LEVEL 6 - UNIT 7 – FAMILY LAW
SUGGESTED ANSWERS – JUNE 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 June 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

The case of Payne v Payne was very important and has remained so in the past 15 years, although it seems that its importance may be diminishing.

The case of Payne involved a Children Act 1989 (CA 1989) application by Mother for permission to permanently remove her daughter, a child of marriage, to New Zealand, where she was born.

In this case, the mother already had a residence order in her favour. Father cross applied for a residence order as he wanted his daughter to remain living in England and Wales. The applicant was given leave to remove the child as it was clear that mother was very unhappy living in England. She had moved to London to work and had met the father; they had conceived the child and married. Mother was still working following the breakdown of the relationship but was gave evidence that she was very unhappy. She had little support network, she didn't like the area she lived in and felt that this was having a detrimental effect on her ability to care for her daughter.

Father's application for a residence order was refused, he appealed the decision, the matter was dealt with finally in the Court of Appeal. As a result of the appeal a number of guidelines were set out that have been referred to in all relocation cases since then.

Those guidelines are as follows;

1. The welfare of the child is always paramount

2. There is no presumption created by CA 1989, s 13(1)(b) in favour of the applicant parent

3. The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight

4. Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end

5. The effect on the applicant parent and the new family of the child of a refusal of leave is very important

6. The effect on the child of the denial of contact with the other parent and in some cases their family is very important

7. The opportunity for continuing contact between the child and the parent left behind may be very significant

In Payne the Judge indicated the applicant in relocation cases is usually the mother and that the motivation for the application is usually a remarriage or desire to return home. Fathers usually object to the application on the basis that there will be a reduction in their contact with the child and that their influence on the child will diminish. In this sense the judgment may be seen to be gender biased and has been criticised in recent case law, Re F (relocation) EWCA Civ 1364.

The appeal court considered the Article 8 ECtHR rights of father, but stated that the rights of mother could not be overlooked. The fact that the welfare of the child is of paramount importance is significant in balancing the parties' rights under Articles 8 and 6.

For many years these principles have dominated case law in respect of both internal and international relocation cases. More recently there have been some criticisms of the Payne guidelines, for example in the case of Re D [2010] EWCA civ 50, the judge indicated that Payne possibly place too great an emphasis on the wishes and feelings of the relocating parent and possibly not enough emphasis on the harm to the child by the fracturing of the relationship with the parent left behind. In Payne, there was no indication of what the child in that case wanted, particularly as she had significant contact with her father and was very attached to her paternal grandmother.

In the case of K v K [2011] EWCA Civ 793, there seems to have been a shift of emphasis away from the guidelines in Payne. According to the analysis of the Judge in this case, there had historically been a misunderstanding between legal principle and guidelines following the decision in Payne. He said that the only legal principle is that the welfare of the child is paramount; this is derived from the Children Act 1989 and not case law. Whilst the guidelines in Payne are useful, they should not be overly relied upon as though they are more important than mere guidelines. That doesn't mean that these cases start from a clean slate, as there will be no presumption in favour of the applicant parent.

Re F (relocation) EWCA Civ 1364 goes slightly further than K v K ([2011) in that the Judges of the Court of Appeal indicate that any judgment based on the guidelines of Payne without any broader legal analysis would be subject to a successful appeal. The judges also stressed that Payne didn't focus on the views of the child and that the judgment was outdated due to its gendered

presumptions. The court should focus on all the options, considering the benefits and detriments of each option. Adopting this balance sheet approach would assist the court to reach the correct decision.

It is also important to note that the Payne guidelines apply neatly in a case where the applicant is clearly the main carer but in shared care cases the emphasis may need to be different.

The guidelines in Payne have not been entirely put to one side but it seems that the starting point is now the case of K v K particularly in shared care cases. The emphasis should always be on the welfare of the child concerned and not the result of the application of guidelines.

Question 2

The case of Jones v Kernott is very important as it is a Supreme Court case and it sets out some very useful guidance on the matter of cohabitee property cases. These are cases where there can be difficult to work out who is the beneficial owner of a property, or what shares the owners are entitled to. As there is no unified law for cohabitants, only the application of trust principles can help to find the true ownership of a property.

