CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

LEVEL 6 - UNIT 7 – FAMILY LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the September 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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

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.

In section B, most of the candidates answered these questions fairly well but many answers were lacking in case law application.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1(a)

Most candidates were able to identify the position with the law prior to the introduction of the Act and the impact of the Act itself. However, very few candidates identified that this Act had in fact led to same sex couples having more opportunities to formalise their relationships than opposite sex couples

(with reference to the Steinfeld case). This therefore limited the marks they achieved.

1(b)

Most candidates identified the key differences with regards to adultery and non-consummation. However, very few candidates discussed the Gender Recognition Certificate changes introduced by the Act.

Question 2

Some excellent answers to this question but quite a lot of poor answers. Most candidates were able to outline the outcome of Owens v Owens. However, candidates struggled to delve deeper into some of the issues that were set out in the judgment to that case, regarding the divorce process more generally. Quite a lot of candidates also failed to consider problems with the other facts beyond behaviour. Some candidates appeared to not have any knowledge of the proposals for reform in this area.

Question 3

On the whole, this question was answered very well. Most candidates adopted a logical order to the answer and referenced lots of relevant case law. Some candidates forgot to reference the Property Act 1925 or sections 14 and 15 of TOLATA, limiting their answers (and in turn their marks) to case law consideration.

Question 4

On the whole, this question was answered very well. Most candidates applied the relevant principles to the question. Where candidates performed less well, it was usually because they had not referenced and applied relevant case law to the question. Very few candidates considered Articles 6 and 8 ECHR.

Section B

Question 1(a)

This question was answered well by most candidates. Candidates need to remember to always consider the option of waiting and relying on a non-fault-based fact. Resumed cohabitation needed to be considered for all available facts (different rules apply to different facts). Some candidates misunderstood the impact of resumed cohabitation on the behaviour fact.

(b)

Most candidates identified the possibility of withholding consent to 2-year separation or the potential use of the section 5 defence. However, only a few stronger answers considered the evidential issues with proving adultery or the prospect of mediation. Weaker candidates also didn't address section 10 as a delaying tactic and where this was addressed, it wasn't applied very well indicating a lack of understanding of this section.

1(c)

Very few candidates answered this correctly. Candidates identified the 1-year requirement but then failed to identify that under section 9, when a CP is converted, the date of the marriage will be treated as being the date the CP was entered into.

Question 2(a)

Most candidates identified that both parents will have PR, although some candidates then went on to reach the incorrect conclusion about how the decision can be made. Poorer answers were lacking in case law references or specific references to the legislation which limited the marks available.

2(b)

Most candidates were able to identify that this question was referring to a Specific Issue Order application under section 8. Application of section 10(4) and the leave test was missing or applied incorrectly in a lot of answers – it is not related to PR. Most candidates identified and applied sections 1(1), 1(2), 1(5) and 1(3) (although some candidates quoted these sections incorrectly). Section 1(2A) was crucial in this question and was missed by a large number of candidates. On the whole, the welfare checklist was applied well.

Question 3

On the whole, this question was answered well, although some candidates did not identify that section 33 was the correct section for the Occupation Order because Asha has Home Rights. Where candidates scored poorly, it was usually because they only provided a general overview of non-molestation orders and occupation orders, without dealing with details such as undertakings, duration of the orders and section 40 directions.

Question 4

On the whole, this question was answered fairly well. Although very few candidates applied the relevant case law to the issues of contributions and inheritance. These were key issues in this case and needed detailed exploration. Poorer candidates outlined the general orders available and the factors but without reference to case law and failed to reach a definitive conclusion about a likely package of orders.

SECTION A

Question 1(a)

The Marriage (Same Sex Couples) Act came into force in July 2013 and enabled sex same couples to marry. In order to accomplish this, section 11 of the Matrimonial Causes Act 1973 was amended to remove any reference to gender when considering whether a marriage was void.

Prior to the introduction of this Act, same sex couples only had the option of a Civil Partnership under the Civil Partnership Act 2004 or cohabitation. Marriage was only available to opposite sex couples and this was governed by the various Marriage Acts.

