ESSAY QUESTION NO. 1

Answer the question in booklet No. 1

Donna and Pam are neighbors who, for the past ten summers, have competed against each other at an annual rose gardening competition. Each year, Pam has taken first place for her roses and Donna has taken second place for her roses. The day before this year's competition, Donna tells her fiancé, Hank, how happy she would be if Pam's roses were eaten by moose. The next morning, Pam discovers that her roses are gone. Looking around, Pam sees moose tracks in the garden and that her fence gate is wide open, and sees a trail of partially eaten carrots that begins on the street and ends at her rose bed. Pam is forced to withdraw from the rose competition.

Donna marries Hank shortly after the competition. After the wedding, Hank discovers several empty carrot bags in the trunk of Donna's car. When Hank asks Donna, in private, about the empty bags, Donna admits to opening the gate and putting the carrots in the garden. Horrified by his wife's behavior, Hank immediately tells Pam what happened.

Pam subsequently sues Donna for trespass and intentional infliction of emotional distress. At trial, Pam calls Hank to testify regarding (1) Donna's statement that she would be "happy" if moose were to eat Pam's roses; (2) the empty carrot bags in Donna's trunk; and (3) Donna's confession regarding the incident. Hank agrees to testify, but Donna objects, asserting the husband-wife privilege. The judge overrules the objection and allows Hank to testify.

Pam later calls her mother, Wilma, to testify regarding the severity of Pam's emotional distress after discovering that moose ate her roses. After laying a proper foundation, Wilma testifies that she took care of Pam every day for months following the incident and that, during that time, Pam was in "mental anguish." Donna objects to the testimony, arguing that Wilma is not a mental health expert, but the judge allows the testimony.

After all of the evidence is presented, Pam asks the judge to take judicial notice of the fact that, for ten years preceding the moose incident, Pam grew better roses than Donna. Donna objects, asserting that the request is untimely. The judge, who attends the rose competition every year and knows that Pam grows superior roses, overrules the objection and grants Pam's request for judicial notice. The judge then instructs the jury that it may, but is not required to, accept all judicially noticed facts as true.

1. Discuss whether Donna's assertion of the husband-wife privilege should have prevented some, none, or all of Hank's testimony.

2. Discuss whether the trial court was correct when it allowed Wilma to testify, over Donna's objection, that Pam suffered "mental anguish."

3. Discuss (a) whether the trial court was correct to take judicial notice of the fact that, for ten years, Pam grew better roses than Donna; (b) whether Pam's request for judicial notice was timely; and (c) whether the judge was correct when he instructed the jury that it may, but was not required to, accept judicially noticed facts as true.

GRADERS' GUIDE
***** QUESTION NO. 1 *****
EVIDENCE

1. Discuss whether Donna's assertion of the husband-wife privilege should have prevented some, none, or all of Hank's testimony. (45 points)

Evidentiary privileges bar the use, in court proceedings, of certain information gained or observed by spouses. Where evidentiary privileges are involved, the party asserting the privilege bears the burden of proving that the contested communication is protected by the privilege. *Plate v. State*, 925 P.2d 1057, 1066 (Alaska App. 1996).

Two types of privileges exist between a husband and wife under Evidence Rule 505. Evidence Rule 505(a) provides that "[a] husband shall not be examined for or against his wife, without his consent, nor a wife for or against her husband, without her consent." The privilege to testify or not testify thus belongs to the witness spouse. The general policy behind the husband-wife privilege is to promote family peace and harmony by not having one spouse testify against the other. *Daniels v. State*, 681 P.2d 341, 345 (Alaska App. 1984).

The second type of privilege between a husband and wife relates to communications made between spouses during the marriage. Evidence Rule 505(b) provides that "neither during the marriage nor afterwards shall either spouse be examined as to any confidential communications made by one spouse to the other during the marriage, without the consent of the other spouse."

a. Donna's Statement that She Would Be "Happy" If Pam's Roses Were Eaten by Moose

Neither of the privileges set out in Evidence Rule 505 would have prevented Hank from testifying regarding Donna's statement that she would have been happy if Pam's rose bushes were eaten by moose. Although Rule 505(a) protects spouses from having to testify against each other, the privilege belongs to the witness spouse, not to the party spouse, and the witness spouse may choose to waive the privilege. Because Hank agreed to testify, Donna would have been unable to stop him by asserting the Rule 505(a) privilege.

The privilege set out in Rule 505(b), on the other hand, may be asserted by either spouse. However, Donna's comment was made before Donna and Hank were married. Consequently, Donna's statement was not a "communication[] made between spouses during the marriage" and the privilege described in Evidence Rule 505(b) does not apply.

Because neither of the Rule 505 privileges applies to Donna's pre-marital statement, these privileges could not have prevented Hank's testimony regarding that statement.

b. Hank's Observation that Donna had Empty Carrot Bags in Her Trunk

Donna similarly could not have prevented Hank's testimony regarding the empty carrot bags in Donna's trunk. Although Hank discovered the empty carrot bags during his marriage to Donna, the Rule 505(b) privilege applies only to "communications" between the spouses, not to a spouse's personal observations. Because Hank's testimony regarding the carrot bags was based on his own observations, rather than Donna's communications to him, Donna could not have prevented the testimony by asserting this privilege.

And, as explained above, Donna could not have asserted the Rule 505(a) privilege because it belongs to and was waived by Hank. Therefore, neither of the Rule 505 privileges could have prevented Hank's testimony regarding the empty carrot bags.

c. Donna's Confession

The trial court should not have allowed Hank to testify regarding Donna's admission that she opened Pam's gate and left the carrot trail through the garden.

