



CHIEF EXAMINER REPORT

JANUARY 2024

LEVEL 6 UNIT 7 – FAMILY LAW

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the January 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed in the suggested points for responses or alternative valid responses.

Chief Examiner Overview

As with previous papers, most candidates elected to answer more questions in section B than section A. With the exception of B1, candidates also did much better in their answers to section B questions. That said, there were some very good answers to section A.

As with previous papers, where candidates did less well in section A, it was due to them not answering the specific question posed and instead just giving a general overview of the area of law. This meant that, whilst they were able to pick up some marks for identifying relevant legislation/case law, they missed out on a lot of marks for the application of that law to the question and the conclusion.

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.

Candidates did not appear confident in discussing human rights issues, despite this being a clear point of discussion within the manual and 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.

There was confusion over when the court would be involved in child maintenance issues and when jurisdiction would lie with the Child Maintenance Service.

Whilst candidates appeared very confident in addressing the section 1 Children Act 1989 principles, their awareness of child arrangements case law seemed more limited.

Detailed knowledge of nullity provisions was lacking for some candidates, including who can apply under each ground and the relevant time bars in s13 MCA 1973.

Some candidates mistakenly believed first cousins to be within the prohibited degrees of relationship when looking at validity of marriage.

Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking the Level 6 exams limits the scope for constructive feedback to be given and for firm conclusions to be reached. Therefore, feedback on candidate performance is limited.

Section A

Question 1	25 marks
<p>The majority of candidates were able to generally discuss the property rights of cohabitants and married couples, though some candidates were not focused enough in their discussion of the rights of married couples, discussing all available orders under the MCA rather than focusing on property orders. Most were also able to identify the difference between the two types of relationship when discussing home rights. Less candidates than expected discussed proposed new developments in this area such as the Cohabitation Rights Bill.</p>	
<p>Suggested Points for Response:</p> <ul style="list-style-type: none">• A brief explanation of cohabitation property rights - i.e. relies on trust and property law principles, including TOLATA claims• Brief discussion of relevant cohabitation case law such as <i>Stack v Dowden</i>; <i>Jones v Kernott</i>; <i>Gissing v Gissing</i> (1971) and <i>Pettitt v Pettitt</i> (1970) – max 4 marks• A brief explanation of property rights on divorce/dissolution i.e. various orders available under the MCA 1973 and CPA 2004.• Brief discussion of relevant MCA case law such as <i>White v White</i>, <i>Charman v Charman</i> and <i>Miller v Miller</i> – max 4 marks• Explain Home Rights under section 30 Family Law Act 1996• Outline the proposals for reform that have been put forward on this issue (marks for this to be awarded in the new developments category)• Arguments that the current law is insufficient: TOLATA claims are expensive and complex; common law marriage myth; a lack of protection for parents who give up work to look after the children; high number of cohabiting couples/parents• Arguments for retaining the current law: freedom of option; couples now have the option of a civil partnership if they do not agree with marriage; may undermine marriage as an option; cohabiting relationships vary in commitment – where is the line to be drawn?	

Question 2a	11 marks
Some candidates attempted to answer this question by simply setting out the legal basis for an occupation order, ignoring the reference to Human Rights implications. This limited the marks that could be awarded.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • Discuss Article 8 – right to ‘respect for private and family life, home and correspondence’. • Identify that on the face of it an occupation order conflicts with Art 8. • Identify that Art 8 is a qualified right and discuss on what basis an interference can be justified. • Discuss that an interference needs to be proportionate with reference to relevant case law such as Silver v UK • Discuss whether the balance of harm test under s33 and s35 FLA 1996 helps achieve this proportionality. • Discuss Art 1 First Protocol ECHR – ‘every natural person is entitled to the peaceful enjoyment of their possessions’ • Identify that the factors set out in s33-38 FLA 1996 should enable a court to strike a balance between ‘the general interest’ of the community and an individual’s rights under Art 1. 	

