

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021
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 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

A number of candidates missed out on fairly easy marks that were allocated for reaching a conclusion in answer to the question posed and for structure. Candidates should ensure a clear structure and inclusion of a conclusion in order to maximise the marks that they achieve in future assessments.

Where candidates performed poorly, this was usually due to the answer being too general and not being tailored to the question actually posed or not being detailed enough.

There were a large number of candidates who provided incorrect section numbers when quoting key statutes, with a common error being to misquote a subsection as a section. For example, referring to the welfare checklist in section 3, when it should be section 1(3).

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

On the whole this question was answered very well. Most candidates were able to describe the development of the law in this area and identify some of the remaining inequalities. Most candidates identified the key differences with regards to adultery and non-consummation. However, very few candidates discussed the Gender Recognition Certificate changes introduced by the Act. Only a small number of candidates addressed future changes expected through divorce reform and the impact that this would have on the remaining inequalities.

Question 2

Answers to this question were mixed. Some very good answers to this question but quite a lot of poor answers. Most candidates were able to outline the different types of domicile but struggled more with their explanation of habitual residence. Some candidates only described the concepts but then didn't proceed to answer the question posed therefore limiting their marks.

Question 3(a)

Most candidates were able to briefly explain the defence and when it can be used. However, in many answers reference to important case law on 'hardship' was lacking. A number of candidates also failed to consider the second element of the defence which is 'wrong in all the circumstances'.

(b)

Most candidates could briefly explain the section and when it applies, although some candidates confused section 10(2) with section 10A. Very few candidates explained the delaying tactic in full, with reference to the related provisions in section 10(3) and 10(4).

Question 4

On the whole, this question was answered well and was a popular question. Most candidates were able to identify which provisions apply to cohabitants and which apply to spouses, making reasonable comments about the differences/similarities. Where candidates performed less well, it was usually because they had not discussed individual sections for occupation orders or had not gone into enough detail comparing the factors and durations within the individual sections. Very few candidates considered section 40.

SECTION B

Question 1(a)

This question was answered well by most candidates. Most candidates were able to identify that section 12(1)(f) or divorce using behaviour were the main options available. Some candidates discussed adultery but failed to identify that it would not apply due to the affair taking place prior to the marriage. A number of candidates failed to discuss section 13 or misapplied it.

(b)

Most candidates discussed the possibility of scientific testing and who has parental responsibility.

Weaker candidates didn't address relevant case law or the court's ability to draw inferences.

Question 2

Most candidates identified that a child arrangements order is the relevant order. Most candidates identified that the grandparents need leave to apply, although some candidates failed to then apply the provisions in section 10(9) to the scenario. Poorer answers were lacking in case law references or made incorrect references to the legislation which limited the marks available. Most candidates identified and applied sections 1(1), 1(2), 1(5) and 1(3) (although some candidates quoted these sections incorrectly). Section 1(2A) was crucial in this question and was missed by a large number of candidates. On the whole, the welfare checklist was applied well.

Question 3

On the whole, this question was answered well. Most candidates identified and applied Radmacher as the relevant key case. Most candidates also applied the factors in section 25 to the case scenario. However, some candidates forgot to also discuss the general principles of fairness with reference to relevant case law.

Question 4(a)

On the whole, this question was answered fairly well. Most candidates identified judicial separation as the relevant option but some wasted time discussing other non relevant options. Most candidates were able to identify that adultery is not a relevant ground due to the same sex relationship, but some candidates failed to discuss future relevant grounds.

(b)

Most candidates identified that the DPMCA is the relevant legislation and were able to explain the grounds and available orders. Weaker candidates did not discuss and apply the factors in section 3(2).

**SUGGESTED POINTS FOR RESPONSES
LEVEL 6 – UNIT 7 – FAMILY LAW**

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.

Section A

Question Number	Suggested points for responses	Max Marks
Q1	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of the position prior to the introduction of the Civil Partnerships, Marriages and Deaths (Registration Etc.) Act 2019, setting out the different options available to same sex and opposite sex couples under the Civil Partnerships Act 2004, the Marriages Acts and the Same Sex (Married Couples) Act 2013. • Discussion of the key case law that preceded the introduction of the 2019 Act – more specifically <u>Steinfeld and Another v Secretary of State</u>. • Explanation of the purpose of the Civil Partnerships, Marriages and Deaths (Registration Etc.) Act 2019 in relation to options for formalising relationships - i.e. to expand civil partnerships to opposite sex couples. • Identification that same sex couples and opposite sex couples now both have the same options for the legal formalisation of their relationships – marriage or civil partnership. • Critical evaluation of any ways in which the law around the legal formalisation and dissolution of relationships can still be said to be different for same sex and opposite sex couples <p>Responses could include:</p> <ul style="list-style-type: none"> • The quadruple lock makes it more difficult for same sex couples to have a religious marriage ceremony. Very good students will also reference the amendments to the Equality Act 2010 to prevent a discrimination claim on this basis. • Civil Partners will no longer need to dissolve their civil partnership where one of them is seeking a full gender 	25

