

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021
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 June 2021 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

Candidates generally performed as expected in most questions. Questions where candidates were generally weaker were 1(c) and 2(a). Candidates that were not sure tended to just put everything they knew about protocol in a "splatter gun approach" rather than focusing on what the question was asking for.

In terms of question 1(a) a proportion of the candidates failed to read the question that was asking for a statement of case and discussed instead the fact that could be relied on. This is not a fault of the question, candidates need to read carefully to see what the question is asking for rather than what they hope it will include.

The longer questions were generally answered quite well, the main marks that were missed by candidates were not including all the elements even if they weren't relevant to show that they knew and applied all elements. Marks were split in the mark scheme favouring the actual application so avoiding candidates that only regurgitated the elements and didn't apply them achieving high marks.

For Level 6 it is expected that candidates will know the correct sections of the acts and state them when discussing elements, some candidates failed to do this and so received less marks.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

Candidates generally did well on this question, the ones that did not achieve full marks generally did not specifically refer to irretrievable breakdown. Some candidates failed to identify what the question was asking for and instead discussed the facts that could be relied on.

(b)

Mainly well answered, some lost marks for not naming the forms or missing steps out of the process.

(c)

This question was quite poorly answered, many candidates were not clear on the protocols and some achieved marks with a "scatter gun approach" of writing all they knew rather than a targeted answer.

Question 2(a)

Candidates either knew this or didn't. Some candidates chose not to answer this question as they clearly wanted to spend more time on questions that they knew better.

(b)

Candidates generally knew the elements here, but tended to lose marks for not applying fully, for example, for resources there were 4 marks available, but many candidates did not outline all the resources the couples had so few achieved full marks for this part.

Question 3(a)

This question was well answered with an average mark of 5 out of 7 a Some candidates failed to achieve higher marks as they didn't include the definition of PR which they should be reminded of when doing this type of question.

(b)

A number of candidates failed to refer to status quo when discussing the likely effect. Same as 2b some candidates didn't complete full application to each element.

Question 4(a)

This question was well answered with most candidates identifying the correct sections and orders. A few failed to mention S30 home rights, which link with S33. Generally, this question was well answered. .

(b)

Generally, as the last question on the paper this one is not always as well completed as some candidates run out of time. The candidates that answered well covered all the elements and applied them in detail for occupation orders.

SUGGESTED POINTS FOR RESPONSES
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The purpose of this document is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The Suggested Points for Responses 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. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

Question Number	Suggested points for responses	Max Marks
Q1(a)	<p>Petition: Part 6: Statement of Case:</p> <ul style="list-style-type: none"> • The Applicant first felt there were problems with the marriage in August 2020. The Applicant felt that the Respondent was unsupportive of her career and the couple had numerous arguments about the division of household chores and whether the Applicant should reduce her working hours. • The couple attended counselling sessions which were productive but by November 2020 the Applicant suspected that the Respondent was having an affair. When the Applicant confronted the Respondent about this he admitted that he had been in a relationship with a colleague from work but that this had now ended. • Although the couple reconciled, the Applicant subsequently found it hard to trust the Respondent and the Applicant now firmly believes that the marriage is irretrievably broken down and petitions for a divorce on this basis 	6
Q1(b)	<ul style="list-style-type: none"> • Once the court receives the Acknowledgement from Mr Fitzpatrick they will send it to us. Mrs Fitzpatrick will then have to complete the application for decree nisi (D84) and the statement in support of divorce (D80B) to confirm that she wishes to proceed with the divorce. • The court will then review the evidence and provided that they are satisfied that the evidence proves that the marriage has irretrievably broken down they will issue the certificate of entitlement to a decree and set the date for pronouncement of decree nisi. 	11

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Q1(c)	<ul style="list-style-type: none"> • The key elements of the Family Law Protocol are that the parties should adopt a constructive and conciliatory approach. • We should give notice to Mr Fitzpatrick of his wife's intention to issue divorce proceedings and we should try to agree the contents of the petition prior to issue. • As the petition will be based on behaviour we do not need Mr Fitzpatrick's consent to the divorce. However this approach will still be helpful for Mrs Fitzpatrick as it may help us establish whether Mr Fitzpatrick will indeed co-operate with the divorce proceedings. 	5
Total		22 marks

