Unit 7 – Family Law  
SUGGESTED ANSWERS – June 2010

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 2010 examinations. 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.

ILEX is currently working with the Level 3 Chief Examiners to standardise the format and content of suggested answers and welcomes feedback from students and tutors with regard to the ‘helpfulness’ of these 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.

SECTION A

Question 1(a)

This definition relates principally to a marriage being voluntary, monogamous and the parties being male and female. The Gender Recognition Act (GRA) 2004 had a major impact on the one man one woman element of the definition.

In the case of Corbett -v Corbett (1970) the court ruled that gender is determined at birth and cannot be altered by surgical intervention.

The case of Corbett remained good law for 30 years and was still upheld in Bellinger -v- Bellinger (2003) which concerned a male to female transsexual who had married as a woman. Again the marriage was void because they were deemed the same sex. Other illustrations would be equally acceptable such as Goodwin -v- United Kingdom (2002), Rees -v- United Kingdom (1987), I -v- United Kingdom (2002). The cases identified incompatibility with Article 8 ECHR 1998, the right to determine one’s own identity, and Article 12 ECHR 1998, the right to marry, thus placing pressure on the UK Government for reform.

The Gender Recognition Act 2004 (GRA 2004) was as a result of the above-mentioned incompatibility. The result is that after April 2005 gender recognition certificates can be issued to applicants over the age of 18 years allowing them to marry in their acquired gender.

A person obtains a gender recognition certificate in accordance with the requirements of S.2 GRA 2004. A gender recognition panel must be satisfied that the applicant

− has, or has had, gender dysphoria:
− has lived in the acquired gender for at least two years; and
− intends to continue living in the acquired gender for the rest of his/her life.
Only when a person is in receipt of a full gender recognition certificate is a person free to marry in accordance with their acquired gender and comply with the definition of marriage contained in Hyde -v Hyde, and the statutory provisions.

Question 1(b)

The Civil Partnership Act 2004 (CPA 2004) allows same sex partners to register their civil partnership and obtain legal recognition and consequences almost identical to married couples.

There are consequences and similarities as between a married couple and a civil partnership. For example, the parties have a duty to provide each other with financial support throughout the marriage. Equally, the parties can apply to the court for financial relief and property awards on the breakdown of the relationship. Furthermore, in both relationships the court has power to split a pension for the benefit of the other party. In terms of intestacy, if one party dies intestate, the other inherits whether it be a married couple or civil partnership. Furthermore, a party has the statutory right to occupy either the matrimonial home or the civil partnership home, what is sometimes referred to as home rights. Both relationships can only be ended by a formal court order. In relation to a marriage by way of nullity or divorce. In terms of a civil partnership by way of nullity or dissolution. (marriage – divorce or nullity, and civil partnership dissolution or nullity),

There are also differences between a marriage and a civil partnership. For example, it is a civil partnership and not a marriage, the former cannot be created in a religious ceremony. Furthermore, when establishing irretrievable breakdown of the marriage or the civil partnership, there is no fact of adultery for civil partnerships. Similarly, when establishing nullity, there are no grounds of non-conssummation for civil partnerships.

One can see that there are more similarities than differences and it would appear that marriage and civil partnership are relatively equal in status. However, a civil partnership may be deemed unequal because of the denial of the right to marriage, a fundamental right under Article 12 ECHR 1998.

Question 2

A marriage can be ended by a divorce or an annulment. Nullity petitions are rare because of the existence of divorce legislation, which has made it much easier for parties to end their relationship even where there may be grounds to have the marriage annulled. Furthermore, the particular fact of unreasonable behaviour for divorce (S.1(2)(b) MCA 1973)would cover all aspects of the grounds cited for nullity under S.12 MCA 1973.

A marriage can be annulled on the basis that it is void under S.11 MCA 1973. Void means that the marriage never legally existed, and that it was invalid from the start. There are several grounds upon which a marriage can be void under S.11 MCA 1973 namely:
- If the parties are within the prohibited degrees of consanguinity (blood ties) or affinity (moral based on marriage). For example an Aunt cannot marry her nephew and a stepfather cannot marry his stepdaughter.
- If either of the parties is already married, they cannot marry another.
- If either party is under the age of 16 years.
- If the parties are not male and female.
If either party to a polygamous marriage was domiciled in England at the time.

