

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 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 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

There did appear to be limited problems with a handful of candidates not finishing the paper due to poor time-management. This generally consisted of candidates who failed to complete part of a question (usually question 4) but some candidates did revert to bullet points when running out of time so were able to score some marks.

As this is a Level 6 paper, candidates are required to answer all 4 questions on the paper. This should arguably make time-management easier because candidates do not need time to consider which questions they are going to answer.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

Most candidates were able to obtain some marks from this sub-question which asked them to explain to the client the ground for divorce and with reasons which fact she should rely on. Stronger candidates were able to list and discuss all of the facts; weaker candidates were confused about the operation of adultery in this context.

1(b)

Weaker candidates struggled to obtain many marks from this sub-question which required them to advise the applicant client of how she could proceed with the divorce if her spouse failed to return the necessary documentation to court by outlining appropriate methods of alternative service. Stronger candidates were able to list and detail the alternative methods available and recognise that this course of action was possibly due to the divorce being based on behaviour.

(c)

This question required candidates to explain the effect of the decree absolute on inheritance and pensions. Surprisingly few candidates were able to answer this question fully, suggesting a lack of knowledge across the syllable as a whole

Question 2: the financial question

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

(a)

Most candidates were able to obtain some marks from this sub-question which required them to explain to the client the steps needed to issue financial proceedings. Weaker candidates expanded their answers to cover the full procedure on a financial order which was not required by the question.

(b)

This sub-question introduced Document A in which it was revealed that the parties had signed a pre-nuptial agreement. Candidates were asked to explain what factors the court would look at in determining the client's application for financial orders. Very few candidates were able to explain the position regarding pre-nuptial agreements following the Radmacher case and to apply the principles to the client's case. Candidates who performed well on this question were able to do this and methodically apply the section 25 MCA factors to the client's case. Weaker candidates failed to apply the factors or discussed the possible orders which the court could make despite the instruction in the question not to do so.

Question 3: the children question

Overall this was the question on which candidates performed well.

(a)

The majority of candidates correctly identified that the client would need to obtain Parental Responsibility in order to have a say in the decision making for his daughter. Stronger candidates analysed which methods were available and which would be best in the circumstances, picking up on the client's instructions in the e-mail (**Document 4**) that he was happy that Paige was settled with the current arrangements.

3(b)

Most candidates were able to state the outcome and apply the factors by identifying that the three overriding principles of the CA 1989 and the welfare checklist would be relevant to the court's decision. Stronger candidates methodically applied the three principles together with the welfare checklist and thus gained good marks on this part of the question. Weaker candidates were confused about the order needed i.e., that it was a specific issue order rather than a child arrangements order and/or listed the factors in the checklist but then failed to apply them to the case study either at all or methodically as required.

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 she was entitled to apply as an Associated Person due to her 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's now an automatic criminal offence to breach the terms of a Non-Molestation order.

(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 test. 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

Cora Hibbert telephones the office. She confirms that she wishes to proceed with a divorce and asks you to prepare the paperwork that she will need.

1(a) *Explain to Mrs Hibbert the ground for divorce and, with reasons, which fact she should rely on.*

- We should explain to Mrs Hibbert that the only ground for divorce is that the marriage has broken down irretrievably.
- She then needs to prove this to the court using one of five facts:- (a) adultery, (b) behaviour, (c) desertion, (d) 2 years' separation with the respondent's consent, (e) five years' separation.
- (The Matrimonial Causes Act 1973 (MCA) provides that) for adultery only conduct between the respondent and a person of the opposite sex may constitute adultery so she cannot cite Emma's affair with Iris as adultery it should instead be included as behaviour.
- The appropriate fact to use here is fact (b) behaviour, (as Mrs Hibbert will be able to cite Emma's affair with Iris, together with the other instances of behaviour such as Emma being unsupportive of Mrs Hibbert's work, socialising without Mrs Hibbert and changing her position about wanting children.)

1(b) *Describe to Mrs Hibbert how she could proceed with the divorce, if Emma fails to return the necessary documentation to the court.*

- As Mrs Hibbert's petition is based on Emma's behaviour, she does not require an admission or her consent to the divorce/ she just needs to prove that the application has been served. Therefore, if Emma fails to return the Acknowledgment of Service to the court within 7 days then Mrs Hibbert has a number of alternative methods available to her:-
- She can request that the petition be personally served which if she is acting in person can be carried out by a court bailiff. She would lodge the application form with the fee at court together with evidence as to why postal service had failed and a description with a photograph of the respondent. The bailiff would effect personal service on the respondent and file a certificate of service at court/Mrs Hibbert cannot use bailiff service if she is legally represented.
- She can arrange for personal service of the petition by a process server or an enquiry agent who will file evidence of service at court.
- Mrs Hibbert could apply for **Deemed service** if she can prove Emma has received the application. We would apply without notice and would lodge evidence proving how she knows that the respondent has received the application [e.g. if Emma tells her that she has received the application but does not intend to return it or if she tears the paperwork up in front of Mrs Hibbert.]
- Mrs Hibbert could apply for **Substituted service** [by advertisements in the press or] by sending the document to the address of a third party such as a relative of Emma or to her place of work. We would apply without notice with evidence stating what efforts have been made to

serve the respondent. The court must be satisfied that there is a reasonable probability that the application will come to the attention of the respondent.

