**ESSAY QUESTION NO. 1**

**Answer this question in booklet No. 1**

Wanda listed an apartment for rent in the newspaper. Bill called Wanda and inquired about the apartment. Wanda told him that rent was $900 per month, with the first month's rent, plus two additional months rent prepaid, and a $100 security deposit due upon signing.

Wanda sent Bill a written month-to-month rental agreement. The rental agreement provided that in the event of a failure to pay rent Wanda had the option of applying the prepaid rent prior to exercising other remedies she might have. Bill signed the agreement and sent Wanda the lease and a check for $3,700 ($900 first month's rent, $1,800 prepaid rent, $1,000 security deposit). Bill erroneously thought that the security deposit was $1,000, rather than $100. Wanda noticed the extra amount but did not say anything to Bill about it.

A few days later, Wanda gave Bill keys to the apartment. She asked him to sign a written agreement to mediate any dispute they might have related to the rental agreement, prior to filing in court. The title to the document was "Attachment 1: Mediation Agreement." Wanda explained that she forgot to include it when she mailed the rental agreement. Bill was annoyed but signed the Mediation Agreement.

Bill later failed to pay rent for one month when it was due. Wanda, who knew that she had an extra $900 of Bill's money (plus the two months' prepaid rent), applied $900 from the prepaid rent to pay the past due rent. Wanda sent Bill a note that she had applied the prepaid rent so that she would not have to evict him. Bill subsequently made a few more timely rent payments, but then failed again to pay rent when due. Wanda called Bill, and when he said that he did not have the money for that month's rent yet, she told him he was going to have to face the consequences.

The next day, Wanda went to Bill's apartment. When she found that he was not home, she firmly affixed a written notice to quit to Bill's door stating that she was terminating his rental agreement for failure to pay rent and that he had one week to move out. When Bill had not moved out a week later, Wanda filed a forcible entry and detainer ("FED") action in state court to evict Bill and properly served Bill with the FED action.

Bill appeared at the FED hearing and made several arguments. First, Bill stated that he did not receive the written notice to quit that Wanda affixed to his door. He stated that he only learned about the notice to quit because Wanda called him the day before the FED hearing to confirm that he was going to attend the FED hearing and she told him about leaving the notice on his

door. Bill also argued that the notice was defective because it did not contain all of the information required in a notice to quit.

Second, Bill argued that the action should be dismissed because of Wanda's failure to mediate the dispute.

Finally, Bill argued that he could not be evicted because Wanda violated the statutory limitation on the amount of prepaid rent and security deposit that she could demand, and that Wanda was required to apply his last month of prepaid rent prior to terminating the tenancy for failure to pay rent.

1. Discuss Bill's argument that Wanda's written termination notice was defective in content and delivery.

2. Can Bill force Wanda to mediate the dispute under the Alaska Uniform Residential Landlord Tenant Act ("URLTA")? Explain.

3. Evaluate the likely success of the FED action given Bill's arguments.

**GRADER'S GUIDE**

*****QUESTION NO. 1*****

**SUBJECT: REAL PROPERTY**

**1. Discuss Bill's argument that Wanda's written termination notice was defective in content and delivery. (30 points)**

Alaska Statutes require landlords to give tenants written notice in order to effect an eviction. AS 09.45.100 governs the form of notice required:

> (a) Except where service of written notice is made under AS 09.45.090(a)(1) or (b)(1), or except when notice to quit is not required by AS 09.45.090(a)(3) or (b)(3), a person entitled to the premises who seeks to recover possession of the premises may not commence and maintain an action to recover possession of premises under AS 09.45.060 -- 09.45.160 unless the person first gives a notice to quit to the person in possession.
> …
> (c) A notice to quit shall be in writing and shall be served upon the tenant or person in possession by being
> (1) delivered to the tenant or person;
> (2) left at the premises in case of absence from the premises; or
> (3) sent by registered or certified mail.

Bill argued that the notice affixed to his door is not sufficient to provide him notice because he never actually received it. AS 09.45.100(c)(2) allows written notice to be "left at the premises." The Alaska Supreme Court has not specifically addressed this subsection of the statute, but generally restated the procedure for providing notice in *Helfrich v. Valdez Motel Corp.*, 207 P.3d 552 (Alaska 2009):

> A notice to quit is a written demand for the tenant to vacate and surrender the property, thereby terminating the tenancy. The notice to quit must meet certain requirements. It must be in writing and must be delivered to the tenant, left at the premises, or sent by registered or certified mail. The notice must tell the tenant why the landlord is terminating the tenancy, what the tenant may do to avoid termination if the breach or violation may be corrected, and the date and time of termination under the lease or rental agreement. The notice must direct the tenant to quit no later than the termination date under the lease or rental agreement. And the notice must notify the tenant that if the tenant remains in

> occupation after termination "the landlord may commence a civil action to remove the tenant … and recover possession."

(internal footnotes and citations omitted).[1] Because Alaska Statutes expressly provide that leaving a notice to quit at the premises is adequate, a court would hold that Wanda's notice is sufficient for purposes of AS 09.45.100.

