ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

Madelyn and David had a brief liaison which resulted in Stephen's birth in 2000. David was unaware of Stephen's birth until the couple re-met in early 2003. The couple did not live together until their marriage later in 2003. David provided Madelyn with $300 for financial support for Stephen during this time.

Madelyn, David and Stephen have been living in Fairbanks, Alaska for the past eighteen months, although Madelyn and David have been separated for the past 6 months. Since the parties' separation, Stephen has been splitting time between his parents' homes on approximately a 50/50 basis.

David filed for divorce on February 1, 2012, when he learned that Madelyn's new boyfriend, Brock had moved into her home. Brock works on the North Slope on a week-on, week-off basis. Brock was convicted of DUI in 2010 and still drinks occasionally. Since she has been seeing Brock, Madelyn has also begun drinking. Neither Brock nor Madelyn drink in the presence of Stephen.

David thinks that Brock is a bad influence on Madelyn and Stephen. He has requested to be awarded sole legal and primary physical custody of Stephen. Madelyn has counterclaimed for joint legal custody and primary physical custody.

Stephen has expressed a preference to live with his father because he doesn't like Brock and because David has always been the more lenient parent. David's leniency has increased since he filed for divorce. David has promised to buy Stephen a four-wheeler after the divorce is concluded.

Madelyn also asked the court to award her child support from Stephen's birth until the date of their marriage. David does not believe he should be held responsible for child support for the months prior to their marriage because it was so long ago and he was unaware that Madelyn had become pregnant.

(1) Discuss the differences between sole and joint legal custody.

(2) Discuss how the court will analyze the question of Stephen's physical custody?

(3) What is the likelihood of David being responsible for the child support that Madelyn alleges accrued before their marriage?

GRADERS' GUIDE
*** * * QUESTION NO. 5 * * ***
FAMILY LAW

(1) **LEGAL CUSTODY.** (30 pts.)

A trial court has discretion in a custody case to award either sole legal custody or shared legal custody.

The Alaska legislature expressed its preference for joint legal custody between parents.

> "The legislature finds that… it is in the public interest to encourage parents to share the rights and responsibilities of child rearing. While actual physical custody may not be practical or appropriate in all cases, it is the intent of the legislature that both parents have the opportunity to guide and nurture their child and to meet the needs of the child on an equal footing beyond the considerations of support or actual custody." In an Act Relating to Child Custody, ch 88, Section 1(a) SLA 1982.

The Alaska Supreme Court cited this section of the Act in Bell v. Bell, 794 P.2d 97, 99 (Alaska 1990) and Farrell v. Farrell, 819 P.2d 896 (Alaska 1991)). Joint legal custody means both parents share the responsibility in making the major decisions that affect their child's welfare. (Bell v. Bell, 794 P.2d 97, 99 (Alaska 1990)). Joint legal custody is independent of what the actual physical custodial arrangement is. (Bell, supra).

With sole legal custody, one parent is vested with almost all the decision-making concerning the child.

(2) **STEPHEN'S PHYSICAL CUSTODY.** (40 pts.)

The court will determine what physical custody arrangement is in Stephen's best interests by considering the factors outlined in AS 25.24.150 (c). West v.West, 21 P.3d 838 (Alaska 2001). The trial court has broad discretion in deciding child custody. Elton H. v.Naomi R., 119 P.3d 969 (Alaska 2005).

The AS 25.24.150 (c) factors are -

(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 of 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. A trial court must consider all the AS 25.24.150(c) factors but it is only required to discuss the relevant ones. See West, supra. It must consider only the facts that directly affect the child's well-being. Velasquez v. Velasquez, 38 P.3d 1143 (Alaska 2002). There are no facts above that would put into issue statutory factors (1),(2),(4),(7) or (9).

A child's preference must be considered by the trial court under AS 25.24.150(c)(3) if the child is of sufficient age and capacity to form a preference. Whether a child has a meaningful preference is up to the trial judge's discretion. (Fardig v. Fardig, 56 P.3d 9 (Alaska 2002)).

The court will examine the reasons behind the child's preference to determine what weight shall be given his or her preference. In Rooney v. Rooney, 914 P.2d 212 (Alaska 1996), the Alaska Supreme Court found that if a preference is based on a child wanting to satisfy a parent or not offending his or her parents that the trial judge finding that the child's preference was not meaningful was upheld. Unlike other states, there is no automatic age in Alaska at which a child can choose who he or she wants to live with.