Question 2b	14 marks
Few candidates identified the relevant case law or discussed Art 5 7 th Protocol. Again, a lot of the candidates who selected this question answered it with a general discussion of financial orders and White v White rather than answering the specific question posed.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • Correct identification of relevant case laws and statutory provisions (7 marks) • Discussion around the posed statement with detailed arguments, for and against being evidenced (4 marks) • A reasoned conclusion which is supported with evidence (2 marks) • Response is appropriately structured (1 mark) • Identify that Art 6 and Art 8 will be relevant when decisions are made about financial orders. • Discuss challenges to child support legislation under Art 6 with reference to relevant case law such as DWP, ex parte Kehoe [2005] • Discuss that Art 5 7th Protocol ECHR was omitted from the HRA 1998 – this would have provided for the equality of rights and responsibilities between spouses. • Explain that although equality is the starting point with reference to relevant case law such as White v White; Miller McFarlane, the 7th Protocol would have conflicted with the application of s25 MCA 1973 which allows flexibility and discretion. 	

Question 3	25 marks
<p>Most candidates were able to set out the relevant sections of the MCA and discuss the leading case law. Better candidates were also able to discuss relevant case law around special contribution and career sacrifice.</p>	
<p>Suggested Points for Response:</p> <ul style="list-style-type: none"> • Identify the legislative provision which deals with financial relief orders – Part II Matrimonial Causes Act 1973 • Briefly explain the factors that the court will apply when deciding what orders to make with reference to s25 MCA 1973 • Discuss the key case law relating to the question: White v White; Charman v Charman; Miller and McFarlane • Identify that the role of the ‘breadwinner’ may still be relevant in ‘special contribution’ cases but identifying that it can only be used in limited cases, with reference to relevant case law such as Lambert v Lambert • Identify that the role of the ‘homemaker’ may also be relevant in ‘career sacrifice’ cases but again this has limitations, with reference to relevant case law such as Miller; McFarlane; • Identify that the needs of the children will be given first consideration under s25(1) and their primary carer may therefore be prioritised in any order. • Other relevant arguments for an outcome other than 50/50 which prioritises one role over the other. • Discussion of the use of pre-nuptial agreements. • Discussion of the proposals in the 2006 Law Commission report and/or The Divorce (Financial Provision) Bill 	

Question 4	25 marks
<p>Better candidates were able to specifically address the question posed with reference to the legislative provisions and relevant case law. Candidates who answered this less well gave an answer which was focused less on the specific question and more on a general overview of the legislative provisions underpinning child arrangements orders.</p>	
<p>Suggested Points for Response:</p> <ul style="list-style-type: none"> • Identify that child arrangement orders are governed by section 8 CA 1989 • Explain the presumption of parental involvement in s1(2A) Children Act 1989. • Arguments for the statement posed could include: discussion of case law where the court has been reluctant to use more significant enforcement measures such as V v T (2007) or Re A (Children) [2009]; discussion of the repeated opportunities that are sometimes awarded to a hostile parent with reference to relevant case law such as Re A (Suspended Residence Order) [2010] or Re M (Children) [2012]; discussion identifying that sometimes the court will find that re-establishing contact is not in the child’s best interests with reference to relevant case law such as Re A (a child) [2015]; Discussion of the potential impact on Art 6 and 8 rights with reference to Glaser v UK [2001] • Arguments against the statement posed could include: an explanation of the amendments introduced by the Children and Adoption Act 2006 including the warning notice which is now attached to Child Arrangement Orders under section 11I CA 1989; identify that a breach of an order would be contempt of court and so has significant consequences; Discuss possible enforcement options under Sections 11A-J CA 1989 (court has a lot of options for dealing with failures to comply); discuss relevant case law where the courts have taken enforcement measures such as Re: S (2004) or Re: C (2007). Discuss the developing concept of ‘parental alienation’ with reference to relevant case law • Discuss the impact of a lack of PR on a father’s ability to be involved in decisions for a child. 	

