LEVEL 6 - UNIT 7– FAMILY LAW
SUGGESTED ANSWERS – JANUARY 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

SECTION A

Question 1(a)

Parties entering into a marriage voluntarily decide to form a union traditionally defined as a 'voluntary union for life of one man to one woman to the exclusion of all others' Hyde v Hyde and Woodmansee (1866). They intend to enter into that contract, knowing that it places obligations on them.

In contrast, parties who enter into a cohabiting relationship do not make a voluntary decision to enter into the same union, the relationship is seen by them and the law to be quite different.

A married couple has the benefit of statutory protection, Matrimonial Causes Act (MCA) 1973, Civil Partnership Act (CPA) 2004 or the Marriage (Same Sex Couples) Act (M(SSC)A 2013. The concept of 'marriage' is now wider than ever before as it applies to either same sex marriage (from 2014) or heterosexual marriage (MCA 1973). The way that the finances are treated under each statute is identical.

MCA (1973) and M(SSC)A 2013 allow a married couple to make a myriad of claims against the other in respect of property, capital, pensions and income. The court is required by MCA 1973 s25 (1) to take the interests of any minor child as the court's first consideration. This means that providing for children is central to any financial division between the parties.

The obligation of the court is to balance the factors set out in s25/(2) and (3) and implement a fair settlement of the finances. The wide-ranging orders and factors mean that the court has a very wide discretion to tailor outcomes for each family.

By way of contrast the court has very limited discretion when dealing with cohabiting couples. There is no statute that governs the distribution of assets

between cohabiting couples. Neither is there a requirement to put children of the relationship first.

Cohabiting couples can choose to enter into a cohabitation contract if they choose to do so, although there is no way of knowing how many couples take this step.

On the breakdown of the cohabiting relationship claims are limited to contractual, trust and property claims.

For property ownership, the legal beneficial ownership of registered land should be reflected on the Land Register. The situation regarding unregistered land may be more difficult to ascertain.

Parties can enter into a separate deed or Declaration of Trust in respect of their beneficial ownership, if it is different to the legal ownership as recorded at the Land Registry. However, where a couple do not have any agreement about the ownership of land, they then need to rely on trust principles if one of them asserts a financial claim over real property. These claims are determined by application under the Trusts of Land and Appointment of Trustees Act (1996). Cases such as Gissing v Gissing 1971 and Pettitt v Pettitt 1970 will influence decision on the distribution of property.

Claims made by cohabiting couples are strictly interpreted, evidence in support of the claim is important and the court is led by the claimant's entitlement and not the wider discretion of fairness as used in the breakdown of married relationships.

1(b)

Children born within a valid marriage are treated differently to children who are born to cohabiting couples. Those children born within marriage are automatically treated as legitimate children of the married couple and both parents have parental responsibility for them. This is not the case for children born within a non-married relationship where parentage for the father needs to be established.

The issue of parental responsibility (PR) for children is important. The father in a non-married relationship will need to be named on the birth certificate in order to acquire parental responsibility. If the father is not named he will need to apply for a parental responsibility order or obtain it by getting a child arrangements order for the child to live with him, thereby obtaining PR for the duration of the Child Arrangement Order (CAO). The mother will always have parental responsibility for children.

The legal position of stepchildren within a marriage is that orders can be made in respect of those children as long as they were treated as a child of the family. This means that the stepparent can be ordered to pay maintenance for their care after the marriage is over.

However, non-biological children who are financially maintained within cohabiting relationships do not have the same status. There is no mechanism for the non-biological parent to provide financial assistance for them after the relationship has broken down.

s25 (1) MCA 1973 applies to all children in married relationships, whether or not they are biologically children of both parents. Children are the first consideration of the court in asset and income distribution.

Stepchildren will also be a factor in the financial equation when looking at s25(3); financial orders can be made to take into account their financial needs.

The biological absent parent will be liable to pay maintenance for their child in the usual way, this will usually be by interaction with the Child Maintenance Service (CMS). As there is no statute governing cohabitees' finances, stepchildren aren't part of the financial equation.

So stepparents who are in a cohabiting relationship cannot be ordered to make financial provision for non-biological children even if they had been financially supporting the children up to the point of relationship breakdown.

