

ESSAY QUESTION NO. 3

Answer this question in booklet No. 3

Dan and Meredith were married in Fairbanks, Alaska on March 17, 2004 and settled there. Their son, Sean, was born in Alaska on February 1, 2005. Shortly after Sean's birth, the family relocated to Idaho due to Dan's job transfer. However, Meredith and Sean returned to Fairbanks to live with her parents in November, 2008.

Sean will be entering kindergarten in the fall of 2010. Sean flew to Idaho and joined Dan for a week long paternal visit in March, 2009.

Upon Dan's arrival in Fairbanks on June 1, 2009 to pick up Sean for a summer visit to Idaho, Dan was properly served with a Summons and Divorce Complaint that Meredith had filed in Alaska Superior Court the same day. Meredith requested sole legal and physical custody of Sean.

In support of her request for sole legal and physical custody of Sean, Meredith filed an affidavit alleging that she was the victim of domestic violence from Dan. There are no police reports about any domestic violence between the couple. Neither party has ever instigated a request for a domestic violence restraining order. Dan denied the allegation.

In his Answer to the Complaint, Dan requested joint legal and physical custody of Sean. Dan wants Sean to spend the first half of the year with him in Idaho and the second half with Meredith in Alaska.

During the litigation, the trial court ordered that Dan receive \$5,000 in interim attorney fees from Meredith. Meredith moved the court for an order allowing her to give Dan a boat, valued by both parties at \$5,000, in lieu of cash. Dan wanted cash and opposed her motion because he thinks it will be difficult to sell the boat. Prior to their separation, Dan put the boat on eBay for a day but had no offers.

1. Dan wants to challenge the Alaska court's jurisdiction. Discuss whether the Alaska court has jurisdiction over: 1) the divorce, 2) child custody and, 3) child support.
2. Assume Alaska has jurisdiction, explain how the court will evaluate Dan's proposed joint custody arrangement.
3. Explain how the trial court will evaluate Meredith's motion requesting that she be allowed to give Dan a boat instead of cash.

GRADERS' GUIDE

*** QUESTION NO. 3 ***

SUBJECT: FAMILY LAW

1. Does Alaska have jurisdiction? (40 pts)

To exercise jurisdiction over a case, a court must have subject matter jurisdiction over the claims asserted and personal jurisdiction over the parties. See Barlow v. Thompson, Op. No. 6443 (Alaska, December 18, 2009) (citations omitted). The question asks examinees to discuss only whether the Alaska court has jurisdiction. Discussion of whether Idaho might have concurrent jurisdiction over some issues is not part of the question.

a. Jurisdiction Over The Divorce

In Alaska, a husband or wife may maintain an action for divorce. AS 25.24.010. Under AS 22.10.020, the superior court is a court of general jurisdiction. Therefore the court has subject matter jurisdiction over the divorce.

The superior court has personal jurisdiction in all divorces where the parties have resided as a couple in Alaska for not less than six consecutive months within the six years preceding the action's commencement, the party asserting the personal claim has continued to reside in Alaska, and the nonresident receives notice as required by law. AS 09.05.015(12).

Here, the facts are that Dan and Meredith married in Fairbanks and lived there for approximately one year within the last six years. Meredith is still an Alaskan resident and so the court has jurisdiction over her. Dan was properly served in Alaska with the complaint. Because Dan was a natural person present in Alaska when served, the Alaska court has personal jurisdiction over Dan. See AS 09.09.015(a)(1)(A); See also, Barlow v. Thompson, Op. No. 6443 (Alaska, December 18, 2009). The court therefore has jurisdiction over the divorce.

b. Child Custody Jurisdiction

The Uniform Child Custody Jurisdiction and Enforcement Act authorizes the superior court to have subject matter jurisdiction to hear certain custody disputes. See AS 25.30.200-910.

AS 25.30.300(1) states that Alaska has jurisdiction to make an initial custody determination if Alaska is the "home state" of the child on the date of the case's

commencement.

"Home state" is defined in AS 25.30.909(7) as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months, including any temporary absences of the child or parent or personal acting as a parent, immediately before the commencement of a child custody proceeding, except that, in the case of a child who is less than six months of age, the terms means the state in which the child lived from birth with any of the persons mentioned, including any temporary absences." AS 25.30.909(7).

Here, Alaska has been the "home state" of Sean since November, 2008. He has lived in Alaska for more than six months before the case was commenced. Sean's one week vacation with his father does not negate Alaska's subject matter jurisdiction. Sean's absence from Alaska was only temporary. There was no indication it was intended to be permanent. See Atkins v. Vigil, 59 P.3d 255 (Alaska 2002). Alaska has jurisdiction to hear the custody case.

a. Child Support Jurisdiction

Alaska adopted the Interstate Family Support Act. Regarding subject matter jurisdiction, AS 25.25.102 provides "The superior court and the child support services agency are the tribunals of this state."

Regarding personal jurisdiction, AS 25.25.201. provides:

Bases for jurisdiction over nonresident.

In a proceeding to establish, enforce, or modify a support order or to determine parentage, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if

- (1) the individual is personally served with a citation, summons, or notice within this state;
- (2) the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contents to personal jurisdiction;
- (3) the individual resided with the child in this state;
- (4) the individual resided in this state and provided prenatal expenses or support for the child;
- (5) the child resides in this state as a result of the acts or directives of the individual;
- (6) the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
- (7) the individual acknowledged parentage in a writing deposited with the Bureau of Vital Statistics under AS 25.20.959; or
- (8) there is another basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

Here, since Dan was personally served with a summons and complaint in Fairbanks, Alaska, Alaska has personal jurisdiction under subsection (1) of AS 25.25.201. Alaska would also have jurisdiction under subsection (3) and (4). Dan had previously resided with Sean in Alaska from Sean's birth to the move to Idaho. Since he and Meredith were married prior to Sean's birth, Dan would have provided prenatal support for Sean.

