

**CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS**

**SEPTEMBER 2020**

**LEVEL 3 - UNIT 14 – PROBATE PRACTICE**

**Note to Candidates and Learning Centre Tutors:**

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the September 2020 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 candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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**

It is most important that candidates read through all the questions in the examination paper very carefully before starting to write their answers. This will ensure that they have a clear understanding of all the issues being raised before they commence their answers.

It is also important that when answering the questions, candidates should pay attention to the specific instruction set out in the question. This is relevant to ensure that the question is properly answered both in terms of content and format. Similarly, if the question asks the candidates to provide an explanation of a specific point, then they should provide the explanation for that particular point rather than give a wider answer that may be too general in nature. In particular, candidates should apply the law to the facts of the particular scenario.

Candidates should also consider the number of marks available for each part of each question. This will give some indication of how much content and detail a particular question requires. It will also give them an indication of how much time they should spend on a particular question.

Candidates should remember that this is a practical examination. As such it will often include questions requiring candidates to provide advice to clients. When giving their advice, candidates should assume that the examiner, like a client, may not have any prior knowledge of the topic upon which the advice is being sought. Therefore, although it may seem to the candidate that they are stating the obvious, it is often necessary to include, as part of the advice, basic information which a candidate may take for granted.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Question 1

This question was divided into four parts.

Part (a) asked the candidates to explain the type of legacy contained in the will. This was answered well, with almost all candidates obtaining all the available marks.

Part (b) asked the candidates to explain which a grant of representation was appropriate in this case and explain who is entitled to apply for it. Again, most candidates identified the correct form as a grant of letters of administration with the Will annexed and were able to explain why it was appropriate. However, some weaker candidates wrongly stated that entitlement was governed by Rule 22 NCPR, instead of Rule 20 which is the correct answer.

Part (c) asked the candidates to explain the tax consequences of the gifts made during the deceased's lifetime. There were some good answers but not all candidates identified or explained the fact that lifetime gifts are potentially exempt transfers. Most candidates had some understanding of the seven-year rule but again it was not always clearly explained or applied to the facts. Some answers were generic rather than fact specific.

Part (d) asked the candidates to identify the appropriate form that should be sent to HM Revenue & Customs and explain why. Almost all candidates answered this correctly, with most able to explain and apply the relevant factors for choosing this form.

### Question 2

This question was in four parts.

Part (a) asked the candidates to set out and explain the tests in Banks v Goodfellow. This was very well answered with candidates being able to identify the tests, although not all explained them.

Part (b) asked the candidates to set out and explain the tests in the Mental Capacity Act 2005. Again, although many candidates identified the tests, not all referred to both parts under s.2(1) and s.3(1).

Part (c) asked the candidates to identify the key points that should be included in the clause in the will leaving a gift to charity. On the whole, the answers to this question lacked sufficient detail and failed to consider all the elements required in the clause.

Part (d) asked the candidates to set out instructions to the client on how to sign the Will. This was well answered with many candidates scoring high marks. However, some scripts lacked clarity when explaining the requirements for execution of the Will.

### **Question 3**

This question was in two parts.

Part (a) asked the candidates to explain why the Will was invalid. This was answered well with most candidates correctly explaining why the Will was not valid and achieving all the available marks.

Part (b) asked the candidates to how the estate would be distributed. The candidates were able to identify that this was an intestacy and to explain the intestacy rules in the context of the scenario. Some candidates set out the intestacy rules without applying them to the facts and weaker candidates failed to appreciate that the share of the child who had predeceased the intestate would pass to her children.

## **SUGGESTED ANSWERS**

### **LEVEL 3 - UNIT 14 – PROBATE PRACTICE**

#### **Question 1**

- (a) The gift to Nathan is a specific legacy of the Toby Jugs. That means that in order to take effect it must form part of Brian's estate at the date of his death. As it does not, the gift fails or 'adeems' and Nathan will receive nothing (i.e. neither the Toby Jugs nor any substitute gift, such as the car).
- (b) The appropriate grant is a grant of letters of administration with the Will annexed. This type of grant is appropriate because there is a valid Will but the executor has predeceased the testator and so is unable to act. There is no appointment of substitute executors in the Will.

