

The following are outlines of the structural analysis and principle issues that arose in Questions 1 & 2 on the Primary Examination 2012. They should not be taken as comprehensive model answers.

Question 1

The basic uncontested family law facts that underpin the problem are that Edward and Rebecca were married in 1996. There are two children of the marriage a girl Athena, aged 13, and a boy Apollo, aged 8. In 2012 Edward and Rebecca separated with the children being left in the care of Rebecca who continued to reside in the former matrimonial home.

In approaching any children's matter one must focus on the best interests of the child (BIC) as the paramount consideration (s 60CA) and in determining BIC the objects and principles identified in s 60B must be kept in mind.

Both parties have applied for Parenting Orders (PO) (s 65D). When considering an application for PO the first consideration is the determination of parental responsibility. When making a PO there is a presumption of equal shared parental responsibility (61DA(1)) unless there are reasonable grounds to believe a parent of a child has engaged in family violence or abuse of the child (s 61DA(2)) or that it is not in the BIC for his or her parents to have equal shared parental responsibility (s 61DA(4)).

Family violence is defined in s4AB. In this problem the Mother's violent tirades against the Father in front of the children falls within the terms of s4AB(3). It is, therefore, arguable that the presumption of equal shared parental responsibility ought not to apply but this exception is applied with discretion. In this case the low level verbal violence that has occasionally occurred in the presence of the children may not be sufficient to dislodge the presumption if it is unlikely to reoccur in the future. The separation of the parents supports the likelihood that these altercations are less likely to occur along with the Mother's continuing treatment for drug and alcohol abuse that underlie her verbally violent behaviour. The s.62G report further supports this conclusion in stating that "there is no reasonable basis to support the proposition that she [the Mother] constitutes a violent risk to the children". A contrary argument could also quite legitimately be put forward.

In determining that shared parental responsibility is not in the BIC the most common factor that will establish this is where there exists such a high level of conflict between the parents that cooperative shared parenting is impracticable. In this case while the Father puts forward that proposition there is little evidence to support his belief. There appears to be no greater acrimony between these parents than is common in post-separation situations and certainly not enough to rebut the presumption underpinned by the objects and principles such as 60B(1) (a), (d) & 60B(2) (a), (c) & (d). There are scant facts on which a strong argument supporting the establishment of the rebuttal of the presumption in accordance with 61 DA (4) can be made out and Courts generally show reluctance to rebut the presumption unless the case is strong and clear.

This then leads us to consider the provisions of 65DAA re: the child spending equal time with each parent or at least substantial and significant time. To determine whether it is in the BIC

for either s65DAA(1) or s65DAA(2) to apply we must consider the primary considerations set out in 60CC(2) [The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* does not change the presumption of equal shared parental responsibility nor the legislative pathway that mandates consideration of equal shared care. It does, however, state that if there is any inconsistency in respect of the two primary considerations stipulated in s 60CC(2), then the right of the child to be protected from harm is given greater weight over the right of the child to have a meaningful relationship with each parent.]. In determining how to ensure that the primary considerations are realized to the fullest extent the circumstances of the case allow it is necessary to take into account the additional considerations listed in 60CC(3).

Amongst the more significant 60CC(3) considerations that arise on the facts of this case are:

Views of the child (s60CC(3)(a):

The child Athena, aged 13, expressed a clear preference to live with the mother. Being 13 years of age the court will give her views considerable weight but in this case that will be largely offset by the immature basis for them (Father is over protective and doesn't let me have fun).

The child, Apollo, aged 8, expresses no clear preference and it appears he wants to maintain a strong relationship with both parents.

Nature of the child's relationship with each parent and others (including grandparents and other relatives (s60CC(3)(b):

Athena has a close relationship with her mother but not with her father with whom she has little interest in spending time with.

Apollo seems to have a good relationship with both parents.

The children have a strong relationship with their maternal grandmother who has assisted with their care since birth.

Level of cooperation between parents (s60CC(3)(c):

The Mother has demonstrated a willingness to cooperate with the Father in the care and welfare of the children evidenced by her proposed PO. The Father conversely is reluctant to have any continuing contact with the Mother and has indicated that he is not willing to engage in cooperative child rearing.