In addition to the usual form of child maintenance that can be sought from the CMS, financial relief for the biological children of cohabiting couples can be sought under Schedule 1 Children Act 1989. This will be in the form of additional maintenance by way of property and capital orders for the child but not for the other parent. These applications are usually reserved for wealthy cases where there is sufficient income, capital and property to go around.

The jurisdiction of the CMS enables the parent with care to apply for additional maintenance from the court in limited circumstances. For example, if the CMS have assessed the maximum sum or for ongoing educational expenses. A separate application would need to be made by a non-married biological parent on relationship breakdown, whereas the married parent could make the claim for additional maintenance as part of the MCA 1973 application.

Question 2

The classic definition of marriage in Hyde v Hyde and Woodmansee (1866) has 3 separate parts;

a) That the union is voluntary
b) That the union is between one man and one woman
c) That the union should be to the exclusion of all others, in other words that it is a monogamous relationship.

The introduction of the Gender Recognition Act (GRA) 2004 and Civil Partnership Act (CPA) 2004 do not in any way affect factors (a) or (c). They do however challenge the concept of the fact that the union should be between a man and a woman. The introduction of the Marriage (Same Sex couples) Act 2013 defeats (b) altogether as it introduced the concept of same sex marriage. The definition of Hyde v Hyde and Woodmansee (1866) is clearly outdated in respect of that fact.

The GRA was introduced to address issues of people who were able to change their gender at birth from the one they born with. At the end of the 20th century people who had changed gender wanted to live according to their new gender, this included a desire to be married.

A number of cases were reported, starting with that of Corbett v Corbett (1970)**.** In this case the bride had been born a man but had completed gender reassignment to become a woman. She wanted to marry a man and so hoped that that would satisfy the condition that marriage could take place between a

man and woman. However, the Judge in this case decided that a person's gender could not be changed by having an operation and so the couple could not be legally married.

This concept was challenged in the European Court of Human Rights (ECtHR) on two separate occasions by couples who felt that it was contrary to the Human Rights Act for transgender people not be able to marry. For example, Rees v UK (1991) and Cossey v UK (1998). However, the ECtHR refused to uphold the right of transgendered individuals to marry.

As moral and social attitudes changed in the 21st Century, the cases of Goodwin v UK (2002) came before the ECtHR and I v UK (2002). As a result of these cases, the ECtHR found that it was incompatible with the ECHR to deny transgendered people the right to marry. It was found to breach Articles 8 and 12 of ECHR. Article 8 is the right to respect for private and family life, this is clearly breached by not allowing someone who has transgendered the right to marry a person of the opposite sex. Article 12 states that men and women of marriageable age have the right to marry and found a family according to the national laws. In the case of Goodwin the applicant showed that the fact that she was not legally recognised as a woman after her surgery had caused her to suffer humiliation and discrimination. This case was not directly about the right to marry but the right to be recognised as a woman.

In the case of I v UK the court considered the right of the applicant to be recognised as a woman and the right to marry a man, which she was not allowed to do. Both cases succeeded in showing that the law was discriminatory and contrary to the ECHR, as a result of which the GRA was introduced.

Although the definition in Hyde v Hyde and Woodmansee continued to apply, the definition of gender was redefined by the GRA. The GRA enables post-operative transgendered people to obtain a birth certificate to reflect their new gender and thus be able to marry a person of the opposite sex.

The Civil Partnership Act 2004, introduced shortly after the GRA in 2005, takes the concept of adult relationships a step further. Although the CPA is not 'marriage' it is a lifetime union between people of the same sex to the exclusion of all others. The definition in Hyde v Hyde is almost directly applicable save for the requirement that there be 'one man and one woman'. This was a step towards equality of same sex marriages which was finally introduced by way of the Marriage (Same Sex Couples) Act 2013 (MC(SCC) A).

In the case of Wilkinson v Kitzinger (2006), the parties had validly married abroad and sought to have their marriage recognised in England. The court held that as the CPA allowed same sex couples legal recognition for their partnerships it was not discriminatory to refuse them the right to have their foreign marriage recognised as such in this jurisdiction. It was not against Articles 8, 12 and 14 of the ECHR and their application was dismissed. This case highlights that until 2006 the definition in Hyde v Hyde still required a marriage union to take place between persons of the opposite sex.

