

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

LEVEL 6 UNIT 5 – EQUITY & TRUSTS

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Better performing candidates demonstrated good knowledge and understanding of the relevant law and used references to statutory provisions and case law appropriately to underpin their analysis/explanation. Candidates who did less well: (a) did not display sufficient legal knowledge on which to base any sort of reasoned argument or (in terms of the Section B questions) to provide any sort of reasoned advice/application, and (b) cited little or no relevant statute or case law.

Weaker candidates tended simply to recite everything that they were able to recall about a particular topic (whether or not it was germane to the question posed). However, learning/recall must be accompanied by reasoned discussion and/or application if higher grades are to be achieved. This is particularly pertinent in relation to the Section A questions, where candidates are expected to be able (as the case may be) to analyse, evaluate or discuss both sides of a particular proposition.

In relation to the Section B questions, a failing which is common to a large number of candidates is a reluctance to commit to a conclusion and/or offer a pragmatic explanation or advice – the phrase “it all depends on what the court decides” (or its equivalent) is an all-too-common feature of many scripts. A noticeable feature of this session’s cohort was a failure to identify all the elements within a scenario which called for discussion – as a result, a proportion of the marks simply went

unclaimed. As ever, the question on trusts of the family home was by far the most popular question, but habitual shortcomings were also apparent, namely: (a) not articulating the separate rules for ECICTs and ICICTs correctly, and (b) not treating quantification as being distinct from qualification.

As stated above, candidates are expected to cite statutory provisions and/or case law in relation to legal principles which they refer to. They are also expected to be accurate in their citation. No credit is given for statements such as 'In a decided case...', or 'In the case about...' or 'In [] v [] ...' or 'The Trustee Act 2000 deals with this...'.
Excessive or unnecessary recitation of the facts of particular cases receives no credit.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

Only 1 candidate answered this question: they did so creditably well. This question was the most challenging question in Section A (because it involved a 'compare and contrast exercise (which candidates do not generally favour) in relation to one of the more technical topics in this subject), all of which doubtless explains its lack of popularity with candidates.

Question 2

Five candidates answered this question, which was a little surprising given that the subject matter is generally popular with candidates as a 'self-contained' area of the course.

Question 3

This question has not featured in this formulation before. However, the wording directly engages AC 4.2 in the unit specification. Candidates struggled particularly with articulating the principles in relation to automatic resulting trusts and *Quistclose* trusts. The discussion of presumed resulting trusts (PRTs) was generally better.

Question 4(a)

In general terms, the overall performance was poor for this question. Most seemed to treat the question as an opportunity to write down whatever they could recall about charities generally, without ever really engaging with the focus of the question (which was the public benefit requirement in relation to different 'heads' of charity). Citation of case law was decidedly absent.

4(b) See previous comment.

Section B

Question 1

Certainties is generally popular with candidates, and parts (a) and (b) of the question were handled pretty well. Several candidates either did not recognise that the gift involved an unincorporated association or were unable to discuss the relevant principles with any real accuracy.

Question 2

Tracing is generally popular with candidates, but they habitually struggle to apply the law to the facts with any conviction.

Question 3

Again, the topic of secret trusts is always popular with candidates, and most are usually able to articulate the basic principles with an acceptable degree of accuracy. This is a topic which lends itself to little 'pockets' of discussion (secret trusts of land, pre-decease of a beneficiary, secret beneficiary witnessing the Will, etc). Unfortunately, candidates regularly 'miss' (or at least do not discuss) some of these elements and lose marks accordingly.

Question 4

Nineteen candidates answered this question. This is no surprise, as trusts of the family home has proven to be one of the most consistently popular topics for candidates over the years (particularly when, as in this year, the topic is the subject of a problem question rather than an essay question). Common 'weaknesses' in scripts are: (a) not distinguishing between the separate rules for ECICTs and ICICTs, and (b) not treating quantification as being distinct from qualification.

SUGGESTED POINTS FOR RESPONSE

JANUARY 2023

LEVEL 6 UNIT 5 – EQUITY & TRUSTS

| Question Number | Suggested Points for Responses | Marks (Max) |
|----------------------------------|---|-------------|
| 1 | <p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant case law and statutory provisions • Discussion around the above with detailed arguments, for and against, being evidenced • A reasoned conclusion which is supported with evidence • Response is appropriately structured (1 mark) <p>Responses should include:</p> <ul style="list-style-type: none"> • Candidates should recognise that the question focuses specifically on knowing receipt and the test for knowledge - dishonest assistance is not relevant here so no credit should be given for discussion of it • Candidates should discuss both the <i>Baden</i> scale and ‘unconscionability’. Weaker candidates may simply describe each, but credit should be given for discussion of the advantages and disadvantages of each • Students should discuss why the <u>Baden</u> scale fell out of favour (cf <u>Akindele</u>) and the subsequent re-appraisal of its utility. • Better candidates should discuss how the two tests may evolve/combine in the future (eg with reference to <u>Starglade v Nash</u> (2010), <u>Armstrong v Winnington</u> (2012) and <u>Group Seven Ltd v Nasir</u> (2017)) • Reasoned conclusion re the proposition set out in the question | 25 |
| Question 1 total:25 marks | | |
| 2 | <p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant case law and statutory provisions | 25 |



