

**CHIEF EXAMINER COMMENTS WITH
SUGGESTED ANSWERS**

JANUARY 2021

LEVEL 3 - UNIT 12 – THE PRACTICE OF FAMILY LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 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

Performance for this session was generally very good. Candidates who were well prepared were able to show both knowledge of the relevant law and understanding through application of the relevant law to the situations described within the scenarios in the pre-release case study.

They had also successfully developed the skills to answer exam questions as they had clearly read and understood the questions and were able to show their knowledge and understanding.

Candidates are reminded that they need to:

1. Provide evidence of knowledge of the relevant law in their answers (key citation, definitions and explanations) AND
2. Apply knowledge, advise as instructed, to the situation in the case study,

as marks are achieved through both aspects. Candidates sometimes fail to achieve marks because they fail to show evidence of knowledge and instead

launch into a discussion of the case study facts or they write about the law but fail to state how it applies in the scenario. In both cases, valuable marks cannot be awarded as an examiner can only credit what is actually written.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1 – Children

Very good performance.

A discussion of child arrangement orders was the key focus of question 1(c) although credit was given to candidates who also discussed a prohibited steps order with reference to Ebony's plan to relocate to Jamaica.

1(d) required candidates to show:

1. A clear identification of a factor (1 mark),
2. An explanation of the factor (1 mark), and
3. How it might apply in relation to Ajay's application for an order in respect of his children.

Although candidates chose the "ascertainable wishes and feelings of a child" (considered in the light of their age and understanding), few cited the factor in full and few made the distinction in their application between the older child, Jaden, and the younger child, Viera, in terms of Jaden's having far more impact.

Question 2 – Domestic violence

Candidates performed well on the first 2 questions but performed less well on the second 2 questions.

Some candidates included non-molestation orders and occupation orders in answer to Question 2(a). These could not be credited as they are not part of the protection provided by the criminal system.

For questions 2(c) and 2(d), the key issue was:

1. A failure to explain that a "without notice" application involved not giving notice to the respondent, and
2. A failure to provide sufficient description of the statement required to support the application.

Question 3 – Divorce

Candidates were generally able to state the ground for divorce with citation and to describe the various stages of the procedure.

However, advice on establishing the ground (3(b)) was disappointing. Barely any candidate provided a definition of adultery.

Question 4 – Financial settlement

Knowledge of financial orders and of s25 MCA factors was generally good. Knowledge of the process for applying for financial orders was variable. Candidates need to be able to show good knowledge of the stages of the process.

SUGGESTED ANSWERS

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Question 1

- (a) Parental Responsibility is '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', s.3(1) Children Act (CA) 1989.

Parental responsibility enables decisions to be made regarding all aspects of a child's life including education, religion and medical treatment.

- (b) A father does not have automatic parental responsibility unless he is married to the mother or, if unmarried, named on the birth certificate and the children were born after 1 December 2003.

Ajay will not have parental responsibility for Jaden and Viera if he was not named on their birth certificate and is not married to Ebony.

There are a number of ways Ajay, as the children's' natural father, can acquire parental responsibility:

1. by marrying the children's' mother;
2. by entering a PR agreement with the mother;
3. by obtaining a court order etc.
4. by obtaining a child arrangements order.

In this case, as it does not appear that Ebony will be co-operative, Ajay should apply to the court for a Parental Responsibility Order.

- (c) Ajay should apply for a Child Arrangements Order. This is an order which decides who a child will live with and who a child will have contact with and how. Contact options include face to face contact or contact by phone or letter.

In this case, the order will identify the contact that Ajay should have with Jaden and Viera, and Ebony will have to comply.

1(d) Any **two** factors from the following:

The ascertainable wishes and feelings of child (considered in light of age and understanding)

This factor involves considering how much weight should be placed on a child's wishes and this depends on the child's age and maturity.

Here, Jaden is 11 years old and so is likely to be capable of expressing his wishes as shown by his texts. These should be taken into account. Viera is only seven years old so less weight may be given to her wishes.