Question Number	Suggested points for responses	Max Marks										
Q2(a)	<ul style="list-style-type: none"> • The effect of the notice of severance is to change the beneficial ownership of the former family home. • The parties originally owned the property as joint tenants in equity (1). The notice severs this joint tenancy so as to convert it into a tenancy in common (1). Mr and Mrs Adebayo now own a distinct share in the property (1) • The rule of survivorship, whereby if one of the parties died their share would automatically vest in the other, no longer applies so that each party can now deal with their own share as they wish. • Mr Adebayo's lawyers should await the acknowledgement of severance from us and then record the severance at the Land Registry by requesting that a Restriction is entered on the Proprietorship Register. • As both Mr and Mrs Adebayo are now free to deal with their shares in the property it would form part of their individual estates on death (1) so both lawyers should advise their respective clients to make a Will if they have not already done so (1). • This is important as until the decree absolute of divorce is pronounced they are still each considered to be the "surviving spouse" of the other under the Intestacy rules. 	5										
Q2 (b)	<p>Section 25 Matrimonial Causes Act (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)). The parties have 2 children, Salim and Zina who are living with Mrs Adebayo and who will continue to do so. Section 25(2) 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> <table data-bbox="406 1787 1193 1982"> <tr> <td>3 bed house in parties' joint names (net equity)</td> <td>£250,000</td> </tr> <tr> <td>Joint life assurance policy: surrender value</td> <td>£80,000</td> </tr> <tr> <td>Shares in Mr Adebayo's sole name</td> <td>£65,000</td> </tr> <tr> <td>Savings in Mr Adebayo's sole name</td> <td>£52,000</td> </tr> <tr> <td>Savings in Mrs Adebayo's sole name</td> <td>£30,000</td> </tr> </table>	3 bed house in parties' joint names (net equity)	£250,000	Joint life assurance policy: surrender value	£80,000	Shares in Mr Adebayo's sole name	£65,000	Savings in Mr Adebayo's sole name	£52,000	Savings in Mrs Adebayo's sole name	£30,000	25
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Savings in Mrs Adebayo's sole name	£30,000											

	Total	£477,000
<p>The parties' unrealisable capital resources are:-</p> <p>Mr Adebayo's pension CE: £74,000</p> <p>Mrs Adebayo's pension CE: £28,000</p> <p>Total £102,000</p>		
<p>Mr Adebayo earns £50,000 net per annum. Mrs Adebayo is working part-time and earns approximately £25,000 net per annum. She has further earning potential as the children are now aged 13 and 11 so are getting to an age where she could work full-time as they will soon both be at High school. Mrs Adebayo also receives child maintenance from Mr Adebayo 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 Adebayo wants the former family home sold and the proceeds divided equally between the parties. The former family home is a 3-bedroom house. Mrs Adebayo 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. The court would accept that Mr Adebayo 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 house for £395,000. Both parties have mortgage capacity, but Mr Adebayo's is better than Mrs Adebayo's 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.</p>		
<ul style="list-style-type: none"> • s25(2)(c): Standard of living. 		
<p>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 Adebayo 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 Adebayo's.</p>		
<ul style="list-style-type: none"> • s.25(2)(d): Ages of the parties and duration of the marriage. 		
<p>Mrs Adebayo is 39 and Mr Adebayo is 41. 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</p>		

post-divorce. The duration of the marriage is 15 years which makes it a fairly long marriage.

- s.25(2)(e): Disability of the parties:
not applicable

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

Mr Adebayo has been the main wage earner. Mrs Adebayo 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

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

Both parties have a pension, but Mr Adebayo's pension CE is higher than Mrs Adebayo's. Mrs Adebayo 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 Adebayo proposes. The court could believe that an immediate clean break is acceptable here as Mrs Adebayo is working and could increase her earning capacity. If Mrs Adebayo 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". A completely equal division of the realisable assets here would give Mr and Mrs Adebayo £238,500 each. A completely equal division of the total assets would give the parties £289,500 each. In his lawyers' offer letter, Mr Adebayo is asking for £125,000 from the former family home and for half of the £80,000 insurance policy. This together with retaining the assets he already has (which are worth £117,000) would give him £282,000 worth of realisable assets (59%) and £356,000 worth (61%) of the total assets. This is clearly unfair as it fails the White yardstick of equality test and as Mrs Adebayo 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.	
Total		30 marks

Question Number	Suggested points for responses	Max Marks
Q3(a)	<p>For Mr Williamson to participate in the decision-making for Evangeline he will need to acquire Parental Responsibility (PR) (1). The concept of parental responsibility was introduced by the Children Act 1989 (CA) and is described 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.” (1)</p> <p>Unlike Evangeline’s mother Miss Lomax, as an unmarried father Mr Williamson does not automatically have PR for Evangeline (1). We know that Evangeline’s birth was registered by Miss Lomax and that Evangeline is registered in the surname of Lomax without any mention of Mr Williamson as her father so this points to him not having obtained PR to date (1)</p> <p>An unmarried father can acquire PR in a number of ways:-</p> <ul style="list-style-type: none"> - by entering into a PR agreement with the mother - by applying to the court for a PR order - by obtaining child arrangements order governing where the child should reside from the court - by marrying the child’s mother - by subsequently re-registering the child’s birth in the father’s surname <p>Realistically the only way that Mr Williamson is likely to acquire PR here is through an application to the court as it seems very unlikely that Miss Lomax will agree to entering into a PR agreement with him</p> <p>Response could also include:</p> <ul style="list-style-type: none"> • Mr Williamson will not obtain PR through a Child Arrangements Order for Evangeline to reside with him as he is not challenging where she should live. 	7
Q3 (b)	Mr Williamson should apply for a specific issue order regarding the proposed holiday	16