Similarly, if any of the formalities of marriage are not complied with then the marriage would be void abinitio (from the beginning). For example, a marriage conducted by a person not in Holy Orders.

Unfortunately divorce is not an option for those people whose marriage was void from the outset because of one or more of the grounds under S.11 MCA 1973. Thus, it is particularly important to retain the law on nullity. It is also important to retain the Law on Nullity for a party seeking financial relief.

A marriage can also be voidable under S.12 MCA 1973, which means it is valid and legal until either party chooses to avoid it. The grounds within S.12 MCA 1973 upon which a marriage can be voidable are as follows:-

- Non consummation of the marriage due to incapacity, and a party can petition on their own incapacity or that of their spouse, and non consummation due to wilful refusal by the other party.
- Lack of consent due to duress, mistake, or unsoundness of mind. Particular relevance being forced marriages which are very much a live issue.
- That one party was suffering from a mental disorder pursuant to S.1 MHA 1983.
- That the wife was pregnant by another man.
- That one of the parties had a STD.
- That either party has been issued with an interim gender recognition certificate during the marriage.
- That one of the parties has an acquired gender.

The consequences of a voidable marriage are that it is legal and valid until one party chooses to avoid it and pursue nullity proceedings. Furthermore, on the granting of the Decree of Nullity the court has the power to make financial orders under S.16 MCA 1973.

Some would argue that English Law should retain Nullity. Although behaviour under S.1(2)(b) MCA 1973 would cover all the voidable grounds, the Law on Nullity plays a vital role in our family law system, particularly by allowing access to the courts immediately rather than waiting a year under divorce legislation, and by virtue of allowing access to financial relief.

Nullity remains critical for those people with religious convictions and fear that they may be ostracised from their community if they divorce. If Nullity was abolished they would have to choose between divorce and ostracism, which may force them to remain in an unhappy/lifeless marriage.

Furthermore, lack of consent due to duress is critical to maintain particular in the remit of forced marriages which are more prevalent today. None of the facts for divorce cover this scenario specifically, and the Forced Marriages (Civil Protection) Act 2007 does not dissolve the marriage but only provides measures to protect people from being forced to marry without their consent, and such measures are not particularly effective.

In conclusion, for all the reasons above-mentioned the Law on Nullity is still relevant, should remain, and should sit alongside divorce legislation.
Question 3

The changes made by the Human Fertilisation and Embryology Act 2008 (HFEA 2008) primarily relate to the concept of who a parent is and the move away from the traditional mother and father approach. The concept of a parent now includes people with no biological relationship with the child and accommodates homosexual parenting. Furthermore, the Act specifically defines a “mother” but also provides for “another” parent who may or may not be the father. This was introduced by the Act to acknowledge that both parents could be of the same sex which would mean that the legal parents are not the same as the biological parents.

For the purpose of this question assisted reproduction refers to a woman being artificially inseminated with her husband/partner’s sperm or donor sperm, or a woman being implanted with donor eggs or a donor embryo. All these methods are referred to as “impregnation” for the benefit of the provisions of the HFEA 2008. In addition surrogacy is a form of assisted reproduction whereby a woman carries and gives birth to a child for the benefit of another (usually referred to as the commissioning parents), the surrogate being artificially inseminated with the sperm of the male commissioning parent or being implanted with an embryo with genetic material taken from both commissioning parents.

One key definition is that of the mother, contained within S.33 HFEA 2008 as “the woman who...has carried a child as a result of the placing in her of an embryo or of sperm and eggs”.

The reference to “the other parent” in the Act is complex, but broadly speaking covers the following categories:

Married Couples – In this situation the husband is deemed to be the other parent irrespective of whether or not his sperm is used, as long as he has consented if another man's sperm was used in accordance with S.35 HFEA 2008. Furthermore, pursuant to S.38 HFEA 2008 there is the maintenance of legitimacy for children of married parents.