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| | <ul style="list-style-type: none"> • Discussion around the above with detailed arguments, for and against, being evidenced • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of separate elements of ‘no profit’ and ‘no conflict’ rules – candidates may illustrate ‘inflexible’ application of these by reference to cases such as <u>Keech v Sandford</u> (1726), <u>Wright v Morgan</u> (1926) and <u>Boardman v Phipps</u> (1967): greater credit should be given where discussion of facts is succinct and is clearly directed towards a particular point of principle • Discussion of how the rules preclude reliance by a defendant on ‘good faith’ (candidates may refer to ‘honesty’) and/or ‘no loss’ • Discussion of exceptions to the rules (eg authorised under trust instrument, consent of beneficiaries, rule in <u>Cradock v Piper</u> (1850), sanctioned by court, etc) – • Discussion of instances where correctness of the inflexibility has been questioned/doubted (eg speech of Lord Herschell in <u>Bray v Ford</u> (1896) and judgment of Arden LJ in <u>Murad v Al Saraj</u> (2005)) • Discussion of examples where harshness of the rules has been/can be mitigated (eg <u>Boardman</u> (above), <u>Holder v Holder</u> (1968), examples from Commonwealth jurisdictions) <p>Reasoned conclusion re proposition set out in the question</p> | |
| | Question 2 total:25 marks | |
| 3 | <p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant case law and statutory provisions • Discussion around the above with detailed arguments, for and against, being evidenced • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Initial general discussion re how resulting trusts (RTs) arise where property is not wholly disposed of and are of two types: automatic RTs (ARTs) and presumed RTs (PRTs) | 25 |

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| | <ul style="list-style-type: none"> Detailed discussion of ARTs and the situations in which they arise: (i) no declaration of trust, (ii) failure of express trust, (iii) failure to dispose of entire equitable interest (including unforeseen events, surplus property, and <u>Quistclose</u> trusts) and (iv) dissolution of unincorporated association Better candidates will discuss the different rules/consequences re each of the above (with reference to cases such as <u>Vandervell v IRC</u> (1967), <u>Chichester Diocesan Fund v Simpson</u> (1944), <u>Simpson v Simpson</u> (1992), <u>Re Foord</u> (1922), <u>Barclays Bank v Quistclose Investments</u> (1968)), and will note that ARTs illustrate the maxim that “equity abhors a vacuum” Detailed discussion of PRTs and the situations in which they arise: (i) voluntary conveyance (with reference to LPA 1925, s 60(3), <u>Lohia v Lohia</u> (1920) and <u>National Crime Agency v Dong</u> (2017)), (ii) purchase in name of third party (with reference to, eg, <u>Bull v Bull</u> (1955)) Discussion of how the presumption can be rebutted in specific scenarios Reasoned conclusion re the proposition set out in the question <p>Responses could include:</p> <p>Candidates may note that resulting trusts are one of the three categories of ‘non-express’ trusts recognised by LPA 1925, s 53(2) – and may note that it is unlikely that there is any form of implied trust that is not in fact a resulting trust or a constructive trust.</p> | |
| Question 3 total:25 marks | | |
| 4(a) | <p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> Correct identification of relevant case law and statutory provisions Discussion around the above with detailed arguments, for and against, being evidenced A reasoned conclusion which is supported with evidence Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> Discussion of requirement of, and rationale for, public benefit requirement (with reference to CA 2011, s 4 and <u>Oppenheim v Tobacco Securities Trust Co Ltd</u> (1951)) – candidates will note that this does not go ‘hand in hand’ with charitable purpose Better candidates will engage in a considered discussion of what constitutes both ‘the public’ and ‘benefit’, with reference to, eg, | 15 |