In 1985 the parties, Miss Jones and Mr Kernott, purchased a property together. It was intended to be used as a family home; the parties already had one child together. The property was purchased in their joint names, Miss Jones contributed the deposit of £6,000, this money came from the sale of her mobile home. The property was purchased for £30,000, the remaining funds came from an endowment mortgage in the parties joint names. Mr Kernott contributed £100 per week to the household expenses while he lived there. Miss Jones paid the mortgage and all household expenses from joint funds.

About a year after they bought the property they took out a joint loan of £2000 to build an extension to the house. Mr Kernott did some of the labouring work himself, the extension added value to the house increasing the value by 50%. A second child was born in that year.

The parties lived together in the house with their two children for nearly 8 ½ years. Mr Kernott then moved out and did not contribute to the household expenses and made little contribution to child maintenance. Miss Jones paid all expenses for the house and children for 14 ½ years until the court proceedings were started. Mr Kernott was able to purchase a property in his own name as the parties cashed in a joint policy and divided the proceeds equally between them. He was able to maintain the outgoings at his property because he was not contributing to the outgoings at the joint property.

Miss Jones started proceedings in 2007 for a declaration of beneficial interests in the property, in the first instance the Judge divided the equity 90% to Miss Jones and 10% to Mr Kernott. Mr Kernott appealed successfully and then matter was appealed again and dealt with by the Supreme Court.

In reviewing the case law in this area, particularly the decision of the House of Lords in Stack v Dowden [2007] UKHL 17, the court formulated a number of principles that are of application in cases involving cohabitants.

1. The court reiterated the principle stated in Stack v Dowden that the starting point must be that where the property is purchased in joint names, that the parties own the property jointly in law and equity.

2. Where one person is suggesting that the parties' intentions regarding ownership were not that of equal ownership or that those intentions changed, the court will try to deduce their actual intentions at the relevant time. If those intentions can be discovered, it is not open to the court to impose a different result because it is fair to do so.
3. If the court cannot deduce their intentions at the time, then the court will have to ask what their intentions would have been as reasonable people. The court should look at the facts of each case and see if an intention can be inferred from the parties conduct. The court referred back to the case of Stack v Dowden in which the court looked at the types of evidence that the court could look at to draw inferences.
4. Where the evidence is not clear of the parties intentions the court should look at the whole course of conduct between the parties.
5. Each case will turn on its own facts, financial contributions are relevant but other factors will enable the court to look at what was intended or fair.

This case is obviously one where the parties owned the property jointly and so the parties were recognised as joint owners from the start. The court was clear that the starting point in cases of sole ownership is different.

In those cases the starting point is to ask whether there was any intention for the non-owner to have any beneficial interest in the property at all. Only if the answer to that question is yes, should the court then turn to the second question which is the extent of the beneficial ownership for the non-owning party. There is no presumption of joint ownership; their intentions will need to be deduced from their conduct.

In this case the original order of the court was restored and Miss Jones was entitled to 90% of the beneficial interest in the property.

It is important that cohabitees are given the right advice about ownership when they purchase a property, but as this case shows that people's intentions can change. Those changes can lead to a different result than the legal ownership indicates but the evidence adduced will be important in helping the court to decide what the parties' intentions were.

The law in relation to cohabitee property ownership is complex and entirely reliant on trusts. Reform in this area has been proposed by way of the Law commission's report on cohabitation: the financial consequences of family breakdown. Unfortunately, the recommendations of the Law Commission have not been acted on by the Government leaving cohabiting couples in limbo. Many believe the law in respect of property ownership isn't adequate for the 21st century.

Question 3(a)

For parties to be married they must comply with certain legal requirements. Anyone who is domiciled in England and Wales must have capacity to marry under English Law, even if the marriage takes place in a different country. The requirements for capacity to marry are contained in Matrimonial Cause Act 1973 (MCA 1973) and the definition of marriage within Hyde v Hyde (1866) and Bellinger v Bellinger.

