CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 - UNIT 20 - THE PRACTICE OF FAMILY LAW

JUNE 2022

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 2022 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

Candidate performance was good with a significant number of candidates able to achieve distinction and merit grades.

Candidates were generally able to show:

- Knowledge of the topics across the specification, and knowledge in an appropriate level of detail
- Understanding through application to the various case studies.

In particular, candidates were able to show knowledge of the major change in divorce law, although disappointingly few made the connection between the case study and Owen v Owen (2018).

However, weaker performance was seen in the responses of nearly 1/3 of candidates. This was somewhat disappointing in an exam where candidates do have the benefit of a pre-release case study. The weaker performance was due to a failure to evidence knowledge, or to evidence it in the detail required at Level 6, and/or a failure to apply knowledge appropriately with reference to the facts in the case study materials.

And overall performance was affected by performance on questions 2(b), the ability of cohabitees to claim an interest in a property via a trust, and 3(c), an application in a domestic abuse situation, by the parent responsible, for contact with the children. Both topics cover situations that are increasingly seen.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

This question produced the best performance on the paper.

(a)

Candidates were able to show knowledge of divorce under MCA 1973 which would have been the basis for the advice given in August 2021, as per case study.

Some candidates failed to identify all the facts before moving on to discuss the relevant facts – unreasonable behaviour (as Mrs Howard wanted to resolve matters quickly) and then the fallback options of separation for two years, but only if Mr Howard agreed, or five years.

Disappointingly, candidates failed to actually discuss that there was no set list of behaviours, but that it could involve a range of behaviours, with examples. And so, they failed to make the link to Owen v Owen (2018) in terms of Mr Howard's behaviour.

(b)

This was a straightforward question on divorce under the DDSA 2020, where the change to "no fault" divorce has been in the public domain for several years. Most candidates were able to show knowledge.

(c)

Certain aspects of the procedure have remained unchanged e.g. application form D8, submission of marriage certificate etc. All candidates were able to achieve some marks. However, not all candidates were aware of the new terminology (conditional orders and final orders) or of the new 20-week time frame to allow for reflection.

Question 2

This question produced the weakest performance across the paper.

(a)

Candidates were generally able to show knowledge of various methods of alternative dispute resolution. However, a significant number failed to refer to the Mediation, Information and Assessment Meeting (MIAM), and answers varied in level of detail provided for each method identified.

(b)

Performance for this question was very varied. Some candidates were able to show good knowledge and understanding of trusts, particularly the constructive trust. Others appeared to find trusts a challenging subject and failed to refer to express or resulting trusts.

Question 3

Performance on this question was varied. The key challenge for many candidates was question 3(c) where they failed to achieve many marks.

(a)

Candidates were generally able to perform well on this question by identifying the orders, referring to "associated persons", commenting on ownership and recommending a power of arrest be attached to the occupation order. But very few referred the requirement that the property for which an occupation order is sought must be a dwelling house occupied by the applicant and respondent as the family home. And some appeared unaware that a power of arrest is automatically attached to a non-molestation order.

(b)

Performance on this question was varied. Some candidates were able to identify the s36 factors, explaining and applying. Others provided limited explanation or application. Most candidates were also aware of the s45 requirements, and also of the balance of harm test, although the standard of explanation varied.

(c)

Performance for this question was disappointing. Although many candidates were able to cite Re H and state that domestic violence is not a bar to contact, many were unable to develop their answer by explaining how the courts approach this issue.

Some candidates wrote about the principles in s1 Children Act and the welfare checklist factors. Only some limited credit could be awarded for this.

Question 4

Performance of many candidates on this question, the next best performing after question 1, was good.

(a)

Generally, good performance was seen. However, some candidates failed to clearly identify (as instructed in the question) that the order to be applied for was a child arrangements order. Candidates were generally able to identify the 3 factors in s10(9), but explanation/application varied.

