LEVEL 6 - UNIT 20 – THE PRACTICE OF FAMILY LAW
SUGGESTED ANSWERS – JUNE 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 June 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)

Petition: Part 6: Statement of Case: - the following points were relevant:-

The Applicant first felt that there were problems in the marriage in May 2015 when the Respondent was very unsupportive of her when she was signed off work due to stress. The Respondent mocked the Applicant in front of their children.

By January 2016 the Applicant was suspicious that the Respondent was having an affair and when she confronted the Respondent he admitted that he had been involved in an affair since the summer of 2015 but had now ended it.

In March 2016 the couple attended some counselling sessions with Relate and initially matters improved but by October 2016 the Applicant felt that matters once again deteriorated as the Respondent was rarely at home at mealtimes or weekends due to work pressures. The Respondent dismissed the Applicant's concerns about how this was affecting the family.

The Respondent continued to be absent from family life and by early 2017 the Applicant and children rarely saw him. In February 2017 the parties moved into separate bedrooms and since that point the parties have not had a sexual relationship.

In June 2017 the Respondent was late attending his son Zachary's Bar Mitzvah which was embarrassing and upsetting for the Applicant and Zachary.

The Applicant is concerned that the strained relationship between the parties is affecting the children and is now firmly of the opinion that the marriage has irretrievably broken down.

1(b)

The next step is for us to send copies (3) of the divorce petition (D8) to the local divorce centre, together with the marriage certificate; court fee; and a statement of reconciliation (D6).

The court will then send the divorce petition to Mr Bernstein together with an Acknowledgement of service form (D10). He has 7 days to complete and return the Acknowledgement.

Once the court receives the Acknowledgement from Mr Bernstein they will send it to us. (Should Mr Bernstein fail to return the Acknowledgment of Service then we will need to prove service.)

Mrs Bernstein will then have to complete the application for decree nisi (D84) and the statement in support of divorce (D80B) to confirm that she wishes to proceed with the divorce.

The district judge will then review the evidence and provided that they are satisfied that the evidence proves that the marriage has irretrievably broken down they will issue the certificate of entitlement to a decree and set the date for pronouncement of decree nisi.

Once the decree nisi has been pronounced Mrs Bernstein can apply to the court for the decree absolute by completing a Notice of application for decree absolute (D36), once six weeks and one day has elapsed.

If Mrs Bernstein does not apply for the decree absolute six weeks and one day after the decree nisi, then Mr Bernstein may apply for it once a further three months have passed.

1(c)

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

Section 10A of the Matrimonial Causes Act 1973 (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.

Question 2(a)

Initially we can negotiate by writing to Mr Collins' lawyers to put forward proposals to settle the parties' finances. If an agreement can be reached then it can be put into a Consent Order for the court to approve. This would ensure that any such agreement was binding.

The parties could alternatively approach a mediator for assistance in resolving the division of their financial assets. The drawbacks to mediation are that the mediator cannot make the parties reach agreement and any agreement reached

is not binding (unless it subsequently forms the basis of a Consent Order and is submitted for the court's approval).

Another method of alternative dispute resolution (ADR) available to family clients wishing to resolve their finances is the collaborative law method. Each party and their solicitor attend a series of meetings to attempt to resolve the division of the financial assets. Both parties agree at the start of the process that should the collaborative approach fail to produce an agreement that they must subsequently engage new solicitors if they wish to pursue the matter to court.

A further method of ADR available at some courts is arbitration

Pursuant to Section 10 (1) of the Children and Families Act 2014 before applying to the court for an order to resolve a party's finances on divorce the parties to the action must attend a Mediation Information and Assessment Meeting with a mediator or certify why they fulfil the requirements not to attend.

2(b)

The life assurance policy is held in the parties' joint names so Mr Collins cannot surrender it without Mrs Collins' consent/signature.

Mrs Collins as a spouse has a statutory right of occupation of the former family home even though the property is held in Mr Collins' sole name. We can register this right of occupation which arises under section 30 Family Law Act 1996 (FLA).

As the family home is registered we can register an agreed Notice at the Land Registry. This will ensure that Mrs Collins' interest in the property is noted and will effectively prevent a sale proceeding without her consent. The registration will be effective until the decree absolute of divorce is pronounced.

£75,000 of the shares and £20,000 of the ISAs are held in Mr Collins' sole name so he could sell/transfer them. We should write to his lawyers for an undertaking that he will not dispose of these assets.