Other Fathers - this covers the situation where no-one else is treated as the other parent of the child, so S.36 HFEA 2008 allows a man to be the father of the child if certain conditions are met even though their sperm is not used to fertilise the eggs. The conditions are that the impregnation must take place at a licensed UK centre and the agreed fatherhood provisions apply under S.37 HFEA 2008 which is about continuing consent at the time of impregnation and no withdrawal of that consent at any stage. One presumes it is in writing but issues arise if verbal consent is sufficient.

Sperm Donors and Egg Donors – Although S.40 HFEA 2008 provides that a person cannot be called the father of the child where he donates sperm for treatment services or non-medical fertility services, there has been case law which has treated that person as the father if the procedure has not been undertaken in the prescribed manner and at the licensed centre. This is illustrated in Re M (Sperm Donor: Father) (2003) Caution must therefore be exercised when donating in a more informal manner, that is when helping friends to have a baby. Similarly, under S.47 HFEA 2008, the woman who donates the egg will not be the other parent simply by virtue of donating, unless of course she wishes to be the other parent and satisfies the conditions.

The most change we have seen with this legislation is for female same sex relationships. It is possible for the female partner of the mother to be the other
parent under S.42 HFEA 2008. If the female partner is the civil partner of the mother at the time of impregnation then the female partner will be the other parent and the child will be legitimate if consent was in place. Furthermore, the Act goes further by stating that even if they are not in a civil partnership, but simply living together, the partner can be the other parent provided no-one else is being treated as such, and the parties comply with the agreed female parenthood conditions, which mirror virtually S.37 “other fathers” namely notice of continuing consent and no withdrawal of that consent. Thus, same sex couples are being recognised in the same way as unmarried heterosexual couples for the purpose of this legislation, and we see formal recognition that two parents can be the same gender.

In terms of surrogacy, the HFEA 2008 has had an impact, and we have seen new provisions. The surrogate mother still meets the definition of “mother” until the child is formally adopted. However, the commissioning parents can be spouses, civil partners or living as partners in an enduring family relationship. Under the 2008 Act the commissioning parents can apply for a parental order under S.54 HFEA 2008 in respect of the child. However, this is only effective if the commissioning parents have the baby living with them and the mother agrees. Thus, there is still the risk that at birth the surrogate will not give the baby to the commissioning parents and the 2008 Act has not changed that. It is not deemed a breach of contract, because the surrogacy arrangement was never legally binding to begin with. Furthermore, those commissioning parents who have chosen to apply for a residence order in respect of the child, have been disappointed because of the court’s reluctance to intervene once a child has bonded with the surrogate mother. Surrogacy is therefore still deemed risky.

In conclusion, it is clear that the Act demonstrates how our law has adapted to fit evolving scientific change. Furthermore, the 2008 Act has moved away from the traditional notion of who is parent so as to reflect the changes in society and the different forms of adult partnerships. The notion of the “other” parent has become much more inclusive, thus allowing for homosexual parenting and parenting for those who are not biological parents of a child. The Act makes it clear that both gay and straight people can use assisted reproduction, including the surrogacy arrangement. Furthermore, the female same sex partner is treated in the same way as the 'other father” under the provisions thus reflecting equality. However, as regards surrogacy, although we have the provisions in S.54 designed to safeguard the commissioning parents, that will only be the case in limited circumstances, and unfortunately the Act has not altered the precarious position of the commissioning parents in a surrogacy arrangement.

**Question 4**

Cohabitants on the breakdown of their relationship will be governed by property law and trust law, and they do not have the benefit of purpose built legislation. As a result this leads to unfairness and hardship, and to a degree uncertainty.

For cohabiting couples, legal ownership is determined by what is on the title deeds whilst beneficial interests relate to those people who are entitled to use the home. In the absence of any document to the contrary, the beneficial interest usually follows the legal ownership, demonstrating the equitable maxim “equity follows the law”.

For cohabitants on the breakdown of their relationship and the ensuing property dispute, one of them will be trying to establish an implied trust. There are two types, a Resulting Trust and a Constructive Trust. The party who is joint legal owner may be trying to convince the court that the beneficial interest was
something other than equal. However, where the property is in the sole name of a party, the other party will be trying to establish that it was intended that the beneficial interest should be shared.

