

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 UNIT 20 – THE PRACTICE OF FAMILY LAW

JUNE 2023

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

This paper attracted a lower number of candidates (50) than in previous exam sessions. The pass rate was disappointing, being significantly lower than previous sessions.

Candidates for this exam have the benefit of the pre-release Case Study Materials (CSM) to support their revision. They also have the benefit of the Chief Examiner Reports which include comments on performance and also give suggested points for responses to indicate what is expected from the candidates in their answers.

Well prepared candidates who had knowledge of the topic across the specification, a good working knowledge of the case study materials and the necessary study skills, particularly those relating to providing responses at Level 6, were able to achieve good marks as they were able to show:

- knowledge of the topics across the specification in an appropriate level of detail for Level 6, and
- understanding through application to the case studies.

The poor performance of these candidates was due to a failure to either:

- evidence relevant knowledge, or
- evidence knowledge in the detail required at Level 6, and/or
- apply knowledge appropriately with reference to the facts within the case study materials.

The best performance was seen for Question 1 on divorce. Performance for the remaining 3 questions was similar, though these questions could be ranked as follows - Question 3, Question 2 and then Question 4 being the worst performing.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1 – Divorce

This question produced the best performance on the paper.

(a)

This question produced a range of responses, with candidates either able to show knowledge and understanding of the relevance of domicile and habitual residence to deciding jurisdiction, or not able to show this knowledge.

With the increase in the opportunity to live and work elsewhere in the world, the situation described in the case study is going to be increasingly encountered.

(b)

The Divorce and Discrimination Act (DDSA) 2020 resulted in a major change to the law on divorce but introducing a simplified, “no fault” process. The majority of candidates answered this question well. It was disappointing that a few of candidates failed to reference the DDSA.

(c)

Generally, good knowledge of the new procedure was shown, with quite a few references to the need to provide a translation of the marriage certificate. However, many responses did not include the need to submit a statement regarding irretrievable breakdown and not all candidates explained the 20 week period.

Question 2 – Financial settlement

Candidate performance was either weak, showing a lack of knowledge and understanding, or did show knowledge and understanding but of varying quality.

2(a)

Candidates needed to answer the question as instructed and explain how the client could remain in the family home:

- 1- While divorce application was pending – home rights, and
- 2- After divorce is finalised – property adjustment orders (PAO's) and trusts of land (Mesher/Martin orders)

Failure to achieve marks available occurred when candidates either did not identify, or did not identify and explain, home rights, or provide an explanation of the range of property orders available or an explanation of the trusts of land.

Some credit was given where candidates who mentioned occupation orders.

(b)

To achieve the marks available candidates needed to:

- 1- Identify and explain the relevant orders, maintenance pending suit and periodical payments and pension sharing orders, and
- 2- Show knowledge by identifying with an explanation each of the s25 factors and then showing understanding by explaining how they would apply to the client's situation as described in the case study.

Some candidates were unable to do this, or to do this to a Level 6 standard.

Question 3

Again, performance on this question was varied with a significant number of weak responses showing a lack of knowledge and understanding whilst other responses did show knowledge and understanding but at varying levels.

The key challenge for many candidates was question 3(c) where some candidates failed to achieve marks available. This was disappointing as this question involved a key topic – the principles and factors that the judges use when making decisions on applications for orders relating to children.

(a)

Candidates needed to firstly identify that Leroy needed parental responsibility to be involved in decision making regarding his children, or to explain parental responsibility. Some did not do this.

Candidates also needed to explain that Leroy did not have parental responsibility because he was not married to Shanyse and because he was not named on the birth certificates. Some candidates mentioned one of the requirements but failed to mention the second.

Knowledge of the various ways (5) to obtain parental responsibility also varied.

3(b)(i)

Candidates generally able to identify the 2 orders required. Some also referenced Children Act s13(1) which relates to the right to take children out of the country.

(ii)

Candidates generally were able to show knowledge of the principles in s1 Children Act. They were also able to identify the checklist factors. Some candidates **explained** the factors and then **applied**, others only gave application.