The definition further undermined when the M (SSC) A) was implemented which allow that couples of the same sex are able to marry. This clearly brings to an end the Hyde v Hyde and Woodmansee definition, the definition in the case of Bellinger v Bellinger (2003) is a better definition - a contract elected by parties regulated by the state in formation and termination.

Question 3

A Child Arrangements Order (CAO) is an Order made by the court under s8 Children Act (CA) 1989. This type of order can regulate where a child resides and how they spend time with the other parent, this is referred to as contact.

The court takes in account a number of principles and presumptions to help guide it to make decisions, these principles operate in all cases where the court is making a CAO.

The welfare principle is sometimes referred to as the paramountcy principle. It is set out in s1(1) CA 1989 and sets out that the welfare of any children is of paramount importance to the court when making decisions about the child. This is central to the decision making process.

The no order principle, s 1(5) CA 1989 sets out that the court will not make an order unless it is satisfied that to do so would be better than to make no order at all. The court will not interfere with a child's life unless the order will be beneficial to them.

The no delay principle, s1 (3) CA 1989 sets out that the court should not delay proceedings as delay is deemed to be harmful to children. Reasonable delays are permitted within children cases to obtain reports or allow statements to be filed.

The presumption of parental involvement (s.1(2)(A) CA 1989 was introduced recently and it sets out that it will be presumed, unless the contrary is shown, that involvement of some kind from each parent will be beneficial for the child. Such involvement shall only be permitted if it does not put the child at risk of suffering harm.

In cases where there has been domestic violence between the parents, guidance can be found in the conjoined cases of RE L, V, M, H (2000) heard in the Court of Appeal. In all four cases, which involved domestic violence by the father against the mother, the fathers had applied to have contact with their children and in all four cases their applications for contact failed. The fathers appealed the decisions and the cases were heard together. The general approach to be taken in cases where domestic violence is alleged was set out;

a) The allegations of domestic violence should be determined by the court
b) If violence is proved then the fears of the resident parent are deemed to be justified otherwise the parent with care might be being obstructive without cause.
c) The court can then decide whether there should be any contact between the violent parent and the child.
d) Contact should not automatically be severed where there has been a finding of violence as the child's welfare needs to be considered in light of the finding of violence, the impact on the child and resident parent of any child arrangements order for contact.
e) The court should consider the reasons for making the application, are they motivated by the desire to see the child or to control the other parent?

These principles have been consolidated by the courts in the Family Procedure Rules 2010 at PD 12 J. When the court decides cases where there has been violence, the court will need to take into account the welfare checklist, s 1(3) CA 1989:

a) The ascertainable wishes and feelings of the child, taking into account the child's age and understanding. If the child wants to have a relationship with the violent parent then this will be taken into account.
b) The child's physical emotional and educational needs, can the child's emotional needs be met by both parties. Does the violent parent understand the impact of the violence on the child even if the child wasn't a victim of the violence?
c) The likely effect on the child of any change in circumstances, if the child hasn't seen the violent parent in a period of time how can the child be re-introduced to that parent safely.
d) The child's age, sex background and other characteristics that the court considers relevant.
e) Any harm that the child has suffered or is at risk of suffering. This category will be important in cases where there has been domestic violence involving the child or that the child has witnessed. Keeping the child safe and ensuring the safety of the other parent during the handover process is very important.
f) How capable each parent is to meet the needs of the child
g) The court needs to bear in mind the orders it can make as these are not restricted to the orders applied for by the parent.

Domestic violence is given a very wide meaning in these cases, it is not limited to cases where there has been actual violence but can include harm, coercive and controlling behaviour and threatening behaviour that falls short of harm.

There are a range of orders the court can make depending on the severity of domestic violence, the most serious order would be one for 'no order for contact' meaning that the applicant would not be able to have any form of direct or indirect contact with the child. This would only be ordered in very serious circumstances where contact will be harmful to the child and or the other parent.