In Jenkins v. Handel, 10 P.3d 586 (Alaska 2000), the Alaska Supreme Court upheld the trial court's giving more weight to the other AS 25.24.150(c) factors than the voiced preference of thirteen and fifteen year old children. The Jenkins trial court had refused to modify custody of the children. (See also Thomas v. Thomas, 171 P.3d 98 (Alaska 2007)).

Yet, the appellate court upheld a custody modification where the trial judge's reliance of the preference of a fourteen year old was the basis of the modification. (See Valentine v. Cote, 3 P.3d 337 (Alaska 2000)).

Even though Stephen is twelve, it is clear from the above cases that it is not automatic that his preference will be given significant weight when the trial court determines the custodial arrangement. It appears that Stephen's preference is motivated by what he can get from his father (leniency, 4 wheeler) as opposed to his mother. This type of motivation is likely to give Stephen's preference less weight with the trial court. Stephen has also expressed his dislike of Brock. It is not clear why this dislike exists i.e. Stephen would dislike any man who isn't his father or there is serious personality conflict between Brock and Stephen. The reasoning behind Stephen's dislike will also affect how much weight the trial court gives Stephen's preference. The court will also consider AS 25.24.150 (c)(5). The parties have had a 50/50 physical custody arrangement for 6 months. There is nothing in the facts to suggest that Stephen is not doing well with this arrangement despite his dislike of Brock. The court could continue this arrangement particular if the week that Stephen is with Madelyn is the same time that Brock is on the North Slope.

David's belief that Brock is a bad influence on Madelyn and Stephen may affect his willingness and ability to facilitate and encourage the mother/son relationship –AS 25.24.150 (c)(6). This can also be considered by the court as to what is best for Stephen. Since Brock is a member of Madelyn's household, his DUI conviction and his continued drinking will be considered under AS 25.24.150 (c) (8). The recentness of the conviction will concern the court. The trial judge will need additional information concerning the conviction such as the BA level, circumstances, Brock's compliance with his sentence, etc. to properly weigh this factor. The court will also consider that it appears that neither Brock nor Madelyn imbibe in Stephen's presence. The court could find that their drinking does not directly affect Stephen and therefore, should have no bearing on a custodial decision.

(3) **BACK CHILD SUPPORT.** (30 pts.)

Generally, any action for a cause not otherwise provided for within the various statutes of limitations may be commenced within ten years after the date the cause of action arose. (See AS 08.10.100).

Claims for back child support are not covered by a specific statute of limitations.

In State, Dept. of Revenue, Child Support Enforcement Division, ex rel. Valdez v. Valdez, 941 P.2d 144, 154 n. 14 (Alaska 1997), the Alaska Supreme

Court held that the right to child support belongs to the children not to the parent.

AS 09.10.140(a) provides

> (a) Except as provided under (c) of this section, if a person entitled to bring an action mentioned in this chapter is at the time the cause of action accrues either (1) under the age of majority, or (2) incompetent by reason of mental illness or mental disability, the time of a disability identified in (1) or (2) of this subsection is not a part of the time limit for the commencement of the action. Except as provided in (b) of this section, the period within which the action may be brought is not extended in any case longer than two years after the disability ceases.

The Alaska Supreme Court in Heustess v. Heustess-Kelly, 259 P.3d 462, 469 (August 2011) held that AS 09.10.140(a) tolls a child support action during the child's minority. It applies even when another (such as a parent) can bring the support action on the child's behalf.

David's argument that alleged support owed was too long ago fails. Stephen is only twelve so Madelyn can bring the action for child support because the statute of limitations runs until Stephen's 20th birthday.

David also wants to argue that he shouldn't be responsible for child support for the period of time he was unaware of Stephen's existence.

Skinner v. Hagberg, 184 P.3d 486, 490 (Alaska 2008) held that the duty of parental support arises on the child's date of birth. Regardless of whether a child support order exists, a parent is obligated not only by statute (AS 25.20.0300) but also at common law to support his or her offspring. (See Benson v. Benson, 977 P.2d 88, 92 (Alaska 1999)).

Thus, Madelyn can prevail and be awarded child support for the period from Stephen's birth to the date of the couple's marriage. David will be entitled to a credit for the financial support he provided from learning of Stephen's existence and the couple's marriage.