

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

### LEVEL 6 UNIT 7 – 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

Candidates preferred to answer more questions in section B than section A. With the exception of question A2, candidates also appeared to perform slightly better on questions in section B.

In terms of general feedback on section A, some candidates failed to answer the actual question posed and instead chose to set out the law quite descriptively. This limited the marks available. Where candidates were asked to consider a posed statement, they quite often only considered arguments for the statement posed and not arguments against it.

In section B, most of the candidates answered these questions fairly well and most candidates made good attempts to apply the law to the scenario. Where candidates did less well, this was usually due to a misunderstanding of the legal position rather than an issue in how they are approaching the question. Though, some did fail to reach a conclusion at the end of their answers meaning they were not awarded the concluding marks.

Particular areas where candidates showed confusion over the legal position:

- Some candidates confused the existing DVPOs with the DAPOs being introduced under the DAA 2021
- Some candidates referenced PR as being a pre-requisite to applying for a child arrangements order, when this is not necessary for a biological father – this has been a common issue in previous exams as well.
- When discussing section 1 Children Act 1989 principles, some candidates got the section number wrong e.g. by saying the welfare checklist is in s3 instead of s1(3) or the presumption of parental involvement was in s2A not s1(2A) - this has been a common issue in previous exams as well.
- There was confusion over when the court would be involved in child maintenance issues and when jurisdiction would lie with the Child Maintenance Service.
- A lot of candidates appeared confused about the difference in how the balance of harm test would be applied under s36 Family Law Act 1996 compared to under s33 of the same Act.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Section A

#### Question 1

This was the most popular question but had a mixed level of responses. The majority of candidates were able to set out the position pre and post the introduction of the Act reasonably well. However, when it came to addressing the statement posed, most candidates focused on arguments for the statement. Very few candidates discussed arguments against the statement posed. Very few candidates discussed the impact on s5 and s10 MCA 1973.

#### Question 2(a)

This question was answered well by most of the candidates who attempted it. Most candidates were able to discuss the relevant legislation and how the law has developed over time. Where some candidates fell down was by not bringing their answer to a conclusion in direct answer to the question posed.

#### (b)

This question was answered fairly well by most candidates who attempted it. However, some did not reference the relevant legislative principles which limited their marks. Most candidates were able to identify the religious benefits. Some candidates also identified the time bar benefits. Similarly, to 2(a), a lot of candidates forgot to add in a concluding comment discussing the specific question posed.



### **Question 3**

A lot of candidates struggled with this question. Most were able to identify some of the changes being implemented under the DAA 2021 and were able to outline some of the protection which existed before the Act. Most identified the new statutory definition and the changes to participation directions. Quite a few candidates confused the existing DVPOs with the new DAPOs being introduced. Very few candidates discussed the other provisions outlined in the MS. After outlining the legal provisions, very few then went on to address the arguments for and against the statement posed. The analysis part of the answer was therefore missing or limited.

### **Question 4**

This was the least popular of the questions in section A and wasn't answered very well by many candidates. Most candidates focused their answers entirely on a discussion of parental responsibility. Where assisted reproduction was discussed, it usually demonstrated some lack of knowledge of this area/some outdated knowledge.

## **Section B**

### **Question 1(a)**

This was a popular question and was answered fairly well by most of the candidates who selected it. Most candidates were able to discuss and apply the section 1 principles. Most were also able to identify the relevant part of section 10 CA 1989 which applies, though some confused PR and the entitlement to apply. Fewer candidates discussed s20 Family Law Reform Act 1969 and relevant case law such as *Re T (Paternity: Ordering Blood Tests) (2001)*. Quite a few candidates forgot to end with a conclusion about whether Jacob is likely to be successful in any application.

### **(b)**

There was a mixed range of responses to this question. Most candidates reached the correct conclusion, but some failed to identify the relevant legislative principles to support their answer.

### **Question 2**

This was a popular question and was answered well by most candidates. Most candidates were able to identify the relevant legislative principles and most applied the s25(2) factors well to the scenario. Most discussed relevant case law such as *White v White* and were able to reach a reasonable conclusion about the orders which may be made. Better candidates also discussed career sacrifice, special contributions and how the inheritance would be dealt with. However, some failed to identify the difficulty in successfully claiming a career sacrifice.

