

**LEVEL 3 - UNIT – 7 - 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 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.

SECTION A

1. (a) The Human Rights Act 1998 incorporates the European Convention on Human Rights (ECHR) into UK law.
- (b) Many of the Articles of the ECHR are relevant to family law, these include:
 - Article 6 (right to a fair hearing);
 - Article 8 (right to respect for a private and family life);
 - Article 12 (right to marry);
 - Article 14 (freedom from discrimination).
2. (a) The concept of 'Gillick competence' refers to children who have sufficient maturity, understanding and intelligence to make their own decisions – for example on matters of health.
- (b) 'Gillick competence' can be used to assess a child's ability to make decisions on matters including the following:
 - contraception;
 - medical decisions;
 - education;
 - wishes and feelings in s.8 Children Act (CA) 1989 disputes;
 - religion.
3. The principles in the CA 1989 are:
 - the welfare, or paramountcy, principle in s.1(1), which states that when a court is determining any question relating to the upbringing of a child, or the administration of the child's property, the welfare of the child is the court's paramount consideration;

- the no-delay principle in s.1(2), which states that any delay in determining questions relating to a child is likely to prejudice the child's welfare;
- the non-intervention (no order) principle in s.1(5), which states that a court should make no order in relation to a child, unless making the order is better than making no order at all;
- the principle in s.1(2A) as amended by s.11 Children and Families Act 2014, that a court is to presume, unless the contrary is shown, that the involvement of both parents in the life of a child will further the child's welfare.

4. Candidates should choose two from the following:

- that the respondent has failed to provide reasonable maintenance for the applicant;
- that the respondent has failed to provide reasonable maintenance for a child of the family;
- that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with him;
- that the respondent has deserted the applicant.

The source of law is s.1 Domestic Proceedings and Magistrates Court Act 1978.

5. Candidates should choose two from the following:

- divorce legally terminates a marriage, judicial separation does not;
- divorce requires proof of the irretrievable breakdown of the marriage, judicial separation does not;
- divorce is a two-stage process while judicial separation is a one-stage process;
- judicial separation can be brought within the first year of marriage, while an application for divorce cannot be brought until the marriage has subsisted for at least one year;
- parties are free to marry following divorce, but cannot re-marry following judicial separation;
- provisions in a will benefitting the other spouse lapse on divorce, but do not on judicial separation;
- pension orders are not available on judicial separation, but are available following divorce.

6. S.11 Matrimonial Causes Act (MCA) 1973 states the rules of capacity to marry:

- the parties must be at least 16 years of age;
- neither party can be already married or in a civil partnership;
- the parties must not be within the prohibited degrees of relationship.

Candidates may have noted that failure on any one of these three conditions will make the marriage void.

7. Candidates should choose three differences, which may include:
 - married couples have a duty to provide each other with financial support, while cohabitants have no such duty;
 - the formation and termination of marriage are governed by statute, while cohabitation has no such restrictions;
 - courts have statutory powers to make financial and property orders following divorce, whereas cohabitants can generally only rely on trusts and property principles;
 - married fathers automatically have parental responsibility, while unmarried fathers do not;
 - if a party to a marriage dies intestate, the other spouse will inherit all or part of the deceased's estate, whereas a cohabitant has no such automatic right of inheritance and must apply to the court;
 - married couples have a duty of consortium, but this does not apply to cohabitants;
 - married couples have 'home' rights of occupation under the Family Law Act 1996, which cohabitants do not automatically have.

8. S.5 MCA 1973 provides that the respondent to a divorce application based on 5 years' separation may oppose the granting of the decree absolute on the ground that it will cause grave financial or other hardship, and that in all the circumstances it is wrong to dissolve the marriage.

9. A civil partnership is voidable under s.50 Civil Partnership Act (CPA) 2004 on one of the following grounds and candidates should choose three from:
 - lack of consent;
 - one party is suffering from a mental disorder;
 - the respondent is pregnant by someone other than the applicant;
 - an interim gender recognition certificate has been issued to either party;
 - the respondent is a person whose gender at the time of the formation of the civil partnership is an acquired gender.

