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 2012 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.

Question 1

Memo to supervisor

(a) The trainee was not correct in saying the firm needed Brian Wilson’s authority. Although they may still act for Brian Wilson in other matters, he is not their client in the matter of Claudia’s will, even though he is one of the named executors.

Having been satisfied as to the fact of Claudia’s death, Jones and Rathbone, as holder of her will, have a duty to release it to the executors named in it; but the appointment of Brian Wilson lapsed in 1993 when Claudia divorced him. Wills Act 1837 s18 (as amended) provides that the appointment of a former spouse as executor takes effect as though the former spouse had died on the date the marriage was dissolved. Therefore, Jones and Rathbone can, and should, release the will to RC who is now the sole executor so that he can make an application for a grant of probate.

(Even if RC was not the only executor appointed by the will who was able to obtain probate, the firm must still release the will to him alone without the concurrence of the other executor(s). One executor can accept the will on behalf of himself and any other executor(s). Consequently, even if the trainee did not realise the implications of the divorce and still believed Brian to be an executor, his firm was still obliged to release the will to RC once satisfied as to his identity. So, whether or not Brian is still an executor is actually irrelevant as far as Jones and Rathbone’s obligation to hand over the will is concerned).

(b) The will Claudia made on 1 April 1990 is still valid notwithstanding her divorce in 1993.

Therefore, the legacies totalling £45,000 are payable to RC, Phyllis and Betty as provided in clause 3.
Clause 4 of the will directs the residue to be divided in ‘equal shares’ between Brian Wilson and Marjorie and so two distinct shares in residue are created. However, another consequence of the divorce and the application of Wills Act 1837’s 18 (as amended) is that the will takes effect as though Brian Wilson had predeceased. Consequently, his half share in the residue in clause 4 lapses and since the will does not provide for any substitution or accrue clause, this half share of residue will devolve on Claudia’s partial intestacy.

Claudia died without leaving a surviving spouse or civil partner and so her undisposed of property passes to her ‘issue’ on the ‘statutory trusts’, (Administration of Estates Act 1925 ss 33 and 47). As an adopted child, Marjorie is treated as Claudia’s child and being her only issue, she is entitled to the lapsed share of residue on the statutory trusts. Marjorie is now aged 32 and so her entitlement under the statutory trusts has vested.

Consequently, Marjorie is entitled to the whole of the residue; half under the will and half under the partial intestacy.

As regards the items in RC’s list, special mention must be made of The Haven and the Rightguard Endowment policy.

The title to The Haven must be checked to see whether Claudia and Marjorie held the beneficial interest as joint tenants or as tenants in common. RC’s note merely says documents show it in ‘joint names’ and so a beneficial joint tenancy cannot be assumed and in any event there might have been a severance. If it is confirmed as a joint tenancy, then Claudia’s interest in this property passed automatically to Marjorie by survivorship and does not pass under her will. However, if they owned it as tenants in common, then Claudia’s share will pass under her will and so still passes to Marjorie but as part of her residuary entitlement.

As to the benefit of the Rightguard Endowment policy, this no longer belonged to Claudia after she assigned the beneficial interest to Marjorie in 1994. So, it will not pass under Claudia’s will and Marjorie can claim the proceeds now by making application to the assurance company.

Subject to these two assets, everything else in RC’s list passes under Claudia’s will and will be administered by RC as the sole executor (assuming he is prepared to extract the grant).

(c) In determining the inheritance tax due as a result of Claudia’s death, it is first necessary to consider any lifetime transfers to see if they have become chargeable.

The facts indicate that in 1994 she gave Marjorie a half share in The Haven worth, at that time, £60,000.00. This would have constituted a potentially exempt transfer but since it was made well over seven years before Claudia’s death, the transfer has now achieved exempt status and so would ordinarily be ignored. However, the facts also suggest that Claudia continued to visit the property on a regular basis, at least until recently. As such, HMRC is likely to contend that the interest she gave to Marjorie was a gift of property subject to a reservation of benefit (GROB). The consequence of this is that the whole value of The Haven (£300,000.00) at the time of her death, and not just Claudia’s existing half share, will be treated as part of her death estate - notwithstanding that she survived the transfer to Marjorie by more than seven years.
Also in 1994, she assigned the benefit of the Rightguard Assurance policy to Marjorie. This was also a potentially exempt transfer of the surrender value of the policy at the date of the assignment. This transfer has now achieved full exempt status by reason of her survival for over seven years. The fact Claudia has continued to pay the premiums should not be a problem since although she has effectively paid them on Marjorie’s behalf, the payments should be exempt under the provision relating to normal expenditure out of income.

