

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

LEVEL 6 – UNIT 20 – THE PRACTICE OF FAMILY LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2022 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

It is clear from the results of this paper, that candidates who have engaged with the pre-seen materials and have practiced past papers have done extremely well overall.

Candidate strengths include the application of the section 25 Matrimonial Causes Act 1973 factors and the completion of the divorce question. Almost all candidates correctly identified the fact to prove the breakdown of the marriage and this question was very well done overall.

There are a few **recurring weaknesses** in candidate responses, and these include:

- Failure to apply the law to the facts given – this is especially relevant to question 2 in respect of the offer to settle and also question 4 when considering the balance of harm test and the factors taken into account
- A lack of understanding of the role and powers of the CMS and the orders that can be used to obtain unpaid child maintenance
- A lack of detail in providing section numbers of relevant Acts of Parliament – here few candidates gave s18A Wills Act 1837 correctly with many simply referring to the 'Wills Act.'

- Where process is requested by the question, candidates should be able to identify the correct forms, courts and processes – this is lacking in consistency across the papers in this January 2022 session

More practical observations on candidate scripts include:

- Where candidates are providing a lengthy response to a high-mark question, they should consider the structure of the answer carefully – for example, would sub-headings make the answer more logical? This is a minor point but one worth considering for ease of marking overall
- Time management – a small number of candidates ran out of time to complete the paper. Candidates should be made aware of techniques to manage time in an exam and the importance of ensuring that all questions are attempted

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This question was generally well answered with almost all candidates able to identify the correct fact to use to prove the irretrievable breakdown of the marriage. Candidates generally recognised that adultery could not be used as this was a same-sex marriage and therefore chose the correct option of unreasonable behaviour.

Some candidates were able to identify the possibility of waiting until April 2022 when ‘no fault divorce’ will be possible as this could, potentially, result in a more amicable split for the parties. Credit was given for recognising this as candidates had been told that the parties were trying to keep the separation amicable in the pre-release materials.

(b)

This question required candidates to be able to identify that the client needs to prove to the court that her partner has received the divorce petition. Candidates were asked to identify four ways in which alternative service could be effected in the event that the respondent fails to acknowledge service. This question was mostly well done, although a number of candidates did not provide the correct number of alternative methods of service.

(c)

Candidates should have identified the correct section (s18A) of the Wills Act 1837 relating to decree absolute and execution of a will and also the lapse of any gift on divorce.

Not all candidates identified the possible claim under the Inheritance (Provision for Family and Dependents) Act 1975.

This question was not done well, and the majority of candidates did not pinpoint the relevant law to the section number. Furthermore, a number of candidates then failed entirely to deal with the issue of pensions and the effect that divorce has on loss of pension benefits going forwards. This was the least well-done section of question 1.

Question 2(a)

This question was not done well by the majority of candidates suggesting that it is an area of family practice which is not covered well during studies and revision.

A minority of candidates were able to identify the powers of the CMS and there was confusion over the use of Deduction from Earnings orders and Attachment of Earnings orders following obtaining a liability order being obtained by the CMS. As a result, few candidates obtained all of the marks for this question.

(b)

Information provided to candidates in advance would indicate the likelihood of a question relating to the factors that the court will take into account and the suitability of a potential offer to settle.

Most candidates were able to competently deal with the factors that the court takes into account when reaching a financial settlement. However, the offer was dealt with less well and the use of case law not always accurate.

On balance, however, this question was reasonably well done with the majority of candidates managing to gain a significant number of marks overall.

Question 3(a)

This question required candidates to provide the possible ways in which the client could obtain parental responsibility for his son. A number of candidates, however, failed to provide the definition of parental responsibility correctly before giving the possible options.

Overall, this question was done well.

(b)

Candidates performed less well on this question which required them to identify that their client would need a specific issue order for the court in order to take his child on holiday in February half-term week. A few candidates obtained no marks at all for this question as they stated that our client needed to make an application to the court for a Child Arrangements Order – this was incorrect. Few candidates dealt with the actual process of making the application well.

On balance, those that correctly identified the type of order scored highly on this question overall.

Question 4(a)

The final question on the paper related to domestic violence and the orders that the court can make. Most candidates were able to identify the correct law in respect of non-molestation and occupation orders. The majority were also able to state the law in respect of associated persons and relevant children. Most could also identify the potential for the court to also attach a power of arrest to any orders made.

Most candidates did well on this question.