With regard to a Resulting Trust, the court will presume this where a party makes a direct financial contribution to the purchase price of the property or deposit. However, it is not sufficient to pay towards monthly mortgage expenses or solicitors fees on the purchase, it has to be a direct financial contribution to the purchase price or deposit. This demonstrates the rigidity of such trusts. Furthermore, it does not necessarily reflect the true position where the non-owning cohabitant spends a lot of money on the house internally and contributes to the mortgage and the bills.

A Constructive Trust requires a common intention between the parties to share the property, with the non-owning party acting to his/her detriment based on that common intention. Such trusts are much more flexible. The key case is Lloyds Bank -v- Rossett (1990) which classified two distinct scenarios.

Firstly, if there is express discussion between the parties to share the property, and in reliance on that the person has acted to his/her detriment, that is conclusive. In Grant -v- Edwards (1986), a man told the woman that the house could not be put in joint names simply because it would prejudice his divorce and she relied on that to her detriment. The court said there was a constructive trust. This was upheld in the case of Midland Bank Plc -v- Dobson (1986)

Secondly, in the absence of express agreement to share, you have to look to conduct to infer common intention, and the non-owning cohabitant acting to his/her detriment in reliance. Lloyds Bank -v- Rossett (1990) states that it is doubtful whether anything less than direct financial contributions to the purchase price will suffice, but this includes direct contributions to the mortgage payments and any other substantial contribution such as renovating the house. This was brought together in the case of Oxley -v- Hiscock (2004) where guidance was given as to the questions to be asked in such matters. Basically, if there was no express declaration of trust was there evidence of communicated common intention. Only if the answer was no do you go onto ask whether common intention could be inferred from direct financial contributions to the purchase price which, in itself, is the detrimental reliance.

The current case law on trusts is Stack -v- Dowden (2007) which is a HOL decision and moves away from identifying the type of trust to focussing more on whether the parties intended to share. Basically, the party would have to establish a common intention when the property was acquired that the beneficial ownership was to be different from the legal ownership. The court set out a series of questions depending on whether the property was in joint names or in the sole name of one party. It was about looking at the parties “true intentions” and in establishing the parties true intentions the courts would have regard to numerous factors, such as why the property was purchased.

Clearly, the case law illustrates the unfairness and uncertainty for cohabitants and hence the need for reform. There is a clear inequality in the law with cohabitants being treated differently to those people who are married or in a civil partnership. It also demonstrates the stagnant nature of the law, which is not reflecting changing social attitudes. Some would say reform is required because trying to establish an interest is onerous, and the law is complex which leads to costly litigation. Additionally, it makes children of cohabitants vulnerable because of the lack of protection.
Equally, some people that reform is not required, primarily on the basis that there should be disparity to reflect the position that living together is not a formal commitment like marriage or civil partnership. Some would argue that in reality trust law is not commonly used because in most cases cohabitants own the property jointly and share income, and when it is used it works. Furthermore reform is costly and may not necessarily result in the desired change.

The Law Commission published a report “Cohabitation: The Financial Consequences of Relationship Breakdown” in July 2007. This recommends that cohabiting couples should have rights when separating but they must have a child together or have cohabited for a minimum period (2-5 years is recommended). However, there is also the recommendation that couples can contract out of the scheme by signing an agreement, which could be set aside if manifestly unfair. There would still be the requirement to show qualifying contributions, but in making any award first consideration would be given to the welfare of a minor child. The court would consider factors similar to those within S,25 MCA 1973 such as the parties financial needs and resources and conduct.

The Government have not implemented the aforementioned proposals as yet. However, the Cohabitation Bill (a Private Member’s Bill) was introduced in December 2008 providing a framework of rights and responsibilities for cohabiters to provide basic protection on the breakdown of their relationship incorporating cohabiters with a child, or those who have lived together for at least 2 years continuously, and with the provision to opt out. The Bill reflects those matters recommended by the Law Commission. Currently the Bill is still before Parliament. If successful, we may see the law for cohabiters being streamlined with the law relating to married couples/civil partners on breakdown of relationships.

**Section B**

**Question 1**

Either Richard or Adele would have to establish irretrievable breakdown of the marriage pursuant to S.1(1) MCA 1973 and it must be evidenced by one of the five facts stated in S.1(2) MCA 1973. They have been married in excess of one year so proceedings can be commenced immediately.