If no undertaking is offered then we could apply to court for an injunction to prevent Mr Collins from selling the shares and ISAs using section 37(2)(a) of the MCA.

The requirements for an application under section 37(2)(a) are firstly that there is an existing MCA application before the court: there is in the prayer in Mrs Collins' petition.

The court must be satisfied that Mr Collins is about to make a disposition- we know that he told Mrs Collins that he is due to see his financial adviser about selling them in the next few days, so this seems to be the case.

The disposition must be made with the intention of defeating the ancillary relief claim or frustrating or impeding its enforcement: this does appear to be Mr Collins' motive given what he has said to Mrs Collins. In any event there is a rebuttable presumption that the respondent intends to make the disposition to jeopardise the proceedings if it has that effect.

In relation to the property at 22 Smithfield Street if it is true that Mr Collins has sold this to his brother then we would have to apply to the court using section 37(2)(b) of the MCA for an injunction setting the sale aside.

To succeed under section 37(2)(b) we would need an existing MCA application before the court, which we have. We would then need to prove that the sale was a reviewable disposition that was made with the intention of defeating the claim for ancillary relief if different financial provision would be made to the applicant as a result.

The sale will be a reviewable disposition, unless it was made for valuable consideration, to a person acting in good faith and without notice of Mr Collins' intention to defeat Mrs Collins' claim. The sale would therefore be a reviewable disposition, as Mr Collins appears to have sold it to his brother at an undervalue, as it was sold for £150,000 but valued at £225,000. The brother is unlikely to be a person acting in good faith, for value without notice. There would be a rebuttable presumption as to Mr Collins' intent, as the disposition would have taken place within three years of any court application

Conclusion: we might threaten the section 37(2) injunction applications but it is not worth the cost as there are other assets (the home and policy and her own shares and ISAs) that Mrs Collins could be compensated from, in which case we would ask for an undertaking that Mr Collins would not dispose of the proceeds of sale of the investment property.

A Mareva injunction or an injunction maybe obtained from the High court using the inherent jurisdiction of the court. We may wish to take steps to freeze the proceeds of sale in the interim.

If Mr Collins did dissipate the assets this could amount to "conduct" under section 25 of the MCA and he could be penalised for this in the overall settlement and via a costs order.

Question 3(a)

For Mr Wilson to participate in the decision-making for Oliver he will need to acquire Parental Responsibility (PR). The concept of parental responsibility was introduced by the Children Act 1989 (CA) and is described as "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."

Unlike the children's mother Miss Pearson, as an unmarried father Mr Wilson does not automatically have PR for his son. We know that Oliver's birth was registered by Miss Pearson and that Oliver is registered in the surname of Pearson without any mention of Mr Wilson as her father. In the e-mail Mr Wilson states that Miss Pearson takes Oliver to the doctor's and dentist's so this points to him not having obtained PR to date.

An unmarried father can acquire PR in a number of ways:

- by entering into a PR agreement with the mother
- by applying to the court for a PR order
- by obtaining a child arrangements order governing where the child should reside from the court
- by marrying the child's mother
- by subsequently re-registering the child's birth in the father's surname

Realistically the only way that Mr Wilson is likely to acquire PR here is through an application to the court as it seems very unlikely that Miss Pearson will agree to

entering into a PR agreement with him. Also in his e-mail Mr Wilson makes it clear that he is not challenging where Oliver should live.

3(b)

Mr Wilson should apply for a specific issue order regarding the proposed holiday. (As Oliver's natural father, he does not need leave to apply). In deciding whether to grant Mr Wilson's application the welfare of the child will be the court's paramount consideration. The court will also consider the no delay and no order principles.

In deciding whether a specific issue order would be in Oliver's best interests the court will apply the s.1 (3) checklist.

The ascertainable wishes and feelings of the child: Mr Wilson tells us that Oliver was very excited about the holiday and upset when he heard the parties arguing about it, it is likely that the court will appreciate this.

The child's physical, emotional and educational needs: the court would generally hold that a holiday would be beneficial to the child's emotional needs and here Oliver's grandparents, aunt, uncle and cousins are also going. In relation to educational needs Mr Wilson is taking Oliver during the summer holidays so his educational needs will not suffer. It could furthermore be argued that a holiday abroad will in any event broaden his education.

The likely effect on the child of any change in circumstances: Oliver stays with Mr Wilson every other weekend and spends half of his school holidays with him so spending time with him during his school holidays will not be a change to the status quo.

The child's age, sex, background etc.: Oliver is 7 years old. This is too young for the court to attach any significant weight to his views.