10. Candidates may choose three from the following or others as appropriate:
 - Matrimonial Causes Act 1973;
 - Civil Partnership Act 2004;
 - Marriage (Same Sex Couples) Act 2013;
 - Marriage Acts 1949 and 1994;
 - Family Law Act 1996;
 - Gender Recognition Act 2004;
 - Human Rights Act 1998;
 - Children Act 1989;
 - Domestic Proceedings and Magistrates Courts Act 1978;
 - Trusts of Land and Appointment of Trustees Act (TLATA) 1996.

SECTION B

Scenario 1 Questions

1. As the sole legal owner, Anne is entitled to the whole of the beneficial interest when the house is sold, and Ben would not have any rights in the property, applying the presumptions in Jones v Kernott (2011) and Stack v Dowden (2007).

Ben will have to rely on property law and establish an implied trust – either a resulting trust or a constructive trust – in order to claim a right in the property and postpone a sale. Following Lloyds Bank v Rosset (1990), he may try to prove a common intention with Anne to share the interest in the house, and that he acted on this to his detriment; or, that he made direct contributions to the purchase or the value of the property. For the former, he will have to provide evidence of an agreement or conversations he and Anne may have had about the house. The oral agreement may be evidence of a shared common intention. Ben could argue that he acted on this to his detriment by establishing his business at the property, as there was some risk attached to doing this. If this is unsuccessful, Ben may rely on any direct contributions he has made to the purchase or value of the house. Here, he will rely on the fact that he used his own redundancy money to renovate the outbuildings. Candidates may speculate that he has also contributed to the mortgage.

Ben could make an application under TLATA 1996 for the court to make a declaration of his interest, and to quantify it by examining the whole course of dealing between him and Anne as per Oxley v Hiscock (2004). If successful, his share is likely to be held by a constructive trust. His direct contributions to the purchase or value of the property may be held by a resulting trust, although the Supreme Court has ruled that the constructive trust is appropriate in family home scenarios. Under TLATA 1996 s.14, Ben can apply to postpone the sale of the house, and the court will apply the factors listed in s.15.

2. (a) The requirements for a valid cohabitation contract include: that the contract is in writing; that the parties to the contract intend to create legal relations with each other; that the contract relates to their property and finances and not to their lifestyle or living arrangements; that both parties have taken independent legal advice; and that both parties have freely and willingly entered the contract, with no evidence of duress.

(b) If a cohabitation contract is upheld it can be very valuable to the parties. Its advantages are: certainty and clarity in the event of relationship breakdown; flexibility to arrange property and financial affairs; allows cohabitants the benefit of financial relief (maintenance) that married couples have but which courts generally do not have statutory powers to order for cohabitants; with correct legal advice, it can provide protection to the financially weaker party.
3. (a) Parental responsibility is defined in s.3(1) CA 1989 as all the rights, duties, powers, responsibilities, and authority which a parent has in relation to the upbringing of a child or the administration of a child's property.

- (b) Ben has parental responsibility for Christopher and Danielle because he is named on their birth certificates as per s.4 CA 1989. An unmarried father will have parental responsibility, if the child is born after 1 December 2003 and he is named on the child's birth certificate.
 - (c) Ben has the right to be involved in decision-making about Christopher and Danielle: e.g., decisions about health and education, religion and any change to their surname. He also has responsibilities relating to their upbringing: e.g. providing a home, keeping them healthy. Looking at the facts for Ben, having parental responsibility means that the court must take into consideration his views on the children's living arrangements.
4. Candidates should identify that Anne will apply for a s.8 CA 1989 child arrangements order, for the children to live with her and Ben in equal amounts of time. This is sometimes called 'shared residence' and candidates can discuss its benefits and disadvantages. Candidates should have gone on to explain the welfare/paramountcy principle, and note that s.1 CA 1989 now includes reference to a presumption that the children's welfare is furthered by the involvement of both parents in the children's lives, and that Anne will rely on this. Candidates might also have discussed the principles of no-delay and non-intervention, noting that Anne and Ben might be able to resolve this issue without a court order.
 5. Candidates should identify that Ben will apply for a s.8 CA 1989 child arrangements order, for the children to live with him, and have contact with Anne – presumably quite generous contact. Ben will also rely on the principle that the children's welfare is the court's paramount consideration. Candidates should apply relevant factors from the welfare checklist, for example, the children's wishes and feelings (are they old enough to express their views), ages, educational needs, ability to cope with change, etc.