Following the introduction of the Act, male spouses continue to be referred to as "husbands" and female spouses are "wives", regardless of whether they are in a same sex or opposite sex marriage. This was ensured through the inclusion of definitions in Schedule 3 of the Marriage (Same Sex Couples) Act.

For same sex couples who had already entered in a civil partnership, section 9 provided the means for them to convert their civil partnership into a marriage. The date of the marriage was thereafter deemed to be the original date that the civil partnership had been entered into.

There is very little difference in the way that same sex and opposite sex marriages are entered into, with the exception of religious ceremonies. Whilst any couple can have a civil marriage, same sex couples can only have a religious ceremony if the religious organisation has opted in. Notably, both the Church of England and Wales and the Catholic Church have not opted in. This has become known as the 'quadruple lock' and is seen by some as being discriminatory against same sex couples. However, in order to ensure freedom of thought, conscience and religion (Article 9 European Convention on Human Rights), the Equality Act 2010 was amended to ensure that no claim of discrimination could be brought against a religious organisation for their failure to opt in.

Whilst the introduction of the Marriage (Same Sex Couples) Act 2013 could be said to have given same sex couples the same right to marriage that has been held by opposite sex couples, it was also argued to have left another gap. This is because it has resulted in same sex couples having two options by which they can formalise their relationships in law (civil partnership or marriage), whereas opposite sex couples had only one option (marriage). This issue was considered by the Supreme Court in Steinfeld v Secretary of State (2017) and it was held that this had led to an incompatibility with Articles 14 and 8 of the European Convention on Human Rights. As a result of this, the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 was introduced to Parliament and received Royal Assent on 26 March 2019. This now allows opposite sex couples to enter into a civil partnership.

1(b)

On divorce, same sex couples will have the same rights with regards to financial claims against one another as opposite sex couples do.

The Marriage (Same Sex Couples) Act 2013 has also removed one of the reasons why a marriage or a civil partnership may need to be brought to an end. This is by way of the inclusion of section 12 of the Act. This ensures that a Gender Recognition Certificate can be granted to one of the parties without the need to end the marriage, provided both parties are in agreement. Prior to the introduction of the Act, the granting of a Gender Recognition Certificate would have made a marriage or civil partnership void because one of the parties to the marriage/civil partnership would no longer be of the gender required by law.

Whilst this is clearly a step forward, there remains some differences in treatment between same sex and opposite sex couples following the introduction of the Act, most notably in the way that the formal relationships can be brought to an end. This appears largely due to a reluctance on the part of the government to acknowledge a sexual relationship as part of a same sex marriage in the same way as they do with opposite sex marriages.

For example, adultery is only available as a possible fact for divorce if it is between two people of the opposite sex. This was established in the case of Dennis v Dennis (1955) which stated that adultery is 'Voluntary sexual intercourse between two persons of the opposite sex, of whom one or both are married but who are not married to each other'. This was confirmed by the introduction of section 1(6) into the Matrimonial Causes Act 1973 by the Marriage (Same Sex Couples) Act 2013. Section 1(6) states that 'Only conduct between the respondent and a person of the opposite sex may constitute adultery for the purposes of this section'. Instead, the extra-marital relationship would have to be relied upon as part of a petition based on behaviour.

Similarly, in nullity proceedings, same sex couples cannot rely upon a wilful refusal or an incapacity to consummate. This is because sections 12(1)(a) and 12(1)(b) Matrimonial Causes Act 1973 do not apply to same sex marriages.

It is therefore clear that there are still some key differences between the approaches taken to same sex relationships compared to opposite sex relationships, especially on the breakdown of marriage.

Question 2

The current substantive law on divorce has not been reformed since the Divorce Reform Act of 1969 when 'no fault' divorce was incorporated into the Matrimonial Causes Act 1973 (MCA). The MCA has largely remained unchanged in relation to divorce since 1973 except for the insertion of s1(6) by the Marriage (Same Sex) Couples Act 2013 to acknowledge that adultery can only take place between two people of the opposite sex.

There is one ground for divorce in England and Wales, the irretrievable breakdown of the marriage. In order to demonstrate that the marriage has irretrievably broken down, one of the five facts, as set out in section 1(2) of the MCA 1973, needs to be proven. The first three of these facts (adultery,

behaviour and desertion) are known as the fault-based facts, as they involve the petitioner to the divorce placing blame on the other spouse. The other two facts (two years separation with consent and five years separation) are non-fault based.

