CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

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 January 2021 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

Whilst there were a number of fails, there were also a number of very high scoring candidates in the January assessments, with two candidates scoring 89.

A common issue with exam technique was for candidates to simply set out everything they knew about a particular area of law, without full applying it to the scenario/question or reaching a reasoned conclusion at the end. There were some very good answers which were let down by the lack of a conclusion in answer to the specific question posed.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

There was a mixed response to this question with some candidates doing quite well and some candidates answering poorly. Very few candidates addressed the arguments for maintaining the current legal position with most candidates focusing their answers on criticisms of the current law. Most candidates had a good knowledge of the reforms that are expected (albeit some focused their answers too much on this instead of answering the actual question posed).

Question 2

This was answered fairly well by most candidates. Although some candidates only demonstrated an understanding of section 33, not the other possible sections that could be used. Quite a number of candidates missed valuable marks by simply explaining the law around occupation orders without actually then concluding with an answer to the specific question.

Question 3

Very few candidates answered this question. Of those who did, there were some excellent responses, whilst others simply described the law in each Act without comparing it (which is what the question required). Very few candidates identified that the use of the Act had been reduced by the introduction of the CMS.

Question 4(a)

This was a very popular question and was answered well by most candidates who chose it.

Question 4(b)

This question was answered well by most candidates, with most candidates showing a good understanding of Radmacher. The discussion of post nuptial agreements was lacking in a lot of candidate's answers, with the focus being on pre nuptial agreements. Some candidates failed to identify that the section 25 factors would still be applied in determining whether it would be fair to hold the parties to the agreement.

Section B

Question 1(a)

Most candidates reached the correct conclusion as to the answer to the question but quite a number of candidates did not support this with discussion of the legislation and case law, thereby limiting the marks they were awarded.

Question 1(b)

This was answered well by most candidates, with a number of candidates scoring full marks. Some candidates did not identify the correct sections of

the legislation for the principles (or even address that they come from legislation at all), which limited their marks.

Question 2(a)

This was not a popular question and of the small number of candidates who answered, it was not answered well, potentially indicating a lack of knowledge (or a lack of confidence in their knowledge) of this issue. Some candidates focused on similarities, rather than differences. Most candidates were only able to identify the adultery point and nullity point, rather than any of the other points set out in the mark scheme.

Question 2(b)

Again, not a popular question and very poorly answered by the candidates who did attempt it. A number of candidates failed to identify from the question that the parties would be only looking to use a sperm donor after they had married/entered into a CP and the impact that this would have on the legal position/parentage.

Question 3

This was a popular question, but the quality of the answers varied. Despite the question making clear that candidates should only focus on civil and family remedies, many candidates still discussed criminal law sanctions. This meant that they did not address the civil/family options in enough detail, particularly when considering the Protection from Harassment Act 1997. A number of candidates spent time discussing occupation orders even though these were not relevant to the scenario.

Question 4

Candidates did particularly well on this question, demonstrating a very good understanding of the law around financial relief and an ability to apply this to propose a reasonable package of orders. A number of candidates scored full marks for this question. Where candidates did not perform as well it was because they did not consider issues such as inheritance, did not apply the section 25(2) factors fully or just listed individual possible orders rather than concluding with a reasoned package of orders.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 7 – FAMILY LAW

SECTION A

Question 1

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 only material addition has been 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, 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 most commonly relied on "fault" based fact is behaviour. The test for establishing a divorce based on behaviour is set out in the 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?"*.

Whether we should have fault based facts is something that has long been debated by practitioners and academics. However, the case for reform was brought to the public's attention recently by the Supreme Court case of Owens v Owens. 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 a period of two years' separation. 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 in modern society.

In comparison, the arguments for maintaining the fault based facts largely rely on the religious elements of marriage and on maintaining the sanctity of marriage by avoiding an easy system for divorce. Others argue a moral need for fault based facts and that misbehaving spouses should be held to account in cases such as those involving domestic abuse and adultery.