Scenario 2 Questions

1. Katrina and Jenny have been civil partners for more than 1 year, therefore, under s.41(1) CPA 2004, Katrina is able to apply to for a dissolution order. Candidates should note that under s.44 CPA 2004, Katrina will have to prove the irretrievable breakdown of their relationship, and base this on one of the 4 factors. Katrina cannot rely on her own behaviour in order to end the civil partnership.

If Katrina wishes for a 'speedy' dissolution, she will need Jenny to apply on the basis of Katrina's unreasonable behaviour. Adultery is not a fact that can be relied on here, although her relationship with a female work colleague could form part of Katrina's unreasonable behaviour, if Jenny were to apply. If Jenny takes no action, Katrina will have to wait and apply for a dissolution on the basis of a two-year separation, with Jenny's consent. If Jenny does not consent, Katrina will have to wait until they have been separated for 5 years. Candidates should describe the meaning of 'separation.'

2.
 - (a) David can apply for a prohibited steps order, under s.8 CA 1989, to stop Katrina taking Zoe to Newcastle. As he is Zoe's father, he is entitled to apply for a s.8 order without the permission of the court. He will need to demonstrate that Zoe's welfare requires her to stay near her home in London, and that a move to Newcastle is not in her best interests. Reference to the welfare/paramountcy principle should be made and application of the welfare checklist. Factors such as her wishes and feelings, age, background, ability to deal with change, educational and emotional needs should be applied.
 - (b) Candidates should discuss s.10 CA 1989 and conclude that Jenny is entitled to apply for a s.8 child arrangements order because she is a civil partner to Katrina and Zoe is a child of the family. Jenny will want this order to maintain contact with Zoe. Candidates should discuss the types of contact the court can order and what would be appropriate for Jenny and Zoe. The welfare principle and welfare checklist factors might also be applied.
3. Candidates should demonstrate understanding of the orders available under Sch 5 CPA 2004, which are the same as those in Sections 22-24 MCA 1973. A discussion should follow on the possibility of an order for maintenance pending suit (Jenny's income is less than Katrina's and she may be in financial need pending a final dissolution order), periodical payments order (Jenny's income is lower than Katrina's and depending on her needs might require financial assistance), a lump sum order following the sale of the flat which is in Katrina's sole name (as Jenny will require somewhere permanent to live). Other orders could be identified, but considering their ages and needs, a transfer of property or pension order is not likely as Katrina intends to sell the flat in any case, and Jenny has sufficient time, given her age, to build a pension of her own.
4. Candidates should identify that Sch. 5 CPA 2004 provides that first consideration will be given to the welfare of Zoe while she is a minor, as she is a child of the family. Candidates should identify the factors and apply the most relevant ones, particularly noting the parties' ages, the fact that both are in employment, the short duration of their partnership, Jenny's earning capacity, and the style of living they have been accustomed to. Relevant case law should be cited in support – e.g. Miller v Miller (2006).
5.
 - (a) A 'clean break' order is made during financial proceedings following divorce or dissolution and permanently severs financial obligations and claims between the parties. The court has a duty to consider whether a clean break is appropriate and, if not, whether a deferred clean break can be made instead.
 - (b) A 'clean break' order is appropriate where the parties are young, have earning capacity, and there are no children of the relationship. Jenny has earning capacity (albeit less than Katrina) and she is still young. She may need financial support until she finds somewhere to live, and so a deferred clean break may be appropriate.