Since Claudia made no chargeable transfers before death, her full nil rate band is available to set against her inheritance tax estate. Her estate will include all the assets mentioned in RC’s list, including the full value of The Haven, but excluding the Rightguard Assurance Policy. There are no exemptions or reliefs applicable but we can deduct any debts, including the funeral expenses, when known. Using, for the time being, the gross figures provided, the total ‘taxable’ estate comes to £919,537.00.

Deducting a full nil rate band of £325,000.00 results in £594,537.00 being taxed at 40% to give a tax liability of £237,814.80. (Claudia has no transferable nil rate band because her marriage ended by reason of divorce rather than the death of her husband).

Liability for the tax will rest with RC as the executor, except for the proportion applicable to the share of The Haven which represents the property subject to the GROB. Liability for this falls on Marjorie as the donee of the original gift.

The inheritance tax which is the liability of the executor will come out of the residue of the estate but since Marjorie is entitled to the whole residue anyway, it would be practical, with her agreement, to pay the tax on the share of The Haven subject to the GROB from residue as well. In any event, RC as the executor will incur a secondary liability for paying this part of the tax if Marjorie has not paid by the end of 12 months from the end of the month of Claudia’s death i.e by 31 January 2013.

It needs to be kept in mind that any estimate of the inheritance tax liability at this stage can be based only on the values as provided by RC. These will need to be updated where necessary to reflect the value at the time of Claudia’s death and if necessary professional valuations will be required, for example, in respect of the two properties and investments.

[NOTE: In the examination, this question said that a calculation of the tax was not required and so candidates were given appropriate credit as long as their explanation was clear, whether or not any calculations were provided.]

**Question 2**

**Memo to supervisor**

(a) Since the will was made by solicitors, any challenge to the wills’ validity is likely to be difficult to establish. There is no obvious reason to suspect the will is invalid due to lack of compliance with the formalities in the Wills Act 1837. Also, the content of Matthew’s letter suggests his father was mentally capable, at least in 2008 when the will was made, and so there appears to be no ground for challenge based on lack of testamentary capacity.
However, the letter does suggest doubt might be cast on his father’s testamentary intention to make the will. His father must have both known and approved the contents of his will and this might have been negated by either (i) undue influence, or (ii) fraud.

(i) Undue influence must amount to something more than mere persuasion and the courts have said that proof of coercion against the testator must be established. The degree of coercion must be such that it negated any free will that his father might have had to make a will in the terms he wanted and, instead, the will reflects the wishes of someone else. Did Rosemary and/or her husband put pressure on Matthew’s father to change his will (even though they did not intend to do so) by suggesting that their financial troubles would lead to the sale of their farm and so he would have to live elsewhere (perhaps in a care home)?

(ii) An allegation of fraud, if made successfully, requires that his father was deceived into making a will which he might not have made if he had been aware of the true facts. Again this might involve statements made by Rosemary and/or her husband similar to those suggested in (i) above. However, in this case the statements would have to be shown to be deliberately untrue, perhaps by making their situation appear worse than it was, with the intention of deceiving his father into changing his will.

Since there is generally a presumption of knowledge and approval, if the will is challenged on the ground of undue influence or fraud, it requires Matthew, as the person seeking to establish the ground, to prove it on the balance of probabilities. There is no presumption of undue influence or fraud in the case of a will.