The child's physical, emotional and educational needs

The court will consider a range of factors including the child's relationship with the parents and the effect of having no contact with a parent.

Here, Jaden and Viera appear to have a close relationship with their mother and also with Ajay. So, maintaining contact with Ajay will be considered important.

The likely effect on child of change in circumstances

The court will be reluctant to upset the status quo.

Here, Jaden and Viera were brought up by both parents until 2016 and then mainly by their mother. Since then, they have maintained their relationship with Ajay through regular visits. The court would be reluctant to change to these arrangements

The child's age, sex and background

Age is relevant in the weight given to expressed wishes; sex is relevant if the child is a teenager; background increasingly important due to multicultural relationships.

Application: Jaden is an 11-year-old boy entering his teens and it would be considered especially important for him to retain contact with his father.

Any harm the child is at risk of suffering

Harm may be physical harm or emotional harm.

Here, the children appear to be potentially suffering emotional harm due to their mother's attitude towards their father and to not being able to visit their father.

Question 2

(a) The police and the criminal justice system offer a number of protective measures to victims of domestic violence.

The police have given a higher priority to domestic violence in recent years and have established specialist domestic violence units to focus on domestic violence, working with other agencies.

Bail conditions can be imposed by the court if an offence has been committed and the perpetrator has been charged and released on bail. Any breach of bail conditions can be dealt with by the victim simply referring the matter to the police.

The police will have power of arrest if a non-molestation order is breached.

The police can issue a domestic violence protection notice (DVPN) and remove the defendant from the property for 48 hours. They can also

apply to the Magistrates for a Domestic Violence Protection Order (DVPO) to allow victim to obtain advice/support. A DVPO can last for a period of between 14 and 28 days.

Domestic Violence Crimes and Victims (DVCV) Act 2004 makes a breach of non-molestation order a criminal offence.

The Domestic Abuse Bill 2019/2021 aims to strengthen the protection for victims and their children.

- (b) A non-molestation order is an order to prevent the respondent from molesting the applicant or relevant child, s.42 Family Law Act (FLA) 1996.

Molestation includes physical behaviour e.g. physical violence and threats of violence

Molestation also includes action which harasses the applicant e.g. nuisance phone calls, loitering near the applicant's home

In this case, Nick has been verbally and physically abusive and has caused an injury to Katie that required hospital treatment so Katie should apply for a non-molestation order to protect herself and Poppy by preventing further abusive behaviour from Nick.

- (c) (i) A without notice application for a non-molestation order is considered by the court without the respondent being aware. It will be considered if 'just and convenient'. The court apply s.45(2) factors, taking into account all the circumstances, including any risk of harm to the applicant or relevant child, if an order is not made immediately; whether applicant will be deterred from making an application if it is not done immediately; whether the respondent will evade service if application is with notice; and whether the respondent would become incensed and take further action.

Here, Katie is becoming very scared of Nick who is becoming increasingly threatening, so a without notice application may be appropriate.

- (ii) The documents required to make a without notice application for a non-molestation order are:

1. Application form F401;
2. a witness statement by the applicant.

For applications without notice the witness statement should include the reason for no notice being given.

Question 3

- (a) (i) Under s.1(1) Matrimonial Causes Act (MCA) 1973, the only ground for a matrimonial order is the irretrievable breakdown of the marriage.

- (ii) One of five facts needs to be established.

In this case, Harry could use Fact A, s.1(2)(a) MCA 1973 to establish the ground.

Fact A involves stating that that the respondent has committed adultery and that the applicant finds it intolerable to live with the respondent. Adultery is sexual intercourse between a man and a woman, one or both of whom are married to another person. Intolerability is subjective and does not have to be connected with the adultery. It is generally sufficient for the applicant to include a statement that it is intolerable to live with the applicant.

Here, Gina has slept with Damien and has admitted adultery to Harry, so Harry could base his application on Fact A.