Adele can petition for divorce against Richard under S.1(2)(b) MCA 1973 “that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent”. This is a two part test being subjective and objective as stated in the case of Livingstone Stallard -v- Livingstone Stallard (1974). The court will ask “would any right thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him”.

Conduct or behaviour is more than just a state of affairs or a state of mind, it must be an act or omission or a course of conduct. For example in the case of Livingstone -v- Stallard constant criticism by the husband of the wife was sufficient. Other examples could include Ash -v- Ash (1972), Katz -v- Katz (1972), Stevens -v- Stevens (1979), Carter-Fea -v- Carter-Fea (1987). Similarly, Richard’s comments to Adele would be relevant behaviour. In addition Adele could rely on the lack of a physical relationship, the lack of communication, the verbal abuse and the going out drinking in support of her behaviour petition.

Richard could petition for divorce citing Adele’s behaviour stemming from her post natal depression and her current stress from which she has not fully
recovered. Richard may advocate that it is due to her behaviour that the marriage has irretrievably broken down. Furthermore, even though Adele’s behaviour is involuntary and understandable due to the previous miscarriages it can still be cited, as stated in the case of Thurlow -v- Thurlow (1976).

Richard could potentially petition based on S.1(2)(d) MCA 1973 “that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the divorce petition and the Respondent consents to the decree being granted”. However, Richard would have to establish a physical and mental dimension to living apart in accordance with S.2(6) MCA 1973. They are still living in the same property, and it would be necessary for Richard to establish that they were living separate and apart in the same household to establish the physical element. It would have to be total physical separation – two completely separate households under one roof. The case of Mouncer -v- Mouncer (1972) demonstrated that not having a physical relationship was not enough, when the parties still continued to eat meals together and the wife did all the housework.

Whilst Adele continues to undertake all the housework, cooks all the meals, they eat together, and they take family trips at the weekend, it is highly unlikely that they would be deemed to be living separate and apart for the purpose of S.1(2)(d) MCA 1973.

Furthermore, the provisions under S.1(2)(d) are subject to the proviso that one party must decide that the marriage is over and only when that decision is made does the time start to run. Thus, we are told that Richard has decided the marriage is over, but the question is at what point. Richard cannot rely on previous periods. Time starts to run from when he makes the decision that the marriage is over, as illustrated with the case of Santos -v- Santos (1972).

Even if Richard made the decision more than two years ago, periods of cohabitation of less than six months stop the clock running, whilst periods of time in excess of six months, start the whole process again under S.2(5) MCA 1973. Each weekend when Richard has returned home it could be deemed to be cohabitation because they are living as a family so they are only living apart during the week when he works away, so the actual working away period would have to be calculated for the purpose of S.1(2)(d) MCA 1973.

Overall, it seems quite unlikely that Richard could establish two years separation for the purpose of S.1(2)(d). However, even if he did there is also the fact that Adele must consent to the petition, such consent being informed and positive under S.2(7) MCA 1973. Adele may refuse to consent.

In conclusion, should either party wish to pursue divorce proceedings immediately, the likely basis would be S.1(2)(b) MCA 1973 unreasonable behaviour, which either Richard or Adele could petition on.

Question 2

2(a)

Afreen and Sunita have the protection of the Family Law Act 1996 (FLA 1996) by virtue of the fact that they are associated persons and relevant child respectively under S.62(2) FLA 1996. Afreen’s association is by virtue of her being a spouse. Sunita is a relevant child because she is a child who is living with, or might reasonably be expected to live with either party to the proceedings.
Afreen would be seeking an occupation order which regulates occupation of the family home. In order to make an application she must comply with the requirements, one of which is being an associated person, and the other of which is that she and Saheed have actually lived at the property together as their home, which they have.

Afreen's application would be under S.33 FLA 1996 as a person who is entitled to occupy the home by virtue of the fact that she is the joint legal owner of the property and has a joint beneficial interest. Under S.33(3) FLA 1996 she would be asking the court to allow her to enter the family home and occupy it with Sunita, and for an order that Saheed leave the property and be excluded from a defined area around the property because of his violence and threats of violence.

