

LEGAL PROFESSION ADMISSION BOARD

MARCH 2013

FAMILY LAW

Time: Three Hours This paper consists of **four** questions.

Candidates are required to attempt all **four** questions.

All questions are of equal value.

All questions may be answered in one examination booklet.

Each page of each answer must be numbered with the appropriate question number.

Candidates must indicate which questions they have answered on the front cover of the first examination booklet.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade.

This examination is worth 80% of the total marks in this subject.

Permitted Materials: This is an open book examination. Candidates may refer to any books and any printed or handwritten material they have brought into the examination room.

As some instances of cheating, plagiarism and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct may result in instant expulsion from the examination and may result in exclusion from all further examinations.

This examination should not be relied on as a guide to the form or content of future examinations in this subject.

Question 1

You act for Sandra (31 years old) who seeks your advice in relation to moving with her 4 year old son, John, from Sydney to coastal Victoria where her family lives. She also seeks your advice concerning the appropriate orders she should seek in response to Mark's application which was recently served on her.

Mark (37 years old) is John's father and vehemently opposes the relocation. Mark wants to formalise parenting arrangements. Mark's application, in summary, seeks the following orders:

- An order for equal shared parental responsibility.
- An order that John lives with each parent on a week- about basis during the school term and for half of each school holiday period.
- An order that John have liberal communication with each parent.
- An order restraining either parent from relocating John's residence more than a 30 minute commute/drive from the school that he currently attends.
- Usual orders for the sharing of information between the parents.

Prior to separation

She and Mark cohabited for 2 and ½ years, 1 year prior to John's birth and 1 and ½ years after John's birth. They lived together in Sydney's inner west.

She worked full time as a Beautician in the Sydney CBD.

Mark was only employed for a total of 4 months during their relationship.

They separated because Mark was a heavy drug user (especially ice, ecstasy, acid) and an alcoholic.

After John was born, Mark would disappear for 2 or 3 weeks at a time, without telling Sandra and then he would re-appear.

She returned to full-time employment when John was 3 months old, and she enrolled John in long-term day care.

Prior to separation, Mark contributed a total of \$200 towards John's support.

After separation

For 2 years post-separation, Mark lived about 4 hours away from Sydney. During this period Mark would "turn up" at her home, about once a month to spend time with John. If he appeared sober, Sandra would facilitate this for 2-3 hours at a time.

Mark returned to Sydney when John was 3 and ½ years old. Mark and Sandra entered into an informal agreement that, provided Mark was sober during these periods, John could spend time with Mark:

- Until John started kindergarten, each alternate weekend from Saturday morning to Sunday evening and overnight every Wednesday from after pre-school until before pre-school on Thursday.

(Question 1 continues)

(Question 1 continued)

- After John started Kindergarten, each alternative weekend from after school on Friday until before school on Monday; from after school on Wednesday for 4 hours and half the school holidays, provided the holiday period week is spent with Mark at his parent's home.

There were difficulties with Mark's consistent compliance with this agreement.

- Mark sometimes did not turn up to collect John from pre-school/school and Sandra would be contacted and have to make urgent alternative arrangements.
- John's pre-school and school both complained to Sandra that Mark would often deliver John without a snack or lunch and that John appeared tired or listless, dirty and hungry.
- Mark sometimes went for a month to 6 weeks without spending time with John. John would expect Mark and be very disappointed.

In January 2013, Mark told her that he has significant gastro-intestinal problems and liver disease which requires surgery.

Sandra has recently become aware that Mark suffers seizures because after John returned from spending the recent Christmas holidays with Mark, John told her that he had to call an ambulance as Mark had a seizure.

Post separation and to date, Mark has contributed a total of \$600 towards John's support.

Relevant relationships

On occasions that Mark was sober and unaffected by drugs or alcohol, he was a loving and caring father and John enjoyed these times with Mark.

John "adores" both his maternal and paternal grandparents.

Sandra gets on very well with Mark's parents and they love having John stay at their home on the South Coast of NSW.

Mark is an only child.

Sandra has 4 siblings and 4 nephews and 3 nieces.

Sandra's parents and siblings now live in a small coastal village in Victoria.

John is very close to his cousins, especially the younger 4 who are close to his age. He usually spends a total of 4 weeks a year during the school holidays periods with the maternal family.

Sandra's reasons for her proposed relocation

Until 2 years ago, 2 of her siblings (with children close to John's age) lived in Sydney. Sandra and John saw them regularly, at least fortnightly. John misses his cousins very much. She feels isolated and misses their support.

In Sydney, Sandra has only been able to afford rental accommodation, usually a 2 bedroom unit, in Sydney's inner west. John has always attended the same primary school in Sydney's inner west.