The case of Owens v Owens highlighted a number of issues with the current law in this area. Mrs Owens petitioned for divorce from Mr Owens on the basis of his behaviour. The test for establishing a divorce based on behaviour had been set out in the previous case of Livingstone-Stallard v Livingstone-Stallard (1974). Namely, *"Would any right thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the character and personalities of the parties?"*. Mr Owens successfully defended the divorce, as the allegations put forward by Mrs Owens were held not to be sufficient to justify the test set out in Livingstone. This meant that Mrs Owens was forced to remain married to Mr Owens until they had been separated for five years, despite the court acknowledging that the marriage was over.

The Supreme Court raised a number of criticisms about the current divorce process when delivering their judgment in this case. This included criticising the paper process, whereby allegations in the divorce petition are not scrutinised unless the divorce is defended. The court also acknowledged that couples may decide to falsify allegations of behaviour in order to obtain a divorce swiftly without needing to wait for two years separation to have passed. Finally, they highlighted the conflict between the fault based facts and the usual conciliatory approach of family lawyers and the family courts.

The Owens case focused on criticisms of the behaviour fact. However, there are also criticisms that can be raised of the other section 1(2) facts. For example, the adultery fact has been criticised for fuelling animosity between the parties and also being difficult to prove if the adulterous party is unwilling to provide a confession statement. In addition, this fact is not available where the affair takes place between two people of the same sex, due to the definition of adultery set out in Dennis v Dennis and now replicated in section 1(6) MCA 1973. The fact of desertion has similar evidential difficulties to adultery and is very rarely used, thereby causing some people to question if the fact has any relevance today.

For those people who do not wish to place blame with their spouse for the breakdown of the marriage, they must wait at least two years from the date of separating to divorce. Even after two years, they are reliant on their spouse consenting to the divorce and, if they do not, then they will be forced to wait five years. Even where the other spouse is willing to give consent, they still have no certainty that the divorce will progress on this basis, because the consent can be withdrawn at any point up to the Decree Nisi being granted without an explanation being required. This consent can also be used as a bargaining chip by the other spouse to obtain a more preferable financial agreement.

The Owens case and other criticisms of the current divorce legislation highlighted as part of a government consultation process, provoked the No Fault Divorce Bill. The outcome of this Bill is yet to be determined. However, it remains clear that the current process is not ideal and does not fit with the overall family law principle of encouraging conciliatory behaviour.

Question 3

Where a cohabitee is not named on the deeds as a beneficial owner of the family home, they will not have any legal right to occupy the property. This can be contrasted with married couples, where a spouse without legal ownership will have the protection of home rights under section 30 Family Law Act 1996. This potentially places non-owning cohabitees in a vulnerable position.

Cohabitees cannot rely on the provisions in the Matrimonial Causes Act 1973 and must therefore rely on property law principles if they wish to make a claim on the property. To do this they should seek to establish a beneficial interest. The relevant legislation will be the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) and the Law of Property Act 1925. More specifically they may need to make an application to the court under section 14 of TOLATA for a declaration of their interest in the property. When deciding whether to make an order, the court will consider the factors set out in section 15 of TOLATA, which includes:

(a) the intentions of the person or persons (if any) who created the trust,
(b) the purposes for which the property subject to the trust is held,
(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
(d) the interests of any secured creditor of any beneficiary.

A beneficial interest may be created by way of a resulting or constructive trust. When created in this way, section 53(2) Law of Property Act 1925 states that the interest does not have to be detailed in writing. Resulting trusts are not relevant to this question because they do not apply where there is no direct contribution to the purchase price.

Lloyds Bank v Rosset (1991) sets out the requirements for establishing a constructive trust. There are two elements, (1) a common intention to share the beneficial interest in the property and (2) in relying on that common intention the claimant must have acted to their detriment.

