

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 3 - UNIT 12 – THE PRACTICE OF FAMILY LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Some excellent scripts were seen from candidates who were well prepared and who had developed the appropriate skills of answering a range of questions as required.

Chief Examiner reports provide information on what is required to achieve good marks, supported by the sample answers. Candidates should refer to these as part of their preparation.

This is a practice paper which assesses knowledge and understanding of the relevant areas of procedure. Candidates are expected to show knowledge of relevant law that underpins practice, including knowledge of the relevant procedures and understanding, through application to specific situations described in the case studies.

Evidence of knowledge includes providing relevant definitions, with citation, and developed through explanation. This knowledge needs to be across the specification. Evidence of understanding is provided through giving advice on the particular situations described in the case study.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Example – Question 1(a)

S.42 Family Law Act (FLA) 1996 (**CITATION**) states that the purpose of a non-molestation order is to prevent the respondent from molesting the applicant or relevant child. (**DEFINITION**)

Molestation includes physical behaviour e.g. physical violence and threats of violence, and also action which harasses the applicant such as nuisance calls or loitering near applicants home. (**EXPLANATION**)

In this case, the incidents of physical violence that Faria has been subjected to, some of which required hospital treatment, would be sufficient for a non-molestation order to be issued. (**APPLICATION**)

Candidates must read the question carefully and answer as instructed. For example Question 2(a) required knowledge of a s.8 order, a child arrangements order. Some candidates dealt with eligibility in their answers which was not credit worthy.

Question 1 – Domestic violence

The performance of candidates in this question was disappointing.

(a) Candidates needed to show knowledge by:

- a clear definition of a non-molestation order, 'an order to prevent the respondent from molesting the applicant or relevant child';
- clear examples of the wide range of behaviours that molestation can involve, and understanding through application by referring to the facts in the case study to achieve marks.

Low marks were the result of a lack of precise definition, limited examples and insufficient detail in application.

(b)(i)

(b)(i) Candidates needed to show knowledge by providing:

- a clear definition of an occupation order, 'an order that deals with the occupation of the family home'; and
- clear examples the ways in which an occupation order can do this; and
- identification of the type of occupation order to be applied for could have been stated with reasons, a s33 order because Faria has home rights; and
- understanding should be shown through application by referring to the facts in the case study.

Low marks were the result of a lack of precise definition, limited or no examples and insufficient detail in application, with few candidates making reference to a s.33 order.

(b)(ii) Some candidates were lacking in understanding of eligibility and the eligibility criteria and did not achieve marks.

(c) This question elicited weak answers from a significant number of candidates. Candidates are required to have a good knowledge of the stages of relevant procedures.

Some candidates failed to note that the question was specifically limited to applications 'ex parte', so notice would not be served on Alan when the application was made.

Question 2 – Children

Performance in this question reflected performance in the exam as a whole, with well prepared candidates able to achieve high marks.

(a) Candidates must read the question and answer as instructed. This question was about a s.8 order, a child arrangements order. Some candidates went beyond this and wrote about eligibility, which was not relevant.

(b) Some candidates performed very well on this question, others very poorly.

Well prepared candidates were able to provide very good answers which identified a principle, described it and then explained how it might apply by referring to information in the case study.

Other candidates performed less well. Candidates must be clear about the key statutory principles (welfare/paramountcy, no delay, no order and shared parenting). Some were not and showed a lack of knowledge and understanding by writing about factors from the welfare checklist.

(c) This question produced a significant number of very good answers from candidates who knew the procedure and were able to describe the various stages.

Question 3 – Matrimonial orders

This question produced the strongest performance.

(a) This question was well answered by candidates who had prepared and who had a good working knowledge of the case study. They were able to identify Fact D as the appropriate fact because the parties had been separated for over 2 years (Jamar moved out and into a rented apartment in October 2017), and Jamar has said that he would not contest a divorce.

However, some candidates suggested Fact B, unreasonable behaviour, for which there was insufficient supporting information.

A few candidates were confused about the difference between Fact C, desertion, and Fact D.

