

**CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS**

**SEPTEMBER 2020**

**LEVEL 6 - UNIT 20 – 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**

Performance was excellent overall.

The reasons for good performance include:

- Broad knowledge across the specification.
- Excellent drafting of the statement of case for the Divorce Petition in Question 3(a)
- Excellent methodical application of statutory factors and case authorities to the facts of the case-studies in Questions 2(b) and 4(b).

Failures were due to:

- A lack of knowledge across the syllabus (unit specification) as a whole e.g. many candidates demonstrated a lack of knowledge about how a cohabitant might acquire an interest in property (Question 1(a)) and the documents which could be drawn up to protect a cohabitant (Question 1(b))

- A failure to apply the relevant law to the facts e.g. in Question 2(b) a failure to methodically apply the section 1 (3) Children Act 1989 (CA) welfare checklist to the client's application for a Child Arrangements order and in Question 4(b) a failure to methodically apply the factors from section 36 Family Law Act 1996 (FLA 1996) to the client's application for an Occupation order.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### **Question 1:** the financial question

This was the question on which candidates performed the worst overall and this was due to parts (a) and (b).

#### **(a)**

This first part of the question was in general not answered to a high standard. Most candidates struggled to detail the ways in which a cohabitant could establish a beneficial interest under an implied trust

#### **(b)**

Again, most candidates struggled to fully list the documents which could be drafted to clarify matters and protect the client against such a claim.

#### **(c)**

Candidates performed better in this final part of the question which asked what action Mrs Ogden could take if her ex-husband failed to pay the voluntary child maintenance agreed. The vast majority of candidates identified that the client should use the Child Maintenance Service and provided detail about this claim.

### **Question 2:** the children question

#### **(a)**

The majority of candidates correctly identified that the client, Mr Porter, would need a Child Arrangements order to enable him to see his daughters. Stronger candidates analysed why this should be for the children to see and visit the client rather than live with him, picking up on the client's instructions in the e-mail (Document 3) that he was happy that the respondent was a good mother. However some candidates mistakenly thought that the client's ability to apply for the section 8 order without the leave of the court was due to him having parental responsibility, rather than it being due to his status as a parent of the children.

#### **(b)**

Most candidates were able to state the outcome and apply the factors by identifying that the three overriding principles of the CA 1989, the presumption of parental involvement and the welfare checklist would be relevant to the court's decision. Stronger candidates methodically applied all of the principles together with the welfare checklist and thus gained good marks on this part of the question. Weaker candidates often listed the factors

in the checklist but then failed to apply them to the case study either at all or methodically as required.

## **2(c)**

Candidates were asked to advise the client about how a Family Assistance Order could help with his difficulties in seeing his daughters. Most candidates were able to provide some of the detail needed in respect of this order although weaker candidates struggled to explain this.

### **Question 3:** the divorce question

This was the question on which candidates performed best overall.

#### **(a)**

The vast majority of candidates were able to obtain full marks drafting a competent statement of case. Occasionally weaker candidates lost marks by not providing enough detail about the dates and/or the actual incidents or by providing background information about the ground for divorce and the five facts which was not required by the question

#### **(b)**

Generally candidates performed well on this part question outlining the divorce procedure, but surprisingly, some candidates were confused about the time-scale applicable to the petitioner and/or respondent applying for decree absolute and sometimes the answers lacked detail in terms of the forms required for each stage.

#### **(c)**

There were a few answers about the Family Law Protocol which focused on irrelevant material such as costs guidance rather than the details needed about warning the respondent of the issue and content of the petition. Also, a number of candidates mistakenly thought that a MIAM was a requirement before divorce proceedings.

### **Question 4:** the domestic abuse question.

#### **(a)**

The majority of candidates were able to identify the client needed a Non-molestation and Occupation order and that he was entitled to apply as an Associated Person due to his cohabitant status. Some candidates identified the need also for the applications to be made without notice. Surprisingly there still seemed to be some confusion about the fact that a power of arrest can only be attached to an Occupation order since it is now an automatic criminal offence to breach the terms of a Non-Molestation order.

#### **4(b)**

When considering the likely outcome by reference to the factors overall candidates appeared less familiar with the section 36 FLA factors and this was particularly evident with the balance of harm questions. However, those candidates who had revised this topic were able to perform well. Weaker

candidates struggled to identify the relevant factors and apply them either at all or methodically as required.

## SUGGESTED ANSWERS

### LEVEL 6 - UNIT 20 – THE PRACTICE OF FAMILY LAW

#### Question 1(a)

We can reassure Mrs Ogden that Adam will not be able to establish an interest under an express trust as the property is held in Mrs Ogden's sole name. The only way Adam could establish an interest would be if he could prove an implied trust.

