CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

LEVEL 6 - UNIT 20 – FAMILY PRACTICE

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 2021 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

The question paper generally performed as expected, However, Question 2b was poorly answered across the cohort (detailed below).

Candidates generally did very well on questions relating to the facts of divorce, welfare checklist for children and factors for occupation orders. The application levels were very good, showing that they were using the knowledge rather than just regurgitating it. Question 2b was very poorly answered overall (discussed below).

In respect of the questions that were not so well answered, wider revision is recommended to ensure the whole specification is covered.

There were no common errors that stood out across the cohort.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This was generally very well answered but some candidates did not have the correct dates and failed to correctly state the earliest date that a petition can be lodged. This was mainly through failing to add on the reconciliation period or only starting the separation from after the reconciliation.

Question 1(b)

Generally, well answered, marks were lost when candidates failed to discuss the other hardship option in relation to religion.

Question 1(c)

Again, well answered with the majority of candidates correctly identifying section 10A of MCA but some were unclear of the process to obtain the Get.

Question 2(a)

Generally, this was well drafted; some candidates lost marks for failing to lay out the Statement of Issues correctly.

Question 2(b)

This question was very poorly answered with the majority of candidates not correctly identifying the order. This process was not known by most candidates. Only one candidate obtained full marks.

Question 3(a)

Marks were lost by some candidates failing to state the sections when giving the initial advice to Mr and Mrs Bamford. Generally, this question was well answered.

Question 3(b)

This question was well answered by the majority of candidates. The candidates that missed marks did not fully apply all the factors from the welfare checklist.

Question 4(a)

This question was well answered. Candidates clearly identified the correct sections in relation to non-molestation and occupation orders.

Question 4(b)

Again, well answered; marks were lost through limited application in places. Some candidates only explained occupation orders and missed out explaining the ex parte requirements or non-molestation orders.

Question 4(c)

Candidates either did quite well or quite badly on this question. It required knowledge or recent case law to achieve the higher marks.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 20 – FAMILY PRACTICE

Question 1(a)

Mrs Aronowitz cannot rely on fact (a) adultery as she and her husband reconciled for more than six months after she discovered the adultery and this is an absolute bar to a divorce proceeding on the basis of adultery.

We know that the adultery was not ongoing as when she found out her husband promised to end the affair immediately and she believes that he did this. There appear to be no other instances of behaviour by her husband to enable her to rely on fact (b).

As she wishes to proceed amicably for the sake of Elijah, the best fact for her to rely on is the no-fault fact of separation. The client tells us that her husband will not agree to a divorce, so we cannot use fact (d) of two years' separation with his consent. Therefore, the most suitable fact for us to use is fact (e) five years' separation.

The five years' separation runs from when Mr Aronowitz moved out of the former family home on 10 November 2015.

The parties reconciled for a period of three months from 10 December 2015 to 10 March 2016. As the period of reconciliation is less than six months it does not break the continuity of the separation period. The period of three months must be added to the period of five years to ensure that the parties have been separated for the required five-year period.

The period of five years separation runs from 10 November 2015 to 10 November 2020. We need to add on the three-month reconciliation. The earliest date on which we could lodge the petition for Mrs Aronowitz is 10 February 2021

1(b)

There is a statutory defence to fact (e) under section 5 of the Matrimonial Causes Act (MCA) 1973.

Mr Aronowitz would need to prove to the court that the divorce would cause him grave financial or other hardship and that it would in all of the circumstances be wrong to dissolve the marriage. The hardship must result from the divorce, not the breakdown of the marriage and the hardship must be grave.

He works as a property developer and we're told he earns a salary of over £100,000 per annum. Additionally, he solely owns shares and some investment properties including 9 Queens Drive. Even though Mrs Aronowitz

will receive a greater share of the matrimonial assets on divorce due to Elijah it still seems unlikely that Mr Aronowitz can succeed in convincing the court that he will suffer grave financial hardship.