In the Lloyds Bank case, Lord Bridge indicated that it was very doubtful whether anything less than a direct financial contribution could be used to establish a common intention. It was clarified that paying household bills, decorating, gardening and buying household contents would not be sufficient. However, an example of a case where the court was prepared to hold that there was evidence of a constructive trust in favour of a non-owner, is Grant v Edwards (1986). In this case the respondent persuaded the applicant that they should purchase a house in his sole name by suggesting that to do otherwise might prejudice her in her pending divorce proceedings. In this case the Court of Appeal found sufficient evidence of common intention because the parties had shared everything and treated the house as though it belonged to them both. The "detriment" to the applicant was being persuaded not to have the house placed in joint names at the time of purchase.

Whether home improvements would be sufficient to demonstrate common intention and detrimental reliance has been debated in case law. In Pettit v Pettit the argument failed due to the improvements being deemed too minor in nature. However, in Stack v Dowden it was made clear that, where the home improvements are substantial and significant in nature, the argument of a common intention to share the beneficial interest may succeed. The cost

of the home improvements can be used to establish the second part of the test, 'detrimental reliance'.

The courts recognise that intentions of the party cannot be crystallised at one point in time and may change as the relationship between them develops. This was the case in Aspden v Elvy (201)], where the applicant had transferred a barn on his farm into his partner's sole name. He then later went on to carry out extensive renovations to the barn. This was sufficient to persuade the court that the intentions of the parties had changed and that he had acquired an equitable interest in the barn.

Once a common intention has been established, the beneficial interest will need to be quantified. In a case where there is express evidence of shared intentions as to proportions, the quantification will be decided by evidence as to what the parties said and did at the time of the purchase. Where there have been no such express discussions, Oxley v Hiscock (2004) provides some guidance on quantification. The court will determine what shares will be "fair having regard to the whole course of dealing between them in relation to the property" and this "includes the arrangements which they make from time to time in order to meet the outgoings which have to be met if they are to live in the property as their home".

The House of Lords in Stack v Dowden (2007) provided further clarification on this. They clarified that the exploration of the whole course of dealing should be restricted to an examination of the conduct of the parties which throws light on what beneficial shares were intended. This requires the court to identify 'actions, discussions, and statements which relate to the parties' agreement and understanding as to ownership of the beneficial interest in the home' rather than the court imposing its own sense of fairness or justice on the parties. Further, the House of Lords indicated that the court should not seek to impute an intention based on all the circumstances.

Question 4

Child arrangements proceedings are governed by section 8 of the Children Act 1989. The purpose of these proceedings is to determine who a child will live with and when they will spend time with the other parent/family member. If a Child Arrangements Order is made as part of those proceedings, it will last until a child turns 18 years old.

Child Arrangements Orders were introduced by the Children and Families Act 2014. They replaced residence and contact orders to create one unified order that will deal with all the arrangements for a child, rather than one parent have the perceived power of a 'residence order' and the other parent having a lesser 'contact order'. Under a child arrangements order, it is of course also possible to set out that parents will share the care of a child equally.

There is no preference as to which parent (if any) should have primary care of the child and both parents will be considered equal in the eyes of the law, with equal duties and responsibilities. This was confirmed in the case of A v A (Shared Residence) (2004). This case also acknowledged that sole residence orders could be misinterpreted as enabling one parent to have control. The A v A case involved serious allegations being made by one parent against the other. However, the case of D v D (Shared Residence Order) (2001) confirmed that exceptional circumstances of this kind do not need to exist for a shared order to be granted. The court confirmed that what is required is a

demonstration that a shared order would be in the best interests of the child in accordance with section 1(1) of the Children Act 1989, otherwise known as the welfare principle. Whether this is the case will depend on the individual circumstances of the case.

Section 1(2A) Children Act 1989 states that the court will "presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare". Some people have interpreted this as meaning that both parents should have equal involvement or contact with a child. However, section 1(2B) clarifies that "'involvement' means involvement of some kind, either direct or indirect, but not any particular division of a child's time". Direct involvement is face to face contact and indirect involvement includes contact via letters, birthday cards etc.

When deciding what parental involvement is in a child's best interests, the court will consider the factors set out in section 1(3) of the Children Act 1989, otherwise known as the welfare checklist. Those factors are:

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) his physical, emotional and educational needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) the range of powers available to the court.

There is no hierarchy between each of those factors and they will all need to be considered when determining whether shared care is the appropriate outcome.