(b) Generally answered very well, though candidates should note that the question refers to 'documents' and fees are not documents.

(c) Service by first class post was required to achieve a mark. Simply referring to 'by post' was not sufficient.

(d) Generally well done with candidates correctly stating that Jamar would need to confirm that he does not intend to defend.

Question 4 – Financial orders

Performance in this question reflected performance in the exam as a whole, with well prepared candidates able to achieve high marks.

(a) This question was answered well by a significant number of candidates. Candidates who performed less well did so because they either named the order but did not explain it (see example) or did not show understanding by justifying their choice through application to the case study.

Example:

Kamesha could apply for maintenance pending suit (s.22 Matrimonial Causes Act (MCA) 1973) which involves regular payments being made up to the date of the decree absolute. (**ORDER EXPLAINED**). As Kamesha appears to have little money of her own, and is reliant on Jamar for money, this order would help with living, legal costs etc. (**APPLICATION**)

(b) This question produced good answers from a number of candidates. Those candidates were able to state the factor accurately, provide a clear explanation and then to apply using the case study facts.

Candidates who performed less well either did not explain the factor, or failed to apply it.

(c) Varying performance was seen in the responses to this question. White v White is a key case and candidates must have a working knowledge of it and its relevance to applications for financial orders.

(d) A significant number of candidates were able to achieve high marks as they were able to state stages in procedure up to the First Appointment and provide some detail.

The question did require candidates to refer to the documents to be exchanged and filed 14 days before the first appointment (the chronology etc). Candidates should note that those candidates who achieved high marks did so because they provided a description of each of these documents.

SUGGESTED ANSWERS

LEVEL 3 - UNIT 12 – THE PRACTICE OF FAMILY LAW

Question 1

(a) S.42 Family Law Act (FLA) 1996 states that the purpose of a non-molestation order is to prevent the respondent from molesting the applicant or relevant child.

Molestation includes physical behaviour e.g. physical violence and threats of violence, and also action which harasses the applicant such as nuisance calls, loitering and coercive and controlling behaviour.

In this case, the incidents of violence that Faria has been subjected to would be sufficient for a non-molestation order to be issued.

- (b) (i)** An occupation order is an order that deals with the occupation of the family home. It is an order that controls who lives in the family home and it can be used to exclude those who use or threaten violence.

In this case, although the house belongs to Alan, Faria can apply for a s.33 occupation order because, as Alan's wife, she has home rights. Also, Alan has physically attacked Faria, so an occupation order would protect her by allowing her to live in the family home with the children while excluding Alan.

- (ii)** Under s.62 FLA 1996, the eligibility to apply for an occupation order requires that:

1. The applicant and the respondent must be 'associated persons'. This covers a range of relationships including spouses, ex-spouses, civil partners, etc.

Here, Faria and Alan are married and so are 'associated persons'.

2. The property concerned must be a dwelling house and must be or must have been intended to be the family home.

Here, 4 Cathedral Close is a dwelling house and is the family home.

So, Faria is eligible to apply for a s.33 occupation order.

- (c)** The procedure to obtain non-molestation and occupation orders *ex parte* is as follows:

- prepare the application form (Form FL401);
- prepare the supporting statement, which must include the reason for the urgent application being made without notice;
- arrange for the statement to be signed;
- issue the application and supporting statement at the court;
- pay fee at the court office;
- the court will allocate a hearing date;
- prepare and attend the without notice hearing;
- order issued and date for a full hearing set;
- a minimum of two days before the full hearing;
- service of the order and notice of full hearing on respondent must be arranged.

Question 2

- (a) Lloyd could apply for a Child Arrangements Order (CAO). This is an order that decides who a child will live with and who a child will have contact with.

Contact can involve direct face-to-face contact or indirect contact by letter, phone or via the internet using, for example, Skype.

In this case, this order will detail the contact that Vicky and Robin will have with Lloyd and his children, and Nathan will have to comply.