	<p>recognition certificate (because civil partnerships are now open to couples of any gender).</p> <ul style="list-style-type: none"> • There is no equivalent of adultery for same sex relationships (section 1(6) MCA 1973 and/or <u>Dennis v Dennis</u> 1955). • Difference in nullity provisions: no non-consummation ground for same sex couples • Consideration of the impact of the provisions in the Divorce, Dissolution and Separation Act 2020 on the above differences. 	
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q2	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of the importance of the concept of domicile • Explanation of the three different types of domicile (origin, dependency and choice), identifying that a person can only ever have one. • Explanation of the concept of habitual residence • Discussion of the problems with domicile and whether those issues would be eradicated by the use of habitual residence instead. <p>Responses could include:</p> <ul style="list-style-type: none"> • Gender based rules that govern domicile of origin don't cater for children of same sex couples • The difficulty in changing domicile/obtaining a domicile of choice no longer reflects a modern, migratory society • Habitual Residence is internationally accepted as a concept • Habitual Residence is a question of fact, not stringent law so is more adaptable to individual circumstances but has a lack of certainty. • Can be Habitually Residence in more than one country – could cause arguments over jurisdiction. • Reference to relevant case law to illustrate the above points. 	25
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q3(a)	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of the section 5 defence, including the two stage test. • Identify that this is a full defence but it only applies where a divorce petition is based on 5 years separation • Discuss the difficulties with proving financial or other hardship. • Discuss the factors that the court will take into account when considering if it would be ‘wrong in all the circumstances’ to end the marriage. • Conclude that it is virtually impossible to now rely on a section 5 defence. <p>Responses could include:</p> <ul style="list-style-type: none"> • Identify that it is now difficult to rely on financial hardship in support of the defence because of the range of financial orders available • Identify that there are no reported successful cases relying on ‘other hardship’ and reference case law where this has failed. • Identify that the court will consider the impact of refusing a decree absolute including the impact on other people concerned such as a new relationship. • The defence will not be relevant if the proposals set out in the Divorce, Dissolution and Separation Act 2020 are successful – section 5 is not retained and no ability to defend. • Relevant case law that demonstrates the points set out above 	13
Q3(b)	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of section 10(2) - delaying tactic, not a defence. • Provides financial protection for a spouse in a weaker financial position. • Identify that it only applies to divorce petitions based on 2- or 5-years separation. • Explain the matters the court will consider under section 10(3) • Discuss the courts ability to make an order anyway under section 10(4) and the circumstances in which this may arise. <p>Responses could include:</p> <ul style="list-style-type: none"> • The use of section 10(2) as a bargaining tool 	12

	<ul style="list-style-type: none"> • The restricted use of 10(2) in that the courts cannot actually make a financial order unless a separate application for financial relief is made • The section will not be relevant if the proposals set out in the Divorce, Dissolution and Separation Act 2020 are successful – section not retained. 	
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q4	<p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • A discussion of the two main orders available to victims of domestic abuse under the Family Law Act 1996: Non-molestation orders (s.42) and Occupation Orders (sections 33-38) • Explain the concept of “associated persons” with reference to section 62 and its inclusion of both spouses and cohabitants. • Identify that both spouses and cohabitants have an equal right to apply for a non-molestation order and there is no difference in the test that is applied. • Identify that for Occupation Orders, the test applied and the length of the order will depend on rights of occupation. • Explain Matrimonial Home Rights and their application to section 33. • Compare the differences between an application under section 33 and an application under section 36. <p>Responses could include:</p> <ul style="list-style-type: none"> • Discuss the additional scrutiny of the relationship in the additional factors that are considered in section 36(6) compared to section 33(6). • Discuss the statutory limit on the length of an occupation order under section 36. • Both spouses and cohabitants can benefit from the provisions in section 40. • Case examples. 	25

