ESSAY QUESTION NO. 9

Answer this question in booklet No. 9

Whitney and Harry have two children together, Rebecca, age 8, and Philip, age 15.

Several years ago, a friend invited Harry to social events and worship services of his church. At first, the family were occasional visitors. Over time, Harry became more deeply involved, attending services, teaching adult religious studies and assisting at revivals. When the children were young, they liked Sunday school and announced they were accepting the church's tenets. Rebecca made friends and still looks forward to church activities. As Philip got older, he complained he was bored by religion and wanted to do other activities. Philip is active in youth hockey with frequent Sunday games. Whitney takes him to his games because Harry is so committed at church.

Whitney believes Harry and his church have grown too strict and dogmatic. She is concerned that Harry tries to involve Philip excessively in the church. She is increasingly angry at Harry, and wants the children kept completely away from the church. The couple separated over these conflicts. They agreed Whitney will have the house.

Whitney now seeks shared legal custody but sole physical custody, and wants Harry barred from taking the children to his church. Harry seeks sole legal custody and shared physical custody of the children. Rebecca loves both parents and is alarmed at the idea of being cut off from either one or from the church. Philip loves both parents but rejects formal religion. He chafes at Harry's limiting his hockey and narrowing his social life.

1. Discuss the merits of Harry's case for sole legal custody of both children.

2. For purposes of this question, assume the Court orders joint legal custody. Discuss the merits of Whitney's case for sole physical custody of both children.

GRADERS' GUIDE
*** * * QUESTION NO. 9 * * ***
FAMILY LAW

This question requires applicants to recognize issues pertinent to legal and physical child custody determinations in general and some factors in particular.

1. Discuss the merits of Harry's case for sole legal custody of both children. (30 points)

Legal custody for unmarried parents is decided under AS 25.20.060; §060(a) expressly refers to the best interest factors of AS 25.24.150(c.)

The broad principle favoring joint legal custody was expressed by the Court in *Bell v. Bell*, 794 P.2d 97, 99 (Alaska 1990.) The *Bell* court noted that, in amending §060, the Legislature had expressed its preference as follows:

> The Legislature finds that . . . it is in the public interest to encourage parents to share the rights and responsibilities of child rearing . . . [even when] actual physical custody may not be practical or appropriate . . . [B]oth parents [should] have the opportunity to guide and nurture their child and to meet the needs of the child on equal footing beyond the considerations of support or actual custody.

Bell at 99 (quoting the Legislative Intent statement at Ch. 88, § 1, SLA 1982.) The Alaska Supreme Court has cited it as establishing a policy or preference for joint legal custody. *Bell*, 794 P.2d at 99; *Farrell v. Farrell*, 819 P.2d 896, 899 (Alaska 1991).

"Joint legal custody means that both parents 'share responsibility in the making of major decisions affecting the child's welfare.'" *Jaymot v. Skillings-Donat*, 216 P.3d 534, 540 (Alaska 2009.) *See also Bell*, 794 P.2d at 99. Legal custody is independent of the physical arrangements (e.g., school years vs. summers, weekdays vs. weekends, visitation only.)

In *Jaymot*, *supra*, the Court affirmed the trial court's decision deviating from the preference for joint legal custody. It stated the parents were unable to communicate and compromise for joint decision-making regarding the child's life; it found the father had greater emotional self-control and was more willing to allow the mother contact with the child. It thus found sole legal custody in the father appropriate, stating, "'joint legal custody is only appropriate when the parents can cooperate and communicate in the child's best interest.' " *Jaymot* at 540 (quoting *Farrell*.)

Whitney is upset and angry about Harry's involving the children in the church. The facts do not, however, show she cannot communicate and compromise, or that Harry has significantly greater emotional self-control, factors that supported the sole legal custody decision in *Jaymot*. Nor is there evidence she has actually blocked Harry's relationship with the children, or prevented Harry from involving them in church activities. On these facts, the court is likely to deny Harry's motion for sole legal custody.

2. For purposes of this question, assume the Court orders joint legal custody. Discuss the merits of Whitney's case for sole physical custody of both children. (70 points)

The court will determine what physical custody arrangement is in the children'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). AS 25.24.150 provides in relevant part:
AS 25.24.150(c:))
. . .
The court shall determine custody in accordance with the best interests of the child under AS 25.20.060 - 25.20.130. In determining the best interests of the child the court shall consider:

> (1) the physical, emotional, mental, religious, and social needs of the child;
>
> (2) the capability and desire of each parent to meet these 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.

(d) In awarding custody the court may consider only those facts that directly affect the well-being of the child.

. . .

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). Examinees should discuss factors (1)-(6); there are no facts above that would put into issue statutory factors (7)-(9).

(1-2) [T]he physical, emotional, mental, religious, and social needs of the child and capability and desire of each parent to meet these needs.
(a.) Religious. (15 points.) The facts indicate that Whitney and Harry disagree as to the religious needs of the children. Religion *may* be considered in an Alaska court's physical custody determination, but it has to be "the . . . religious . . . needs of the child," AS 25.24.150(c)(1)[1] – not the religious preference of a parent or a judge.

In *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979), the trial court granted sole physical custody to the father, relying on the child's religious needs. The trial judge's findings had included the following:

> The religious needs of Joseph will be best met by Randall. Randall is involved in an organized religious community and has in the past been principally involved in Joseph's religious education. Lindsey has evidenced a passive interest in this area of Joseph's development, but would not frustrate Randall's desires as to Joseph's religious education.