Adam will not be able to establish a resulting trust as this requires a contribution to the purchase price at the time of purchase. The property was originally bought by Mr and Mrs Ogden so Adam clearly did not contribute to the purchase price at the time the property was purchased.

The only interest which Adam could try to claim would arise under a constructive trust.

The case of Lloyds Bank-v-Rosset sets out the requirements for a constructive trust. These are that there must be a common intention between the parties and the non-legal owner must have acted to their detriment.

The common intention can be express or implied through conduct. Lloyds Bank-v-Rosset suggested that financial contributions in the form of paying for home decoration or buying furniture would not be sufficient.

However case law suggests that the payment of household expenses like bills could suggest there is a beneficial interest if the legal owner has been able to pay the mortgage instalments because other household expenses were being met.

We need to advise Mrs Ogden to ensure that she is solely responsible for the mortgage payments and that Adam should not pay all of the household bills.

We need to advise Mrs Ogden to make it clear that she regards the House as hers ie not to have any discussions to suggest that Adam has an interest  
We should advise Mrs Ogden that if she were to marry Adam, he would gain certain rights as her spouse.

#### 1(b)

We could offer to prepare a cohabitation contract to govern the arrangements that apply whilst Mrs Ogden and Adam are living together and on the breakdown of the relationship.

A cohabitation contract is governed by contract law/certain contractual formalities have to be observed when entering into the agreement eg intention to create legal relations, certainty and consideration

In the cohabitation contract we should include clauses that state that Mrs Ogden is the sole owner of the property and that any payment by Adam

towards any household bills or the mortgage does not count as a contribution which entitles him to an interest in the house.

We could draw up a declaration of trust to clarify that Mrs Ogden solely holds the beneficial interest in the house.

We could draw up a Will for Mrs Ogden to state who should receive the house on her death

### **1(c)**

In the absence of a court order if Mr Ogden should withdraw his agreement to pay the child maintenance which the parties have agreed then Mrs Ogden would need to apply to the Child Maintenance Service.

The CMS will assess Mr Ogden's gross weekly income before income tax and national insurance contributions are taken off but after occupational or personal pension scheme contributions are deducted.

There will be an application fee of £20. Mr Ogden will have to pay a collection fee of 20% of the maintenance figure (which will be added to the maintenance) and Mrs Ogden will have to pay a collection fee of 4% of the maintenance figure (which will be deducted from the maintenance figure).

In light of the additional financial penalties it may therefore be sensible for us to write to Mr Ogden to warn him of the consequences of failing to pay the child maintenance on a voluntary basis.

There are no other children and Mr Ogden sees Elliott for less than 52 nights per year, so no deductions are made.

### **Question 2(a)**

He should apply for a child arrangements order

This will set out the arrangements for the children to see and stay with Mr Porter as this is what he is currently having difficulties with.

He is not contesting the agreement he made with his ex-partner that the children should live with her. He thinks that Miss Watts is a good mother and he does not wish to unsettle the children.

Pursuant to section 10(4) Children Act 1989 Mr Porter as a parent of the children is automatically entitled to apply for any section 8 order, he does not require the leave of the court.

### **(b)**

When deciding whether to grant the child arrangements order the welfare of the children would be the court's paramount consideration. The court would also apply the presumption of parental involvement and consider the no delay and no order principles.

The court then applies the s.1(3) welfare checklist:

- The ascertainable wishes and feelings of the child: It appears that the children do want to see their father, as Mr Porter tells us that he has received numerous texts from the children saying that they want to see him. The children are 12 and 6 respectively. Jasmine's views as a 12-year-old will be given more weight by the court. At 6, Violet is too young for the court to attach much weight to her views.
- the child's physical, emotional and educational needs: the court recognises that children should have a relationship with both of their parents. It is clear from the children's texts that they are missing their father
- the likely effect on the child of any change in circumstances: the children are used to seeing and staying with their father on a regular basis, so the current problems with this are a change to the status quo.
- the child's age sex, background etc: At 12 years of age Jasmine is at the stage where her views will be considered by the court. Violet at six, is too young for her views to carry much weight/they have a new baby brother Ryan who they have not yet met.
- any harm that the child has suffered or is at risk of suffering: the children have sent their father numerous text messages. The current situation is therefore causing emotional harm to the children.
- how capable the parents are of meeting the child's needs: this is not an issue here. Mr Porter has always seen the children regularly so there is no suggestion that he cannot look after the children and he has done so on numerous occasions. We know that he also accepts that Miss Watts is a good mother so is not questioning her capability.
- the range of powers available to the court: the court could make any section 8 order although realistically a child arrangements order for contact seems the only appropriate order here given that Mr Porter has said that he does not want to unsettle the children which even a child arrangements order in which the parents shared residence would do to a degree.

