



# **UNIVERSITY OF ZIMBABWE**

## **November/December 2018 Examinations**

<b>Faculty:</b>	<b>LAW</b>
<b>Department:</b>	<b>PRIVATE LAW</b>
<b>Paper code and Title:</b>	<b>LB203 FAMILY LAW</b>
<b>Duration:</b>	<b>3 HOURS</b>
<b>Examiner:</b>	<b>DR E. RUTSATE</b>

**Authorized Materials:**      **Un-annotated copies of Course Outline, Constitution and prescribed Statutes**

### **INSTRUCTIONS:**

1. This paper contains 2 Sections and 6 Questions
2. Answer FOUR questions, TWO from Section A and TWO from Section B.
3. NOTE THAT QUESTION 1 IN SECTION A AND QUESTION 4 IN SECTION B ARE COMPULSORY
4. Start each answer on a new page. Note that if a question has sub-questions such as a, b or c, it should be treated as one question. Do not answer the sub questions on new pages but as a continuation.
5. Each question carries an overall mark of 20
6. This question paper comprises 5 printed pages

**NB: DO NOT TURN OVER THE QUESTION PAPER OR COMMENCE WRITING UNTIL INSTRUCTED TO DO SO.**

## **SECTION A**

### **Question 1**

You are a Magistrate at Harare Civil Court. The maintenance case of Tilda Dube versus Tom Gutu is brought before you for a hearing. The facts of the case are as follows; Tom and Tilda were married 16 years ago in terms of the Marriage Act [Chapter 5:11]. Tilda has three minor children with Tom namely Susan (15); Ben (13) and Norma (9). All these children attend private school. Tilda is self-employed and makes around \$4,000 per month. Tilda and Tom have since gone on separation and he has not been contributing any maintenance for the children. Tilda is feeling the burden of looking after the children on her own. She pays rent in the sum of \$500 per month. Norma is asthmatic and requires expensive medication. Tilda is also looking after her parents who are in the rural areas.

Tom on the other hand is employed as a General Manager at a retail outlet. His net income is \$5,000 per month. Tom's defence is that he will only look after the children if Tilda and the children come back home. He is afraid that if he gives Tilda any money, she will be reckless and not spend it on the children. He also avers that the amount in the sum of \$3300 that Tilda is seeking (i.e. \$1,100 for each child) is excessive. If the court finds that he should be paying maintenance (which he still disputes that he should pay) he is offering \$300 per child per month. On top of it all, Tom avers that a month prior to the current maintenance application, he also received summons from his son Talent who was born from a relationship he had with one Sarah Kaseke. Talent's mother never made an application for maintenance but now she has been laid off from work and she is finding it hard to pay fees for Talent who is 20 years old and a student at the University of Zimbabwe. Tom is also looking after his late sister's three children and he hardly has any money left at the end of the month. At the hearing, Tom's lawyer vigorously cross examines Tilda and she ends up crying.

After hearing the case, prepare a judgement covering the following issues:

- (a) The factors that the court considers in determining whether or not a respondent should pay maintenance; **(5 marks)**
- (b) The quantum of maintenance based on the Gwachiwa formula and any other factors that the court will take into account in making a determination on the quantum; **(7 marks)**
- (c) Whether or not Tom is legally liable to pay maintenance for Talent and why? **(4 marks)**
- (d) Also comment on the nature of a maintenance hearing and what the court can do. **(4 marks)**

**[20 Marks]**

## **Question 2**

- (a) Define the best interests of the child concept. **(5 marks)**
- (b) Outline the different legal and human rights frameworks under which it is provided for. **(7 marks)**
- (c) With detailed reference to both Zimbabwean and South African case law discuss the different legal scenarios under which the courts have used the concept. **(8 marks)**

**[20 Marks]**

## **Question 3**

Varume Ngwarai is a pressure group advocating for the rights of men. They are due to appear before the Parliament of Zimbabwe Portfolio Committee on Women, Gender and the Youth with the aim of expressing their disappointment on the law relating to paternity. In a press conference that they held, they made reference to a newspaper article which stated that out of 11 cases of paternity, 7 of the alleged fathers turned out not to be the fathers. You are a legal officer with Equality Rights Now in Zimbabwe (ERNZ). The Chairperson of the Committee approaches you for legal information on the issue.

