

ESSAY QUESTION NO. 6

Answer this question in booklet No. 6

Molly and Floyd were divorced in 2000. They had shared legal custody of their only daughter, Chloe. Molly was awarded primary physical custody due to Floyd's alcoholism. Chloe has lived in Alaska since birth. Floyd lives in Florida and has not seen Chloe since 2003. He phones Chloe sporadically during the year. He sent a card only once on Chloe's birthday. Floyd is current in his child support, although he has been months behind in the past.

Molly had always been supportive of Floyd's relationship with their daughter, but she was diagnosed with cancer in April, 2008. She immediately made Floyd aware of her diagnosis and moved to Texas to undergo treatment later that year. Despite the treatments, Molly died last month.

Due to Molly's cancer treatments out of state, Chloe has lived much of the past year in Anchorage with Ava, Don, Ava's husband, and their daughter, Susan. Chloe has her own room at Ava and Don's home. Like Molly and Ava, Chloe and Susan are lifelong best friends. They just completed their sophomore year of high school. Don has been the assistant coach of the girls' ski team for four years.

Molly died before she formalized any arrangements for Chloe's care. The couple has taken Chloe to biweekly counseling sessions for the past several months to deal with her mother's illness and death

1. Ava and Don wish to adopt Chloe and have filed their adoption petition. Discuss what procedural steps need to be taken by Ava and Don prior to the final hearing. Do not discuss the Indian Child Welfare Act (ICWA).
2. Discuss what other court proceedings Don and Ava might commence to ensure that Chloe continues to live with them.

GRADER'S GUIDE

QUESTION NO. 6

SUBJECT: FAMILY LAW

(1) After Filing Their Adoption Petition, Discuss What Procedural Steps Need To Be Taken By Don And Ava Prior To The Final Hearing. (65 points)

One of the procedural steps is that the couple must obtain Chloe's written consent. Chloe must consent because she is over ten years old. Consent of the minor is required if the child is 10 years of age or older unless the court finds that it is in the minor's best interests to dispense with the youngster's consent. (AS 25.23.040 (a)(5)). From the facts, it appears Chloe would consent.

Another procedural step is that Don and Ava must file Floyd's written consent. AS 25.23.020 (a)(2) requires a father's written consent to his child's adoption if he was married to the mother at the time of conception or anytime after conception, the father has adopted the child or the father has otherwise legitimized the child under the law.

Floyd was married to Molly. Their divorce decree outlines his custodial rights and obligations. Floyd's consent is required unless his consent is dispensed with by the court.

If Floyd refuses to give his consent, Ava and Don can move the court to dispense with Floyd's consent under AS 25.23.050. AS 25.23.050 provides:

"(a) Consent to adoption is not required of

(1) for purposes of this section, a parent who has abandoned a child for a period of at least six months;

(2) a parent of a child in the custody of another, if the parent for a period of at least one year has failed significantly without justifiable cause, including but not limited to indigency,

(A) to communicate meaningfully with the child, or

(B) to provide for the care and support of the child as required by law or judicial decree..."

To establish abandonment under AS 25.23.050(a)(1), a two prong inquiry must be made by the court. Has the parent's conduct evidenced a conscious disregard for his or her parental obligations? Has the disregard led to the destruction of the parent/child relationship? In re A. J. N., 525 P.2d 520 (Alaska 1974).

Floyd has had sporadic phone calls with Chloe for several years. No visits have occurred since 2003. He has paid his support obligation. His contact, although limited, would most likely not be found to be a conscious disregard of his parental obligation to Chloe that would allow a court to find that the first prong of the two prong inquiry for abandonment has been met. Thus, Floyd's consent could not be dispensed with on the grounds of abandonment. (AS 25.23.050(a)(1)).

This means the court can only dispense with Floyd's consent if either criteria outlined in AS 25.23.050(a)(2)(A) or (B) is satisfied.

Ava and Don bear the burden of proof that Floyd has failed to significantly communicate with or provide for Chloe's support. D. L. J. v W. D. R., 635 P.2d 834 (Alaska 1981).