Each party must have the capacity to marry in accordance with the law of his country of domicile. The marriage must comply with legal formalities in the place where the marriage is celebrated.

Domicile is a legal concept which links a person with a legal system; it is a factual relationship between a person and their permanent home.

A person, according to English Law will always have a place of domicile, but a person cannot have more than one domicile at the same time. It is not possible for a person to have no place of domicile.

There are three ways in which a domicile can be acquired:

1. Domicile of origin, when a person is born they will have a domicile which is acquired from their parents. If the parents are married, it will be the father's domicile. If the parents are unmarried, it will be the domicile of the mother. The domicile of origin remains until another domicile is chosen and the domicile of origin is abandoned. In the event that a domicile of choice is lost then the domicile of origin will revive if another domicile of choice isn't made.

2. Domicile of dependence. Until the age of 16 years a person's domicile will be the same as the dependant parent. If the parents are married, but separate, and the child continues to live with the mother with no home with his father, the child will take the mother's domicile. Case law in this area is quite old and relies on there being only one main carer for a child.

3. Domicile of choice. Any person over the age of 16 years may acquire a domicile of choice. The issue of whether a domicile of choice has been acquired is a factual one. A domicile of choice is acquired by actions, attitudes, commitments and other factors. If a person moves to another country he can acquire a new domicile if he has a "settled intention of living there permanently".

   In the case of Irvin v Irvin (2001), a husband had lived in the Netherlands since 1979. The husband had continued links with friends in England, he had an intention to return to England to retire, he had British nationality and had limited involvement in Dutch society. The judge decided that on the balance of probabilities, he had not given up his English domicile and acquired a new domicile of choice.

   In Agulian v Cyganik (2006). The deceased was born in Cyprus and had lived in England for 45 years. The Court of Appeal stated that the relevant question was "had the deceased formed the necessary intention to remain permanently or indefinitely in England?" The Court said that his Cypriot domicile of origin remained in place unless and until there was clear evidence of sufficient intention to acquire a new domicile of choice. In this case he retained his domicile of origin.

   Cheni v Cheni (1962), the marriage of the parties took place in 1924 in Egypt where the parties were domiciled at the time. The parties then moved to England in 1957 where they became domiciled. The English court held that although the husband was the maternal uncle of the wife, the marriage was valid in their country of domicile at the time of the ceremony of marriage.

   Likewise in the case of Mohammed v Knott (1969), the parties entered into a valid marriage in Nigeria that was potentially polygamous. The marriage was recognised as being valid in England as it was valid in Nigeria,

The issue of domicile is therefore very important to create a binding marriage in the jurisdiction that it took place.

3(b)

The Divorce (Religious Marriages) Act 2002 (D (RM) A 2002), introduced a new provision to the Matrimonial Causes Act 1973 (MCA 1973), at S.10A. This section allows parties to prevent the making of the decree absolute until a declaration is signed allowing the religious marriage to be dissolved.

This provision was introduced to protect those who have undergone a religious marriage ceremony and need to have a religious dissolution which they may not have any control over without this provision. For example, in the Jewish community women may need assistance of the civil courts to force a religious divorce which their husband can otherwise withhold. Without the religious divorce, the woman cannot remarry in accordance with their religion. This applies to other religious usages too, the Quakers for example.

For a divorce to be recognised in Jewish law, a "get" must be obtained, the civil decree absolute in not sufficient. Both parties must co-operate to obtain the "get". Unfortunately sometimes the divorce would be obtained in the civil court but the husband may refuse to obtain the "get" or the wife may refuse to accept it. The provisions of the D(RM) A 2002 enables Jewish people to prevent the grant of the decree absolute until a declaration has been submitted signed by both parties stating that they have taken steps to dissolve the marriage in Jewish law. This provision is not only restricted to the Jewish religion, s10A MCA 1973 indicates that it is applicable to other prescribed religious usages, s 10A (1)(ii).

Irrespective of who applied for the civil divorce, either party can apply to the court under this section to get the religious divorce declaration.

