LEVEL 6 - UNIT – 7 FAMILY LAW

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

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 January 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

The more popular questions were Section A Question 2 and Section B Question 1. Candidates who attempted these questions generally scored high marks and achieved most of the mark scheme points.

Candidates that didn't score as well, had poor knowledge of the law so were not able to apply them accurately to the scenarios in Section B. Level 6 requires more than just regurgitating the law, it requires an understanding and application as well as use of relevant case law.

Several common errors were apparent in candidates' knowledge and application which included the following:

- Mis-identification of the area of law for question A1(b) – failing to recognise that the question required discussion of religious marriages.
- When discussing child maintenance in QB1(c) and QB4 some candidates discussed spousal maintenance and seemed to mix these two up
- As the law had changed since the paper was written about civil partnerships not being able to be opposite sex – the examiner accepted either response. For next year the updated law would expect to be

quoted – Civil Partnership, Marriage and Death (Registration etc) Act 2019.

Candidates tended to answer fairly well questions A1 and A4 and B1 and B3. Candidates tended to answer less well questions A2 and A3, B2 and B4.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Common errors on specific questions is given below:

SECTION A

Question 1

a) This was generally well answered by most candidates. The candidates that scored lower marks tended to miss out reference to relevant case law or the statutes that applied. Some candidates were confused over the different ways of acquiring domicile.

b) Candidates who picked up on the correct area (i.e. religious marriages) generally scored well. The main points that were lost were in relation to the law not just being restricted to Jewish marriages.

Question 2

a) Candidates that chose this question generally mentioned pre-nuptial agreements in a fair amount of detail, but some did not mention post-nuptial agreements. Radmacher was referred to regularly with some candidates giving the facts and some giving the requirements of a pre-nuptial agreement both of which were credited. Generally, candidates scored high marks on this question.

b) Marks on this part were often missed in relation to how to create a cohabitation agreement and the difference between a cohabitation agreement and an agreement for cohabitation. Candidates mostly referred to the case law Sutton v Mishcon de Reya.

Question 3

Candidates that chose this question generally answered it well. Candidates who lost marks didn't refer to the change that single people can now commission a surrogacy which came into law in 2018. Sometimes terminology was not used or referred to correctly which lost marks (e.g. commissioning parents, parental orders, total and partial surrogacy). Also, the sections of the HFEA were missed sometimes and it is expected that they would be referred to accurately where relevant.

Question 4

This question mainly had candidates accessing just over half of the marks. The part that most candidates missed is the critical assessment of the each of the laws, there needed to be critical assessment of non-molestation, protection from harassment and controlling and coercive behaviour. Many

candidates simply explained what the laws were without looking at their effectiveness.

SECTION B

Question 1

a) This question was well answered by most candidates, with many achieving full marks. Candidates who missed marks tended not to comment on the likelihood of success for Bartimus.

b) This question again was well answered; there was mostly clear identification and explanation of the three principles. The candidates then went on to explain the welfare checklist and apply it to the scenario. Candidates that didn't achieve full marks didn't refer to any relevant case law.

c) Some candidates missed a lot of the marks for this question by not identifying the CMS or the way that Alliyah would be assessed. There was not clear understanding of the process for this question in a lot of cases.

Question 2

a) Occupation orders were identified and the correct law identified. Candidates that scored lower on this question only explained the factors the court would take into account and didn't apply them to the scenario. There was also limited reference to relevant case law.

b) Candidates generally answered this question well and were able to identify the GRA 2004. Some candidates focused on dissolution, however the question says that the Erin wants to stay with Fin, so the focus should have been on how to change their relationship because of the change of gender. Reference needed to be made to civil partnerships only being for same sex (unless candidates discussed the recent law change in which case this was recognised in the marks). The focus needed to be on how Erin and Fin could stay together.

Question 3

This was a popular question with candidates choosing to discuss the different factors the court would apply. Some candidates failed to discuss the clean break principle which is quite important in this question. Failure to identify this meant that suggested solutions did not offer a clean break at times.

Question 4

Candidates that chose to answer this question either answered it very well, or very badly. Good answers included reference to the relevant case law and clear application to the scenario. Again the child maintenance part of this question was poorly answered with many candidates discussing orders that can be given on divorce rather than CMS and the Children Act 1989 orders.