### **Question 3**

This question was answered well by most candidates. Most were able to identify and discuss the relevant legislation and case law. Most were able to apply the principles well to the scenario. Some candidates forgot to discuss quantification or didn't apply that aspect as well to the scenario. Very

few candidates discussed the possibility of a Sch 1 claim. A lot of candidates forgot to end with a conclusion.

**Question 4**

This was a popular question and was answered fairly well by most candidates. Most candidates were able to identify the relevant orders which could be applied for and were able to identify that the occupation order would be applied for under s36. However, a lot of candidates then became confused when applying the relevant s36(6) factors and the balance of harm test, in particular, mistakenly believing that a mandatory duty applied to the balance of harm test (this is not the case under s36).

**SUGGESTED POINTS FOR RESPONSE**

**LEVEL 6 UNIT 7 – FAMILY LAW**

Question Number	Suggested Points for Responses	Marks (Max)
1	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Explain the basis for divorce prior to the 2020 Act: one ground and 5 facts for opposite sex couples – refer to the provisions in s1 Matrimonial Causes Act 1973, or one ground and 4 facts for same sex couples – refer to the Marriage (Same Sex Couples) Act 2013</li> <li>• Explain the basis for dissolution prior to the 2020 Act: one ground and 4 facts – refer to the provisions in s44 Civil Partnership Act 2004.</li> <li>• Explain the key changes implemented under 2020 Act: removal of the facts, possibility of a joint petition, change in terminology, s5 MCA 1973 repealed but s10 retained</li> <li>• Arguments that this has improved the position: less chance of a defended divorce; no need to apportion blame; more neutral language; more amicable due to joint petition possibility; removes the controversy around the adultery fact being available to opposite sex but not same sex couples; Aligns the dissolution and divorce language.</li> <li>• Arguments that it hasn't improved the position: ground remains the same; defended divorces were rare in any case; there is still a waiting period between the different stages and this is even longer than previously was the case; no fault divorce was permitted under the old route through the separation facts; 1 year time bar remains; still some (very limited) options to dispute; the 2020 Act does not make financial proceedings or child arrangements proceedings any easier or more streamlined.</li> </ul>	25



	<p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Reference to relevant case law demonstrating issues with the law prior to the changes such as Owens v Owens; Dennis v Dennis etc</li> <li>• Discussion of the 2017 House of Commons Briefing Paper which debated no fault divorce</li> <li>• Discussion of the previous proposals under Part 2 Family Law Act 1996 (FLA 1996)</li> </ul>	
<b>Question 1 Total: 25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discuss the introduction of Civil Partnerships under the Civil Partnership Act 2004</li> <li>• Discuss the introduction of Same Sex Marriage under the Marriage (Same Sex Couples) Act 2013</li> <li>• Discuss the ability for civil partners to convert their civil partnership into a marriage under s9 M(SSC)A 2013</li> <li>• Discuss the extension of civil partnerships to opposite sex couples under The Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019</li> <li>• Identify that the provisions governing civil partnerships and same sex marriages are largely identical</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• With reference to the current relevance of civil partnership, discuss the consultation which took place in 2014 to determine the future of civil partnerships</li> <li>• Discuss <u>R (Steinfeld and Another) v Secretary of State for International Development</u> [2018] and the human rights issues discussed within that case.</li> <li>• Discuss whether the phrase ‘civil partner’ as opposed to ‘married’ is more attractive to some people</li> </ul>	14
2(b)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Explain that judicial separation terminates the obligation of spouses to live together but does not end the marriage – s18 MCA 1973</li> <li>• Identify that the number of judicial separations granted are very low.</li> <li>• Discuss whether they are still required or relevant now that the divorce process has been amended under the Divorce, Dissolution and Separation Act 2020 and is more amicable/simpler.</li> </ul>	11