Such an application could be made ex-parte (without notice), but the court require stringent conditions to be met to make such an order on that basis. Furthermore, making an occupation order demonstrates interference with the right to peaceful enjoyment of personal possessions, and therefore the decision to make an order is not taken lightly, for fear it may infringe rights.

The court will first look at the balance of harm test contained within S.33(7) FLA 1996, as stated in the case of Chalmers -v- Johns (1999). If the applicant or relevant child is likely to suffer significant harm if the order is not made, then the court must make the occupation order unless the respondent or a relevant child will suffer greater harm if the order is made. Primarily, whether greater harm will be caused by making an order or refusing one. Significant is not defined in the FLA 1996, but harm is in S.63. In relation to an adult harm means “ill treatment or impairment of health” and ill-treatment includes physical and mental ill-treatment. For a child, the definition of harm is wider to include ill-treatment or impairment of health or development”. Furthermore for a child ill-treatment covers physical, mental and sexual abuse.

With regard to Afreen, it is likely that she will suffer significant harm if the order is not made. She and Sunita are living in a cramped one bedroom house, sleeping on a sofa bed in a lounge, miles away from home. This will impact on the health of both of them and will impact on Sunita's development. Afreen has lost the links with her community and Sunita is unable to attend nursery with her friends. She will be eligible for Local Authority accommodation as a priority, but that may still involve a considerable wait, and she may be housed miles away from the family home and Sunita's nursery.

Saheed could also establish significant harm to Fezan if an order is made. Fezan too is a relevant child for the purpose of the FLA 1996. There is very little chance of Local Authority accommodation because of the violent behaviour, so Saheed and Fezan would have to move to his parents over 30 miles away. This would cause Saheed to lose his job and Fezan would have to change schools, lose is close friends and activities, and his strong links with his community.

Thus, the balance of harm test may not be satisfied as was the case in B -v- B (Occupation Order) (1999), which had similar facts to this present situation.

If the balance of harm test is not satisfied the court will then look at the factors contained within S.33(6) FLA 1996 in deciding whether to exercise discretion to make an order:-

- the housing needs of the parties. Afreen and Saheed both have relevant children and require a house for themselves and a child.
The financial resources of the parties. Saheed has an income and can afford to pay a mortgage or rent. Afreen does not work and her income will probably be state based whilst possibly making an application for maintenance.

The likely effect of either making the order or refusing the order on the health, safety or well being of the parties or any relevant child. If an order is made Fezan will be moving 30 miles away, will lose his friends, his activities and will have to change school which will have a massive impact on him emotionally, and Saheed will lose his job. If the order is refused, Afreen and Sunita will have to remain in a cramped one bedroom property out of the area, away from friends and nursery, pending the granting of a Local Authority accommodation.

The conduct of the parties. Saheed's conduct has been more than trivial and the courts will take into account the violence, threats of violence and the constant continuing harassment.

It maybe that Afreen's application for an occupation order would be refused following the balance of harm test and and the application of the factors as above-mentioned.

2(b)

Afreen can make an application under S.42 FLA 1996 for a non-molestation order, which is an order that forbids the respondent from molesting the applicant and any relevant child. Although molestation is not defined in the Act, all the case law suggests that Saheed's actions, namely violence, threats of violence, abusive telephone calls, and following Afreen, would constitute molestation. Furthermore, it appears that the conduct is sufficiently serious to justify the intervention of the court.

The court would look at all the circumstances of the case including the need to secure the health, safety and well-being of the applicant and any relevant child. Essentially Afreen will need to establish that the order is necessary for the protection of herself and her daughter.

If a candidate has answered part(b) in part(a) credit will be given.

Question 3

Financial provision in respect of Tony and Monica on the breakdown of their relationship is governed by the Matrimonial Causes Act 1973 (MCA 1973), with the types of order that the court can make being contained within S.22 to S.25 MCA 1973. The court would take into account the factors contained within S.25 MCA 1973 and the body of case law in determining what type of order should be made. The overall aim of the courts is to achieve fairness on the division of assets.