To establish "other" hardship is very unusual and case-law suggests that Mr Aronowitz would need to cite religious reasons. We are told that Mr Aronowitz is not a strict observer of his faith although his parents strongly disapprove of divorce.

There has been no reported case where the defence of religious hardship has succeeded/such arguments have failed.

(c)

As Mrs Aronowitz's faith is Jewish she would need to obtain a "Get" in order for her divorce to be recognised at Jewish law, as under Jewish law an individual cannot be married or divorced against his or her will.

Mr Aronowitz would therefore need to go before a Beth Din court for divorce and deliver this to Mrs Aronowitz who would be obliged to accept it.

[Section 10A of the MCA applies] where the parties have been married according to particular religious usages and provides that the court may on application by either party order that the Decree Nisi should not be made Absolute, until both parties have produced a declaration to the court confirming that they have taken the necessary steps to dissolve their marriage in compliance with the relevant religious usages.

As Mr Aronowitz is reluctant to divorce, he may not wish to go before the Beth Din court

Question 2(a)

See exemplar Statement of Issues.

(b)

In relation to the lump sum order of £125,000, we know from the information we have from Mr Shaw's financial statement that he has £150,000 in his sole name held with the Clayton Building Society. The most suitable course of action for us to take would be to apply for a third-party debt order against this Building Society account.

We would need to make the application without notice, to the Bedford Family court which granted the Consent order. We must provide evidence of the order sought, the total arrears (here £125,000) and the third party (Clayton Building Society) who owes money to the defaulter (Mr Shaw).

The court would initially make an interim order for Mr Shaw as the defaulter to show cause why the order should not be made. This interim order would be served on Mr Shaw and the Clayton Building Society and the proceeds in the account would be frozen. A date would then be fixed for the full hearing when the court can make a final order requiring the Building Society to pay the monies of £125,000 owed to Mrs Shaw direct from Mr Shaw's account.

As there has been no change in the parties' circumstances since the making of the Consent order it is highly likely that we will be successful with this application.

Question 3(a)

We should advise Mr and Mrs Bamford that as grandparents, they do not come within the list of those automatically entitled to apply for a section 8 order under the Children Act 1989 (s.10(4) and (5)) they will therefore need the leave of the court (s. 10(2)(b)).

The court would need to consider their application for leave (usually at a hearing) using the factors in s.10(9):

The nature of the proposed application: Mr and Mrs Bamford should be advised to apply for a child arrangement order to provide for when they should see and spend time with Harper and Logan.

The applicant's connection with the child: they are the children's paternal grandparents and so have a biological connection to the children. In Re M [1995] 2 FLR 86 CA said that grandparents ought to have a special place in any child's affection worthy of being maintained by contact. Until recently the children stayed with their grandparents every other Saturday night and during the school holidays.

Any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it. In Re M the court said the risk had to be disruption to an extent that the child would be harmed by it. Harm here meant impairment of health and development. A child's upset unhappiness, confusion or anxiety needed to be particularly severe before it could amount to an impairment of emotional, social or behavioural development. It is highly unlikely on the current facts that Victoria can establish there is any risk of harm.

Applying the s 10(9) criteria it therefore seems likely that Mr and Mrs Bamford would be granted leave to apply as they have a very strong relationship with their grandchildren. However the fact that leave has been granted does not create a presumption in favour of a substantive order or elevate a person who is not a natural parent to the position of a natural parent. This would mean that the court would consider the application for the subsequent section 8 order separately.

Mr and Mrs Bamford should apply for leave using form C2 and a draft form C100.

3(b)

In deciding whether to grant the order, the welfare of the children will be the court's paramount consideration.

The court will also consider the no delay and no order principles.

The court will apply the s.1(3) welfare checklist:

- The ascertainable wishes and feelings of the child: The children are 13 and 6 respectively. Harper's views as a 13-year-old will be

given more weight by the court. At 6, Logan is too young for the court to attach much weight to his views. Mr and Mrs Bamford tell us that they have received texts from Harper saying that she and Logan miss them.