Likely effect of any change in the child's circumstances (s60CC(3)(d):

The Mother has been the primary care giver since the children's births and since separation the children have continued to be cared for by the Mother in the former matrimonial home. Need strong argument to justify changing the status quo here.

The maternal grandmother has been actively involved in the care of the children both before and after separation and this would be unlikely to continue should the children reside with the Father.

The children have always lived together and while the child Athena is not concerned if they were separated the child Apollo expressed a strong attachment to his sister. Little basis for PO that separates where the children live.

Capacity of each parent to provide for a child s 60CC(3)(f):

Notwithstanding the Mother's history of drug and alcohol problems contributing to an 'anger management' disorder she has demonstrated good child rearing skills. She is undergoing both drug and alcohol treatment programs and is currently drug free but continues to consume alcohol, albeit, on a moderate basis.

The Father, who suffers from 'bipolar affective disorder' that causes him to suffer fits of depression during which he becomes withdrawn and lethargic. The s 62G report found that the Father is 'unable to offer much in the way of a positive contribution to [the children's] emotional and intellectual needs'.

Parental attitude toward child and parental responsibilities (s 60CC(3)(i):

The Mother has been the primary care giver to the children since birth. Further she has contributed to the financial support of the family by undertaking part-time work as a barmaid.

The Father demonstrated only sporadic interest in his parenting responsibilities during the marriage. The Father made little effort to contribute to the children's welfare by making no financial contribution to the family during the marriage.

Taking these considerations into account we need to next look at the provisions of s.65DAA.

65DAA(1) requires that:

- (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
- (b) consider whether the child spending equal time with each of the parents is reasonably practicable;

The limited capacity, willingness and attitude towards child rearing demonstrated by the Father in the s60CC(3) considerations would make an equal time arrangement clearly inappropriate.

The Court needs to next consider s 65DAA(2):

consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; [65DAA(3) defines *substantial and significant time* with a parent as requiring:

- (a) the time the child spends with the parent includes both:
 - (i) days that fall on weekends and holidays; and
 - (ii) days that do not fall on weekends or holidays; and
- (b) the time the child spends with the parent allows the parent to be involved in:
 - (i) the child's daily routine; and
 - (ii) occasions and events that are of particular significance to the child; and
- (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.]

A strong argument could be made that the considerations identified in s60CC(3) equally support a substantial and significant time arrangement for the Father being inappropriate. Against this one must consider the primary consideration in 60CC(2)(a) regarding the child having a meaningful relationship with both parents (further underpinned by s60B) and thus determining the BIC is not as clear-cut as was the case in applying s65DAA(2). A discussion of the competing interests and risks needs to be undertaken here.

In the event that one concludes that s65DAA(3) is not to be applied one then needs to consider what would be an appropriate contact and communication regime for the father.

What Parenting Orders Should the Court Issue?

- 1) A s 61DA PO regarding the distribution of parental responsibility.
- 2) A PO determining the contact and time each child will spend with the Mother and Father.
- 3) An order enjoining the Father from denigrating or insulting the Mother either to or in the presence of the children (Your mother is crazy.)
- 4) Any other order you may believe is appropriate to the circumstances of the case.

Question 2

Jurisdictional Issues

- The parties were validly married for approximately 17 years.
- The *Family Law Act Cth* (1975) applies. Section 79 and 75(2) are relevant sections for property settlement where the parties are married.
- The parties are Australian residents and ordinarily resident in Australia for the purposes of instituting any family law proceedings.

Preliminary Issues

- There is no limitation period as the parties are not yet divorced.
- There is no Financial Agreement which would oust the jurisdiction of the Family Law Courts.
- The wife should be advised to lodge a Caveat immediately over the title to the Norwood property.
- The wife should be advised that she can make an application to the Family Law Court for urgent and interim spousal maintenance: section 72, 77 and 75(2) factors to be discussed including the threshold test (a party is unable to adequately support themselves and the other party is reasonably able to pay). Wife is in need of immediate financial assistance. However, the husband is currently not working due to depression. He is currently paying the mortgage and the children's private school fees.
- The wife could apply for an order for the sole use and occupation of the former matrimonial home, although unlikely to get such an order given that she is already residing in the property and the husband does not take issue with this.
- Discuss with the wife that she could seek injunctive orders in her application restraining the husband from dissipating the assets. However, the Court could make this a mutual order given her use of \$50,000 within a month of separation.
- Need to advise the wife of the possibility of seeking an order for the husband to provide full disclosure of all relevant documents relating to the accountancy firm (if he is not prepared to provide such documents) to ascertain his interest, if any, in the firm.
- Advise wife to seek a Centrelink benefit and to make an application for child support through the Child Support Agency.