LEVEL 6 - UNIT 7 – FAMILY LAW

SUGGESTED ANSWERS

SECTION A

Question 1(a)

Domicile is a legal concept which links a person with a legal system; it is a factual relationship between a person and their permanent home.

A person, according to English Law will always have a place of domicile, but a person cannot have more than one domicile at the same time. It is not possible for a person to have no place of domicile.

There are three ways in which a domicile can be acquired:

1. Domicile of origin. When a person is born, they will have a domicile which is acquired from their parents. If the parents are married, it will be the father's domicile. If the parents are unmarried, it will be the domicile of the mother. The domicile of origin remains until another domicile is chosen and the domicile of origin is abandoned. In the event that a domicile of choice is lost then the domicile of origin will revive if another domicile of choice isn't made.

2. Domicile of dependence. Until the age of 16 years a person's domicile will be the same as that of the parent(s) they live with. If the parents are married, but separated, and the child continues to live with the mother with no home with his father, the child will take the mother's domicile. Case law in this area is quite old and relies on there being only one main carer for a child.

3. Domicile of choice. Any person over the age of 16 years may acquire a domicile of choice. The issue of whether a domicile of choice has been acquired is a factual one. A domicile of choice is acquired by actions, attitudes, commitments and other factors. If a person moves to another country, he or she can acquire a new domicile if s/he has a "settled intention of living there permanently".

In the case of Irvin v Irvin (2001), a husband had lived in the Netherlands since 1979. The husband had continued links with friends in England, he had an intention to return to England to retire, he had British nationality and had limited involvement in Dutch society. The judge decided that, on the balance of probabilities, he had not given up his English domicile and acquired a new domicile of choice.

In Agulian v Cyganik (2006), the deceased was born in Cyprus and had lived in England for 45 years. The Court of Appeal stated that the relevant question was "had the deceased formed the necessary intention to remain permanently or indefinitely in England?" The Court said that his Cypriot domicile of origin remained in place unless and until there was clear evidence of sufficient intention to acquire a new domicile of choice. In this case he retained his domicile of origin.

Cheni v Cheni (1962), the marriage of the parties took place in 1924 in Egypt where the parties were domiciled at the time. The parties then moved to

England in 1957 where they became domiciled. The English court held that although the husband was the maternal uncle of the wife, the marriage was valid in their country of domicile at the time of the ceremony of marriage.

Likewise, in the case of Mohammed v Knott (1969), the parties entered into a valid marriage in Nigeria that was potentially polygamous. The marriage was recognised as being valid in England as it was valid in Nigeria.

Recognition of foreign marriages in England and Wales depends on if the marriage fulfilled the requirements of the domicile it was performed in.

The issue of domicile is therefore very important to create a binding marriage in the jurisdiction that it took place.

1(b)

The Divorce (Religious Marriages) Act 2002 (D (RM) A 2002), introduced a new provision to the Matrimonial Causes Act 1973 (MCA 1973), at S.10A. This section allows parties to prevent the making of the decree absolute until a declaration is signed allowing the religious marriage to be dissolved.

This provision was introduced to protect those who have undergone a religious marriage ceremony and need to have a religious dissolution which they may not have any control over without such a provision. For example, in the Jewish community women may need the assistance of the civil courts to force a religious divorce which their husband can otherwise withhold. Without the religious divorce, the woman cannot remarry in accordance with their religion. This applies to other religious groups too, the Quakers for example.

Irrespective of who applies for the civil divorce, either party can apply to the court under this section to get the religious divorce declaration.

When an application is received the court will make the order to prevent the decree absolute being pronounced if it is just and reasonable to do so.

Question 2(a)

Parties who enter into either a marriage or Civil Partnership have the comfort of having either The Matrimonial Causes Act 1973 (MCA 1973), or the Civil Partnership Act 2004 (CP 2004) to fall back on for financial relief. They need not enter into an agreement to secure their finances as both statutes give the court wide powers to make financial orders. The court can make a variety of orders in relation to property, capital, income and pensions. Couples who enter into these formal relationships have many ways in which they can potentially achieve their fair share of the matrimonial or partnership assets.