When an application is received the court will make the order to prevent the decree absolute being pronounced if it is just and reasonable to do so.

Question 4

The introduction of the Human Fertilisation and Embryology Act (HFEA) 2008 has changed the concept of parentage and who can be considered a parent. It has opened the doors to same sex couples being recognised as a child's parents which is in keeping with the ethos of the Civil Partnership Act 2005 and the Marriage (Same Sex Couples) Act 2013.

This act provides for increasingly common situations where the legal parents are not the same as the biological parents. Each child will still only have 2 parents.

The first example of this is where there has been a form of assisted reproduction. This can refer to a woman being artificially inseminated with her partner's sperm or donor sperm. In the alternative the woman could be implanted with donor eggs or a donor embryo. The donor of the biological material is irrelevant to the legal recognition of the parent, as long as insemination takes place within the strict provisions of the Act.

The second example is where there has been a surrogacy arrangement. This involves a woman carrying and giving birth to a child for the benefit the commissioning parents. The parties enter into an arrangement before the child is conceived to recognise that the surrogate will hand the child over to the commissioning parents.

The surrogate is then artificially inseminated with the sperm of the male parent, this is known as a partial surrogacy. The surrogate is the legal mother pending the making of a parental order under s54 HFEA 2008.

A key definition within the HFEA 2008 is that of the "mother" who is "the woman who....has carried a child as a result of the placing in her of an embryo or of sperm and eggs".

In the alternative the surrogate can be implanted with an embryo with genetic material taken from both commissioning parents, this is known as a total surrogacy.

An application for a parental order, where one is needed, must be made 6 months from the date of the child's birth. In Re X and Y (2011) the court indicated that the parental order would only be made if it is in the welfare interest of the child. The welfare of the child is the court's paramount consideration.

The concept of the "other parent" in artificial insemination cases, can be complex:

1. Married Couples: In a traditional heterosexual marriage this will be the husband whether or not his sperm is used. The provisions are very strict as to how this should take place to ensure his legal recognition. He needs to give consent to use another man's sperm in accordance with S.35 HFEA 2008.

   S.38 HFEA 2008, there is the continued presumption of legitimacy for children of married parents. Thus, the child is presumed to be the child of the husband.

2. Other Fathers: S.36 HFEA 2008 recognised a man to be the legal father of the child if certain conditions are met, even though his sperm is not used. Impregnation must take place at a licensed UK centre, and the agreed fatherhood provisions apply under S.37 HFEA 2008. These provisions specify that he should give consent at the time of impregnation and not withdraw consent at any stage.

3. Sperm Donors: S.40 HFEA 2008 provides that a person cannot be legally recognised as the father of the child where he donates sperm for treatment services or non-medical fertility services. Case law in this field is rife, for example in Re M (Sperm Donor: Father)(2003).

   Caution must therefore be exercised when donating in a more informal manner, for example when offering to help friends.

4. Egg Donors: S.47 HFEA 2008, a woman who donates eggs will not be the "other parent" simply by virtue of donating. If the egg donor wants to be the other parent she must satisfy the conditions.

5. Female same sex relationships: One parent is the mother and the other will be the "other parent"; Ss.41/42/43 HFEA 2008. This demonstrates that same sex couples have the same recognition as heterosexual couples, and that the "parents" of a child can be of the same gender.

If the couple are living together, the partner can be "the other parent" provided no-one else is being treated as such and the parties comply with the agreed female parenthood conditions s44, which are very similar to the provisions in S.37 HFEA 2008 for "other fathers". This means that the other parent must give consent and not withdraw that consent at any time.

In conclusion, it is clear that the HFEA 2008 demonstrates that the law has adapted to fit changing relationships in the 21st century. The notion of the "other parent" has become much more inclusive, catering for same sex parenting and parenting by those who are not the biological parents of a child.

SECTION B

Question 1(a)

Cyrus is not the biological father for either Michael or Loulla. As such he does not have parental responsibility for either of them even though he has treated them as children of the family. He could apply for parental responsibility as a step parent under s4A(1).

