

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

LEVEL 6 UNIT 7 – FAMILY LAW

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 January 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

There was a fairly even split of questions answered in Section A and Section B.

In terms of general feedback on section A, some candidates failed to answer the actual question posed and instead chose to just outline everything they knew about a particular area. This meant that a lot of time was wasted including information that attracted little to no marks.

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. For a lot of candidates, they then needed to be stronger in their conclusions to obtain more marks. 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.

Particular areas where candidates showed confusion over the legal position:

- s46(2) and s51 Family Law Act 1986
- Occupation order sections and the application of the balance of harm test to sections other than s33.
- Family Assistance Orders
- Eligibility to apply for Child Arrangements Orders (this isn't dependent on PR)

- s12 and s13 MCA 1973 (in particular, the different time bars and which provisions will apply to same sex couples)
- The position of single parents in surrogacy cases.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This was answered well overall but very few candidates identified the case that this quote came from – Mills v Mills. Most candidates were able to discuss the background law, including clean break orders and some of the leading case law. However, quite a few candidates then failed to apply this directly to the question by considering arguments for and against the statement. This limited the marks available.

Question 2(a)

Most candidates were able to identify the key principles and some of the key cases. However, many candidates did not identify the appropriate legislation. Very few identified the relevance of s46 MCA. Many candidates spent far too much time discussing domicile.

2(b)

This was answered poorly by a lot of candidates. Many candidates were able to identify s46(1) as a relevant section but very few then went on to discuss s46(2) or s51.

Question 3

This was answered reasonably well by candidates, though a common error was to spend far too long discussing the general position of cohabitants and property rights. Not enough time was spent discussing home rights, which should have been the focus of the answer. Occupation orders were discussed reasonably well but some candidates made errors when discussing the difference between s33 and s36 (particularly the way in which the balance of harm test is applied).

Question 4

Only two candidates answered this question, and it was answered very poorly in both cases. Candidates did not seem to appreciate the various ways in which a local authority may be involved in private proceedings. Family Assistance Orders were ignored.

Section B

Question 1(a)

Overall, this was answered very well by most candidates. It was also a popular question. Most candidates discussed the section 1 principles well but very few discussed a MIAM and the conditions that could be attached to the order. A lot of candidates mistakenly believed that the father needs PR to be able to apply for child arrangements order without leave – this is not correct.

1(b)

This was also a popular question and answered very well by most candidates. What candidates did less well is apply the case law to the scenario (these tended not to be linked together). Some candidates went off on a tangent and discussed the Protection from Harassment Act or criminal sanctions, which were not required under this question and attracted no marks.

Question 2

This was answered reasonably well by candidates. Most candidates were able to identify the leading case law and apply it to the scenario. Where candidates did less well is by failing to go on to discuss and apply the s25(2) MCA 1973 factors to the case. This also meant that they did not reach a conclusion on the orders which would likely be made in this case.

Question 3

There were mixed levels of responses to this question. Common errors included a misunderstanding of when s12(a) and (b) will and won't apply (both wouldn't apply in this case because they are currently a same sex couple). Another error was around the time bars in s13 (it would be 6 months where the application is under s12(g)). Some candidates also spent far too long explaining the old divorce process which would no longer apply – no marks were awarded for this.

Question 4

Most candidates were able to identify the basic legal principles in this case. However, many candidates ignored Edward's legal position. A lot of candidates also referred to an outdated legal position for single parents, believing that a single parent couldn't apply for a parental order – this is no longer correct.