Some applicants may also argue that Wanda provided oral notice of the FED action on two occasions: first, when she called him and told him that "he was going to have to face the consequences" for his failure to pay rent; and second, when she called him the day before the FED hearing. Neither call is likely to be considered adequate notice by a court because there is no indication in the facts that Wanda provided Bill with the information required by AS 09.45.100 in either call. In *DeNardo v. Corneloup*, 163 P.3d 956 (Alaska 2007), the Alaska Supreme Court held that oral notice did not suffice for a written notice requirement from a tenant to a landlord. Moreover, the second call the day before the hearing would not have provided Bill with an adequate opportunity to prepare for the FED hearing.

Bill also argued that the notice was defective because it did not contain all of the required information under AS 09.45.105, which provides:

> Notice to quit served upon the tenant or person in possession must
>
> (1) state
>
> > (A) the nature of the breach or violation of the lease or rental agreement or other reason for termination of the tenancy of the tenant or person in possession;
> >
> > (B) in circumstances in which the breach or violation described in "A" of this paragraph may be corrected by the tenant or person in possession to avoid the termination of the tenancy, the nature of the remedial action to be taken, and the date and time by which the corrective actions must be completed in order to avoid termination of the tenancy;
> >
> > (C) the date and time when the tenancy of the tenant or person in possession under the lease or rental agreement will terminate;

[1] In *Greene v. Lindsey*, 456 U.S. 444 (1982), the United States Supreme Court addressed a similar statute in Kentucky. There, under factual circumstances very different from those presented here, the Court concluded that posting notice on a door was not sufficient for purposes of Due Process. *See id.* at 453-54.

> (2) direct the tenant or person in possession to quit the premises not later than the date and time of the termination of the tenancy; and
>
> (3) give notice to the tenant or person in possession that, if the tenancy terminates and the tenant or person in possession continues to occupy the premises, the landlord may commence a civil action to remove the tenant or person and recover possession.

Bill's argument will be successful. Wanda's notice did provide the nature of the breach of the lease agreement (failure to pay rent), AS 09.45.105(1)(A), and did direct Bill to move out by a certain date and time (one week later), AS 09.45.105(2). Arguably, the notice also provided the date and time the lease would terminate (one week later), AS 09.45.105(1)(C). But the notice did not provide any information regarding whether Bill could correct the violation, AS 09.45.105(1)(B), and did not state that Wanda would commence an FED action if the notice to quit was not heeded, AS 09.45.105(3).

In short, the court would likely find that Wanda's notice was properly delivered, but inadequate in content.

**2. Can Bill force Wanda to mediate the dispute? (30 points)**

Bill will probably be able to force Wanda to mediate the dispute prior to bringing her court action. The facts state that Wanda had Bill sign a mediation agreement. Wanda will argue that AS 34.03.345(a) requires mediation agreements to be a part of, or at least be referenced in, the actual rental agreement, and that because this agreement was not referenced in the rental agreement it is unenforceable. Wanda probably will not prevail on this argument.

The Alaska Uniform Residential Landlord and Tenant Act ("Alaska URLTA"), AS 34.03.345(a) provides:

> A landlord and a tenant may agree to mediate disputes between them as to an obligation of either of them arising out of the rental agreement. If the landlord and tenant agree to mediate disputes, they shall include the scope of the agreement within the executed rental agreement, incorporate a reference to that agreement within the rental agreement, or add the text of the agreement as a separate attachment to the rental agreement.

Wanda will argue that the mediation agreement was: (1) not within the text of the executed rental agreement; (2) not incorporated by reference in the rental agreement; and (3) not a separate attachment to the rental agreement. Bill will

argue first that the mediation agreement was titled "Attachment 1" and that AS 34.03.345(a) allows the parties to "add the text of the agreement as a separate attachment to the rental agreement." Bill will argue that he and Wanda did exactly what is allowed by the statute when they executed the mediation agreement. That is a fair reading of the statute. Although the Alaska Supreme Court has not yet addressed AS 34.03.345, it has expressed on several occasions a preference favoring the enforcement of alternative dispute resolution mechanisms. *See Blood v. Kenneth Murray Ins.*, 68 P.3d 1251, 1255 (Alaska 2003) ("The law favors arbitration. Waiver is not to be lightly inferred.") (internal footnotes omitted); *DeSalvo v. Bryant*, 42 P.3d 525, (Alaska 2002)(expressing policy in favor of private settlement of matters); *cf. Dena' Nena' Henash v. Ipalook*, 985 P.2d 442, 450 (Alaska 1999) (holding "Sound judicial policy dictates that private settlements and stipulations between the parties are to be favored and should not be lightly set aside."). Therefore, Bill has a fairly good chance of being able to enforce the mediation agreement.