In respect of either relationship there are two types of agreement that might be used to regulate the couple's finances. A Pre-nuptial agreement can refer to an agreement entered into before the parties marry or form a Civil Partnership. Likewise, a Post-nuptial agreement can regulate the parties' finances but is entered into by the parties after the ceremony.

The leading case which reflects the current position of the courts is Radmacher v Granatino (2010). The parties entered into a pre-nuptial agreement which protected the wife's wealth from any claim by the husband if their marriage broke down. The wife had the agreement drawn up by her German notary:

the husband did not get the document translated, neither did he take independent legal advice on the agreement or see any disclosure of the wife's financial position before signing it. The court decided that the agreement would be given weight as the husband understood the intention of the agreement and was prepared to be bound by it when he signed it. He was offered the opportunity to take legal advice, but he declined to take it.

The Supreme Court held that the if the parties entered into either a pre or post nuptial agreement of their own free will, without undue influence or pressure and that they understood the agreement (even if they had not taken independent legal advice on it) the agreement would be given weight. This does not mean that the agreement will be binding as the court will always have the overall discretion to make a final order that is not in keeping with the agreement signed by the parties.

Couples who enter into formal relationships which are governed by MCA 1973 or CP 2004 have no real need to enter into any agreements to secure financial provision. However, they may choose to enter into either a pre or post nuptial agreement in order to ensure that their spouse's claims are predetermined and limited in the event of a relationship breakdown. These agreements are usually limiting in nature but must always be fair in order to be given weight by the court. The discretion of the court cannot be fettered in these cases but can be influenced by a properly drafted agreement.

2(b)

Cohabitation is not strictly defined but can be described as a relationship between two people of the same or opposite sex, who are not married, or in a civil partnership, but live together as if they were. People in a cohabiting relationship sometimes believe that they have the same legal rights as married people if they cohabit for a certain period of time. This is known as the myth of the common law marriage: however, unless the parties enter into an agreement, they are unlikely to have financial obligations towards each other unless property rights can be established.

There is no statute to regulate cohabiting relationships and couples must rely on trust law and equitable principles. It is therefore important for couples to consider the need to enter into a financial contract if they intend to create legal relations between themselves. This is applicable to interests in property and other financial assets.

Cohabitees can enter into an agreement called a cohabitation contract. This is a contract that can deal with the ownership of property, including personal property, and can regulate other matters between the parties. Historically these types of agreements were void on the grounds of public policy as they were seen to undermine the status of marriage. Due to the increase in cohabitating relationships, these agreements are much more likely to be needed to regulate couples' financial and property matters.

It is likely that this type of agreement will be upheld as long as contractual rules are observed; the parties must have had the intention to create legal relations and there should be an absence of undue influence.

However, contracts for cohabitation are likely to be void on the grounds of public policy as they require the parties to behave in a certain way during the course of cohabitation. Case law in this area is sparse but the case of Sutton

v Mishcon de Reya and Another (2003) sets out the case against a contract for cohabitation.

The case was a negligence claim against a firm of solicitors who had drafted a cohabitation contract for a same sex couple who proposed to live in a master and slave relationship. Following the breakdown of the relationship, the agreement was challenged by one of the parties and the court found that the contract was void on the grounds of public policy.

Parties can choose to enter into a deed of declaration of trust when they purchase or transfer real property, although this is not a full cohabitation contract as it only relates to the property in question.

Proposals for reform were set out in 2007 by The Law Commission in their report 'Cohabitation: The Financial Consequences of Relationship Breakdown'. No binding action was taken by the government in response to this report and the problem remains unsolved.

Cohabitees are in a vulnerable position without a statutory framework in place in the event that their relationship breaks down. It is more important than ever that they enter into an agreement to record their financial intentions at the start of the relationship and any change in these intentions as the relationship progresses. This is to ensure that they are clear about the respective obligations they have toward each other.

Question 3

The main statute that deals with these new types of parenting is the Human Fertilisation and Embryology Act 2008 (HFEA 2008). This Act only came into existence in the 21st century, which should indicate that it is both up-to-date and fit for purpose for modern society.

Surrogacy is an arrangement whereby a woman carries a child for another couple, the intention being that the child will be brought up by the couple, rather than the woman who carries the child. There are different variations of the surrogacy arrangement. An arrangement such as this should be entered into with the woman before she begins to carry the child.