(b) The procedure for obtaining a divorce after the filing of the acknowledgement of service would be as follows:

- A copy of the respondent's acknowledgement of service is sent to the applicant by the court.
- The applicant can then file their application for decree nisi.
- The applicant must also file a statement in support of their application.
- A legal adviser at the local divorce centre will consider the application.
- If the adviser is satisfied that all is in order, a certificate of entitlement will be issued.
- The parties will be informed of the date for a decree nisi to be issued.
- The decree nisi will be issued and copies sent to both parties.
- Six weeks later an application for the decree absolute can be made by applicant.
- The decree absolute will be issued if all is in order. Copies will be sent to both parties.
- If the applicant fails to apply for the decree absolute, the respondent can apply after three months.

Question 4

(a) Any **two** of the following:

1. Maintenance pending suit – an order for periodical payments to be made up to the date of the decree absolute.

As Gina currently has limited funds of her own and will need help with living costs and legal costs, she could apply for this order.

2. Periodical Payments - an order for one party to make periodical payments to the other party to provide regular income.

Here, it appears that Gina currently is not employed and has yet to get a job. She will require money to live until such time as she is able to obtain employment, so could apply for this order.

3. Pension sharing order - an order that part of one spouse's pension fund be used to create a separate fund for the other spouse.

Here, Harry has a generous pension, but Gina does not, and her remaining working life and earning capacity is limited. Gina might therefore apply for this order.

4. Lump sum order - an order to pay a specified sum to the other party e.g. £20,000

Here, Harry has a generous investment portfolio and so would be in a position to make a lump sum payment which Gina could use towards paying off her mortgage.

4(b) Any **two** of the following:

1. Financial resources of parties

The court will consider the income, earning capacity and property at time of order and in the foreseeable future.

Here, Harry has a substantial pension and income from investments while Gina has no income currently but does have living costs to meet.

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

The court will consider the financial commitments of the parties such as housing, food, etc.

Here, Gina needs an income to cover her living costs, such as her mortgage, until she is able to find a job.

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

The court will consider the standard of living enjoyed by family before breakdown of marriage and will aim to maintain this if possible. If not, then a fall in living standards should be borne equally.

Here, it appears that Gina and Harry will have enjoyed a very good lifestyle and this will be considered in relation to any order to be made.

4. The age of parties and duration of marriage

The duration of marriage is a consideration – was the marriage a long one, or a short one. Age is relevant when considering future earning capacity.

Harry and Gina's marriage has lasted 10 years so would not be considered a long marriage, but it has lasted for a sufficient period to be taken into account.

Re age - Gina says that she does not anticipate problems in getting work but she is 52 so she may find this more challenging. Unless or until she finds work, she will want support from Harry.

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

The court will give equal weight to the party providing the family income and the party managing the home and providing support.

Here, Harry has significant assets and has provided the income and the home but Gina has provided support in other ways such as caring for Harry through his health problems.

6. The value of any benefit that would be lost

This factor is most frequently used when a loss of pension benefit is involved.

Here, Harry is in receipt of a generous pension which Gina would have benefitted from, whilst Gina's pension provision is very limited.

(c) The procedure for obtaining a financial order is as follows:

- Form A is served on the respondent
- Together with the notice of the First Appointment
- The applicant and the respondent complete and exchange Form E no less than 35 days before First appointment to provide details of their financial assets and responsibilities.
- At least 14 days before the first appointment each party must file and serve on the other party questionnaires, a statement of issues, a chronology and Form G and Form H.
- The First Appointment takes place to define issues
- The judge should direct the case to be referred to an FDR, or make other directions as necessary
- Financial Dispute Resolution (FDR) appointment for conciliation and settlement.
- The FDR is conducted on a 'privileged basis' to encourage parties to 'put their cards on the table'.
- The court can make consent orders if an agreement is reached
- If no agreement is reached, then a date is set for a final hearing and directions are given.
- The parties must file open proposals and responses – the applicant at least 14 days before the final hearing, the respondent at least 7 days before.

If no agreement is reached, there will be a final hearing and Orders are made.