Prepare a comprehensive paper critically analysing the law relating to paternity. Your answer should be backed by comprehensive case law from local and other jurisdictions on how other countries approach the issue.

**[20 Marks]**

## **SECTION B**

### **Question 4**

Obrien Ntuli, a cross-border truck driver got married to Oppah Mutsinze, a nurse in a civil marriage in Bulawayo in 2002. The couple who rented a house in Nketa suburb had two children Olinda born in 2004 and Owen born in 2006. After a series of violent fights over money issues and disagreements over why Obrien had trained to be a sangoma (traditional healer) in South Africa, the couple divorced in 2008. In 2009, Oppah moved to Harare with the children then aged 5 years and 3 years respectively. She went on to live with her unemployed mother and father, a pensioner who owned a 4 roomed house in Mabvuku, Harare.

Obrien who by 2010, was now a popular sangoma in Bulawayo and had remarried, would often send \$150 after every 3 months for the children's maintenance. In June 2012, Oppah moved to the UK, leaving her two children aged 8 years and 6 years in the custody of her mother, who was by then aged 50 years. Obrien was not happy with the arrangements but did not take any action as he had recently married a second wife and hence did not want to jeopardise his new marriage. He also stopped contributing any maintenance for the two children as from July 2012. Initially Oppah was sending a few pounds each month for her

children's upkeep but of late due to her prolonged illegal immigrant status she is having difficulties in securing any job and hence is leading a hand to mouth lifestyle.

Realizing the need to care for her two grandchildren, Mrs Mutsinze started growing vegetables in an open space located across from her house which she would sell together with fruits she ordered from Mbare Musika. Starting in January, 2017 she would realise a monthly profit of approximately \$300. However as from September, 2018 due to a serious cholera outbreak in Harare, her usual customers were no longer buying her fruits and vegetables. She got a paltry \$25 at the end of September and October, 2018 while her husband gets \$80 per month as pension. Although they are failing to financially cope, Mrs Mutsinze cannot let out any of the other rooms in her house since Olinda now a teenager in Form 2 requires the privacy of her own bedroom. She now has more needs which include sanitary ware. Having outgrown the uniforms bought for her when she started Form 1 in January, 2017, Olinda requires new school uniforms when schools open in January, 2019. Owen will also be starting Form 1 in January, 2019 and hence also requires new uniforms.

You are a junior lawyer with Kunta Kinte and Associates legal firm in Harare and Mrs Mutsinze instructed you to issue summons to Obrien for maintenance for the two children now aged 14 years and 12 years in the sum of \$200 per month per child, starting January, 2019. She also requires that Obrien pay arrear maintenance from July, 2012 to December, 2018 at \$50 per month for both children which is what he was voluntarily paying before Oppah left for the UK totalling, \$3 900.

In his response, Obrien argues that children cannot be maintained in arrear. He is not prepared to pay any maintenance to Mrs Mutsinze. He has filed a counter application applying for custody of the two children indicating that at 56 years, Mrs Mutsinze is too old to take care of teenagers as compared to him at 36 years with two wives who could look after them whenever he was outside the country on business. He said Mrs Mutsinze was poor with no money and yet he earned \$800 per month as a truck driver and made \$2000 per month as a sangoma and so he could take better care of his children. He also averred that as the biological parent of the two children he had more right to have custody than a 3<sup>rd</sup> party. He also wanted his children to grow up together with his other two girl children aged 7 years and 5 years knowing his clan's culture, language and customs.

You are required to fully advise a distraught Mrs Mutsinze on all the legal issues arising in this matter and her prospects of success as she is now crying after hearing Obrien's response. She fears losing custody of her grandchildren to whom she is very close.

**[20 Marks]**

## Question 5

Tukai Makomo got customarily married to Sekai Mlambo in 2010 whereby Tukai paid \$500 in bride price or lobola to Sekai's parents. The couple never registered their marriage. The couple lived together for 3 years with no child. Hence starting in 2013 Tukai started having many other girlfriends in a bid to have a child because he believed that it was Sekai who was barren. The couple started having marital problems whereby they would always be fighting over Tukai's extramarital affairs. In 2014 as an act of revenge, Sekai started having an extra-marital affair with Jonasi, a neighbour who had a wife and two children who were both girls. Sekai fell pregnant as a result of her affair with Jonasi and gave birth to a boy child Mark who is now aged 4 years. Mark looks exactly like Jonasi's two daughters. Tukai accepted Mark as his child but his marital problems with Sekai continued and he continued with his extra-marital affair with his long-time lover, Muchaneta.

