

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 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 September 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 questions as instructed.

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:

- 1.** Knowledge of relevant law that underpins practice, including knowledge of the relevant procedures, and to show
- 2.** Understanding through application to specific situations described in the case studies.

Evidence of knowledge required includes providing:

1. Definitions, with
2. Accurate citation, developed through
3. Explanation.

This knowledge needs to be demonstrated across the specification.

Candidates are advised to ensure that they have good working knowledge of the various procedures covered by this specification.

They are also advised to ensure that they understand relevant terminology. For example, Question 3(b) asked about the "test" applied when dealing with an application for an occupation order. This required candidates to show knowledge of the balance of harm test. However, a number of candidates answered by referring to "associated persons" and "a dwelling house" which are eligibility criteria.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1 – Divorce.

NOTE: When the Divorce, Dissolution and Separation Act 2020 comes into full force, at the time of reporting indicators are that this will not be until Autumn 2021, topics such as the 5 facts (1(a)) and draft Statement of Case (1(c)) will no longer be examined. However, until the Act is in full force, the current rules under the Matrimonial Causes Act 1973 will apply.

(a)

This question was generally very well answered. It was particularly pleasing to see candidates showing good knowledge of Livingstone-Stallard v Livingstone-Stallard, with some candidates also referring to more recent cases such as Owen v Owen.

A number of candidates identified and described, sometimes in some detail, all 5 facts. Although these candidates showed knowledge, it was not the knowledge required as the focus required was on Fact B (unreasonable behaviour) which was clearly identified in the scenario.

(b)

Candidates should identify Form D8, divorce application form, to achieve credit. Application form is not sufficient.

(c)

This question requires candidates to show knowledge of:

1. Terminology – applicant and respondent, and not Catherine and Aleksander.
2. Appropriate format – each type of behaviour referenced should be shown as a separate bullet point e.g. excessive dependence on alcohol, financial irresponsibility etc.

3. The Statement of Case should end with a conclusion.

Question 2 – Financial Orders.

(a)

There was a lack of understanding of this principle shown in some scripts. In some it was stated that the principle only applied when the couple were young and had no other children. And other scripts stated that it would not apply in Aleksander and Catherine’s case because Catherine had no assets of her own.

(b)(i)

To show knowledge and understanding and to achieve the marks available for this question candidates must:

1. identify each order and explain how it works (knowledge); and
2. explain why it should be applied for in this case by Catherine, i.e. reference Catherine’s circumstances.

2 (b) (ii) and 2 (b)(iii)

This is a practice paper and candidates will be examined on their knowledge of procedure, as in these questions. The performance of many candidates for these 2 questions was disappointing. They failed to state that the First Appointment was to define issues, while the First Dispute Resolution Appointment is to encourage conciliation and settlement, and they were unable to describe each in sufficient detail.

Question 3 – Domestic violence.

(a)(i)

Performance for this question was mixed, but a significant number of candidates were able to show knowledge through definition and explanation as well as understanding through relating the application to Yin.

(ii)

In contrast, performance for this question was disappointing, Candidates failed to provide a definition/description of an occupation order. And candidates also failed to identify that in this case Yin could apply for a s.36 order, even though the home was not in her name and she was not married to Sarah.

(b)

The question asked the candidates to explain “the test...”. A significant number of candidates did not do as instructed, which was to write about the balance of harm test. Instead they wrote about associated persons and dwelling houses (eligibility criteria) or in some cases about the factors. Candidates need to read questions carefully and be aware of the wording used.

3(c) This question required candidates to:

1. Clearly identify a factor (knowledge).
2. Describe what the factor involves (knowledge).
3. Explain, using information from the case study, why it would apply in the case of Yin and Sarah (application).

Candidates frequently either did not describe the factor or did not explain why it is applied to Yin.

Question 4 – Children

(a)(i)

This question required candidates to show knowledge of a child arrangements order and to state its effect in Yin's case – that it would enable Yin to continue caring for the children, specifying what contact Sarah should have, and that Sarah would have to comply.

(ii)

It is important that the candidates develop a good knowledge of the case study prior to the exam. The case study clearly stated that Yin and Sarah were not married or in a civil partnership. Yin therefore did not have PR. But, as the children had lived with her for more than 3 years, she was eligible to apply under s.10(5) Children Act 1989. Many candidates did not recognise this.

(b)

This question was a test of knowledge of procedure – the First Hearing Dispute Resolution Appointment when an application is made for a s.8 Children Act order. The question instructs candidates to "Identify what matters....giving examples...". Candidates who were well prepared and recognised the importance of the term "matters", were able to achieve good marks. A significant number of candidates did not understand the question, writing instead about the welfare checklist and so were unable to be credited with marks.

