ESSAY QUESTION NO. 4

Answer this question in booklet No. 4

Maura and Doug, Alaskan residents, dated for several months prior to his enlistment in the military in 2009. When he enlisted, their relationship ended. Neither party was interested in having a long distance relationship. Maura also had some concerns about Doug's choice of occupation since she was a pacifist. Doug has not returned to Alaska since he reported for duty.

Occasionally, Doug reads the Anchorage newspaper online to keep up with the happenings in town. Recently, he noticed a wedding announcement for Maura. That announcement included information that Maura's two year old son, Sean, had been the ring bearer for Maura and her new husband, Hank. Upon learning of Maura's son, Doug contacted several old friends in Anchorage and learned that Maura had given birth within the first year of Doug leaving and that Sean had red hair and freckles. Doug also has red hair and freckles. Doug suspects that Sean may be his son. Doug has come to you for advice on legitimizing Sean and adoption.

1. Explain what ways Doug may legitimize Sean.

2. Explain what, if any, rights Doug may have if Maura's husband petitions to adopt Sean. (Do not discuss the Indian Child Welfare Act)

3. Assume Hank's adoption of Sean was completed in May 2011. Doug learns of Sean's existence in June 2012. Discuss whether Doug can overturn the adoption.

GRADERS' GUIDE
*** * * QUESTION NO. 4 * * ***
FAMILY LAW

A. Doug can legitimize Sean. (45 pts)

There are three methods for an out-of-wedlock child to be legitimized by the father.

1. by subsequently marrying the undisputed parent of the child;
2. acknowledging paternity in a form signed by both the putative father and the mother; and
3. by court decision.

AS 25.20.050 (a) provides

> (a) A child born out of wedlock is legitimated and considered the heir of the putative parent when (1) the putative parent subsequently marries the undisputed parent of the child; (2) for acknowledgments made before July 1, 1997, the putative parent acknowledges, in writing, being a parent of the child; (3) for acknowledgments made on or after July 1, 1997, the putative father and the mother both sign a form for acknowledging paternity under AS 18.50.165; or (4) the putative parent is determined by a superior court without jury or by another tribunal, upon sufficient evidence, to be a parent of the child. Acceptable evidence includes evidence that the putative parent's conduct and bearing toward the child, either by word or act, indicates that the child is the child of the putative parent. That conduct may be construed by the tribunal to constitute evidence of parentage. When indefinite, ambiguous, or uncertain terms are used, the tribunal may use extrinsic evidence to show the putative parent's intent.

Since Maura and Hank are newly wed, Doug is not able to marry Maura. That option for legitimizing Sean is unavailable.

Sean was born after July 1, 1997 so that paternity acknowledgment must be signed by both Doug and Maura. AS 18.50.165 (a) outlines the necessary information that must be on the acknowledgment form.

AS 18.50.165(a) states

> (a) The state registrar shall prepare a form for use in acknowledging paternity under AS 25.20.055. On or after July 1, 1997, the form must comply with the minimum requirements of 42 U.S.C. 652(a)(7). The form must include

(1) a statement that the man who signs the form is acknowledging that the man is the natural father of the child named in the form and that the man assumes the parental duty of support of that child;
(2) the address and social security number of both parents of the child named in the form;
(3) signature lines for both parents;
(4) a signature line for either a witness or notary public; and
(5) on and after July 1, 1997, a statement that

(A) sets out the legal consequences to and the rights and responsibilities of the mother and the man acknowledging paternity of signing the form, including
(i) if one of the parents is a minor, any rights given due to minority status;
(ii) legal alternatives to signing the form; and
(iii) the legal responsibility that arises from signing the form;
(B) the mother and the man acknowledging paternity have been notified that, unless fraud, duress, or material mistake of fact is shown in accordance with AS 25.20.050, the acknowledgment may only be rescinded by the earlier of the following dates:
(i) 60 days after the date of the person's signature; or the date of initiation of an administrative or judicial procedure to establish support of the child in which the person is a party; and
(C) the mother and the man acknowledging paternity have read and understand the contents of the form.