- (b) Candidates could identify and explain any **two** of the following key principles from the Children Act 1989:

1 The child's welfare is paramount (s.1(1) CA 1989)

The welfare of the child should come before and above any other consideration in deciding whether to make an order.

In this case, the welfare of Vicky and Robin should come before and above any other considerations, including the wishes of Nathan and of Lloyd, in deciding whether, or not, to make an order. As Vicky and Robin have expressed a wish to visit this should be a key consideration.

2 No delay (s.1(3) CA 1989)

Issues involving the children should be resolved as soon as possible since a child will become unsettled and will be distressed by any changes.

Issues involving Vicky and Robin should be resolved as soon as possible so that any distress caused is kept to the minimum. They are happy where they are but are prepared to move to live with their father, provided they are sure that they can visit Lloyd.

3 No order (s.1(5) CA 1989)

The court should not make the order(s) unless it considers that doing so would be better for the child than making no order at all. The court must be assured that there will actually be a benefit to the child if the order is made.

The court would prefer Nathan and Lloyd to make an arrangement themselves rather than the court making an order. It seems uncertain whether this will happen in this case, so making an order may be necessary.

4 Shared parenting principle (s.1(2)(A) CA 1989 (as amended by s.11 Children and Families Act (CFA) 2014)).

There is a presumption, subject to evidence to the contrary, that the involvement of a parent in the life of a child will further the child's development.

It is important that Nathan, as their father, should continue to be involved in Vicky and Robin's life.

- (c) The procedure to obtain a s.8 Children Act 1989 order is as follows:

- attendance at a Mediation Information & Assessment Meeting (MIAM) should occur, unless exempt (for example, if a domestic violence case);
- completion of application form (Form C100) and C1A if harm is alleged;
- applicant files C100 with the court;
- within 24 hours the court will issue parties with a hearing date (Form C6); and will
- issue the following to the parties – copies of C100 (and C1A if relevant), acknowledgement form (C7) and blank Form C1A;
- within 48 hours of filing, the court should serve CAFCASS with copy forms;
- respondent to file and serve acknowledgement of service (Form C7) within 10 working days;
- first hearing dispute resolution appointment (FHDRA) for the court to investigate issues takes place within 5-6 weeks;
- the court will consider a timetable for proceedings;
- the court will give directions on the filing of documents, witness statements, etc;
- the court may list for a further dispute resolution appointment (DRA);
- the court may require CAFCASS to complete a report;
- final hearing and order(s) made.

Question 3

- (a)** Kamesha must establish the ground for divorce. Under s.1(1) Matrimonial Causes Act (MCA) 1973, the only ground for divorce is that there is the irretrievable breakdown of the marriage. This can be established by satisfying one of five facts. In Kamesha's case, she should base her application on Fact D (s.1(2)(d) MCA 1973) – that the parties have lived apart for at least 2 years immediately preceding the application and that the respondent consents.

Here, Kamesha and Jamar have been living apart since October 2017 and Jamar has stated that he wants a divorce, so Kamesha can base her application on Fact D.

The government is currently planning to change and simplify the law on divorce by moving to no-fault divorce, such as this one, in all cases.

- (b)** The documents required to start proceedings are:
1. Application form, Form D8.
 2. Original marriage certificate, or a certified copy.
 3. Certificate of reconciliation as Kempstons have been instructed to act.
- (c)** The method of service on the respondent of the divorce application in this case is by 1st class post.
- (d)** Once Jamar has received the application, he must complete , sign and return the Acknowledgement of Service within 7 days, and he must indicate that he does not intend to defend.

Question 4

(a) Candidates could identify and explain any **two** of the following financial orders:

1. Maintenance pending suit (s.22 MCA 1973) – periodical payments up to the date of the decree absolute. As Kamesha appears to have little money of her own, and is reliant on Jamar for money, this order would help with living, legal costs etc.

2. Periodical Payments order (s.23 MCA 1973) - an order for one party to make periodical payments to the other party to provide regular income. Here, it appears that Kamesha has no income but will require money to live.