- If strenuous efforts have been made to find and serve the respondent but these have failed, then it may be possible for Mrs Hibbert to apply to **dispense with service** but only if she can show that it is impracticable to effect service by any other means, or it is otherwise necessary or expedient. We would apply without notice with supporting evidence as to the efforts made.

1(c) *Explain to Mrs Hibbert the effect of the decree absolute on inheritance and pensions.*

- We should explain to Mrs Hibbert that [section 18A Wills Act 1837 provides that] unless the contrary intention appears in the Will, the Decree Absolute has the effect on the Will of either spouse that any appointment in the Will of the Testatrix's former spouse as executor is ignored and any devise/bequest to the former spouse automatically lapses.
- A Decree Absolute also affects the former spouse's rights under the Intestacy rules as they are no longer the 'surviving spouse'. However, in certain circumstances they may be able to make a claim against the deceased former spouse's estate under the Inheritance (Provision for Family and Dependents) Act 1975.
- We should also explain that widows' benefits under pension schemes are lost when the Decree Absolute is made / Advise client to revise letter of wishes / form of nomination if it was in favour of former spouse.
- Issues of finance and property should be resolved before applying for the Decree Absolute.

Question 2

Your secretary hands you an urgent email sent to Molly by Zahara Rashid earlier this morning

2(a) *Explain to Mrs Rashid the steps you will need to take to issue financial proceedings, referring to any relevant documents.*

- We would need to advise Mrs Rashid that section 10 of the Children and Families Act 2014 requires that before applying to the court for an order in proceedings for a financial remedy, the applicant must attend a Mediation Information and Assessment Meeting with a mediator or certify why they meet the exemption criteria
- As seems likely, if the parties are unable to agree matters at mediation we will need to apply to the court for a financial order. We will need to send Form A and the Court fee to the court.
- Mrs Rashid will need to complete and exchange a financial statement with Mr Rashid (35 days) **before she attends the First Appointment.**
- Form A notifies the court that the MIAM exemption/requirement has been complied with.

2(b) Explain, with reference to Mrs Rashid's position, what factors the court will look at, in determining her application for financial orders.

- Under section 25 of the Matrimonial Causes Act 1973 (the MCA) the court must consider all of the circumstances of the case with the first consideration being given to the welfare of any minor children. The parties have two children, Taslima (6) and Sahmir (4) and they live with their mother at the former family home.
- All the circumstances can include the existence of a pre-nuptial agreement, as here. In Radmacher-v-Granatino [2010] the court held that it will uphold such an agreement where it has been freely entered into by each party with a full appreciation of its implications, unless there are circumstances which make it unfair to do so.
- Although the court in Radmacher agreed that the circumstances would depend on the particular facts of the case, guidance was given that a pre-nuptial agreement cannot prejudice the reasonable requirements of any children of the family. Also, that the court should respect the autonomy of the parties and not make an order just because the court knows best. Finally, that changes in circumstances of the parties over time may make it unfair to uphold the agreement (e.g. becoming ill or being made redundant)
- In Radmacher the court stated that each party would have to enter the agreement freely without undue influence or pressure and be fully informed of the implications of the agreement. Each party must have disclosure of all of the information relevant to making the decision and each party must intend that the agreement will govern the arrangements on divorce.
- Applying this to Mrs Rashid's case it appears that there are circumstances which make it unfair for the court to uphold the agreement. Firstly, it prejudices the reasonable requirements of the children of the family as it only allows Mrs Rashid to apply for child maintenance and prevents her from making any applications for income or capital orders from Mr Rashid.
- Also, Mrs Rashid did not have financial disclosure from Mr Rashid of his financial assets and when she asked him about this, he reassured her that everyone was entering into these agreements and there was nothing to worry about. She did not take legal advice. Mr Rashid only produced the pre-nuptial agreement 2 days before the wedding.