Section B

Question 1a	12 marks
<p>Most candidates were able to identify that an application to the CMS was the correct legal mechanism. However, many went on to also discuss a potential application under the MCA or DPMCA which is unlikely given Jamal's salary. Most candidates were able to briefly set out the way that maintenance would be calculated and were able to identify that a reduction would be made due to overnight stays. However, a few candidates supported their answer with reference to the relevant sections of the Child Support Act 1991.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none">• Discuss that both Malia and Bryony will be 'qualifying children' under s3(1) Child Support Act 1991.• Discuss that Jamal will be classed as the 'absent parent' under s3(2) Child Support Act 1991• Discuss that Louise will be classed as the 'person with care' under s3(3) Child Support Act 1991• Discuss the 'duty to maintain' under s1 Child Support Act 1991.• Discuss that the Child Maintenance Service will calculate the amount payable based on Jamal's gross salary.• Explain that a reduction can be made of 1/7th for the night that the children spend with Jamal• Discuss the duration of the child maintenance obligation: until the children reach 16 or 19 if they remain in further education• Discuss the possibility of a family based arrangement• Identifying that Jamal will need to be habitually resident in the UK for the CMS to have jurisdiction – s44 Child Support Act 1991• Further detail about the CMS calculation• Discussion of the collect and pay scheme.• Other relevant sections under the Child Support Act 1991	

Question 1b	13 marks
<p>Some candidates mistakenly believed that a CMS application was still possible. Others were able to identify that the CMS could not be used but were not able to accurately discuss the potential court route. Most were, however, able to identify that Christopher is likely to be a child of the family and many were able to identify that any maintenance being paid by the biological father would be considered.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none">• Identify that the Child Support Act 1991 only applies to legal parents, not step parents – s54 Child Support Act 1991• Discuss the possibility of an application for a periodical payments order under s23(1)(d) Matrimonial Causes Act 1973• Discuss whether Christopher meets the definition of 'a child of the family'• Identify and apply the factors in s25(3) and s25(4) MCA 1973 (including discussing whether maintenance should be sought from Christopher's biological father)• Discuss the duration of periodical payment orders with reference to s29 MCA 1973• Discuss the possibility of a family based arrangement	

Question 2	25 marks
<p>Most candidates were able to discuss the divorce process and the orders available under the MCA fairly well, though some wasted time considering what facts would have been available under the old divorce route (no marks were awarded to this because this is a scenario question rather than an essay question and should have been focused on the current law). Candidates appeared to struggle more with the discussion of judicial separation, though most acknowledged it as an option. Better candidates were able to also discuss special contribution and career sacrifice. Some candidates forgot to reach a conclusion about the best option for the client.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • Set out the legal basis for a judicial separation under s17 MCA 1973 compared to the ground for divorce under s1 MCA 1973 (no need to state that the marriage has irretrievably broken down) • Explain that there is no need to attribute fault under either route following the Divorce, Dissolution and Separation Act 2020 • Explain the judicial separation is just a 1 stage process, whereas divorce is a 2 stage process (conditional and final order). • Explain the effects of judicial separation in regard to intestacy rights and the marital obligation to cohabit – s18 MCA 1973 • Explain that David will be unable to remarry unless he obtains a divorce. • Explain that the court is able to make similar financial orders on judicial separation to divorce, save for pension sharing orders. • Identify that on judicial separation the court is not obliged to consider a ‘clean break’ order because it is possible for further financial orders to be made on a later divorce– s25A MCA 1973 • Explain that for either route, if asked to make financial orders, the court will consider the factors in s25(1) and s25(2), save for s25(2)(h) which won’t apply in a judicial separation case. • 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"> ○ A property adjustment order; ○ A mesher order; ○ pension offsetting; and ○ A time limited periodical payment order • Discussion of child maintenance • Discussion of whether there has been a ‘career sacrifice’ here with reference to relevant case law such as McFarlane v McFarlane – unlikely to be successful in this argument in these circumstances. • Discussion of whether there has been a ‘special contribution’ here with reference to relevant case law such as Lambert v Lambert – unlikely to be successful in this argument in these circumstances. • The possibility of an application being made under s10(2) to delay the final order in the divorce proceedings. 	