However, it might be possible to displace the presumption of knowledge and approval by establishing ‘suspicious circumstances’ because Rosemary, as the person who takes the substantial benefit, could be said to have been instrumental in making the will by taking her father to see her own solicitors. If the court felt this was suspicious, it would place the burden on Rosemary to establish knowledge and approval. Even then, she could probably do so quite easily as long as the solicitors followed best practice (eg ‘the golden rule’) and took the necessary steps, including seeing him alone, to ensure the terms of the new will reflected father’s actual wishes. Consequently, it seems Matthew will find such allegations very difficult to substantiate.

(b) You should write to the solicitors in Exeter to confirm you have been instructed by Matthew in the matter of the 2008 will and that your client has reason to doubt the validity of the will. The letter should require the solicitors, as the firm who had the conduct of the making the will, to provide a full account of the circumstances in which instructions were taken and the manner in which execution of the will took place. What you should specifically ask for and receive is a copy of their file notes.

In anticipation of any refusal by the firm to provide this information, your letter should say that the information is requested on the authority of the case of Larke v Nugus and the subsequent Practice Note issued by the Law Society. This requires the solicitors to provide such information since they are witnesses in any potential litigation and the voluntary provision of the information now will save the costs which would otherwise be incurred by
its compulsory production through the issue of proceedings. The firm is likely to accede to your request because if they fail to do so, their client runs the risk of being penalised as to costs if the matter goes to court, even if they win the case and the will is upheld as being valid.

(c) You should advise Matthew to instruct us to enter a Caveat on his behalf under NCPR 1987 r44 which will prevent a grant being issued in respect of the 2008 will. If an application for probate is made by Rosemary as the executor, it will be suspended and she will have to serve a warning on Matthew requiring him to either withdraw the Caveat or enter an appearance. By choosing the latter, Matthew will be afforded the opportunity to challenge the will by way of a probate claim.

The Caveat is lodge by making application containing details of the deceased etc to any Probate Registry in Form 3 as prescribed by NCPR and paying the appropriate fee. Once the probate registry accepts the caveat, it is effective for 6 months and may be renewed every 6 months.

(d) You will need further information so that you are aware of what the court will take into account when it applies the guidelines in s3(1) of the 1975 Act to Matthew’s claim. The common guidelines applicable to all applicants, and so to Matthew, are:

- The financial needs and resources of the applicant and any beneficiary (ie Rosemary). So you will need to know about Matthew’s financial situation, both as to his income and capital resources. In his letter, Matthew mentions a threat of redundancy and you should seek further information about his employment situation. You must also ask him what financial commitments he has to meet. Similar information is required, if available, about Rosemary.

- The deceased’s moral obligations towards Matthew and Rosemary. Matthew’s letter suggests that much of his father’s wealth might have been derived from Martha, ie his mother. This should be confirmed with Matthew since it may suggest his father was under a moral obligation to leave more to Matthew rather than Rosemary.

- The size and nature of the estate. Matthew should endeavour to make further enquiries about this from the solicitors in Exeter (or we could seek this information on his behalf if he instructed us to do so). The larger the estate, the more likely it is that an award can be made if the court sees fit to find in Matthew’s favour.

- The physical or mental disability of either Matthew or Rosemary. Although there is nothing in Matthew’s letter to suggest this is relevant, confirmation needs to be obtained.

- Any other relevant matter. You need to ask Matthew whether his father had made any lifetime provision for either Rosemary or himself. Also, ask about Matthew’s conduct towards his father and also his sister’s.

Information should also be obtained on whether his father left any written statement indicating the reason why he made the provision in the will that he did.
There are also additional guidelines applicable to particular types of applicant, including children, but I do not consider these are relevant in Matthew’s case and so no further information is needed concerning them.

**Question 3**

**Memo to supervisor**

(a) (i) If they are **not married** when Simon dies, there will be no spouse exemption and his whole estate will be chargeable to inheritance tax at 40% to the extent it exceeds his available nil rate band.

His legacy to Danni will (by implication if there is nothing to the contrary) be ‘tax free’ and so the proportion of the total tax attributable to the value of the legacy (£200,000) will be paid out of residue. Therefore, the residue passing to Miranda will be reduced by both the tax attributable to Danni’s legacy as well as the tax attributable to residue itself.