4(b)

Here candidates needed to consider the balance of harm test and apply it to the pre-seen case study facts. From this, candidates should then have gone on to discuss the factors that the court will take into account again applying these to the facts presented. Whilst most candidates could list the factors, few applied them well to the client given in the question resulting in only a few candidates scoring very highly for this question.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 – UNIT 20 – THE PRACTICE OF FAMILY LAW

Question Number	Suggested Points for Responses	Max Marks
1(a)	<p><i>Responses should include:</i></p> <p>Explanation to Ms Bosstek that the only ground for dissolution is that the marriage has broken down irretrievably.</p> <p>She will have to show this with reference to one of five facts which are as follows:</p> <ul style="list-style-type: none"> (a) adultery (b) behaviour (c) desertion (d) 2 years' separation with consent or (d) 5 years' separation. <p>These facts are provided in s1(2)(a-e) Matrimonial Causes Act 1973</p> <p>Adultery cannot be used as a fact here as this is a same-sex marriage, however, it can be used to evidence the fact of unreasonable behaviour</p> <p>The suggested fact to use here is fact (b) behaviour, as our client will be able to cite Helen's affair, together with the other instances of behaviour such as declining to spend time together on a trip to the US.</p> <p><i>Responses could include:</i></p> <p>Students may also identify the test in Livingstone Stallard which was considered in Owens v Owens [2018]. Some discussion of the 'right-thinking person' in Livingstone Stallard should be credited and the approach used by the Court of Appeal and Supreme Court in Owens discussed.</p>	8
1(b)	<p><i>Responses should include:</i></p> <p>Ms Bosstek will need to demonstrate to the court that the marriage has broken down irretrievably based upon the fact of behaviour.</p>	7

	<p>As Ms Bosstek’s petition is based on Helen’s behaviour, she does not require an admission or her consent to the dissolution. She needs to demonstrate to the court that the respondent has received the petition.</p> <p>Proof of service of the application will be required</p> <p>Options include:</p> <ol style="list-style-type: none"> 1) Personal service – this can be carried out by the court bailiff by lodging the application plus fee at court. NOT available to our client as she is legally represented 2) Process Server – or an enquiry agent who will serve and the file a certificate at court 3) Deemed Service – Our client would need to prove that Helen Brown had received the application. (For example, a verbal exchange confirming that the application had been received and would be ignored). 4) Substituted Service – for example an advert in the press locally or sending the document to the address of a third party such as a close relative. This could also be to a workplace. 5) Dispense with service - this can only happen after strenuous efforts have been made and the client can show that it is not practical to effect by any other means. This is a without notice application to include supporting evidence <p><i>Responses could include:</i></p> <p>Therefore, if Helen fails to return the Acknowledgment of Service to the court within 7 days, then our client needs to consider alternative service.</p>	
<p>1(c)</p>	<p><i>Responses should include:</i></p> <p><i>s18A Wills Act 1837</i> Provides that unless contrary intention is shown in the will, a decree absolute has the effect on the will of either spouse that any appointment as an executor is ignored.</p> <p>The decree absolute also affects the former spouse’s rights under the Intestacy rules as they are no longer the ‘surviving spouse’.</p> <p>However, in certain circumstances they may be able to make a claim against the deceased former spouse’s estate under the Inheritance (Provision for Family and Dependents) Act 1975.</p>	<p>5</p>

	<p>Any pension benefits are also lost, and issues of finance and property should be resolved in advance of the decree absolute.</p> <p><i>Responses could include:</i></p> <p>Any bequest to the former spouse will also lapse.</p> <p>The client should be advised to review any form of nomination where this was in favour of the former spouse.</p>	
Question 1 Total:		20 marks

Question Number	Suggested Points for Responses	Max Marks
2(a)	<p><i>Responses should include:</i></p> <p>The CMS has a range of powers that are used against the non-resident parent.</p> <p>1) Deductions from earnings orders can be served on the non-resident parent's employer requiring them to make deductions from salary and pay this to the CMS who pay it to the resident parent. The charge for this is £50.</p> <p>This is not available where the non-resident parent is self-employed.</p> <p>2) Deductions from bank or building society are used where the non-resident parent is self-employed. Requires the bank to pay money directly to the CMS. The charge for this is £50.</p> <p>If a DEO is not effective the court action can be taken.</p> <p>A liability order is obtained where the CMS apply to the Family Court giving the non-resident parent 7 days' notice of the application. Where the court is satisfied the payments are due then a liability order will be issued.</p> <p>The CMS then consider the means of enforcement which can include:</p> <ul style="list-style-type: none"> • registration of a charge at HMLR • seizure of goods • freezing bank accounts • third party debt orders • deductions orders • attachment of earnings order • committal order <p><i>Responses could include:</i></p> <p>Finally, the CMS can seek to take a driving license or passport.</p>	6