Question 3	25 marks
<p>Most candidates were able to identify that divorce is not currently an option due to the length of marriage (though some candidates forgot about that time bar). Some candidates mistakenly believed that the marriage would not be valid because Habiba and Ibrahim were within the prohibited degrees of relationship (this is not correct). Some candidates also mistakenly believed that Habiba could rely on her own pregnancy in nullity proceedings. Better responses identified Habiba's domicile as being relevant to capacity and that the formalities of marriage in Pakistan needed to be complied with. Better candidates also addressed the relevant time bars in s13 MCA.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • Identify that for the marriage to be valid, the formalities of marriage in Pakistan must have been complied with because this is where the marriage took place. • Identify that capacity to marry will be determined by the parties' pre-marriage domicile - relevant case law such as Pugh v Pugh should be referenced. For Habiba this would be according to the law of England and Wales and for Ibrahim it would be the law in Pakistan. • Identify that first cousins will not fall within the 'prohibited degrees of relationship' under the Marriage Act 1949. • Identify that the marriage is potentially voidable under s12(c) due a lack of valid consent with reference to relevant case law such as Singh v Singh [1971], Szechter v Szechter [1971], Hirani v Hirani [1982] and P v R (Forced Marriage: Annulment: Procedure) [2003]. • Discuss s12(f) MCA 1973 but identify that this nullity ground could only be relied on by Ibrahim, not Habiba. • Discuss the relevant time bars under s13 MCA 1973. • Identify that the courts of England and Wales will have jurisdiction to grant a decree of nullity with reference to s5(2) Domicile and Matrimonial Proceedings Act 1973. • Identify that divorce is not an option at the moment because they have not yet been married for one year with reference to s3 MCA 1973. • Discuss the ground for divorce under s1 MCA 1973 if Habiba is willing to wait 1 year. • Discuss the definition of forced marriage in section 63(4) of the Family Law Act 1996. • Identify that forcing someone to marry is a criminal offence under s121 Anti-social Behaviour, Crime and Policing Act 2014 • Discuss Forced Marriage Protection Orders under the Family Law Act 1996 	

Question 4	25 marks
<p>Most candidates were able to clearly identify the relevant court application required and the legislative provisions which would be applied. Most were also able to apply the welfare checklist well to the scenario. However, fewer responses then went on to address and apply the relevant domestic abuse case law and procedural rules.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • Identify that the relevant order would be a child arrangements order under Section 8 Children Act 1989. • Explain the relevant principles in section 1 CA 1989. • Application of the welfare checklist in section 1(3) CA 1989 to the facts • Discuss the presumption of parental involvement in section 1(2A) and its relevance to this scenario • Identify that both the physical and non-physical behaviour would amount to domestic abuse under s1 Domestic Abuse Act 2021. • Discussion of Re L,V,M and H (2000) and application to the scenario. • Discuss how the evidence of domestic abuse will be considered by the court with reference to relevant case law such as Re B-B (Domestic Abuse Fact-Finding) [2022] and Re H-N and others (children) (domestic abuse: finding of fact hearings) [2021]. • Discuss the potential conditions that could be attached to the order with reference to s11(7) CA 1989 or relevant case law • Discussion of Practice Direction 12J • Discuss how Yasmine might be protected during the proceedings with reference to the Domestic Abuse Act 2021 and Part 3A Family Procedure Rules 2010 • Other relevant case law illustrating principles outlined above 	