A key issue was the lack of practical understanding of how factors would apply in the particular situation described.

Re the ascertainable wishes and feelings of the child (considered in the light of age and understanding), few candidates actually referred to the latter part of the factor (age/understanding).

Question 4

This question produced the weakest performance.

(a)

In general, marks were not achieved where candidates failed to:

- Include relevant citation for each order
- Failed to clearly state eligibility criteria and apply
- Reference that the house should be a dwelling intended as the family home
- Explain why a s36 order

(b)

This was the last question. But again involved knowledge and understanding of a key topic – how decisions are made when an application is made for a non-molestation order and an occupation order. Candidates who had prepared well were able to answer as required, others were not.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 – UNIT 20 – THE PRACTICE OF FAMILY LAW

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>Answers should include:</p> <p>Jurisdiction, or place where divorce takes place, can have important impact on financial settlement. s5(2) Domestic and Matrimonial Proceeding Act (DMPA) 1973 sets out the basis on which a court has jurisdiction. This involves a range of situations involving habitual residence or domicile Domicile is initially established at birth but can change. It indicates a person’s main and permanent home Ben was born in England and works in England, so his country of domicile is England. He can petition to an English court for a divorce. Credit relevant discussion of “habitual residence” e.g. it involves considering a person’s “centre of interests” Ben’s “habitual residence” has been England, then France when he lived and worked there but now reverts to England.</p> <p>Answers could include: Reference to case law re habitual residence Reference to “forum shopping</p>	7
1(b)	<p>Answers should include:</p> <p>s1 Divorce, Dissolution and Separation Act (DDSA) 2021 Ground for divorce is irretrievable breakdown of marriage. DDSA 2021 introduce “no fault” divorce. The applicant(s) satisfy the ground by submitting a statement that the marriage has irretrievably broken down. The other party, Eloise, cannot challenge the application.</p> <p>Answers could include: Reference to reasons for “no fault” divorce as illustrated by Owens v Owens</p>	5
1(c)	<p>Answers should include:</p> <p>Complete and submit application form (on-line via divorce portal or by form D8 by post) Need to send marriage certificate, certificate of reconciliation and fee Must also include a statement that the marriage has broken down irretrievably A copy of application must be served on Eloise, the respondent, together with an acknowledgement of service form which must normally be</p>	9

	<p>returned within 14 days – but as Eloise is in France period is extended to 21 days.</p> <p>The respondent can no longer contest the divorce, unless there is an issue with procedure.</p> <p>Once service is acknowledged there is a 20 week “cooling off” period to consider position and sort out finances etc</p> <p>After 20 weeks can apply for a conditional order and if all documents in order a certificate of entitlement will be issued</p> <p>After 6 weeks and a day can apply for the final order which ends the marriage</p> <p>A divorce should be obtained within 6 months.</p> <p>Answers could include:</p> <p>As Eloise is resident in France service may be more challenging than service in England.</p> <p>Reference to possible need for translation of documents e.g. marriage certificate from French</p>	
Question 1 Total:21 marks		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<p>Answers should include:</p> <p>Where a couple are married and the home is in the sole name of one spouse, the other spouse has <i>home rights</i>, s30 Family Law Act (FLA) 1996 Home rights allow the non-owning partner to occupy the property until the relationship is formally terminated the non-owning partner who is in occupation cannot be evicted by the owning spouse, or, if not in occupation, can enter and occupy the home.</p> <p>The home rights protection will end when the divorce is finalised so an application for a final divorce order should not be made until a court order is in place to provide continuing protection.</p> <p>A property adjustment order (PAO) should be applied for under s24 Matrimonial Causes Act (MCA)1973 which gives the court wide discretion to address the issue of the family home – sell and divide proceeds, transfer to one party, or settle the property through a trust for land, a Mesher order or Martin order.</p> <p>Mesher order – both parties hold property, with one occupying until a specific event, such as youngest child reaching 18 years or occupying party re-marries, at which point property may be sold and proceeds shared.</p> <p>S25 Matrimonial Causes Act (MCA) 1973 sets out the factors to be considered and in this case:</p> <p>S25 First consideration is the welfare of any minor child. Here there are 2 children to be considered, and one child, George, is disabled. The family home has been specially adapted for him which will be a key consideration.</p> <p>Financial resources of parties Income, earning capacity and property at time of order and in foreseeable future. Thomas is in a well-paid job</p>	11