	<ul style="list-style-type: none"> <li>Identify that they are usually used where the parties object to divorce on religious or other grounds or where they cannot divorce because they have not been married for one year (s3 MCA 1973). These will still be issues post the divorce reforms so arguably still relevant.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>Discuss the financial orders available and intestacy rights for parties who have a judicial separation compared to a divorce.</li> </ul>	
<b>Question 2 Total: 25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
3	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>Briefly summarise the protective orders available to victims of domestic abuse and their children pre DAA 2021.</li> <li>Explain the key provisions being introduced under the Act including: <ul style="list-style-type: none"> <li>Statutory definitions of domestic abuse in s1 (victim) and s3 (children) of the Act and Practice Direction 12J</li> <li>Changes to secure tenancies under s79 DAA 2021</li> <li>Local Authority obligations under s57 DAA 2021</li> <li>Introduction of the DA Commissioner role</li> <li>New DAPO and DAPNs, replacing DVPOs and DVPNs</li> <li>Changes to participation directions</li> <li>New offence – strangulation – removes defence of consent</li> </ul> </li> <li>Arguments in favour of the statement: greater understanding of varied nature of domestic abuse (move away from focus on physical abuse); increased obligations on local authorities to provide support for victims of domestic abuse; increased protection for victims when giving evidence during family court proceedings; greater flexibility offered by new DAPOs (duration, behaviour covered and parties who can apply)</li> <li>Arguments against the statement: a definition on its own does not mean increased understanding; there was already an acceptance in the family courts that children experience harm through domestic abuse; there was already the ability to impose participation directions under Part 3A and Practice Direction 3AA Family Procedure Rules; overlap between definition of personally connected in s2 DAA 2021 and associated persons in s62 FLA 1996; overlap between DAPOs and non-molestation orders.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>Discussion of previous changes implemented under the Serious Crime Act 2015</li> </ul>	25

	<ul style="list-style-type: none"> <li>• Other changes implemented under the DAA 2021 which are not highlighted above.</li> </ul>	
<b>Question 3 Total:25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
4	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discuss the history of legitimacy as a concept including the impact on inheritance rights</li> <li>• Explain the changes implemented by The Family Law Reform Act 1969</li> <li>• Discuss the impact of parents’ marriage on parental responsibility and the presumption of legitimacy with reference to s2 and s3 Children Act 1989</li> <li>• Discuss that the presumption of legitimacy can be rebutted with reference to s26 FLRA 1969 and relevant case law such as Preston-Jones v Preston-Jones</li> <li>• Discuss the possibility of becoming legitimated through parents subsequently marrying or entering into a civil partnership - s2 Legitimacy Act 1976</li> <li>• Explain that the children of void marriages will be treated as legitimate if both or either of the parties reasonably believed that the marriage was valid at the time of conception - s1 Legitimacy Act 1976.</li> <li>• Discuss the impact of legitimacy presumptions on cases involving assisted reproduction with reference to s35 and 38 HFEA 2008</li> <li>• Discuss the possibility of a declaration of parentage or legitimacy under s56 Family Law Act 1986</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Legitimacy still impacts the right to inherit a title of honour.</li> <li>• Discuss the impact of a parent’s marriage on domicile.</li> </ul>	25
<b>Question 4 Total: 25 marks</b>		

## SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discuss Bethany’s paternity and how this may be established with reference to s20 Family Law Reform Act 1969 and relevant case law such as Re T (Paternity: Ordering Blood Tests) (2001)</li> <li>• Discuss parental responsibility, whether Jacob has it and, if not, how he may obtain it with reference to s3 and s4 CA 1989</li> <li>• Identify that a child arrangements order under s8 CA 1989 would be the appropriate order if an agreement cannot be reached.</li> <li>• Discuss the relevant section 1 principles (s1(1), s1(2), s1(2A), s1(3), s1(5))</li> <li>• Identify that Jacob may still be able to apply for an order if not Bethany’s biological father – s10(5) CA 1989 – has she lived with him for 3 years?</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• The test in Re H (minors) 1991 in relation to whether PR would be granted here</li> <li>• Identify that some contact is likely to be ordered but unlikely to be on the terms that Jacob has suggested (provides very little quality time between Bethany and her mother once she starts school).</li> </ul>	18
1(b)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Identify that maintenance is a separate issue to child arrangements</li> <li>• Discuss the duty to financially provide for biological children – section 1 Child Support Act 1991 – this will therefore depend on the outcome of the paternity test.</li> <li>• Discuss the different options for resolving child maintenance issues: family-based arrangement or application to the Child Maintenance Service</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Identify that the provisions in the MCA 1973 will not apply because they were not married.</li> </ul> <p>Discuss a potential Sch 1 CA 1989 claim</p>	7
<b>Question 1 Total:25 marks</b>		