It should also be noted that there are already options for bringing a marriage to an end without apportioning blame, albeit after a set period of time, namely two years with consent or five years without. Some therefore argue that no reform is needed whilst these options exist and in fact making spouses wait for these set periods will ensure that they fully consider their options and any financial implications before progressing with the divorce.

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. Unfortunately, consideration of this Bill has been somewhat delayed. 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 2

Occupation orders are governed by the Family Law Act (FLA) 1996, more specifically sections 33 – 40.

The purpose of an occupation order is to regulate the occupation of the family home and can potentially exclude a person from entering the home. These orders are often used to protect victim of domestic abuse, but their use is not solely limited to those cases.

In order to be able to make an application for an occupation order, a victim would need to demonstrate that they are associated with the perpetrator of the domestic abuse by way of one of the categories set out under section 62 FLA 1996.

The section of the FLA 1996 that a victim would use to apply for an order would depend on the property rights that they and the perpetrator each have. There are five possible sections:

- Section 33 – If the applicant is entitled to occupy the property by virtue of a beneficial estate, interest or contract, or by virtue of any enactment giving them the right to remain in occupation. They will also be eligible to apply under this section if they have matrimonial home rights in relation to the property.

- Section 35 -If the applicant is a former spouse or former civil partner with no existing right to occupy the property.

- Section 36 -If the applicant is a cohabitant or former cohabitant with no existing right to occupy the property.

- Section 37 -If neither the applicant nor their spouse or civil partner is entitled to occupy the property.

- Section 38 -If neither the applicant nor their cohabitant or former cohabitant is entitled to occupy the property.

The precise factors that will be considered by the court will depend on the section which is being used. However, the balance of harm test is common to all of the sections. Following the decision in Chalmers v John (1999), it is now accepted that this is the test that should be applied prior to the court considering any of the specific factors set out within the sections. This test involves the court considering whether they are under a duty to make an occupation order. A duty is imposed on the court 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 test will therefore be of particular relevance in domestic abuse cases.

The balance of harm test can sometimes lead to an outcome that may otherwise be perceived to be unfair (B v B) (1999)). In B v B the wife was forced to leave the home with her young baby following violence perpetrated against her by her husband. Her husband remained in the home with his son from a previous relationship. When applying the balance of harm test, the court found in favour of the husband remaining in the property, despite the domestic violence that had occurred. This was because the local authority would be under a duty to rehouse the wife and baby, whereas with the husband they would not because he would be found to have made himself 'intentionally homeless'. The court were also influenced by the fact that the son was of school age and attended a local school. They therefore found that a change in living arrangements would impact him more than it would the baby.

However, even if the court determines that the balance of harm test does not fall in the applicant's favour, they can still go on to make the order once they have considered the factors set out within the relevant section. This therefore provides the court with a degree of flexibility in cases where the balance of harm test does not lead to a fair outcome. The factors common to all sections are as follows:

(a) the housing needs and housing resources of each of the parties and of any relevant child;

(b) the financial resources of each of the parties;

(c) the likely effect of any order, or of any decision by the court not to exercise its powers on the health, safety or well-being of the parties and of any relevant child; and

(d) the conduct of the parties in relation to each other and otherwise.

Applications under sections 35 and 36 also have a number of additional factors designed to consider the nature of the parties relationship and whether there are any pending other proceedings regarding the property.

This order can be made on a without notice basis but the court needs to be careful about the respondent's Article 8 rights and ensure that any order is necessary. The test for obtaining an order on an *ex parte* basis is set out within section 45 Family Law Act 1996. More specifically, the court shall have regard to all the circumstances including:

(a) any risk of significant harm to the applicant or a relevant child, attributable to conduct of the respondent, if the order is not made immediately;

(b) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately; and

(c) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay in effecting substituted service.