As he is married to their mother he can still make applications under s8 of the Children Act 1989, s10(5) CA 1989 states that no permission is required. In this case he will probably want to make an application for a child arrangements order for the court to decide where the children live and how often they will see him in the circumstances.

He could make applications for specific issue or prohibited steps although this seems unlikely in the circumstances of this case.

With regard to Bella, he is the biological father and he was married to Artemis at the time of Bella's birth. He therefore has parental responsibility for her. He can make the same s8 CA1989 applications for Bella as he can for Michael and Loulla. He will probably want a child arrangements order in place to determine where she lives and how often he sees her.

1(b)

Artemis should be advised that as Michael is 16 years old the court is not likely to make any s8 orders under Children Act 1989, s9(7) CA 1989. The court is therefore not likely to consider any application in respect of Michael unless there are special circumstances, none are apparent from the information we have.

With regard to an application for parental responsibility for Loulla, the court would consider that her welfare will be of paramount concern, s1(1) CA 1989. They will also consider that no order should be made unless it is in the best interests of Loulla for an order to be made, s1(5) CA 1989. In this case Loulla has a father who is regularly involved in her life. We are not told if he has parental responsibility for her. The court is not required to consider the welfare checklist in making an order for step parent's parental responsibility but may do so. It is not clear whether the court would grant Cyrus parental responsibility as a step parent if the parties' relationship has broken down.

In respect of any applications for a child arrangements order for either Loulla or Bella the court would take into account the welfare checklist s 1 CA 1989. None of the factors in the welfare checklist has any priority to any other.

In respect of each application the court will consider;

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) his physical, emotional and educational needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question.

The no order principle and the paramountcy principle will also be taken into account. The court will also need to take into account the no delay principle and deal with matters quickly.

The court should also take into account the presumption of parental involvement s2A CA 1989 – the court will "presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare."

The court will in all likelihood grant an order for both Loulla and Bella to see Cyrus. It is likely that Loulla will have less regular contact with him as she has frequent contact with her biological father. Bella will probably have more frequent contact with him when balancing the welfare checklist factors.

1(c)

Artemis should be advised to apply to the CMS for child maintenance for Bella as she is the biological child of Cyrus. They will make an assessment for him to pay a regular income using their standard formula. They will assess him to pay 12% of his gross income up to £800 per week and then 9% of his gross income thereafter. Artemis will find that she receives the maximum assessment for Bella as Cyrus earns more than £3000 gross per week which is the maximum sum that the CMS can assess. She cannot apply to the CMS to assess maintenance for Michael or Loulla as the CMS has no jurisdiction to do so. We are told that their father is paying for them in any event.

Artemis should be advised that in the event that she and Cyrus get divorced, she can apply for the court to assess the payment of maintenance for all the children.

The court has the power to order a top up maintenance assessment for Bella as her father earns more than the maximum sum the CMS can assess. Artemis will need to get the maximum assessment from the CMS so that the court has jurisdiction to order further sums.

The court also has jurisdiction to order a step parent to make payments for step children s23 Matrimonial Causes Act (MCA) 1973. As Cyrus has been paying for the children to be privately educated Artemis may wish this to continue and the court has the power to make this order.

The court will take into account s 25(3)(4) MCA 1973 if such applications are made in respect of the children;

This provision considers the financial needs of the children; the income, earning capacity (if any), property and other financial resources of the children, this will include the provision their father makes for them. The court will also consider the manner in which they were being educated or trained. As Cyrus was paying for private school fees this will be an important factor and Cyrus may be ordered to continue to pay these fees until the children reach the age of 18.

Question 2

Hilda can make applications under s22, 23 MCA 1973 for financial provision which includes MPS, periodical payments, secured periodical payments and lump sum orders. She can also make an application for a property adjustment orders, in respect of the jointly owned property (s24 MCA 1973). She can also apply for pension sharing and pension attachment orders.

The court will take into account all the circumstances of the case, s25(1), s25(A) MCA 1973the duty to impose a clean break as soon as possible after the pronouncement of the decree absolute.

