LEVEL 6 - UNIT 20 – THE PRACTICE OF FAMILY LAW
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 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 tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate performance in the examination.

Question 1(a)

Mrs Vine 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 her husband broke off the affair as soon as she discovered it. There appear to be no other instances of behaviour by her husband to enable her to rely on fact (b).

Given her wish to proceed amicably for the sake of the children, the best fact for her to rely on is the no-fault fact of separation. The client tells us that her husband will not contemplate 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) 5 years' separation.

The 5 years' separation runs from when Mr Vine moved out of the former family home on 31 December 2012. The parties reconciled for a period of one month from 20 February 2013 to 20 March 2013. The facts suggest the necessary physical and emotional separation required.

As the period of reconciliation is less than six months it does not break the continuity of the separation period. The period of one month 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 31 December 2012 to 31 December 2017. We then need to add on the one month period of reconciliation. The earliest date on which we could lodge the petition for Mrs Vine is 31 January 2018.

1(b)

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

Mr Vine 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 full-time as an architect and we're told he earns a generous salary. Additionally he solely owns the property at Meadow View together with shares and savings and his share of the former family home. Even though Mrs Vine will receive a greater share of the matrimonial assets on divorce due to the children it still seems unlikely that Mr Vine 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 Vine would need to cite religious reasons. We are told that Mr Vine is not religious and our client believes his reluctance is simply because his parents would disapprove.

(c)

The key elements of the Family Law Protocol are that the parties should adopt a constructive and conciliatory approach.

We should give notice to Mr Vine of his wife's intention to issue divorce proceedings and we should try to agree the contents of the petition prior to issue.

As the petition will be based on five years' separation we do not need Mr Vine's consent to the divorce. However this approach will still be helpful for Mrs Vine as it may help us establish whether Mr Vine will seek to rely on the statutory defence

Question 2(a)

In the Bedford Family Court Case Number

BETWEEN

SADIA MAHMOOD Applicant

and

NASSER MAHMOOD Respondent

APPLICANT'S CONCISE STATEMENT OF APPARENT ISSUES

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

- The Applicant asserts that the property is worth £550,000.

- The Respondent asserts that the property is worth £475,000.

2. Valuation of the Investment Property: 23 Bright Street, Clayton

- The Applicant asserts that the property is worth £200,000.
- The Respondent asserts that the property is worth £175,000.

3. The Future of the Former Family Home.

- The Applicant asserts that she should remain in occupation with the property being transferred to her outright.
- 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 Investment Property should be sold.
- The Respondent asserts that the Investment Property should be transferred to him outright.

5. The Applicant's Living Arrangements.

- The Respondent asserts that the Applicant is living with her partner.
- The Applicant denies that she is cohabiting.

6. The Respondent's Pension.

- The Applicant asserts that there should be a pension sharing order.
- The Respondent asserts that there should be no claim on his pension assets.

7. 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 2018

Served by Kempstons LLP, The Manor House, Bedford MK42 7AB REF: LP/LR/M124

Acting for the Applicant

2(b)

In the absence of a court order if Mr Mahmood should withdraw his agreement to pay the child maintenance which the parties have agreed then Mrs Mahmood would need to apply to the Child Maintenance Service.

The CMS will assess Mr Mahmood's gross weekly income before income tax and national insurance contributions are taken off but after occupational or personal pension scheme contributions are deducted.

There will be an application fee of £20. Mr Mahmood will have to pay a collection fee of 20% of the maintenance figure (which will be added to the maintenance) and Mrs Mahmood will have to pay a collection fee of 4% of the maintenance figure (which will be deducted from the maintenance figure).

In light of the additional financial penalties it may therefore be sensible for us to write to Mr Mahmood to warn him of the consequences of failing to pay the child maintenance on a voluntary basis.

There are no other children and Mr Mahmood sees the children for less than 52 nights per year so no deductions would be made.

Question 3(a)

We should advise Mr and Mrs Dunn 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 Dunn should be advised to apply for a child arrangements order to provide for when they should see and spend time with Hattie and Tom.

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 saw their grandparents every week and stayed with them 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 Zoe can establish there is any risk of harm.

Applying the s 10(9) criteria it therefore seems likely that Mr and Mrs Dunn 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 Dunn should apply for leave using form C2 and a draft form C100

3(b)

We would explain to Mr and Mrs Dunn that they should apply for a child arrangements order to govern when they should see and otherwise spend time with Hattie and Tom as this will address the issues they have experienced with Zoe restricting and subsequently stopping their agreed visits.

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 then apply the s.1(3) welfare checklist:

- The ascertainable wishes and feelings of the child: The children are 12 and 9 respectively. Hattie's views as a 12 year old will be given more weight by the court. At 9, Tom is a little young for the court to attach much weight to his views. Mr and Mrs Dunn tell us that they have received texts from Hattie saying that she and Tom 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 November 2017 the children saw their grandparents every Saturday and until October 2017 it was usual for the children to stay with them during their school holidays. Particularly in light of their parents' separation, 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, seeing their paternal grandparents also 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 harm by not seeing their grandparents particularly in light of their parents' separation.

- 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 Dunn 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 Dunn's favour.

Question 4(a)

The relevant orders which we should apply for to protect Miss Fairhurst 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 Fairhurst must establish that she is an associated person under section 62 FLA. She is because she and Mr Quinn 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 Fairhurst 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 Quinn's threat that she had better stay away from him unless she wanted more of the same, we should make the application without notice under section 45 FLA as there's a significant risk of harm to Miss Fairhurst 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 Fairhurst could seek a transfer of tenancy from their private landlord

4(b)

To make the application without notice under section 45 FLA we must prove to the court that Miss Fairhurst and Yasmin are at risk of significant harm if the order is not made immediately. Alternatively we can rely on the fact Miss Fairhurst 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 Miss Fairhurst and Yasmin. There have been examples of verbal abuse and more recently physical abuse and two of these incidents have been witnessed by Yasmin. Miss Fairhurst 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 Fairhurst or Yasmin 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 Quinn 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 Fairhurst if the order is not made.

Here Miss Fairhurst 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 Quinn 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 Fairhurst's needs are greater as she is the main carer for Yasmin and she has nowhere else to go as her sister's home is a two bedroom house which she lives in with her husband and two children. Mr Quinn can stay at his parents' three bedroom home or his brother's two bedroom home. Whilst Miss Fairhurst would be considered to be unintentionally homeless and would thus obtain priority on the local authority's housing list, moving Yasmin from her home would cause upheaval and she would need a two bedroom property ideally. Whilst Mr Quinn 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 in to his parents' or brother's home.

- The respective financial resources of the parties. Miss Fairhurst's needs are greater as she is bringing up Yasmin. Mr Quinn 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 Fairhurst and Yasmin as they need to be protected from Mr Quinn's violence and threats.

- The conduct of the parties in relation to each other and otherwise. Mr Quinn has been verbally and physically violent. Yasmin 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 Fairhurst's version of events then they must also grant a power of arrest under section 47 FLA as Mr Quinn has used and threatened violence against her.

4(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.

If Miss Fairhurst 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.

On the making of a child arrangements order 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.

Due to the fact that Yasmin has witnessed the last two incidents of violence it is likely that the court would feel that supervised visits are an appropriate measure.