It is rare to get an occupation order without notice because of the interference with the respondent's property rights.

Breach of an occupation order will not be a criminal offence in the way that a breach of a non-molestation order will. Instead, any breach will be dealt with by way of contempt of court proceedings. However, a power of arrest could be attached to the occupation order if the respondent has used violence or threatened to use violence against the applicant. The power of arrest would allow the police to arrest the respondent for breach of the order, even though a criminal offence has not been committed. The respondent would then need to be brought back before the court at the earliest opportunity for contempt proceedings to take place.

Whilst occupation orders can be useful orders in domestic abuse cases, the fact that they may not always be determined in the victim-survivor's favour and the reluctance on the court's behalf to make them ex-parte can often mean that they need to be combined with other orders such as non-molestation orders to ensure full protection. The fact that a breach will not be a criminal offence, also means that enforcement will require a further potentially traumatic set of proceedings.

Question 3

Once divorce proceedings have been commenced, parties to a marriage can make applications under the Matrimonial Causes Act 1973 for financial orders. However, there may be circumstances where the relationship has broken down but the parties are not yet ready to divorce. If the parties are not able to reach agreement, then it may be that one party is forced to make an application to court for financial provision. In those circumstances (i.e. the marriage is still subsisting and divorce proceedings have not been commenced) such an application will be under the provisions of the Domestic Proceedings and Magistrates Courts Act 1978 (DPMCA 1978).

Section2 DPMCA 1978 gives the courts the power to make a financial order if the applicant satisfies one of the grounds contained in S.1 DPMCA 1978. The first two grounds are a failure by the respondent to provide reasonable maintenance for the applicant, and failure to provide a proper contribution to

reasonable maintenance for a child of the family. The term "reasonable maintenance" is not defined within the Act and therefore it will be a question of fact in each case. The remaining two grounds upon which the application can be based relate to the respondent having behaved in such a way that the applicant cannot reasonably be expected to live with him or her, and the respondent having deserted the applicant.

Under this Act, the Court can make periodical payments and lump sum orders in favour of a spouse and/or a child of the family. The court can also make interim orders under section 19, similar to maintenance pending suit. The periodical payment provisions available for children of the family are much more limited following the Child Support Act 1991, with the Child Maintenance Service retaining jurisdiction in most cases.

Unlike under the Matrimonial Causes Act the DPMCA doesn't not provide the court with the power to make property adjustment orders (for example, to deal with the ownership of the matrimonial home) or pension orders. To obtain an order regarding these assets, the parties would need to divorce.

When considering what order to make for the applicant and/or any child of the family, the court must consider all the circumstances of the case with first consideration being given to the welfare of any minor child of the family pursuant to S.3(1) DPMCA 1978. However, they also have specific factors set out in S.3(2) DPMCA 1978 to consider, which in essence mirror the statutory factors contained within S.25(1) and (2) Matrimonial Causes Act 1973 (MCA 1973) which are considered on divorce/dissolution. The only exception is section 25(2)(h) which is not mirrored in section 3(2) of the DPMCA because this section concerns the loss of a pension benefit and there is no power within the DPMCA to deal with pensions.

Orders under the DPMCA last for such a duration as the court thinks fit and will come to an end of the death of either of the parties or on the remarriage of the applicant. With the financial orders under the MCA 1973, the court will attempt to reach a clean break between the parties and therefore any periodical payments are likely to be time limited.

In summary, the approach taken to determining what orders are necessary under the DPMCA is very similar to the MCA 1973. However, a broader range of orders are available under the MCA 1973 to deal with property division and pensions. This could therefore be said to lead to a fairer long term outcome for the parties, whereas the DPMCA is designed to deal with the short term arrangements pending any divorce.

Question 4(a)

There is no statute to regulate cohabiting relationships, but cohabitation contracts can be used to set out financial obligations in relation to property. Without such a contract, cohabitees would have to rely on trust law and equitable property law principles if their relationship were to break down and there was to be a dispute about property ownership.

