

ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

Wendy and Henry separated on November 1, 2008. They began to live together in 1995. Shortly after they began to live together, Wendy and her two siblings were gifted by their parents with several rental houses on Martha's Vineyard. The siblings were given equal shares. At transfer, these houses were valued at \$750,000. These houses are the sole property of "MV Partnership" which Wendy and her siblings created for the management of this real estate. Under the partnership agreement, each partner has two free weeks every calendar year to utilize one of the houses. Wendy and Henry have vacationed at one of the houses every other year. Since she is an accountant, Wendy has prepared gratis the partnership tax return every year and attended the annual partnership meeting. The "MV Partnership" recently rejected an unsolicited offer of \$5 million for the houses.

The couple married in 1998, the same week they each received Master's degrees. Except for the family leave they each exercised at the birth of their children, both spouses worked full time. Delila was born in 2000. Sam arrived in 2003.

Wendy earns \$110,000, plus a yearly bonus as an accountant. Wendy's yearly bonus has averaged \$12,000 for the past five years. Henry earns \$80,000 a year as a biologist for Alaska Fish and Game.

Wendy and Henry separated on October 31, 2008.

In November, 2008, Henry cashed in one month of his accrued leave to pay for a Christmas cruise with the children and to pay the yearly assessment on the couple's home.

1. How should Wendy's share of the "MV Partnership" be treated by the court when dividing the marital estate?
2. Henry wants spousal support so he can return to school and obtain a PhD in biology. What type of spousal support might the court order?
3. Is the cashed leave a marital asset? Explain.
4. Henry wants Wendy and himself to be each responsible for one-half of the college tuition for their children. Explain whether the court has the authority to order the parents to pay college costs.

GRADER'S GUIDE

***** QUESTION NO. 2 *****

SUBJECT: FAMILY LAW

1. The "MV Partnership" (40 pts)

When dividing property in a divorce, an Alaska trial court must utilize a three-prong approach:

- a. determine what property is marital
- b. value that property
- c. divide the property equitably. *Wanberg v. Wanberg*, 664 P.2d 568, 570 (Alaska 1983); *Lundquist v. Lundquist*, 923 P.2d 42, 46 (Alaska 1996).

Marital property includes all property acquired during a marriage except for inherited property and property acquired with separate property which is kept as separate property. (*Hansen v. Hansen*, 119 P.3d 1005, 1009 (Alaska 2005)); *Schmitz v. Schmitz*, 88 P.3d 1116 (Alaska 2004)).

Pre-marital property becomes marital as a matter of law upon a showing the parties intended to treat the property as marital. (*Elliott v. James*, 977 P.2d 727 (Alaska 1999)).

A spouse's pre-marital or separate property can become marital through either "transmutation" or "active appreciation". (*Harrower v. Harrower*, 71 P.3d 854, 857 (Alaska 2003)).

The doctrine of "transmutation" is based upon the parties' intent. If separate property is transmuted into marital, then the asset's entire equity is subject to division, not just the increase in value. (See *Compton v. Compton*, 902 P.2d 805, 812 (Alaska 1995)).

"Active appreciation" is defined as the appreciation in value of a spouse's separate property by the infusion of marital money, efforts, or both. (See *Harrower*, 71 P.3d at 857)). Only the increase in value is marital property.

The theories of "active appreciation" and "transmutation" are mutually exclusive. If separate property is transmuted into marital, then the asset's entire equity is subject to division, not just the increase in value. (*Compton*, 902 P.2d at 812).

Since this question discusses real property and the couple occupied a house every other year, an examinee may discuss *Green v. Green*, 29 P.3d 854 (Alaska 2001). *Green*, supra, outlined four factors that a trial court should use to determine whether a separately owned residence has been transmuted into marital property:

- (1) whether the parties used it as a marital residence;
- (2) whether both parties contributed to the ongoing maintenance and improvement;
- (3) whether both parties held title; and
- (4) whether the parties used the non-titled spouse's credit to improve the property. All four *Green* factors need not be present for a determination that a separate asset has been transmuted to marital.

Applying the *Green* factors, the "MV Partnership" houses were not used as a marital residence. Although the couple used a house for vacation every other year, it is doubtful this minimal use is sufficient for the court to find the partnership's real estate had become marital. Neither Henry nor Wendy did anything to improve the property's value. Title remained in the partnership's name. Neither spouse's credit was used to improve the property. Under the theory of transmutation, the "MV Partnership" did not become marital.

The examinee must examine whether the increase in the partnership's value is due to "active appreciation".

"Active appreciation" differs from "transmutation" because transmutation is based on the parties' intent.

When marital funds, efforts, or both cause an increase in value to a spouse's separate property, then active appreciation has occurred. (*Harrower*, 71 P.3d at 857). To find active appreciation in separate property, a trial court must make three subsidiary findings: (1) it must find that the separate property appreciated in value during the marriage; (2) it must find that a spouse or both spouses made marital contributions to the property; and (3) the court must find a causal connection between the marital contribution and at least part of the appreciation. (*Hanson v. Hanson*, 125 P.3d 299, (Alaska 2005).