	<p>whilst Millicent is not able to work as George needs constant care but will need a home for herself and the children. She has no income of her own and no viable alternative accommodation, which his father does have.</p> <p>Financial needs of parties Both will need a home. Thomas currently earning a good wage and living with girlfriend, while Milly has no income and is carer for 2 children and no means to fund a home.</p> <p>An application for home rights and then a Mesher order is likely to be successful although the home is in Thomas's sole name. The minor children who have always lived at 4 Arthur Court. A Mesher order would enable Millicent and the children to remain living in the family home, but it would eventually revert to Thomas.</p> <p>Credit reference to Millicent being able to apply for an occupation order as an alternative as although this is generally an order where there has been domestic abuse, it is not actually required.</p> <p>Answers could include: The home right should be registered with the Land Registry</p>	
2(b)	<p>Answers should include:</p> <p>Millicent should apply for maintenance pending suit to ensure regular payments are made by Thomas before the divorce is finalised, and then periodical payments post-divorce.</p> <p>S25 Matrimonial Causes Act (MCA) 1973 sets out the factors to be considered.</p> <p>S25 (1) First consideration is the welfare of any minor child. Here there are 2 children to be considered, and one child, George, is disabled. His welfare will be an important consideration.</p> <p>Financial resources of parties Income, earning capacity and property at time of order and in foreseeable future. Thomas is in a well-paid job whilst Millicent is not able to work as George needs constant care but will need a home for herself and the children. Millicent has no income of her own which she will need to support herself and the children.</p> <p>Present and future financial needs obligations and responsibilities of parties - including housing, food, etc, travel expenses. Both parties will need money to pay for normal costs. Thomas is earning and is earning a good salary, but Millicent is not and will need support.</p> <p>Standard of living enjoyed by family before breakdown of marriage The court will aim to maintain this, if possible, if not then a fall in living standards should be borne equally. In this case, it is likely that there will be some fall in standards for both as Thomas' income will have to support his family, and himself living separately. However, the needs of the children, particularly George, will be important.</p>	14

	<p>Age of parties and duration of marriage - age is relevant to earning capacity and length of marriage is relevant. Both parties are relatively young. Thomas is in a well-paid job whilst Millicent is unlikely to be able to work for some significant time.</p> <p>Contributions made by parties to the welfare of the marriage - the court will give equal weight to the party providing the income and the party managing the home and providing support, White v White (2000) Thomas is the wage earner, but Millicent has been the stay-at-home parent, and full-time carer for George will be considered to have made and equal contribution.</p> <p>Physical or mental disability s25(2)(e) – disability will increase need for financial support.</p> <p>The value of any benefit that would be lost s25 (2) (f) - this factor is most frequently used when a loss of pension benefit is involved.</p> <p>Answers could include: Could also consider applying for a pension sharing order as Thomas has a pension, whereas Milly does not.</p> <p>Conduct of the parties (s25(2)(g) – only significant negative conduct will be considered (0) Not relevant here.</p> <p>A “clean break” should be considered. Not appropriate here as there are children to consider, and Milly is their carer and has no income currently. Credit reference financial support for children – e.g. as application for financial support would be for Milly, and not for children, for children she should apply to CMS for child maintenance.</p>	
	Question 2 Total:25 marks	
Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<p>Answers should include:</p> <p>To be involved in decision making regarding his sons, Leroy needs to have parental responsibility (PR) S3(1) Children Act (CA)1989 defines PR as “all the rights, duties, powers responsibilities and authority which by law the parent of a child has in relation to the child and his property.”</p> <p>Chandice, as their natural mother, has automatic PR but Leroy, their father does not have this automatically as he was not married to Chandice or named on the birth certificate.</p> <p>As an unmarried father, Leroy can acquire PR in a number of ways:</p> <ol style="list-style-type: none"> 1. By entering a PR agreement with the mother 2. By applying to the court for a PR agreement 3. By obtaining a child arrangements order (CAO) with residence rights 4. By marrying the child’s mother 5. By re-registering the birth naming him as father 	5

