

**LEVEL 3 - UNIT 7 – FAMILY LAW
SUGGESTED ANSWERS – JANUARY 2017**

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

SECTION A

1. A s.8 order may be applied for by:
 - a Parent or guardian;
 - a special guardian;
 - a step parent with parental responsibility;
 - anyone with a child arrangements order which provides the child should live with them.

2. A civil partnership may be dissolved on the ground that it that it has broken down irretrievably, s.44(1) CPA (Civil Partnership Act) 2004.

3. To have the capacity to enter a valid marriage, s.11 Matrimonial Causes Act 1973 states that a couple must be:
 - not too closely related, and
 - aged at least 16, and
 - not already married or in a civil partnership.

4. Ways in which the rights of cohabitantes differ from those of married couples are:
 - Cohabitantes do not have a duty to financially support the other party during the relationship but married couples do have a duty to provide each other with financial support during the marriage.
 - When a cohabitation relationship breaks down, the court's powers to deal with property owned are limited as it can only apply property and trusts law to decide who owns what. When a marriage breaks

down, the court has wide powers under the Matrimonial Causes Act 1973 to deal with the property.

- If a cohabitee dies intestate, the other has no automatic right to inherit. If a married partner dies intestate, the other partner has the right to inherit some, or all, of the estate.
 - A cohabitee has no statutory right to occupy the family home. A married partner has the right to occupy the family home unless this is ended by a court order.
 - A cohabitation relationship can be terminated by either party without any formalities. A marriage can only be terminated by complying with the required formalities.
5. James should apply for a Child Arrangements Order, Section 8 CA (Children Act) 1989 as amended, to enable him to see the children regularly.
6. A void marriage is unlawful from its beginning. A voidable marriage is a lawful marriage that can be terminated at the option of one of the parties in certain circumstances.
7. Grounds for a voidable marriage are that:
- the marriage has not been consummated due to the incapacity of one of the parties;
 - the marriage has not been consummated owing to the wilful refusal of one party to consummate it;
 - one party did not validly consent to the marriage due to duress, mistake, or unsoundness of mind;
 - at the time of marriage, one party, though capable of giving a valid consent, was mentally unfit to marry;
 - at the time of the marriage, one party was suffering from a sexually transmitted infection and the other party was unaware;
 - at the time of the marriage, the wife was pregnant by some person other than the spouse;
 - one of the parties obtained an interim gender recognition certificate after the marriage;
 - one of the parties had legally acquired a gender before the marriage.
8. The grounds on which a judicial separation may be granted are:
- adultery;
 - unreasonable behaviour;
 - desertion;
 - separation after two years with consent;
 - separation after five years without consent.

9. The financial orders available to the court to deal with the family home of divorcing couples are:
 - Sale of property order – power to order the sale of any property;
 - Transfer of property order – power to order one party to transfer property to the other party.
 - Settlement of property order – one party ordered to settle the property for the benefit of the other party.

10. The Human Rights Act 1998 incorporates the European Convention on Human Rights into domestic law.

SECTION B

Scenario 1 Questions

1. The only ground upon which Ashanti can divorce Kudzai is the irretrievable breakdown of the marriage. This must be evidenced by one of five facts.

In Ashanti's case, she might rely on the fact that the respondent, Kudzai, has committed adultery and that she, the applicant, finds it intolerable to live with the respondent, s.1(2)(a) Matrimonial Causes Act 1973 (MCA 1973). She does not have to show that the adultery and intolerability are linked, Cleary v Cleary (1974).

If Kudzai is prepared to admit that he has a sexual relationship with his new girlfriend, Ashanti may be able to petition on the 'adultery' fact. However, she cannot rely on the act of adultery that he admitted to two years ago, as she and Kudzai have been living together for more than six months since that time. There needs to be a new act of adultery.

