Essay Question No. 3

Answer question in booklet No. 3

In January 1999, Horace Hunt and Wilma Wilson were engaged to be married. They decided to buy a 5-acre lot with a cabin near Palmer, Alaska. In June 1999, at the closing of title to the property, Horace and Wilma each paid one-fourth of the purchase price by certified check and both signed the mortgage documents (as Horace Hunt and Wilma Wilson) for the balance due. The deed delivered to them was made to Horace Hunt and Wilma Wilson, "as husband and wife," although they were not married. Shortly thereafter, they moved to the cabin and began to live together. Horace and Wilma each paid equal shares of the mortgage, upkeep, and taxes.

In 2001, Horace and Wilma planted a vegetable garden on a 60x40-foot strip of the property adjacent to "Boundary Creek," a stream that they believed to be the northern boundary of their property. Horace and Wilma installed several posts and an eight-foot high fence around the garden to clearly delineate the boundary line between what they thought was their land and the property of their neighbor, Nancy. They also installed irrigation hoses, using water pumped from Boundary Creek. From time to time, at Wilma's invitation, Nancy picked vegetables from the garden for her use.

Horace and Wilma never married, although they called themselves "the Wilson-Hunts."

In June 2012, Nancy decided to sell her home. In preparation for the sale, she located the original 1960 federal homestead deed to her land. The deed was for 62 acres, bounded on the south by the "meander line" representing Boundary Creek. On the map accompanying the 1960 deed, Boundary Creek was straighter and ran south of the 60x40-foot strip where Horace and Wilma had planted the garden. Over the years, the creek had gradually changed course, eroding part of Nancy's land, and depositing soil on the Wilson-Hunt side of the creek – right where the garden was.

Nancy showed Horace and Wilma the 1960 deed and map and asked that they move the garden and fence south of the line shown on the map. Horace and Wilma refused. In January 2013, Nancy commenced an action to quiet title to the 60x40-foot strip of land and to redraw the boundary to match the 1960 map. The Wilson-Hunts filed an answer, claiming they owned the land under adverse possession or the doctrine of accretion.

Horace quit his job to travel around the world. He needed money to travel, and the cabin and land was his only significant asset. In May 2013, Horace commenced an action against Wilma seeking the partition and sale of

the land and half of the proceeds of sale. Wilma opposes the sale of their home and garden.

1. As between Nancy and the Wilson-Hunts, who is the likely owner of the disputed 60x40-foot garden strip? Explain your answer.

2. Discuss whether Horace and Wilma took their land as tenants by the entireties or tenants in common.

3. Does Horace have a right to a partition of the land over Wilma's objection? Explain your answer.

Graders' Guide
*****Question No. 3*****
Real Property

1. The candidate should identify two possible defenses to the quiet title action: accretion and adverse possession, and reach the conclusion that Nancy does not own the disputed strip under both. 50%

Accretion is the deposit of land caused by the gradual erosion of a stream bank to one side and concomitant deposit of soil on other land. Soil deposited by accretion becomes the property of the riparian owner, here the Wilson-Hunts. *See, Honsinger v. State*, 642 P.2d 1352 (Alaska 1982). Because the change in Boundary Creek's course was gradual, and not the result of a sudden event (like an ice dam breaking or a landslide) or a man-made diversion, the benefit of the accretion inures to the shoreline (riparian) owner. A meander line is not a boundary, but a survey line to allow the seller to assess the amount and value of the land granted; the watercourse described by the meander line is the boundary.
An examinee may note that Nancy cannot claim the "substantial accretion" exception described in *Deboer v. United States*, 653 F.2d 1313 (9th Cir. 1981). That exception provides that the original meander line is treated as the boundary of the grant if, between the time of survey and the time of entry, a substantial amount of land was formed by accretion between the survey line and the waters of the stream. Because the accretion occurred after the time of entry, AND, even if accretion had in part occurred before entry, the amount of land is not substantial in relation to the original grant, so the patentee and their successors are not entitled to retain the original meander line as the permanent boundary.

Adverse possession Prior to the 2003 amendments to the Alaska Statutes, adverse possession was established by "Adverse possession [that is] continuous, adverse and notorious possession" by the claimant for ten years or more against the true owner, during which time the true owner cannot have filed a lawsuit or done something else to interrupt the adverse possession. *Alaska Nat'l Bank v. Linck,* 559 P.2d 1049 (1977). The core concepts are (1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner and (3) the possession must have been reasonably visible to the record owner. *Id.* Whether or not the claimant believed the land was his or not was irrelevant. However, if the claimant's occupancy was based on "color of title", the Alaska statutes provided that "[t]he uninterrupted adverse notorious possession of real property under color and claim of title **for seven years** or more . . . is conclusively presumed to give title." Thus, before 2003, to gain title under AS 09.45.052(a) an adverse possessor must have proven: (1) color of title, (2) continuity, (3) hostility, and (4) notoriety. Three conditions established color of title: (1) the adverse possessor has a written

document purporting to transfer title to him; (2) the written document accurately describes the land claimed by the adverse possessor; and (3) the adverse possession was in good faith. An adverse possessor meets the good faith requirement if he had "an honest belief based on reasonable grounds that he had valid title to the land when he entered it."