Although surrogacy arrangements are regularly entered into, they cannot be enforced against any of the people entering into them. This can of course be difficult for parties where things go wrong

Section 33(1) HFEA 2008 defines the mother as the woman who is carrying a child as a result of placing an embryo or sperm and eggs. No other woman is to be treated as the mother of the child. The parents who have made arrangements for the surrogacy to take place are called the commissioning parents.

It is important to note that in England and Wales it is a criminal offence to carry out a commercial surrogacy arrangement. Persons entering into the arrangement are permitted to pay for the woman's reasonable expenses but no more. It is not possible to advertise surrogacy services either. It could be argued that these arrangements are not in accord with people's expectation of surrogacy arrangements today, as other jurisdictions are much more open to commercial surrogacy arrangements. The payment of money in excess of reasonable expenses is not acceptable in the modern surrogacy arrangement

in England and Wales even if the surrogacy takes place overseas, where this will be the norm.

The two types of surrogacy arrangements are either a total surrogacy or a partial surrogacy. A total surrogacy is one where the commissioning parents use an egg from the mother and the sperm from the father before implanting both in the surrogate mother. The commissioning couple are therefore the genetic parents but the law states that the surrogate is the mother pending the making of a parental order.

A partial surrogacy is where the surrogate is artificially inseminated using the sperm of the commissioning father using the surrogate's egg. The genetic and legal mother is the surrogate pending the making of a parental order.

Once the child is born using either type of surrogacy arrangement, the commissioning parents should apply for a parental order under s54 HFEA 2008 within six months. Consent to a parental order must be given no less than six weeks after a child is born. A parental order extinguishes the mother's rights and the commissioning parents become the legal parents, as long as certain conditions of surrogacy have been met. A single person is not permitted to apply for a parental order.

Two people who are married, civil partners or a couple in an enduring relationship should make the application. One of them should have donated their gametes for a parental order to be granted. The mother and any man considered to be the father of the child must give consent to the order being made.

Such an application can only be made once the surrogate mother has handed the child over to the commissioning couple. These rules are strict and if the mother refuses to give consent problems can arise.

In the case of Re X and Y (2011) the court considered the meaning of the payment of reasonable expenses. The couple contacted a service in India to arrange for a surrogacy. They entered into partial surrogacy arrangements with two women, using an anonymous egg donor. It was clear that the children born would be handed over to the commissioning parents. They agreed to pay expenses for each mother, including medical and non-medical expenses. Both surrogate mothers agreed to relinquish all parental rights to the commissioning parents. The court considered whether the payments made to the women fell foul of the provisions of s55(8) HFEA 2008. The parents agreed that the money they had paid was more than just reasonable expenses but that it should not prevent a parental order bring made. Whether the court should authorise those reasonable expenses is a matter of consideration. The court took into account whether the couple were trying to commit a fraud.

In D and L (Surrogacy) (2012), a male couple had commissioned a partial surrogacy arrangement in India, using an anonymous donor egg and the sperm from one party. Twins were born as a result of the arrangement. They had been handed over to the couple two days after the birth. However, the mother did not give her consent to a parental order and the commissioning parents could not find her to obtain her consent. The judge found that the requirements were met to make a parental order even without the consent of the surrogate and that requirement was dispensed with. This was done as the welfare of the children was paramount and all reasonable steps had been taken to find her. The mother had given consent to the surrogacy arrangement

before the expiration of six weeks from the date of the birth. The court also retrospectively authorised the payment of monies which was accepted to be beyond reasonable expenses.

In Re Z (no 2) (2016), the father commissioned a partial surrogacy as a single parent in the USA. When the child was born and handed over to him, he applied for a parental order in England, but his application was refused. A single person in England and Wales is not permitted to apply for a parental order: s54 HFEA 2008. The child was made a ward of court and the judge declared that the law is incompatible with Articles 8 and 14 of HRA 1998. The treatment of single people is different to that of couples. The court felt that this difference could no longer be justified. Adoption was an alternative for the father instead of making an application for a parental order. However, the father did not want to adopt his own child as he was recognised as the child's father according to American law.

The Human Rights Act 1998, article 8 – right to family life has been referred to in some cases in relation to a child being entitled to know their natural parents.

It is therefore arguable that there are areas of the current surrogacy law that require amendment to make them sufficient in modern society. The discrimination against single people and the prohibition of commercial arrangements are not consistent with foreign surrogacy arrangements.