In June, 2018 Sekai was caught *in flagrante delicto* (red handed) by Tukai having sexual intercourse with Jonasi in Tukai and Sekai's bedroom. Sekai fled to her parents' home with her child Mark, telling Tukai that Mark was not his child. The two later reconciled and Sekai returned home in September, 2018. Tukai has sued Jonasi for adultery damages while Sekai has also sued Muchaneta for adultery damages in the local Magistrate court. In responding to Tukai's action, Jonasi is admitting the adultery and wants to have custody of Mark claiming him as his son.

Tukai and Sekai have approached you as a lawyer with Freedom Alive Probono Lawyers Association (FAPLA) for free legal advice on their cases as they seek a way forward. Advise the two accordingly.

**[20 Marks]**

## Question 6

Hazvinei Maposa was only 18 years old when she had to get married to one Milton Makuruku aged 22 years as she was pregnant. She met Milton at an upmarket night club in Borrowdale frequented by young women and men from rich families. Milton who was actually employed as a full-time disc jockey (DJ) at the night club had lied to Hazvi that he came from a wealthy family and was only disc jockeying as a hobby while on vacation from college in USA. In actual fact, Milton lived in a worker's cottage with his poor parents, a gardener and a houseworker at their employer's house in Borrowdale. He only had "O" Level qualifications since his parents could not fund his further education.

On the other hand, Hazvi was an only child of a very wealthy family who had just completed her Advanced Level studies at a local private school. On realizing the truth when Hazvi fell pregnant, her parents hurriedly arranged the two's white wedding which occurred on 14 April 1988. Hazvi's parents gave their daughter a beautiful double storey house in Highlands suburb currently valued at US\$800 000 as well as a set of antique jewellery pieces inherited down the family line worth US\$500 000. The house was fully furnished with antique furniture

which had been in the Maposa holiday home in Nyanga. Hazvi's parents funded Milton's further education while Hazvi stayed at home.

After acquiring a degree in Accounts in 1996, Milton thereafter got very good executive jobs and bought two more houses in Mandara and Chisipite in which he put tenants. Hazvi's parents both collapsed and died one after the other during the economic recession of 2008 due to stress after they had lost everything after making an unwise investment decision in which they lost their own house. Since 2012, Hazvi and Milton who have three children aged 22, 16 and 12 have been having serious marital problems due to Milton's numerous adulterous affairs.

In 2016, Milton started a shipping business which is doing very well. In August 2017, Milton moved out of the matrimonial home in Highlands and is living with a girlfriend in his Chisipite house. After winning Parliamentary elections in July, 2018 for a seat in Chitungwiza where his parents now live, Milton has instituted divorce proceedings alleging irretrievable breakdown of marriage. He is prepared to pay maintenance for the 2 minor children as an out of court agreement but not for Hazvi whom he says at 48 years she can start a new life and fend for herself. He gives an example of himself who at 52 years has become a Member of Parliament. However, Hazvi has never been formally employed during their 30 year marriage as she was a full-time housewife.

As regards division of matrimonial property, Milton is suggesting that the Highlands home, antique furniture and jewellery be sold as it belongs to both of them and they equally share the proceeds. He also argues that he should be awarded the other two houses as he solely bought them without any input from Hazvinei who was not employed. He says Hazvi can keep the Honda CRV he bought for her in 2011 while he retains the Toyota Fortuner, Range Rover Evoque and Mercedes Benz vehicles he bought outside of his company vehicle, a Jeep Cherokee which he will get as a retirement benefit on 31 December, 2018. He is also expecting to receive another car for his role as an MP.

Hazvinei has approached you, a young lawyer working for a top flight legal firm Williams, Rugayo and Georges. She needs to know what the law says in matters similar to her case. Although admitting that the couple has not had any sexual intercourse since August, 2017, a period exceeding 12 months, Hazvi is of the view that with proper counselling their marital relations can be restored. She doesn't want a divorce. You are required to fully advise Hazvinei on the legal issues arising in this matter.

**(20 marks)**

**END OF EXAMINATION QUESTION PAPER**