The combined cases of Re L, Re V, Re M, Re H (Contact: domestic violence) (2000) confirmed that domestic violence is not an absolute bar to contact/shared care. However, the approach should be child centred, the circumstances of the violence should be considered, and the potentially damaging effect of contact with a violent parent should not be underestimated.

The other principles within section 1 Children Act 1989 should also be considered before any order is made. This includes the principle set out within section 1(2) "that any delay in determining the question is likely to prejudice the welfare of the child" and the principle in section 1(5) that the court "shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all".

Aside from the principles in section 1, the court must also keep in mind the rights of the child and the parents under articles 6 and 8 of the European Convention on Human Rights when making any determination about a child's upbringing.

In summary, whilst shared care may become a more popular option in cases where the child is used to spending time with both parents and this option is in the child's best interests, this is not and should not become a presumption.

Every case should be considered on its own facts and what may benefit one child may not benefit another.

SECTION B

Question 1(a)

The relevant legislation if Jessica wishes to bring her marriage to an end is the Matrimonial Causes Act 1973.

There is only one ground for a divorce, which is that the marriage has broken down irretrievably: section 1(1) MCA 1973.

Jessica would be required to evidence the breakdown of the marriage by reference to one of the five available facts. These are found in sections 1(2)(a)-(e) MCA 1973.

Section 1(2)(a) MCA 1973 provides than an applicant can issue divorce proceedings immediately if the respondent has committed adultery and the applicant finds it intolerable to live with him or her. However, the definition of adultery is found in Dennis v Dennis (1955), which sets out that it must be penetrative sex between two people of opposite genders. This definition was not amended by the Marriage (Same Sex Couples) Act 2013 and Section 1(6) was inserted into the MCA 1973 to confirm this. We do not know at this point whether Sarah's affair was with a man or a woman. This will dictate whether this fact can be relied on.

If the affair was with a woman, Jessica could instead rely on the second fact under section 1(2)(b) MCA 1973, which is that Sarah has behaved in such a way that Jessica cannot reasonably be expected to live with her. Guidance on the test that is applied to this fact is found in the case of Livingstone-Stallard v Livingstone-Stallard (1974). The test is whether a right-thinking person would conclude that Jessica could not reasonably be expected to live with Sarah. The test has both objective and subjective elements. Jessica could seek to rely on Sarah's intimate relationship with her work colleague, together with her dismissive and irritable behaviour

However, given Sarah's poor health and Jessica's wish not to upset her, Jessica may agree to delay the divorce and to rely on one of the non-fault based separation facts. Jessica and Sarah will either need to be separated for two years (if Sarah is willing to consent to the divorce) or five years if she is not. If they resume cohabitation at any point up to six months, the period of cohabitation will need to be added on to the period of separation. If they resume cohabitation for more than six months then this will restart the time for separation, meaning that they will need to separate for a further two or five years once cohabitation has ceased again.

Resumed cohabitation could also have an impact on a petition based on adultery or unreasonable behaviour. Any resumed cohabitation over six months will be an absolute bar to the adultery fact (unless there is a new act of adultery within that time). Whilst it will not be an absolute bar for the behaviour fact, it may cause the court to question whether the test in Livingstone-Stallard (1974) has been fulfilled.

Jessica should therefore take care to ensure that any resumed cohabitation does not exceed six months if she wishes to pursue a divorce on this basis.

1(b)

If the affair was with a work colleague of the opposite sex, then Jessica could petition for a divorce based on Sarah's adultery. However, Sarah could try and prevent this by refusing to sign a confession statement. Unless Jessica could produce other evidence (such as the text messages), this would prevent the divorce from proceeding on this basis. However, Sarah should be aware that Jessica could simply petition on the basis of Sarah's behaviour instead, which would not require a confession statement.

It is possible for Sarah to defend a petition based on behaviour, as was the case in Owens v Owens (2018). However, this may be difficult in the circumstances and could potentially increase the costs of the divorce, something Sarah may wish to avoid given her financial worries.

Sarah should also be made aware that the adultery will not impact on any future financial claims she may subsequently make so this should not be her motivation for defending a petition based on this fact. This was confirmed in the case of Miller v Miller (2006).