Question 4

There are numerous laws in the Family, Civil and Criminal Courts that can protect a victim from domestic harm.

Domestic abuse has a wide-ranging definition, it is not restricted to violence between parties, and it can cover wide ranging behaviour from, for example, stalking offences, coercive and controlling behaviour to serious incidents or threats of violence.

The Family Law Act 1996 (FLA 1996) is the main statute that provides protection to victims of abuse in the domestic setting. Applications are made to the Family Court. A person who wishes to apply for protection from abuse must first show that they are an 'associated person' within the meaning of s62 FLA. There are numerous categories: married couples, civil partners and cohabitees are covered by this definition. Parties who are related can make applications for protection, for example a step-son could make an application against a step-mother.

Once an associated relationship can be established, the court will have a wide discretion to decide whether or not to make an order for protection. There are two types of protective orders under the FLA 1996: an applicant can apply for a non-molestation order and/or an occupation order.

The non-molestation order would protect the applicant from harm caused by the respondent. There is no statutory definition of molestation; case law indicates that molestation can be equated to pestering: Vaughan v Vaughan (1973). In the case of C v C (1998), the Judge stated that the behaviour must be of such a high degree that it requires the intervention of the court.

An application for a non-molestation order can be made either without notice or *inter partes.* This means that, if it is a matter of urgency, an application can be made speedily to protect the applicant. Any person wishing to make such an application would have to satisfy the conditions set out in s45 FLA 1996. The criteria for making an application without notice to the other party are narrow.

If a non-molestation order is made against the respondent, a breach of the terms of the order is a criminal offence. This change was bought about by the Domestic Violence, Crime and Victims Act 2004. The respondent can be punished for a breach of an order either by a criminal court or a civil court but not both. If punished by a criminal court, the potential punishment is a prison term not exceeding five years if convicted on indictment or, on summary conviction, a term not exceeding 12 months, or a fine.

An application can also be made for an occupation order under the FLA 1996. This means that a person who is an associated person can apply for orders to regulate the occupation of the property or to declare existing rights to occupy. These are governed by ss33 – 38 FLA 1996. Depending on which section the applicant applies under, the court either has the power to make an order or is required to make an order in certain circumstances. For an application made under s33 FLA 1996, the court is concerned about the applicant or a relevant child suffering significant harm at the hands of the respondent. If this is proved to be the case according to the civil standard of proof, then the court must make an order; this is called the balance of harm test. If the test is not met, then the court can still make an order under its discretionary powers by assessing the criteria laid out in s33(6). Different tests apply to the different sections depending on the parties' rights to occupy the property in question. The court will look more carefully at a cohabiting couple's relationship when applying s35 FLA 96. If granted the occupation order will only be extended on one occasion under this section.

A power of arrest can be attached to an occupation order, the breach of which is not a criminal offence, but the respondent can be arrested by the police and brought to the Family Court. The breach is punishable by the applicant bringing contempt proceedings following the respondent's arrest.

The Protection from Harassment Act 1997 (PHA 1997) was introduced in both the civil and criminal arenas. Often, if parties are unable to show that they are associated persons under FLA 1996, they might fall under the provisions of PHA 1997. The applicant needs to show that the respondent has pursued a course of conduct which amounts to harassment of the applicant. Although there is no definition of harassment, the respondent ought to have known that the conduct amounts to harassment. The criminal offence of harassment attracts a fine or prison sentence from six months' to five years' imprisonment.

The Crime and Security Act 2010, sections 24 – 26 gives the Police powers to issues a domestic violence protection notice or order. A DVPN or DVPO can be used at an early stage of an investigation of a domestic violence incident to provide short-term protection and removal of the perpetrator from the premises for up to 28 days.

The most recent protection from domestic abuse was introduced by s76 Serious Crime Act 2015 (SCA 2015). This creates an offence of controlling or coercive behaviour. It is now a criminal offence for a person to engage

repeatedly in behaviour that is controlling or coercive. The parties must be personally connected, and the victim must show that the behaviour has had a serious effect and that the perpetrator was aware of this. This type of behaviour is not likely to be covered by either FLA 1996 or PHA 1997. The definition of people who are personally connected is similar to that of associated persons in FLA 1996.