Although the privilege set out in Evidence Rule 505(a) was not Donna's to assert, she should have been able to assert the privilege set out in Rule 505(b), which prevents a spouse from testifying "to any confidential communications" made to him by the other spouse during the marriage "without the consent of the other spouse." Unlike the privilege under Rule 505(a), the right to consent to the testimony of a spouse under Evidence Rule 505(b) rests with the non-testifying spouse – in this case, Donna.

Donna and Hank were married at the time Donna admitted to Hank that she opened Pam's fence and put the carrots in Pam's garden. The facts also indicate that Hank spoke to Donna "in private" about the empty bags, meaning that the conversation was likely a "confidential communication" within the meaning of Evidence Rule 505(b). Because Donna clearly did not consent to the testimony, the trial court erred when it allowed Hank to testify, over Donna's objection, regarding Donna's confession.

2. Discuss whether the trial court was correct when it allowed Wilma to testify, over Donna's objection, that Pam suffered "mental anguish." (30 points)

The trial court was correct to allow Wilma to testify regarding Pam's mental condition.

Wilma testified regarding the severity of Pam's emotional distress following the incident in which the moose ate Pam's roses. Nothing in the fact pattern indicates that Wilma is a mental health professional or that she has any sort of background that would qualify her as an expert. Consequently, Wilma's testimony is limited to that of a lay person.

A lay witness may testify to opinions and inferences which are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Alaska R. Evid. 701. Alaska courts have allowed lay witness opinions on a variety of issues, including a person's mental state. *See, e.g., Loof v. Sanders*, 686 P.2d 1205, 1212-13 (Alaska 1984) (allowing lay opinion on a person's intoxication); *Markgraf v. State*, 12 P.3d 197, 199-200 (Alaska App. 2000) (allowing lay opinion that a person seemed scared); *Smithart v. State*, 946 P.2d 1264, 1274-75 (Alaska App. 1997) (allowing lay opinion on a defendant's unusual interest in a murder investigation); *Jackson v. State*, 890 P.2d 587, 589-91 (Alaska App. 1995) (allowing lay opinion by mother regarding degree of daughter's mental impairment); *Callahan v. State*, 769 P.2d 444, 446 (allowing lay opinion on the extent of a person's injuries).

Here, Wilma's testimony regarding Pam's emotional state following the moose incident is both relevant and helpful to the jury in determining whether Donna is liable to Pam for intentional infliction of emotional distress (i.e., whether Pam actually suffered the requisite emotional distress). Wilma testified that she personally cared for Pam every day during the months following the incident, indicating that her opinion is based on her personal observations. Because Wilma's testimony was "rationally based on the perception of the witness," and was helpful to "the determination of a fact at issue," Wilma's opinion that Pam suffered "mental anguish" was properly admitted under Evidence Rule 701.

3. Discuss (a) whether the judge was correct to take judicial notice of the fact that, for ten years, Pam grew better roses than Donna; (b) whether Pam's request for judicial notice was timely; and (c) whether the judge was correct when he instructed the jury that it may, but was not required, to accept judicially noticed facts as true. (25 points)

a. Judicially Noticeable Facts

The judge should not have taken judicial notice of the fact that, historically, Pam has grown better roses than Donna.

Evidence Rule 201 provides that a trial court may take judicial notice of certain types of facts. *See* Alaska R. Evid. 201. Where a court takes judicial notice, it makes an "on-the record declaration of the existence of a fact

normally decided by the trier of fact, without requiring proof of that fact." Alaska R. Evid. 201(a). However, a fact is appropriate for judicial notice only if it is not subject to reasonable dispute either because it (1) is generally known within the State of Alaska; or (2) is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Alaska R. Evid. 201(b).

Here, Pam asked the judge to take judicial notice of the fact that, for ten years preceding the moose incident, Pam grew better roses than Donna. Although Pam may have won the rose competition each year, the fact that Pam's roses were "better" than Donna's is subject to reasonable dispute and is neither a generally known principle nor capable of accurate and ready determination through any source whose accuracy cannot be reasonably questioned. It is therefore not a judicially noticeable fact.

Moreover, it was error for the judge to rely on his own personal knowledge in deciding whether to take judicial notice. Judicial notice of facts subject to reasonable dispute, even if the facts are within the judge's personal knowledge or belief, is improper. *See, e.g., State v. Grogan*, 628 P.2d 570, 573 n. 4 (Alaska 1981) (trial judge "may have improperly taken judicial notice of facts within his personal knowledge").

Therefore, even if he knew it to be true, the judge erred in taking judicial notice of the fact that, for the previous ten years, Pam grew better roses than Donna.

b. Timing of Taking Notice

Donna objected on the basis that Pam failed to make the request for judicial notice until the end of trial. However, "[j]udicial notice may be taken at any stage of the proceeding." Alaska R. Evid. 203(b). Therefore, the fact that Pam waited until the end of trial to make the request would not, by itself, have prevented the judge from taking judicial notice.

c. Instructing the Jury

The trial court erred in instructing the jury of its obligation with respect to judicially noticed facts. Evidence Rule 203(c) provides that, "in a *criminal* case, the court shall instruct the jury that it may, but it is not required to, accept as conclusive any fact judicially noticed." In a *civil* case, however, the court must "instruct the jury to accept as conclusive any fact judicially noticed." Alaska R. Evid. 203(c). Because Donna's is a civil case, the jury was required to accept as true, and had no discretion to disregard, judicially noticed facts. Therefore, the judge's instruction was improper.