<p>2(b)</p>	<p><i>Responses should include:</i></p> <p>Section 25 MCA provides that the court must take into account all of the circumstances of the case, giving first consideration to the welfare of any minor children (s.25(1)).</p> <p>The parties have 2 children, Monty and Lilly who are living with Mrs Clarke and who will continue to do so. Section 25(2)</p> <p>MCA then sets out a list of factors for the court to use in resolving a couple's finances on divorce.</p> <ul style="list-style-type: none"> • s.25 (2)(a): Resources. <p>The parties' realisable capital resources are:</p> <p>4 bed house in parties' joint names (net equity) £225,000 Joint life assurance policy: surrender value: £50,000 Shares in Mr Clarke's sole name £65,000 Savings in Mr Clarke's sole name £86,000 Savings in Mrs Clarke's sole name £33,000</p> <p><i>Total £459,000</i></p> <p>The parties' unrealisable capital resources are: - Mr Clarke's pension CE: £82,000 Mrs Clarke's pension CE: £52,000</p> <p><i>Total £134,000</i></p> <p>Mr Clarke earns £57,000 gross per annum.</p> <p>Mrs Clarke is working part-time and earns approximately £17,000 gross per annum.</p> <p>She has further earning potential as the children are now aged 13 and 16 so are getting to an age where she could work full-time as they will soon both be more independent.</p> <p>Mrs Clarke also receives child maintenance from Mr Clarke via the CMS</p> <ul style="list-style-type: none"> • s.25(2)(b): Needs. <p>The court will consider the children's need to have a secure home first and will also consider each of the parties' needs to have a home. Mr Clarke wants the former family home sold and the net proceeds divided equally between the parties. The former family home is a 4-bedroom detached house.</p> <p>Mrs Clarke is unlikely to rehouse herself in a smaller or cheaper house and the children require it as a home, so the court is unlikely to order a sale.</p>	<p>24</p>
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The court would accept that Mr Clarke needs his own accommodation and ideally this should also be a 3-bedroom property so that the children can stay with him.

He says that he has seen a 3-bedroom semi-detached house he likes for himself for £175,000 – this appears reasonable.

Both parties have mortgage capacity, but Mr Clarke' is better than Mrs Clarke' as he earns more than she does.

The court would expect the parties to use this mortgage capacity. Both parties and the children also need sufficient income to live on.

- s25(2)(c): Standard of living.

In light of the parties' income and assets they had an average standard of living during the marriage. The court will attempt to ensure that both parties bear any reduction in their standard of living post-divorce equally. However, as Mrs Clarke has the children living with her, and their interests must be considered first, it is likely her standard of living will be reduced less than Mr Clarke'.

- s.25(2)(d): Ages of the parties and duration of the marriage.

Mrs Clarke is 40 and Mr Clarke is 45. They are close in age and are both young enough to continue working for a number of years, contribute to their pensions and improve their financial position post-divorce.

The duration of the marriage is 17 years which makes it at the 'short end' of a long marriage.

- s.25(2)(e): Disability of the parties: here Mrs Clarke is disabled, although is able to live relatively normally provided that she has some adaptations to her home environment. In the unlikely event that the court were to order a sale of the family home, then the costs of adapting another property would need to be taken into account.

- s.25(2)(f): Contributions to the family.

Mr Clarke has been the main earner.

Mrs Clarke has worked part-time, as well as looking after the home and the children of the family. She will continue to look after the children.

The court will rank these contributions equally.

- s.25(2)(g): Conduct: there is no conduct on the facts. (Students may omit altogether)

- s.25(2)(h): any loss of benefit.

Both parties have a pension, but Mr Clarke's pension CE is higher than Mrs Clarke's.

Mrs Clarke could apply for a pension sharing order or we could argue that she should receive a higher share of the realisable assets by way of set-off.

• The court must also consider whether the parties should have a clean break which is what Mr Clarke proposes. The court could believe that an immediate clean break is acceptable here, as Mrs Clarke is working and could increase her earning capacity. If Mrs Clarke were to have a larger share of the capital from the marriage, then this would increase this possibility.

Alternatively, the court may prefer to protect her position by way of a nominal maintenance order.

• The court will also apply the principles from the case of *White-v-White* (2000) 2 FLR 981, thus the court should check any settlement proposal against the “yardstick of equality”.