Since July 17, 2003, A.S. 09.45.052 provides that the uninterrupted adverse notorious possession of real property **under color and claim of title for seven years** or more, or the **uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant**, is conclusively presumed to give title to the property except as against the state or the United States. Unless the claimant adversely possessed for ten years (without color of title) before July 17, 2003, the claimant cannot afterward gain title unless he or she meets the "good faith but mistaken belief" exception above. The 2003 amendment effectively did away with common law adverse possession in Alaska. Because Harry and Wilma did not hold the land for 10 years before July 2003, they are subject to the new law.

Here, Horace and Wilma possessed the land "under color of title" if their deed described the property boundary as Boundary Creek. Thus, they constructively gained title automatically against Nancy under the 2003 statute in June of 2006. They had a recorded deed for which they paid the purchase price and mortgage in good faith. They had an "honest and reasonable belief in the validity of the title when they entered [the property]." *Ault v. State*, 688 P.2d 951, 956 (Alaska 1984). It was uninterrupted, as they resided there the entire time. If their belief was "mistaken" that the boundary was Boundary Creek in its present location, they gained it in June 2009, under operation of law, as the ten years of notorious possession against an adjacent real property owner had run. Here they had built a garden, put in a fence and water irrigation system, lived there for 10 years continually, well known to their adjacent neighbor, Nancy.

An examinee may earn points by briefly setting out the facts that establish open, continuous, hostile (adverse), notorious (open) possession. Here, the occupation by the Wilson-Hunts was continuous from the time they built the garden. They used the land as if it were their land, not asking Nancy's permission to install a fence and irrigation system and instead giving her permission to harvest vegetables. They used the land openly in a way visible to Nancy. There is nothing in the facts that suggests that they did not act in good faith in purchasing the land, or that they did not have reasonable grounds to believe they had title to the land by their deed, notwithstanding the "husband & wife" error on the deed. An examinee may note that adverse possession is the weaker claim, because land acquired by accretion is owned by the owner of the benefitted land from the moment soil is deposited.

2. Form of tenancy. 25%

This question asks the examinee to distinguish tenancy in common from tenancy by the entirety or joint tenancy and recognize that a tenancy in common was formed.

In Alaska, a conveyance to a husband and wife conveys land that will be held by the husband and wife as tenants by the entirety (AS 34.15.). A tenancy by the entirety cannot be dissolved or partitioned except voluntarily or upon divorce or the death of one of the parties. The co-tenant by entirety has a right of survivorship in the property upon the death of the co-tenant. Here, Horace and Wilma were NOT married when they bought the land. A conveyance of land or an interest in land made to two or more persons, other than to executors and trustees, as such, shall be construed to create a tenancy in common in the estate. AS 34.15.110 (a). Thus, because Horace and Wilma were NOT married when they purchased the land, they took as tenants in common (an examinee may note that joint tenancy was abolished in Alaska). The fact that the deed was to them as "husband and wife" is not sufficient to overcome the fact that they were NOT husband and wife at the time of conveyance.

A tenancy in common is an "undivided interest" in the property and all cotenants have an equal right to use the property, although the value of interests may reflect unequal investment in the property if there is evidence rebutting the presumption of equal interests. *D.M. v. D.A.*, 885 P.2d 94 (Alaska 1994). There is no "right of survivorship" if one of the tenants in common dies, and each interest may be separately sold, mortgaged or willed to another. Thus, unlike a joint tenancy or tenancy by entireties, where interest passes automatically to the survivor, upon the death of a tenant in common there must be a probate (court supervised administration) of the estate of the deceased to transfer the interest (ownership) in the tenancy in common.

3. Right to partition. 25%

This question asks the examinee to determine if a tenant in common can force a partition of the property held in common. Tenants in common have an "**undivided**" interest. Because Horace and Wilma contributed equally to the property, each holds an equal undivided interest. Horace may sell his undivided interest in the property, but he cannot compel partition of the land by sale in the absence of certain conditions. AS 09.45.260. A desire to liquidate his share of a common interest in the land is probably insufficient to require a forced partition by sale, since he can sell the "undivided interest" he presently has and such a sale would greatly prejudice Wilma by depriving her of her home. However, in an action for partition, the court could find that the property should be partitioned to allow Wilma to retain exclusive use of the cabin and garden against buyers of Horace's interest. The property could be

sold and the proceeds divided, or the land partitioned in such a way that equal interests were represented but so as to allow Wilma to retain exclusive use of the cabin and garden while Horace's part of property is sold, or Wilma could be ordered to pay Horace for the share of the cabin and garden if it would be unreasonably burdensome to divide the way that equally divides the value. *Keenan v. Wade,* 182 P.3d 1099 (Alaska 2008). An examinee may note that clear and convincing evidence is needed to controvert the express terms of the title to the property, *Callahan v. Dye,* 2006 WL 1667668.