Chief Examiner’s Report

The purpose of the report is to provide feedback to centres and students on the students’ performance in the examination with recommendations about how any issues identified may be addressed.

The target audience for this report are centre tutors and students. The report should be read in conjunction with the Suggested Answers for the examination.

Unit Name: Level 6 - Unit 7 - Family Law

Exam Session: June 2014

STUDENT PERFORMANCE OVERALL

The reasons for the specific failures include:

- Lack of knowledge of the law being questioned.
- Lack of structure to essay questions, including omission of an introduction and failure to conclude, thus reducing the marks allocated.
- Lack of application to problem scenarios.
- Lack of citation of key statutes and case law across both essay and problem questions.
- Incorporating copious amounts of irrelevant material.
- Failure to actually answer the question posed, particularly with essay questions.

STUDENT PERFORMANCE FOR EACH QUESTION:

SECTION A

Question 1
This question expected candidates to analyse the law relating to contact and how it is impacted where there has been domestic violence. Candidates were expected to identify that contact is the right of the child and that the paramouncy principle under the Children Act 1989 (CA 1989) focusses on ensuring the court act “in the best interests of the child”. Candidates were then expected to define a contact order under S.8 CA 1989, and briefly explain the different types of contact (direct, indirect, supervised, unsupervised and reasonable), before briefly touching on the key principles under S.1 CA 1989 (paramouncy, non-intervention, no delay), and the S.1(3) checklist. Candidates then needed to explain the position in relation to contact where there is a history of domestic violence, and this was the bulk of the answer. Candidates were expected to explore the earlier case law such as Re H (1998) and Re S (2000) promoting contact, but also Re C (2000), where there will be no contact when it distresses a child. Candidates should then have focussed on the joint appeal cases of Re L, Re V, Re H, Re M (Contact: Domestic Violence) (2000), facts and principles that stemmed from the case in determining contact where there is a finding of domestic violence. Candidates then needed to demonstrate that this has been followed in subsequent cases such as Re G (2000), and conclude by saying that the court are reluctant to stop all contact even in serious cases, and the option of indirect contact is always there, and the Government's ethos is to ensure contact with both parents “if safe to do so”. Following standardisation, it was agreed to give additional credit to those candidates who referred to a balancing of rights under Article 8 European Convention on Human Rights (ECHR) – rights of the child with the rights of the father. Overall, the answers were weak because numerous candidates failed to focus on the key joint appeal cases which was pivotal to answering this question fully.

Question 2
This question required candidates to explain the provisions under S.12(c) Matrimonial Causes Act 1973 (MCA 193) relating the ground of lack of consent as a result of duress, as well as
raising the bars to such a provision contained within S.13 (1), (2), (3) MCA 1973. Candidates needed to explain the effect of the provision (marriage is valid until avoided, and the parties can still seek financial relief per S.16 MCA 1973). The focus of the question was then on a body of case law stemming from Singh v Singh (1971), Szecht v Szecht (1971), Hirani v Hirani (1982), Buckland v Buckland (1968), H v H (1954) and reaching the key case of P v R (2003) and extreme example of a forced marriage. All the cases required brief facts and a decision. They also needed candidates to identify within each how duress was defined or viewed. Candidates were then required to conclude with briefly discussing the Forced Marriages (Civil Protection) Act 2007 which came into force in November 2008, making it a criminal offence to force someone to marry. Following standardisation it was agreed to credit those candidates who also raised the point that with S.12 MCA 1973 you do not need to wait a year to take action, which you must do with divorce or dissolution. There were a lot of high scoring answers on this question, which was straightforward. Those candidates that scored low did so because of lack of case law, or lack of explanation of case law, or simply because they recited the whole of S.12 MCA 1973 grounds for making a marriage voidable, instead of focussing on only S.12(c), which was the basis of the question.

Question 3
This question required candidates to examine the body of case law that has developed over the last 12 years in relation to pre-nuptial agreements. Candidates needed to introduce the area with reference to the Matrimonial Causes Act 1973 and the body of case law which determines financial disputes between spouses, and particular a reference to "all the circumstances of the case" which may now incorporate consideration of any pre-nuptial agreement. However, candidates also needed to reiterate that such agreements have no legal status in English Law, are contrary to public policy, and undermine the institution of marriage. The question then revolved around demonstrating a knowledge of the case law and how it has evolved to the present state: M v M (2002), K v K ((2003), Ella v Ella (2007), Macleod v Macleod (2009), and finally Radmacher v Granatino (2010). Candidates needed to explain brief facts of each case, decision, and principles from each case. More detail was needed on Radmacher v Granatino including the key considerations before concluding with the Law Commission Consultation paper reciting the formalities for a pre-nuptial agreement (formal, intention to be bound, both parties to gain from the agreement, independent legal advice, no duress). This question could only gain high marks if the case law over the last 12 years was identified and explained, and conclusions drawn relating to the Law Commission. There were some good answers, but the majority were weak because they did not discuss the key case law.