The Police can also issue Domestic Violence Protection Notices, this is useful if they think there is domestic violence but the parties do not want to proceed with action.

If a person is found guilty of such an offence the punishment is an unlimited fine and/or a prison sentence of six months to five years.

The laws of protection for a victim of domestic abuse cover a wide range of circumstances and offer a range of civil and criminal solutions. This is likely to lead to confusion for the victim of domestic harm and may be off putting to an applicant without advice.

SECTION B

Question 1(a)

Bartimus can apply for a Child Arrangement Order for Chloe and Davina. This would still be the case if Chloe is found not to be his biological child as he has lived with her for more than five years as a child of the family.

The presumption is that Chloe is Bartimus' child as he is named on the birth certificate and it will be up to Alliyah to rebut that presumption if she wishes to dispute it.

He would ask for an order that the children live with him and have contact with Alliyah.

(b)

The court will take into account certain principles: the welfare principle ensures that the court places the welfare of the child at the centre of the process, (s1(1) CA 1989). The no delay principle (s1(2) CA 1989) ensures that the court does not delay decisions in the matter. The no order principle (s1(5)) means that the court will not make an order unless to do so is necessary. The court will also consider the rebuttable presumption that the involvement of each of the parents of the child will further the child's welfare, (s1(2A) CA 1989).

The court will consider each parent's application under s8 CA 1989 by applying the welfare checklist found at s1(3) CA 1989.

When parents are no longer in a relationship it is open to them to agree where their children reside and how often the non-resident parent sees the children. There is no need for the parents to involve the court unless a dispute arises

between them about any matters concerning the children. If the resident parent refuses to allow the non-resident parent to have reasonable contact with the children, it would be open to that parent to make an application to the court for a Child Arrangements Order (CAO), s8 Children Act 1989 (CA 89).

If the courts decide to make an order, the order can state where the children live and when they see the other parent. The court will be guided by the principles referred to above. The court considers the welfare of the child to be of paramount importance in all cases. The court will not make an order unless it would be better for the child than making no order at all. The court should avoid delay in progressing an application as this would be detrimental to the child's welfare.

The presumption of parental involvement recognises that it is important for both parents to be involved in their child's life unless it would be contrary to the child's welfare for this to be ordered. The presumption is of course rebuttable.

In the case of Re S (Contact: Promoting Relationship with Absent Parent) (2004) the Court of Appeal stated that 'good enough' parents could expect to have a relationship with their child. Contact with the non-resident parent should take place unless it is deemed not to be in the child's best interests.

Where the court makes a CAO for one parent to have contact with the children, the resident parent will be ordered to make the children available for such contact. This is to ensure that the order is enforceable against the resident parent. A CAO is usually endorsed with a warning notice to ensure that the parents understand that there are consequences of breaching the order, s 11I CA 89.

1(c)

Bartimus should be advised to apply to the CMS for child maintenance for Chloe and Davina as they are the biological children of Alliyah as Alliyah has a duty to maintain her children along with Bartimus. They will make an assessment for her to pay a regular income using their standard formula. They will assess her to pay 12% of her gross income up to £800 per week and then 9% of her gross income thereafter.

Bartimus should be advised that in the event that he and Alliyah get divorced, he can apply for the court to assess the payment of maintenance for the children.

The court has the power to order a top up maintenance assessment for Chloe and Davina if Alliyah earns more than the maximum sum the CMS can assess. The court could also order that Alliyah pays the school fees. Bartimus will need to get the maximum assessment from the CMS so that the court has jurisdiction to order further sums.

If they wish to avoid court orders they could make a voluntary agreement in relation to maintenance.

Question 2(a)

If Erin wishes to remain in the flat, to the exclusion of Fin, she would need to apply for an occupation order. This would 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 Erin is likely to suffer harm if the order is not made because Fin has been physically violent towards her a number of times. However, Fin could arguably also suffer harm as a result of being made homeless.

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

- the housing needs and housing resources of each of the parties: Fin is currently unemployed so would not be able to fund alternative housing. Fin is currently residing with his brother, but we do not know if this can be a longer-term position or whether he can afford to rent somewhere else.

- the financial resources of each of the parties: Erin is currently employed, whereas Fin is not. However, we know that Erin works in a supermarket and is therefore likely to be on a modest income.