Hilda should be advised that the court will balance the factors set out in s25(2) MCA 1973 in respect of the division of finances on divorce. As there are no minor children of the family the financial division will be balanced to produce a fair result between Hilda and Walter.

S25(2)(a) – The court will take into account the property that is jointly owned and valued at £250,000. If there are any savings or other assets they will fall to be divided by the court. At the moment Hilda has an income from a variety of sources including her pension. She is not able to work due to her age and disability. Walter is not yet in receipt of his pension as he is still working. He earns a salary of £60,000 gross per annum but he is going to retire in 2 months' time so this income will no longer be available to him. When he draws his pension he will be entitled to draw down a tax free lump sum of £225,000 and he will have a pension income of £24,000 net per annum, (£2000 net pcm). Neither party has a mortgage capacity or future earning capacity.

S25 (2) (b) – Each party has a need for accommodation. Each is currently adequately housed, Walter with his partner and Hilda in the jointly owned home. As the property is a 3 bed property, Hilda is over housed. The court will consider if it is necessary for her to continue to live where she is or whether the house needs to be sold. Hilda won't be able to live in the house without financial assistance from Walter as the outgoings are £400pcm more than her income.

S25(2) (C) – The parties both worked during the marriage and have a mortgage free home. We are not told anything more about their standard of living during the marriage save for the fact that Hilda has been confined to a wheelchair for 5 years.

S25(2) (D) – Hilda is 67 years old and Walter is 65. They have been married for 45 years so this is a long marriage. The parties have been separated for 1 year.

S25(2) (e) – Hilda is disabled and the property has been adapted at her expense to be suitable for her needs. The court will take this factor into account.

S25(2) (F) – We are told that Hilda paid off the remaining mortgage of £45,000 and used the remaining funds to adapt the house for her disability. The parties contributions during the marriage appear to be different but equal, (White v White (2000) UKHL 54). Walter has a good job and a good pension. Although Hilda did work she also looked after the children. Her pension is not as good as Walter's. Hilda made a notable financial contribution 7 years ago when she received her pension lump sum. The court may take this into account.

S25(2) (G) – there are no factors to take into account here. Walter's adultery is not conduct for the purpose of this section.

S25(2) (H) – traditionally the court would use this section to look at pensions. The pensions are considered to be part of the overall assets, Hilda's pension has a CE of £350,000 in payment and Walter's pension is valued at £1.2 million but it is not yet in payment. It appears that the pensions were all accrued during the long marriage.

When taking into account the above factors the court is likely to take the view that the parties' assets should be divided equally between the parties. It is possible that the court will make an order to transfer the jointly owned property to Hilda, so that she can keep this as her home. This means that she will keep capital assets of £250,000 and her need for housing will be met.

She will still have a need for income of at least £400 pcm to enable her to remain in the property. As Walter is about to draw his pension and stop working, it is likely that she will only get periodical payments for a short time until he stops working in 2 months. Thereafter, Walter's income will come from his pension and we are told that he will be entitled to £2000 pcm from his pension income. If his pension is shared in part with Hilda then she would be entitled to draw a small income from his pension. The court will need to consider whether it is fair for Hilda to keep all the equity from the house and also take a small share of Walter's pension. He can draw £225,000 from his pension which is almost the same capital that Hilda can keep from the property. Walter will be able to use this money as he pleases, he does not need to purchase a property as he is living with his partner.

Overall, the court might think that it is fair for Hilda to remain living in the property and to have small share of Walter's pension income by way of either a pension sharing order or a pension attachment order to help her to pay the outgoings on the property.

It is more likely that the court would make a pension sharing order as this would give Hilda more security for the future. The court would need an expert's report to decide what percentage of Walter's pension Hilda will need to divide Walter's pension fairly.

Question 3(a)

Hari and Shreena are associated persons as defined by s62 Family Law Act 1996 as they are in a cohabiting relationship and have a child together. Hari needs to be advised that he can apply for a non-molestation order to protect himself, s42 Family Law Act 1996 (FLA 96).