First consideration is given to the welfare of any minor child of the family, namely Stacey under S.25(1) MCA 1973. The case law suggests that the parent with care will be in a better position because the courts will want to ensure the provision of a home for the child, as stated in the case of B -v- B (Financial Provision: Welfare of Minor Child and Conduct) (2002)

The courts will have regard to the statutory factors contained within S.25(2) as regards what orders are appropriate in the case of Tony and Monica, and of particular relevance to Tonya and Monica are the following factors:-
S.25(2)(a) MCA 1973 states that the court must look at the income, earning capacity, property and other financial resources of each of the parties which they have or are likely to have in the foreseeable future. Thus the court will look at the incomes and note that Tony earns 3 times more than Monica. The court will also look at the net value of the matrimonial home as being £320,000, and two further holiday homes both free of mortgage with a combined value of £220,000, and the fact Monica has no pension provision, whilst Tony has a substantial pension.

S.25(2)(b) MCA 1973 states that the court must look at the financial needs, obligations and responsibilities which each spouse has or is likely to have in the foreseeable future. The court would pay particular regard to the fact that the matrimonial home is needed for Monica’s business, without which she loses her income. Furthermore, the housing needs of Monica are greater because she has a minor child, Stacey. The court will look at the reasonable needs of both of them.

S.25(2)(c) MCA 1973 states that the court will look at the standard of living enjoyed by the family before the breakdown of the marriage. It will be noted that Monica and Tony have had a relatively good lifestyle with good incomes, and holiday homes. The court will be anxious to ensure that both parties maintain their standard or living and that one of them is not penalised.

S.25(2)(d) MCA 1973 states that the court will look at the age of the parties and the length of the marriage. Both Tony and Monica are 41 years of age, so substantial working years left, and that they have been married for nine years. As was stated in the case of Miller -v- Miller (2006) to state “a short marriage is no less of a partnership of equals than a long marriage”. nine years will probably be seen as short to medium.

S.25(2)(f) MCA 1973 states that the courts must look at the contributions which each of the parties has made or is likely to make in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home and the children. Clearly, Monica has contributed to Tony’s successful career by entertaining his business clients.

The court may also consider the loss of acquiring a pension benefit, which is a statutory factor, and clearly has relevance to Monica.

The court would also consider the clean break provisions under S.25A MCA 1973 either immediately, or in the future so as to encourage Tony and Monica to put the past behind them and move forward, thus creating less animosity because there is no continuing financial obligation. For Tony and Monica there is a huge discrepancy in Incomes and therefore it may point to a deferred clean break.

The court would also look at relevant case law such as White -v- White (2000) with reference to the yardstick of equality in the division of assets, and the issue of contributions. The court would also consider the cases of Miller -v- Miller (2006) and McFarlane -v- McFarlane. (2006) Both HOL cases and which are big money cases, but the principles that came from them apply to all cases. The courts do have flexibility in determining ancillary cases but the guidelines that exist ensure consistency. However, the overriding objective is to produce a fair outcome looking at the financial needs of the parties, compensation and sharing.

To conclude, we need to meet both parties needs, but Monica also has the minor child. She should also be compensated for helping Tony achieve his current earning capacity. It may be that Monica retains the family home, whilst Tony
retains the holiday homes. However, the holiday homes are free of mortgage, whilst the family home, is still subject to mortgage despite the net equity being higher. The mortgage company may be reluctant to transfer directly into Monica's name because of limited income, and additionally she may not be able to afford the house. Thus, In the circumstances it may involve settlement of the property with continuing periodical payments with a view to a deferred clean break. However, there is also the option for all three properties to be sold, and the proceeds with Monica gaining the majority of the proceeds to enable her to purchase a property outright sufficient for the needs of her daughter, herself and her business. Both parties would retain their respective incomes and pensions, and Tony would have sufficient monies to purchase another property. Finally, Tony has to be aware that the substantial pension that he has may be used as a bargaining tool by Monica. If he wishes to retain all his pension then he will need to be more willing to release other assets. The alternative is that the court could order that the pension be earmarked or split, with some portion for Monica's benefit.

**Question 4**

Jack can apply under the Children Act 1989 (CA 1989) for a Parental Responsibility Order, a Contact Order and a Prohibited Steps Order. The key principle is that the welfare of the child is of paramount importance S.1 CA 1989.