Sarah has indicated a wish to reconcile. If Jessica does not agree or if the reconciliation breaks down, then Sarah may want to persuade Jessica to wait and petition based on two years separation with her consent. If this fact is relied on, it will give Sarah opportunity to undertake her treatment before the divorce is commenced but it will also allow her to use the provisions in section 10 MCA 1973. Under s10(2), Sarah could ask the court to postpone the decree absolute until reasonable financial provision has been made for her.

The most Sarah could realistically achieve is a delay of the decree absolute, she is unlikely to be able to prevent the divorce altogether.

(c)

The relevant legislation for converting civil partnerships into a marriage is s9 Marriage (Same Sex Couples) Act 2013.

In order to obtain a divorce, s3 MCA 1973 states that the parties must have been married for 1 year before a petition can be filed. Jessica and Sarah have only been "married" for 6 months. However, s9(6) M(SSC) Act 2013 states that the date of marriage is treated as being the date that the civil partnership was entered (three years ago). Therefore, s3 MCA 1973 is satisfied and the advice would not change.

Question 2(a)

As James and Maria were married at the time of Felipe's birth, section 2 Children Act (CA) 1989 determines that they will both have parental responsibility for him. Parental Responsibility (PR) is defined by section 3 CA 1989 as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".

Section 2(7) CA 1989 sets out that each person with PR may exercise that responsibility unilaterally. However, case law has made clear that, where more than one person holds parental responsibility for a child, there is a duty to consult with each other about major decisions that may affect a child in the long term. This includes decisions about a child's education, as was confirmed

in the case of Re G (Parental Responsibility: Education) (1994), where the court held that a father could not enrol his child in boarding school without first consulting with the mother.

Maria therefore should not unilaterally make decisions about Felipe's education without consulting with James first. They should attempt to reach an agreement if possible that is consistent with Felipe's best interests (section 1(1) CA 1989).

2(b)

If James and Maria cannot reach an agreement regarding Felipe's education, then either of them could apply to court for a Specific Issue Order under section 8 CA 1989. The court will then make a determination as to how Felipe should be educated. As the biological parents of Felipe, section 10(4) CA 1989 sets out that neither parent will need leave of the court before making this application.

When determining this matter, the paramount consideration of the court under section 1(1) CA 1989 will be to determine what is in Felipe's best interests. When determining this, the court will have consideration of the factors set out in section 1(3) CA 1989, otherwise known as the welfare checklist. Felipe's wishes and feelings will be of particular relevance here and these are not clear from the information available. At 12 years old, he is likely to be capable of voicing an opinion on his preferred school, although the court will also take into account his level of understanding. The court will consider his educational needs and where they will be best fulfilled. The court will also take into consideration the likely effect of any change in circumstances on Felipe, namely the effect of moving him from one school to another. They will also look at any harm that he has suffered. This could include the effect that his parent's separation has had on him, although it could be concluded that this was a natural reaction of a child of his age. CAFCASS may be asked to comment on each of these issues (particularly reporting on Felipe's wishes and feelings in light of his age and understanding) and provide a recommendation to the court.

The principle in section 1(2A) is key in this case. This principle states that the court will presume (unless the contrary is shown) that the child's welfare will be promoted by the involvement of both parents in their life. This means that both parents should be involved in key decisions such as those around education and it is not for one parent to dictate those arrangements alone.

The court will also take into account the principles in section 1(2) and section 1(5) CA 1989. Section 1(2) is the principle that "any delay in determining the question is likely to prejudice the welfare of the child". This has particular relevance in this case where there is a place available for Felipe at the private school immediately. Section 1(5) states that the court "shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all". This will clearly be satisfied if the parents are unable to reach an agreement.

Question 3

The two orders available through the family courts are non-molestation orders and occupation orders. Both of these orders are dealt with under the Family Law Act 1996 (FLA).

In order to be able to make an application for one of those orders, Asha and Jacob would need to demonstrate that they are each associated with Kamal by way of one of the categories set out under section 62 FLA 1996. As Asha and Kamal are married they would satisfy this test. However, Jacob would not be deemed to be "associated" with Kamal.

