ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

After eighteen years of marriage, Darren and Marcia are getting divorced. They have two children: Sam, twelve, and Chelsea, eight. Marcia wants to move with the children to Arizona because she has always wanted to live in a warmer climate. Darren wants the children to remain in Anchorage, their life-long home. They have agreed to shared legal custody.

Marcia had a DUI in 2005. She completed all the requirements of her sentence. She currently drinks socially. Marcia and the children regularly attend church services. Darren occasionally joins them. Marcia has been a stay-at-home mom for the last few years but plans to be employed upon relocation.

Darren has coached both children's soccer teams for several years. Darren's parents live in Ketchikan and visit with the children usually once a year.

Marcia purchased a condo for $150,000 in Seattle prior to the marriage. Title has remained solely in Marcia's name. The condo is usually rented out but occasionally the couple stayed in it for long weekends. In 2007, the couple borrowed $12,000 to renovate the condo. When the loan was taken out, the condo's value was $250,000. Rental income paid the entire loan as well as all other condo expenses. The condo is now worth $280,000.

(1) How will a court analyze the physical custody issue? Discuss your analysis.

(2) How would the court treat the Seattle condo? Discuss.

(3) Assume two years after the divorce, Darren is promoted and transferred to California. Marcia and the children are living in Arizona. Marcia has asked you to request the Alaska Superior Court modify the Alaska child support order. Explain your advice to Marcia.

GRADERS' GUIDE
*** * * QUESTION NO. 2 * * ***
FAMILY LAW

(1) How will a court analyze the physical custody issue? (50 points)

In determining custody,. a court must look at the factors outlined in AS 25.24.150(c).

AS 25.24.150(c) provides:

(c) The court shall determine custody in accordance with the best interests of the child under AS 25.20.130. In determining the best interest of the child, the court must consider

(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 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 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 trial court's best interests of the children's analysis must consider the custody issue in light of Marcia's move to Arizona. (Moeller-Prokosch v. Prokosch, 27 P.3d 314, 315 (Alaska 2001)).

The trial court must assume that the move will take place in determining custody. (Moeller-Prokosch v. Prokosch, supra at 316).

Besides looking at the AS 25.24.150(c) factors, the court must decide whether there are legitimate reasons for Marcia's move. (See McQuade v. McQuade, 901 P.2d 421, 424 (Alaska 1995)). A proposed move is considered legitimate if it was not primarily motivated by a desire to make visitation more difficult for the non-custodial parent. (House v. House, 779 P.2d 1204, 1208 (Alaska 1989)).

If a move is found to be for legitimate reasons, the trial court may not hold the proposed move against the movant. (Moeller-Prokosch v. Prokosch, 53 P.3 152, 155 (Alaska 2002)).

In looking at the statutory factors, the trial judge must also consider the move's potential effect on the children. (Moeller-Prokosch, supra at 317).

The trial judge must decide whether Marcia's reason for moving to Arizona, warmer weather, is a legitimate reason for her relocation. The trial court will have to find her primary motivation is not to thwart Darren's relationship with their children.

Relocaton to further one's education or to be closer to older family members have been accepted as legitimate reasons to allow a move.

In applying AS 25.24.150(c) to Darren and Marcia's situation, there is nothing to indicate the children's physical, mental, emotional, religious and social needs are not being met by either parent. Marcia is doing more in meeting their religious needs with her encouragement of regular religious attendance. Darren's coaching of soccer illustrates his meeting of their physical and social needs.

There is nothing in the facts to indicate that either Darren or Marcia cannot meet the children's needs.

The children's preferences are unknown. It can be assumed that there is love and affection between both children and both parents.

For Factor 5, Darren does have a significant advantage in that Alaska has been the children's home their entire life. They have a regular religious community that they are members of. The children have participated in team sports. They have other family members who live in the state whom they see, at least, yearly.

There are no allegations of domestic violence, child abuse or child neglect so Factor 7 is not present.

Marcia's DUI is an issue the trial court will need to consider (Factor 8). The court would need further facts to determine whether this DUI was just a one time occurrence or part of a habit of excessive drinking.

The examinee need not determine which parent will be successful in being awarded physical custody.

(2) How would the court treat the Seattle condo? (25 points)

The trial court utilizes a three-prong approach when distributing 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 (Alaska 1983)).

Marital property consists of all property acquired during the marriage, except inherited property and property acquired with separate property which is kept as separate property. (Fortson v. Fortson, 131 P.3d 451 (Alaska 2006)).

The trial court is vested with broad discretion in fairly and equitably allocating property under AS 25.24.160(a)(4). (Keturi v. Keturi, 804 P.3d (Alaska 2004)).

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 theories of "active appreciation" and "transmutation" are mutually exclusive.

"Active appreciation" is defined as the appreciation iin value of a spouse's separate property by the infusion of marital money, efforts, or both. (Harrower v. Harrower, supra at 857). Just the increase in value of the property is marital property. There must be a nexus between the activity or investment and the increase in value.

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. (Compton v. Compton, 902 P.2d 805, 812 (Alaska 1995)).

Green v. Green, 29 P.3d 854 (Alaska 2001) announced the four factors that a trial court should utilize in determining whether a separately owned residence has been transmuted into marital property. These factors are:(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. No single factor or combination of factors is dispositive (Chotiner v. Chotiner, 82 P.2d 829, 832 (Alaska 1992)). Not all four factors have to be present for the court to find that a separate property has been transmuted into marital property.

Utilizing the Green factors, the Seattle condo was never the parties' main residence. It is debatable whether a trial court would find their usage of the condo to be sufficient or not. The facts do not give any information as to the frequency of Darren and Marcia's staying at the condo. Title was never in Darren's name. There is no evidence either spouse contributed physical labor or marital earnings to its improvement or its ongoing maintenance. The facts

indicate that the rent covered the condo's ongoing cost so there were no out of pocket expenditures.

Both parties' credit was utilized to improve the property because both were liable on the loan to renovate. Had the rents been insufficient to meet the loan payments, the bank would have held both spouses responsible for payment. Discussion of active appreciation is proper – and gets points.

(3) Modification of Alaska Child Support Order (25 points)

Since neither Darren, Marcia nor their children reside in Alaska, Alaska no longer has jurisdiction to modify the child support order. AS 25.24.205(a0910 provides:

"(a) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a child support order.
(1) As long as this state remains the residence of the obligor, the individual obligee, or the child whose benefit the support order is issued..."

Although Alaska issued the original child support order, its continuing exclusive jurisdiction has evaporated because neither Marcia, the children nor Darren is an Alaskan resident anymore. Alaska has lost jurisdiction under its own law.

Alaska is no longer the home state of the children under AS 25.25.191(4):

(4) "home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the time of filing of a complaint or comparable pleading for support and, of a child is less than six months old, the state in which the child lived from birth with a parent or person acting as a parent; a period of temporary absence of a parent or a person acting as a parent is counted as part of the six-month or other period".

If Marcia wants to modify the child support, she must, under the Uniform Interstate Family Support Act, register the Alaska order with the California court. The support order must be registered with the California court because California has jurisdiction under UIFSA, not Arizona. California is the only state that has personal jurisdiction over Darren since he is a California resident. California has UIFSA jurisdiction because (a) the children, the obligee, and the obligor no longer live in the issuing state, Alaska; (b) the petitioner seeking modification is not a California resident; and (c) the respondent (Darren) is subject to the California tribunal.