- 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: Fin has been physically violent towards Erin and he therefore could not return to the property whilst she is still there. Fin's wellbeing may be affected if he is made homeless.

- the conduct of the parties in relation to each other and otherwise: Fin has been physically violent towards Erin and has threatened to kill her.

Given the conduct of Fin towards Erin, the court may be convinced to make the occupation order. Fin could stay with his brother so has the option of alternative housing. As he is unemployed, the court might decide not to make an occupation order if this would make him homeless.

The applications could be made on a without notice basis, s45 FLA 1996. However, Erin 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 Fin in the first place. It is unlikely that she would be able to convince the court to grant the occupation order on an ex parte basis, as she is not in immediate danger in the house as Fin is not staying there.

If an occupation order is made, it 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.

Fin could offer an undertaking in place of either of the orders. However, the court cannot accept an undertaking in a case where there has been physical violence. An undertaking could therefore not be accepted in place of an order in this case.

2(b)

In the case of Corbett v Corbett (1971) the purported marriage was between a male and a male to female transsexual. The court held in this case that the biological sexual constitution of a person is fixed at birth and cannot be changed. At this time marriage was defined under Hyde v Hyde and Woodmansee (1866) as "the union for life of one man and one woman to the exclusion of all others." This meant that their marriage was not valid.

In the case of Bellinger v Bellinger (2003) which again involved a person who was born male and had transitioned to become female. She married as a woman and wanted a declaration that her marriage was valid even though the circumstances were no different to those in Corbett. Her applications were rejected as s11(c) MCA 73 did not allow her to marry someone who had the same birth gender as her. For the first time the court did express sympathy for someone in her position, but the marriage was held to be void for the same reasons as in the case of Corbett. Mrs Bellinger was told that the court could not extend the definition of marriage by giving the terms 'male' and 'female' a new meaning. Only parliament had the power to do that.

The House of Lords in Bellinger did make an important move by declaring s11(c) MCA 1973 to be incompatible with Arts 8 and 12 ECtHR. This led to the introduction of GRA 04 which allows for people to obtain gender recognition certificates. Once such a certificate is obtained a person can obtain a new birth certificate in their new gender. They can then identify legally as their acquired gender and marry a person of their birth gender if they choose to do so. This resolves the problem faced by both Mrs Corbett and Mrs Bellinger.

If Fin completes the transition process and obtains a gender recognition certificate, then he can no longer be in a civil partnership with Erin as a civil partnership requires that the parties are both the same gender. The Civil Partnership would be void, the parties could however enter a marriage if they wish to remain together.

Since this paper was written the Civil Partnership, Marriages and Deaths (Registration, etc) Act 2019 has passed. This act allows opposite sex couples to enter civil partnerships. This means that Erin and Fin would not have to end their civil partnership if Fin changes gender.

If the parties did want to end their civil partnership it would be either by annulment if a gender recognition certificate has been sought or dissolution on the ground of unreasonable behaviour for Erin.

Question 3

As Imani and James are married, the division of their assets will be governed by the Matrimonial Causes Act 1973 (MCA 1973). Imani and James do not need any advice about the divorce as they are dealing with this themselves.

They may however, wish to know how the court would consider splitting their assets.

They need to know that the court will take into account a variety of factors, set out in s25 MCA 1973. Those factors are balanced against each other before the court finally decides what orders to make to distribute the assets between the parties.

Firstly, the court will want to give primary consideration to the welfare of any minor children of the family. We know that there are two children who are aged between 12 and 15 years old. The children are Imani's children and she receives child maintenance for them from her their father.

The court will also look at all the circumstances of the case and then the factors as set out in s25 (2) MCA 1973 and apply them to this case as follows:

- Income, earning capacity and other financial resources. The parties own a three-bedroom semi-detached house with equity of £70,000. James has limited mortgage-raising capacity as he is on a low income. Imani earns £30,000 gross per annum.

- Financial needs, obligations and responsibilities. Imani and the children have a need to house themselves in suitable accommodation, being at least a three-bedroomed property. It is not known if the children are girls or boys or whether they can share rooms, in which case they might only need a smaller property. James would only need a small property with one bedroom for himself.