(Question 1 continues)

(Question 1 continued)

As a single mother, she is only offered a 6 month lease, with the tenancy then continuing on a month to month basis. She and John have had to move on 6 occasions in the past 5 years because the landlord has decided to renovate or sell the unit she had been renting. She can no longer afford to rent accommodation in Sydney's inner west. She now rents a unit which is a 30 minute drive (or 45 – 50 minutes by public transport) away from John's school. As she spends 1.5 hours commuting to and from work, she has had to enrol John in before and after school care. He has become quite unsettled at school since their last move.

Sandra's parents have offered to financially assist Sandra with the purchase of a 3-bedroom home for herself and John, and to set up her in her own Beauty Salon business should she be permitted to relocate. Sandra wants to take up their offer.

Mark's recent drug and alcohol use

Based on when they were living together, Sandra estimates that Mark's periods of abstinence would last from 2 – 3 days up to 3 weeks. He would then "fall off the wagon" and go on a drug and alcohol binge for anything between 2 weeks and up to 2 months. She believes that this has been and remains his current pattern of alcohol and drug use.

In 2009, Mark was disqualified from driving for 5 years as a result of his third high-range drink-driving offence.

When John returned home from spending time with Mark during the recent Christmas school holiday period John asked Sandra:

- "Mum, why does dad always take his back pack to the bathroom, and when he comes out acts funny?"
- "Why does Dad always smell like beer?"
- "Dad was driving and the police stopped the car. They then took us to the Police Station and we had to wait for ages until nan and pop (Mark's parents) came and picked us up."

Mark's mother confirmed that on 28 December 2012, Mark was driving (with John) while disqualified. He had a blood alcohol level in the high range and was arrested and charged.

Sandra is very concerned about Mark's continued drug and alcohol use and wants to ensure that Mark does not use drugs or alcohol when John is in his care.

Specifically referring to the facts and the relevant law, advise Sandra about the nature of the orders she should seek in her response to Mark's application and the matters a court will consider in determining her proposal to relocate.

(20 marks)

(Question 2 follows)

Question 2

You act for Elizabeth who seeks your advice in relation to property settlement after the breakdown of her marriage to Alex. Elizabeth instructs you that:

- She and Alex have been married for 15 years.
- They have 2 children, Jill (aged 12 years) and Tom (aged 9 years).
- She and Alex separated under the same roof 6 months ago.
- She is an artist and art restorer and was in full time employment at a reputable commercial art gallery earning approximately \$60,000pa when she married Alex.
- Alex is a qualified engineer and was in full time employment with a multi-national construction company earning approximately \$80,000pa plus company car when they married.
- When she and Alex married, Elizabeth had the following assets:
 - An interest in a time share in Aspen inherited from her grandmother – value \$40,000 based on value for probate.
 - 2 Arthur Boyd paintings inherited from her grandmother – value \$30,000 based on value for probate.
 - A Mazda motor vehicle – value \$8,000 based on its trade-in value 1 year later.
 - Savings of \$10,000 – based on relevant Bank statement.
 - Interest in Creative SuperFund – value \$70,000 based on her annual statement for that year.
 - She did not have any liabilities.
- When she and Alex married Alex had the following assets:
 - A motorbike – value \$12,000 based on its trade-in value 1 year later.
 - Interest in MLC SuperFund – value \$50,000 based on his annual statement for that year.
 - Minimal savings, because she and her family paid for their wedding and honeymoon.
 - She does not recall whether he had any liabilities.
- They initially lived in rental accommodation during the first year of their marriage, equally sharing expenses and household duties and contributing to joint savings
- 1 year after they were married, she and Alex purchased a 3 – level terrace at Paddington (former matrimonial home “FMH”) for \$350,000.
- The purchase of the FMH was financed as follows:

Deposit:	\$ 35,000 (joint savings)
Balance of purchase price (including stamp duty & legals):	\$ 50,000 (gift from her parents)
	\$ 300,000 (mortgage)

(Question 2 continues)

(Question 2 continued)