The court will need to consider each parent's Article 8 right to a family life and only limit the violent parent's rights where these are necessary for the protection of the child and the other parent.

Question 4

Historically void and voidable marriages pre-exist divorce law and so they were needed at the time. The legal concepts of void and voidable marriage were introduced at a time when it was not possible to obtain a divorce because there was no mechanism to do so.

Void marriages are said to be void '*ab initio'* – from the outset. There are three grounds on which the court can declare a marriage to be void contained under s11 Matrimonial Causes Act (MCA) (1973). These are;

a) The marriage is not valid because;
    i. The parties are within the prohibited degrees of relationship
    ii. Either of the parties was under the age of 16
    iii. Certain formalities of marriage were not observed
b) At the time of the marriage either party was already married or in a civil partnership.
c) For a polygamous marriage entered into outside England and Wales one of the parties was domiciled in England and Wales.

The provision that the parties were not respectively male and female was removed when the Marriage (Same Sex Couples) Act (M (SSC) A) 2013 was introduced.

These grounds are limited in nature and involve narrow situations within which the marriage would not be recognised. The courts will not make a declaration of a void marriage unless the evidence is clear on the balance of probabilities that the marriage should be void. It is for the person who wants to show that the marriage is void to discharge the burden of proof. In Wicken v Wicken (1999) the husband wanted to show the marriage was void because the wife was already validly married. She produced evidence of a divorce and so the burden of proof was not discharged.

Where the parties have been living together for a long time a divorce is more likely to be appropriate than nullity.

The court will also need to consider the fact that where a marriage has been declared void, the children of that union will be treated as legitimate if one of the parties believed that the marriage was valid at the time of conception.

For the purpose of the Inheritance (Provision for Family and Dependants) Act (I(PFD)A) 1975, a person who has obtained a declaration of nullity is a former spouse. So that person can make a claim against the estate of their 'spouse' in the event of their death.

A voidable marriage is valid until a decree of nullity is pronounced; the decree of nullity brings the marriage to an end. The parties to the marriage can make financial claims against each other as a result of the marriage. Voidable marriages are governed by s12 MCA 1973, there are limited grounds upon which marriages can be treated at voidable;

a) Incapacity to consummate the marriage, one of the parties has been unable to consummate. This includes both physical and psychological incapacity to the extent that consummation will never be likely and the incapacity is incurable.
b) Wilful refusal to consummate, this required one person to have attempted consummation and the other to refuse, the fact of premarital consummation is irrelevant.
c) Lack of consent – one party did not consent to marry, this could be either that they were forced into the marriage, they made a mistake or that they were unsound of mind and such did not give valid consent.
d) Lack of capacity due to mental illness, which is defined by the Mental Health Act.
e) At the time of the marriage one party was suffering from a sexually transmitted disease, or in the words of the Act a venereal disease.
f) At the time of the marriage one spouse was pregnant by someone other than the spouse.
g) One of the parties had acquired a gender before the marriage or that an interim gender recognition certificate has been issued to either party after the marriage. These two grounds were added after the introduction of the Gender Recognition Act 2004 (GRA) .

The grounds in relation to non-consummation due to incapacity or wilful refusal can't be used in relation to Same Sex Marriage or Civil Partnership dissolutions.

There are bars to an application contained in s13 MCA 1973 which prevent a person from pursuing a decree of nullity. These bars only relate to applications

under s12. If a person knew that there was a potential reason for an annulment and they led the other person to believe that they wouldn't do this then they are not permitted to apply, their only recourse to end the marriage would be by divorce or judicial separation.

If there has been a delay in taking proceedings this can act as a bar. If the ground relied on is regarding consent, mental illness or having a STD then the proceedings must commence within 3 years from the date the applicant becomes aware of the ground.If the applicant knew about the respondent's STD, acquired gender or pregnancy by another person they can't rely on the ground.

If the ground relied on is the fact that a party obtained an interim gender recognition certificate then the proceedings must be commenced within six months from the date of the certificate.

Given that the grounds for both void and voidable marriages could probably also result in a decree of divorce there is arguably no need to have a decree of nullity. As divorce does not equate to declaring a marriage void from the outset, there may be reason to maintain the option of void marriages open.