- the child's physical, emotional and educational needs: the courts have recognised the important part that grandparents can play in their grandchildren's lives. Until October 2020 the children stayed with their grandparents every other Saturday night and it was usual for the children to stay with them during their school holidays. Particularly in light of their parents' separation and the fact their father's work demands make it difficult for him to see them at weekends the relationship with their grandparents is important in meeting their emotional needs. As the visits and stays take place at weekends and during school holidays this does not impact on the children's educational needs.

- the likely effect on the child of any change in circumstances: the children are used to seeing and staying with their grandparents, so it is the recent stopping of these visits which is the change to the status quo. The court aims to preserve the status quo.

- the child's age sex, background etc: although the children do still see their father, he often has to work at weekends and he does not see them as often as he would like. Seeing their paternal grandparents helps to maintain their link to that side of their family.

- any harm that the child has suffered or is at risk of suffering: the court is likely to find that the children could suffer (emotional) harm by not seeing their grandparents particularly in light of their parents' separation and their father's infrequent contact.

- how capable the parents or grandparents are of meeting the child's needs: this is not an issue here. There is no suggestion that Mr and Mrs Bamford cannot look after the children and they have done so regularly until recently.

- the range of powers available to the court: the court could make any section 8 order although realistically they will only make a child arrangements order here.

As the parties appear to be 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 child arrangements order is in the best interests of the children and make one in Mr and Mrs Bamford's favour.

Question 4(a)

The relevant orders which we should apply for to protect Miss Fielding are a non-molestation order under section 42 of the Family Law Act 1996 (FLA) and an occupation order under section 33 of the FLA.

To qualify to apply for both orders Miss Fielding must establish that she is an associated person under section 62 FLA. She is because she and Mr Pauling are cohabitants.

The application for the occupation order will be brought under section 33 FLA as we are told that the tenancy is held in their joint names thus Miss Fielding has a right to occupy it under a contract i.e. the tenancy with their private landlord.

Given the latest incident of violence and Mr Pauling's threat that he will kill her we should make the application without notice under section 45 FLA as there is a significant risk of harm to Miss Fielding if the order is not made immediately.

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.

Miss Fielding could seek a transfer of tenancy from their private landlord.

(b)

To make the application without notice under section 45 FLA we must prove to the court that Miss Fielding and Bethany are at risk of significant harm if the order is not made immediately. Alternatively, we can rely on the fact Miss Fielding will be deterred or prevented from pursuing the application if the order is not made immediately. Given the severity of the last incident and the threat 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 Fielding and Bethany There have been examples of verbal abuse and more recently physical abuse and two of these incidents have been witnessed by Bethany. Miss Fielding 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 order, the court will firstly apply the balance of harm test under section 33(7) FLA and consider whether if the order was not made Miss Fielding or Bethany would be likely to suffer significant harm. If the answer to this question is yes then the court shall make the occupation order unless the court finds that Mr Pauling is likely to suffer significant harm if the order is made and that the harm suffered by him is as great or greater than the harm attributable to him and suffered by Miss Fielding if the order is not made.

Here Miss Fielding is likely to satisfy this test as if the order 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 Pauling as if the order is made, he will simply have to find somewhere else to live.

If the court had doubts about whether the balance of harm test was satisfied, then they would go on to consider the factors in section 33(6) FLA:

- the respective housing needs and housing resources of the parties and any child. Miss Fielding's needs are greater as she is the main carer for Bethany, and she has nowhere else to go as her mother's home is a one-bedroom flat in a retirement complex. Mr Pauling can

stay at his parents' three-bedroom home or Ollie's two-bedroom home. Whilst Miss Fielding would be unintentionally homeless and would thus obtain priority on the local authority's housing list, moving Bethany from her home would cause upheaval and she would need a two-bedroom property ideally. Whilst Mr Pauling would be regarded as intentionally homeless and thus receive no priority on the local authority's housing list there appears to be no reason why he can't move into his parents' or even Ollie's home.