Section 25 (2) lists the following eight factors to be considered by the court when dealing with financial orders for a spouse:

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would be in the opinion of the court reasonable to expect a party to the marriage to take steps to acquire. The realisable assets are as follows:
 - FMH £525,000
 - Less mortgage £200,000
 - Net equity=£ 325,000
 - Investment Property= £250,000
 - Joint life assurance policy £130,000
 - Value of Mr Rashid's shares £80,000
 - Value of Mrs Rashid's savings £25,000

Total £810,000.00

The unrealisable assets consist of Mr Rashid's pension which has a CE of £190,000 and Mrs Rashid's pension which has a CE of £60,000. Total £250,000. Mrs Rashid works part-time and earns £30,000 gross per annum. Mr Rashid works full-time and earns £100,000 gross per annum.

- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future. Each of them needs a house which must be a minimum of a 3-bedroom property to accommodate the children. Mrs Rashid's needs are greater than Mr Rashid's as the children live with her full-time. However, Mr Rashid has the children to stay every other Saturday night. They both have earned income so should both be eligible for mortgage funding to assist with meeting their housing needs. Mr Rashid's mortgage capacity will be considerably higher. Mrs Rashid will have income needs for herself and the children whilst Mr Rashid will only have income needs for himself. The parties have agreed child maintenance.
- (c) the standard of living enjoyed by the family before the breakdown of the marriage. This would be good given the parties' income and assets. The court will endeavour to reduce each party's standard of living after the divorce to an equal degree, but this is not always possible where there are children in the equation thus Mr Rashid may well suffer a greater reduction in his standard of living than Mrs Rashid.
- (d) the age of each party to the marriage and the duration of the marriage. Mr Rashid is 45 and Mrs Rashid is 43. They both have future earning capacity. The length of the marriage is eight years, so it would be considered a short to medium length marriage.
- (e) any physical or mental disability of either of the parties to the marriage. Not applicable.
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family. Mrs Rashid has looked after the children and household and worked and will continue to do so and therefore has an ongoing contribution. Mr Rashid has always been the higher wage-earner. Neither of them has made any additional financial contribution (e.g. through an inheritance). It is likely that the parties' contributions would be weighed equally by the court.
- (g) the conduct of each of the parties, if that conduct is such that it would, in the opinion of the court, be inequitable to disregard it. We are not aware of any bad conduct. The court could consider the pre-nuptial agreement under this factor.
- (h) in the case of proceedings for divorce or nullity of marriage any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring. Both parties have pensions, but the value of Mr Rashid's is substantially higher than Mrs Rashid's. Mrs Rashid works part-time so may struggle to build up her pension contributions at this stage. The parties are 43 and 45 years of age respectively so they still have a number of years to add to their pension funds.

- White v White [2000] suggests that the court should measure their initial findings after considering the section 25 factors, against a yardstick of equality. (The subsequent “big-money” cases of Miller v Miller; McFarlane v McFarlane (2006) added the principles of ‘needs, compensation and sharing’.) We should therefore check our initial thoughts against the yardstick of equality.
- The court should also consider whether a clean break is appropriate, although this is unlikely given the disparity of earnings and the ages of the children.

Question 3

Jasper Oakley attends at the office for his appointment with you.

3(a) *Explain to Mr Oakley how he can secure his right to be involved in the decision-making about Paige.*

- For Mr Oakley to participate in the decision-making for Paige he will need to acquire Parental Responsibility (PR). The concept of parental responsibility was introduced by the Children Act 1989 (CA) and is described as “all the rights duties powers responsibilities and authority which by law a parent of a child has in relation to the child and his property.”
- Unlike Paige’s mother Miss Warner, as an unmarried father Mr Oakley does not automatically have PR for Paige. We know that Paige’s birth was registered by Miss Warner and that Paige is registered in the surname of Warner without any mention of Mr Oakley as her father/In the e-mail Mr Oakley states that Miss Warner had to take Paige to the dentist so this points to him not having obtained PR to date.
- An unmarried father can acquire PR in a number of ways:
 - by entering into a PR agreement with the mother
 - by applying to the court for a PR order
 - by obtaining a child-arrangements order governing where the child should reside from the court
 - by marrying the child’s mother
 - by subsequently re-registering the child’s birth in the father’s surname
- Realistically the only way that Mr Oakley is likely to acquire PR here is through an application to the court as it seems very unlikely that Miss Warner will agree to entering into a PR agreement with him
- Mr Oakley will not obtain PR through a Child Arrangements Order for Paige to reside with him as he is not challenging where she should live.

3(b) *Analyse the factors which the court will take into account in relation to the court order that Mr Oakley should apply for regarding the proposed holiday.*

- Mr Oakley should apply for a specific issue order regarding the proposed holiday
- In deciding whether to grant Mr Oakley’s application the welfare of the child will be the court’s paramount consideration. The court will also consider the no delay and no order principles and the presumption of shared parental involvement.
- In deciding whether a specific issue order would be in Paige’s best interests the court will apply the s.1(3) checklist.