The FLA 1996 does not provide a definition of molestation and the term can be interpreted quite widely. Hari would need to show that Shreena's actions are deliberate and sufficient to justify the intervention of the court, C v C (1998). The leading case on molestation is that of Vaughan v Vaughan (1973) which

equates harassment with pestering. The court will look at protecting the health, safety and well-being of the applicant, Hari.

Even though Shreena suffered from post-natal depression, she appears to be in control of her actions. She has on a number of occasions verbally abused and threatened Hari and has recently made threats to kill him. There is a psychological element to her behaviour as she has woken him on several occasions to threaten him, this is preventing him from sleeping and is affecting his work. In light of her behaviour the court is likely to make a non-molestation order against Shreena to protect him from her harassment.

Hari may be able to make the application on a without notice basis (s45 FLA 96) if he can show that if he were to make the application on notice that Shreena would avoid service of the order or that he would be deterred from making the application if an order is not made immediately. The court would also look at the risk of significant harm to Hari or Nikky by Shreena if the order is not made immediately.

Hari could also make an application for an occupation order to regulate the occupation of the jointly owned home or perhaps to exclude Shreena from the home altogether. As they are joint owners he has the right to make an application under s33 FLA 96. There are a number of orders the court can make, s33(3) FLA. That section sets out that Hari can get an order if he is entitled to occupy the property, is associated to Shreena and that the property was intended to be their home. All three conditions are met, the court would first consider the provisions of s33(7) FLA 96, Chalmers v Johns (1999).

If it appears to the court that Hari or Nikky will suffer significant harm at Shreena's hand if an order is not made, it shall make the order. Under this provision the court will not make the order if it is established that Sheena or Nikky will suffer significant harm if the order is made. The court also needs to know whether the harm suffered by Shreena or Nikky is as great as or greater than the harm Hari would suffer if an order is made. This is known as the balance of harm test. It might be difficult for Hari to show that he would suffer significant harm in this case and that such harm would be greater than the harm Shreena would suffer if an order was made. If he doesn't persuade the court of this in the first instance the court will look at the other discretionary factors.

The court will look at the factors in s33(6) FLA 96 that can lead to orders being made. The court will look at the housing needs and financial resources of the parties, the likely effect of any order on the health safety or well-being of the parties and Nikky. The court will also look at the conduct of the parties. In this case we know that Shreena is Nikky's main carer and that she works part time near her school. Hari is in a financially stronger position as he works full time and he earns a good salary. It may be that either the court makes an order to regulate the occupation of the property as it has two bedrooms. It may be possible for Shreena to occupy a room and for Hari to occupy the other room, Nikky could move between her parents care. This may provide him with sufficient protection with a non-molestation order. There doesn't need to be actual violence for an occupation order to be made Grubb v Grubb (2009).

If Shreena were to breach the non-molestation order this would be a criminal offence. A power of arrest could be attached to the occupation order and breach of that could be dealt with by Shreena's arrest, she would then be taken to court. The occupation order can be applied for without notice but it is such a draconian order that it is not likely to be granted without notice.

3(b)

Shreena has told Hari that he is not Nikky's father and he will need to establish parentage. Although having his name on her birth certificate would give rise to the presumption of parentage, it is not the only way to show that he is her father. At the moment there is no presumption that he is her father, although until now that is what he has been led to believe.

Hari could make an application under s55A Family Law Act 1986 for a declaration of parentage in respect of Nikky.

Hari could establish parentage by blood tests, under Family Law Reform Act 1969 (FLRA) s 20. The court can make an order for scientific tests to see if Hari is Nikky's father. The court can order samples to be taken from Nikky to assist the tests if it is in Nikky's best interests to do so. If Shreena or Hari refused to allow these tests to go ahead to collect their biological material, then the court could draw inferences from their refusal.

Scientific tests will establish whether Hari is Nikky's father, as long as he takes the test, he can then be advised about further applications that he could make under the Children Act 1989.

Question 4

The statute that governs the creation of their relationship is the Marriage (Same Sex Couples) Act 2013. By extension of this act the Matrimonial Causes Act 1973 (MCA 1973) applies to the divorce of parties who are in a same sex marriage.