Credit students where other case law been discussed to include *Chaman v Charman* [2207] in relation to stellar contributions and *Miller v Miller* [2006]

A completely equal division of the total assets here would give Mr and Mrs Clarke £296,500 each.

A completely equal division of the realisable assets would give the parties £229,500 each.

In his lawyers’ offer letter, Mr Clarke is asking for £112,500 from the former family home and for the £50,000 from the insurance policy. This together with retaining the assets he already has (£86,000 in savings and £82,000 pension plus £65,00 in shares in his name) would give him £395,500 including his unrealisable pension asset. Without the pension this sum is therefore £313,500.

This equates to 67% of the total realisable assets.

This is clearly unfair, as it fails the White yardstick of equality test and as Mrs Clarke has the children living with her, it is likely that the court will award her more than one-half of the realisable assets in any event.

Responses could include:

A choice is being made to work part-time but this may not be possible in reality – Distinction level students will recognise that our client may simply have to increase her working hours here.

A Mesher Order could be considered here – credit students who consider and discuss this possibility.

Students may also consider that the court will take into account the disability of our client and what this could mean once the children are no longer dependent

	Consider an offer on behalf of our client – proportionality and overriding objective may be identified by strong candidates	
Question 2 Total:		30 marks

Question Number	Suggested Points for Responses	Max Marks
3(a)	<p><i>Responses should include:</i></p> <p>For Mr Jodha to participate in the decision-making for Bruno he will need to acquire Parental Responsibility (PR).</p> <p>Defined in the 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.”</p> <p>Unlike Bruno’s mother Miss Baski, as an unmarried father Mr Jodha does not automatically have PR for Bruno.</p> <p>In the e-mail Mr Jodha states that he and Miss Baski have previously made an agreement which has not been formalised. This would suggest that a PR agreement could be entered into.</p> <p>Parental Responsibility Agreement (Amendment) Regulations 2001 will apply.</p> <p>Form C(PRA1) to be completed including names of the mother and father and details of the child. Must be signed by both and witnessed.</p> <p><i>Responses could include:</i></p> <p>The form is filed at the Central Family Court in London. Court sends a copy to each parent. Can only end by order of the court.</p> <p>Credit candidates who suggest that the birth certificate could be re-registered</p>	7
3(b)	<p><i>Responses should include:</i></p> <p>Mr Jodha should apply for a specific issue order regarding the proposed holiday</p> <p>In deciding whether to grant Mr Jodha’s application the welfare of the child will be the court’s paramount consideration. The court will also consider the no delay and no order principles and the presumption of shared parental involvement.</p> <p>In deciding whether a specific issue order would be in Bruno’s best interests the court will apply the s.1(3) checklist:</p>	18

- The ascertainable wishes and feelings of the child: Mr Jodha tells us that Bruno is really excited about the holiday; it is likely that the court will appreciate this.
- The child's physical, emotional and educational needs: the court would generally hold that a holiday would be beneficial to the child's emotional needs. In relation to educational needs Mr Jodha is taking Bruno during the February half- term holidays so his educational needs will not suffer/It could be argued that a holiday abroad will in any event broaden his education.
- The likely effect on the child of any change in circumstances: Bruno stays with Mr Jodha every other weekend and spends half of his school holidays with him so spending time with him during his school holidays will not be a change to the status quo.
- The child's age, sex, background etc.: Bruno is 8 years old. The court will decide what weight to attach any significant weight to his views.
- Any harm that the child has suffered or is at risk of suffering: it is unlikely that the court will consider the situation to be one which poses physical harm to Bruno although the court may recognise the possibility of emotional harm caused by denying him the holiday. The holiday destination proposed is not an unusual one or one which suggests any risk.
- How capable the parents are of meeting the children's needs: this is not an issue here. There is no suggestion that Mr Jodha cannot look after Bruno as he regularly does so at weekends and during school holidays.
- The range of powers available to the court

As the parties are in dispute the court will have to make an order to resolve the issue. The court will decide this application in accordance with the welfare principle and so it is highly likely that the court will feel that the holiday proposed is in Bruno's best interests and make a specific issue order in Mr Jodha's favour.

Responses could include:

The court could make any section 8 order although realistically they will only make a specific issue or prohibited steps order here as the court has made it clear that these applications are not a back door to getting contact or residence issues resolved.

Mr Jodha, as Bruno's natural father, does not need leave to apply for the Specific Issue order.