Voidable marriages do not differ very much to divorce in their nature and consequences. For example, the children of a voidable marriage are legitimate and financial orders can be made between spouses. Claims can be made under I(PFD)A as the spouses will be 'former spouses' after the decree of nullity. The only reason to protect these provisions is to distinguish between those marriages that have suffered a certain type of behaviour by one party that leads to a decree of nullity. Those who have strong religious convictions may still wish to avail themselves of those provisions.

Few applications are made for either void or voidable marriages per annum and divorce is widely available for those who need to dissolve their marriage. Only those with strong religious backgrounds are likely to need to have those provisions available to them.

SECTION B

Question 1

Parties to a marriage need to establish that the marriage has broken down irretrievably in order to pursue a divorce as there is only one ground for divorces 1 Matrimonial Causes Act (MCA) 1973.

It seems that Savvanah has decided that the marriage is at an end. If either party wanted to petition for divorce they would need to establish one of the five facts in addition to stating that the marriage has broken down irretrievably. The five available facts s1 (2) MCA 1973 are;

(a) Adultery
(b) Unreasonable behaviour where the Petitioner finds it intolerable to live with the Respondent
(c) 2 years desertion
(d) 2 years separation with the other party's consent
(e) 5 years separation

These parties have been married for more than one year so they can pursue a divorce.

At least one of the facts will be available to enable the parties to divorce now, however they can opt to wait to get divorced in the future if they do not want to rely on a fault based divorce.

The fact of adultery is defined as voluntary sexual intercourse between a man and a woman; in this case George has had a sexual relationship with another man and that can't be used to support an adultery petition. There is nothing to suggest that George has had sexual relations with another woman and so any petition presented by Savannah should not cite adultery with another man.

There is no mention that she has committed adultery and so George cannot pursue this fact either.

The fact of unreasonable behaviour may be available for either George or Savvanah.

Any unreasonable behaviour cited would need to meet the test of Livingstone-Stallard v Livingstone-Stallard (1974). This is both a subjective and an objective test, 'would a right thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the character and personalities of the parties?'. Savannah could rely on the affair with another man as an example of George's unreasonable behaviour.

George could proceed on the basis of unreasonable behaviour citing that Savannah agreed he could pursue extra marital sexual relationships and then threw him out when she found out about Petros. He could say that this meets the necessary test set out in Livingstone- Stallard. He could also rely on the fact that she threw his belongings away.

Savannah could proceed with this fact because although she agreed that George could pursue extra-marital relationships, she had specified that she should never find out, and that she never imagined that George would have a long term sexual relationship with a man. She believes that he has broken the agreement they reached and she has found his behaviour unreasonable.

The fact of two years desertion could not apply in this situation as the parties have continued to live together under the same roof and have not formed separate households. There was not an intention by George to desert Savannah when he moved into the spare room, as they both agreed that the arrangement suited them. For the fact of desertion to operate the parties cannot agree to the separation which is what these parties did.

The parties could potentially be seen as being separated and living under the same roof since December 2011 when George moved into the spare room. For a separation to occur one party must regard the marriage to be over. George and Savannah seem to have moved into separate bedrooms out of convenience and not because they had decided to separate, Mouncer v Mouncer (1972). Despite the fact that they were not having sexual intercourse, there doesn't seem to be a parallel intention to end the marriage. A period of two years separation is not relevant at this stage.

If they wish to proceed on the basis of separation, their separation will commence from the time that Savannah threw George out of the house in November 2016. If the parties want to wait then they can rely on this fact in the future but only if the other consents to the divorce at that stage.

Five years separation is not available now as the parties have not been living separately for that period, but if they are willing to wait this might be an option in the future.

If the parties resume cohabitation after the separation for a period of up to six months it will not prevent them from relying on the fact of separation. The time period would be calculated by adding on the period of cohabitation to the separation period. If cohabitation resumes for more than six months neither will be able to proceed with the divorce petition at that time and the period of separation would start afresh from the date that they separate again.

Question 2(a)

Stefan needs to be advised that there are various protections available to him under the Family Law Act (FLA 1996) and also the Protection from Harassment Act (PHA) (1997).