SUGGESTED POINTS FOR RESPONSE

JANUARY 2023

LEVEL 6 UNIT 7 – FAMILY LAW

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none">• Correct identification and explanation of relevant case law and statutory provisions• Discussion around the posed statement with detailed arguments, for and against being evidenced• A reasoned conclusion which is supported with evidence• Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none">• Identify that this relates to periodical payments orders under s23 MCA 1973• Identify that the reference to meal ticket for life comes from the case of Mills v Mills• An explanation of clean break orders (both deferred and immediate) with reference to section 25A MCA 1973• Discussion of the factors that the court will consider when determining what financial orders to make – section 25(1) and (2) MCA 1973• Discussion of other relevant case law such as Miller v Miller; McFarlane v McFarlane; Edgar v Edgar• Arguments for the statement: court obliged to consider a clean break order; joint lives orders unlikely for short marriages; circumstances when PPOs will automatically come to an end; possibility of capitalised lump sum orders instead of PPOs.• Arguments against the statement: still largely based on needs (if needs require a whole life order, one may be granted); variation of orders possible; cannot oust the jurisdiction of the court; the court must avoid undue hardship <p>Responses could include:</p> <ul style="list-style-type: none">• Explain that clean breaks do not apply to child maintenance	25



	<ul style="list-style-type: none"> • Discussion of maintenance agreements and when they can be varied with reference to s34-36 MCA 1973 • Discuss Martin v Martin orders • The divorce (financial provision) bill and Law Commission report on marital property, needs and agreements. • Family Justice council guidance on Financial Needs on divorce. 	
	Question 1 total: 25 marks	
2(a)	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant case laws and statutory provisions • Discussion around the above in relation to the posed statement • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Identify that the formalities which govern marriage are determined by the law of the place where it is celebrated. • If parties fail to comply with formalities in the celebratory country, the marriage will be invalid unless it is covered by the Foreign Marriages Acts 1892–1947, • The parties must also have capacity to marry according to the law of their pre-marriage domicile (not necessarily the country where the marriage took place) - relevant case law such as Pugh v Pugh should be referenced. • Discuss the test set out in <u>Cheni v Cheni</u> - “whether the marriage is so offensive to the conscience of the English court that it should refuse to recognise and give effect to the proper foreign law”. • Discuss the recognition of polygamous marriages with reference to relevant case law such as Hussein v Hussein and/or Mohamed v Knott. • Discuss declarations of validity under s46 MCA 1973 <p>Responses could include:</p> <ul style="list-style-type: none"> • Discussion of the provisions in s47 MCA 1973 regarding financial orders • Under s10 M(SSC)A 2013, same-sex couples who marry abroad under foreign law are now recognised as being married in England and Wales. 	15
2(b)	An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.	10

	<p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant case laws and statutory provisions • Discussion around the above in relation to the posed statement • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • A foreign decree of nullity, divorce or judicial separation will be recognised as valid by the English courts if it fulfils the requirements of s46(1) Family Law Act 1986 – each of those requirements should be explained. • There are countries that permit marriages to be annulled or dissolved with no formality whatsoever. These decrees are obtained otherwise than ‘by means of proceedings’ and may be recognised provided that the parties fulfil the requirements set out in s46(2) FLA 1986 – those requirements should be explained. • Candidates should identify that the requirements in (2) are more onerous than (1) and there is a preference in English law for marriages to end by proceedings. • Identify the circumstances in which recognition can be withheld under s51 FLA 1986. <p>Responses could include:</p> <ul style="list-style-type: none"> • Discuss the relevance of Art 6 ECHR to the s51 factors. 	
Question 2 total:25 marks		
3	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant case laws and statutory provisions • Discussion around the posed statement with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Identify that this question is about home rights under section 30 FLA 1996. 	25

