

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

LEVEL 6 – UNIT 7 – FAMILY LAW

### Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 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

Similar issues have been identified to those which have arisen in previous exam papers.

More specifically, in section A weaker candidates tend to simply set out the law, ignoring the question actually posed. This was particularly true for questions 1 and 3 where consideration of arguments for and against a particular proposition were required to get full marks.

Section B questions were generally answered well but weaker answers were lacking in case law application or only answered part of the question (e.g. focusing on PR and not addressing associated financial orders).

Some candidates forgot to conclude their answers, meaning they missed out on what should have been fairly straight forward marks.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### SECTION A

#### Question 1

Most candidates were able to set out the law correctly and in a good amount of detail. However, quite a number of candidates failed to actually answer the question posed by critically evaluating the statement in the question and the arguments for and against amending the legal position. The strongest candidates were able to balance arguments on both sides, rather than just focusing on arguments for reform. Candidates who performed well were also able to discuss the proposals for reform which have already been considered by the courts/law commission/parliament. Weaker candidates described the current law and nothing more.

#### Question 2(a)

Some excellent answers to this question. Most candidates were able to outline the case law well and better candidates then related this back to the question with a reasoned conclusion. Weaker candidates focused on only one or two cases without fully answering the question.

#### (b)

This wasn't answered quite as well as (a). Stronger candidates discussed the case law, whereas weaker candidates only summarised what the Act did. Many of the weaker candidates didn't discuss the impact on s11(c) or reach a conclusion in answer to the question.

#### Question 3

Most candidates were able to discuss the Radmacher case and other relevant legal principles/cases. However, weaker candidates did not go on to answer the question posed and a number of candidates ignored the reference to QNAs and therefore did not discuss the law commission proposals on this issue at all.

#### Question 4

Most candidates were able to discuss the PR elements of the answer well and scored highly on this part. However, very few went on to then discuss the possible financial orders/options. This meant that many candidates were limited to only half of the marks.

### SECTION B

#### Question 1(a)

This question was answered well by most candidates. Most candidates were able to discuss Andrew's domicile in detail and the implications for that on the question, reaching the correct conclusion. Many candidates forgot to discuss Yasmin's domicile and only briefly discussed formalities.

**1(b)**

Most candidates reached the correct conclusion. Good candidates also discussed the relevant case law. Only a couple of very strong candidates discussed the possibility of a declaration of validity and financial orders. Most candidates forgot to address this.

**Question 2(a)**

Overall, this question was answered very well with most candidates identifying the relevant case law and applying it well. Some candidates forgot to address quantification which limited the marks available. Some candidates also forgot to draw a conclusion at the end, which again meant that they missed out on valuable marks.

**(b)**

Most candidates were able to identify that this question was referring to occupation orders. Some candidates referred only to TOLATA and were awarded some but not all marks for this. Many candidates forgot to address Joel as a 'relevant child' or consider the duration of the order.

**Question 3**

Responses to this question were varied. Some candidates answered the question well but a lot of candidates failed to consider the provisions in s11 in enough detail (or in some cases at all). A number of candidates also did not address the different financial orders available, in particular ignoring sch 1 claims.

**Question 4**

Candidates appeared to struggle with this question. Most candidates were able to apply the factors in s25 MCA 1973 but ignored the more relevant factors in s31. Weaker candidates also failed to address the key case law on disclosure such as Sharland. Some candidates mistakenly believed that the cohabitation would automatically bring the periodical payment order to an end.

**SUGGESTED POINTS FOR RESPONSE**

**LEVEL 6 – UNIT 7 – FAMILY LAW**

**SECTION A**

Question Number	Suggested Points for Responses	Max Marks
<b>1</b>	Responses should include: <ul style="list-style-type: none"> <li>• A brief explanation of cohabitation property rights - i.e. relies on trust and property law principles, including TOLATA claims</li> <li>• A brief explanation of property rights on divorce/dissolution i.e. various orders available under the MCA 1973 and CPA 2004</li> <li>• Address the common law marriage myth</li> <li>• Explain Home Rights under section 30 Family Law Act 1996</li> <li>• Outline the proposals for reform that have been put forward on this issue</li> </ul>	<b>25</b>