Jacob could not therefore make an application under the FLA 1996 and would instead need to consider an application to the civil courts under the Protection from Harassment Act 1997. Jacob would need to show that Kamal has pursued a course of conduct which amounts to harassment. A course of conduct is defined by section 7 of the PHA 1997 as "conduct on at least two occasions". This test should be satisfied in this case. Although there is no definition of harassment, the test is whether Kamal ought to have known that the conduct amounts to harassment. Again, this test should be satisfied. If he is successful he could obtain an injunction for his personal protection and potentially compensation for any damage caused by the harassment, for example if the social media posts have had a detrimental impact on his employment or for any anxiety caused by the harassment.

Turning now to Asha, the first application she could make is for a non-molestation order under s42 of the FLA 1996. Molestation is not defined in statute. However, there is case law guidance. For example, the case of Vaughan v Vaughan (1973) sets out that molestation can be wide-ranging, from physical violence to nuisance 'phone calls. In Horner v Horner (1982) the court stated that there must be a sufficient degree of harassment to justify intervention. Here the harassment would be as a result of the messages and social media posts. Kamal's actions towards Asha prior to the separation may also constitute molestation.

The court will take into account the need to secure Asha and the children's health, safety and well-being. This includes their mental health so it does not necessarily matter that Kamal has not made any physical threats towards them.

As a result of Kamal's indication that Asha should leave the property and allow him to return, she may also want to consider applying for an occupation order to allow her to remain in the property to Kamal's exclusion. It does not matter that the property is only in Kamal's name, as Asha will have matrimonial home rights under section 30(2) Family Law Act 1996 as a result of being married to Kamal. This provides her with an automatic right to live in the property for the duration of the marriage. This right includes the right not to be evicted or excluded. Any application for an occupation order would therefore be under section 33 FLA 1996.

Following the decision in Chalmers v Johns (1999), the court would first have to consider if they are under a duty to make the occupation order. Section 33(7) FLA imposes a duty on the court to make an order if it appears that the applicant or relevant child is likely to suffer significant harm attributable to the conduct of the respondent if an order is not made. The only exception to this is if the respondent or any relevant child is likely to suffer significant harm

if the order is made and this is as great as or greater than the harm that would be suffered by the applicant through the order not being made. This is known as the balance of harm test (B v B (Occupation Order) 1999). In this case Asha could argue that she would suffer harm if she had to leave the property by virtue of being made homeless and would equally suffer harm if Kamal were allowed to return by virtue of his behaviour and comments towards her. We also know that the children became very upset when both Kamal and Asha were living in the property together, so it could be argued that they would suffer emotional harm if Kamal was allowed to return. Kamal may seek to argue that he is also suffering harm by being excluded from the property, although this may be a difficult argument given that he currently has a property to stay in with his parents.

Even if the court decided that Kamal would suffer more harm, they still have discretion to make the order in Asha's favour. In deciding whether to exercise this discretion, they should apply the factors in section 33(6). Namely:

(a) the housing needs and housing resources of each of the parties: Kamal is currently residing with his parents but we do not know if this can be a longer term position or whether he can afford to rent somewhere else. In contrast we know that Asha is currently unemployed and therefore would not be able to fund alternative housing. We do not know if she has family or friends that she could stay with.

(b) the financial resources of each of the parties: Kamal is currently employed, whereas Asha isn't.

(c) the likely effect of any order, or of any decision by the court not to exercise its powers, on the health, safety or wellbeing of the parties: Kamal has been very derogatory towards Asha, which could lead to emotional/psychological harm.

(d) the conduct of the parties in relation to each other and otherwise: Kamal has been psychologically abusive towards Asha, making derogatory comments to her, both directly and over social media.

Given the conduct of Kamal towards Asha and her current weak financial position, the court may be convinced to make the occupation order. Her current financial position may also lead the court to make an order under section 40 FLA 1996, directing that Kamal should continue to pay the mortgage and bills on the property.

The applications could be made on a without notice basis, s45 FLA 1996. However, Asha would need to show the court that she is at risk of significant harm if the order is not made immediately or that there is a likelihood that she would be prevented from making the application if she does not make it without notice to Kamal in the first place. This may be difficult given that Kamal has not made any direct threats towards Asha.

If a non-molestation order or occupation order is made they will be in place for a specified period of time (not necessarily the same period of time). However, current judicial guidance indicates a period of six months. The court may be particularly concerned to limit the duration of the occupation order given that it restricts one of the parties' legal rights over the property.