	<ul style="list-style-type: none"> • Set out the definition of home rights with reference to s30(2) FLA 1996 • Explain that non-owning spouses and civil partners have statutory home rights but non-owning cohabitants do not. • Explain that in contrast, to have a right to occupy cohabitants would need to establish property rights through a contract or beneficial interest. • Briefly explain how a beneficial interest may be established with reference to relevant case law such as <u>Gissing v Gissing</u> and <u>Stack v Dowden</u> (marks will be awarded to a maximum of 4 cases to prevent the answer solely focusing on this one issue). • Discuss how home rights can be registered and the benefits of doing so with reference to s30(3) FLA, s31 FLA and relevant case law such as <u>Sanctuary Housing Association v Campbell</u> [1999]. <p>Responses could include:</p> <ul style="list-style-type: none"> • Explain when home rights come to an end. • Explain the benefit of having home rights when applying for an occupation order, comparing s33 to s36. Discussion could include reference to the length of order, factors considered by the court and the difference in the balance of harm test. • Discuss orders available under TOLATA. • Discussion of relevant provisions in the Married Women’s Property Act 1882 (MWWPA 1882) 	
Question 3 total:25 marks		
4	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant case laws and statutory provisions • Discussion and explanation of the above in relation to the posed question • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Discuss when a family assistance order (s16(1) CA 1989) can be made. • Explain what a family assistance order can direct a local authority to do. • Discuss the duration of family assistance orders. • Discuss the changes implemented by s6 Children and Adoption Act 2006 	25

	<ul style="list-style-type: none"> • Discuss the court’s approach to family assistance orders with reference to relevant case law such as <u>S v P (Contact Application: Family Assistance Order)</u> [1997] and <u>Re E (Family Assistance Order)</u> [1999] • Discuss when the court can make a section 37 direction with reference to s37 CA 1989 and relevant case law such as <u>Re L (s37 Application)</u> [1999] • Discuss what local authorities are obliged to do if a section 37 direction is made. <p>Responses could include:</p> <ul style="list-style-type: none"> • Discuss risk assessments conducted under s16A CA 1989 • Discuss section 7 reports. 	
Question 4 total:25 marks		

SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Application of the above to the scenario • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Discuss mediation as a potential option to resolve the dispute, identifying that a MIAM is required in any event before an application can be made. • Identify that a child arrangements order under s8 CA 1989 would be the appropriate order if an agreement cannot be reached. • Discuss the relevant section 1 principles (s1(1), s1(2), s1(2A), s1(3), s1(5)) • Discuss the potential conditions that could be attached to the order with reference to s11(7) CA 1989 or relevant case law <p>Responses could include:</p> <ul style="list-style-type: none"> • Identify that Jamal should not attempt to contact Emma directly following the solicitor’s letter. 	15

	<ul style="list-style-type: none"> • Discussion as to whether mediation would be appropriate given the allegations of harassment • Identify that Jamal has PR by way of being named on the birth certificate (s4(1)(a) CA 1989) • Discuss the definition of PR with reference to s3(1) CA 1989 and identify that this means he should be involved in decisions about his daughter (max 2 marks for all discussion of PR) 	
1(b)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification and explanations of relevant statutory principles and case law • Application of those laws to the scenario • A reasoned conclusion which outlines justifications and is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • An explanation of what a non-molestation order is with reference to s42 Family Law Act 1996 • Discuss whether the parties would be 'associated persons' with reference to s62 FLA 1996 • A discussion of what will amount to molestation with reference to relevant case law such as <u>Vaughan v Vaughan</u> or <u>Horner v Horner</u>. • Draw a conclusion about whether the alleged behaviour would amount to molestation. • Draw a conclusion about whether the behaviour would justify the intervention of the court with reference to <u>C v C</u> and the statutory test. • Discuss the possibility of an undertaking instead of an order with reference to s46 FLA 1996 <p>Responses could include:</p> <ul style="list-style-type: none"> • Discussion of the statutory definition of domestic abuse under the Domestic Abuse Act 2021 • A discussion of when a non-molestation order can be made <i>ex-parte</i> (drawing a conclusion that this is unlikely in this case) • Discussion of warning letters • Explain how non-molestation orders are enforced with reference to s42A FLA 1996 • Discuss the length of non-molestation orders 	10
Question 1 total: 25 marks		