Floyd called Chloe sporadically. They have not seen each other in approximately seven years. He once sent a card for Chloe's birthday. It appears Chloe has not received any other cards, letters, or correspondence from him. Nor do the facts indicate any gifts to Chloe.

On these facts, a court could find that Floyd has failed to communicate meaningfully with Chloe. This conduct could lead the court to dispense with Floyd's consent for his failure to meaningfully communicate (AS 25.23.050(a)(2)(A) with Chloe.

The facts indicate that Floyd is current in his child support but has had past arrearages. The facts do not elaborate the extent of the arrears in terms of either the actual debt or for what months he was behind. Courts can consider a parent's entire history of support to determine whether that parent has waived his or her right to block an adoption. Matter of J. J. J., 718 P.2d 948 (Alaska 1986). In J. J. J., supra, the Alaska Supreme Court held that the twelve month period did not have to immediately precede the adoption's filing.

Depending on Floyd's child support payment history, the court may or may not find that Floyd's consent could be dispensed with under AS 25.23.050(a)(2)(B).

Another procedural step that the couple must complete is a report of expenditures. AS 25.23.090 provides that a report of petitioner's expenditures must be filed by all petitioners except a step-parent whose spouse is a natural or adoptive parent of the child. Ava and Don are not Chloe's step-parents so they are required to complete the expense report.

Because neither Ava nor Don are Chloe's step-parent nor are they related to Chloe within the fourth degree of lineal or collateral consanguinity, and Chloe is not an adult (See AS 25.23.100(g)), an investigation must be also conducted by either the Dept. of Health & Social Services or another qualified agency or

persons to review the conditions and antecedents of the minor, to determine whether Ava and Don's adoptive home is suitable, and determine whether the adoption is in Chloe's best interests.

Because Chloe is not their step-child, notice of the adoption and hearing must also be given to the Dept. of Health & Social Services. Notice must also be given to any agency or person whose consent is required but who has not consented and anyone whose consent is dispensed with under AS 25.23.050(a)(1),(2),(3),(6-9) and hasn't consented. These notices are required under AS 25.23.100(a) .

(2) Discuss What Other Court Proceedings Don And Ava Might Commence To Ensure That Chloe Continues To Live With Them. (35 points)

Ava and Don can pursue either a custody case against Floyd or file a guardianship.

Custody: As to Chloe, Ava and Don are non-parents. For a non-parent to be awarded custody over a parent, the court must find that the parent is unfit, has abandoned the child, or that the welfare of the child requires that a non-parent receive custody. (Turner v. Pannick, 840 P.2d 1051 (Alaska 1975)). The standard of proof is clear and convincing evidence. (Evans v. McTaggart, 88 P.2d 1078 (Alaska 2004)).

The best interests of the child standard is rejected in cases between a parent and a non-parent. (Kinnard v Kinnard, 43 P.3d 150 (Alaska 2002)). No facts suggest that Floyd is unfit.

Floyd has provided financial support, has visited his daughter (although infrequently) and does sporadically phone Chloe. It would appear that Ava and Don would not be able to substantiate a finding of abandonment by Floyd.

The only hope Ava and Don have is to prove Chloe's welfare requires that they obtain custody. They will have to prove that it would be detrimental to Chloe for her to be in Floyd's custody. (Todd v Todd, 989 P.2d 141 (Alaska 1999)).

Chloe has had a lifelong relationship with Ava, Don and their daughter. She has her own room at their home. They have provided hands-on care to Chloe throughout her mother's illness and death. Having lived in Alaska her entire life, Chloe is familiar with the community - this is where her school is, team, counselor and friends are. She has two years left to complete her education. There is nothing in the facts to suggest she has any ties with Florida except her limited relationship with Floyd. Ava and Don could argue that Chloe's welfare requires her remaining in Alaska to insure her emotional, social and educational stability.

Guardianship: Ava and Don can file for a guardianship under AS 13.26.045. That statute provides " The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order."

Parental rights to Chloe's custody have not been terminated.

Ava and Don would argue parental rights are suspended by circumstances - Molly's death and Floyd's failure to fully exercise his parental rights of visitation for about seven years and his limited telephonic contact with Chloe.