If the legacy to Danni is made ‘subject to tax’, then it will bear its own inheritance tax. This means Danni will receive a net sum after the inheritance tax attributable to £200,000 has been deducted. The residue passing to Miranda will simply bear the tax attributable to residue. So the effect is that Danni will receive less than if the legacy was tax free, but Miranda would receive more.

Therefore, we need Simon’s instructions as to whether Danni’s legacy should be tax free or not.

If they are **married** by the time of Simon’s death, only the legacy to Danni will be chargeable to inheritance tax because the residue passing to Miranda will be exempt. This gives rise to a partially exempt transfer and if Danni’s legacy is ‘tax free’ (either expressly or by implication), its value must be grossed up to ascertain the tax attributable to it which would then be paid out of residue. However, since the legacy is the only chargeable element of Simon’s estate and its value is within Simon’s nil rate band, any grossing up would be at 0% and so no tax would be payable.

**Whether or not they are married**, the legacy of £200,000 will take effect as a Bereaved Minor’s Trust because Danni is Simon’s child and she will satisfy the contingency to become entitled to the capital and income no later than age 18. This means that there will be no further charge to inheritance tax (beyond any that might be payable on Simon’s death), either when she attains 18 or if she is given capital in the meantime as a result of the exercise of a power of advancement.

(ii) If Simon gave Miranda a life interest instead of an absolute entitlement, this would be an Immediate Post Death Interest (IPDI) for the purposes of the inheritance tax legislation. This is the case whether or not they are married and on Simon’s death the consequences for inheritance tax will be exactly the same as if Miranda had been given an absolute interest. So, if they are married when Simon dies, the residue passing into Miranda’s life interest will still qualify for the spouse exemption.
Whether they were married or not when Simon dies, on Miranda’s death, the trust capital supporting her life interest (ie supporting the IPDI) will be treated as part of her death estate for inheritance tax purposes. Any inheritance tax chargeable on her death which is attributable to the value of the trust fund will be paid from it before the balance is applied for the children as remainder beneficiaries.

(b) Sections 31 and 32 Trustee Act 1925 will apply automatically without express mention but can be modified by Simon’s will to give his executors and trustees greater flexibility to ensure the legacy can be used to pay Danni’s school fees.

The legacy will carry the right to **income** and s31 Trustee Act 1925 allows such income to be applied for the maintenance, education and benefit of Danni. Income not so applied but accumulated by the trustees can also be applied in later years as though current income. Clearly this power would allow income from the legacy to be used for paying school fees but s31 states that the trustees can only exercise this power if it is reasonable to do so. This requires application of an objective standard and so it is better for the trustees if Simon’s will allows the trustees to apply income ‘as they think fit’. This gives them a subjective discretion to apply income when they believe it is right to do so rather than having to apply the objective standard of reasonableness which can lead to uncertainty.

Section 32 Trustee Act 1925 allows the trustees to apply up to one half of the **capital** value of the legacy for Danni’s advancement or benefit. Paying her school fees is clearly within the scope of the power. It is possible to modify the statutory power by allowing the trustees to advance more than half the capital, even up to the full amount.

(c) If Miranda dies before Simon when they were not married, her estate will attract 100% business property relief on the value of her secretarial business since she will clearly have owned it for at least two years. So the value of her business will not attract inheritance tax.

No other exemptions or reliefs will apply but her chargeable estate will have the benefit of a transferable nil rate band from Alistair, her first husband. It would appear that when he died ten years ago, his whole estate passed to Miranda and was spouse exempt. Therefore, unless he made any chargeable transfers before he died, it seems he did not use any of his available nil rate band. Consequently, Miranda’s PRs will be able to claim 100% uplift in whatever nil rate allowance is applicable at the date of her death.

(It is irrelevant that Alistair died long before the introduction of the transferable nil rate band in October 2007. Similarly, it does not matter that he may not have owned enough property to make full use of his own nil rate band at the time of his death).

**Question 4**

(a) See completed Oath attached.