(b)

Candidates were able to identify the key principles under s1 Children Act 1989, although it was disappointing that many candidates did not provide a concise description of each principle.

Candidates did generally show good knowledge of the welfare checklist factors and were, in the main, able to show understanding by appropriate application**.**

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 - UNIT 20 - THE PRACTICE OF FAMILY LAW

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	Responses should include: The ground for divorce was the irretrievable breakdown of marriage. S1(1) Matrimonial causes Act (MCA) 1973 Mrs Howard would have to show this with reference to one of the five facts detailed in s(1)(2) (a-e) MCA 1973, which were as follows: (a) adultery (b) behaviour (c) desertion (d) 2 years separation and both parties consent (e) 5 years separation To obtain a divorce quickly, Mrs Howard would have to show **unreasonable behaviour**. She would have to show that Mr Howard had acted in such a way that she could not be reasonably expected to live with him The test for unreasonable behaviour was stated in Livingstone-Stallard v Livingstone –Stallard [1974]– the "right thinking person approach" and is both objective and subjective. There is no set list of unreasonable behaviour. It can include a range of behaviours (examples) On the information provided by Mrs Howard it would be difficult to satisfy as the courts are reluctant to grant applications under s1(2)(b) where the parties have simply lost interest in each other, Owen v Owens [2018] The only option suggested facts would have been **separation** which would have involved a wait of at least 2 years, if Mrs Howard could get Mr Howard to agree. Otherwise Mrs Howard would have to wait 5 years.	**9**

Question Number	Suggested Points for Responses	Marks (Max)
1(b)	Responses should include: The ground for divorce is the irretrievable breakdown of marriage, S1(1) Divorce, Dissolution and Separation Act (DDSA) 2020 The DDSA 2020 introduces "no fault" divorce and removes the need for a "fact" to be shown Mrs Howard now simply needs to state that the marriage has broken down irretrievably and does not have to provide any further information. Mr Howard is no longer able object to a divorce. Applying under this Act should enable Mrs Howard to obtain a divorce within 6 months *Responses could include:* The DDSA 2020 followed a consultation Reducing Family Conflict: Reform of the legal requirements for divorce	**5**
Question Number	**Suggested Points for Responses**	**Marks (Max)**
(c)	Responses should include: Mrs Howard must complete and submit application for a divorce order The application must include a statement that the marriage has broken down irretrievably A 20-week period follows to allow parties to consider their position and to withdraw the application if they wish to do so After 20 weeks Mrs Howard can apply for a conditional order (decree nisi) After a further 6 weeks, Mrs Howard can apply for a final order (decree absolute) Court will issue final order and marriage is terminated. Responses could include: Application may be a sole application or may be made jointly.	**6**

	Should submit copy of marriage certificate, certificate of reconciliation and fee. Application should be submitted on-line via the divorce portal, although paper submissions are still possible. Mr Howard should be served.	
		Question 1 Total: 20 marks
Question Number	**Suggested Points for Responses**	**Marks (Max)**
2(a)	Responses should include: **Alternative dispute resolution (ADR) –** financial matters can be resolved by the parties via litigation or through some form of ADR, or via a combination of ADR approved by the court. ADR methods are quicker, less costly and should promote a more amicable settlement. **Negotiation -** write to Mr Abbott's lawyers to put forward proposals regarding the parties' finances ie negotiate. If agreement can be reached, then it can be put in a Consent order for the court to approve. **Mediation -** approach a mediator for assistance in agreeing the division of their assets. A mediator is neutral and cannot make the parties reach agreement. Any agreement reached is not binding unless it is incorporated in a Consent Order and approved by the court. **Collaborative law method** - available to family clients needing to resolve the division of their assets. Involves a series of meetings to discuss division. If this method is unsuccessful the parties must engage new solicitors if they are going to pursue the matter to court. **Arbitration** may be available in some courts. A **Mediation, Information and Assessment Meeting (MIAM)** must be attended by the parties before applying to the court for an order to resolve the parties finances, unless they can certify that they do not have to attend a MIAM.	**7**