<p>2</p>	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification and explanations of relevant statutory principles and case law • Application of those laws to the scenario • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • A discussion of the leading case of <u>Radmacher v Granatino</u> and the factors laid down in that case, comparing the facts of that case to this scenario (this should be considered in detail). • A discussion of the factors that the court will consider when determining what financial orders to make – section 25(1) and (2) MCA 1973 • Application of the s25 factors to this case. • Discussion of the potential orders that could be made in this case with reference to the provisions in the MCA 1973 • Discuss the potential need for a post nuptial agreement if circumstances change e.g. they have children with reference to relevant case law such as <u>MacLeod v MacLeod</u> • Identification that sufficient provision needs to be made for any child of the family and child maintenance cannot be avoided through this type of agreement. <p>Responses could include:</p> <ul style="list-style-type: none"> • Other relevant case law setting out the legal position in relation to pre-nuptial agreements e.g. <u>Kremen v Agrest</u> [2012], <u>M v M (Pre-nuptial Agreement)</u> [2002] • An explanation of the Law Commission proposals for Qualifying Nuptial Agreements • Discussion more generally of child maintenance obligations. 	<p>25</p>
<p>Question 2 total:25 marks</p>		
<p>3</p>	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant legislation and case law • Identification of relevant alternatives/options available 	<p>25</p>

	<ul style="list-style-type: none"> • Discussion around the above with application to the scenario and detailed arguments, for and against options being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Explain that a marriage can now be between either gender so the validity of the marriage is not affected (reference should be made to the removal of s11(c) MCA 1973). • Case law outlining the development of the law around the definition of marriage and transgender rights (e.g. <u>Bellinger v Bellinger</u>) • Identify that the marriage is potentially voidable under s12(g) MCA 1973 (not (h) because the gender hasn't yet been acquired) • Explain why s12(a) and (b) MCA 1973 could not be relied on i.e. at the time of the marriage both parties were legally male and lack of consummation cannot be relied on in a same sex marriage • Discuss the potential bars to an application for nullity under s13 MCA 1973, in particular s13(1) (conduct) and s13(2), identifying the difference in time bar where an interim GRC has been granted after the marriage (6 month time bar, rather than 3 years). • Identify that another option is to apply for divorce – briefly outline the ground for divorce with reference to s1(1) MCA 1973. Explain that a reason does not have been given for the breakdown of the marriage. <p>Responses could include:</p> <ul style="list-style-type: none"> • Discussion of the steps that would be taken to apply for a full GRC with reference to s2 and s3 Gender Recognition Act 2004 • A brief outline of the divorce process 	
	Question 3 total:25 marks	
4	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification and explanations of relevant facts and laws • Application of those laws to the scenario 	25

	<ul style="list-style-type: none"> • A reasoned conclusion which outlines justifications and is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Identify that this is a partial surrogacy arrangement • Identify that the relevant legislation is The Human Fertilisation and Embryology Act 2008 (HFEA) which governs these cases along with The Surrogacy Arrangements Act 1985 (SSA). • Explain that under the definition in Section 33 HFEA 2008 Diane would be the mother of the child unless a parental order is made. • Discuss the presumption of legitimacy with reference to Section 38 and 35 HFEA and explain that it is likely that Edward will be the legal father of the child, not Simon, even though Simon’s sperm has been used. • Explain the requirements for a parental order including the time limits with reference to section 54 HFEA 2008. • With reference to case law such as Re X and Y (Children) [2012] and the legislative provisions in the Surrogacy Arrangements Act 1985, discuss the prohibition of commercial surrogacy in relation to the payment proposed. • Discuss the difficulties with enforcing a surrogacy arrangement with reference to section 1A Surrogacy Arrangement Act 1985 <p>Responses could include: Other relevant case law on surrogacy</p> <ul style="list-style-type: none"> • Discuss Human Rights implications with reference to relevant case law • Discuss the law commission proposals on surrogacy reform 	
Question 4 total:25 marks		