- Elizabeth resigned 3 months prior to Jill's birth, and until approximately 3 years prior to separation, she did not earn an income. During this period she undertook the primary, homemaking and parenting role and Alex met their ongoing financial commitments and expenses.
- Upon her resignation, she received a termination payment of \$35,000. She used \$30,000 to reduce the mortgage and \$5000 for purchasing items for the nursery in preparation for Jill's birth.
- Shortly prior to Tom's birth, Alex resigned from his employment. Alex received a termination payment of \$60,000 but Elizabeth does not know what he did with this.
- He then commenced working as a contractor, utilising a corporate structure, Jalex Engineering Services Pty Ltd ("JES P/L"), until approximately 3 years prior to separation.
- JES P/L had its registered office at the FMH and Alex is its sole director and shareholder.
- JES P/L employed Alex and he received a wage of \$70,000pa during this period, although JES P/L received fees between \$140,000pa and \$160,000pa on average. JES P/L did not have any other employees.
- Elizabeth had no involvement in JES P/L, although she would occasionally answer the phone and take messages.
- About 7 years ago, Alex received \$150,000 from his grandfather's estate which he invested in a share portfolio which he has managed.
- Approximately 3 years prior to separation, they agreed to operate a commercial art gallery and restoration business from the FMH, utilizing a corporate structure in which they were equal shareholders and directors.
- They incorporated TAJE Modern Gallery Pty Ltd (TAJE P/L) for this purpose. TAJE P/L obtained an overdraft facility of \$50,000.
- They drew down \$150,000 on their mortgage to renovate the FMH to accommodate the gallery. After this draw down, the mortgage balance was \$450,000.
- Elizabeth designed the gallery space, including specifications concerning lighting, temperature, colour scheme, fabrics and finishes. Alex arranged and supervised the sub-contractors.
- They also set up a self-managed superannuation scheme, TAJE Super, at this time and rolled over their respective entitlements into this fund. Alex rolled over his then entitlement of \$220,000 and Elizabeth rolled over her then entitlement of \$80,000 into TAJE Super.
- Alex always managed their finances. From recent discussions with Alex about their current financial circumstances, she has prepared the following balance sheet:

(Question 2 continues)

(Question 2 continued)

Item	Ownership	Wifes Value	Husband Value
Assets (non-superannuation)			
Paddington terrace (Former matrimonial home)	Joint	\$1.5million	\$1.5million
TAJE P/L	Joint	Not known	\$200,000
JES P/L	Husband	Not known	Nil
Share portfolio	Husband	\$150,000	\$150,000
Saab motor vehicle	Husband	\$95,000	\$25,000
Mazda motor vehicle	Wife	\$20,000	\$20,000
Time share Aspen	Wife	\$50,000	\$50,000
2x Arthur Boyd paintings	Wife	\$30,000	\$100,000
Motorbike	Husband	\$50,000	\$50,000
Furniture/furnishings	Joint	\$5,000	\$5,000
Total Assets (non-superannuation)		\$1.9million	\$2.1million
Assets (Superannuation)			
TAJE Super (member balance)	Husband	\$280,000	\$280,000
TAJE Super (member balance)	Wife	\$220,000	\$220,000
Total Assets (superannuation)		\$500,000	\$500,000
Liabilities			
Mortgage on FMH	Joint	\$450,000	\$750,000
Overdraft – TAJE	Joint	\$50,000	\$150,000
Loan for Saab	Husband	Nil	\$100,000
Total Liabilities		\$500,000	\$1million
Nett Assets (non-superannuation)		\$1.4million	\$1.1million
Nett Assets (including superannuation)		\$1.9million	\$1.6million

- Elizabeth is shocked at the extent of their liabilities. Alex did not consult her nor obtain her consent to the increasing these liabilities beyond the amount she ascribes as their respective values in the balance sheet. She was not aware of the alleged loan for the Saab.
- She wants to continue her parenting role.
- She would like to keep living in the FMH and to run the gallery business and she is prepared to re-finance the mortgage and overdraft to the values she ascribes to them.
- Maintaining her superannuation interest is not important, but she would like to keep her time share, her 2 Arthur Boyd paintings and car.
- She is not confident that Alex is being entirely honest about their assets and liabilities.
- Alex is 42 years and in good health.
- Elizabeth is 48 years and in good health.

(Question 2 continues)

(Question 2 continued)

- Although she has never actually received any monies from TAJE P/L, Alex told her that he and Elizabeth are each shown in the company accounts to draw a weekly wage of \$750 from TAJE P/L and this continues to date.
- Other than her recent experience in their gallery business, she has no recent experience in her area of expertise and believes that it will be extremely difficult for her to obtain employment similar to her employment at the time of their marriage.
- She believes that Alex will have no difficulty either obtaining employment as an engineer or as a contractor.
- As they are separated under the one roof and operating the gallery business together, Elizabeth has not made an application for child support.

Specifically referring to the facts and the relevant law, advise Elizabeth about the approach that a court is likely to adopt in determining her entitlement to a property settlement and the orders that a Court is likely to make. Include in your answer a brief discussion of the impact that the recent High Court decision of Stanford and Stanford [2012] HCA 52 has had/may have on the approach that a court may adopt in determining her entitlement to a property settlement.

(20 marks)

(Question 3 follows)

Question 3

Answer **BOTH** parts of this question.

(a) Elizabeth returns to see you. She tells you that there has been a significant deterioration in her relationship with Alex over the past month and that they are constantly arguing.

The tension in the FMH is unbearable and their arguments are starting to adversely affect the children. It is also adversely affecting the business. Alex has been criticising her in front of clients and he is rude to clients. The gallery has lost 2 valuable clients and its most successful artist because of his behaviour.