The entitlement to apply is governed by r.20 Non Contentious Probate Rules (NCPR) 1987. In the absence of any trustee of residue, both Candice and Alan are entitled to apply as the two people entitled to the residue.

- (c) Lifetime gifts are potentially exempt transfers (PETs). This means that they will be brought back into account when calculating inheritance tax on death if they were made less than 7 years before the date of death.

In this case the gifts to Tommy and Sean are outside the 7-year rule so they are not brought back into account.

The gift to Monty is within 7 years so it will be taken into account. It can in part be covered by Brian's annual exemption of £3,000 per year and in addition one unused year may be carried forward. A total of £6,000 may therefore be deducted from this gift, leaving a balance of £4,000. This has the effect of reducing the nil rate band (NRB) applicable to Brian's estate by that amount.

Note that taper relief will not apply. In addition, the normal expenditure out of income exemption will not apply.

- (d) Following a request for a HMRC reference to include on the forms, Form IHT 400 is required along with any supplementary pages, because the estate exceeds Brian's NRB and there is no transferrable spouse NRB, as Fiona's NRB was entirely used up by her gift to Nathan as a non-exempt beneficiary. Also, any payment of tax due, in the form of either a cheque or direct payment from a bank or building society. Finally, Form IHT421 is also needed.

## Question 2

Here, candidates needed not only to set out each test, but also provide some explanation for each element of this test:

- (a) Banks v Goodfellow (1870) test

The testator should understand -

- The nature and effect of the act. In other words that she is making a Will and roughly what this means;
- The extent of her property. Although she does not need to know exactly what she owns, some general idea of whether she is rich or not, owns a house or not etc;
- The moral claims to which she ought to have regard. This means she ought to be able to bring to mind people who she might reasonably expect to consider as beneficiaries, even if she then decides not to include them.

- (b) The test under the Mental Capacity Act 2005 states that a person lacks mental capacity if:

- he is unable to make a decision for himself because of an impairment of, or disturbance in the functioning of, the mind or brain and he is unable to:
- understand information relevant to the decision;
- retain that information
- use or weigh that information as part of the process of making that decision;
- communicate his decision.

- (c) There are a number of ways of drafting these clauses – any wording provided it is clear and does the job will suffice, and there is no need to quote a known precedent. The following elements are required:

Name, address and charity number of the charity; a receipt clause discharging the responsibility of the executors by a receipt of the person appearing to be the treasurer, secretary or other officer of the charity; permission for the executors to pay the legacy to any other charity of their choice which performs similar functions to the intended beneficiary if the charity has ceased to exist.

(d) Answers should have been in a letter format and relevant to the client.

- Morag should read the Will and check it is correct and reflects her instructions.
- She then needs to make sure that two independent witnesses are present and stay in the room for the duration of the Will signing.
- The witnesses must not be beneficiaries named in the Will or married/civil partners to the beneficiaries named in the Will.
- Morag must then sign and date the Will in ink.
- The witnesses must see Morag sign the Will.
- Each witness must then sign where indicated and add their name and address.
- The Will must then be returned to us.
- It is important that nothing is pinned, stapled or otherwise attached to the Will.

### **Question 3**

(a) A Will is revoked by the testator's later marriage. Emily's 2012 marriage has therefore revoked her 2010 Will.

(b) Emily has died intestate so her estate will be divided in accordance with the intestacy rules. Distribution is governed by s.46 Administration of Estates Act 1925 (as amended by the Inheritance and Trustees' Powers Act 2014).

In the absence of any spouse or issue or surviving parents, Emily's estate will be divided between her surviving siblings, or if a sibling has died before her, to their children, if they have any.

So, one third will pass to Noel, and one third to Joanne. The one third share that would have passed to Frances will pass to her son Kyle.

All beneficiaries are over 18 so their share will vest immediately.