(b) The following items will be sent to the Probate Registry when making application for the grant:
• The original will - duly marked by the applicants for the grant and the solicitor before whom the oath is sworn or affirmed;

• Two A4 size photocopies of the will;

• The Executors’ Oath duly sworn or affirmed;

• The Fee (including fee for copies);

• Form IHT421 duly receipted by HMRC.

[There is nothing shown by the form of the will or the facts to suggest any further affidavit evidence is required in support of the application for the grant].

(c) Paragraphs for inclusion in a letter to beneficiary explaining the capital gains tax position if he takes some existing investments in partial satisfaction of his share in the residue.

“If you take some of your mother’s existing shareholdings in partial satisfaction of your entitlement, then for capital gains tax purposes (CGT) you will be treated as having acquired them on the date when she died, ie at their probate value on 2 October 2011. The probate value of each of your mother’s shareholdings is shown on the enclosed stockbroker’s valuation which we obtained following her death.

This probate value is important because if you later dispose of your shareholding, either by way of sale or gift, any liability to CGT (assuming a gain in value) will be determined by reference to the difference between that probate value and the value at the time when you dispose of the shares. Similarly, if at the date of disposal the shares have gone down in value since the death, your loss for CGT purposes will also be calculated by reference to the probate value.

It follows that neither the current value of the shares nor the value when the shares are actually transferred to you by the executors is relevant for CGT purposes.”
SUGGESTED ANSWER Question 4(a)

IN THE HIGH COURT OF JUSTICE

Family Division

Extracting Solicitor: KEMPSTONS (REF: WU1/F2)
Address: THE MANOR HOUSE
BEDFORD MK42 9AB
DX 02345987

The DISTRICT Registry BARSET

IN the Estate of

HILDA DOROTHEA WAITES
otherwise known as HILDA DOROTHY WAITES
deceased.

We NIGEL WAITES of 32 Millbank, Farnborough,
GUILFORD Financial Adviser and AURIL SLATTERY
do of 23 Fox Bank, Manchester M99 1SA Barrister

make Oath and say (2):

(1) We believe the paper writing now produced to and marked by (3) US

to contain the true and original last Will and Testament (4)
of HILDA DOROTHEA WAITES otherwise known as
HILDA DOROTHY WAITES
of The Nook Residential Home, Sandlesley, Bedfordshire
MK44 6BB formerly of Gull Rock View, Maple Terrace,
Windy Cove, Duxton-on-Sea, DY43 6RF
deceased,

who was born on the (5) 22nd day of February 1936
and who died on the 2nd day of October 2011
aged 75 years (6) domiciled in (7) England and Wales
and that to the best of our knowledge, information and belief there was (8) no land
vested in the said deceased which was settled previously to her death (and not by her Will

and which remained settled land notwithstanding her death

And (9) we further make oath and say (2)

that

executors (10) named in the said Will

have renounced probate thereof.

Notice of this application has been given to HELEN MOORE

the executor (11) to whom power is to be reserved, (please

And (12) we further make Oath and say (2)

that (13) we are two of the

Executors

named in the said Will

P.T.O.
PRCA/1
and that (i) WE will (i) collect, get in and administer according to law the real and
personal estate of the said deceased; (ii) when required to do so by the Court, exhibit in the Court a full
inventory of the said estate and when so required render an account thereof to the Court; and (iii) when required to
do so by the High Court, deliver up the grant of probate to that Court; and that to the best
of our knowledge, information and belief

the gross estate passing under the grant does not exceed £ ——
and the net estate does not exceed £ ——

and that this is not a case in which an Inland Revenue Account is required to be delivered.

(7) the gross estate passing under the grant amounts to £171,173.60
and the net estate amounts to £166,137.40.

The true name of the said deceased is HILDA
DOROTHEA WAITES but she held shares in
STANDARD LIFE PLC in the name of HILDA DOROTHY
WAITES

[NOTE: Just one asset needs to be described]

SWORN by
the above-named Deponent
at

this day of

Before me,

A Commissioner for Oaths/Solicitor.

SWORN by
the above-named Deponent
at

this day of

Before me,

A Commissioner for Oaths/Solicitor.

SWORN by
the above-named Deponent
at

this day of

Before me,

A Commissioner for Oaths/Solicitor.