Question Number	Suggested Points for Responses	Marks (Max)
2	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• A discussion of the factors that the court will consider when determining what financial orders to make – section 25(1) and (2) MCA 1973</li> <li>• Application of the s25 factors to this case. Particular attention should be paid to: <ul style="list-style-type: none"> <li>○ the application of s25(1) and the needs of the children including the need for accommodation.</li> <li>○ s25(a) and (b) in relation to the disparity of income and pensions.</li> <li>○ s25(d) - this would be considered a long marriage and their age is relevant in terms of not being close to retirement.</li> <li>○ S25(f) - the individual contributions they have each made including discussion of the inheritance and whether it can be ringfenced with reference to relevant case law such as <u>White v White</u></li> </ul> </li> <li>• Discussion of the potential orders that could be made in this case with reference to the provisions in the MCA 1973 including discussing the possibility of: <ul style="list-style-type: none"> <li>○ A mesher order or order for sale;</li> <li>○ pension offsetting; and</li> <li>○ spousal maintenance.</li> </ul> </li> <li>• Discuss the obligation to consider a clean break order – s25A MCA 1973</li> <li>• Discuss relevant case law such as <u>White v White</u> and <u>Charman v Charman</u>.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Discussion of child maintenance</li> <li>• Discussion of whether there has been a ‘career sacrifice’ here with reference to relevant case law such as <u>McFarlane v McFarlane</u> – unlikely to be successful in this argument in these circumstances.</li> <li>• Discussion of whether there has been a ‘special contribution’ here with reference to relevant case law such as <u>Lambert v Lambert</u> – unlikely to be successful in this argument in these circumstances.</li> </ul>	25
<b>Question 2 Total:25 marks</b>		

Question Number	Suggested Points for Responses	Marks (Max)
3	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>Identify that property and trusts law will apply – the relevant legislation is the Trusts of Land and Appointment of Trustees Act (1996).</li> <li>The presumption is that Rebecca owns all the beneficial interest in the property because it is in her sole name</li> <li>Identify that the split legal fees and mortgage payments would not constitute a resulting trust (<u>Curly v Parkes</u> 2005).</li> <li>Set out the 2 elements needed to establish a constructive trust with reference to <u>Lloyds Bank v Rosset</u> (1990)</li> <li>Discuss the need to show a common intention with reference to relevant case law such as <u>Gissing v Gissing</u>.</li> <li>Discuss other key relevant case law such as <u>Stack v Dowden</u> and <u>Jones v Kernott</u></li> <li>Identify the contributions that Carrie has made and whether they will be considered relevant to common intention and/or acting to her detriment.</li> <li>Identify that an application would be made under section 14 of the Trusts of Land &amp; Appointment of Trustees Act 1996 and consider the factors in section 15 of the same Act.</li> <li>Discuss how the beneficial interest would be quantified with reference to <u>Jones v Kernott</u> (2011)</li> <li>Discuss the possibility of a Sch 1 Children Act claim</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>Carrie cannot rely on the MCA 1973 and doesn't have home rights because she was never married to Rebecca.</li> <li>The possibility of applying for an occupation order.</li> </ul>	25

**Question 3 Total:25 marks**

Question Number	Suggested Points for Responses	Marks (Max)
4	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>Identify that they are associated persons – s62 Family Law Act 1996</li> <li>Identify that Lola will constitute a 'relevant child' – s62(2) FLA 1996</li> <li>Discuss the potential to apply for an ex parte non-molestation order with reference to s42 and s45 FLA 1996</li> <li>Set out the criteria for a non-molestation order with reference to the statute and relevant case law such as <u>Vaughn v Vaughn</u> and apply to the facts</li> <li>Discuss the potential application for an occupation order under s36 FLA 1996</li> <li>Discuss the balance of harm test in s36(7) and apply to the facts</li> <li>Discuss the factors in s36(6) and apply to the facts</li> </ul>	25



	<ul style="list-style-type: none"> <li>• Discuss relevant occupation order case law such as B v B and apply to the facts of this case</li> <li>• Identify that the behaviour may also amount to a criminal offence, in particular controlling and coercive behaviour</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Discuss actions under the Protection from Harassment Act 1997</li> <li>• Discuss the possibility of a transfer of tenancy order under Sch 7 FLA 1996</li> <li>• Discuss local authority obligations in regard to tenancies and other support under the Domestic Abuse Act 2021.</li> <li>• Other relevant directions such as those under s40 FLA 1996</li> <li>• Duration of orders</li> <li>• Power of arrest – occupation order only</li> </ul>	
<b>Question 4 Total: 25 marks</b>		