As Mr Porter has had difficulties for about two months now in exercising the arrangements which had been agreed by the parties when they separated it seems likely that the court will have to make an order to resolve the issue. The court will decide this application in accordance with the welfare principle and so it is highly likely that the court will feel that Mr Porter should be given a child arrangements order which reflects the arrangements the parties had agreed previously

## **2(c)**

If a Family Assistance Order is made alongside a contact provision contained in a child arrangements order a CAFCASS officer may be directed to advise and assist on establishing improving and maintaining contact

If a Family Assistance Order is made alongside a section 8 order of any kind the court can direct that the CAFCASS officer must report to the court on specified matters relating to the section 8 order including whether it should be varied or discharged.

It is a voluntary order so the court cannot make it without the consent of everyone named in the order so this would need the consent of both Mr Porter and Miss Watts.

We should advise Mr Porter that we could therefore as part of his application for a child arrangements order relating to when he should see and spend time with the girls request that the court make a Family Assistance order at the same time.

The Practice Direction (Family Proceedings) (Family Assistance Orders) (2007) which states that before making a FAO the court must have obtained the opinion of the appropriate officer about whether it would be in the best interests of the child for the FAO to be made and if so how the FAO could operate and for what period.

The court can make a Family Assistance Order under section 16 Children Act 1989.

### **Question 3(a)**

Application: Part 6: Statement of Case:

- The Applicant first felt that there were problems with the marriage two years' ago when the Respondent's best friend went through a divorce. Since then the Respondent would socialise with his friends at least three nights a week. This has taken a toll on family life and it has been left to the Applicant to care for the parties' daughter, Karolina who has special needs.
- Prior to this the parties shared the care for Karolina as they both worked full-time. However, when the Respondent began socialising more often this inevitably meant that the Applicant provided the majority of care for Karolina. The Applicant tried to raise this issue with the Respondent, but he dismissed it saying that he was just supporting his best friend over a difficult period.
- The Applicant had suspicions that the Respondent may have had an affair. She found text messages on the Respondent's phone from someone called Fran. In the texts Fran said that she was missing Mr Nowak and couldn't wait to see him again. When the Applicant confronted the Respondent about the texts, he denied having an affair and said that he was entitled to have a bit of fun but it was over now anyway.
- The Respondent's socialising has had monetary implications for the family who have fallen into debt. The Applicant has been very uncomfortable about this but when she has attempted to discuss it with the Respondent, he said that everyone had debt and that she worried too much.
- Last week bailiffs turned up at the property threatening to take items with them unless some of the debts were settled. The parties' daughter was present when the bailiffs called. She was very scared and upset by their visit and it took the Applicant a long time to calm her down.



- The Applicant now firmly believes that the marriage is irretrievably broken down and petitions for a divorce on this basis.

### **3(b)**

The next step is for us to send 3 copies of the application for divorce (D8) to the local family court (Bedford) together with the marriage certificate; court fee; and a statement of reconciliation (D6)

The court will then send the application for divorce to Mr Nowak together with an Acknowledgement of service form (D10). He has 7 days to complete and return the Acknowledgement.

Once the court receives the Acknowledgement from Mr Nowak they will send it to us. Mrs Nowak will then have to complete the application for decree nisi (D84) and the statement in support of divorce (D80B) to confirm that she wishes to proceed with the divorce.

The court will then review the evidence and provided that they are satisfied that the evidence proves that the marriage has irretrievably broken down they will issue the certificate of entitlement to a decree and set the date for pronouncement of decree nisi.

Once the decree nisi has been pronounced Mrs Nowak can apply to the court for the decree absolute by completing a Notice of application for decree absolute (D36), once six weeks and one day has elapsed.

We will need to prove service upon Mr Nowak should he fail to return the Acknowledgment of Service.

Should Mrs Nowak not apply for decree absolute after six weeks and one day, Mr Nowak can apply once a further three months have passed.

### **(c)**

The key elements of the Family Law Protocol are that the parties should adopt a constructive and conciliatory approach.

We should give notice to Mr Nowak of his wife's intention to issue divorce proceedings and we should try to agree the contents of the application prior to issue.

As Mr Nowak is unrepresented, we should communicate clearly and try to avoid any technical language or legal jargon.

As the application for divorce will be based on behaviour we do not need Mr Nowak's consent to the divorce. However this approach will still be helpful for Mrs Nowak as it may help us establish whether Mr Nowak will co-operate with the divorce proceedings.