SUGGESTED ANSWERS

LEVEL 3 - UNIT 12 – THE PRACTICE OF FAMILY LAW

Question 1(a)

Under s.1(1) Matrimonial Causes Act (MCA) 1973, the ground for divorce that Aleksander must establish is the irretrievable breakdown of his marriage. This can be established by satisfying one of five facts.

In Aleksander's case the relevant fact is Fact B – unreasonable behaviour, under s.1(2)(b) MCA 1973.

Unreasonable behaviour involves the applicant proving that the respondent has behaved in such a way that the applicant cannot be reasonably expected to live with the respondent.

There is no set list of behaviours – but examples of what unreasonable behaviour can involve include violence, abuse of drink or drugs, lack of demand for sex and financial irresponsibility. In the case of Livingstone-Stallard v Livingstone-Stallard (1974) the 'right thinking person' test was established. This involves an objective test (could a reasonable person be expected to live with the respondent?) and a subjective test (how has this respondent's behaviour affected this applicant?).

In the case of Aleksander and Catherine there have been a number of concerns.

Catherine is barely communicating with Aleksander and there are periods of prolonged silence.

Catherine has told Aleksander to sleep in the spare bedroom, indicating that there is a lack of demand for sex.

Catherine has been drinking increasingly heavily which has resulted in angry arguments with Aleksander.

It appears that Catherine has been financially irresponsible as she has been buying alcohol with a credit card and appears to have run up a significant debt.

And finally, there is physical abuse, with Catherine throwing objects at Aleksander and then physically attacking him, causing injuries that have required hospital treatment.

As a result of this behaviour, Aleksander has finally decided that he cannot live with Catherine. There is no future in the marriage.

1(b)

The documents required to issue divorce proceedings are:

1. Application form D8.
2. The original marriage certificate, or a certified copy.
3. The certificate with regard to reconciliation if the legal adviser is 'acting'. In this case Aleksander has instructed Kempstons to act.

(c)

Draft Statement of Case

- The Respondent has **failed to be supportive** of the Applicant in his business venture **or to make any effort to contribute to the marital income** expecting the Applicant to assume the whole financial burden which has made the Applicant feel depressed.
- The Respondent has been **financially irresponsible**, incurring substantial credit card debts and the Applicant is very concerned about how payment can be managed.

- The Respondent has been **drinking heavily** over recent months, resulting in **angry and verbally abusive rows** with the Applicant making him feel threatened.
- The Respondent has shown **no interest in sex** for the past 6 months and has made the Applicant sleep in a separate bedroom, making him feel alone.
- There has been a serious **lack of communication** between the Respondent and the Applicant, with the Respondent regularly refusing to speak to the Applicant, making the Applicant feel depressed and alone.
- On Monday 25 May, the Respondent was **physically violent** to the Applicant and caused injuries requiring hospital treatment.
- The applicant has **moved out of the family home** and does not intend to return.
- The Applicant feels that there is no future in the marriage as the Respondent's behaviour makes him feel isolated and unsupported and depressed.

Question 2(a)

Under s.25 A MCA 1973, the court has a duty to consider whether a 'clean break' is appropriate.

The 'clean break' principle provides that the parties should be financially independent of each other after divorce, if possible. The principle could apply in Aleksander and Catherine's case because they are older with no dependent children and there are sufficient assets to divide.

However, the court might decide not to apply the principle because Catherine has no income and may require periodical payments, at least for a while, as she may find getting a job difficult because of her age and her lack of work experience.

A delayed 'clean break' might be considered.

2(b)(i)

Answers should include **2 orders** from the following list:

Maintenance pending suit - an order that will instruct one party to make periodical payments to the other party up to the date of the decree absolute. Here, Catherine appears to have no money of her own and would need help with living costs and legal costs.

A periodical payments order - an order for one party to make periodical payments to the other party to provide regular income after the decree absolute. Here, it appears that Catherine has no income and may find it difficult to get a job due to her age and her lack of work experience. But she will require an income to live.

A lump sum order - an order for one party to pay the other party a lump sum e.g £100,000. Here, Catherine will require a home and a lump sum could pay for this, but Aleksander's money is tied up in assets, his business and his house. He has limited funds available for this.

A property adjustment order - an order to deal with property by transfer, sale etc. Here, both parties will need a home. Their home is quite valuable.

The Court could order the sale of family home and the proceeds split so that they can each buy a property.

A pension sharing order - an order that Respondent's pension fund will be divided and a separate pension fund created for the Applicant. Here, Aleksander has a healthy pension fund worth £440,000, but Catherine does not, so this order would allow pension provision to be made for Catherine.

A pension attachment order – an order where the court orders the pension provider to pay some, or all, of a pension to the spouse. Here, Aleksander has a healthy pension fund, but Catherine does not. However, Catherine would have to wait for Aleksander to take his pension if she is to benefit.