Under s42 FLA 1996 he could apply for a non-molestation order which would protect him from violence, threats of violence, molestation or pestering from Rajiv. As he and Rajiv have been living together they are associated persons (s62 (1)(a)), they are either cohabitants or former cohabitants. Any application he makes could be made on a without notice basis s45 FLA 1996 as there could be significant risk of harm to Stefan if an order is not made immediately. Stefan may even be deterred from making the application to the court if an order is not made on a without notice basis. We do not know if Rajiv will evade service of the order as we know that he is staying with his parents and Stefan knows where he works.

If he decided to use the PHA he could apply to the court for protection from Rajiv's harassment. Although harassment is not defined under the PHA, the violence should be covered. There have been more than two incidents from Rajiv and so the basis of an application can be made out. If he is successful he could obtain an injunction for his personal protection and perhaps also damages for any anxiety caused by the harassment.

Stefan should be advised to report the incidents to the police who may take action.

In order to return to his home Stefan could consider making an application for an occupation order. The application would be made under s 33 FLA 1996 as Stefan is renting the property in his name alone. He is therefore a person entitled to occupy the home.

The application would be for him to be able to return to the home, having left it and for Rajiv to be prevented from returning to the property. It is likely that Stefan would also want there to be an exclusion zone surrounding the property. This will prevent Rajiv from coming within e.g. 100m of the property.

2(b)

For the without notice application to succeed Stefan would need to show that he has met at least one of the factors set out in s45 FLA 1996, that he is at risk of significant harm if the order is not made immediately, that he would be deterred or prevented from making the application if he did not do it now or that Rajiv would evade service. Two of those grounds seem to warrant a without notice application.

For the application to consider the non-molestation order the court would need to be persuaded that Stefan has suffered a form of molestation, the actual violence against him will be sufficient to persuade the court, Rajiv's behaviour earlier in the relationship would have constituted pestering or molesting, Vaughn v Vaughn (1973).

In deciding whether or not to make a non-molestation order to protect Stefan the court will have regard to the circumstances including the need to secure the health, safety and wellbeing of Stefan. He has already suffered physical violence and months of aggressive behaviour from Rajiv. It is likely that a without notice non-molestation order would be granted due to the serious nature of the last attack. Any breach of this order will be an arrestable offence. If the order is made without notice it will initially be for a short duration. It can be made for a longer period when the matter is returned to court.

With regard to the application for the occupation order, the application will be made under s33 FLA 1996. The court can make a variety of orders under s33(3) to enforce Stefan's entitlement to return to occupation, remain in occupation and exclude Rajiv from occupying in the future.

The factors the court will take into account are at s33(6). The court will balance the housing needs and resources of the parties, s33(6)(a). At the moment Stefan is staying with a friend but Rajiv has gone to his parents' home. This shows that Rajiv has alternate permanent housing available to him. Stefan is sleeping on a sofa so his alternative housing resources are not permanent.

S33(6)(b):the court will look at both parties resources, we do not know how much the parties earn but we know that they are both working. We do not know if the parties have savings that they can use.

S33(6)(c):the court will consider the likely effect of any order on the health, safety, or wellbeing of the parties. Stefan has suffered serious injuries and is scared to go home. He is at risk of further violence if an order is not made. He needs to be able to return to his property without the fear that Rajiv will be able to walk in. It is more likely than not that the court will make an order in his favour.

S33(6)(d):the conduct of the parties in relation to each other. Rajiv has been violent and aggressive towards Stefan and so this will be a major factor.

The court is also obliged to consider the balance of harm test at s33(7). This requires the court to balance the harm to the applicant and respondent by making an order. There are no children in this case to take into account.

Chalmers v Johns (1999), the balance of harm test should be applied first and if the test is not satisfied the court will look at s33(6).

Considering all matters the court is likely to make an occupation order to allow Stefan to return to the home and to exclude Rajiv from it. This order can be made on a without notice basis but the court needs to be careful about Rajiv's Article 8 rights and ensure that any order is necessary.

The court is likely to make the order for 6-12 months and a power of arrest will be attached to the occupation order provisions.

Question 3(a)

Marcus and Antoinette are considering using assisted reproduction techniques to help them to have a child together. It is important to note that at this stage they are not married to each other.