- Standard of living during the marriage. The parties seem to have had a good standard of living but not extravagant. They seem to have lived comfortably on their dual incomes; however, this standard may have to drop if they are to live on their own separate incomes.

- Age of the parties and duration of the marriage. The parties are in their mid-thirties and have been married for two years, this is therefore a short marriage.

- Any disability suffered by either party. There is no physical or mental disability that needs to be taken into account.

- The contribution made by both parties.– The court will look at both parties' contributions to the family finances.

- The conduct of the parties. There is no conduct that needs to be taken into account

- The value of any benefit lost on the divorce. This can be taken to support pension sharing or pension attachment orders. Both parties have pensions, however Imani's is likely to be of more significant value as she has been paying into it for longer.

The first issue to consider is whether Imani needs to stay in the current home, which is the appropriate size for her and the two children. She also owned the property before the marriage, and it has been the family home for her children in this time. As this is short marriage, the court may consider that she came

to the marriage with this asset and so should be able to leave the marriage with it.

Imani may be required, instead of providing property to James, to make periodic payments or a lump sum payment to him. If he got a lump sum payment, he might be able to use this as a deposit on a property of his own. If this is the case, Imani could also get a charge against the other property for an appropriate lump sum, depending on the distribution of the other assets.

With regard to the pension difference, there might be a pension sharing or attachment order against Imani's pension to equalise the parties' pensions. If this is the case, it is likely that Imani would get an equal share of the equity in the house in the future. The parties might offset the pension disparity against the equity if they prefer.

The court would consider a clean break order s25A MCA 1973. In this case Imani would probably need to pay some spousal maintenance, for a limited time, maybe in the form of a lump sum so that James can afford to buy his own property.

The court will look to achieve fairness to both parties when distributing the assets. The court will consider the yardstick of equality from White v White (2000) and Charman v Charman (2007) but as this is a short marriage the judgment of Sharp v Sharp (2017) could also be considered as to whether a 50/50 split is appropriate. The difficulty in this case could be James's lower earning capacity which may mean Imani would have to financially support him in the short term, so accessing a postponed clean break.

Question 4(a)

The court has very limited discretion when dealing with cohabiting couples. There is no statute that governs the distribution of assets between cohabiting couples. Neither is there a requirement to put children of the relationship first.

Cohabiting couples can enter into a cohabitation contract if they choose to do so, although there is no way of knowing how many couples take this step. On the breakdown of the cohabiting relationship claims are limited to contractual, trust and property claims.

For property ownership, the legal beneficial ownership of registered land should be reflected on the Land Register. The situation regarding unregistered land may be more difficult to ascertain.

Parties can enter into a separate deed or Declaration of Trust in respect of their beneficial ownership, if it is different to the legal ownership as recorded at the Land Registry. However, where a couple do not have any agreement about the ownership of land, they then need to rely on trust principles if one of them asserts a financial claim over real property. These claims are determined by applications under the Trusts of Land and Appointment of Trustees Act (1996).

Constructive trusts can be implied in the absence of a declaration of trust. They are used where the trustee (in this case Liam) has induced another (Karl) to act to their detriment in the belief they would acquire a beneficial interest in the land. Gissing v Gissing (1971) set out a two stage process:

1. Inducement of the claimant that they would share ownership
2. Claimant must act to their detriment for example contributing to the purchase price or mortgage payments.

Lloyds Bank v Rosset (1991) reaffirmed these stages and added that a common intention must be drawn from the actions and conduct of the parties

Claims made by cohabiting couples are strictly interpreted, evidence in support of the claim is important and the court is led by the claimant's entitlement and not the wider discretion of fairness as used in the breakdown of married relationships.

As Karl has contributed to the purchase of the property and repayments of the mortgage, he may be able to claim a constructive trust.

4(b)

The usual form of child maintenance that can be sought from the CMS is financial relief using a prescribed formula. Under Schedule 1 Children Act 1989 additional maintenance by way of property and capital orders for the child but not for the other parent can be applied for from the courts.

The jurisdiction of the CMS enables the parent with care to apply for additional maintenance from the court in limited circumstances, for example, if the CMS have assessed the maximum sum or for ongoing educational expenses. A separate application would need to be made by a non-married biological parent on relationship breakdown, whereas the married parent could make the claim for additional maintenance as part of the MCA 1973 application.