- The ascertainable wishes and feelings of the child: Mr Oakley tells us that Paige is really excited about the holiday, it is likely that the court will appreciate this.
- The child's physical, emotional and educational needs: the court would generally hold that a holiday would be beneficial to the child's emotional needs. In relation to educational needs Mr Oakley is taking Paige during the summer holidays so her educational needs will not suffer/It could be argued that a holiday abroad will in any event broaden her education.
- The likely effect on the child of any change in circumstances: Paige stays with Mr Oakley every other weekend and spends half of her school holidays with him so spending time with him during her school holidays will not be a change to the status quo.
- The child's age, sex, background etc.: Paige is 6 years old. This is too young for the court to attach any significant weight to her views.
- Any harm that the child has suffered or is at risk of suffering: it is unlikely that the court will consider the situation to be one which poses physical harm to Paige although the court may recognise the possibility of emotional harm caused by denying her the holiday. The holiday destination proposed is not an unusual one or one which suggests any risk.
- How capable the parents are of meeting the children's needs: this is not an issue here. There is no suggestion that Mr Oakley cannot look after Paige as he regularly does so at weekends and during school holidays.
- The range of powers available to the court: the court could make any section 8 order although realistically they will only make a specific issue or prohibited steps order here as the court has made it clear that these applications are not a back door to getting contact or residence issues resolved.
- As the parties are in dispute 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 the holiday proposed is in Paige's best interests and make a specific issue order in Mr Oakley's favour.
- Mr Oakley, as Paige's natural father, does not need leave to apply for the Specific Issue order.

Question 4

Leah Varley attends at the office for her appointment with you.

4(a) *Explain what orders you should apply for to protect Miss Varley and why she is entitled to apply.*

- The relevant orders which we should apply for to protect Miss Varley 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 Miss Varley must establish that she is an associated person under section 62 FLA. She is because she and Mr Yeoward are cohabitants.
- The application for the occupation order will be brought under section 36 FLA as we are told that the tenancy is held in Mr Yeoward's sole name thus Mr Yeoward has a right to occupy the property by virtue of a contract with the local authority but Miss Varley has no such right to occupy. The property has been the home of Miss Varley and Mr Yeoward.

- Given the escalating levels of violence used by Mr Yeoward and his threat that he would finish what he started, 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.

4(b) *Advise Miss Varley what the likely outcome of the case will be, with reference to the factors that the court will consider when deciding whether to grant the orders sought.*

- To make the application without notice under section 45 FLA we must prove to the court that Miss Varley and Brianna are at risk of significant harm if the order is not made immediately. Alternatively, we can rely on the fact that Miss Varley will be deterred or prevented from pursuing the application if the order is not made immediately. Given the severity of the violence, and Mr Yeoward's text message threat saying that he would finish what he started, 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 Miss Varley and Brianna. There is a history of physical abuse and the last episode of violence was a serious one. Miss Varley 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. Miss Varley's needs are greater as she is the main carer for Brianna and she has nowhere else to go as her mother's home only has two bedrooms and her sister already lives there. Mr Yeoward can move into his brother Dylan's two-bedroom property. Whilst Miss Varley would be considered to be unintentionally homeless and would thus obtain priority on the local authority's housing list, moving Brianna from her home would cause upheaval and she would need a two-bedroom property ideally. Whilst Mr Yeoward would be regarded as intentionally homeless and thus receive no priority on the local authority's housing list, he has savings which should enable him to rent another property so will not need to rely on local authority housing in any event.
- the respective financial resources of the parties. Miss Varley's needs are greater as she is currently only working part-time and bringing up Brianna. Mr Yeoward is working full-time and has savings, so he has better resources even if he did need to rent 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 Miss Varley and Brianna as they need to be protected from Mr Yeoward's violence and threats.
- the conduct of the parties in relation to each other and otherwise. Mr Yeoward has been verbally and increasingly physically violent, the last incident of violence was serious
- 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 seven 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, Brianna.
- The length of time that has elapsed since the parties ceased living together. Miss Varley left the property following the last incidence of violence two nights previously.
- 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 Miss Varley is likely to satisfy this test as if the exclusion provision is not made she will either suffer further violence or have to find somewhere else to live. This will be greater than the harm suffered by Mr Yeoward as if the exclusion provision is made he will simply have to live at his brother's or rent another property to live in. Although he may argue that this would mean that he could not see Brianna, arrangements could be made for supervised contact
- If the court believes Miss Varley's version of events then they must also attach a power of arrest to the occupation order under section 47 FLA as Mr Yeoward has used and threatened violence against Miss Varley.
- Miss Varley should apply for a transfer of tenancy. The duration of the order will be six months.
- The court could make regulatory orders providing for Mr Yeoward to be excluded from the property and from an area around the property
- The court would make mandatory orders allowing Miss Varley back into the property and ordering Mr Yeoward to allow her to re-enter