Doug can inquire whether Maura is willing to sign the acknowledgment form. If she and Doug sign and file it with the State Registrar at Vital Statistics, Doug becomes the legal father of Sean.

While it is possible that Doug is not the father, given the timing, the red hair, and the freckles, Doug is a likely candidate. Maura was not forthcoming about her pregnancy or Sean's birth with Doug so she may not be agreeable to signing the form.

The likely scenario is that Doug will have to file a complaint to establish paternity in superior court. The trial court is statutorily required to order all parties including the child to submit to genetic testing, unless the court finds there is good cause to not order the testing after considering the best interests of the child. See AS 25.20.050 (e), (i). There are no facts given that indicate it is in the best interests of Sean to not order the genetic testing.

If the testing results in a probability of parentage of 95 percent or higher, it creates the presumption of Doug's paternity. That presumption may be rebutted only by clear and convincing evidence. See AS 25.20.050(d).

In Smith v. Smith, 845 P.2d 1090 (Alaska 1993), the Alaska Supreme Court upheld the statutory presumption on blood testing that resulted in a 99.59% probability of paternity.

There are no Alaska cases addressing the ultimate burden of proof if the presumption of paternity resulting from genetic testing is rebutted, but the Alaska Supreme Court has noted that the United States Supreme Court has held that the preponderance of the evidence standard is constitutional in paternity establishment cases. *Denuptiis v. Unocal Corp.*, 63 P.3d 272, 278-79 (citing *Rivera v. Minnich*, 483 U.S. 574 (1987)).

B. Doug's rights in an adoption. (40 pts)

1. Notice

When Hank files for an adoption, Doug is entitled to notice whether or not he has legitimized Sean under AS 25.23.100. This required notice must occur at a minimum of twenty days before the adoption hearing.

AS 25.23.100 states

> (a) After the filing of a petition to adopt a minor, the court shall fix a time and place for hearing the petition. At least 20 days before the date of hearing, the petitioner shall give notice of the filing of the petition and of the time and place of hearing to (1) the department, unless the adoption is by a stepparent of the child; (2) any agency or person whose consent to the adoption is required by this chapter, but who has not consented; and (3) a person whose consent is dispensed with upon any ground mentioned in AS 25.23.050(a)(1), (2), (3), (6), (8) and (9), but who has not consented. The notice to the department shall be accompanied by a copy of the petition.

If Doug has legitimized Sean at the time Hank files for adoption, Doug is entitled to notice as the father of Sean because his consent would be required for the adoption. AS 25.23.100(a)(2);AS 25.23.040(a)(2). As discussed in the next section, on these facts Hank does not have an argument that Doug abandoned Sean or failed without justifiable cause to pay child support or communicate with Sean.

Even if Doug has not legitimized Sean, Doug is still entitled to notice of the adoption under AS 25.23.100(a)(3), which provides for notice to persons whose consent to the adoption is not required under AS 25.23.050(a)(1) – (3), (6), (8),

and (9). Subsection (a)(3) dispenses with consent if the father has not legitimized the minor.
(Examinees may discuss additional subsections that might apply to dispense with Doug's consent and they are discussed in the next section).

AS 25.23.100(c) requires a reasonable investigation by the petitioner or the State (Department of Health and Social Services) to ensure that all persons within AS 25.23.100(a) are given notice of the adoption. Examinees may note that Doug will only receive notice of the adoption if Maura honestly informs that court of Sean's true parentage. He will not receive notice of the adoption if Maura hides their relationship.

The notice must include a statement of the grounds under which consent to the adoption is not required. AS 25.23.100(b). Notice shall be given in the manner appropriate to service of process in a civil action. *Id.* Notice by publication shall not be given except for compelling reasons.