Jurisdiction is also possible under subsection (6) since the couple were married almost a year before Sean's birth and there is nothing in the facts to suggest that the couple did not engage in sexual relations. AS 25.25.201(6). See gen., Teseniar v. Spicer, 74 P.3d 910, 913 (Alaska 2003)(citing AS 25.25.611).

(2) Dan's Request For Joint Legal And Physical Custody (45 Points)

AS 25.24.150 (c) lists the factors the court must consider in any custody decision. They are

- (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 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.

The emphasis in this question is to test the examinee's knowledge of domestic violence (AS 25.24.150(c) (7) , (g), and (h). Examinees may also discuss the other AS 25.24.150 (c) factors. There are no facts given that would suggest that either Dan or Meredith had an advantage or disadvantage on AS 25.24.150 (c), (1), (2), and (8).

As for the child's preference, Sean is only 5 years old and is, therefore, not mature enough to state a well-thought out preference concerning his custodial situation.

Given Sean's young age, there is nothing in the facts to suggest that there is not love and affection existing between him and both parents.

As for factor 5, the length of time Sean has lived in a stable, satisfactory environment, Sean has lived with Meredith his entire life. He has been situated in Fairbanks with his grandparents for over a year. There has been nothing presented to indicate that Meredith is not providing stability and a good life for Sean. This factor is in Meredith's favor.

AS 25.24.150 (c) (6), the sixth factor, is the willingness and ability of a parent to foster the relationship between Sean and the other parent. Sean cruised with Dan and other paternal family members just a few short months after his relocation. Sean is going to see his Dad for a summer visit. It does not appear that Dan objected to Sean's relocation to Fairbanks with Meredith. Both parents seem to allow Sean to have a relationship with the other parent.

As for factor 9, no other pertinent evidence was given that the court would need to consider.

a. The Effect Of Domestic Violence (General).

In making any decision concerning legal and physical custody, the trial court must consider the evidence of domestic violence in a proposed custodial household. See AS 25.20.090(8), AS 25.24.150(c)(7).

AS 25.24.150(g) provides there is a rebuttable presumption that a parent with a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded either sole or joint legal custody or sole or legal joint physical custody.

A history of perpetrating domestic violence is defined in AS 25.24.150(h) as during one incident causing serious physical injury or a court finding that a parent has engaged in more than one incident of domestic violence.

b. Joint Legal Custody

Joint legal custody means the parents share responsibility in making decisions affecting their child's welfare. See Bell v Bell, 794 P.2d 97, 99 (Alaska 1990). The Alaska Supreme Court has held that joint legal custody is only appropriate where the parents can communicate sufficiently with each other in their child's best interests to make the arrangement workable. See Zimin v.

Zimin, 837 P.2d 118, 123 (Alaska 1992).

A history of domestic violence is a factor for a court to find the parents do not have the ability to communicate and cooperate. See Farrell v. Farrell, 819 P.2d 896, 900 (Alaska 1981).

If after hearing the evidence, a trial judge determines that Meredith suffered domestic violence inflicted by Dan, this court cannot award shared legal custody. AS 25.24.150(g)

c. Joint Physical Custody

As noted, Meredith claims that domestic violence occurred during their marriage. Dan denies her claim. The facts do not elaborate as to the nature of the domestic violence claim, whether this was a one time occurrence or an on-going pattern, or the severity of the domestic violence. At trial, each party would present their evidence. If a court finds that Dan has a history of perpetrating domestic violence, he cannot receive joint physical custody of Sean. AS 25.24.150.

Another issue affecting an award of joint physical custody is geographic location. The facts state that Sean lives with his mother in Alaska and Dan lives in Idaho. Dan wants Sean to spend half the year with him and half the year with Meredith.

Under the facts, Sean will be entering kindergarten in the fall of 2010. In West v. Lawson, 951 P.2d 1200 (Alaska 1998) the Court that when parents live in distant geographical locations that a six month alternating schedule disrupts a young child's stability and is not in a child's best interests absent compelling evidence to the contrary. *See id.* at 1206. The child in West was three years old and Sean is five however he is still very young. Under the facts here, there does not appear to be compelling evidence for an alternating schedule. There are thousands of miles between Fairbanks and Idaho It would be too disruptive to Sean's education and therefore, to his stability for him to transfer schools every six months. Further, in Kelly v. Kelly, 926 P.2d 1168 (Alaska 1996), the Alaska Supreme Court upheld a divided physical custody award where the parents lived in different communities, but the Court noted that the divided custody was to cease when the child reached school age. *See id.* at 1169. Regardless of possible domestic violence, examinees should conclude that it is unlikely that the court will award Dan joint physical custody of Sean under the arrangement he proposes.

(3) Meredith's Motion To Give Dan A Boat In Instead Of Cash (15 pts)

In Dragseth v. Dragseth, 210 P.3d 1206 (Alaska 2009), the Court held that there is no problem per se if the trial court awards property as a substitute for

the cash value of an attorney fee award. *See id.* at 1213. But when a party raises concerns about the ability to convert the property into cash, the trial court must make sufficient inquiry and findings to justify the award of property in lieu of cash. *See id.*

In this case, Dan has raised concerns about the ability to convert the property award to cash. But placing the boat on E-bay for one day is not sufficient to determine whether the boat is saleable or not. Therefore, court would need more information about the boat's sales potential at \$5,000 before it makes a determination about whether it is appropriate to award Dan the boat in lieu of cash.