 582, 586 n. 7, (Alaska 1982).

3. <u>Will the court allow Fred to intervene</u>? (40 points).

Intervention is permitted either as of right or permissively within the discretion of the court. See Civil Rule 24.

<u>Intervention as of Right</u> (25 points)

Civil Rule 24(a) provides:

Upon timely application, anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

A four-part test is imposed to determine if the court is required to grant intervention as a matter of right: (1) the motion must be timely; (2) the applicant must show an interest in the subject matter of the action; (3) it must be shown that this interest may be impaired as a consequence of the action; and (4) it must be shown that the interest is not adequately represented by an existing party. See *State v. Weidner,* 684 P.2d 103, 113 (Alaska 1984).
The court reviews a denial of intervention as a matter of right for abuse of discretion if timeliness is an issue. The court applies its independent judgment if timeliness is not an issue and if the facts relevant to intervention are not disputed. See *Alaskans for a Common Language*, 3 P.3d 906, 912 (Alaska 2000). Civil Rule 24(a) is liberally construed. See *id.*

Here, assuming John made a timely motion to intervene, he probably does not have sufficient interest in the subject matter of the action to be entitled to intervene as of right. To satisfy part (2) of the test, the requisite interest for intervention as a matter of right must be direct, substantial, and significantly protectable. A contingent interest is insufficient to satisfy part (2) of the test. See *Weidner*, 684 P.2d at 113. (State land lottery winners could not intervene as a matter of right when trial court had ordered lottery be held but that no interest would vest in winners pending outcome of litigation over lottery validity).

Here, John has no interest in the child support arrears which are the subject of the action. He is concerned only about the administrative "hassle" of garnishing Harvey's wages. His interest in the impact of garnishment process on his business is not a direct interest in the subject of the action, the arrearages. Also, assuming he did have a legitimate action against CSSD due to administrative problems with the garnishment, that action could proceed even if the court determined garnishment of Harvey's wages should not be suspended while Harvey's motion for relief from judgment is pending.

Permissive Intervention (15 points)

Civil Rule 24(a) provides:
Upon timely application, anyone may be permitted to intervene in an action when the applicant's claim or defense and the main action have a question of law or fact in common… In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The court has discretion to grant or deny intervention. The court must determine whether or not intervention would unduly delay or prejudice the adjudication of the rights of the original parties. Recognizing that additional parties are always the source of additional questions, briefs, objections, arguments and motions, where no new issues are presented, the most effective and expeditious way to participate is by a brief amicus curiae and not by intervention. See *Weidner, 684 P.2d at 114.*

John is unlikely to be granted permissive intervention. The facts and law regarding his claim do not have much in common with Harvey's. John acknowledges the legal right of CSSD to garnish an employee's wages for child support. His complaint is about the administrative hassle he has in complying with the garnishment. The factual and legal questions surrounding that issue – whether a business has a claim against CSSD for difficulties it has complying with a request to garnish an employee's wages- are unrelated to Harvey's issues with the garnishment - whether the arrearages judgment is void, or issues of fraud.