Firstly looking at the breakdown of the relationship, the parties have been married for more than one year so either of them can make an application for a divorce. The bar against divorce in the first year does not apply, s3(1) MCA 1973.

There is only one ground for divorce s 1(1) MCA 1973, that the marriage has broken down irretrievably. The ground for divorce needs to be evidenced by one of the five available facts. These are found at s1 (2) MCA 1973 (a) – (e), adultery of the respondent with a person of the opposite sex and that the applicant finds it intolerable to live with the applicant, unreasonable behaviour, 2 years desertion, 2 years separation with the other party's consent and 5 years separation.

It is clear that if the parties want to get divorced now that potentially only adultery and unreasonable behaviour apply.

In order to proceed on the basis of adultery one of the parties to the marriage must have had sexual intercourse with a person of the opposite sex. Sexual intercourse must be either full or partial penetration, Dennis v Dennis (1955). In this case, Iftikar has told Joseph that he had a sexual encounter with a woman and so Joseph may be able to pursue a divorce against him on the basis of his adultery. The sexual encounter would need to involve at least partial penetration by Iftikar of the woman.

If he is able to rely on that fact, he also needs to show that he finds it intolerable to live with Iftikar. In this case the parties agreed to go to marriage guidance counselling and they attended for 3 months. Although Joseph was willing to give their marriage a chance, Iftikar has decided to end the marriage due to Joseph's infidelity. However, it is not necessary to show that the intolerability is as a

result if the adultery. As the parties have continued to live together, Joseph can only rely on the adultery for 6 months after finding out about it, s2(2) MCA 1973.

Although Joseph has been unfaithful to Iftikar by having sex with another man, this does not qualify as adultery due to the narrow definition. However, Iftikar could consider commencing a petition based on Joseph's unreasonable behaviour. The provision states that the respondent has behaved in such a way that the applicant can no longer be expected to live with him. Unreasonable behaviour can cover a large spectrum of behaviour, the test is a two part test which is both subjective and objective and can be found in the case of Livingstone-Stallard v Livingstone-Stallard (1974). The court would ask 'would any right thinking person come to the conclusion that this partner has behaved in such a way that the other partner cannot reasonably be expected to live with him?' Whilst Iftikar could rely on the one incident of unfaithfulness, this might not be enough for the court to accept that unreasonable behaviour has been proven unless Iftikar has other incidents of behaviour that he can rely on.

If the parties agree to wait to commence divorce proceedings, either party could petition the other on the basis of 2 years separation, the other party would need to consent. From the information we have been given, the parties have not yet separated and have recently come to the conclusion that the marriage is over. They may therefore need to wait for 2 years to elapse before the can proceed on this basis.

As far as the finances are concerned, the parties sound as though they entered into the Civil Partnership with the benefit of a Pre-Civil Partnership agreement. That agreement should be influential on the court in the event of the breakdown of the marriage. These types of agreement are contrary to public policy but following the guidance of the Supreme Court in the case of Radmacher v Granatino (2011) the courts can give weight to them. The guidelines will be considered by the court in this case to determine what weight to give to the agreement. The court will want to know if Iftikar entered into the agreement voluntarily and it seems from what he says that he did. The fact that Iftikar did not know Joseph's true financial position or have any legal advice will be important factors. However, it seems that Iftikar, like Mr Granatino, understood that his partner was very wealthy and understood the nature of the agreement he was entering into. It does seem in this case that Joseph is older and perhaps used his dominant position to ensure that Iftikar did as he wanted, but as Joseph told Iftikar to get legal advice this might not be the case.

The court in Radmacher decided that the court should give effect to the pre-nuptial agreement unless there were circumstances that vitiated the agreement. In this case it doesn't seem that there are circumstances that vitiate the agreement save for the important fact that the agreement may not produce a fair settlement after a relationship which endured 17 years cohabitation. The court may believe that a long relationship with an agreement entered into 10 years ago should result in a financial settlement to meet Iftikar's needs, which appear to be limited to housing needs.