Question 4(a)
This part of the question involved candidates analysing marriages and civil partnerships, identifying similarities and differences, and commenting on whether or not there was equality. Candidates needed to raise points such as ground for divorce/dissolution, the facts to be relied on, financial support during the relationship, financial support on breakdown, how to end the relationship, where a ceremony can take place and the content. Credit was to be given for any coherent points raised. However candidates also needed to address Article 12 European Convention on Human Rights (ECHR) in that civil partnerships are denied the right to marry as illustrated with Wilkinson v Kitzinger. Credit was also given for stating that this may no longer be the case since the implementation of the Marriage (Same Sex Couples) Act 2014. There were a lot of really good answers to this question, but some candidates did just recite the statutory provisions on forming a marriage/civil partnership and did not answer the question, or there was a lack of illustrations.

Question 4(b)
This revolved around a discussion of "consortium", and required candidates to provide a definition in accordance with Best v Samuel Fox & Co (1952) as a "bundle of rights, difficult to define, that attaches to marriage". Candidates then needed to give some examples, such as the right to mutual services, reasonable sexual intercourse, duty to cohabit. Candidates also needed to state that some of the rights are difficult to define, such as “reasonable sexual intercourse", what is reasonable? Candidates then needed to conclude by explaining the situations when consortium is lost, such as agreeing to live apart, judicial separation, decree nisi of divorce and matrimonial misconduct. This question was answered badly by the majority of candidates, who only managed to give some examples of consortium, without answering the question.
SECTION B

Question 1
This question related to a former cohabiting couple, Hannah and Matthew, who had a child Emily.

Question 1(a)
This part of the question related to property rights for cohabiting couples, and the reliance on trust and land law, and the principle that "equity follows the law". Candidates needed to identify that Hannah could possibly establish a resulting trust by virtue of her contribution to the deposit on the house, with reference to Curley v Parkes. Candidates should have stated that Hannah would be able to recover what she had put in with an application under the Trust of Land and Appointment of Trustee Act 1996. This question was for minimal marks, and most candidates scored extremely well. However, there was the tendency to write copious amounts of information, including a discussion on constructive trusts which was not particularly relevant, and which scored no additional marks.

Question 1(b)
This part of the question required candidates to identify which applications Matthew would be able to make, and why, in relation to his daughter Emily. Candidates needed to identify that Matthew would be seeking a contact order under Section 8 Children Act 1989 (CA 1989) and provide a definition of contact. Candidates should have identified that as a parent Matthew could do this under S.10(4) CA 1989, and it was only dependent on being a parent. Candidates then had to say that contact was the right of the child, and that in deciding the application the court would take account of the key principles contained with S.1 CA 1989 – namely paramony, no delay and non-intervention, with brief explanations. Candidates then needed to focus on stating and applying the factors from the S.1(3) welfare checklist, and based on the checklist conclude the likely outcome of the application, which would most likely be granted. Candidates also needed to identify that Matthew, as the unmarried father, and not being on the birth certificate, did not have parental responsibility, so if he wanted to be involved in decisions affecting Emily, he would have to seek a parental responsibility agreement from Hannah or a parental responsibility order under S.4 CA 1989. Candidates needed to define parental responsibility under S.3(1) CA 1989, and identify the key case of Re H (Minors)(LA:Parental Rights)(No3)(1991) and the factors to be taken into consideration on such an application (attachment, commitment and reason for applying). Following standardisation it was agreed to credit the following additional points: brief discussion of the new child arrangements order, possibility of shared residence and briefly mentioning the single family court would now have jurisdiction. There were some really good answers to these questions, but numerous candidates made significant omissions. Some candidates failed to define or even address the parental responsibility issue. Some candidates also confused the law stating that Matthew needed parental responsibility before he could apply for a Section 8 contact order. Other candidates just recited chapter and verse of every type of Section 8 order without relevance to the question, and the general criticism was a lack of application of the law to the scenario.

Question 2
This was the standard financial relief on divorce question. It has been examined numerous times previously so the format and content should be relatively straightforward for the candidates. Candidates should have started by saying how financial relief on divorce is considered under the Matrimonial Causes Act 1973 (MCA 1973), “all the circumstances of the case”, first consideration to the welfare of minor children, the statutory facts, clean break principles, and thereafter reliance on the body of case law that has developed. Candidates needed to address each and every consideration, before stating and applying each of the statutory factors under S.25(2) MCA 1973 to the scenario involving Helvia and Nikhill. Candidates should also have made reference and applied significant case law decisions such as White v White (2000), Miller v Miller (2006), McFarlane v McFarlane (2006). Based on the application aforementioned, candidates were then required to advise on the likely orders for Helvia. This required a brief mention of the types of orders available in terms of capital, income and pension orders, before concluding the likely orders with explanation for Helvia. There was some really good answers to this question demonstrating a good structure, content and application. However, there was also the tendency for numerous candidates to simply recite everything they could from the statute book about factors and orders without
application to the given scenario, thus reducing marks.