Part 2 of the Human Fertilisation and Embryology Act (HFEA) 2008 governs assisted reproduction cases. HFEA states that a child can only have two parents.

S33 states that Antoinette will be considered the mother of the child as she will carry the child and in this case she will be using her own eggs. This ensures that she will be the legal mother.

S35 deals with who will be a father in these cases, at the moment Marcus and Antoinette have not agreed whether they are using donor sperm from an anonymous donor or Omar's sperm. In either case they intend that Marcus should be recognised at the legal father.

The statute sets out a series of conditions that need to be met for a person to be considered the father of a child conceived by artificial insemination. Marcus should be advised about the specific conditions so that he and Antoinette can decide how they wish to proceed with respect to the sperm donor.

S37 set out those 'fatherhood conditions'. Firstly Marcus and Antoinette would need to obtain their treatment from a licenced provider. This means that if Antoinette wanted to use Omar's sperm she should do so using a proper provider rather than using any other way of insemination.

Once they decide to approach a licenced provider, Marcus needs to give them notice that he consents to be the father of the child that Antoinette will carry. Antoinette will also need to give the licenced provider notice that she consents to Marcus being recognised as the father of the child. Although either can withdraw their notice of consent before the date of treatment, if Marcus is to be treated as the father neither should withdraw consent.

Antoinette should not give notice to the provider for another person being treated as the father, neither should she give notice to the provider that another woman should be treated as the 'other parent'. Marcus and Antoinette must not be within the prohibited degrees of relationship with each other; we have not been told that they are related to each other in any way.

S41 states that where sperm is used in accordance with these rules, the donor of the sperm will not be recognised at the child's father even if the child has no father. If Antoinette used Omar's sperm intending Marcus to be the father, and Marcus withdrew his consent Omar doesn't become the father by default.

If artificial insemination goes ahead according to the rules then Marcus will be recognised as the legal parent of the child for all purposes, s48(1).

If they choose to use Omar's sperm, they would still need to meet the conditions set out in HFEA to ensure that Marcus is considered to be the child's father and not Omar. If Antoinette was tempted to inseminate herself with Omar's sperm, she would not have complied with the requirements. She would be the mother of the child in those circumstances, but Omar would be the father and not Marcus. In this respect, Re M (sperm donor father) (2003) is still valid.

Antoinette should register Marcus as the father on the child's birth certificate to ensure that he has parental responsibility. If she does not do this then Marcus would need to apply for a parental responsibility order or enter into a parental responsibility agreement with Antoinette.

Question 3(b)

If the child was conceived after the parties married then the advice to Marcus would be different.

S35 HFEA states that if the parties are married at the time of the artificial insemination then Marcus would be considered to be the father. This is the case if it is not his sperm that is used, unless it can be shown that he had not consented to the treatment. Thus there is a presumption of fatherhood which is rebuttable with the right evidence.

The common law presumption that a child born within a marriage is the child of both parties is preserved by s28(2) and (3). This means that there is no additional requirement for each party to give their specific consent to Marcus being recognised as the legal father. The treatment still needs to go ahead at the licenced centre.

If a child is conceived using donor sperm in this way, Antoinette will not need to register Marcus on the child's birth certificate as he will have parental responsibility for that child in any event.

The situation is little more complex if they decide to use Omar's sperm without doing so at a licensed centre. If Antoinette decides to use his sperm and inseminate herself, the child will be presumed to be her husband's. Marcus will therefore be recognised as the father and he will have parental responsibility for the child.

That presumption is rebuttable by evidence that the child is not genetically Marcus' child. Scientific tests would show that Marcus was not the father, s20(1) Family Law Act 1969. Once the tests show that Omar is the father he could acquire parental responsibility and apply for orders in respect of the child. He could also be made to pay maintenance for the child via the Child Maintenance Service (CMS).

Marcus could apply to get step-parents parental responsibility.

If Marcus and Antoinette both want to be recognised as the legal parents of the child, they should observe the strict rules of HFEA and ensure that any insemination takes place using a licenced centre.

Question 4

Helen and Anna have entered into a pre-nuptial agreement to protect money Helen's inheritance from her father.