Question Number	Suggested Points for Responses	Marks (Max)
2(b)	Responses should include: The main remedy for a co-habitant if a relationship breaks down is to claim a beneficial interest (an express, resulting or constructive trust) in the home under s14-15 Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996). Tyrone cannot establish an **express trust** as the property will be held in Mrs Abbott's name. Tyrone cannot establish a **resulting trust** as this requires a contribution to the purchase price. The property is to be transferred into Mrs Abbott's name, subject to her possibly taking out a mortgage to enable her to make an adjusting payment to Mr Abbott. Tyrone, who is unemployed, will not have contributed. Tyrone would have to try to claim a **constructive trust.** This requires a common intention between the parties and action by the non-legal owner to their detriment, Lloyds Bank v Rosset [1990]. The common intention can be either express or implied through conduct. Financial contributions such as paying for home decoration or buying furniture is not enough, Lloyds Bank v Rosset (1990). Payment of household expenses may suggest a beneficial interest if this has allowed the beneficial owner to pay the mortgage ie a sharing of costs. Currently, Mrs Abbott pays the mortgage and Mrs Abbott has the responsibility for paying household bills, subject to a small contribution from Tyrone. She needs to continue on this basis and not receive any significant payments towards household expenses from Tyrone. Further protection could be provided by preparing a cohabitation contract addressing arrangements whilst Mrs Abbott and Tyrone are co-habiting and on the breakdown of the relationship. The contract should include reference to Mrs Abbott as the sole owner of the property and also that any payment by Tyrone towards household bills does not count as a contribution which entitles him to claim an interest in the house	**13**
		Question 2 Total: 20 marks

Question Number	Suggested Points for Responses	Marks (Max)
3(a)	Responses should include: The relevant orders which we should apply for to protect Ms Smith are a non-molestation order under section 42 of the Family Law Act 1996 (FLA) and an occupation order under section 36 of the FLA 1996. To qualify for both orders Ms Smith must establish that she is an associated person under s62 FLA 1996. She can establish this as she and Mr Lake are cohabiting. To qualify for an occupation order Ms Smith must also establish that she is the property is a dwelling house occupied by applicant and respondent as their home. She can establish this as The Cedars is the family home. The application for an occupation order will be brought under s36 FLA 1996 as the family home is solely owned by Mr Lake. But Ms Smith is a co-habitant. Responses could include: The non-molestation order will have a power of arrest attached and breach is automatically a criminal offence for which the police can take action. Given that there is a history of violence, we should ask the court to attach a power of arrest to the occupation order under s47 FLA 1996.	**4**
Question Number	**Suggested Points for Responses**	**Marks (Max)**
3(b)	Responses should include: To make the application without notice under section 45 FLA we must prove to the court that Ms Smith and Rollo and Oscar are at risk of significant harm if the order is not made immediately. Alternatively, we can rely on the fact Ms Smith will be deterred or prevented from pursuing the application if the order is not made immediately. Given the severity of the last incident and the threat it is very likely that the court will grant one or both of the orders applied for without notice. In relation to the non-molestation order, under section 42 FLA the court will take into account all the circumstances of the case including the need to secure the health, safety and wellbeing of Ms Smith and the boys. There have been examples of verbal abuse and more recently physical abuse and these incidents have been witnessed by Rollo and Oscar. Ms	**16**