Historically these contracts were void on public policy grounds. However, this has now changed in acknowledgment that more and more couples are choosing to cohabit. Now provided that contractual rules are complied with, these contracts will generally be upheld by the courts.

Cohabitation contracts must be distinguished from contracts for cohabitation. This was confirmed in the case of Sutton v Mishcon de Reya, which involved a contract drawn up in a "master and slave" relationship. The court determined that a cohabitation contract between two people in a sexual relationship who lived together would be valid but a contract for sexual services would not be.

In addition or separate to cohabitation contracts, declarations of trust can also be used to set out the parties intentions when they purchase or transfer property.

Question 4(b)

Couples who have entered into a marriage or civil partnership will be able to rely on the provisions in the Matrimonial Causes Act (MCA) 1973 or the Civil Partnership Act (CPA) 2004 if their relationship breaks down. Both of those statutes contain wide powers for the court to make financial orders, including orders for the adjustment of property, periodical payments and the division of pensions.

When deciding what orders to make the court will have regard to the factors in section 25, together with case law such as White v White.

However, prior to entering into a marriage/civil partnership, a couple can use a pre-nuptial agreement to set out their intentions about what will happen if their relationship is to break down.

The leading case on pre-nuptial agreements is Radmacher v Granatino (2010). In this case the parties had 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 and the husband did not get the document translated. He also did not see any disclosure of the wife's financial position before signing it. He was offered the opportunity to take legal advice but he declined to take 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.

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..

A pre-nuptial agreement can therefore be influential on the court's determination and, where possible, the court will try and respect individual autonomy. However, this does not mean that pre-nuptial agreements are binding on the courts, as the courts will retain discretion to order something other than what is set out in the agreement. The judge hearing the case will still need to consider whether the agreement leads to a fair outcome, with reference to the factors in section 25. If it does not, then they can depart from the agreement.

It is possible for a couple to reach such an agreement after the marriage has taken place and this is known as a post-nuptial agreement. Similarly, to pre-nuptial agreements, post-nuptial agreements used to be contrary to public policy but they are now permitted since the case of MacLeod v MacLeod. Post-

nuptial agreements can also be used to update a pre-nuptial agreement, for instance when a couple have children or if one of the couple achieves unexpected wealth.

SECTION B

Question 1(a)

As Abraham is on the children's birth certificates, he will share parental responsibility with Josie (section 2 Children Act 1989).

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 such as those about a child's education, as was confirmed in the case of Re G (Parental Responsibility: Education) (1994) or decisions about changing a child's surname, Dawson v Wearmouth (1999).

Josie and Abraham can therefore each separately make day to day decisions for the children but they should not unilaterally make major long term decisions (including moving them to London) without consulting each other first.

Question 1(b)

To prevent Josie from removing the children from nursery and taking them to London, Abraham could apply to the court for a Prohibited Steps Order under section 8 Children Act 1989.

At the same time Abraham could ask the court to make a Child Arrangements Order, setting out that the children are to live with him and specifying how any contact with Josie will take place.

When determining this matter, the paramount consideration of the court under section 1(1) CA 1989 will be to determine what is in the children'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. The children's wishes and feelings will be considered but their understanding will also be taken into consideration. At four and two years old they are unlikely to understand the decision that the court is being asked to make. The court will take into consideration the likely effect of any change in circumstances on the children. Whilst their gender will be considered, this does not necessarily mean that the court will determine that they will be best looked after by their mother. What will be of more relevance to this case is any harm that they have suffered, for example emotional harm following the incident where Josie passed out drunk on the sofa whilst caring for them. The court will consider whether the children are likely to suffer further harm whilst in her care given her abuse of alcohol. CAFCASS may be asked to comment on each of these issues 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 for the children and it is not for one parent to dictate those arrangements alone. Whilst involvement does not necessarily equal direct contact to the parent without care the courts will usually find that it is in a child's best interests to have contact with both parents where this can take place safely. Rather than Josie having no contact, it may be ordered that any contact is supervised pending her obtaining help with her alcohol problems.