3. Lump sum (s.23 MCA 1973) - an order for one party to pay the other party a lump sum e.g. £100,000. Here, Kamesha will require a home and a lump sum could pay for this, but there are not sufficient assets that could be used for this order unless the family home is sold.

4. Pension sharing/attachment order (s.166 Pensions Act 1995)
A pension sharing order creates a separate pension fund for the applicant, and reduces the respondent's fund. Alternatively, a pension attachment order instructs the pension provider to pay a specified amount of the pension to the applicant on retirement or death of the respondent. Here, Jamar has contributed to a pension but Kamesha has no real pension provision, so a pension sharing/attachment order should be applied for.

5. Property adjustment order (PAO) – an order dealing with the property by either sale or transfer or through a trust of land (a Mesher or Martin order). Here, Kamesha needs a home for herself and the children, and Jamar currently has his rented flat. As Kamesha may not be able to afford the mortgage payments, the house could be sold, and the proceeds split to enable Kamesha to buy a home of her own.

(b) Any **two** of the following s.25 MCA 1973 factors:

1. The welfare of the children of the family

The first consideration of the court is always the welfare of any minor children of the family. Here, there are two children, Tyrell and Moesha, and their welfare must be considered first.

2. All the circumstances of the case

The court is required to consider all the relevant information and in particular 8 specific factors.

In this case, financial considerations will be important as Jamar is the wage earner and Kamesha relies on him.

3. Financial resources of parties

This factor relates to the income, earning capacity and property of each party at the time of the order and in the foreseeable future.

Jamar still has a substantial income and earning capacity and Kamesha has been the homemaker. Kamesha currently has no income of her

own. She will need her own income in the future and her earning capacity is uncertain.

4. Present and future financial needs obligations and responsibilities of parties

This factor relates to the present and future financial needs, obligations and responsibilities of the parties. It includes consideration of the cost of housing, food, travel etc.

Kamesha will need an income to cover the cost of running a home.

5. Standard of living enjoyed by family before breakdown of marriage

This factor involves the court considering the standard of living enjoyed by the family before the breakdown of the marriage, which the court will aim to maintain if possible. If that is not possible, then any fall in living standards should be borne equally by the parties.

Kamesha says that the family has enjoyed a comfortable life style and that the children have enjoyed treats and holidays. The court will aim to maintain this if it is possible.

6. Age of parties and duration of marriage

The age of the parties is relevant to their earning capacity and the duration of the marriage involves considering whether the marriage is a short one or a long one. Where the marriage is a long one the applicant can expect this to be reflected in any financial orders.

Here, Jamar is 47 and Kamesha is 52, and they have been married for 14 years. This is a long marriage and the court must consider this. Also, as she is reaching middle age and has not worked for 12 years, Kamesha may find it challenging to return to work.

7. Contributions made by parties to the welfare of the marriage

This factor involves the court considering the respective roles of the parties. The court will give equal weight to the party going out to work and earning and the party staying at home to look after the home and family.

Here, Jamar has been the breadwinner and Kamesha has been the homemaker. Kamesha's role would be considered to be equivalent to Jamar's.

- (c)** The case of White v White (2001) stated that there should be no discrimination between a husband and wife in their respective roles, as income earner and homemaker. It established the principle of the 'yardstick of equality' which requires that the court should aim to achieve equality between husband and wife and should only depart from this if there is a good reason.

Here, although Jamar has been the income earner, Kamesha has looked after the home and the family, and has supported Jamar in his sporting activities, so the yardstick of equality should apply.

- (d)** The steps to prepare for the First Appointment are as follows:

- attend a MIAM;
- complete application form A
- complete form E – a statement of income, property etc.
- not less than **35 days** before the First Appointment, exchange form E with Jamar and file it with the court;
- exchange and file at court at least **14 days** before the First Appointment various documents:
 - a statement of issues – issues on which there is no agreement between the parties;
 - the chronology – a history of the marriage;
 - questionnaires – stating further information or documents sought;
 - Form G – stating whether the party is in a position to use the First Appointment as a Financial Dispute Resolution (FDR) appointment.
 - Form H – an estimate of costs so far.