2(b)(ii)

The First Appointment is a review appointment which aims to define issues in order to save time and costs. At this appointment the judge can:

- decide to what extent questionnaires should be answered and documents provided;
- give further directions;
- make an interim order;
- direct referral to an FDR or a final hearing.

(iii)

The First Dispute Resolution (FDR) appointment is a meeting for purposes of conciliation and settlement. The case will not proceed further if consent orders can be agreed by the parties. The FDR is conducted on a 'privileged basis' to encourage the parties to 'put all their cards on the table'. The parties are expected to make their best efforts to reach agreement. If an agreement cannot be reached, the Judge will make further directions and list the case for final hearing.

Question 3(a)(i)

A non-molestation order is an order to prevent the respondent molesting the applicant, s.42 Family Law Act (FLA) 1996. Molestation can include a wide variety of behaviour – from physical violence to threatening behaviour and harassment.

Here, Sarah has been verbally and physically abusive to Yin and has caused Yin serious injury. The non-molestation order will forbid a repetition. Breach of a non-molestation order is a criminal offence and the police can arrest Sarah if she breaches the order.

(ii)

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.

Yin should apply for a s.36 occupation order as she is a co-habitee with no right to occupy the family home because it is registered in Sarah's sole name.

In this case, Sarah has physically attacked Yin, so an occupation order would protect her by allowing her to live in the family home with the children and could exclude Sarah.

3(b)

The test that the court will apply in deciding whether to grant an occupation order in Yin's case is the 'balance of harm' test. This test involves balancing the significant harm to the parties of making such an order.

If it appears to the court that the applicant, or any child, is likely to suffer significant harm because of the conduct of the respondent, then the court is under a duty to make an order UNLESS the respondent, or any child, is likely to suffer greater harm.

Here, Yin has suffered significant harm (e.g. cracked ribs and concussion) and may suffer further due to the conduct of Sarah if an order is not made to allow Yin to remain in the family home, and to exclude Sarah. Sarah should not suffer significant harm if an order is made as she can live in her London flat.

(c)

Any **three** factors from the following:

The housing needs and resources of each of the parties

Yin needs a home for herself and her children, she has no home of her own, and Sarah has her flat.

The financial resources of each of the parties.

Here, Sarah is in a well-paid job and has her flat, while Yin is currently the full-time carer for the children and has no income or home of her own.

The likely effect of any order, or of any decision by the court not to exercise its powers on health, safety and well-being of the parties and of any relevant child.

If the court does not allow Yin and the children to remain in the family home, they could become homeless. However, Sarah has another home – her flat.

The conduct of the parties in relation to each other and otherwise.

In this case, Sarah is showing increasingly angry and violent behaviour towards Yin and is showing this in the presence of the children.

The nature of the parties' relationship

Yin and Sarah have been in a relationship for 12 years, which is a reasonably long period of time.

The length of time they have co-habited

Yin and Sarah have co-habited for 10 years, which is a reasonably long time.

Whether there are any children who are children of both parties or for whom both parties have parental responsibility or have had parental responsibility

Sarah has parental responsibility for the children. Yin was not named on their birth certificates and so does not have parental responsibility.

Relating to the legal or beneficial ownership of the dwelling house.

The family home is registered in Sarah's sole name. An occupation order is viewed as a draconian order, so the court would consider the legal ownership seriously.

Question 4(a)(i)

To ensure that the children continue to live with her, Yin should apply for a child arrangements order (CAO) under s.8 Children Act (CA) 1989. This is an order to regulate with whom a child shall live and with whom a child shall have contact. This order would deal with the living arrangements for Daniel and Pearl and would give Yin parental responsibility, the right to make decisions concerning the children.

(ii)

The eligibility to apply for a CAO is found in s.10(4) and s.10(5) CA 1989.

Under s.10(5), Yin can apply as a person with whom the child has lived for three years. This period need not be continuous but must have begun no later than five years previously or ended more than three months before making the application.

Here, the children have lived with Yin since birth (Daniel since July 2015 and Pearl since October 2016) and are still living with her.

4(b)

Matters that will be considered at the First Hearing Dispute Resolution appointment (FHDRA) are:

- Safeguarding checks – report of the CAFCASS officer will be considered.
- The MIAM position – has MIAM occurred, if not has exemption been validly claimed e.g. has domestic violence occurred.
- In this case, domestic violence has occurred, as Sarah has attacked Yin causing injuries requiring hospital treatment so exemption could be claimed.
- Dispute resolution – the court will seek to resolve issues between parties if it is possible.
- Welfare reports – reports by CAFCASS or the local authority that court has required to address welfare issues.
- The wishes and feelings of the child will be considered in the light of their age and understanding.
- In this case, the children are still quite young so their feelings may not be given much, if any, weight.
- Case management – future management to meet the 'no delay' principle
- Consent orders will be made if agreement is reached and there are no safeguarding issues.