Elizabeth has recently seen a letter from the mortgagee disclosing that mortgage repayments have not been made for the past 5 months and threatening taking legal action for possession if the arrears are not paid by 22 March 2013.

When she attempted to discuss this letter with Alex the previous night he “just exploded”. He abused Elizabeth, using disgusting language, including “the f... and c.... words”. The children became distressed and Tom started to cry. Alex abused Tom, calling him a “f..... sissy” and said to Jill: “I hope you don’t grow up to be a f.... bitch, like your mother”. Alex then stormed off and has not returned to the FMH.

Elizabeth seeks your advice. She wants to make sure that Alex:

- Moves out of the FMH;
- No longer has any involvement with the running of the gallery business which she wants to run herself from now on;
- Pays the mortgage arrears by 22 March 2013;
- Does not swear at, or abuse the children or call them derogatory names or criticise her to the children.

Any relevant facts from Question 2 are applicable to this question.

Specifically referring to the facts and the relevant law, advise Elizabeth about whether or not a court can grant the relief that she seeks. Include in your answer the matters that a court will consider determining whether or not to grant the relief that Elizabeth seeks.

(10 marks)

(Question 3 continues)

(Question 3 continued)

(b) Elizabeth returns to see you. Alex has now moved out of the FMH. Elizabeth and the children continue to live in the FMH and she now operates the gallery business.

Court orders, by consent, have been made in relation to parenting arrangements which, inter alia, provide that the children:

- Live with Elizabeth;
- Spend time with Alex each alternative fortnight from after school on Friday to before school on Monday during the school terms and for half the school holidays.

Elizabeth seeks your advice about her entitlements to receive child support for the children.

Alex has been paying her a total of \$150 per week for the children since the above court orders were made.

Elizabeth has told Alex that this is not nearly enough to cover the expenses in relation to the children. In response Alex has offered to pay Elizabeth a total of \$350 per week for the children provided that she does not go through the Child Support Agency.

Elizabeth still does not trust Alex. She believes that Alex has obtained a lucrative engineering contract (she believes at least \$150,000pa) and that he is trying to avoid paying the full amount of child support for which he is liable.

Any relevant facts from Question 2 are applicable to this question.

Advise Elizabeth about the factors that are considered in determining the amount of child support which she will receive. Include in your answer a brief discussion of the advantages and disadvantages to Elizabeth of entering into an agreement with Alex for the payment of child support and of any specific requirements for such agreement/s.

(10 marks)

(Question 4 follows)

Question 4

Answer **BOTH** parts of this question.

(a) You act for Peter who seeks your advice.

Peter instructs you that his former de facto partner, Kate, wants to finalise their financial arrangements by entering into a financial agreement.

He instructs you that he and Kate have 3 children, aged between 7 and 12 years. The children live with Kate and spend time with him whenever he is in Sydney.

He is a commercial pilot and earns in excess of \$250,000 pa and has superannuation entitlements of \$500,000.

Kate does not work. She last worked, as an air hostess, nearly 13 years ago.

He and Kate have agreed that they will divide their property equally and this also applies to his superannuation.

He wants to make sure that the financial agreement also deals with any claim against him that Kate may have for maintenance.

Peter also seeks your assurance that neither Kate nor any one else will be able to challenge the financial agreement entered into between Kate and himself.

Advise Peter. Include in your advice the requirements for a financial agreement to be binding, including any specific requirements relating to superannuation and maintenance and the grounds, if any, on which a financial agreement may be challenged.

(10 marks)

(Question 4 continues)

(Question 4 continued)

(b) Peter returns to see you. He complains that Kate's lawyers are very difficult to deal with. He says that his lawyer has convinced her that she will get a better deal in court and she has refused to enter into the proposed financial agreement.

He shows you a letter that he received from Kate's lawyer seeking that he pay Kate maintenance as follows:

- A lump sum of \$8,000 within 7 days to pay for her outstanding bills such as telephone, electricity, health insurance, registration and insurance on her car and urgent repairs to her car; and
- \$500 per week from 22 March 2013 for her ongoing expenses.

Peter cannot understand the basis on which Kate can make these claims for maintenance as she lives in their home and he makes the mortgage repayments and pays all the rates and assessed child support.

Peter also tells you that Kate has access to funds of at least \$20,000. She has her own savings of at least \$10,000. In addition, there is at least \$10,000 in the children's various bank accounts and Kate has been the only person who has operated these accounts.

Any relevant facts in Part A of this question are applicable to Part B of this question.

Specifically referring to the facts and relevant law, advise Peter of the matters that a court will consider in determining Kate's claims for maintenance and the merits of her claims.

(10 marks)

END OF PAPER