Main Property Settlement Issues

- The property listed in the exam problem fall within the definition of property.
- Discuss that any proceedings can be instituted at any time and that the limitation period of 12 months commences only if there is a divorce order.
- Outline the 4 step process: *Lee Steere (1985)*, *McLay (1996)*, *Hickey*.
- The Court is likely to adopt a global approach given that the marriage is long.

- Consider Step One:
 - Assume full and frank disclosure. If the husband does not disclose his interest in the accountancy firm then any orders may be set aside in the future: s79A, or the Court may draw an adverse inference: *Black and Kellner (1992)*.
 - Assume assets valued at the time of the hearing: *Mackie (1981)*; *P and P (1985)*.
 - Discuss the issue of the husband and wife's use of the savings accounts post separation. The husband's use of \$30,000 is unlikely to be wastage as he used the monies to purchase furniture and effects and presumably to make the mortgage repayments/private school fees. However, the furniture and effects would need to be valued (market value and not purchase price) and included in the asset pool. The wife's use of \$50,000 in one month could be seen as wastage and added back into the asset pool. It can be seen as excessive given that the husband is making the mortgage repayments/private school fees. However, we would need more information from the wife as to how she expended the monies.

- Consider Step Two:
 - There is no presumption of a 50:50 starting point: *Mallett (1984)*.
 - No guidance as to the weight to be attached to each element in section 79(4).
 - Direct financial contribution to acquisition (section 79(4)(a)) - Husband had assets prior to marriage. The Norwood property generated income to pay off the mortgage over the former matrimonial home. The husband paid for all assets accumulated during the course of the marriage together with all household expenses.
 - The husband could try to claim 'extra or special skills' but the assets are not in the high range as in *Ferraro (1993)*.
 - The wife's contributions could erode an early contribution because it was a long marriage, however, the Norwood property was generating an income stream and has doubled in value.
 - Direct financial contribution to conservation or improvement (section 79(a)(a)) - Husband paid for all materials to enable the wife to undertake the gardening.
 - Direct non-financial contribution (section 79(4)(b)) - The wife undertook gardening thereby maintaining the property.
 - There are no indirect non-financial contributions (section 79(4)(b)) - The wife could argue that she gave up her career to care for the children but this was a mutual decision. Furthermore, there is nothing on the facts to indicate that she accepted a modest standard of living or was involved/assisted in the accountancy firm.
 - Contributions made to the welfare of the family (section 79(c)) - The wife made significant contributions by attending to all of the children's needs and the household chores. The wife's contributions to the welfare of the family should be recognised in a substantial way: *Crawford (1979)*; *Waters (1995)*.
 - Post separation contributions to be taken into account - The wife contributed to the welfare of the children post separation: *Williams (1985)*.
 - There are no inheritances, windfalls or negative contributions.
 - Contributions at this stage are assessed slightly in favour of the husband.

- Consider Step Three:
 - The Court will consider matters set out in section 79(4)(d)-(g) and will take into account the section 75(2) factors so far as they are relevant.

- Detailed discussion of the relevant section 75 factors. The wife is in good health. The husband is suffering depression although we do not know the severity of this. A medical report would be required if he is unable to return to work. There is a huge disparity in income between the parties. The wife has the sole care of the children with little assistance from the husband at this stage. Even if the wife returned to the work force she would not be able to receive an income comparable to the husband. The husband could argue that he is paying the private school fees by way of child support.
- There would be an adjustment in favour of the wife after assessing the section 75(2) factors.
- Fourth Step:
 - The likely outcome would be a split of 60 to 65% of the realisable assets in favour of the wife and this would not create an inequitable situation for either party that might require final adjustment.
 - The superannuation interests would be split in such a manner that would result in the parties receiving an equal amount.