	<ul style="list-style-type: none"> <li>• Arguments for amending the law: TOLATA claims are expensive and complex; a lack of protection for parents who give up work to look after the children; high number of cohabiting couples/parents</li> <li>• Arguments for retaining the current law: freedom of option; couples now have the option of a civil partnership if they do not agree with marriage; may undermine marriage as an option; cohabiting relationships vary in commitment – where is the line to be drawn?</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Discussion of the Cohabitation Rights Bill 2019-2021</li> <li>• Discussion of the use of cohabitation contracts, declarations of trust and pre-nuptial agreements with reference to relevant case law</li> <li>• Inheritance/intestacy position for cohabitants compared to married couples</li> <li>• Discussion of the general approach taken under MCA 1973 (to achieve a fair result) and in property/trusts law (to give effect to the parties' intentions, whether fair or not)</li> </ul>	
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Question Number	Suggested Points for Responses	Max Marks
<b>2(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• The common law definition of marriage set out in Hyde v Hyde and Woodmansee (1866)</li> <li>• Reference to relevant case law setting out the position pre GRA such as Corbett v Corbett (1970) and Rees v UK (1987) or Cossey v UK (1991).</li> <li>• Declarations of incompatibility with Human Rights by the European Court of Human Rights in Goodwin v UK (2002) and I v UK (2002).</li> <li>• Bellinger v Bellinger [2003] - marriage held to be void because the parties were not a man and a woman.</li> <li>• The GRA 2004 enables post-operative transgendered people to obtain a birth certificate to reflect their new gender</li> <li>• The GRA 2004 permitted an applicant to marry a person of the opposite gender to their new gender – important for establishing capacity to marry before 29 March 2014</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Section 11(c) MCA 1973</li> <li>• Being issued with an interim GRC after the time of the marriage is still a ground for a voidable marriage – section 12 MCA 1973</li> <li>• The changes now have less relevance due to the M(SSC)A but this should mainly be discussed in the next part of the question.</li> </ul>	<b>17</b>

<b>2(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Discuss relevant case law establishing the position prior to the M(SSC) Act and the Human Rights position e.g. Wilkinson v Kitzinger [2006]</li> <li>• The Marriage (Same Sex Couples) Act 2013 introduced the concept of same sex marriage.</li> <li>• Repealed section 11(c) MCA 1973 – set out what the section stated</li> <li>• Direct conflict between new provisions and the common law definition.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Less conflict with the Bellinger v Bellinger definition.</li> </ul>	<b>8</b>
<b>Question 2 Total:</b>		<b>25 marks</b>

Question Number	Suggested Points for Responses	Max Marks
<b>3</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• A detailed discussion of the leading case of Radmacher v Granatino and the factors laid down in that case</li> <li>• The factors that the court will consider when determining what financial orders to make – section 25(1) and (2) MCA 1973</li> <li>• An explanation of the Law Commission proposals for Qualifying Nuptial Agreements, including the factors that must be complied with</li> <li>• QNAs won't prevent financial orders being made for the benefit of children</li> <li>• The QNA won't be rigidly upheld where the parties' needs require something otherwise.</li> <li>• Benefits of QNAs: more certainty, facilitates the parties' autonomy, can be used to protect non-matrimonial property, should reduce costs</li> <li>• Arguments against QNAs: potentially only applicable to wealthier couples given the needs requirements, concerns that one party would be put under pressure, could undermine marriage/public policy issues, gender inequality issues.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Other relevant case law setting out the legal position in relation to pre-nuptial agreements e.g. Kremen v Agrest [2012], M v M (Pre-nuptial Agreement) [2002]</li> <li>• The proposals under the Divorce (Financial Provision) Bill</li> </ul>	<b>25</b>

Question Number	Suggested Points for Responses	Max Marks
<b>4</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Step-parents do not automatically obtain parental responsibility for their step-children but they can acquire it under section 4A CA 1989 by agreement or court order if they are married to the child's parent (doesn't apply to cohabitants).</li> <li>• Step-parents with PR can lose it by court order.</li> <li>• The possibility of a Schedule 1 CA 1989 claim – periodical payments and property orders</li> <li>• Financial orders could be made on divorce under section 23 MCA 1973. The court will need to consider section 25(3) and section 25(4) MCA 1973.</li> <li>• Step-parents may apply for a child arrangements order under section 8 CA 1989 if they have PR for a child or have treated them as a child of the family.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• The Child Maintenance Service cannot order a step-parent to pay child maintenance</li> <li>• Relevant case law such as R v R [2011]</li> <li>• Prohibitions on step-children marrying step-parents - Marriage Act 1949</li> <li>• A step-parent can be the subject of a non-molestation order with regards to a relevant child.</li> </ul>	<b>25</b>
<b>Question 4 Total:</b>		<b>27 marks</b>

## SECTION B

Question Number	Suggested Points for Responses	Max Marks
<b>1(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• As Andrew is domiciled in England, the law of England &amp; Wales is used to determine whether he has capacity to marry. Need to refer to s 11 MCA 1973 and explain the concept of domicile.</li> <li>• As Yasmin is domiciled in Pakistan, the law in Pakistan would be used to determine if she has capacity. Is she already married?</li> <li>• As they are getting married in Pakistan he must comply with the formalities of marriage in Pakistan</li> <li>• If the Decree Absolute has not been granted in the first marriage then he will still be married to Sarah and he will not have capacity to marry Yasmin</li> <li>• S11 (d) MCA 1973 – a polygamous marriage entered outside of England and Wales where one of the parties is domiciled in England &amp; Wales is void – marriage to Yasmin will be void</li> </ul>	<b>15</b>