In this case, the first step of *Hanson* has been satisfied because the partnership did appreciate in value during the marriage. As for the second step, Wendy prepared the partnership return and attended the annual partnership meeting. These actions could be viewed as marital contributions. There are no facts given that would indicate that her participation in any decisions made during the annual meeting affected

the appreciation. The third Hanson step requires that there be a nexus between the spouse's contribution and the asset's appreciation. It is doubtful that Wendy's efforts during the marriage increased the partnership's value as opposed to the rise in the partnership's value due to market circumstances. It is likely that a trial court would term her efforts to be minimal and not constitute active appreciation.

The trial court does have the authority to invade separate property if a balancing of the equities requires it. (AS 25.24.160(a)(4), (Samson v. Sampson, 14 P.3d 272 (Alaska 2000)).

Although this is no evidence of the value of the parties' joint marital estate, the examinee needs to realize that due to Wendy's superior earning capacity and her substantial separate property, "MV Partnership", that the trial court could do an unequal property division of the marital estate favoring Henry or invade Wendy's separate property to balance the equities if the court finds that the marital estate is insufficient.

AS 25.24.160(a)(4) gives the trial court broad discretion to equitably allocate property. (See Keturi v. Keturi, 84 P.3d 408, 412 (Alaska 2004)).

1. 2. Spousal support (30 pts)

AS 25.24.160(a)(2) bestows upon trial courts to award spousal support "as may be just and necessary..." The following are the factors the court must consider in any award of spousal support:

- a. the length of the marriage and station in life of the parties during the marriage;
- b. the age and health of the parties'
- c. the earning capacity of the parties, including their educational backgrounds, training, employment skills, work experiences, length of absence from the job market; and custodial responsibilities for children during the marriage;
- d. the financial condition of the parties, including the availability and cost of health insurance;
- e. the conduct of the parties, including whether there has been unreasonable depletion of marital assets;
- f. the division of property under (4) of this subsection; and
- g. other factors the court determines to be relevant in each individual case.

In Dixon v. Dixon, 747 P.2d 169, 1173 (Alaska 1987), the Alaska Supreme Court announced its preference for trial courts to provide for parties' financial needs by property disposition rather than by alimony.

Rehabilitative support can be awarded for a specific purpose such as further education or job training even when there is an adequate distribution of the marital estate. Its purpose is to assist with advancement in the work place. (See *Brown v. Brown*, 914 P.2d 206, 211 (Alaska 1996).

Rehabilitative support may be appropriate when one spouse is leaving the marriage with few job skills and limited earning capacity. (See *Conner v. Conner*, 68 P.3d 1232 (Alaska 2003), *Ferrau v. Rowdon*, 42 P.3d 1047 (Alaska 2002).

The spouse requesting rehabilitative alimony must identify a career goal, the degree or job training program aimed at realizing that career goal and a reasonable time frame during which the degree or job training can be earned. (*Virgin v. Virgin*, 990 P.2d 1040 (Alaska 1999).

Here, Henry has already achieved a Masters degree. He is earning \$80,000 per year with employment benefits. While Wendy earns more than Henry, it is questionable whether it is significantly higher. There is nothing in the facts to indicate whether obtaining a PhD would lead to an appreciable increase in his salary or career advancement.

An award of rehabilitative alimony must be accompanied by adequate findings concerning the financial abilities and needs of both spouses. (See *Myers v. Myers*, 927 P.2d 326 (Alaska 1996).

Although it is doubtful a trial court would award rehabilitative support to someone earning \$80,000 per year, the examinee need only discuss the criteria the court would consider in awarding rehabilitative alimony.

3. Cashable leave (20 pts)

In *Schober v. Schober*, 692 P.2d 267, 268, the unused personal leave accrued by an Alaska State Trooper was found to be a marital asset subject to division.

Here, Henry cashed in the leave after the couple's separation. When a marital asset is sold or disposed of in the interim between separation and trial, the sales proceeds are considered marital. (See *Foster v. Foster*, 883 P.2d 397, 399 (Alaska 1994). In *Foster*, supra at 399-400, if the proceeds are used for a marital purpose, then they need not be accounted in the final property distribution. Thus, the cashable leave that was used to pay the couple's joint obligation, the yearly assessment, will not be part of the final distribution.

The cashable leave used to purchase the cruise can be recaptured by the court by crediting the cashed leave to the spouse who controlled the asset. (See *Gallant v. Gallant*, 882 P.2d 1252, 1255 (Alaska 1994),

4. College costs (10 pts.)

An Alaskan court has the authority to order support for minor children. (See AS 25.24.160(a)(1).

When husband and wife with children divorce, the court cannot require either parent to pay for post-majority college education except by enforcement of contract between spouses to provide for such costs. (*H.P.A. v. S.C.A.*, 704 P.2d 205 (Alaska 1985).