	Smith can demonstrate that there is a genuine need for protection and in these circumstances the court will grant a non-molestation order. When considering the occupation order, the court will firstly apply the balance of harm test under section 33(7) FLA and consider whether if the order was not made Ms Smith or Rollo and Oscar would be likely to suffer significant harm. If the answer to this question is yes then the court shall make the occupation order unless the court finds that Mr Lake is likely to suffer significant harm if the order is made and that the harm suffered by him is as great or greater than the harm attributable to him and suffered by Ms Smith if the order is not made. Here Ms Smith 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 Lake as if the order is made, he has got somewhere else to live, his flat in London. If the court had doubts about whether the balance of harm test was satisfied, then they would go on to consider the factors in section 36(6) FLA: The respective housing needs and housing resources of the parties and any child. Ms Smith's needs are greater as she is the main carer for the boys, and she has nowhere else to go, she has no family nearby. Mr Lake can stay at his London flat whilst M/s Smith would be unintentionally homeless and would thus obtain priority on the local authority's housing list, moving the boys from their home would cause upheaval and she would need a three-bedroom property ideally. Whilst Mr Lake would be regarded as intentionally homeless and thus receive no priority on the local authority's housing list there appears to be no reason why he can't move into his parents' or even Ollie's home. The respective financial resources of the parties. Ms Smith's needs are greater as she is bringing up the boys. Mr Lake is working and earning enough to support himself and to pay for his flat. 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 adverse effect on Ms Smith and Rollo and Oscar as they need to be protected from Mr Lake's violence and threats. The conduct of the parties in relation to each other and otherwise. Mr Lake has been verbally and physically violent to Ms Smith the boys have witnessed the recent two incidents of violence.	

	It is very likely that the court will grant the occupation order on the facts of this case. Responses could include: Additional s36 factors: Nature of parties relationship and level of commitment Length of time parties have been cohabiting Children of both parties or for whom parties have parental responsibility Length of time that has elapsed since the parties ceased co-habiting Pending proceedings between the parties If the court believes Ms Jackson's version of events, then they must also grant a power of arrest under section 47 FLA as Mr Lake has used and threatened violence against her.	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
3(c)	Responses should include: • In Re H (Contact: Domestic Violence) [1998] the Court of Appeal stated that domestic violence was not of itself a bar to contact • The cases of Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence) [2000] set out some principles to consider namely: • the conduct of both parties towards each other and the child. • the effect of the violence on the child and the parent caring for the children. • the motivation of the parent seeking contact and • in cases of serious domestic violence, the ability of the offending parent to recognise his past conduct, be aware of the need to change and to make genuine efforts to do so. • In addition to the case law there is the *Practice Direction (Residence and Contact Orders: Domestic Violence and Harm)* [2009] as supplemented by Family Procedure Rules 2010 Practice Direction 12J which requires numerous steps to be taken, including the prompt sending of the documents to CAFCASS for screening, consideration of the need for an initial fact-finding hearing to determine the issue of violence and the consideration of separate representation for the child. Where a welfare report is ordered, the court order should contain specific directions to the reporter to address the issue of domestic violence.	**10**

	• When the court is considering making a Child Arrangements Order (CAO) PD12J requires it to have regard to a list of factors similar to those in Re L (Contact Domestic violence) [2002] • If Ms Smith is successful in obtaining non-molestation and occupation orders, CAFCASS will note the existence of the orders and address the issue in their report. The court could also hold a finding of fact hearing or could rely on the findings in the domestic abuse proceedings. • On the making of a CAO where domestic violence has been proved, the court should consider what directions or conditions should be attached, such as whether the contact should be supervised and whether the order should be reviewed by the court at a later date. • Where the court finds that direct contact is not suitable it must consider indirect contact. • A finding of domestic abuse by a parent may rebut the presumption that the involvement of that parent in the life of the child concerned will further the child's welfare if it would put the child at risk of suffering harm whatever the form of the involvement (1) • Due to the fact that the boys have witnessed the last two incidents of violence it is likely that the court would feel that supervised visits are an appropriate measure or possibly indirect contact. It could impose a requirement on Mr Lake to seek advice or treatment as a pre-condition to him obtaining contact by way of an activity direction.	