- the respective financial resources of the parties. Miss Fielding's needs are greater as she is bringing up Bethany. Mr Pauling is working and earning enough to support himself so he would have the resources 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 Fielding and Bethany as they need to be protected from Mr Pauling's violence and threats.

- the conduct of the parties in relation to each other and otherwise. Mr Pauling has been verbally and physically violent. Bethany saw the last two incidents of violence.

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

If the court believes Miss Fielding's version of events, then they must also grant a power of arrest under section 47 FLA as Mr Pauling has used and threatened violence against her

(c)

In Re H (Contact: Domestic Violence) [1998] the Court of Appeal stated that domestic violence was not of itself a bar to contact

The cases of Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence) [2000] set out some principles to consider namely:

(a) the conduct of both parties towards each other and the child;
(b) the effect of the violence on the child and the parent caring for the children;
(c) the motivation of the parent seeking contact and
(d) in cases of serious domestic violence, the ability of the offending parent to recognise his past conduct, be aware of the need to change and to make genuine efforts to do so.

In addition to the case law there is the *Practice Direction (Residence and Contact Orders: Domestic Violence and Harm)* [2009] as supplemented by Family Procedure Rules 2010 Practice Direction 12J which requires numerous steps to be taken, including the prompt sending of the documents to CAFCASS for screening, consideration of the need for an initial fact-finding hearing to determine the issue of violence and the consideration of separate representation for the child. Where a welfare report is ordered, the court order

should contain specific directions to the reporter to address the issue of domestic violence.

When the court is considering making a Child Arrangements Order (CAO) PD12J requires it to have regard to a list of factors similar to those in Re L (Contact Domestic violence) [2002]

If Miss Fielding is successful in obtaining non-molestation and occupation orders, CAFCASS will note the existence of the orders and address the issue in their report. The court could also hold a finding of fact hearing, or could rely on the findings in the domestic abuse proceedings.

As a pre-condition to making a CAO the court should consider whether any party should seek advice or treatment, this could take the form of an activity direction

On the making of a CAO where domestic violence has been proved, the court should consider what directions or conditions should be attached, such as whether the contact should be supervised and whether the order should be reviewed by the court at a later date.

Where the court finds that direct contact is not suitable it must consider indirect contact.

A finding of domestic abuse by a parent may rebut the presumption that the involvement of that parent in the life of the child concerned will further the child's welfare if it would put the child at risk of suffering harm whatever the form of the involvement.

Due to the fact that Bethany has witnessed the last two incidents of violence it is likely that the court would feel that supervised visits are an appropriate measure or possibly indirect contact. It could impose a requirement on Mr Pauling to seek advice or treatment as a pre-condition to him obtaining contact by way of an activity direction.

Statement of Issues for the Applicant

In the Family Court at Bedford

BETWEEN

NATALIE SHAW Applicant

and

KIERAN SHAW Respondent

APPLICANT'S CONCISE STATEMENT OF APPARENT ISSUES

1. Valuation of the Former Family Home: 8 Beattie Drive, Clayton.

- The Applicant asserts that the property is worth £399,000.

- The Respondent asserts that the property is worth £350,000.

2. Valuation of the Investment Property: 21 Palmer Street Clayton

- The Applicant asserts that the property is worth £210,000.

- The Respondent asserts that the property is worth £240,000.

3. The Future of the Former Family Home.

- The Applicant asserts that she should remain in occupation with the property being transferred to her.

- The Respondent asserts that the property should be sold and the proceeds divided.

4. The Future of the Investment Property

- The Applicant asserts that the property should be sold.

- The Respondent asserts that the property should be transferred into his sole name.

5. The Respondent's Pension.

- The Applicant asserts that there should be a pension sharing order.

- The Respondent asserts that there should be no pension sharing order.

6. The Applicant's Income Needs.

- The Applicant asserts that she will need periodical payments.

- The Respondent asserts that the Applicant is capable of supporting herself and that

- there should be a clean break.

Dated: January 2021

Served by Kempstons LLP, The Manor House, Bedford MK42 7AB REF: CH/LR/S140

Acting for the Applicant