CILEx CHARTERED INSTITUTE OF LEGAL EXECUTIVES

LEVEL 6 - UNIT 20 – THE PRACTICE OF 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 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 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.

Question 1(a)

See attached form D8 divorce petition.

1(b)

As Mrs Young's petition is based on her husband's behaviour, she does not require an admission or his consent to the divorce, she just needs to prove that the application has been served. Therefore if Mr Young fails to return the Acknowledgment of Service to the court within 7 days, Mrs Young has a number of alternative methods available to her:-

She can request that the petition be personally served which can be carried out by a court bailiff. We 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.

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.

Alternatively Mrs Young could apply for Deemed service if she can prove her husband has received the divorce proceedings. The application for deemed service is made without notice and must be supported with evidence proving how the applicant knows that the respondent has received the application, e.g. if her husband tells her that he has received the application but does not intend to return it, or if he tears up the divorce application in front of her.

Mrs Young could apply for Substituted service by placing advertisements in the press or by sending the divorce proceedings to the address of a third party, such as a relative of her husband, or to his place of work. We would apply on a without notice basis 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 Young 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 for this without notice and lodge supporting evidence about the efforts made.

Question 2(a)

We would need to advise Mrs Chan that section 10 of the Children and Families Act 2014 now 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 the application form, Form A and the relevant court fee to the court.

Form A contains information relating to the client's exemption from or attendance at a MIAM in accordance with the statutory requirements.

Mrs Chan will need to complete and exchange a financial statement (Form E) with Mr Chan before she attends the First Appointment.

2(b)

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, Victoria (16) and Edward (14) 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, 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 Chan'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 Chan to apply for child maintenance and prevents her from making any applications for income or capital orders from Mr Chan.

Also Mrs Chan was pressurised by her mother-in-law to enter into the agreement. She did not have financial disclosure from Mr Chan of his financial assets and he reassured her that he would never rely on the agreement. Mrs Chan did not take independent legal advice.

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 £750,000
  Less mortgage £100,000
  Net equity=£ 650,000
  Holiday Home=£350,000
  Joint life assurance policy £150,000
  Joint value of parties' shares £200,000
  Mrs Chan's ISA savings £30,000
  Total £1,380,000.00

  The unrealisable assets consist of Mr Chan's pension which has a CE of £210,000 and Mrs Chan's pension which has a CE of £60,000. Total £270,000.

  Mrs Chan works full-time and earns £65,000 gross per annum. Mr Chan works full-time and earns £120,000 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 should be a minimum of a 3 bedroom property to accommodate the children. Mrs Chan's needs are greater than Mr Chan's as the children live with her full-time. However Mr Chan has the children to stay every other weekend. They both have generous earned income, so should both be eligible for mortgage funding to assist with meeting their housing needs. Mr Chan's mortgage capacity will be considerably higher. Mrs Chan will have income needs for herself and the children whilst Mr Chan will only have income needs for himself. The parties have agreed child maintenance and private school fees between them.

- (c) the standard of living enjoyed by the family before the breakdown of the marriage. This would be high 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 Chan may well suffer a greater reduction in his standard of living than Mrs Chan.

- (d) the age of each party to the marriage and the duration of the marriage. Mr Chan is 42 and Mrs Chan is 41. They both have future

earning capacity. The length of the marriage is seventeen years so it would be considered a long 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 Chan has looked after the children and household and worked and will continue to do so and therefore has an ongoing contribution. Mr Chan 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 conduct and Mrs Chan has lodged a two years' separation petition. 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 Chan's is substantially higher than Mrs Chan's. Mrs Chan works full-time so arguably she can build up her pension contributions at this stage and as the parties are 42 and 41 years of age respectively 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.

Question 3(a)

We should apply for a child arrangements order to set out the arrangements for the children to see and stay with Mr Poole as this is what he is currently having difficulties with.

He is not contesting the agreement he made with his ex-wife that the children should live with her. He thinks that Miss Griffiths is a good mother and he does not wish to uproot the children. Also, as he works full-time it is unlikely that he would be in a position to look after the children full-time.

Pursuant to section 10(4) Children Act 1989, Mr Poole 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.

3(b)

See attached form C100.

Question 4(a)

The relevant orders which we should apply for to protect Mrs Ibbott 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 Mrs Ibbott must establish that she is an associated person under section 62 FLA. She is because she and Mr Ibbott are married.

The application for the occupation order will be brought under section 33 FLA, as although the family home is owned solely by Mr Ibbott, as a spouse Mrs Ibbott has a statutory right to occupy under section 30 FLA.

Given the recent incidents of violence and Mr Ibbott's threat that if she goes back to the family home he will 'finish her off,' we should make the application without notice under section 45 FLA, as there's a significant risk of harm to Mrs Ibbott 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.

4(b)

To make the application without notice under section 45 FLA, we must prove to the court that Mrs Ibbott and Darcey are at risk of significant harm if the order is not made immediately. Alternatively, we can rely on the fact that Mrs Ibbott will be deterred or prevented from pursuing the application if the order is not made immediately. Given the severity of the violence 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 Mrs Ibbott and Darcey. There is a history of verbal abuse and more recently physical abuse and the last episodes of violence have been serious. Mrs Ibbott 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 Mrs Ibbott or Darcey 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 Ibbott 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 Mrs Ibbott if the order is not made.

Here Mrs Ibbott 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 Ibbott, 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. Mrs Ibbott's needs are greater as she is the main carer for Darcey and she has nowhere else to go as her mother's home is a one bedroom apartment. Mr Ibbott can stay at his brother's three bedroom home or his parents' three bedroom home. Whilst Mrs Ibbott would be considered to be unintentionally homeless and would thus obtain priority on the local authority's housing list, moving Darcey from her home would cause upheaval and Mrs Ibbott would need a two bedroom property ideally. Whilst Mr Ibbott would be regarded as intentionally homeless and thus receive no priority on the local authority's housing list he has good financial resources so could rent privately and there appears to be no reason why he can't move in to his brother's or parents' home in the meantime.

- the respective financial resources of the parties. Mrs Ibbott's needs are greater as she is currently only working part-time and bringing up Darcey. Mr Ibbott is working and earning good money so he would have the better 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 Mrs Ibbott and Darcey as they need to be protected from Mr Ibbott's violence and threats.

- the conduct of the parties in relation to each other and otherwise. Mr Ibbott has been verbally and increasingly physically violent, the last incidents of violence were serious.

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

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