Question 3 Total:

25 marks

Question Number	Suggested Points for Responses	Max Marks
4(a)	<p><i>Responses should include:</i></p> <p>The relevant orders which we should apply for to protect Miss Flynn are a non-molestation order under section 42 of the Family Law Act 1996 (FLA) and an occupation order under section 33 of the FLA.</p> <p>To qualify to apply for both orders Miss Flynn must establish that she is an associated person under section 62 FLA.</p> <p>This can be done as she and her partner are cohabiting.</p> <p>The application for the occupation order will be brought under section 33 FLA as the family home is owned jointly by the couple.</p> <p>Given the recent incidents of violence and Mr Jones’s calls threatening her, we should make the application without notice under section 45 FLA as there is a significant risk of harm to Miss Flynn if the order is not made immediately.</p> <p><i>Responses could include:</i></p> <p>Students could recognise that the court has the power under s40 to order periodical payments in respect of the accommodation. They can take into account financial needs and resources of the parties including obligations to children s40(2). Here unlikely but may be mentioned.</p> <p>As there has been violence we should also ask the court to attach a power of arrest to the occupation order under section 47 FLA.</p>	9
4(b)	<p><i>Responses should include:</i></p> <p>To make the application without notice under section 45 FLA we must prove to the court that Miss Flynn and Rose are at risk of significant harm if the order is not made immediately.</p> <p>Alternatively, we can rely on the fact that Miss Flynn will be deterred or prevented from pursuing the application if the order is not made immediately. Given the severity of the violence and threats it is very likely that the court will grant one or both of the orders applied for without notice.</p> <p>In relation to the non-molestation order, under section 42 FLA the court will take into account all the circumstances of the case including the need to secure the health, safety and wellbeing of Miss Flynn and Rose. The recent episodes of violence were serious.</p>	16

When considering the occupation order, the court will firstly apply the balance of harm test under section 33(7) FLA and consider whether if the order were not made Miss Flynn or Rose would be likely to suffer significant harm. If the answer to this question is yes, then the court shall make the occupation order, unless the court finds that Mr Jones is likely to suffer significant harm if the order is made and that the harm by him is as great or greater than the harm attributable to him and suffered by Miss Flynn if the order is not made.

Here Miss Flynn is likely to satisfy this test as if the order is not made, she will either suffer further violence or have to find somewhere else to live. This will be greater than the harm suffered by Mr Jones as if the order is made, he will simply have to find somewhere else to live.

If the court had doubts about whether the balance of harm test was satisfied, then they would go on to consider the factors in section 33(6) FLA:

- the respective housing needs and housing resources of the parties and any child. Miss Flynn's needs are greater as she is the main carer for Rose

She has nowhere else to go as her sister's home is not suitable as she must sleep on the sofa.

Mr Jones can stay at his friends' his parents potentially.

Whilst Miss Flynn would be unintentionally homeless and would thus obtain priority on the local authority's housing list, moving Rose would be disruptive and Miss Flynn needs a 2-bedroom property ideally. Whilst Mr Jones would be regarded as intentionally homeless and thus receive no priority on the local authority's housing list, he has some financial resources so could rent privately or buy and there appears to be no reason why he cannot move into his parents' home in the meantime

- the respective financial resources of the parties. Miss Flynn's needs are greater - however, she is the higher wage earner and bringing up Rose. Miss Flynn's earnings are likely to be sufficient to allow her to pay the overheads on the family home alone. Mr Jones is working and earning reasonable money which would enable him to rent somewhere small.

- the likely effect of any order or of any decision by the court not to make such an order on the health, safety and wellbeing of the parties and child. Here if an order were not made it would have an adverse effect on Miss Flynn and Rose as they need to be protected from Mr Jones's violence and threats.

- the conduct of the parties in relation to each other and otherwise. Mr Jones has been verbally and physically violent, the recent threats and incidents of violence were serious.

	<p>It is very likely that the court will grant the occupation order on the facts of this case.</p> <p><i>Responses could include:</i></p> <p>To make the application without notice under section 45 FLA we must prove to the court that Miss Flynn and Rose are at risk of significant harm if the order is not made immediately. Alternatively, we can rely on the fact that Miss Flynn will be deterred or prevented from pursuing the application if the order is not made immediately.</p> <p>Miss Flynn will need to demonstrate that there is a genuine need for protection and in these circumstances the court will grant a non-molestation order.</p> <p>If the court believes Miss Flynn’s version of events, then they must also grant a power of arrest under section 47 FLA as Mr Jones has used and threatened violence against her</p>	
Question 4 Total:		25 marks