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". The court should therefore make a decision about the arrangements for the children as soon as possible, whilst also allowing time for both parents to be heard and for any appropriate evidence to be produced. 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.

In this case the likely outcome would be a Prohibited Steps Order preventing Josie from removing the children from nursery and taking them to London. The court are also likely to order a Child Arrangements Order setting out that the children are to live with Abraham and have contact with Josie, which may be supervised pending her engaging with an alcohol or counselling service.

Question 2(a)

Civil partnerships are governed by the Civil Partnership Act 2004. Same sex marriage was introduced by the Marriage (Same Sex Couples) Act 2014 and marriage more generally is governed by the Matrimonial Causes Act 1973.

There are very few differences between civil partnerships and marriages. Those that do exist are in the formation and the ways in which they can be brought to an end.

Taking formation first, marriage is solemnised through the repeating of a prescribed form of words, whereas civil partnerships are registered by signing a civil partnership agreement. This is because civil partnerships are secular, whereas marriages can involve a religious element. A religious ceremony is possible for a same sex marriage, provided the religious organisation agrees and no claim of discrimination can be brought against a religious organisation who refuses to conduct the ceremony (Equality Act 2010).

In terms of the way in which the legal relationships can be brought to an end, marriage is ended by divorce, whereas a civil partnership is ended by obtaining a dissolution order. Most of the grounds on which the legal relationships are voidable are the same, with the exception of the ground that one of the parties had a communicable venereal disease at the time of the marriage. This is only a ground to make a same sex marriage voidable and doesn't apply to civil partnerships. Similarly the facts that can be used to bring the legal relationship to an end are all identical, with the exception of adultery. Adultery is not a fact available to dissolve a CP but is available in a divorce where the adultery was with someone of the opposite sex (section 1(6) MCA 1973).

2(b)

The relevant legislation is the Human Fertilisation and Embryology Act 2008.

A child can only ever have two legal parents, but other people can obtain parental responsibility for a child. Parental responsibility is defined by section 3(1) Children Act 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".

Regardless of whether a licensed clinic is used, section 33 of the HFEA means that Sarah would be a legal parent because she will carry the child and is using her own eggs.

Under section 42 HFEA, as Sarah and Bethany will be married or in a civil partnership at the time of insemination, they will both become legal parents. The only exception to this would be if Bethany does not consent to the treatment.

If they were to use a licensed clinic for the sperm donation, the donor would not become a legal parent and would have no legal rights or obligations in relation to the child.

If they were to opt for home sperm donation, Bethany and Sarah will still be deemed to be the legal parents of the child. However, if a licensed clinic is not used Marcus could apply to the court for a Parental Responsibility Order and/or a Child Arrangements Order in respect of the child. Such an application would be prevented by completing the required paperwork if they were to use a licensed clinic.

However, he would first need permission from the court to make this application. The court would apply the test set out in section 10(9) Children Act 1989 when determining such an application.

Under section 10(9), the court will consider:

(a) the nature of the proposed application for the section 8 order;
(b) the applicant's connection with the child; and
(c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it.

The relationship that Sarah and Bethany allow Marcus to have with the child will therefore have an influence on how that test would be determined.

In summary, it would be wise for Sarah and Bethany to use a licensed clinic for the sperm donation to prevent any future applications by Marcus. However, if they do opt for home insemination, they should be careful not to allow Marcus to build up any "connection" with the child.

Question 3

In relation to Mohammed, Jane would be able to apply for a non-molestation order under section 40 Family Law Act 1996 if she can show that they are associated persons under section 62(3). It is likely that they would fall under the category of associated persons as a result of having had "an intimate personal relationship with each other that was of a significant duration". "A

significant duration" is given a wide interpretation and is likely to include their relationship of six months.