	<ul style="list-style-type: none"> <li>Conclude that Andrew would need to confirm the Decree Absolute was granted in his divorce to Sarah or petition for divorce before he can marry Yasmin.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>The definition of a polygamous marriage in Hussein v Hussein [1982]</li> <li>Other capacity issues to consider: age of Yasmin, are they related etc.</li> </ul>	
<b>1(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>Recognise that Andrew's domicile would be in Pakistan</li> <li>Capacity to marry would be according to the law in Pakistan</li> <li>Polygamous marriage permitted in these circumstances</li> <li>Possibility of a declaration of validity and financial orders: Section 47 MCA 1973 and Section 46 Family Law Act 1986</li> <li>Reference to relevant case law such as Mohamed v Knott [1969] and/or Cheni v Cheni [1962]</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>The definition of a polygamous marriage in Hussein v Hussein [1982]</li> </ul>	<b>10</b>
<b>Question 1 Total:</b>		<b>25 marks</b>

Question Number	Suggested Points for Responses	Max Marks
<b>2(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>The presumption is that Karim owns all the beneficial interest in the property because it is in his sole name</li> <li>Set out the 2 elements needed to establish a constructive trust with reference to Lloyds Bank v Rosset (1990)</li> <li>Identify and apply relevant comparable case law around express common intention</li> <li>Identify and apply relevant comparable case law around implied common intention</li> <li>Identify the contributions that Belinda has made and whether they will be considered relevant to common intention and/or acting to her detriment.</li> <li>Identify that an application would be made under section 14 of the Trusts of Land &amp; Appointment of Trustees Act 1996</li> <li>Discuss how the beneficial interest would be quantified with reference to Jones v Kernott (2011)</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>Belinda cannot rely on the MCA 1973 and doesn't have home rights because she was never married to Karim.</li> <li>No direct contribution to the purchase price so no resulting trust</li> </ul>	<b>15</b>

	<ul style="list-style-type: none"> <li>• Most case law around express common intention relates to discussions prior to the property being purchased</li> </ul>	
<b>2(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Belinda could seek an occupation order under section 36 Family Law Act 1996 as she and Karim are cohabitants and Karim has a right to occupy.</li> <li>• The order would apply to Joel too as a ‘relevant child’</li> <li>• An occupation provision would protect their right not to be excluded.</li> <li>• Apply the factors in section 36(6) to the scenario</li> <li>• Duration of the order – max 6 months with one extension (12 months max in total)</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• A regulatory/exclusion requirement is unlikely</li> <li>• Breach of an occupation order would be contempt of court</li> <li>• If the candidate has reached the conclusion in (a) that the client has a beneficial interest in the property and uses this as a justification to rely on s33 instead of s36, the marks will be permitted for discussion of that section instead. The justification must however be set out in the answer.</li> </ul>	<b>10</b>
<b>Question 2 Total:</b>		<b>27 marks</b>

Question Number	Suggested Points for Responses	Max Marks
<b>3</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identify that there is a Child Arrangements Order in place under section 8 CA 1989</li> <li>• Explain the warning notice attached to Child Arrangement Orders under section 11</li> <li>• Identify that a breach of the order would be contempt of court</li> <li>• Discuss possible enforcement options under Sections 11A-J CA 1989</li> <li>• Discuss relevant case law on enforcement</li> <li>• Identify that an application could be made to the Child Maintenance Service</li> <li>• Possibility of an application under Sch 1 CA 1989 in respect of the private school fees</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• The arrangement in the court order appears to be a ‘shared care’ arrangement which may mean that no maintenance is payable</li> <li>• The presumption of parental involvement in section 1(2A) and 1(2B) CA 1989</li> </ul>	<b>25</b>

	<ul style="list-style-type: none"> <li>• Discussion of a specific issue order to decide on the future schooling</li> <li>• Discussion of the welfare principle and checklist in regard to amending the current order or a specific issue order</li> </ul>	
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Question Number	Suggested Points for Responses	Max Marks
<b>4</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identify the need for full and frank disclosure in financial proceedings with reference to cases such as Sharland v Sharland [2015] and Gohil v Gohil [2015]</li> <li>• Possible implications of non-disclosure with reference to relevant case law such as AR v JR [2018]</li> <li>• Identify that cohabitation will not automatically bring a periodical payments order to an end with reference to K v K (Periodical Payments: Cohabitation) [2006]</li> <li>• s31 MCA 1973 gives the court power to vary or discharge certain orders – periodical payments orders but not capital orders (although potential here due to non-disclosure)</li> <li>• Set out the matters that the court will consider when deciding whether to vary or discharge an order under section 31(7) MCA 1973 and apply to the scenario.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Relevant comparable case law such as Grey v Grey [2010] and/or W v W [2015]</li> <li>• Recommendations of possible variations with reference to section 25.</li> </ul>	<b>25</b>