Question 3 Total:30 marks

Question Number	Suggested Points for Responses	Marks (Max)
4(a)	Responses should include: Mr and Mrs Jackson should apply for a Child Arrangements Order (CAO) under s8 Children Act (CA) (1989) in order to formalise contact with Alvita This is an order which states who a child should live with and who a child should have contact with. Contact can be direct or indirect (e.g. phone calls, letters, texts) As grandparents Mr and Mrs Jackson do not come within the list of those automatically entitled to apply for a section 8 order under the Children Act 1989 (s.10(4) and (5)). They will need leave of the court to apply for a CAO (s. 10(2)(b)).	**12**

	The court would need to consider their application for leave (usually at a hearing) using the factors in s.10(9): - **The nature of the proposed application**: Mr and Mrs Jackson should be advised to apply for a CAO to identify for when they should see and spend time with Alvita. **The applicant's connection with the child:** Mr and Mrs Jackson are Alvita's paternal grandparents and so have a biological connection to her. The Court of Appeal has said that grandparents ought to have a special place in any child's affection worthy of being maintained by contact, Re M [1995] 2 FLR 86. Until 2019 Mr and Mrs Jackson were actively involved in Alvita's life, providing childcare while her mother worked **Any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it**: In Re M the court said the risk had to be disruption to an extent that the child would be harmed by it. Harm here meant impairment of health and development. A child's upset unhappiness, confusion or anxiety needed to be particularly severe before it could amount to an impairment of emotional, social or behavioural development. It is highly unlikely on the current facts that Opal can establish there is any risk of harm. Applying the s 10(9) criteria it therefore seems likely that Mr and Mrs Jackson would be granted leave to apply as they have a very strong relationship with their grandchild. However, the fact that leave has been granted does not create a presumption in favour of a substantive order or elevate a person who is not a natural parent to the position of a natural parent. This would mean that the court would consider the application for the subsequent section 8 order separately. Responses could include: Mr and Mrs Jackson could apply for leave using Form C2 and Form C100.	

Question Number	Suggested Points for Responses	Marks (Max)
4(b)	Responses should include: 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. The court will also consider the no delay principle, the no order principle and the presumption of parental involvement. The court will apply the s.1(3) welfare checklist: - **The ascertainable wishes and feelings of the child (considered in light of age and understanding):** Alvita is 9 years old. She has told her father that she misses her grandparents. At the age of 9 years, she may be considered too young for the court to attach much weight to her views. **The child's physical, emotional and educational needs**: the courts have recognised the important part that grandparents can play in their grandchildren's lives. Until 2019 Alvita was cared for by her parents for a significant part of each week. In light of her parents' separation and the fact her father's work make it very difficult for him to see her, her relationship with her grandparents will be important in meeting her emotional needs. Provided visits could be arranged at suitable times they need not affect Alvita's educational needs. **the likely effect on the child of any change in circumstances:** Alvita is used to seeing their grandparents on a very regular basis, so the stopping contact is a change to the status quo. The court aims to preserve the status quo. **the child's age sex, background etc**: This involves a wide range of considerations. In Alvita's case, she no longer sees her father very often due to the location of his job so seeing her paternal grandparents would help to maintain helps to maintain the link to that side of her family. **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 Alvita could suffer (emotional) harm by not seeing her grandparents	**18**

	particularly in light of her parents' separation and her father's infrequent contact. **how capable the parents or grandparents are of meeting the child's needs:** this is not an issue here. There is no suggestion that Mr and Mrs Jackson cannot look after Alvita as they have done so regularly for the first 5 or 6 years of her life. **the range of powers available to the court:** the court could make any section 8 order although realistically they will only make child arrangements order here. As the parties appear to be in dispute the court will have to make an order to resolve the issue (no order principle). The court will decide this application in accordance with the welfare principle and so it is highly likely that the court will feel that the child arrangements order is in the best interests of the children and make one in Mr and Mrs Jackson's favour.	
		Question 4 Total:30 marks