Alternatively, Ashanti could petition on the fact that the respondent has behaved in such a way that the applicant can no longer reasonably be expected to live with the respondent ('unreasonable behaviour'), s.1(2)(b) MCA 1973. Here, Ashanti could cite the mocking comments, the throwing of the drink and also Kudzai's new relationship as 'behaviour', even if she cannot prove adultery, Livingstone-Stallard v Livingstone-Stallard (1974).

2. (a) Under s.24 MCA 1973, the orders the court could make in relation to the house are:
 - an order transferring the house to Ashanti, or
 - an order for the sale of the property with an immediate division of the proceeds, or
 - A 'Martin' order, which is an order settling the property for Ashanti's benefit to enable Ashanti to live in the property until a 'triggering' event such as her re-marriage, death or voluntary vacation of the property.(b) The orders that a court could make in relation to the pension are:
 - a pension attachment order, s.24B MCA 1973. Here the Court would order that, once Kudzai starts to receive his pension, the trustees of the scheme will pay a set percentage directly to Ashanti, or
 - a pension sharing order, s.23 MCA 1973, under which the Court would order that there is an immediate transfer of a percentage of the current value of Kudzai's pension into a separate fund for Ashanti to provide her with a pension to be paid once she reaches pension age.
3. Factors to be considered under the MCA 1973 in these circumstances are:
 - The financial resources of the parties – their income, earning capacity and property, both at the time of the order and in the foreseeable future. Here, Kudzai is the party who earns the most money and who owns the house, Ashanti only has a small part-time income.

- The present and future financial needs obligations and responsibilities of parties which includes the costs of housing, food, travel expenses etc. Here, both parties will need a home, and Ashanti will need an income for living expenses.
 - The standard of living enjoyed by the family before the breakdown of the marriage. Here, Kudzai and Ashanti appear to have a good standard of living. The court will wish this to be maintained, but any fall in standards should be shared.
 - The age of the parties and duration of a marriage. This is a long marriage. Kudzai is able to earn his living, but Ashanti is at an age when returning to work is difficult.
 - The contribution made by the parties to the welfare of the marriage. Here Kudzai was the breadwinner, and Ashanti the homemaker – both roles are of equal value per White v White (2000).
 - The value of any benefit a party will lose if the marriage is dissolved. Here, Ashanti has no pension provision and will not benefit from Kudzai's pension if they divorce.
4. (a) Judicial separation terminates the obligation to cohabit but the parties are not free to remarry, whereas divorce terminates the marriage and the parties are free to remarry.
- (b) On granting a decree of judicial separation, a court can make financial orders similar to those made after granting a decree of divorce, but the court cannot make a pension sharing order following judicial separation.

Scenario 2 Questions

1. For there to be a valid marriage, the parties must have capacity, s.11 MCA 1973, and the necessary legal formalities must be complied with.

To have capacity the parties must be at least 16, and between the ages of 16 and 18 they also require parental consent.

Here, Ellie was 17 and does not appear to have had parental consent. Also, no formalities are indicated in relation to the 'ceremony'. So Jason and Ellie are not legally married but are cohabiting.

2. The property rights of cohabiting couples are governed by the ordinary law of property and trusts. The court will check whether the parties have a written agreement regarding the property. If there is no agreement, the court will identify whether the property is held in joint names, or a sole name. If the property is held in a sole name, the person who wishes to challenge this must satisfy the court that the property is held subject to an implied trust. The implied trust can be a resulting trust or a constructive trust. A resulting trust is where there is a direct financial contribution. A constructive trust is where there was an agreement between the parties.

The Trusts of Land and Appointment of Trustees Act (TLATA) 1996 gives the court powers to declare what shares the property is held in.

Here, the property is held in Jason's sole name, so Ellie has no legal entitlement, but she contributed to the deposit so can claim rights under a resulting trust.

The court can use its powers under TLATA to deal with the property.

3. Parental responsibility is 'all the rights, duties, powers, responsibility and authority which by law a parent of a child has in relation to the child and his property', s.3(1) CA 1989.