Parental responsibility is defined in S.3(1) CA 1989 as “all rights, duties, powers, responsibility and authority which by law a parent of a child has in relation to the child and his property.” As an unmarried father, whose name is not on the birth certificate, Jack does not automatically have Parental Responsibility in relation to his daughter Belle, and it is unlikely that Mary will agree to it, given the circumstances. Jack would have to apply to the court for a Parental Responsibility Order under S.4(1)(a) CA 1989. Parental responsibility will allow Jack some say in the important decisions that will affect his daughter, such as education, medical treatment and religion.

In deciding whether or not to make a Parental Responsibility Order, the court will consider the specific factors cited in Re: H (Minors)(Local Authority:Parental Rights)(No3)(1991). The factors are the degree of commitment he has shown to Belle, the degree of attachment that Jack and Belle have, and his reasons for applying for Parental Responsibility. The court will only make an order if it is for Belle's welfare.

Jack can also make an application under under S.8 CA 1989 for a Prohibited Steps Order, which is an order to stop Mary taking Belle and moving to Portsmouth. The court will look at the welfare checklist in S.1(3) CA 1989 which is explained later, but will also specifically look at what Mary proposes in terms of the move, the effect of refusing the relocation on Mary and on Belle, the effect on Belle of less contact with her father and the paternal grandparents, and the motivations of both parties. The court would ultimately look at whether it was in Belle’s best interests to relocate.

Jack can also make an application for a Contact Order under S.8 CA 1989, on the basis that Mary is refusing direct contact and is limiting him to telephone calls and letters. Contact is the right of the child and it involves the resident parent allowing the child to have contact with another person, usually the absent parent. Jack's application for Contact could be heard with the Prohibited Steps application, and the welfare checklist would be applied. The courts would also
consider the other principles – non-intervention principle, and the no-delay principle, in dealing with his applications.

It is highly unlikely to be successful but Jack could also apply for a Residence Order, which determines where the child will reside on a permanent basis.

The welfare checklist is contained within S.1(3) CA 1989, as follows:-

- The wishes and feelings of the child. Belle is only two years of age and so this is not relevant.
- The physical, emotional and educational needs of the child. The courts will look at the accommodation and if Belle has sufficient food. The court will consider Belle’s emotional needs to maintain a relationship with her father, and also she is still a baby and the need to be close to her mother Mary. Belle’s educational needs would not necessarily be a significant factor at this age.
- Any harm that a child has suffered or is at risk of suffering. Clearly, Belle is suffering harm by being denied a relationship with her father and the paternal grandparents.
- The child's age and sex. As a young girl Belle's needs may best be met by her mother, although this is not presumed.
- The capacity of both parties to look after the child. Again the scenario does not suggest any such issues from either parent.
- The likely effect on the child of proposed changes. For Belle, there would be no issues regarding school in view of her age, but moving away would mean losing the close bond with her father.

In conclusion, there appears to be no reason why Jack would not be granted Parental Responsibility in respect of Belle based on the specific factors and his application being based on his concern and love for his daughter. If granted he could exercise it independently (as can Mary) except in certain situations. Jack should also be aware that it can be removed if used to score points, or as a weapon, as was illustrated in the case of Re: P (Parental Responsibility)(1998).

In all probability Mary would be permitted to relocate to Portsmouth to care for her mother and start her new life based on the factors above-mentioned. The move would be likely to be in Belle's interests but on condition that Jack had contact with Belle. There is no reason to suggest that indirect contact would be the only option based on the circumstances and the welfare checklist. Jack would be granted direct Contact. It would be necessary to make an order because of Mary's resistance to such Contact. The court have been quite precise about maintaining the child's contact with the absent parent. In the case of Re: S (Contact Promoting Relationship with Absent Parent) (2004) “good enough parents should have a relationship with their children”. Furthermore, it was stated that even if there is hostility or lack of co-operation by the mother attempts at contact with the absent parent should continue. If Jack encounters problems he has S.11A CA 1989 which gives the court the power the power to direct that Mary take part in information sessions and counselling and S.11G CA 1989 allows the court to order a CAFCASS officer to monitor compliance. In reality for Jack these sanctions may not be sufficient.