	In this case, the only likely way for Leroy to acquire PR given Chandice's attitude is through an application to the court .	
3(b)(i)	<p>Answers should include:</p> <p>Leroy should apply for:</p> <ol style="list-style-type: none"> 1. A child arrangements order (CAO) - an order that states who a child should live with and who a child should have contact with This order will state when Leroy will have contact with his sons and the form that contact will take and Chandice will have to comply As the children's father, although he does not have parental responsibility, Leroy can apply without the leave of the court. 2. A specific issue order - an order that deals with an issue on which the parents are unable to reach agreement. As Leroy and Chandice are unable to reach an agreement about whether Leroy can take Devon and Rohan to visit his grandparents in Jamaica, the court will have to make the decision and both parties will have to comply. <p>Answers could include: Credit for reference to taking a child abroad and s13</p>	5
Q3b(ii)	<p>Answers should include:</p> <p>In deciding whether to grant a s8 order, the court will consider the principles under the Children Act (CA) 1989. The "welfare principle" states that the welfare of the children will be the court's paramount consideration. The welfare of the children must be considered above all other wishes including those of the parents. The welfare checklist lists factors to be considered.</p> <p>The court will also consider the no delay principle, the no order principle and the presumption of parental involvement.</p> <p>Credit application to scenario e.g. it is considered important for both parents (Leroy as well as Chandice) to be involved in a child's life but as Chandice and Leroy are in dispute the court must decide what is in the best interests of Devon and Rohan and both parents must comply.</p> <p>The court will apply the s.1 welfare checklist:-</p> <p>The ascertainable wishes and feelings of the child (considered in light of age and understanding): Devon is 10 years old, and Rohan is 8 years old. Devon has told his father that he and his brother miss him. But at the age of 10 years, he may be considered too young for the court to attach much weight to his views.</p> <p>The child's physical, emotional and educational needs: The court will consider a range of considerations in relation to day-to-day care and support.</p>	18

The court will consider the importance of contact with their father. Devon and Rohan have until recently spent time with their father on a regular basis but this no longer happens and is likely to affect them emotionally and in their education.

The likely effect on the child of any change in circumstances:

the court will aim to preserve the status quo. Devon and Rohan are used to seeing their father on a very regular basis so the stopping contact is a change to the status quo.

The child's age sex, background etc:

this involves a wide range of considerations relating to a child's background such as cultural and religious issues. In this case, the boys no longer see their father very often due to their mother's decision and the planned holiday may not happen It is important that they learn about their father's background.

Any harm that the child has suffered or is at risk of suffering:

harm can be physical harm or emotional harm. The court is likely to find that Devon and Rohan could suffer (emotional) harm by not seeing their father and through the disappointment of not making the trip to Jamaica.

How capable the parents are of meeting the child's needs:

this is not an issue here. There is no suggestion that Leroy cannot look after the boys as he has done so regularly with no problems.

The range of powers available to the court:

the court could make any section 8 order available taking into account all relevant factors. The court is likely to issue child arrangements order here to ensure that Leroy has regular contact with the boys. And may also issue a specific issue order if satisfied that the trip to Jamaica would be in the boys' best interests. As the parties appear to be in dispute concerning aspects of the boys lives the court will have to make an order to resolve the issues (no order principle).

Conclusion

CAO – yes – welfare principle and parental involvement
Specific issue order – likely to be yes if, after considering the facts, decide this is in best interests of children.