Bonjour, 592 P.2d at 1237 (footnote omitted.)

[1] At least in 1979, Alaska's provision allowing religion to be considered was unusual or even unique. The Court wrote, "Our research reveals no other jurisdiction having a statute specifically allowing a court to consider the religious needs of a minor in a child custody proceeding." *Bonjour v. Bonjour,* 592 P.2d at 1238.

Our Court found error in this trial court ruling. It found it:

> constitutionally permissible for a court to take account of the actual religious needs of a child in awarding custody to one parent or another. AS 09.55.205, insofar as it permits a court to consider the "religious needs" of a minor as an aspect of the child's "best interests," does not infringe upon constitutionally protected rights. We stress, however, that the court must make a finding that the child has actual, not presumed, religious needs, and that one parent will be more able to satisfy those needs than the other parent. By actual religious needs, we refer to the expressed preference of a child mature enough to make a choice between a form of religion or the lack of it. A child's religious needs or preferences may enter into the custody equation in a variety of different ways. For instance, if a court determines that a fifteen-year-old child is a devout adherent to a particular religion or is otherwise deeply religious and that one parent will provide the child greater freedom in his or her pursuit of religious enlightenment, then the court may consider this as a factor in awarding custody. In order to avoid running afoul of the establishment clause, however, the statute cannot be limited to consideration of the formal religious needs of the child. A fifteen-year-old child might conceivably have developed a profound aversion to formal religious training of any sort. If a court finds this to be the case, then in awarding custody, the court may take into account the fact that one parent has shown a greater willingness to respect the child's opposition to formal religion. The primary goal of the court in awarding custody is to further the best interests of the child, which includes respecting the beliefs of a mature child, whether they be religious or non-religious. So long as a court makes findings as to a child's actual needs respecting religion, the court may consider such needs, as one factor, in awarding custody.

Bonjour, 592 P.2d at 1239-1240 (Citation, footnote omitted.) The Court concluded the 4-year-old child in *Bonjour* was not mature enough to express a preference or a religious need that courts could rely on, without "running afoul of the establishment clause." The Court in *Hamilton v. Hamilton*, 42 P.3d 1107 (2002,) concluded similarly with regard to nine- and seven-year-olds. It is likely that Rebecca at age 8 is not mature enough for the Court to rely on her preference or religious need. On the other hand, the *Bonjour* decision at 1240 would suggest the court may rely on the expressed preference or religious need of Philip, at 15 (including a preference to avoid organized religion.) Because of Rebecca's age, her religious preference or needs may not weigh for or against Whitney's proposed custody ruling. Because of Philip's age, his preference to

avoid the church may be considered by the court as weighing in favor of Whitney.

(b) Physical, Emotional, Mental and Social. (15 points)

While the facts suggest Harry wants Philip to participate as much as possible in the church, which sometimes conflicts with hockey games, there is no indication Harry bars Philip from seeing non-church friends, or forbids him to play hockey. There is no indication Philip currently has friends at church.

Whitney wants the children kept away from the church. This may have a bearing in Rebecca's case. Sole physical custody would generally give Whitney control over the children's schedules, enabling her to tear the younger child away from her friends. In this respect, Whitney's attitude weighs against giving her sole physical custody of Rebecca.

No facts specifically bear on the children's emotional or mental needs.

(3) "Child's Preference." (10 points)

The Court may respect a child's stated preference for custody or time with a parent, if the child is of sufficient age to have a meaningful preference. Determining that age is left to the discretion of the trial court. *Fardig v. Fardig*, 56 P.3d 9 (Alaska 2002.) Philip is probably old enough to have his preference considered. He might be characterized as somewhat preferring not to live with his father if that will entail more church participation.

(4) Love and affection between the child and each parent. (10 points)

The facts state both children love their parents; it is not stated but may be assumed that both parents love their children. This factor will not weigh for or against either parent.

(5) Stability, Continuity. (10 points)

Stability is a relevant factor for the trial court to consider under AS 25.24.150 (c)(5.) *McDanold v. McDanold*, 718 P.2d 467 (Alaska 1986;) *Meier v. Cloud*, 34 P.3d 1274 (Alaska 2001.) The fact that Whitney will keep the family home could weigh somewhat in favor of her proposal.

(6) "The willingness and ability of each parent to facilitate and encourage an ongoing relationship with the other parent." (10 points) (AS 25.24.150(c)(6.)

Whitney's expressed desire to keep the children away from the church raises a concern as to whether she would cooperate in letting Harry have a

good ongoing relationship with them. On the other hand, no facts indicate she would actively interfere.

Nor do any facts indicate Harry would interfere with Whitney's interactions with the children, were joint physical custody granted. On this posture, the "ongoing relationship" factor appears to weigh somewhat against Whitney's proposal, and in favor of joint physical custody.

The remaining AS 25.24.150(c) factors (issues of sexual assault, domestic violence or substance abuse, addressed in the latter part of statutory factor (6) through factor (9) are not raised on the facts of the question and need not be addressed by the examinee.

A consideration not raised by the facts or the call of the question, but often mentioned by examinees, is Alaska's preference for keeping siblings together. *Nichols v. Nichols*, 516 P.2d 732, 736 (Alaska 1973).