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| | <p><u>National Anti-Vivisection Society v IRC (1947)</u>, <u>Dingle v Turner (1972)</u>, <u>Coats v Gilmour (1948)</u>, <u>In Re Pinion (1965)</u>, <u>McGovern v Attorney General (1981)</u></p> <ul style="list-style-type: none"> • Candidates will relate the discussion above to the specific topic of trusts for the advancement of education, with reference to, eg, 'preference' cases such as <u>Re Koettgen (1954)</u> and also <u>Independent Schools Council v Charity Commission (2012)</u> | |
| 4(b) | <p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification and explanations of relevant case law and statutory provisions • Discussion around the above with detailed arguments, for and against, being evidenced • A reasoned conclusion which is supported with evidence <p>Responses should include:</p> <ul style="list-style-type: none"> • The general discussion re law and cases in relation to 'the public' and 'benefit' may repeat, or incorporate by reference, the earlier discussion in (a) • Discussion re historically less stringent requirements in relation to trusts for relief of poverty (eg class can be defined by 'personal nexus' (ie link of family, employment or membership of an unincorporated association, as exemplified in, eg, <u>Dingle v Turner (1972)</u> and <u>Re Scarisbrick's Will Trusts (1951)</u>) which have been carried over in relation to successive Charities Acts (see <u>HM Attorney General v Charity Commission for England and Wales (2012)</u>) | 10 |
| Question 4 total: 25 marks | | |

SECTION B

| Question Number | Suggested Points for Responses | Marks (Max) |
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| 1(a) | <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons, but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant facts and law | 7 |



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| | <ul style="list-style-type: none"> • Discussion around the above with detailed arguments, for and against, being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include:</p> <ul style="list-style-type: none"> • General discussion re three certainties and <u>Knight v Knight</u> (1840) • Discussion of certainty of subject matter, with reference to, eg, <u>Palmer v Simmonds</u> (1854) • Recognition that discretionary trust element is immaterial in light of failure re subject matter | |
| 1(b) | <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons, but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant facts and law • Discussion around the above with detailed arguments, for and against, being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of certainty of intention, with reference to, eg, <u>Re Adams and the Kensington Vestry</u> (1884) and <u>Lamb v Eames</u> (1871) • Discussion re interpretation of provision in light of imperative words used elsewhere (cf <u>Comiskey v Bowring Hanbury</u> (1905)) | 6 |
| 1(c) | <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons, but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant facts and law • Discussion around the above with detailed arguments, for and against, being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include:</p> | 12 |

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| | <ul style="list-style-type: none"> • Discussion re certainty of subject matter as to both the gift of individual bottles and ‘any remaining’ • Discussion re certainty of objects, with reference to <u>McPhail v Doulton</u> (1971) • Discussion re remaining bottles to be used for the purposes of an unincorporated association (UA), including: (i) definition of UA, (ii) conceptual and practical problems re validity of gifts/trusts in favour of UAs, (iii) various bases on which courts have upheld validity of such gifts/trusts – all the above with specific reference to cases such as <u>Leahy v AG for NSW</u> (1959), <u>Neville Estates v Madden</u> (1962) and <u>Re Recher</u> (1972) <p>Reasoned application of the above to the facts with possible conclusion that gift is validated under: (i) <u>Re Grant’s WT</u> (1980) as ‘shorthand’ description of individual members, or (ii) perhaps even <u>Re Osoba</u> (1979)</p> | |
| | Question 1 Total:25 marks | |
| 2 | <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons, but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant facts and law • Discussion around the above with detailed arguments, for and against, being evidenced • Relevant alternatives/options available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion re when equitable tracing is available in relation to breach of trust and/or fiduciary duty and its preferability over a common law claim where: (i) funds are mixed or used to purchase another asset, and/or (ii) there are competing claims in bankruptcy (<u>Agip (Africa) Ltd v Jackson</u> (1991)) – discussion should be brief and tied to the facts of the scenario • Discussion of proprietary claim re flat and Isolde. Helena may claim a proportionate share of the flat: <u>Re Diplock</u> (1948) and <u>Foskett v McKeown</u> (2001) • Discussion of possible personal claim against Isolde under <u>Re Diplock, Ministry of Health v Simpson</u> (1951). However: (i) Helena must first sue Gautam (and may claim unrecovered balance only from Isolde), and (ii) can only recover principal sum without interest. Isolde may have change of position defence if expenditure was: (i) in reliance on monies received; and (ii) ‘extraordinary’ (<u>Lipkin Gorman v Karpnale</u> (1991)) • Discussion of proprietary claims re Gautam’s subsequent expenditure. Appropriate discussion and application of <u>Re Hallett</u> | 25 |