### **Question 4(a)**

The relevant orders which we should apply for to protect Mr Young are a non-molestation order under section 42 of the Family Law Act 1996 (FLA) and an occupation order under section 36 of the FLA.



To qualify to apply for both orders Mr Young must establish that he is an associated person under section 62 FLA. He is, because he and Miss Richardson are cohabitants.

The application for the occupation order will be brought under section 36 FLA as we are told that the home is owned in Miss Richardson's sole name thus Miss Richardson has a right to occupy the property but Mr Young has no such right to occupy. The property has been the home of Mr Young and Miss Richardson.

Given the escalating levels of violence used by Miss Richardson and her threat that he will have more of the same if he returns, we should make the application without notice under section 45 FLA.

As there has been violence we should also ask the court to attach a power of arrest to the occupation order under section 47 FLA.

**(b)**

To make the application without notice under section 45 FLA we must prove to the court that Mr Young and Layla are at risk of significant harm if the order is not made immediately. Alternatively we can rely on the fact that Mr Young will be deterred or prevented from pursuing the application if the order is not made immediately. Given the severity of the violence, the fact that Layla witnessed one incident and Miss Richardson's text message threat saying that he will get more of the same if he returns, it is very likely that the court will grant one or both of the orders applied for without notice.

In relation to the non-molestation order, under section 42 FLA the court will take into account all the circumstances of the case including the need to secure the health, safety and wellbeing of Mr Young and Layla. There is evidence of verbal and more recently physical abuse, the last episode of violence was a serious one and Layla has witnessed one incident. Mr Young can demonstrate that there is a genuine need for protection and in these circumstances the court will grant a non-molestation order.

When considering the occupation provisions within the occupation order, the court must take into account all of the circumstances including the respective housing needs and housing resources of the parties and any child. Mr Young's needs are greater as he is the main carer for Layla and he has nowhere else to go as his parents live in Cornwall and his friend does not have room for him. It appears that Miss Richardson can move in to her parent's four bedroom property. Whilst Mr Young would be considered to be unintentionally homeless and would thus obtain priority on the local authority's housing list, moving Layla from her home would cause upheaval and he would need a two bedroom property ideally. Whilst Miss Richardson would be regarded as intentionally homeless and thus receive no priority on the local authority's housing list she has more than enough money to rent privately or buy another property so will not need to rely on local authority housing in any event.

- the respective financial resources of the parties. Mr Young's needs are greater as he does not work. Miss Richardson is working full-time and has ample resources to rent or buy another property to live in.
- the likely effect of any order or of any decision by the court not to make such an order on the health, safety and wellbeing of the parties and

child. Here if an order were not made it would have an adverse effect on Mr Young and Layla as they need to be protected from Miss Richardson's violence and threats.

- the conduct of the parties in relation to each other and otherwise. Miss Richardson has been verbally and increasingly physically violent, the violence was serious and Layla has witnessed one incident.
- the nature of the parties' relationship and in particular the level of commitment involved in it. The parties lived together as husband and wife for seven years and have a child together so it is a committed relationship.
- The length of time they have lived together as husband and wife. They have lived together for nine years which is a substantial period of time.
- Whether there are or have been any children who are children of both parties or for whom both parties had parental responsibility. They have one child together, Layla.
- The length of time that has elapsed since the parties ceased living together. Mr Young left the property following the last incidence of violence
- The existence of any pending proceedings between the parties under Sch 1 to CA 1989 or relating to the legal or beneficial ownership of the home. There are none.

It is very likely that the court will grant the occupation provisions of the occupation order on the facts of this case.

In deciding whether to make the exclusion provision the court must take into account all of the circumstances including the factors in (a) to (d) of s36 mentioned above. In addition the court must consider the following balance of harm questions:-

- Whether the applicant or any relevant child is likely to suffer significant harm attributable to the conduct of the respondent if the exclusion provision is not made and whether the harm likely to be suffered by the respondent or child if the provision is included is as great or greater than the harm attributable to the conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included. Here Mr Young is likely to satisfy this test as if the exclusion provision is not made he will either suffer further violence or have to find somewhere else to live. This will be greater than the harm suffered by Miss Richardson as if the exclusion provision is made she will simply have to live at her parent's home or rent another property to live in. Although she may argue that this would mean that she could not see Layla arrangements could be made for supervised visits which would be more appropriate in the circumstances in any event

If the court believes Mr Young's version of events then they must also attach a power of arrest to the occupation order under section 47 FLA as Miss Richardson has used and threatened violence against Mr Young

The duration of the order will be six months.