Scenario 3 Questions

1. Sara and Hamid have been married for more than one year, so Sara is able to apply for a divorce: s.3 MCA 1973. Candidates should explain that there is only one ground on which a court will grant a divorce, namely the irretrievable breakdown of her marriage to Hamid as in s.1(1) MCA 1973. Candidates should define irretrievable breakdown. Sara is likely to rely on the fact of the respondent's, Hamid's, behaviour – s.1(2)(b). Sara must prove that Hamid has behaved in such a way that it is unreasonable for Sara to continue to live with him. Candidates should discuss the aspects of Hamid's behaviour on which Sara will rely. The test in Livingstone-Stallard v Livingstone-Stallard (1974) should be stated and applied. Candidates may also cite other relevant case law and may know the recent case of Owens v Owens (2017) and apply that to Sara's situation. Sara should be advised that if Hamid defends the application, she will have to leave the family home and rely on the two-year separation with consent, or five-year separation facts.
2. (a) Candidates should explain that Sara would be able to apply for financial relief from Hamid, and should identify and apply four orders that are relevant to Sara and Hamid's situation. Candidates should cite the source of law as Sections 21-24 MCA 1973.

Maintenance-pending-suit: Sara has no income of her own while Hamid has a substantial income. She will need financial support before the decree absolute.

Periodical payments: Sara has earning potential based on her previous work, but will need time to re-train before she is earning enough to support herself and will need financial support.

Lump sum: Sara will need to re-house herself as she intends to leave the family home. This could be accomplished by the sale of the family home, which has no mortgage and is worth £1 million, by sale of the rental flat, or by drawing on the substantial capital in Hamid's business.

Transfer of property: Sara indicates that she wishes to leave the family home, so transfer of ownership of the flat may be suitable.

Sale of property: sale of property provides capital to re-house the parties, and this is a likely order, as it will allow both Hamid and Sara to find new places to live.

Pension order: Sara is likely to have no pension of her own, and Hamid does. At Sara's age it will be very difficult for her to achieve a reasonable pension.

- (b) Candidates need to cite s.25 MCA 1973 as the source of a 'checklist' of factors that a court will consider on an application for financial relief.

First consideration should be given to the welfare of any child of the family while a minor – however, Sara and Hamid do not have children.

Four relevant factors should be identified and applied to the facts:

Financial resources: Hamid has a substantial income and capital from his business; the family home is worth £1million and is mortgage-free, and Hamid has a pension. Sara has no income of her own and no pension.

Financial needs: both parties need somewhere to live; Sara needs an income to be able to support herself, as well as a pension.

Standard of living: Sara and Hamid have clearly had the means to lead a comfortable life, as the value of the house and the annual income indicate.

Age of parties and duration of marriage: Hamid and Sara have been married for 20 years, and are 50 years old and 48 years old respectively; the duration of the marriage will be relevant in determining the share of the assets that Sara receives; her age is relevant to her ability to earn an income commensurate with what she might have achieved if she had continued to work, as well as her ability to establish a pension for herself.

Contribution to the family: Sara has maintained the home and freed Hamid up to devote himself to the business; Sara has cared for Hamid's elderly parents up until their recent deaths; Hamid has provided the income for their home and other expenses; the case of White v White (2000) should be cited along with more recent cases as sources of law on how Sara and Hamid's contributions will be assessed.

Benefits lost: Because she has cared for Hamid's parents, Sara has lost an opportunity to work and establish her own pension and compensation for this loss should be considered. McFarlane v McFarlane (2006) is a useful case to consider.

Factors such as physical or mental disability, and conduct should not be discussed as the facts of the scenario do not indicate their relevance.

3. (a) Candidates should identify the possibility of an application by Sara for a decree of judicial separation under s.17 Matrimonial Causes Act 1973.
- (b) A decree of judicial separation relieves Sara and Hamid from the obligation to live together, but does not legally terminate their marriage as divorce would. Sara can base her application on one of the 5 facts, but does not have to prove the irretrievable breakdown of their marriage as she would if she applied for a divorce.

Sara would still be able to apply for financial and property orders, just as she would be able to do in a divorce application, and so she would not need to suffer financially. She would no longer have a duty to cohabit with Hamid. She would not, however, be able to apply for a pension sharing order. Hamid would have the satisfaction of not going through a divorce, which he objects to. His objection to divorce could result in Sara having to wait 5 years to divorce. Candidates are not

told why Hamid objects, however judicial separation is often a suitable alternative to couples who, on religious or cultural grounds, feel unable or unwilling to proceed with a divorce.