Note, the Service Members Relief Act enables a military service member to obtain a stay of adoption proceedings if they request it, and certain conditions are met. The Act does not affect the notice and consent requirements, and is outside the scope of the call of the question.

2. Consent

As noted above, if Doug legitimates Sean and Hank then petitions to adopt Sean, Doug's consent is required for the adoption. AS 25.23.040(a)(2). Doug's consent must be in writing. AS 25.23.040(a).

AS 25.23.040(a)(2) provides:

> "(a) Unless consent is not required under AS 25.23.050, a petition to adopt a minor may be granted only if written consent to a particular adoption has been executed by
>
> (2) the father of the minor, if the father was married to the mother at the time the minor was conceived or at any time after conception, the minor is the father's child by adoption, or the father has otherwise legitimated the minor under the laws of the state."

If Doug has not legitimized Sean, his consent is not required. AS 25.23.050(a)(3) (providing that the consent of the minor's father is not required if it is not required under AS 25.23.040(a)(2)).

In addition, examinees may note that AS 25.23.050 (a)(1) dispenses with consent if the father is deemed to have abandoned the child for at least six months. Subsection (a)(2) dispenses with consent if the child is in the custody

of another and the parent has, for a period of at least one year, failed without justifiable cause to communicate meaningfully with the child or to provide child support.

The court construes AS 25.23.050 strictly in order to protect the rights of the natural parents. *In re D.J.A.*, 793 P.2d 1033, 1037 (Alaska 1990). There are no facts supporting an argument that Doug abandoned Sean. He did not know of Sean's existence. A "conscious disregard" of parental obligations is required. *In re A.J.N.*, 525 P.2d 520, 523 (Alaska 1974).

Similarly, the facts don't support an argument that Doug has failed without just cause to communicate with Sean and to provide child support. As explained in *In re D.J.A.*, the adoptive parent (Hank) would ultimately have to prove by clear and convincing evidence that Doug failed without justifiable cause to communicate significantly with Sean or to provide support for at least one year. *Id.* Hank cannot meet that burden here. Doug has not had any contact with Sean during the two years since he was born, but Doug did not know of Sean's existence until he recently saw Maura's wedding announcement in the newspaper. Therefore his failure to communicate or provide support to Sean was justifiable.

C. Overturning the adoption. (15 pts.)

Doug can not overturn the adoption. Alaska Rule of Adoption 17 (a) states "A person may move to set aside the decree by filing a motion stating the grounds for challenging the validity of the decree, with service on other parties, subject to the time limitations of AS 25.23.140(b) and (c), and 25 U.S.C. Section 1913 (d)…."

AS 25.23.140 (b) provides

> "Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree may not be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter, unless, in the case of the adoption of a minor the petitioner has not taken custody of the minor, or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one year period."

Since the adoption was entered in May 2011, more than one year has passed. There are no facts that indicate that Sean is not living with Hank and Maura. Sean is not an adult. Therefore, Doug is statutorily barred from challenging the adoption.

The Alaska Supreme Court discussed the reasons for Alaska's stringent one-year limit on challenges to adoption in *Goliver v. McAllister*, 34 P.3d 324, 326 (Alaska 2001) (citing *Hernandez v. Lambert*, 951 P.2d 324, 326 (Alaska 1998)). The court noted that "[a]doptive custody results in the rapid development of lasting and powerful psychological ties between adoptive parents and children, especially young children. Once formed, these bonds can seldom be severed without irreparable damage to the child's well-being." *Id.* The court further observed, "Alaska's one-year filing limit embodies a careful balance between competing interests: on one hand, the interest of preserving 'stability in a family relationship, particularly when a young minor is involved'; on the other hand, the interest of avoiding 'the possible loss to a person whose rights are cut off through fraud or ignorance.' Id.

Note, neither AS 25.23.140 (c) nor 25 U.S.C. Section 1913(d) are applicable. The state statute deals with adoption arising from state terminations of parental rights. The federal law pertains to ICWA.