Any harm that the child has suffered or is at risk of suffering: it is unlikely that the court will consider the situation to be one which poses physical harm to Oliver although the court may recognise the possibility of emotional harm caused by denying him the holiday. The holiday destination proposed is not an unusual one or one which suggests any risk.

How capable the parents are of meeting the children's needs: this is not an issue here. There is no suggestion that Mr Wilson cannot look after Oliver as he regularly does so at weekends and during school holidays.

The range of powers available to the court: the court could make any section 8 order although realistically they will only make a specific issue or prohibited steps order here as the court has made it clear that these applications are not a back-door to getting contact or residence issues resolved.

As the parties are 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 holiday proposed is in Oliver's best interests and make a specific issue order in Mr Wilson's favour.

Question 4(a)

The relevant orders which we should apply for to protect Miss Knight are a non-molestation order under section 42 of the Family Law Act 1996 (FLA) and an occupation order under section 36 of the FLA.

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

The application for the occupation order will be brought under section 36 FLA as we are told that the home is owned in Mr Yates' sole name thus Mr Yates has a right to occupy the property but Miss Knight has no such right to occupy. The property has been the home of Miss Knight and Mr Yates.

Given the escalating levels of violence used by Mr Yates and his threat that he will kill her if she returns, we should make the application without notice under section 45 FLA.

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 Miss Knight and Tabitha are at risk of significant harm if the order is not made immediately. Alternatively we can rely on the fact that Miss Knight will be deterred or prevented from pursuing the application if the order is not made immediately. Given the severity of the violence, the fact that Tabitha witnessed one incident and Mr Yates' text message threat saying that he will kill Miss Knight if she returns, 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 Knight and Tabitha. There is a history of controlling behaviour, verbal and physical abuse, the last episode of violence was a serious one and Tabitha has witnessed it. Miss Knight 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 provisions within the occupation order, the court must take into account all of the circumstances including the respective housing needs and housing resources of the parties and any child. Mrs Knight's needs are greater as she is the main carer for Tabitha and she has nowhere else to go as her parents live abroad and her friend does not have room for her. Mr Yates can move in to his parent's four bedroom property. Whilst Miss Knight would be considered to be unintentionally homeless and would thus obtain priority on the local authority's housing list, moving Tabitha from her home would cause upheaval and she would need a two bedroom property ideally. Whilst Mr Yates would be regarded as intentionally homeless and thus receive no priority on the local authority's housing list he earns enough money to rent privately or buy another property so will not need to rely on local authority housing in any event.

The respective financial resources of the parties. Miss Knight's needs are greater as she only works part-time and is bringing up Tabitha. Mr Yates is working full-

time and earning enough to support himself, so he has better resources even if he did need to rent or buy 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 Knight and Tabitha as they need to be protected from Mr Yates' violence and threats.

The conduct of the parties in relation to each other and otherwise. Mr Yates has been verbally and increasingly physically violent, the violence was serious and Tabitha has witnessed one incident

The nature of the parties' relationship and in particular the level of commitment involved in it. The parties lived together as husband and wife for six years and have a child together so it is a committed relationship.

The length of time they have lived together as husband and wife. They have lived together for six years which is a substantial period of time.

Whether there are or have been any children who are children of both parties or for whom both parties had parental responsibility. They have one child together, Tabitha.

The length of time that has elapsed since the parties ceased living together. Miss Knight left the property following the last incidence of violence two nights ago.

The existence of any pending proceedings between the parties under Sch 1 to CA 1989 or relating to the legal or beneficial ownership of the home. There are none.

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

In deciding whether to make the exclusion provision the court must take into account all of the circumstances including the factors in (a) to (d) of s36 mentioned above. In addition the court must consider the following balance of harm questions:

- Whether the applicant or any relevant child is likely to suffer significant harm attributable to the conduct of the respondent if the exclusion provision is not made and whether the harm likely to be suffered by the respondent or child if the provision is included is as great or greater than the harm attributable to the conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included. Here Miss Knight is likely to satisfy this test as if the exclusion provision 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 Yates as if the exclusion provision is made he will simply have to live at his parent's home or rent another property to live in. Although he may argue that this would mean that he could not see Tabitha arrangements could be made for supervised contact which would be more appropriate in the circumstances in any event.

If the court believes Miss Knight's version of events then they must also attach a power of arrest to the occupation order under section 47 FLA as Mr Yates has used and threatened violence against Miss Knight. The duration of the order will be six months.