Section 62 of the FLA sets out that the order can also be drafted to protect a "relevant child", defined as "any child who is living with or might reasonably be expected to live with either party to the proceedings". The application could therefore be made to also protect Jane's son.

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 controlling behaviour, harassment and the threats to kill her would clearly amount to molestation.

The court will take into account the need to secure Jane and her son's health, safety and well-being.

The order could include terms that Mohammed is prevented from contacting Jane, coming to the house (or within a specified area of the house) and a general term that he should not attempt to "intimidate, harass or pester" Jane or her son.

The non-molestation order could also include a term specifying that Mohammed cannot instruct or encourage another person (i.e. Damian) to take any of the actions prohibited in the order. However, proving that these instructions came from Mohammed may be difficult.

The application could be made on a without notice basis, s45 FLA 1996. However, Jane 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 Mohammed in the first place. Given the threats Mohammed made when he came to the house, this should be easy to satisfy.

In terms of the duration of the order, the court could potentially make it for an indefinite period but it is more likely to be six-twelve months.

As Mohammed has threatened violence against Jane and her son, the court should not accept an undertaking in place of an order in this case (section 46 FLA 1996).

Any breach of the non-molestation order will be a criminal offence (section 42A FLA 1996).

In conclusion, it is likely that the court would make a non-molestation order in this case.

As Jane and Damian are not "associated persons" under the definition in section 62 Family Law Act 1996, Jane could not apply for a non-molestation order against Damian and would instead have to apply to the civil courts for an injunction under the Protection from Harassment Act 1997.

Jane would need to show that Damian 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 Damian ought to have known that the conduct amounts to harassment. Again, this test should be satisfied. If she is successful, she could obtain an injunction for her 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 her employment or for any anxiety caused by the harassment.

In conclusion, it is likely that the court would make a civil injunction against Damian.

Question 4

As divorce proceedings have been commenced, Kian can proceed with an application for financial relief under the Matrimonial Causes Act 1973.

The possible financial orders that the court could make 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:

(a) the income and resources of the parties: Kian is currently the higher earner but Jemima also has a good career and may be expected to find full time work given the age of the children.

(b) the needs, obligations and responsibilities of the parties: Jemima and the children will need a home, but Kian's new partner and their future baby will also need to be considered.

(c) the age of the parties and the duration of the marriage: we are not told the age of the parties but they have been married for 12 years, which will be considered a reasonably long marriage.

(d) The contributions which each of the parties have made: Jemima used her inheritance money to discharge the mortgage on the matrimonial home but has £40,000 left over. 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.

(e) Conduct: Kian's adultery is not relevant conduct for the purpose of financial proceedings (Wachtel v Wachtel).

(f) The value of any benefit lost on divorce: both parties have pensions, albeit there is some disparity in value.

The court will also be required to consider whether a clean break order is possible under section 25A MCA 1973, i.e. where the parties have no ongoing obligations towards each other.

Jemima could try and argue that, rather than a clean break, there should be a Mesher order in respect of the matrimonial home, whereby the sale is deferred until the children have finished school. However, this is unlikely to be ordered in this case where there are sufficient assets to allow an instant clean break by offsetting assets against each other and because Kian has a new baby on the way.

A likely outcome may be that a property adjustment order is made in favour of Jemima, whereby the matrimonial home is transferred to her outright in exchange for Jemima paying Kian a lump sum from her savings to enable him to put down a deposit and not making a claim on his pension. Both parties would then retain their own pensions. This would also achieve a clean break. Periodical payments are unlikely to be necessary here because Jemima has a good career and will retain an amount from her savings to meet her needs, whilst identifying full time employment.

Any child maintenance matters will be dealt with in accordance with the Child Maintenance Service (CMS) formula unless Kian and Jemima want to agree something else.