Question 3 Total:28 marks



Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<p>Answers should include:</p> <p>A non-molestation order under s42 of the Family Law Act 1996 (FLA).</p> <p>An occupation order under section 36 of the FLA.</p> <p>To qualify to apply for both orders Ms Norton must establish that she and Mr Hilton are “personally connected” under Domestic Abuse Act (DAA) 2021 replacing “associated person” under section 62 FLA.</p> <p>She is because she and Mr Hilton are in an intimate relationship as cohabitants.</p> <p>To qualify for an occupation order Ms Norton must also establish that 12 Lime Walk is a dwelling intended to be the family home.</p> <p>The application for the occupation order will be brought under s36 FLA as Ms Norton is a cohabitant with no existing right to occupy and home is owned by Mr Hilton.</p> <p>Answers could include: Given the pattern of behaviour and Mr Hilton’s latest threat we should make the application without notice under s45 FLA as there is a significant risk of harm to Ms Hilton if the order is not made immediately. Reference to Domestic Abuse Act 2021.</p>	6
4(b)	<p>Answers should include:</p> <p>Non-molestation order:</p> <p>Court must consider all the circumstances of the case, including the need to secure the health, safety and well-being of the applicant or any relevant child.</p> <p>Behaviour must involve a level of molestation that justifies intervention by the court.</p> <p>Or there must be concern that the applicant will be deterred from taking action.</p> <p>Here, Mr Hilton’s behaviour is increasing in threat and in occasions and she is now fearful for her safety and that of the children. The children are also at risk and will be affected.</p> <p>It is therefore likely that the court will issue a non-molestation order to allow Ms Norton and the children to remain in the family home, and to exclude Mr Hilton.</p>	20

Occupation order:

The court must consider all the circumstances of the case including:

- **the respective housing needs and housing resources of the parties and any child.** Ms Norton’s needs are greater as she is the main carer for the twins, and she has nowhere else to go. Mr Hilton can stay in his London flat.

Whilst Ms Norton would be unintentionally homeless and would thus obtain priority on the local authority’s housing list, moving the twins from her home would cause upheaval and she would need a two-bedroom property ideally. Whilst Mr Hilton would not be regarded as homeless as he has his flat.

- **the respective financial resources of the parties.** Ms Norton’s needs are greater as she is bringing up the twins. Mr Hilton is working and earning enough to support himself, so he has the resources.

- **the likely effect of any order or of any decision by the court not to make such an order on the health, safety and wellbeing of the parties and child.** Here if an order were not made it would have an adverse effect on Ms Norton and the twins. They need to be protected from Mr Hilton’s violence and threats.

- **the conduct of the parties in relation to each other and otherwise.** Mr Hilton has been verbally and physically violent and controlling. The twins have witnessed the verbal abuse and the physical violence. saw the last two incidents of violence.

And also:

- The nature of the parties’ relationship
- Length of time they have co-habited
- Any children of parties for whom they have PR
- Length of time since they ceased to live together
- Pending proceedings

The court must also consider the **balance of harm test** under section 36(8) FLA 1996 and consider:

1 - Whether Ms Norton and the twins would be likely to suffer significant harm if an order was not made and if the answer to this question is “Yes” then the court should consider

2 - Whether Mr Hilton is likely to suffer significant harm if the order is made and that the harm suffered is as great or greater than the harm attributable to him and suffered by Ms Norton if the order is not made

	<p>Unlike s33, there is no mandatory duty to make an order if the answer to either question is “Yes” as they are simply questions for the court to consider.</p> <p>Here Ms Norton is likely to satisfy this test as if the order is not made, she will either suffer further violence or have to find somewhere else to live. This will be greater than the harm suffered by Mr Hilton as if the order is made, he has his London flat to live in.</p> <p>It is very likely that the court will grant the occupation order on the facts of this case.</p> <p>If the court believes Ms Norton’s version of events, then they must also grant a power of arrest under section 47 FLA as Mr Hilton has used and threatened violence against her.</p> <p>Answers could include:</p> <p>The court may order the respondent to contribute towards household bills such as the mortgage.</p>	
Question 4 Total:26 marks		