This can include the right to make decisions relating to the child's upbringing, property and education, and the right to choose a child's name and religion, and the right to consent to medical treatment and marriage.

4. (a) If the parents are not married at birth the mother alone acquires parental responsibility automatically. An unmarried father will only obtain parental responsibility if he is named on the birth certificate after 1 December 2003.

Here, Ellie has automatic parental responsibility for Bea as her natural mother. But Jason and Ellie are not married, and Jason is not named on the birth certificate, so Jason does not have parental responsibility.

- (b) An unmarried father can obtain parental responsibility by:

- entering a formal agreement with the mother, or
- by obtaining a parental responsibility court order.

Here, Jason should apply for a court order unless he can obtain Ellie's agreement.

5. Jason should apply for a prohibited steps order (PSO), s8 CA 1989, which is a court order that prevents a parent from taking a particular step in relation to a child. Here Ellie can be prevented from taking Bea to the centre.

Scenario 3 Questions

1. (a) The ground for dissolution is that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent, s.44 Civil Partnership Act 2004.

The applicant must establish the ground by proving one of four facts:

- Unreasonable behaviour – that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent;
- 2 years separation and the respondent consents;
- 5 years separation – no consent is required;

- Desertion – the respondent has deserted the applicant for a continuous period of at least two years immediately preceding the application.

Adultery is not a fact for the dissolution of a civil partnership.

- (b) Tim could rely on unreasonable behaviour in this situation. He could cite the long working hours and lack of contact with the twins, and also the affair with Suzi. He cannot use adultery in this case.

2. The following financial orders might be made following the dissolution of the civil partnership:

- A periodical payments order. This is an order to one party to pay the other party regular sums of money. Here Tim has no income of his own, and may not be able to earn in the future.
- A lump sum order. This is an order to one party to pay the other party a reasonable one off sum. Here Zak has substantial investments (property) and so could pay Tim a substantial amount.
- A sale of property order. This is an order to sell a property and divide the proceeds. Here Zak owns several properties but Tim owns none.
- A transfer of property order. This is an order to transfer one or more properties from one party to another. Here Zak owns several properties and Tim owns none.
- A settlement of property order. This is an order to settle one, or more, properties for the benefit of the other party and children for life, or for a specified period e.g. until re-marriage. Here, the family home could be settled for the benefit of Tim for his life, and for the children.

3. Zak should apply for a prohibited steps order if he wishes to prevent Tim taking the twins out of the country. This is an order that prevents someone from taking a step in relation to a child.

4. Factors from the welfare checklist that the court must take into account whether considering an application for a s.8 order are:

- The wishes and feelings of the child concerned taking into account their age and understanding.

The views of children may be taken into account depending on their age and maturity. Here the twins are very young and will be unable to express themselves.

- The court will consider the child's physical, emotional and educational needs.

This includes a variety of factors, including the need for emotional

contact with both parents. Here, Zak provides the home etc, but Tim has been the main carer.

- The likely effect on the child if circumstances were to change as a result of the court's decision.

The court will be reluctant to remove a child from familiar surroundings where he is settled. Here, the twins will have settled in the family home being cared for by Tim.

- The child's age, sex, background and any other characteristics which will be relevant to the court's decision.

Issues of race, religion and lifestyle are taken into account when considering this factor. The court might consider the twins would be better cared for by a parent rather than a nanny.

- Any harm the child has suffered or may be at risk of suffering.

This factor includes physical abuse, and also factors affecting development, such as not seeing one parent, or a parent's drug or alcohol abuse. Here, separation from Tim is likely to have an emotional impact on the twins.

- The capability of the child's parents (or any other person the courts find relevant) at meeting the child's needs.

The Court considers which party is best able to care for a child. Here, Tim has been responsible for the care of the twins, with Zak withdrawing over a recent period.

- The powers available to the court in the given proceedings.

The court will make the order that appears most appropriate. Here, it may be better for the twins to remain at home with Tim.