Section B

Question Number	Suggested points for responses	Max Marks
Q1(a)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Identify that Jermaine could potentially apply for a decree of nullity under section 12(1)(f) Matrimonial Causes Act 1973 • Discussion on the time limitation on nullity set out in section 13(2) and identification that leave would be required. • Identify that alternatively, Jermaine could petition for divorce. • Set out the ground for divorce in Section 1(1) MCA 1973 and the potentially relevant facts in section 1(2) (behaviour or wait and rely on a separation fact). • Explanation of the test for behaviour as outlined in Livingstone-Stallard v Livingstone Stallard. • Identify that a divorce based on adultery would not be available because the affair took place before the marriage. <p>Responses could include:</p> <ul style="list-style-type: none"> • Explanation of the evidential difficulties that may arise if Eliza is denying Steven's claims. • Other relevant case law illustrating principles outlined above • Explain the implications of each option for available financial orders, inheritance, wills etc. • Discussion of the Divorce, Dissolution and Separation Act 2020 and its impact on the options available. 	13
Q1(b)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • An explanation of the court's powers under s20 Family Law Reform Act 1969 to direct scientific testing. • Parents with PR can give consent on behalf of the child – both parties have PR here through marriage but are not in agreement. Reference to relevant sections of the Children Act 1989 – Sections 2 and 3. • Discussion of the court's ability to give consent on behalf of a child but ideally still need the mother to give a sample. • Discussion of the court's ability to draw inferences if consent is refused under s23(1) FLRA 1969 • Discussion of relevant case law Re T (Paternity: Ordering Blood Tests) (2001) and Re H and A (Children) (2002) 	12

	Responses could include: <ul style="list-style-type: none"> • Application of Art 8 European Convention on Human Rights • Identification that the welfare principle does not apply when the court is considering whether or not to order testing. 	
Total		25 marks
Question Number	Suggested points for responses	Max Marks
Q2	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Identify that if they cannot agree contact with Louise, the relevant order would be a child arrangements order under Section 8 Children Act 1989. • Identify that grandparents require leave of the court before they can apply for a CAO. • Discuss the test for leave in section 10(9) Children Act 1989 and apply it to the facts in this scenario. • Explain the relevant principles in section 1 CA 1989. • Application of the welfare checklist in section 1(3) CA 1989 to the facts • Discussion of Re L,V,M and H (2000) and application to the scenario. <p>Responses could include:</p> <ul style="list-style-type: none"> • Other relevant case law illustrating principles outlined above • Identify that the presumption in section 1(2A) does not apply to grandparents. • Discussion of Practice Direction 12J 	25
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q3	<p>An answer which offers advice based on evidence. It should supply possible alternatives but highlight the likely outcome with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • A discussion of the <u>Granatino v Radmacher</u> case. • Application of the principles in <u>Granatino v Radmacher</u> to the facts • Identify the relevant legislation – Matrimonial Causes Act 1973 and section 25 as the key section. • A discussion of the general principle of fairness with reference to key case law (<u>White v White/Miller v Miller/Charman v Charman</u>) • An application of the factors in section 25 MCA 1925 to the facts <p>Responses could include:</p> <ul style="list-style-type: none"> • A discussion of the possible orders a court can make on divorce • Other relevant case law illustrating how pre-nuptial agreements are interpreted by the courts or how the section 25 principles might be applied 	25
Total		25 marks
Question Number	Suggested points for responses	Max Marks
Q4(a)	<p>An answer which offers advice based on evidence. It should supply possible alternative legal options and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • An explanation of judicial separation and the legal effects. • Identify the relevant legislation – section 17 Matrimonial Causes Act 1973 • Identify that judicial separation can be applied for straight away (no need to wait 12 months) • Identification of the possible grounds for JS (section 1 MCA 1973) that she could rely on both now and in the future. • Discussion of what will constitute adultery with reference to relevant case law/legislation. 	13

	<p>Responses could include:</p> <ul style="list-style-type: none"> • A comparison with the divorce procedure. • A comparison with the effect of divorce. • Relevant case law illustrating principles outlined above 	
Q4(b)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Identify the relevant legislation – DPMCA 1978 • Explain the grounds set out in section 1 and apply to the facts • Discuss the orders available. <p>Responses could include:</p> <ul style="list-style-type: none"> • Discussion of the factors in section 3(2) DPMCA 1978 • Identify that a wider scope of orders is available under the MCA 1973 if she were to divorce. • Explain the duration of the orders that are available 	12
Total		25 marks