In deciding whether to grant Mr Williamson's application the welfare of the child will be the court's paramount consideration (1). The court will also consider the no delay and no order principles (1) and the presumption of shared parental involvement (1)

In deciding whether a specific issue order would be in Evangeline's best interests the court will apply the s.1(3) checklist:-

- The ascertainable wishes and feelings of the child: Mr Williamson tells us that Evangeline was really excited about the holiday and is very upset that she cannot go, 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 (1) In relation to educational needs Mr Williamson is taking Evangeline during the summer holidays so her educational needs will not suffer/It could be argued that a holiday abroad will in any event broaden her education (1).
- The likely effect on the child of any change in circumstances: Evangeline stays with Mr Williamson every other weekend and spends half of her school holidays with him (1) so spending time with him during her school holidays will not be a change to the status quo (1).
- The child's age, sex, background etc.: Evangeline is 7 years old. This is too young for the court to attach any significant weight to her 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 Evangeline although the court may recognise the possibility of emotional harm caused by denying her the holiday (1). The holiday destination proposed is not an unusual one or one which suggests any risk (1).
- How capable the parents are of meeting the children's needs: this is not an issue here. There is no suggestion that Mr Williamson cannot look after Evangeline as he regularly does so at weekends and during school holidays.
- The range of powers available to the court: 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

	<p>has made it clear that these applications are not a back-door to getting contact or residence issues resolved.</p> <ul style="list-style-type: none"> 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 Evangeline's best interests and make a specific issue order in Mr Williamson's favour. <p>Response could also include:</p> <ul style="list-style-type: none"> Mr Williamson as Evangeline's natural father does not need leave to apply for the Specific Issue order. 	
Total		23 marks
Question Number	Suggested points for responses	Max Marks
Q4(a)	<p>The relevant orders which we should apply for to protect Mrs Gordon 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 Mrs Gordon must establish that she is an associated person under section 62 FLA. She is because she and Mr Gordon are married.</p> <p>The application for the occupation order will be brought under section 33 FLA as although the family home is owned solely by Mr Gordon, as a spouse Mrs Gordon has a statutory right to occupy under section 30 FLA.</p> <p>Given the recent incidents of violence and Mr Gordon's threat that if she goes back to the family home she will be dead, we should make the application without notice.</p> <p>Response could also include:</p> <ul style="list-style-type: none"> 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. 	7
Q4(b)	<p>To make the application without notice under section 45 FLA we must prove to the court that Mrs Gordon and Porter are at risk of significant harm if the order is not made immediately. Alternatively, we can rely on the fact that Mrs Gordon will be deterred or prevented from pursuing the application if the order is not made immediately. Given</p>	18

the level of violence and the threat it is very likely that the court will grant one or both of the orders applied for without notice.

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 Mrs Gordon and Porter. There is a history of verbal abuse, and the episodes of violence were serious (1). Mrs Gordon can demonstrate that there is a genuine need for protection and in these circumstances the court will grant a non-molestation order (1).

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 was not made Mrs Gordon or Porter 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 Gordon is likely to suffer significant harm if the order is made and that the harm suffered by him is as great or greater than the harm attributable to him and suffered by Mrs Gordon if the order is not made.

Here Mrs Gordon 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 Gordon, 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. Mrs Gordon's needs are greater as she is the main carer for Porter and she has nowhere else to go as her sister's home is a one bedroom flat and her parents live in Spain. Mr Gordon can stay at his parent's three-bedroom home. Whilst Mrs Gordon would be considered to be unintentionally homeless and would thus obtain priority on the local authority's housing list, moving Porter from her home would cause upheaval and she would need a two-bedroom property ideally. Whilst Mr Gordon would be regarded as intentionally homeless and thus receive no priority on the local authority's housing list he has good financial resources so could rent privately and there appears to be no reason why he can't move in to his parents' home in the meantime.
- the respective financial resources of the parties. Mrs Gordon's needs are greater as she is currently only working part-time and bringing up Porter. Mr Gordon is working and earning good

	<p>money so he would have the better resources to rent another property to live in if required.</p> <ul style="list-style-type: none"> 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 Mrs Gordon and Porter as they need to be protected from Mr Gordon’s violence and threats. the conduct of the parties in relation to each other and otherwise. Mr Gordon has been verbally and now physically abusive and has said that if Mrs Gordon goes back she will be dead, It is very likely that the court will grant the occupation order on the facts of this case. <p>If the court believes Mrs Gordon’s version of events, then they must also grant a power of arrest under section 47 FLA to the on-notice occupation orders as Mr Gordon has used and threatened violence against her.</p> <p>Response could also include:</p> <ul style="list-style-type: none"> Mrs Gordon could pursue a property adjustment order for the transfer of the former family home to her within divorce proceedings. 	
Total	25 marks	