Question 3
This question involved a male same sex civil partnership involving Peter and Alan. Candidates were asked to advise on dissolution of the civil partnership, and also how to enforce the existing non-molestation and occupation orders. Candidates needed to identify the ground of irretrievable breakdown in S.44(1) Civil Partnership Act 2004 (CPA 2004), and briefly state the four facts within S.44(5) CPA 2004 (behaviour, desertion, living apart 2 years and living apart 5 years), before identifying the key fact as behaviour. Candidates needed to give the full statutory citation of this before explaining the principle, and demonstrating an understanding of the test with reference to the case of Livingstone-Stallard v Livingstone-Stallard (1976) “objective” and “subjective”. Candidates also needed to give case examples of unreasonable behaviour, such as Ash v Ash (1972) and Carter-Fea v Carter-Fea (1987) before applying to the scenario involving Peter and Alan, to conclude if a petition is likely to succeed. Candidates also needed to briefly mention the effect of resuming cohabitation, but the discretion exercised for behaviour. Candidates then needed to address the breach of the non-molestation order by Alan, with particular emphasis on S.42A Family Law Act 1996 (FLA 1996), which now makes breach a criminal offence with punishment on indictment of 5 years imprisonment and/or a fine, or on summary conviction of 12 months imprisonment and/or a fine. Candidates needed to explain how this differed for breach of the occupation order, which was still punishable by way of contempt of court. Candidates needed to identify S.47(7) FLA 1996 where arrest could take place immediately if a power of arrest had been attached to the order, and if found guilty the sanctions for contempt of court would be imprisonment and/or fine. Candidates also needed to extend this and discuss the case of Hale v Tanner (2000) and mention the guidelines to follow when sentencing for contempt of court. This then needed to be applied to Alan. Following standardisation it was agreed to give additional credit to those candidates who briefly explained the two stage dissolution process (conditional and final order). There was a mixture of really good and really weak answers. The really weak answers tended to recite all the provisions from S.44(5) CPA 2004, without application of the key one of unreasonable behaviour, and also discussed the criteria for making non-molestation and occupation orders despite the fact the scenario stated they had been made but breached. There was generally the omission of the provisions of Hale v Tanner (2000) from almost every answer. There was also a general lack of application of the law to the given scenario.

Question 4
This question involved a brief encounter which resulted in the birth of Ebony, and issues now revolving around establishing parentage and maintenance. Candidates were expected to discuss and advise Roger on issues relating to DNA testing, voluntary agreements for maintenance, child support agency maintenance, and top-up maintenance under Schedule 1 Children Act 1989 (CA 1989). Candidates needed to state and apply S.20(1) Family Law Reform Act 1969 (FLRA 1969) on the provisions relating to DNA testing, and discuss the issue of whether the mother Melissa would consent to samples being taken from Ebony, and what the case would be if she objected. Candidates needed to discuss in depth the key case of Re T (Paternity: Ordering Blood Tests) (2001) and issues relating to Article 8 European Convention on Human Rights (ECHR), before advising Roger that the court would probably order the DNA testing of Ebony. Candidates then had to move on to discuss the issue of child support maintenance, assuming Ebony was the child of Roger. This should have started with a discussion of how it would be better to reach a voluntary agreement if possible; otherwise Melissa could seek it from the Child Support Agency. Thereafter candidates were required to say that in view of Roger's wealth, and Melissa's limited financial means, Melissa could apply for a top-up order under Schedule 1 CA 1989 and seek various orders including periodical payments, lump sum and even a settlement of property order, with a brief explanation of each. Candidates were also expected to identify the factors that the court would take into account in deciding what order to make (income and earning capacity of the applicant and any parent, financial needs and obligations now or in the foreseeable future, financial needs of the child, any income or property of the child, any physical or mental disabilities of the child and the manner in which the child is expected to be educated). Reference then needed to be made to the key case of Re P (Child: Financial Provision) (2003) facts and decision to show how it would apply to Roger, and he could, in view of his wealth, be ordered to make periodical payments and settle a house for his daughter. Finally, candidates needed to explain that contact is the right of the child and not the parent, and therefore, Roger cannot
be forced to see his child if he does not want to. This question was answered by only 12 candidates, and it was not answered particularly well. Significant omissions included reference to S.20(1) FLRA 1969, Re T (2001) the factors under Schedule 1 CA 1989 and Re P (2003). There was a general lack of understanding and application by those candidates who answered this question.