Bill will also argue that Wanda cannot avoid the mediation requirement based upon her argument that her own actions violated the statutory requirements for incorporating a mediation requirement into the rental agreement. He should succeed in this argument. Courts are reluctant to allow parties to escape their own otherwise valid contractual obligations due to their own negligence or malfeasance. *See Inman v. Clyde Hall Drilling Co.*, 369 P.2d 498, 500 (Alaska 1962) ("As a matter of judicial policy the court should maintain and enforce contracts, rather than enable parties to escape from the obligations they have chosen to incur."). Bill will also be able to establish that the dispute over whether or not he was in default clearly "relate[s] to the rental agreement" and is within the terms of the mediation agreement because the mediation agreement covers "any dispute" related to the rental agreement. In short, Bill should prevail on his arguments, get the case dismissed, and force Wanda to mediate the dispute.

**3. Evaluate the likely success of the FED action given Bill's arguments. (40 points)**

Bill has made two arguments on the merits. First, that he was not in default because Wanda violated the statutory limit on the amount of prepaid rent and security deposit he could collect. Second, that he was not in default because Wanda had to apply the last month of prepaid rent she was holding prior to finding him in default.

Bill's first argument is based upon a provision of the Alaska URLTA, AS 34.03.070(a), which provides:

> A landlord may not demand or receive prepaid rent or a security deposit, however denominated, in an amount or value in excess of

> two months' periodic rent. This section does not apply to rental units where the rent exceeds $2,000 a month.

Here, it is clear that Wanda violated this provision when she demanded the first month plus two additional months' rent be paid up front,[2] plus a security deposit (the facts state that Wanda asked for the first month's rent, plus two months prepaid rent, plus a $100 security deposit).

The Alaska URLTA provides no specific remedy for such a violation of AS 34.03.070(a). However, because Wanda violated AS 34.03.070(a), the URLTA provides an additional affirmative duty of acting in good faith before exercising any right under the Act (*see* AS 34.03.320). Wanda knew that she had an extra $900 of Bill's money (the equivalent of a full month's rent), and that she still had not applied the final month of Bill's prepaid rent. A court is also likely to find specifically that Wanda violated the duty of good faith by failing to return the overpayment of the security deposit. For those reasons, a court would likely find that Bill was not in default of payment of rent obligations at the time that Wanda filed the FED action.

Bill's second argument is related to the first: that Wanda should have been required to apply his last month of prepaid rent to his delinquent rent prior to Wanda finding him in default. It is unclear whether Bill would succeed on this argument.

AS 34.03.070(b) provides:

> Upon termination of the tenancy, property or money held by the landlord as prepaid rent or as a security deposit may be applied to the payment of accrued rent and the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with AS 34.03.120 . The accrued rent and damages must be itemized by the landlord in a written notice mailed to the tenant's last known address within the time limit prescribed by (g) of this section, together with the amount due the tenant. . . .[3]

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[2] The Alaska URLTA defines prepaid rent as "that amount of money demanded by the landlord at the initiation of the tenancy for the purpose of ensuring that rent will be paid, but does not include the first month's rent or money received as security for damage." AS 34.03.360(15).

[3] AS 34.03.070(g) provides:
(g) If the landlord or tenant gives notice that complies with AS 34.03.290, the landlord shall mail the written notice and refund required by (b) of this section within 14 days after the tenancy is terminated and possession is delivered by the tenant. If the tenant does not give notice that complies with AS 34.03.290 , the landlord shall mail the written notice and refund required by (b) of this section within 30 days after the tenancy is terminated, possession is delivered by the tenant, or the landlord becomes aware that the dwelling unit is abandoned. If the landlord does

The facts state that the rental agreement included a provision "that in the event of a failure to pay rent Wanda had the option of applying the prepaid rent prior to exercising other remedies she might have." Under the Alaska URLTA and the rental agreement, *normally* Wanda would have the option of applying the prepaid month's rent or the security deposit to Bill's delinquent rent. *See* AS 34.03.070(b) ("Upon termination of the tenancy, property or money held by the landlord as prepaid rent or as a security deposit *may* be applied to the payment of accrued rent . . . .") (emphasis added); Rental Agreement ("option of applying").

However, Bill has a fairly strong argument that this is not a normal situation for two reasons. First, because of Wanda's violation of AS 34.03.070(a) (discussed above). Second, because Wanda had previously applied one of Bill's prepaid months to a delinquent month's rent but refused to do the same the second time. Although not directly on point, the Alaska Supreme Court in *Sullivan v. Subramanian*, 2 P.3d 66 (Alaska 2000), did hold that a landlord should have prorated a tenant's monthly rent under AS 34.03.070(b) when the tenant paid the month's rent, but vacated the premises prior to the end of the month due to disputes with the landlord. The *Sullivan* case involved many other issues not relevant to this case, but can be read as an endorsement of requiring a landlord to use a tenant's money that the landlord already holds prior to trying to enforce other remedies. It does not matter which conclusion an applicant may reach on this issue.

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not know the mailing address of the tenant, but knows or has reason to know how to contact the tenant to give the notice required by (b) of this section, the landlord shall make a reasonable effort to deliver the notice and refund to the tenant.