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| | <p>(1880), <u>Re Oatway</u> (1903), <u>Re Tilley's Will Trusts</u> (1967) and <u>Foskett v McKeown</u> (2001)</p> <ul style="list-style-type: none"> • Discussion of dishonest assistance re Kerry's actions. Appropriate discussion and application of <u>Royal Brunei Airlines v Tan</u> (1995), <u>Twinsectra v Yardley</u> (2002), <u>Barlow Clowes v Eurotrust</u> (2006) and <u>Abou- Rahmah v Abacha</u> (2007) | |
| Question 2 total:25 marks | | |
| 3 | <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons, but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant facts and law • Discussion around the above with detailed arguments, for and against, being evidenced • Relevant alternatives/options available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion that secret trusts do not need to comply with Wills Act 1837, s 9 despite being testamentary dispositions: see, eg, <u>McCormick v Grogan</u> (1869) • Discussion setting out criteria for a valid fully secret or half secret trust in relation to certainties, communication, acceptance and reliance (see, eg, <u>Ottaway v Norman</u> (1972), <u>Kasperbauer v Griffith</u> (2000), <u>Wallgrave v Tebbs</u> (1855) and <u>Moss v Cooper</u> (1861)) • Application to £100K to Pavel, with additional discussion re: (i) discrepancy in amount of gift and amount communicated (<u>Re Colin Cooper</u> (1939)), and (ii) subsequent attempted disclaimer (contrasting <u>Re Maddock</u> (1902) with <u>Blackwell v Blackwell</u> (1929)) • Application to £150K to Quinn and Ruslan, with additional discussion re non-communication and joint tenants (<u>Re Stead</u> (1900)) • Application to house to Tatiana, with additional discussion re: (i) <u>Re Keen</u> (1937), (ii) secret trusts of land (LPA 1925, s 53(1)(b), <u>Ottaway v Norman</u> (1972) and <u>Re Baillie</u> (1886)), and (iii) Nico witnessing the Will (<u>Re Young</u> (1951)) | 25 |
| Question 3 total:25 marks | | |
| 4 | <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons, but highlight the best option with sound justifications.</p> | 25 |

Marks should be distributed in the following areas:

- Correct identification of relevant facts and law
- Discussion around the above with detailed arguments, for and against, being evidenced
- Relevant alternatives/options available
- Response is appropriately structured

Responses should include:

- Discussion re House: this is a 'joint names' case, so in the absence of an express declaration as to beneficial ownership: (i) there is no room for presuming a resulting trust based on extent of contributions, and (ii) the law presumes beneficial joint tenancy, which on relationship breakdown leads to 50/50 split: Jones v Kernott (2011), endorsing, eg, Pettitt v Pettit (1970) and Gissing v Gissing (1971)
- 50/50 presumption is rebuttable, so burden of proof falls on Wendy to displace it by demonstrating that parties' common intentions as to what their shares in the property would be (either at the outset or subsequently) were different (thereby raising the existence of a common intention constructive trust (CICT)): Stack v Dowden (2007). This may require an assessment of their whole course of conduct in relation to it (including all the factors identified in Stack)
- Candidates will review the whole course of V and W's conduct to see if a change of intention can be inferred (better candidates may even discuss imputation) arising out of the 'Stack factors' – permissible conclusions are that V's sole contributions to the mortgage for approx 3 years and/or W's sole contributions since 2018 (especially the latter) justify that conclusion
- Candidates will then make a reasoned assessment of the likely division of the proceeds of sale, bearing in mind guiding principle of identifying "that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": Oxley v Hiscock (2005)
- Discussion re Cottage: this is a 'sole name' case and so falls to be analysed on a separate basis (Jones) - principles for establishing an implied CICT, including direct and indirect contributions, detrimental reliance, etc, with reference to further cases such as Lloyds Bank v Rosset (1991), Le Foe v Le Foe (2001), Abbott v Abbott (2007) and Grant v Edwards (1986), drawing a clear distinction between 'qualification' and 'quantification'
- Application of the stated law to the facts with a reasoned conclusion as to whether Xena qualifies for a share in the Cottage under a CICT, taking into account: (i) her contributions towards the renovations expenses, (ii) her supervision of the renovation

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| | <p>project, and (iii) the apparent absence of any oral discussions and/or common understanding with Victor.</p> <ul style="list-style-type: none"> • Candidates will discuss the quantum of Xena’s possible share (taking account of the quantification principles described above): they may well conclude that her share (if any) reflects the extent to which her direct contribution has resulted in an increase in the value of the Cottage. <p>Responses could include:</p> <ul style="list-style-type: none"> • Candidates may embark on a contextual discussion re express trusts, resulting trusts and common intention constructive trusts (express and implied). | |
| Question 4 total:25 marks | | |