The parties have chosen to enter into a pre-nuptial agreement. Pre-nuptial agreements are not automatically enforceable in England and Wales.

The court will take into account the terms of the agreement in light of the leading case of Radmacher v Grantino (2010).

In the case of Radmacher v Grantino the parties entered into an agreement before the marriage, but the agreement was not translated so that the husband could understand all the terms; neither did the parties give each other full financial disclosure of their finances. However, he was deemed to understand the terms of the agreement and thus the court held him to those terms. He was given a lump sum that was sufficient to meet his immediate needs to pay off debts. He was also awarded the use of property during the children's minority after which time the property reverted to his wife. He would have received a much better settlement if he hadn't signed the agreement.

In this case the court should give due consideration to the existence of the pre-nuptial agreement. It is likely that the court will give it quite a lot of weight as both Helen and Anna took legal advice before they signed the agreement and they both gave each other financial disclosure. From the information we have it seems that they understood the agreement they entered into and the court will use this as a guideline when deciding how to divide the equity between the parties.

The court will be obliged to look at the Civil Partnership Act (CPA) 2004 factors which are identical to s25 of the Matrimonial Causes Act (MCA) 1973. As per Lawrence v Gallagher (2012), the fact that claims arise from civil partnership rather than marriage is of little significance. The CPA factors are contained in Schedule 5 of Part 5 para 21 (2a-h) and the orders that can be made are in Schedule 5 parts 1 – 4A.

This first thing to note in this matter is the fact that the parties do not have any children that need to be accounted for.

a) Income or earning capacity.
   We are told that Helen and Anna are both working and they earn similar salaries. There doesn't seem to be any scope to suggest that either should increase their earning capacity.

b) The financial needs, obligations and responsibilities of each person now and in the foreseeable future.
   Both have a need to be re-housed in a 1 bed property. The current property is in their joint names with a joint mortgage.

c) The standard of living enjoyed by both.
   We do not know much about their standard of living, we can only assume it was modest given their incomes. We know that they don't have any debt other than the mortgage.

d) The age of the parties and the duration of the civil partnership.
   Helen is 55 years and Anna is 60 years old, they can each work for another 12 and 6 years if they respectively retire aged 66 years. The Civil Partnership is 9 years in length but the court would consider the years of cohabitation. This is a long relationship of 14 years. Co v Co (2004).

e) Physical or mental disability of either party.
   There is none.

f) The contributions that each has made.
   Helen contributed the money from her father's inheritance to the purchase of the property. The fact that this is protected by way of a pre-nuptial

agreement is significant. To the best of our knowledge, Anna has made contributions but none that would match Helen's inheritance which was received during their cohabitation/civil partnership.

There is no suggestion that conduct is relevant in this case as the parties are on amicable terms. There are pensions that need to be considered which could be looked at as a benefit which will be lost on the dissolution of the Civil Partnership.

If the terms of the pre-nuptial agreement are adhered to Helen will get £40,000 back and then 50% of the equity. The total net equity is £63,500, after deducting her £40,000 there is £23,500 to divide between the parties. Helen could receive £51,750 which she could use towards her rehousing. In advising Anna it is important to note that there do not seem to be any reasons to depart from the terms of the agreement with reference to the property.

However, the agreement is silent about all other orders.

It is not likely that the court would make orders for maintenance in this case, the court will consider Schedule 5, part 5, 23(2) which says that the court should look to terminate the parties' obligations towards each other. As the income disparity is not great and Anna will retire in the next six years a clean break in respect of income is likely.

With respect to the parties' pensions, Anna might want to take her tax free lump sum and offer to buy Helen out of the property. Whilst Helen is getting the lion's share of the equity, the court might consider it fair to allow Anna to remain in the property. Overall, as each party has a pension the court might feel that it is fair not to redistribute pensions. This approach would allow Anna to remain in the current home as long as she is able to take on the current mortgage in her sole name.

Whilst this would represent a departure from equality, this could be justified by the fact that Anna is slightly older than Helen and the fact that Helen is taking 81% of the liquid capital. If Anna keeps her pension then she would keep 66% of the pension assets.