If a non-molestation order is made, breach of that order will be a criminal offence.

As there has been no physical violence, Kamal could offer an undertaking in place of either of the orders.

Question 4

Ramesh can only proceed with an application for financial relief under the Matrimonial Causes Act 1973 (MCA 1973) once the divorce proceedings are commenced.

If Ramesh is prepared to file a petition for divorce or if Anita petitions first, he could then make an application for maintenance pending suit under section 22 MCA 1973. There is no statutory test that must be applied by the courts when considering this application but the court will simply look at whether making an order is reasonable.

Ramesh could also apply for a legal services order under section 22ZA MCA 1973 for assistance with the payment of his legal fees. However, he would first need to show that he is not able to raise the money by any other means such as a bank loan.

Both of those orders can be made after the divorce petition has been filed. The other financial orders can only be made after the Decree Nisi has been granted and will only take effect after the pronouncement of the Decree Absolute. The other possible financial orders include a property adjustment order, pension sharing orders, periodical payments orders and lump sum orders.

When determining what orders to make, section 25(1) MCA 1973 states that the court must take into account all the circumstances of the case but that the first consideration will be the needs of the children. They are first on the list of concerns and the court will want to ensure that their needs are met, in particular their housing needs.

The starting point will be to assume that all matrimonial property should be split equally (Miller v Miller 2006). The court should only depart from an equal division of capital assets where there are good reasons.

When determining whether such reasons exist, the court will consider the factors in section 25(2) MCA 1973. Of particular relevance in this case will be section 25(2)(a): the income, earning capacity, property and other financial resources of both parties and section 25(2) (b): the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future. Ramesh has a need to be accommodated with the children and he also has a current income need as he gave up work to look after the children. He also may have a future financial need because he only has a very small pension. Anita wants capital to move to London, in particular to source accommodation when she is living there. She does not have an income need as she has been offered a lucrative salary. She also has a substantial pension.

The factor set out in (d) will also have relevance to this case, namely the age of each party to the marriage and the duration of the marriage. This is a 14-

year marriage and so will be considered a long marriage by the court and both parties are in their 40s, meaning they still have a considerable time before expected retirement.

Ramesh may try to argue that he should be compensated for his career sacrifice in line with the case of McFarlane v McFarlane (2006). However, it is unlikely that this argument will succeed, as a policing job is unlikely to be classed as a high-income profession. However, we need more information about what his exact role within the police force was. As Ramesh is in his 40s there will be opportunity for him to rebuild his career and there will be expectation that he returns to work in the near future, at least part time, given that the children are both of school age.

Anita similarly may try to argue that she has made a special contribution to the marriage by earning a high income. Again, this is unlikely to succeed. In Lambert v Lambert (2002) it was made clear that the courts should not be discriminating between the role of the 'homemaker' and the 'breadwinner'.

Ramesh may also seek to argue that he should receive a greater share of the assets because the shares were bought with money he had inherited. The courts do have the opportunity to "ring-fence" inherited property (White v White 2000) but only if the other party's needs can be met without it. This may be possible in this case.

The court should consider a clean break order, s25A MCA 1973. In this case, Anita would probably need to pay some spousal maintenance in addition to child maintenance, for a limited time. Both the children are at school so Ramesh should be able to take up employment of some kind, therefore any periodical payments are likely to be limited in duration. Alternatively, the court may want to consider ordering that the shares are sold, and a lump sum is provided to Ramesh in place of a periodical payments order. This will help support Ramesh until he can find new employment.

With regards to the pension difference, the court might make a pension sharing or attachment order against Anita's pension to equalise the parties' pensions. If this is the case, it is likely that Anita would also be awarded an equal share of the equity in the house, although the sale may be deferred until the children have finished school (a Mesher order). Alternatively, the parties might choose to offset the pension disparity against the equity, for example, with Anita keeping her pension and Ramesh retaining the matrimonial home.

Whilst this would lead to an unequal division of the assets, this may be justified on the basis that this will provide Anita with a clean break and she has a greater future earning capacity than Ramesh.

Finally, any child maintenance matters will be dealt with in accordance with the Child Maintenance Service (CMS) formula unless they want to agree something else.